Id. at 372. To survive a motion for summary judgment on such a claim, a plaintiff must provide "persuasive evidence" that the evidence in question was fabricated. *Id.* Specifically,

> testimony that is incorrect or simply disputed should not be treated as fabricated merely because it turns out to have been wrong. Therefore, for example, a witness's misidentification should not be regarded as a fabrication in the absence of persuasive evidence supporting a conclusion that the proponents of the evidence were aware that the identification was incorrect, and thus, in effect, offered the evidence in bad faith.

Halsey v. Pfeiffer, 750 F.3d 273, 295 (3d Cir. 2014). The plaintiff must also "demonstrate that the fabricated evidence 'was so significant that it could have affected the outcome of the criminal case.'" *Black*, 835 F.3d at 372 (quoting *Halsey*, 750 F.3d at 295). Given these hurdles, the Court of Appeals has repeatedly observed that "it will be an unusual case in which a police officer cannot obtain a summary judgment in a civil action charging him with having fabricated evidence used in an earlier criminal case." *Id.* (quoting *Halsey*, 750 F.3d at 295). Measured against these standards, Tate's claim that Brooks fabricated his identification of Tate fails.

As an initial matter, Tate has not produced the requisite "persuasive evidence" of fabrication. To support his claim of fabrication, Tate points to (1) the fact that Brooks's identification was suppressed; (2) the discrepancies in Brooks's and Hasara's suppression hearing testimony regarding the circumstances in which Brooks identified Tate; (3) Brooks's failure to sign his statement or Tate's photo; and (4) Brooks's failure to ask any of the other officers at the bar whether they had seen Tate there. But none of these facts support the inference that Brooks knew his identification was incorrect.

That the identification was suppressed suggests only that the state trial court found the identification *procedure* used by Hasara—which involved showing Brooks a single photograph of Tate—was unnecessarily suggestive and that the resulting identification was unreliable. *See United States v. Brownlee*, 454 F.3d 131, 137 (3d Cir. 2006) ("An identification procedure that is

both (1) unnecessarily suggestive and (2) creates a substantial risk of misidentification violates due process."); *see also* Hr'g Tr. 3, July 2, 2012 (seeking suppression of the identification on the basis that the "photograph procedure was unduly suggestive" and led to "an unreliable identification process"). It does not establish that the identification was necessarily incorrect, much less knowingly so, and there is nothing in the record to suggest that the trial court believed Brooks fabricated the identification. The mere fact that the identification was suppressed thus does not support the conclusion that Brooks "w[as] aware that the identification was incorrect, and . . . , in effect, offered the evidence in bad faith." *Halsey*, 750 F.3d at 295.

Tate's focus on the minor discrepancies in Hasara's and Brooks's suppression hearing testimony is also misplaced. At the hearing, both witnesses testified that they had an initial phone conversation in April 2011, followed by an in-person meeting, and that Brooks identified Tate after viewing a single BMV photograph at Hasara's request. That the witnesses recalled differently whether Brooks made the identification during the initial phone call or the subsequent in-person meeting is unremarkable, particularly given that more than a year passed between the identification and the suppression hearing. Contrary to Tate's assertion, the difference in recollection as to how and where the identification was made does not show that Brooks lied to the court at the suppression hearing and certainly does not support the inference that the identification itself was knowingly false.

The remaining evidence cited by Tate is similarly unavailing. As to Brooks's failure to sign his statement and Tate's photograph, it is not even clear that Brooks's conduct was procedurally improper, as Tate offers no evidence to rebut Brooks's suppression hearing testimony that police officers generally are not required to sign their statements. *See* Hr'g Tr. 69, July 2, 2012. At best, this evidence suggests sloppiness, not fabrication. And Tate provides no

explanation why Brooks's failure to ask any of the other officers at the scene whether *they* had seen Tate at the bar has any bearing on the veracity of Brooks's own identification of Tate.

Nor has Tate produced evidence from which a jury could find there is a reasonable likelihood that, absent Brooks's identification, he would not have been charged. At the time Tate was arrested, Hasara had determined that the gun recovered from the bar had been purchased by Luise-Johnson at the Tree Line Gun Shop, and Luise-Johnson had admitted that she purchased the gun for Tate, who had a prior felony conviction for third-degree murder, in exchange for a payment of $1,000. Moreover, surveillance video from the gun shop corroborated Luise-Johnson's account, showing Luise-Johnson in the shop with Tate purchasing a gun Tate had picked out. As Hasara stated at the suppression hearing, based on this evidence, there was ample basis to charge Tate, even without evidence connecting him to the Beaumont Lounge.[10] *See id.* at 35; *see also id.* at 40 (stating Hasara would have arrested Tate whether or not Brooks identified him, based on the other evidence in the record). And the fact that the case continued to trial after Brooks's identification was suppressed demonstrates that the charges against Tate did not hinge on Brooks's identification. As such, Tate has failed to establish a meaningful connection between Brooks's identification and the ensuing charges.

Because Tate has not presented evidence from which a reasonable jury could find either that Brooks's identification was fabricated or that absent the identification, Tate would not have been charged, summary judgment in favor of Brooks is warranted as to Tate's fabricated evidence claim.

