

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

TREVON JACKSON, et al.,

Plaintiffs,

v.

Case No. 22-CV-121

CITY OF MILWAUKEE, et al.,

Defendants.

ORDER

On January 31, 2022, plaintiffs Trevon Jackson and Yazmen Pierce filed a complaint against five City of Milwaukee Police Officers: defendants Nora R. Burlo, Hannah Merkel, Evan J. Sneed, Anthony J. Milone, and Tyler J. Seelow, as well as the City of Milwaukee as indemnitor for the five defendant police officers. (ECF No. 1 at ¶¶ 10-15.) The plaintiffs claim that on March 18, 2021, the five defendant police officers conducted an unlawful search and seizure and/or failed to intervene in violation of 42 U.S.C. § 1983. (ECF No. 1 at ¶¶ 35-37.)

On January 23, 2023, roughly a year after filing the complaint, the plaintiffs moved for partial summary judgment on the issue of liability against defendant police

officers Burlo, Milone, and Seelow,¹ reserving the issue of damages for trial. (ECF No. 19 at 1.) The defendants have cross-moved for summary judgment, arguing that the court should dismiss this action in its entirety. (ECF No. 14.) Both summary judgment motions are fully briefed and ready for resolution. All parties have consented to this court's jurisdiction. (ECF Nos. 2, 5.)

1. Facts

On March 18, 2021, at around 10:00 p.m., City of Milwaukee Police Officers were dispatched to 4123 North 20th Street Milwaukee, Wisconsin in response to a caller reporting “a subject with a gun.” (ECF No. 24 at ¶ 6.) Plaintiffs Trevon Jackson and Yazmen Pierce reside at 4121 North 20th Street. (ECF No. 28 at ¶¶ 1-3.) The caller's address, 4123 North 20th Street, and the plaintiffs' address, 4121 North 20th Street, each represent one half of a two-story duplex. The caller lives in the downstairs unit, and the plaintiffs live in the upstairs unit. (ECF No. 24 at ¶ 8.)

The caller stated that she had knocked on the plaintiffs' door because someone was pounding on the floor (her ceiling), and Jackson answered the door with a large gun in his hand. (ECF No. 24 at ¶ 8.) The caller said she feared for her life. (ECF No. 24 at ¶ 8.) Burlo, Merkel, Seelow, Milone, and Sneed—as well as officer Chad Boyack, who is not a defendant—responded to 4123 North 20th Street. (ECF No. 24 at ¶ 7.) The police

¹ The plaintiffs have agreed to dismiss Merkel and Sneed from the case. (ECF No. 23 at 1.)

officers' relevant actions were captured by their body-worn cameras.² (ECF No. 28 at ¶ 5.)

Directly outside of the plaintiffs' second floor apartment door is a staircase leading downstairs to two doors—a wooden inner door and an outer screen door—which open to a front porch. (ECF No. 28 at ¶ 13.) When the officers arrived, the plaintiffs came downstairs to speak with them on the porch. (ECF No. 28 at ¶ 10.) Jackson stood with his back to the doorway, partially blocking it, with Pierce standing to his right. (ECF No. 28 at ¶ 14.) The inner wooden door was open, offering a glimpse of the lit hallway staircase through the closed screen door.

It is unclear from the body-worn camera footage what, if any, colloquy initially took place, but at some point the officers asked Jackson for consent to search his residence. (ECF No. 28 at ¶ 15.) Jackson refused. (ECF No. 28 at ¶ 16.) When Burlo told Jackson, "We can check [your apartment] and then be done," Jackson responded, "No. We can go to court and ya'll get a warrant because this is trespassing." (ECF No. 28 at ¶¶ 17-18.) Either Boyack or Milone³ responded to Jackson, "Or I can cuff you right now. It's not trespassing. Actually, you're going to have to sit in my car." (ECF No. 28 at ¶ 19.) Then the officer—again, it is unclear whether it was Boyack or Milone—grabbed

² The court will at times cite to footage from the officers' body-worn cameras, which was provided by the parties as exhibits. Those citations will use the following format: (Ex. [Letter] (*e.g.*, A, B, C) – [Officer Name] at [Timestamp] (*e.g.*, 04:23-45)).

³ It is unclear from the body-worn camera footage whether Boyack or Milone made this statement. And the parties dispute whether the statement was made by Boyack or Milone. (ECF No. 28 at ¶ 19.)

Jackson by the wrist and escorted him from the porch, while another officer—either Boyack or Milone—followed closely behind. (ECF No. 28 at ¶ 20.) When Jackson asked, “Why, why?” either Boyack or Milone⁴ responded, “Because it’s an investigation and a lady is alleging you had a firearm; it’s called disorderly conduct while armed.” (ECF No. 28 at ¶ 21.)

