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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Thomas Lovejoy and Carolyn Lovejoy,
husband and wife,

Plaintiffs,

vs.

Sheriff Joseph Arpaio and Ava Arpaio,
husband and wife,

Defendants.

No. CV 09-01912-PHX-NVW

ORDER

Before the Court is “Plaintiffs’ Motion in Limine No. 3 Regarding Evidence of Prosecutorial Support of Charging Decision” (Doc. 124). The motion will be denied.

As the Court stated at summary judgment, this dispute need not be decided now, and Lovejoy’s motion still does not compel a decision now whether *Hartman*¹ abrogated *Smiddy I*.² *Hartman* concerned itself entirely with the presumption of independent prosecutorial judgment. As noted at oral argument on this motion, however, *Smiddy I* makes clear that the entire question of independent prosecutorial judgment only becomes relevant “where police officers do not act maliciously or with reckless disregard for the rights of an arrested person.” *Smiddy I*, 665 F.2d at 267. Thus, if Lovejoy can prove (i) lack of probable cause, (ii) that Arpaio was culpably involved in the decision to arrest, and (iii) that Arpaio was motivated by desire for publicity of political gain, Lovejoy

¹ *Hartman v. Moore*, 547 U.S. 250 (2006).

² *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981).

1 would prove “malicious[ness]” or “reckless disregard for” his rights and he can hold
2 Arpaio responsible for all of his damages, including those caused by the prosecution.

3 Lovejoy’s position at oral argument — that he still needs to show that Arpaio
4 somehow caused his prosecution before he can recover damages incurred during the
5 prosecution — is incorrect. The plaintiff in *Smiddy I* sued only for the unconstitutional
6 arrest. *See Smiddy I*, 665 F.2d at 264. The Ninth Circuit held that damages for both the
7 arrest and prosecution would be appropriate if the “police officers . . . act[ed] maliciously
8 or with reckless disregard for the rights of [the] arrested person.” *Id.* at 267.
9 Accordingly, if Lovejoy proves that Arpaio acted “maliciously or with reckless disregard
10 for” his rights with respect to the arrest, Lovejoy proves all he needs to prove to recover
11 his full damages.³

12 Lovejoy’s other concern at oral argument — that he needs a directed verdict on
13 probable cause before he can dispense with evidence regarding the what happened at the
14 County Attorney’s Office — is also incorrect. The basis of this argument is unclear, but
15 Lovejoy may believe that he needs the evidence from the County Attorney’s Office to
16 shore up his case that probable cause did not exist. But the goings-on at the County
17 Attorney’s Office are not relevant under *Smiddy I*’s “maliciously or with reckless
18 disregard” inquiry. To repeat, the plaintiff in *Smiddy I* sued only for the unconstitutional
19 arrest. The evidence in that case related entirely to what the police knew when they
20 chose to make the arrest. *Id.* at 263–64. This Court’s summary judgment analysis
21 likewise focused on what the Sheriff’s Office knew at the time of the arrest. (Doc. 115 at
22 25–32; *see also id.* at 24 (“In Lovejoy’s case . . . the arrest and prosecution were both
23 justified on [the same theory]. There was no post-arrest investigation that modified that

24 ³ As discussed in the Court’s summary judgment order, one line of cases following
25 *Smiddy I* have acknowledged that the injuries incurred through the prosecution can be
26 viewed as “a foreseeable consequence of the arrest, and therefore the injuries caused by
27 the prosecution are natural extensions of the injuries caused by the unconstitutional
28 arrest. *See, e.g., Barlow v. Ground*, 943 F.2d 1132, 1136 (9th Cir. 1991); *Borunda v.*
Richmond, 885 F.2d 1384, 1389 (9th Cir. 1988).” (Doc. 115 at 36.)

1 theory. Accordingly, the arrest and prosecution stand or fall together . . .”).) Lovejoy
2 can obtain all the damages he seeks if he proves that Arpaio acted “maliciously or with
3 reckless disregard for” his rights at the time of his arrest.

