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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/02/10
RUTH WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TIMOTHY KEY, individually, and) 1 CA-CV 10-0116
as next friend and guardian of)
BRANDON KEY, a minor,) DEPARTMENT E
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
STATE OF ARIZONA et al,)
)
Defendant/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-051524

The Honorable Brian R. Hauser, Judge

AFFIRMED

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H A L L, Judge

¶1 This is a malicious prosecution case. Timothy Key (Key) contends that the superior court committed legal error in granting summary judgment to the State of Arizona (the State) and holding that probable cause existed for his prosecution. Alternatively, Key contends that collateral estoppel bars the court's ruling. We reject both contentions and affirm the judgment for reasons that follow.

FACTS AND PROCEDURAL BACKGROUND

¶2 The important facts are not disputed. Key was indicted for the sale or transportation of narcotic drugs on January 12, 2005 in violation of Arizona Revised Statutes (A.R.S.) section 13-3408 (2010). The indictment arose out of undercover operations conducted in Phoenix on December 23, 2004, and January 12, 2005.

I. December 23, 2004.

¶3 During the first operation, Arizona Department of Public Safety (DPS) Detectives H. and B., along with a third officer, worked undercover near 15th Avenue and Fillmore Street. The officers approached a pedestrian, Edward Scott (Scott), about purchasing an "Eight Ball," a one-eighth ounce of illegal drugs. Scott led the officers to the nearby Desert Sun Hotel on Grand Avenue.

¶4 Upon their arrival, Scott and H. entered the hotel and contacted a man working behind the front desk. The latter had

dirty blonde hair and a moustache, stood approximately 5'6", weighed 150 pounds, and appeared to be in his 40s. The man made a phone call, hung up, and announced: "Ten minutes."

¶15 Another man, later identified as "Sparky," appeared in a white Chevy S-10 Blazer. Sparky and the desk attendant conferred, then Scott and the attendant conferred, and Scott gave H. a note pad that said "8 Ball \$80." Scott transferred the Eight Ball to H. in exchange for eighty dollars, and H. saw Scott give the money to the desk attendant.

¶16 Six days later, H. advised a Phoenix Police Department narcotics officer, Detective S., about the Eight Ball purchase. S. accordingly dispatched Phoenix Police Officer A. to the Desert Sun Hotel that day. A. spoke to a desk attendant there who identified himself as "Timothy Key" and provided a Texas driver's license. A. copied the license information onto a card, and then furnished it to S. H. then retrieved Key's driver's license photo from a data base using that information. Upon reviewing the photo, H. identified Key as the person with whom he had dealt at the Desert Sun Hotel on December 23, 2004.

II. January 12, 2005.

¶17 On January 12, 2005, H. and B. returned to the Desert Sun Hotel at approximately 6:00 p.m. As they entered the lobby, H. recognized the person behind the front desk as the individual who had facilitated the drug sale on December 23, 2004. The

front desk attendant stated that the person H. was there to see had just left and would return in half an hour. When the officers came back shortly after 8:00 p.m., the attendant reiterated "he's not back yet, I haven't seen him."

¶18 As the officers were leaving, a woman approached and asked what H. was looking for. When H. said he was looking for an Eight Ball of rock, she responded "you just gotta know the right people" and went to speak to the attendant. She then advised that the attendant needed to go to his room.

¶19 When the attendant returned, H. met him at the front desk and stated that he needed at least an Eight Ball. The attendant asked H. to "come around back." H. and the attendant then walked through the door to the right of the desk, and H. purchased 3.6 grams of white rocks with a cocaine base. Although the attendant identified himself as "Jeff," H. concluded the name was an alias as he had previously identified the attendant as Key via the driver's license photo.

¶110 On January 13, 2005, H. and B. identified Key from a booking photo as the person who had sold them narcotics, and submitted the case to the Maricopa County Attorney's Office for prosecution. Based upon H.'s testimony, a grand jury indicted Key on March 28, 2005, for the Class 2 felony of selling or transporting narcotic drugs on January 12, 2005. An arrest warrant issued, and Key was extradited from Texas to Arizona on

May 13, 2006. Key pled not guilty and provided alibi evidence. In a July 18, 2006 order, the superior court dismissed the indictment upon a motion by the Maricopa County Attorney's Office.

¶11 Key, individually and on behalf of his son, Brandon Key, filed a 42 U.S.C. § 1983 lawsuit against the State, H., B., and the DPS on June 1, 2007. The lawsuit also raised claims for malicious prosecution, negligence and/or gross negligence, intentional infliction of emotional distress, negligent supervision, and loss of consortium.