Immediately after Boyack and Milone detained Jackson and removed him from the porch, Pierce moved toward her residence door, pulled back the outer screen door, and stepped inside, into the threshold of the stairway leading up to her apartment. (Ex. C – Burlo at 04:31-36.) As Pierce stepped inside, Burlo propped open the screen door with her foot and asked Pierce, “Am I able to go upstairs with you and clear this up?” (Ex. C – Burlo at 04:36-37.) Jackson—who was detained and out of view—can be heard shouting from behind, “It’s my house, she can’t [inaudible] she don’t live here, she don’t live here.” (Ex. C – Burlo at 04:38-44.) Pierce then explained to Burlo that she wasn’t on the lease but had just moved in. (ECF No. 28 at ¶ 28.) Burlo responded:

I’m telling you right now that you don’t have to be on the lease. And if you guys wanna clear this up, we can clear it up real fast and real easy, honestly. At this point he’s being difficult, and I get it, but the problem is your neighbors called.

(Ex. C – Burlo at 05:02-14.)

Pierce did not respond to Burlo’s request to come up to the apartment but instead asked Burlo if she could talk to her sister on the phone, trying to close the screen door as

⁴ Again, it is unclear who was speaking. (ECF No. 28 at ¶ 21.)

she asked. (Ex. C – Burlo at 05:15-20.) Burlo did not answer Pierce’s question but did say that the screen door needed to remain open, as she continued to prop the door open with her body. (ECF No. 28 at ¶¶ 31-32.) Pierce then turned away from Burlo, took two steps up the stairs toward her apartment, but stopped when Burlo told her, “Ma’am, I need you to stay where I can see you.” (ECF No. 28 at ¶ 33.) Remaining in Burlo’s view, Pierce explained the situation to her sister over the phone, including that Jackson did not want the police to search the house. (ECF No. 28 at ¶ 35.)

Pierce asked her sister to come over, at which point Burlo—who was listening to Pierce’s end of the conversation—told Pierce that her sister would have to stay on the sidewalk if she came over. (ECF No. 28 at ¶ 36.) Burlo further explained, “I just want you two [Pierce and Jackson] to enjoy the rest of your night, I really just wanna get in, get out.” (Ex. C – Burlo at 06:09-13.) Burlo then turned toward officer Seelow, who was also on the porch, and stated that Pierce had “moved in a couple days ago, her things are here.” (Ex. C – Burlo at 06:17-20.) From Seelow’s body-worn camera footage Burlo is heard saying, “She moved in a couple days ago, her things are here, so if she gives us permission,” then trailing off so that Seelow could finish her sentence. (Ex. B – Seelow at 06:42-50.) Seelow responded, “If she has things here, I would comfortably say she lives here, and she has the right to tell us whether we can come in and look.” (Ex. B – Seelow at 06:49-59.) Burlo then asked Pierce, “So do we have permission to look? And then we’re on our way, honestly.” (Ex. B – Seelow at 07:07-10.) Burlo paused to let Pierce

answer, but when no answer came, she added, “I just want you to move on with your night.” (Ex. B – Seelow at 07:10-20.)

Pierce did not respond to Burlo’s request for permission to search, and instead got back on her phone and asked the person on the other end, “Where you at?” (ECF No. 28 at ¶ 38.) Officer Seelow can be heard asking Burlo, “Can you have her stay off the phone? She’s calling more people.” (Ex. B – Seelow at 07:36-39.) Burlo then told Pierce, “Ma’am, I’m going to have you get off the phone now, okay? Hang up the phone, okay? This could be over; we could’ve been gone by now. We’re just looking for one firearm, if it’s not here, it’s not here and we’re gone. We don’t care about anything else.” (Ex. B – Seelow BWC at 07:41-08:07.) Seelow chimed in, “I don’t even care if there’s mounds or kilos of whatever the hell; I don’t give a shit about that. Literally, it’s just one firearm, because the neighbors called.” (Ex. B – Seelow at 08:08-20.)

Pierce then asked what the search would look like, to which Seelow responded, “[We’re] just gonna walk around. We’re not tearing apart anything, we’re not opening drawers, we’re not doing none of that.” (Ex. B – Seelow BWC at 08:20-35.) Pierce then asked, “And leaving?” (ECF No. 28 at ¶ 45.) Burlo responded, “Yep.” (ECF No. 28 at ¶ 46.) And Seelow reiterated, “We’re literally just walking through and leaving. And that’s all we’re doing. Literally, that’s all we’re doing.” (ECF No. 28 at ¶ 47.) Pierce then said, “Okay,” signaling her consent to the search. (ECF No. 28 at ¶ 48.) Pierce and Seelow then followed Pierce up the stairs into the plaintiffs’ residence. (ECF No. 28 at ¶ 49.)

Once in the plaintiffs' residence, Burlo and Seelow opened and searched closets, lifted and searched under mattresses, searched behind beds, inside cabinet drawers, behind a wall panel, behind a shower curtain, and in a cabinet under a bathroom sink. (ECF No. 28 at ¶¶ 51-52.) Upon opening and inspecting a kitchen closet, Seelow waved Burlo over, told Burlo to turn off her body-worn camera, and then turned off his body-worn camera. (ECF No. 28 at ¶ 53.) Seelow had located a semi-automatic pistol rifle in a kitchen closet. (ECF No. 28 at ¶ 54.)