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[10] While Luise-Johnson later claimed to have purchased the gun for a different individual, whom the police also charged, the video evidence from the gun shop supported Luise-Johnson's earlier account implicating Tate.

As to Tate's malicious prosecution claim, to prevail on such a claim, a plaintiff must establish "(1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in [the plaintiff's] favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." *Johnson v. Knorr*, 477 F.3d 75, 81-82 (3d Cir. 2007). Failure to satisfy any one of these elements is fatal to a malicious prosecution claim. *See Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009) (en banc).

Brooks argues summary judgment is warranted as to Tate's malicious prosecution claim because Tate has failed to produce evidence on which a jury could find in his favor on the initiation, probable cause, and malice elements of the claim. The Court agrees.

With respect to the initiation element, although responsibility for initiating criminal proceedings generally lies with prosecutors, rather than police officers, "[a] police officer can be held liable for malicious prosecution if he fails to disclose exculpatory evidence to prosecutors, makes false or misleading reports to the prosecutor, omits material information from the reports, or otherwise interferes with the prosecutor's independent judgment in deciding whether to prosecute." *Lennon v. Sharon Hill Borough*, No. 12-6701, 2014 WL 1395038, at *5 (E.D. Pa. Apr. 10, 2014) (citation and internal quotation marks omitted); *see also Halsey*, 750 F.3d at 297 ("It is settled law that 'officers who conceal and misrepresent material facts to the district attorney are not insulated from a § 1983 claim for malicious prosecution simply because the prosecutor, grand jury, trial court, and appellate court all act independently to facilitate erroneous convictions.'" (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1292 (10th Cir. 2004)); *Brockington v. City of Phila.*, 354 F. Supp. 2d 563, 569 (E.D. Pa. 2005) (holding a police officer may be

"considered to have initiated a criminal proceeding if he or she knowingly provided false information to the prosecutor or otherwise interfered with the prosecutor's informed discretion" (citation and internal quotation marks omitted)).

The investigation regarding the gun was handled by Hasara and other members of the Attorney General's Gun Violence Task Force, not Brooks. It was Hasara, not Brooks, who swore out the affidavit of probable cause. The only information Brooks contributed to the affidavit was his identification of Tate. While Tate contends Brooks's identification was fabricated, as explained above, Tate has not produced evidence from which a reasonable jury could find that Brooks knew his identification was incorrect. Tate also accuses Brooks of intentionally withholding exculpatory fingerprint and DNA test results, but this allegation is wholly unsubstantiated, as there is no evidence such testing was ever performed, much less that any test results exculpated Tate. Tate has thus failed to create a genuine issue of material fact as to the initiation element of his malicious prosecution claim.[11]

The Court also agrees with Brooks that Tate has failed to produce evidence from which a reasonable jury could find the criminal proceedings against Tate were initiated without probable cause. Probable cause exists when "the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *Goodwin v. Conway*, 836 F.3d

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[11] Indeed, Tate's malicious prosecution claim would fail on the initiation element even if a police officer could be deemed to have initiated a criminal proceeding by *innocently* providing incorrect information to the prosecution, as, for the reasons discussed above, there was ample basis to charge Tate even without Brooks's identification. *Cf. Boseman v. Upper Providence Twp.*, 680 F. App'x 65, 68 (3d Cir. 2017) (assuming a police officer could be deemed to have initiated criminal proceedings against a plaintiff where the officer "was the arresting officer and the only inculpatory witness at [the plaintiff's] criminal trial" and where "[p]resumably, but for [the officer's] arrest and report, [the plaintiff] would not have been charged").

321, 327 (3d Cir. 2016) (citation omitted). Although the existence of probable cause is generally a jury question, "a [d]istrict [c]ourt may conclude that probable cause exists as a matter of law, and, hence, grant summary judgment if the evidence, when viewed in the light most favorable to the plaintiff, reasonably would not support a contrary finding." *Richards v. Pennsylvania*, 196 F. App'x 82, 84 (3d Cir. 2006).

Tate was charged with numerous offenses related to the purchase of the gun that was ultimately retrieved from the Beaumont Lounge. The most serious of these offenses—and the only offense discussed by the parties in their summary judgment briefing—was the offense of possession of a firearm by a former convict, in violation of 18 Pa. Cons. Stat. Ann. § 6105, a second degree felony. Section 6105 makes it unlawful for a person who has been convicted of certain enumerated offenses, including murder and voluntary manslaughter, to "possess, use, control, sell, transfer or manufacture . . . a firearm in this Commonwealth." 18 Pa. Cons. Stat. Ann. § 6105(a)(1). It is undisputed that when Hasara swore out the affidavit of probable cause for Tate's arrest, he had knowledge of Tate's prior murder and manslaughter convictions. *See* Def.'s Mot. for Summ. J. Ex. A. The question is thus whether the facts and circumstances within Hasara's knowledge were sufficient to warrant a reasonable belief that Tate possessed the gun in question.