¶12 The State moved to dismiss because (1) Key had failed to timely serve the individual defendants with a notice of claim, (2) the DPS is a non-jural entity, and (3) the statute of limitations had expired on all of Key's common law tort claims except for the malicious prosecution claim. The superior court dismissed DPS, H., and B. in accordance with the plaintiffs' stipulation. The superior court then denied the "Motion to Dismiss and/or Summary Judgment Re: Probable Cause" as to the malicious prosecution claim, and refused to dismiss the negligence/gross negligence, negligent supervision, and intentional infliction of emotional distress claims based upon the statute of limitations defense.

¶13 The State next moved for summary judgment on (1) the malicious prosecution claim based upon the absence of malice and

the existence of probable cause, and (2) the negligence, negligent supervision, and intentional infliction of emotional distress claims based upon the plaintiffs' failure to comply with the notice of claim statute and the statute of limitations.¹ The superior court judge then assigned to the case ruled that there was no reason to revisit the rulings of the previously assigned judicial officer. Key then filed a motion in limine to prevent the State from introducing any probable cause evidence. The State opposed the motion and moved for clarification of the court's order denying its motion on the probable cause and statute of limitations issues.

¶14 Following oral argument, the superior court issued a minute entry stating "this judicial officer clearly erred" in concluding that the prior judge's order had finally decided the probable cause issue. The court held that the DPS officers acted reasonably in relying upon the investigation conducted by the Phoenix police and in using that information to retrieve Key's driver's license photos. The court concluded that, for a trained police officer, an identification based upon a single photo was objectively reasonable. Accordingly, the court found probable cause and held that therefore "all of plaintiffs'

¹ In the meantime, this court denied the plaintiffs' request for special action relief in an order filed on October 29, 2008. The proceedings were stayed until the unsuccessful appeal of this court's ruling to the Arizona Supreme Court.

claims fail," thereby obviating the need to address the statute of limitations or causation issues. It also ordered the plaintiffs' complaint dismissed.

¶15 The superior court subsequently adopted the minute entry ruling in a signed order. Key timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

I. As A Matter Of Law, Collateral Estoppel Does Not Bar The Grant Of Summary Judgment.

¶16 Key argues that collateral estoppel precludes the superior court from entering summary judgment in favor of the State on his malicious prosecution claim. He contends that the prior denials of the State's motion to dismiss on this issue are determinative, and the superior court erroneously re-examined these issues following the State's motion for clarification. We review the collateral estoppel issue de novo. See *Campbell v. SZL Props. Ltd.*, 204 Ariz. 221, 223, ¶ 8, 62 P.3d 966, 968 (App. 2003).²

¶17 The Arizona Supreme Court defines collateral estoppel as follows:

Collateral estoppel, or issue preclusion, applies when an issue was actually litigated in a previous proceeding, there was a full and fair opportunity to litigate the issue,

² Even assuming that discovery had yielded no new material prior to the ruling on the State's motion for clarification, the court was not precluded from revisiting its earlier ruling.

resolution of the issue was essential to the decision, a valid and final decision on the merits was entered, and there is common identity of the parties.

Hullett v. Cousin, 204 Ariz. 292, 297-98, ¶ 27, 63 P.3d 1029, 1034-35 (2003).

¶18 The collateral estoppel argument fails because the motions to dismiss were not decided in a "previous proceeding." Rather, they were resolved earlier in this proceeding, and there was no previous proceeding on which to base collateral estoppel.³ Key therefore has failed to satisfy this requirement, and the State was entitled to summary judgment on the malicious prosecution claim. See *Wisell v. Indo-Med Commodities, Inc.*, 903 N.Y.S.2d 116, 117 (A.D. 2010) (holding that neither collateral estoppel nor res judicata applied within the same action to prior findings concerning equitable counterclaims); *Alba v. Hayden*, 237 P.3d 767, 769 (N.M. Ct. App. 2010) (explaining that collateral estoppel only applies to "successive litigation and not to issues or claims raised in the same proceeding").

¶19 We accordingly reject Key's collateral estoppel argument. Our resolution of this issue obviates the need to consider the State's finality and constitutional arguments.

³ Key does not raise a law of the case argument in this appeal, and we accordingly do not address the issue.

II. As a Matter of Law, Probable Cause Supported Key's Prosecution.

¶20 Key alternatively argues that the superior court erred by granting summary judgment to the State and holding that probable cause existed for his prosecution.

¶21 On appeal from a grant of summary judgment, we determine de novo whether any genuine dispute of material fact exists and whether the superior court correctly applied the substantive law. *Great Am. Mortgage, Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 124-25, 938 P.2d 1124, 1125-26 (App. 1997). We view the facts in the light most favorable to the party against whom summary judgment was granted. *Estate of Hernandez v. Flavio*, 187 Ariz. 506, 509, 930 P.2d 1309, 1312 (1997).