Burlo met with Pierce again after the search and had her sign a consent to search form. (ECF No. 28 at ¶ 60.) Burlo explained that their earlier conversation had been recorded but that this form was "just for [her] paperwork." (ECF No. 28 at ¶ 61.) Burlo read the consent to search form aloud to Pierce, explaining that she had the right to cut the search off at any point and the right to refuse the search altogether. (ECF No. 28 at ¶ 62.) Burlo then told Pierce, "So you just need to sign this." (ECF No. 28 at ¶ 63.) Pierce signed the form. (ECF No. 28 at ¶ 64.)

After officers Milone and Boyack had taken Jackson away from the porch, and around the time the firearm was found, Milone learned that a restraining order barred Jackson from possessing a firearm. (ECF No. 28 at ¶ 65.) Jackson was arrested. (ECF No. 28 at ¶ 66.) After Jackson's lawyer filed a motion to suppress, a state prosecutor—rather than respond to the motion—dismissed the charges. *See State of Wisconsin v. Trevon Jackson*, Milwaukee County Case No. 2021CF1091, (available at

<https://wcca.wicourts.gov/caseDetail.html?caseNo=2021CF001091&countyNo=40&mode=details>). Jackson and Pierce then filed this action.

2. Summary Judgment Standard

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” only if it “might affect the outcome of the suit” and a dispute is “genuine” only if a reasonable factfinder could return a verdict for the non-movant. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). In resolving a motion for summary judgment, the court is to “construe all evidence and draw all reasonable inferences from the evidence in” favor of the non-movant. *E.Y. v. United States*, 758 F.3d 861, 863 (7th Cir. 2014) (citing *Gil v. Reed*, 535 F.3d 551, 556 (7th Cir. 2008); *Del Raso v. United States*, 244 F.3d 567, 570 (7th Cir. 2001)). “The controlling question is whether a reasonable trier of fact could find in favor of the non-moving party on the evidence submitted in support of and [in] opposition to the motion for summary judgment.” *White v. City of Chicago*, 829 F.3d 837, 841 (7th Cir. 2016).

3. Analysis

Jackson and Pierce seek summary judgment on the issue of liability for their § 1983 claim. They argue that the police officer defendants can be found liable for violating their Fourth Amendment rights in “three different ways.” (ECF No. 20 at 4.) First, they argue that defendants “Burlo, Milone, and Seelow are liable because Jackson

objected to the search before he was unreasonably removed from the porch.” (ECF No. 20 at 5.) Second, and in the alternative, they argue that “Burlo and Seelow are liable because Pierce’s consent was tainted by [her] illegal seizure.” (ECF No. 20 at 5.) And third, also in the alternative, they argue that, if Pierce’s consent was valid, “Burlo and Seelow are liable because their search exceeded the scope of Pierce’s consent.” (ECF No. 20 at 6.)

The defendants argue that the plaintiffs’ constitutional rights were not violated and seek dismissal of the action in its entirety. Specifically, they argue that Milone lawfully removed Jackson from the porch and, therefore, the officers were not bound by his objection; that Pierce was not unlawfully seized and, therefore, her consent was lawfully obtained; and that the search by Burlo and Seelow did not exceed the scope of Pierce’s consent. (ECF Nos. 15, 30.) In the event the court finds that the plaintiffs’ rights were violated, the defendants argue that the officers are entitled to qualified immunity.

3.1. Jackson’s Objection to the Search

Generally, police officers need only one cotenant’s consent for a warrantless—but lawful—search of a shared residence. *See United States v. Matlock*, 415 U.S. 164, 170 (1974). But when officers, standing at a residence’s threshold, are faced with two cotenants—one consenting and one refusing—the refusal controls. *Georgia v. Randolph*, 547 U.S. 103, 114 (2006).

In *Fernandez v. California*, 571 U.S. 292 (2014), the Supreme Court elaborated on the *Randolph* exception to consent searches. There, a tip on the whereabouts of a robbery suspect led police officers to an apartment. *Id.* at 295. When they knocked on the door, a battered and bleeding woman answered. *Id.* at 295. When the officers asked her if she could step out so that they could conduct a protective sweep, a man joined her and answered, “You don’t have any right to come in here. I know my rights.” *Id.* at 296. Suspecting that the man had assaulted the woman, they removed him, placed him under arrest, and brought him to the police station for booking. *Id.* The officers returned to the residence approximately an hour later, informed the woman of the man’s arrest, and asked for her consent to search the residence, which she gave. *Id.* The search uncovered evidence connecting the man with the robbery, and he was convicted. *Id.* at 296-97. Affirming his conviction, the Supreme Court held that, while a “physically present” cotenant who “expressly refuses” to grant consent renders unlawful any subsequent search of a shared residence (*i.e.*, the *Randolph* exception), this exception does not apply where the potentially objecting cotenant is absent from the consent colloquy due to his “lawful detention or arrest.” *Id.* at 302-03. In other words, “an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.” *Id.* at 303.