Under Pennsylvania law, a firearm possession conviction may be based on actual, constructive, or joint constructive possession of the firearm. *See Commonwealth v. Benjamin*, No. 43 WDA 2015, 2016 WL 5380103, at *2 (Pa. Super. Ct. Aug. 24, 2016); *Commonwealth v. Heidler*, 741 A.2d 213, 215 (Pa. Super. Ct. 1999). Constructive possession of a firearm exists when a person has "conscious dominion" over the firearm—i.e., "the power to control the

firearm and the intent to exercise such control," elements which may be "inferred from the totality of the circumstances." *Heidler*, 741 A.2d at 215-16.

As noted, when Hasara swore out the affidavit of probable cause, he had taken a statement from Luise-Johnson in which she admitted that she had purchased the gun for Tate in exchange for a payment of $1,000; that Tate had driven her to the gun store, told her what kind of gun to buy, and given her the cash to pay for it; and that after she purchased the gun, Tate dropped her off at home and left, taking the gun and ammunition with him. Hasara had also obtained video surveillance footage from the gun store, which showed Luise-Johnson and Tate in the store together, where Tate pointed twice to a particular gun, which Luise-Johnson then purchased. In addition, while attempting to interview Luise-Johnson at her home after the gun was reported stolen and recovered from the bar, Hasara personally observed Tate approach Luise-Johnson's home, then abruptly turn and leave upon seeing law enforcement officers at her door. Based on these facts, Hasara had ample reason to believe Tate had at least constructive possession of the gun at or around the time Luise-Johnson purchased the gun and left it with him, and thus had probable cause to charge Tate with possession of a firearm by a former convict.[12]

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[12] In *Wright v. City of Philadelphia*, the Third Circuit Court of Appeals held the existence of probable cause for a plaintiff's arrest and prosecution on one of the charges against her "dispose[d] of her malicious prosecution claims with respect to all of the charges brought against her." 409 F.3d 595, 604 (3d Cir. 2005). Two years later, in *Johnson v. Knorr*, however, the Court of Appeals held "a defendant initiating criminal proceedings on multiple charges is not necessarily insulated in a malicious prosecution case merely because the prosecution of one of the charges was justified." 477 F.3d at 85. In declining to interpret *Wright* as adopting an across-the-board rule that the existence of probable cause as to one charge insulates law enforcement officers from malicious prosecution liability for other charges, the court in *Johnson* expressed concern that such a rule would "allow law enforcement officers to 'tack on more serious, unfounded charges'" for which probable cause was lacking so long as there was probable cause to arrest the plaintiff on some charge, and that the addition of more serious charges would "place an additional burden on the [plaintiff]." *Id.* at 83-84. The court also found *Wright* factually distinguishable, noting that whereas in *Wright*, the defendant-officer simply prepared an affidavit of probable cause and then arrested the plaintiff, in *Johnson*, the defendant-

Finally, Tate has produced no evidence from which a reasonable jury could find that Brooks acted maliciously or for a purpose other than bringing Tate to justice. In his opposition to Brooks's summary judgment motion, Tate argues malice can be inferred from (1) Brooks's allegedly fabricated identification of Tate and false suppression hearing testimony regarding the circumstances in which he made the identification; (2) Brooks's alleged withholding of DNA and fingerprint evidence that would have exonerated Tate; and (3) the alleged "destruction of several pages of lies" from Luise-Johnson. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. 2. None of these allegations finds support in the record. The Court has previously discussed the lack of evidentiary support for Tate's allegations regarding Brooks's identification and suppression hearing testimony and the purported DNA and fingerprint evidence. In addition to being unsupported, Tate's allegations regarding the destruction of evidence from Luise-Johnson are unexplained—and unconnected to Brooks in any event. Tate's malicious prosecution claim thus fails for want of evidence of malice as well. *See King v. Deputy Att'y Gen. Del.*, 616 F. App'x 491, 495 n.6 (3d Cir. 2015) ("Malice means spite or ill-will, the use of a prosecution for an extraneous purpose, or a lack of belief in the guilt of the accused.").

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officer's involvement in the prosecution was alleged to have extended beyond the plaintiff's arrest. *See id.* at 84. The Court of Appeals has more recently noted the "considerable tension" that exists between the treatment of the probable cause element in *Wright* and *Johnson*, and suggested that to the extent the cases "are in unavoidable conflict," *Wright*, the earlier-decided case, would control. *Kossler*, 564 F.3d at 193-94 & n.8.

Because Tate's allegations against Brooks primarily concern Brooks's identification of Tate prior to his arrest, this case is arguably controlled by *Wright*. Even assuming *Johnson* applies, however, because all of the offenses charged relate to the purchase of the gun, and because the § 6105 offense is the most serious of the charged offenses (and the only offense the parties discuss even peripherally in their summary judgment briefing), the Court concludes the existence of probable cause as to the § 6015 offense is sufficient to defeat Tate's malicious prosecution claim against Brooks.

Because Tate has failed to produce evidence from which a reasonable jury could find that Brooks fabricated evidence against him or maliciously prosecuted him, Brooks's motion for summary judgment is granted, and Tate's motion for summary judgment is denied.