¶22 The elements of a malicious prosecution claim are: "1) a criminal prosecution, 2) that terminates in favor of plaintiff, 3) with defendants as prosecutors, 4) actuated by malice, 5) without probable cause[,] and 6) causing damages." *Cullison v. City of Peoria*, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978) (citations omitted). Whether a given state of facts supports probable cause is a question of law to be determined by the court. *Slade v. City of Phoenix*, 112 Ariz. 298, 301, 541 P.2d 550, 553 (1975).

¶23 By its very nature, probable cause "implies the use of probabilities," *Cullison*, 120 Ariz. at 168, 584 P.2d at 1159,

and does not require the prosecutor "to have a conviction of [the accused's] guilt beyond a reasonable doubt." Restatement (Second) of Torts § 662 cmt. c (1977). A police officer has probable cause to seek charges against a person when the officer has "reasonably trustworthy information of facts and circumstances sufficient to lead a reasonable [person] to believe an offense is being or has been committed and that the person to be [charged] committed it." *Hansen v. Garcia*, 148 Ariz. 205, 207, 713 P.2d 1263, 1265 (App. 1985) (holding that the officers had probable cause to arrest a shooter even though they later discovered that the shooting was accidental or in self-defense).

¶124 Putting aside the question of whether the indictment is evidence of probable cause—a factor which the superior court did not cite and the State does not invoke on appeal—we hold that the State established probable cause through first-hand identification by two law enforcement officers who had interacted with a person they had identified as Key. Those officers reasonably reconfirmed their identification of Key as the individual who had sold them crack cocaine after seeing his photo. Moreover, H. stated that "Mr. Key has unique and easily identifiable features, including a receding hairline and prominent forehead, prominent cheek bones, an uneven nose, blue eyes and blonde hair all of which allowed me to positively

identify him in 2004 and to do so now." In light of this evidence, we conclude that probable cause existed in this case under the totality of the circumstances. See *Cullison*, 120 Ariz. at 168, 584 P.2d at 1159 (affirming probable cause based upon the identification of a suspect by a person claiming to be a first-hand witness).

¶25 Notwithstanding the later dismissal of the charges, the State could reasonably have believed that Key had committed the crimes charged. Probable cause to seek charges "may exist despite the fact that the charges are subsequently dismissed." *Hockett v. City of Tucson*, 139 Ariz. 317, 320, 678 P.2d 502, 505 (App. 1983); see *Cullison*, 120 Ariz. at 168, 584 P.2d at 1159 ("[W]hen the police make an arrest based upon probable cause, it is not material that the person arrested may turn out to be innocent, and the arresting officer is not required to conduct a trial before determining whether or not to make the arrest.").

¶26 Further, probable cause is judged by information known to the defendant at the initiation of proceedings, not at their conclusion. *Brown v. Cluley*, 179 A.2d 93, 97 (Del. Super. 1962); *Sisler v. City of Centerville*, 372 N.W.2d 248, 253 (Iowa 1985) (upholding summary judgment in favor of the defendants because the facts known at the time they brought the charge were sufficient to warrant a person of reasonable caution to believe that the suspect had committed the offense and the evidence was

insufficient to generate a fact issue on probable cause). There were no circumstances casting doubt on the information obtained during the relevant period. See *Walsh v. Eberlein*, 114 Ariz. 342, 344-45, 560 P.2d 1249, 1251-52 (App. 1976) (affirming the probable cause determination based upon eyewitness identification). Key emphasizes that he later produced alibi evidence allegedly showing that he had cashed a check in Texas during the drug purchase on January 12, 2005. He also contends that the State had notice of his absence from Arizona when the summons was returned as undeliverable. This information is irrelevant, as the record fails to reflect that it was known to H. and B. at the time they referred the case to the prosecutor.

¶127 Key also suggests that the officers should have done more to assure an accurate identification. This position "confuses the ideal with the minimum." *Slade*, 112 Ariz. at 301, 541 P.2d at 553. Just as the police may depend upon information provided by civilian witnesses, they are similarly entitled to rely upon information supplied by fellow law enforcement officers, unless evidence to the contrary appears. See *id.*; see generally *Trabal v. Wells Fargo Armored Serv. Corp.*, 269 F.3d 243, 251 (3d Cir. 2001) ("[T]he law does not require that a prosecutor explore every potentially exculpatory lead before filing a criminal complaint or initiating a prosecution."). In short, the undisputed facts establish probable cause as a matter

of law. Probable cause constitutes a complete defense to Key's malicious prosecution claim. See *Gonzales v. City of Phoenix*, 203 Ariz. 152, 156, ¶ 19, 52 P.3d 184, 188 (2002); *Slade*, 112 Ariz. at 301, 541 P.2d at 553.

CONCLUSION

¶28 We affirm the superior court's grant of summary judgment in all respects.

/s/

PHILIP HALL, Presiding Judge

CONCURRING:

/s/

SHELDON H. WEISBERG, Judge

/s/

PETER B. SWANN, Judge