In reaching this holding, the Court rejected the petitioner’s argument that “his objection, made at the threshold of the premises that the police wanted to search,

remained effective until he changed his mind and withdrew his objection.” *Fernandez*, 571 U.S. at 303. The Court explained that a cotenant’s objection bars police entry only “when the objector is standing in the door saying ‘stay out’ when the officers propose to make a consent search.” *Id.* at 306. An objector is “absent”—and, thus, his objection properly disregarded—when he is not present “at the door” for the “consent colloquy” that follows his lawful detention or arrest. *See United States v. Jones*, 861 F.3d 638, 642-43 (7th Cir. 2017) (“[T]he *Randolph* exception does not apply where the [objecting cotenant’s] absence from the consent colloquy is the result of lawful detention or arrest ... [E]ven if Jones expressly refused consent to search—he was no longer standing at the door and expressly refusing consent when the officers received Kelley’s consent to search the residence.”) (internal citation and quotations omitted)); *United States v. Witzlib*, 796 F.3d 799, 802 (7th Cir. 2015) (“*Georgia v. Randolph* suggests that ‘a potential defendant with self-interest in objecting’ ... who is ‘in fact at the door and object[ing]’ can bar a consent search authorized by a joint occupant, but not a potential defendant who is ‘nearby but not invited to take part in the threshold colloquy.’” (citing *Randolph*, 547 U.S. at 121; *Fernandez*, 571 U.S. at 303; *United States v. Henderson*, 536 F.3d 776, 784 (7th Cir. 2008))).

Jackson and Pierce were cotenants of 4121 North 20th Street on the night of the search. When officer Burlo suggested to Jackson that the officers “check [the plaintiffs’ residence] and then be done,” Jackson refused to consent to a search of the residence.

Milone and Boyack then escorted Jackson from the porch—as a result, he was absent from the subsequent “consent colloquy” with Pierce.

The plaintiffs argue that “[t]here was no objective basis to remove Jackson [from his porch], so his objection to entry into his house must stand.” Therefore, the officers violated his Fourth Amendment rights when they entered his residence over his objection. The defendants argue that there was reasonable suspicion to believe Jackson had engaged in disorderly conduct, making Milone’s⁵ decision to remove Jackson for investigative purposes objectively reasonable. The defendants further argue that Milone’s decision to remove Jackson from the porch was in the interest of officer safety due to the potential presence of a gun in the porch’s vicinity. Because Jackson was absent from the subsequent consent colloquy with Pierce due to his lawful detention, the officers did not need to adhere to his earlier objection.

A police officer can detain an individual for investigative purposes when the officer has a reasonable suspicion, supported by articulable facts, that a crime is about to be or has been committed. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *see also United States v. Williams*, 731 F.3d 678, 683 (7th Cir. 2013). “Reasonable suspicion is more than a hunch—when an officer initiates a *Terry* stop, he must be able to point to specific facts that suggest that a stopped individual has committed, was committing, or is about to

⁵ As discussed above, both Milone and Boyack detained Jackson. (ECF No. 24 at ¶ 14.) But because Boyack is not a defendant, the discussion here will address only Milone’s role in the encounter.

commit an offense.” *D.Z. v. Buell*, 796 F.3d 749, 754 (7th Cir. 2015) (internal citations omitted).

Reviewing courts evaluate whether an officer had the requisite reasonable suspicion to support an investigative detention by examining “the totality of the circumstances known to the officer at the time of the [detention], including the experience of the officer and the behavior and characteristics of the suspect.” *United States v. Lawshea*, 461 F.3d 857, 859 (7th Cir. 2006). The standard is objective and asks, “[W]ould the facts available to the officer at the moment of the seizure ... warrant a man of reasonable caution in the belief that the action taken was appropriate?” *United States v. Tillmon*, 19 F.3d 1221, 1224 (7th Cir. 1994) (internal citations and quotations omitted). An officer’s subjective intent does not factor into this analysis. *United States v. Barnett*, 505 F.3d 637, 639-40 (7th Cir. 2007).

At the time he detained Jackson Milone was aware that Jackson’s neighbor had reported him pounding loudly on his floor—the neighbor’s ceiling—and that the pounding caused the neighbor to knock on the plaintiffs’ door and subsequently call the police after Jackson answered the door with a gun in his hand. The neighbor’s report of the pounding gave officer Milone reasonable suspicion to believe that Jackson had engaged in disorderly conduct. *See* Wis. Stat. 947.01(1) (“Whoever, in a ... private place, engages in ... unreasonably loud ... conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of [disorderly conduct].”). The report

also gave Milone reason to believe that Jackson—lawfully or unlawfully—possessed a gun. Indeed, when Jackson asked why he was being removed from his porch, either Milone or Boyack replied, “Because it’s an investigation and a lady is alleging you had a firearm; it’s called disorderly conduct while armed.” Under such circumstances, the decision to detain Jackson for purposes of investigating the neighbor’s disorderly conduct report was objectively reasonable—and the decision to remove Jackson from the porch due to the possibility of a firearm in the vicinity was reasonable given the potential danger posed to the officers.

