STATE OF MICHIGAN

COURT OF APPEALS

CURTIS LEE NEWELL,

Plaintiff-Appellant,

v

CHAD LEE ALLEN, BRENT MILES, and OAKLAND COUNTY,

Defendants-Appellees.

UNPUBLISHED
July 2, 2009

No. 285086
Oakland Circuit Court
LC No. 06-076539-CZ

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

Talbot, J. (*concurring in part and dissenting in part).*

While I concur with the majority regarding their decision to affirm the grant of summary disposition in favor of defendants Miles and Oakland County, I respectfully disagree with the reversal of the trial court's grant of summary disposition in favor of defendant Allen.

I take issue with the majority's treatment and assumptions regarding alleged discrepancies between the search warrant affidavit and the affidavit prepared for the underlying litigation pertaining to this appeal as creating a sufficient issue of material fact to warrant denial of summary disposition in favor of Allen. As recognized by the majority, the alleged inaccurate statements attributed in the search warrant affidavit pertaining to the confidential informant's reaction to seeing plaintiff during the surveillance and Allen's interpretation of that statement as an identification of plaintiff by the confidential informant was reasonable and cannot serve as a basis for plaintiff's claims.

Specifically, I believe two major problems exist with the majority opinion. The first is the assumption by the majority, with the benefit of hindsight, that because one affidavit, which was prepared for the civil litigation does not contain all of the allegations within the search warrant affidavit that one can make the logical leap that the search warrant affidavit not only contained false information, but that such false information meets the requirement of being made "knowingly and intentionally, or with reckless disregard for the truth." The second major problem concerns the actual status of the law and how it is applied to the factual circumstances of this case.

I find that summary disposition was appropriate based on plaintiff's failure to present evidence that Allen secured the search warrant with "false, unsubstantiated information." Allen's affidavit in support of the litigation underlying this appeal averred that he was "entirely

truthful in the affidavit" he submitted to secure the search warrant. The mere omission of certain statements in the affidavit submitted in the civil litigation that ensued from the search warrant affidavit is not, as suggested by the majority, sufficient to create a question of fact with regard to a determination of whether the statements made in the search warrant affidavit were knowingly false. This is particularly true given the fact that the two affidavits were prepared at different times, by different individuals for substantially different purposes. Plaintiff's contention that evidence could be developed at trial to support his assertions reveals a blatant misunderstanding of the need to come forward with more than mere allegations and promises in response to a motion for summary disposition. Defendant's motion for summary disposition was not filed until approximately one week subsequent to the close of discovery and plaintiff had not bothered to depose defendant or engage in discovery that could have established his factual claim. As noted in *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999), "A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules."

Specifically, the majority mistakenly implies that defendant was required to offer an adequate explanation regarding the alleged "incongruity" between the affidavits and improperly shifts the burden of production in a motion for summary disposition. The majority's focus is wrongfully on their assumption that any discrepancy supports the existence of a genuine issue of material fact and ignores that defendant affirmatively averred in the litigation affidavit that his statements in the search warrant affidavit were "entirely truthful." Such inappropriate fact-finding and assumption by the majority ignores that on a motion for summary disposition the nonmovant cannot simply rely on the allegations contained in his or her pleadings, but is required to come forward with evidence of specific facts to establish the existence of a material factual dispute preventing summary disposition. *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363, 371. Plaintiff has failed to proffer "any substantively admissible evidence" that disputed defendant's averral. *Maiden, supra* at 121. As such, the majority improperly alleviates plaintiff's burden as the nonmovant in accordance with the rules pertaining to summary disposition.

I also write separately to address the majority's assertion of the "standard" they contend is applicable in a false arrest/imprisonment action. In response to that discussion, I believe the majority ignores the legal premise for substantiation of either a false arrest or false imprisonment claim and its relationship to the establishment of probable cause for the search warrant. Having reviewed the affidavit submitted by Allen to obtain the search warrant, I find that even with removal of the purportedly false or offending information sufficient, unchallenged, allegations existed to substantiate the issuance of the search warrant. Hence, because probable cause existed for issuance of the warrant there would be no difference in the outcome of events that led to this appeal.

As discussed in *People v Mullen,* 282 Mich App 14, 22; 762 NW2d 170 (2008):

> The United States Supreme Court has found that false statements must be stricken from a search warrant affidavit:
>
> > [W]here the defendant makes a substantial preliminary showing that a *false statement knowingly and intentionally, or with reckless disregard for the truth,* was included by the affiant in the warrant affidavit, and if the

> allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, *with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded* to the same extent as if probable cause was lacking on the face of the affidavit. [*Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978) (emphasis added).]