4 In sum, given that *Smiddy I* provides a path to complete recovery without reaching
5 the question of independent prosecutorial judgment, the Court need not resolve whether
6 *Hartman* abrogated *Smiddy I*'s treatment of the independent judgment issue if Lovejoy
7 proves malice or reckless disregard as part of his unconstitutional arrest case.⁴ And if
8 Lovejoy intends to prove that Arpaio acted maliciously or with reckless disregard
9 concerning the arrest, Lovejoy would not need his malicious prosecution or civil
10 conspiracy causes of action. Focusing entirely on the arrest and whether it was done with
11 maliciousness or reckless disregard would permit the parties to cut the entire post-arrest
12 portion of the evidence from their trial presentations, save for testimony that the case
13 went to trial and Lovejoy was acquitted (which is undisputed), and testimony regarding
14 damages arising post-arrest.

15 However, if Lovejoy still wishes to pursue his malicious prosecution cause of
16 action or the conspiracy cause of action, or both, then all the evidence relating to the
17 County Attorney's Office — both what the dissenting attorneys thought, and what
18 Thomas and Aubuchon thought — is relevant to the elements of Lovejoy's case,
19 notwithstanding *Hartman*'s potential effect on *Smiddy I*. In the malicious prosecution
20 context, Lovejoy must prove that Arpaio somehow procured the prosecution. The
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22 ⁴ It is perhaps worth noting that *Smiddy I*'s “maliciously or with reckless
23 disregard” qualification is effectively the same standard established in *Hartman*.
24 *Hartman* asks for a retaliatory motive and lack of probable cause. *Smiddy I* asks for
25 maliciousness or reckless disregard and lack of probable cause. In both cases, it suffices
26 to show an unconstitutional motive and lack of probable cause. This is in contrast to
27 *Beck*, which speculates that *Hartman*'s effect on *Smiddy I*, if any, is to cut the inquiry
28 down to lack of probable cause alone, regardless of motive. See *Beck v. City of Upland*,
527 F.3d 853, 864 (9th Cir. 2008) (“Proof of the absence of probable cause, it appears, is
the sole factor necessary to resolve the chain of causation problem.”).

1 conspiracy case requires effectively the same showing. The evidence from the County
2 Attorney's Office is relevant to whether Arpaio had sufficient involvement.

3 But there is another possibility. Lovejoy could drop his malicious prosecution and
4 conspiracy causes of action but still lack confidence that he can prove malice or reckless
5 disregard with respect to the arrest. In that instance, *Smiddy I* would require Lovejoy to
6 rebut the presumption of independent prosecutorial judgment before he could recover
7 prosecution-related damages. Thus, without knowing if *Hartman* abrogated *Smiddy I* on
8 the issue of the independent judgment presumption, Lovejoy would need to put on his
9 evidence from the County Attorney's Office.

10 However, *Hartman's* effect on *Smiddy I* still does not become concretely relevant
11 until and unless the jury concludes that (a) malice and reckless disregard did not exist as
12 to the arrest and (b) Lovejoy has not rebutted the independent judgment presumption.
13 Thus, as the Court stated at summary judgment, no ruling is necessary at this point
14 because its relevance here turns on the jury's conclusions. (Doc. 115 at 37–38 n.6.) The
15 jury instructions and verdict form can be framed to isolate whether the jury indeed
16 concluded that malice and reckless disregard did not exist and the independent
17 prosecutorial judgment presumption had not been rebutted.

18 Lovejoy nonetheless argues,

19 If . . . Defendants [are] permitted to present evidence of the
20 alleged independent decision-making by the Maricopa
21 County Attorney's Office ("MCAO"), such evidence would
22 likely mislead the jury into concluding that Arpaio might not
23 be liable for Sergeant Lovejoy's post-charge damages
24 because of the MCAO's decision-making; or at least that the
25 MCAO's decision-making is a mitigating factor that should
26 reduce any punitive damages award against Sheriff Arpaio.

25 (Doc. 124 at 4.) However, this concern is largely of Lovejoy's own making. If Lovejoy
26 intends to put on evidence of what the dissenting Deputy County Attorneys concluded
27 (which he intends to do no matter what, according to counsel at oral argument), it is only
28 relevant to proving (a) elements of the malicious prosecution or conspiracy claims, or

1 (b) a lack of independent prosecutorial judgment. As to both issues, Arpaio must be
2 allowed to present whatever countervailing evidence he has, including Thomas's and
3 Aubuchon's expected testimony that they reached their own independent judgment.

4 IT IS THEREFORE ORDERED that "Plaintiffs' Motion in Limine No. 3
5 Regarding Evidence of Prosecutorial Support of Charging Decision" (Doc. 124) is
6 DENIED.

7 Dated this 4th day of April, 2012.

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12 Neil V. Wake
13 United States District Judge
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