The plaintiffs challenge the assertion that Milone removed Jackson because of officer safety concerns. They contend that Milone “removed Jackson from his porch to prevent him from objecting.” (ECF No. 20 at 9-11.)

In *Fernandez* the Supreme Court addressed dictum from *Randolph* that explained that “consent by one occupant might not be sufficient if ‘there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.’” *Fernandez*, 571 U.S. at 302 (citing *Randolph*, 547 U.S. at 121). The *Fernandez* Court elaborated that “the *Randolph* dictum is best understood not to require an inquiry into the subjective intent of officers who detain or arrest a potential objector but instead to refer to situations in which the removal of the potential objector is not objectively reasonable.” *Id.* The Court reasoned that, outside of certain limited contexts, “such as an inventory search or administrative inspection,” it has

“never held ... that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment.” *Id.* (citing *Kentucky v. King*, 563 U.S. 452, 464 (2011)).

The timing of Milone’s decision to remove Jackson suggests that he might have done so simply to take away Jackson’s ability to object to the search. Milone seized and removed Jackson immediately after Jackson unequivocally objected to Burlo’s request to search. But the subjective intent behind Milone’s removal of Jackson is irrelevant; what matters is whether removing Jackson was objectively reasonable. Given the possibility that there was a gun within Jackson’s vicinity if he remained on the porch, it was objectively reasonable to remove him from the porch after he was lawfully detained.

In sum, while Jackson objected to the search, officer Milone had reasonable suspicion to believe that Jackson had engaged in disorderly conduct, that he had access to a large firearm, and that removing him from the porch was reasonably necessary for officer safety. As such, Milone’s decision to first detain Jackson and then remove him from the porch was objectively reasonable.

Given his lawful detention, and his resulting absence from Burlo’s and Seelow’s subsequent consent colloquy with Pierce at the threshold of the plaintiffs’ residence, Jackson’s objection did not bar the search of his residence. *See Fernandez*, 571 U.S. at 302-03; *Jones*, 861 F.3d at 642-43. As such, the court will deny the plaintiffs’ motion for partial summary judgment on their claim that Milone, Seelow, and Burlo are liable because Jackson’s objection rendered unconstitutional the officers’ subsequent entry. And

because the only allegations against officer Milone relate to that claim, the court will grant the defendants' motion for summary judgment as it relates to the claim that Milone should be dismissed as a defendant given that he had no personal involvement in any constitutional deprivation.

3.2. Pierce's Consent to the Search

The plaintiffs argue that officers Burlo and Seelow illegally seized Pierce after Jackson was taken away. And because Pierce gave her consent only while she was illegally seized, her consent was invalid. Because the officers' warrantless search lacked consent, it violated the plaintiffs' Fourth Amendment rights.

3.2.1. Seizure

Police officers seize an individual when they restrain her freedom of movement through a show of authority and the individual obeys. *See Brendlin v. California*, 551 U.S. 249, 254 (2007). "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person." *United States v. Street*, 917 F.3d 586, 592 (7th Cir. 2019) (alterations and quotations omitted) (quoting *Terry*, 392 U.S. at 16-17). To determine if a seizure has occurred, the test is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Brendlin*, 551 U.S. at 255 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

After Milone and Boyack removed Jackson from the porch, Pierce opened the screen door and attempted to retreat up the stairway into her apartment. Burlo cut off Pierce's retreat by following her, propping open the screen door, and asking, "Am I able to go upstairs with you and clear this up?" When Pierce asked if she could speak to her sister and tried to close the screen door so that she could take the phone call in private, Burlo—still holding the door open with her body—ordered, "The door needs to stay open, the door needs to stay open." And when Pierce began walking up the stairs to her apartment, Burlo halted her progress with the order, "Ma'am, I need you to stay where I can see you."

No reasonable person, having received these police orders, would have felt free to terminate the encounter and retreat into her apartment. Burlo's clear and unequivocal orders—given in full uniform, after other officers had already seized and removed Jackson—restrained Pierce's ability to retreat into her apartment. Therefore, Pierce was seized. *See Terry*, 392 U.S. at 16 ("[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

Having determined that Burlo and Seelow seized Pierce, the next question is whether that seizure was lawful. Again, officers can detain an individual for investigative purposes when the officer has a reasonable suspicion, supported by articulable facts, that a crime is about to be or has been committed. *See Terry*, 392 U.S. at 21-22. But the defendants concede that "[n]othing gave Burlo and Seelow any reason to

suspect that Pierce had committed, was committing, or was going to commit a crime” (ECF No. 33 at ¶ 16), and they do not argue that Pierce’s seizure was reasonably necessary to ensure officer safety. As such, Pierce’s seizure was unlawful.