The *Mullin* Court, citing *People v Martin*, 271 Mich App 280, 311; 721 NW2d 815 (2006), further noted, "In Michigan, there is a presumption that an affidavit supporting a search warrant is valid. [*Mullin*, *supra* at 23.]

Consequently, a legal basis existed for dismissal of plaintiff's civil claim premised on the existence of probable cause sufficient to support the issuance of the search warrant even if the challenged statements in the search warrant affidavit were excised. As noted by this Court in *Peterson Novelties v City of Berkley*, 259 Mich App 1, 17-18; 672 NW2d 351 (2003):

> False imprisonment has been defined by this Court as an unlawful restraint on a person's liberty or freedom of movement. *Clarke v Kmart Corp*, 197 Mich App 541, 546; 495 NW2d 820 (1992). A false arrest is an illegal or unjustified arrest, and the guilt or innocence of the person arrested is irrelevant. *Lewis*, *supra* at 218 [*Lewis v Farmer Jack Div*, 415 Mich 212; 327 NW2d 893 (1982)]. To prevail on a claim of false arrest or false imprisonment, a plaintiff must show that the arrest was not legal, i.e. the arrest was not based on probable cause. *Id.; Burns v Olde Discount Corp*, 212 Mich App 576, 581; 538 NW2d 686 (1995); *Tope v Howe*, 179 Mich App 91, 105; 445 NW2d 452 (1989). If the arrest was legal, there has not been a false arrest or a false imprisonment. *Tope*, *supra* at 105.

Notably, in a footnote the majority cites to *Walsh v Taylor*, 263 Mich App 618; 689 NW2d 506 (2004) to set forth the elements of false imprisonment, but omits the reference in *Walsh* to this very same factor "[t]hat the restraint [required to demonstrate false imprisonment] must have occurred without probable cause to support it." *Walsh*, *supra* at 627, citing *Peterson Novelties*, *supra* at 18. Because probable cause existed to substantiate the issuance of the search warrant, even without the inclusion of the challenged information, plaintiff's claims of either false arrest or false imprisonment cannot prevail and I would affirm the trial court's ruling.

The majority's reliance on the holding of *Raudabaugh v Bailey*, 133 Mich App 242; 350 NW2d 242 (1993), is also misplaced. This Court in Raudabaugh explained:

> While a complaining witness is immune from liability for false arrested where a valid complaint was issued, this immunity does not extend to instances where the complaining witness does not act reasonable: for example, when he knew, or should have known, that, were it not for his mistake, the arrest warrant would not have been issued. The record supports the trial court's findings that the warrants did not operate to insulate defendants from liability for false arrest, as

> Sergeant Baley personally secured the warrants based on false, unsubstantiated information. [*Id.* at 248.]

Sufficient information existed in the search warrant affidavit, even with the excise of the purportedly false information, to establish probable cause for issuance of the warrant. The existence of probable cause, coupled with plaintiff's failure to come forward with any actual evidence in support of his contention that the statements were known by Allen to be false when made supports the grant of summary disposition in defendant's favor.

Finally, I take issue with the majority's assertion that the warrant "affidavit is devoid of any real connection between plaintiff and this drug deal" and implying the use of profiling in obtaining the warrant. Contrary to the majority's interpretation, this statement is both disingenuous and comprises inappropriate fact-finding. The record demonstrates that defendants used a confidential informant believed to be credible, which is not challenged. They participated and overheard the arrangements made by the confidential informant to set up a drug transaction involving marijuana. At the exact time, date and location indicated by the confidential informant two of the identified participants, Noah and Lucky, were present in the exact type of vehicle expected. Although defendants did not observe an exchange of money or drugs, unfortunately for plaintiff he was present and matched the description of the supplier and drove the same type and color of vehicle expected for the exchange and was seen interacting with Noah and Lucky. Shortly thereafter, officers stopped the vehicle used by Noah and Lucky and confiscated marijuana, which was stored in the precise location anticipated based on the arrangements leading to the set up of the drug transaction. While these factors may be circumstantial they are not "devoid of any real connection." The majority ignores the fact, "Probable cause does not require certainty. Rather, it requires only a probability or substantial chance of criminal activity." *Mullen, supra* at 27 (citations omitted). Specifically:

> Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search. [*Id.*, citing *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000).]

I would contend, given the factual circumstances described, which are unchallenged, Allen and the other officers had a reasonable basis and probable cause to seek the search warrant.

/s/ Michael J. Talbot