RENDERED: February 23, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000038-MR

TINA VANCE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON,[1] JUDGE
ACTION NO. 96-CI-005923

WILLIE ARTIS — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Tina Vance has appealed from the orders of the Jefferson Circuit Court that dismissed her complaint for false arrest or imprisonment against Jefferson County police officer Willie Artis. Having concluded that Vance's claims against Officer Artis are barred by the doctrine of qualified immunity, we affirm.

[1]Judge William E. McAnulty, Jr. presided over this case before being elected to the Court of Appeals.

In her complaint filed on October 10, 1996, against Officer Artis, the Jefferson County Police Department and Frank L. Paulley, Vance alleged that she sold a motor vehicle to Paulley on March 27, 1995, "and retained a security interest on said vehicle." Vance claimed that her security interest in the vehicle was created by a document signed by Paulley and her, which reads as follows:

> To Whom it may concern:
>
> I /s Frank Paulley is [sic] buying a 88 [T]oyota pick up from Tina Vance for 3000.00 dollar [sic] 250.00 down and 150.00 a month. I will pay the 250.00 down on the ____ day of Feb[.] 1995 and 150[.]00 dollars ____ 9th day of each month. _____ bal. is payed [sic] if payment _____ I will have thirty days _____ off are return to Tina.
>
> Thank you.
> /s Tina Vance
> 200 Lob__ street
> Shepherville [sic], Ky 40165
>
> /s Frank Paulley
> South Park
> Louisville[,] Ky 40219
>
> Date 2-22-95
> N.P.S.A.L. /s Linda S. Harrell
> comm[.] expires 8-25-96

Vance made the following allegations in her complaint: After Paulley "failed and refused to make all payments due thereunder", Vance "lawfully repossessed the vehicle, on or about May 31, 1996." Paulley then "contacted the Jefferson County Police Department, claiming that [Vance] had stolen his vehicle." "Artis, in his capacity as a Jefferson County Police Officer, contacted [Vance] concerning said vehicle." As a part of the

"[n]umerous discussions" among Vance, Paulley and Officer Artis, Vance informed "Artis [ ] that she did, in fact, have a security interest on the vehicle, and that she had properly repossessed same." Officer Artis "subsequently sought, and obtained, on June 14, 1996, a warrant for the arrest of [Vance] for the alleged theft of the vehicle from [ ] Paulley." "[A]t no time, did [ ] Artis [ ] seek to ascertain whether [Vance] actually had a security interest and lien on the vehicle." "On or about June 14, 1996, [Vance] was arrested by [ ] Artis [ ] on the charge of theft by unlawful taking over $300.00, [a] felony." "On July 9, 1996, a probable cause hearing was held in this matter, and at the conclusion of the Commonwealth's evidence, the Commonwealth moved to dismiss the Complaint, which motion was granted by the Judge." "During the probable cause hearing, [ ] Paulley [ ] falsely testified, stating that there was no written contract or other agreement regarding the vehicle." "Artis [ ] also testified that he had made no attempt[ ] to verify whether or not there was a lien against the vehicle in question."

Vance also claimed: Her "arrest and imprisonment [ ] was made without reasonable grounds and/or cause and/or was not in good faith." "As a result of the above intentional, unlawful, involuntary restraint, arrest and imprisonment of [Vance] through the use of force and the threat of force, [she] has suffered damages [from] lost income and . . . injury to her reputation[;] incurred legal and other expenses . . . [and] suffered humiliation, mental and emotional stress." Since Vance claimed

"[t]he institution and continuation of these criminal proceedings against [her] . . . was without probable cause and motivated by malice[,]" she also sought punitive damages.