3.2.2. Consent

The defendants argue that, even if Pierce was unlawfully seized, her consent to the search was nonetheless “an act of free will[,] which ... purge[s] the primary taint of the unlawful seizure.” (ECF No. 30 at 9 (citing *McGann v. Ne. Ill. Reg’l Commuter R.R. Corp.*, 8 F.3d 1174, 1184 (7th Cir. 1993)).) In *McGann*, the Seventh Circuit held that “[c]onsent obtained after an illegal seizure is invalid unless it can be shown that the consent was in fact sufficiently an act of free will to purge the primary taint of the unlawful seizure.” 8 F.3d at 1184 (citing *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). The court elaborated that “purported consent is free of the unlawful taint if there is a break in the causal connection between the illegality and the consent given.” *Id.* To determine whether there “is a break in the causal connection between the illegality and the consent given,” this court must consider: “(1) the lapse of time between the illegality and [Pierce’s] consent; (2) any intervening factors between the two events; and (3) the ‘purpose and flagrancy of the official misconduct.’” *United States v. Palomino-Chavez*, 761 F. App’x 637, 644 (7th Cir. 2019) (citing *United States v. Cellitti*, 387 F.3d 618, 623 (7th Cir. 2004)); see also *United States v. Jerez*, 108 F.3d 684, 694-95 (7th Cir. 1997).

Immediately upon seizing Pierce in her stairway Burlo and Seelow pressed her for consent to enter her apartment. When Pierce called her sister, Burlo listened to Pierce's end of the call, interrupted Pierce as she spoke to her sister, and told Pierce that, if her sister came, she would have to stay by the curb. When Pierce tried to call someone else, Burlo—at Seelow's direction—told her to hang up the phone. Neither Burlo nor Seelow ever told Pierce that she could refuse their requests or that she was free to terminate the encounter and retreat into her apartment at any time. Indeed, Burlo never retracted her order, “[S]tay where I can see you.” When Pierce asked what the search would look like, Seelow and Burlo assured her that they were “not going to open drawers, nothing like that,” they were just going to “walk through and leave.” Only then did Pierce give in and say, “Okay.”

There was no “lapse of time” between the illegal seizure and Pierce's consent. The illegal seizure was “ongoing” when Pierce finally gave her consent, “foreclosing the possibility that the consent was sufficiently attenuated from the unlawful conduct as to purge the taint.” *United States v. Johnson*, 427 F.3d 1053, 1057 (7th Cir. 2005); *see also McGann*, 8 F.3d at 1184 (“When statements and conduct evidencing consent to a search are given contemporaneously with the illegal seizure, with no break in the causal chain, the actions of the person seized are not free from the taint of the unlawful detention and are thus insufficient to show consent.”).

Nor were there any intervening factors between the unlawful seizure and Pierce's consent that eliminated the taint of the illegal seizure. Burlo's body-worn camera footage shows a clear seizure, beginning when Burlo ordered that the door leading to the apartment stay open and that Pierce remain where Burlo could see her, all the way through Pierce giving her consent. Nothing that occurred in between those events—Burlo listening to Pierce's phone call with her sister or Burlo telling Pierce to hang up her phone—can be considered an intervening factor that eliminated the taint of the illegal seizure. To the contrary, they emphasized the fact that Pierce had been seized. Neither Burlo nor Seelow said anything along the lines of, "Feel free to close the door on us," or, "You don't have to talk with us." Rather, Burlo twice told Pierce, "I just want you to move on with your night," suggesting that the only way Pierce *could* "move on with her night" was if she gave her consent. Pierce's seizure was not independent from her consent; rather, it was the means through which the officers obtained her consent.

Lastly, a clear purpose of the unlawful seizure was to obtain Pierce's consent. Although the officers' conduct was not so egregious as to be considered "flagrant," the first two factors plainly show that there was no break in the causal connection between the unlawful seizure and Pierce's consent to sufficiently rid that consent of the seizure's taint.

In sum, Pierce was unlawfully seized before giving Burlo and Seelow consent to search her apartment. Because there was no lapse of time between these two events—

indeed, the unlawful seizure and the obtaining of Pierce's consent were contemporaneous—and no intervening factors that eliminated the taint of the unlawful seizure, officers Burlo and Seelow entered the plaintiffs' residence without valid consent and, therefore, violated the plaintiffs' Fourth Amendment rights.

3.2.3. Qualified Immunity

Qualified immunity balances “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A government employee can be found personally liable for injuries caused by his violation of the Constitution only if that conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

“The qualified immunity standard ‘gives ample room for mistaken judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’” *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 337 (1986)).

Once a defendant raises the defense of qualified immunity, the plaintiff bears the burden of defeating it either by identifying a closely analogous case or by persuading the court that the conduct is so egregious and unreasonable that, notwithstanding the lack of an analogous decision, no reasonable officer could have thought he was acting lawfully.

Abbott v. Sangamon County, 705 F.3d 706, 723-24 (7th Cir. 2013).

For purposes of qualified immunity, “‘clearly established law’ should not be defined ‘at a high level of generality.’” *White v. Pauly*, 580 U.S. 73, 79 (2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). Rather, “the clearly established law must be ‘particularized’ to the facts of the case.” *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The plaintiffs argue that Seelow and Burlo are not entitled to qualified immunity because “the law was clearly established both by a similar case and because the contours of the right were so established that Burlo and Seelow’s conduct was obviously unconstitutional.” (ECF No. 35 at 13.) The plaintiffs argue that *United States v. Johnson*, 427 F.3d 1053 (7th Cir. 2005), is sufficiently analogous to this case and clearly establishes that Burlo and Seelow violated the Fourth Amendment when they seized Pierce, without reasonable suspicion that she had done anything wrong or that she presented a risk to officer safety, and then relied on her tainted consent to conduct a warrantless search. (ECF No. 23 at 12.)

In *Johnson*, police officers met Johnson at his front door, told him that they received an anonymous tip that he was in possession of a large amount of crack cocaine, and asked for consent to search his house. *Johnson*, 427 F.3d at 1055. Johnson denied having any drugs. *Id.* After speaking with the officers for several minutes, Johnson turned from the officers and walked down the hallway toward his apartment. *Id.* One of the officers drew his gun, pointed it at the ground, and told Johnson that, if he kept

walking, it would be an officer safety issue. *Id.* Johnson stopped and turned back towards the officers, who again asked to search his apartment, at which point Johnson consented. *Id.* (“Well, you might as well come in.”). During the search the officers uncovered a package of crack cocaine. *Id.*

In analyzing whether Johnson’s consent to the search was valid, the court first stated that “consent given during an illegal detention is presumptively invalid,” *Johnson*, 427 F.3d at 1056 (citing *Celletti*, 387 F.3d at 622-23), and concluded that the officers seized Johnson without a reasonable suspicion that he had been, or was about to be, engaged in criminal activity. *Id.* at 1057. The court then found that “the unlawful seizure was ongoing when Johnson voiced his consent, foreclosing the possibility that the consent was sufficiently attenuated from the unlawful conduct to purge the taint.” *Id.* (citing *United States v. Jerez*, 108 F.3d 684, 695 (7th Cir. 1997)).

The defendants contend that *Johnson* is distinguishable because Johnson gave his consent while he was seized, whereas Pierce was free to move away from Burlo and Seelow but still gave her consent to the search. (ECF No. 31 at 8-9.) In making this argument, the defendants emphasize the fact that “Johnson consented to the search while the gun was pointed at him.”

Whether a gun was used in the seizure in *Johnson* is an immaterial distinction. While a gun can certainly be used to seize a suspect, telling the suspect to stay put can have the same effect. The question is whether a reasonable person “would ... feel free to

decline the officers' request or otherwise terminate the encounter." *Johnson*, 427 F.3d at 1057 (citations omitted). The defendants are wrong when they argue that Pierce was "free to move away" from Burlo and Seelow. She wasn't. She was told to stay put when she tried to "move away." While it is true that Pierce's seizure did not involve the same degree of physical coercion, Burlo—like the officer in *Johnson*—used a show of authority to restrain Pierce's freedom of movement.

The defendants do not try to distinguish *Johnson* on the lawfulness of the seizure. They do not, for example, argue that the officers in *Johnson* lacked a valid basis to seize Johnson—thus making his seizure unlawful—whereas Burlo and Seelow had a lawful basis to seize Pierce. In fact, they never argue that any seizure of Pierce was lawful. To the contrary, by conceding that "[n]othing gave Burlo and Seelow any reason to suspect that Pierce had committed, was committing, or was going to commit a crime" (ECF No. 33 at ¶ 16), the defendants implicitly admit that, if Pierce was seized, she was illegally seized. As such, given that it is clear that Pierce was seized, it is clearly established that her seizure was unlawful.

The rule from *Johnson* is clear: when officers unlawfully seize a person, any consent given during the seizure is tainted, and a search premised solely on tainted consent violates the Fourth Amendment. When applied to the facts here, the rule from *Johnson* leads to the same conclusion: Burlo and Seelow violated Pierce's and Jackson's constitutional right not to have government officials enter and search their residence

without first obtaining a warrant or valid consent. *Johnson* and this case share key factual similarities. Pierce and Johnson were both at the threshold of their residence when, in the presence of officers requesting consent to enter, they attempted to retreat into their residences. *Johnson*, 427 F.3d at 1055. Both Johnson and Pierce only made it a few steps before an officer halted their progress. Once seized, the officers in both cases used the unlawful seizure to elicit consent to search the seized person's residence. And in both cases the unlawful seizure and the giving of consent were contemporaneous, rendering the consent invalid.

Given that *Johnson* involved the same clearly established rule and similar facts, Burlo and Seelow had sufficient notice that Pierce's consent was tainted, and that if they relied on the tainted consent to enter and search the plaintiffs' residence without a warrant they would be violating the plaintiffs' Fourth Amendment rights. As such, officers Burlo and Seelow are not entitled to qualified immunity for their violation of the plaintiffs' Fourth Amendment rights. The plaintiffs' motion for partial summary judgment will be granted on the claim that Burlo and Seelow are liable for conducting a warrantless search premised on consent tainted by an illegal seizure.

3.3. Scope of the Search

The plaintiffs alternatively argue that, if Pierce's consent was not tainted, summary judgment against Burlo and Seelow is nonetheless appropriate because the officers exceeded the scope of Pierce's consent. (ECF No. 20 at 15-16.)

An individual who consents to a search of her residence can limit the scope of the search. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). “The standard for measuring the scope of consent under the Fourth Amendment is one of objective reasonableness and asks what the typical reasonable person would have understood by the exchange between the law enforcement agent and the person who gives consent.” *United States v. Jackson*, 598 F.3d 340, 348 (7th Cir. 2010) (citing *Jimeno*, 500 U.S. at 251); *see also United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000) (“Generally, consent to search a space includes consent to search containers within that space where a reasonable officer would construe the consent to extend to the container.”).

When Pierce asked Burlo and Seelow what the search would look like, Burlo answered, “We’re gonna look, see if there’s a firearm. We’re not tearing apart your stuff, nothing.” Seelow added, “We’re not tearing apart anything. We’re not opening drawers—we’re doing none of that. We’re literally just walking through.” “And leaving?” asked Pierce. Burlo answered, “Yep,” and Seelow confirmed, “And leaving, that is all we’re doing.” Pierce then said, “Okay,” and led the two officers upstairs into her apartment.

It is clear from this exchange that Burlo and Seelow exceeded the scope of the search to which Pierce agreed. Burlo and Seelow offered to confine the search’s scope to a simple plain sight walk-through. And that was the only search to which Pierce consented. But Seelow and Burlo did not limit their search to a plain sight walk

through. Once inside the apartment they opened and searched closets and cabinets, searched under mattresses and behind an already loose wall panel, stopping only after Seelow had opened a kitchen closet to reveal a large gun. As such, Burlo and Seelow exceeded the scope of the search to which Pierce consented.

The defendants argue that a “typical reasonable person would have understood the exchange between Pierce and Officer[s] Burlo [and Seelow] to objectively mean that the officers were searching for a large firearm,” and that the search would likely include opening closets and cabinets and looking behind shower curtains and under mattresses. (ECF No. 31 at 10.) In other words, the officers’ search was limited to “all areas where it would be objectively reasonable to search [for] ... a large firearm.” (ECF No. 31 at 10.)

But that argument is inconsistent with the officers’ statements that any search would “literally” involve “just walking through” her residence, “not opening drawers” or anything similar. Thus, even if Pierce’s consent was valid, the officers nonetheless violated the plaintiffs’ Fourth Amendment rights by exceeding the scope of the consent search.

It is clearly established that, if a person limits the scope of a warrantless—but consensual—search, any resulting search that exceeds that scope violates the Fourth Amendment. *See, e.g., Jimeno*, 500 U.S. at 251; *Jackson*, 598 F.3d at 348; *United States v. Saucedo*, 688 F.3d 863, 865-66 (7th Cir. 2012). After telling Pierce that they were just going to walk through the apartment and not open drawers or anything similar, Burlo and

Seelow started lifting mattresses and opening and searching closets and cabinets. Because no reasonable officer would have understood the scope of Pierce's consent to include such conduct, neither officer would be entitled to qualified immunity for exceeding the scope of Pierce's consent even if the consent was valid.

4. Conclusion

Because Jackson was absent from the consent colloquy between Pierce and officers Burlo and Seelow due to a lawful detention, his objection given before that lawful detention did not bar the officers from searching his residence without a warrant. But because Pierce only gave her consent while she was illegally detained, Burlo and Seelow did not have valid consent to search the plaintiffs' residence. Therefore, Burlo and Seelow are liable for violating the plaintiffs' Fourth Amendment right to be free from warrantless searches. Even if Pierce's consent was valid, because the search by Burlo and Seelow exceeded the scope of any consent given, they would nonetheless be liable for violating the plaintiffs' Fourth Amendment rights.

IT IS THEREFORE ORDERED that the plaintiffs' motion for partial summary judgment (ECF No. 19) is **GRANTED IN PART** and **DENIED IN PART**. It is **granted** with respect to the claim that officers Nora R. Burlo and Tyler J. Seelow are liable for violating the plaintiffs' Fourth Amendment rights for carrying out a warrantless search of their residence premised solely on consent tainted by an illegal seizure. It is **denied** with respect to the claim that officers Anthony J. Milone, Burlo, and Seelow are liable

for violating the plaintiffs' Fourth Amendment rights because those officers disregarded Jackson's objection after illegally detaining and removing Jackson from his porch.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment (ECF No. 14) is **GRANTED IN PART** and **DENIED IN PART**. It is **granted** with respect to defendants Hannah Merkel, Evan J. Sneed, and Anthony J. Milone. **IT IS THEREFORE ORDERED** that defendants Hannah Merkel, Evan J. Sneed, and Anthony J. Milone be **DISMISSED**. In all other respects, it is **denied**.

Dated at Milwaukee, Wisconsin this 18th day of May, 2023.


WILLIAM E. DUFFIN
U.S. Magistrate Judge