The Jefferson County Police Department and Officer Artis filed a joint answer to the complaint, wherein they pled as a defense, inter alia, the following: (1) sovereign immunity; (2) that Officer Artis "acted in good faith, without malice and within the lawful scope of and pursuant to his authority as a public official"; (3) their actions "were reasonable, proper, legal, with probable cause, and without wrongful intent, malice, impact or effect"; and (4) Officer Artis is immune under qualified immunity.[2]

On January 6, 1998, Jefferson County,[3] the Jefferson County Police Department and Officer Artis filed a joint motion to dismiss, or for judgment on the pleadings, or for summary judgment and a memorandum in support. Among the grounds stated to support their position were (1) a claim that the complaint failed to assert the necessary elements of malice and absence of probable cause; (2) Officer Artis is protected by qualified immunity; and (3) all three defendants are protected by sovereign

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[2]Paulley, pro se, filed a handwritten note requesting that the court set a trial date. After denying Vance's motion for a default judgment against Paulley, the trial court granted her motion for judgment on the pleadings against Paulley and scheduled a hearing to determine damages.

[3]On May 19, 1997, the trial court entered an order granting Vance leave to file an amended complaint which added Jefferson County as a defendant.

immunity. In support of their motion, the defendants asserted (1) that the pickup truck that was "repossessed" by Vance contained tools that Vance had no claim to; (2) that when Officer Artis contacted Vance to discuss Paulley's complaint, Vance "refused to disclose the location of the truck or to return the tools that Paulley said were in the truck." These defendants disputed Vance's claim of a security interest in the truck because "nowhere does the contract provide for the retention of a security interest or lien" against the vehicle.

The police report prepared by Officer Artis was filed of record and it stated, in part, as follows:

> Victim advises that the accused took his truck because he still owed her money for the vehicle. This was done without permission or a court order. Victim had numerous tools in the vehicle which are also missing [emphasis original].

In support of their motion to dismiss, these three defendants emphasized before the trial court that Vance had failed to allege in her complaint that during Officer Artis' investigation that she had "produced any documentation regarding her supposed security interest" and that she had failed to mention in her complaint that she had "refused to tell Officer Artis where the vehicle was" located. These defendants also noted that in his investigative report Officer Artis wrote:

> Vic[tim] says he would forget about truck if he got his tools back. Spoke to susp[ect]. She admitted taking truck, but would not tell where it is. Stated she knew nothing about tools. Says she placed a lien on truck also.

> States she would talk to vic[tim] to settle dispute.

Even though they had been sued for false arrest or imprisonment, in their memorandum these defendants relied upon Broaddus v. Campbell,[4] and Raine v. Drasin,[5] which set forth the following essential elements for malicious prosecution:[6]

> (1) [T]he institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding [emphasis original].

These defendants argued before the trial court that while "malice is not per se a necessary element of a claim for false arrest, lack of probable cause, as well as lack of belief that the crime has been committed, indisputably is." These defendants relied upon Myers v. City of Louisville,[7] to support their position that a "cause of action against [a] police officer [ ] for false arrest requires that [an] officer [ ] 'did not then believe, and have probable cause to believe' that a crime had been committed, and [the] officer [ ] 'as a matter of public policy should not be

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[4]Ky.App., 911 S.W.2d 281, 283 (1995).

[5]Ky., 621 S.W.2d 895, 899 (1981).

[6]The parties frequently mixed their discussion of the elements of false arrest with the elements of malicious prosecution.

[7]Ky.App., 590 S.W.2d 348, 349 (1979).

required to make fine, legal distinctions on the spur of the moment' in making an arrest." These defendants argued that "[p]robable cause is evidence or fact that 'would induce an attorney [in this case a police officer] of 'ordinary prudence' to believe' that the action taken (in this case arrest of Plaintiff) was proper."[8]

These defendants continued their argument before the trial court by observing that "[t]he presence of an arrest warrant makes the existence of probable cause even more indisputable." In Hale v. Baker,[9] "[t]he complaint for the warrant of arrest of Hale was made on the advice of the attorneys who had conducted the entire investigation. This constituted probable cause to have the warrant of arrest issued. The advice of the attorneys, based on a full and fair disclosure of all material facts, is a complete defense to an action for malicious prosecution." In Miller v. Jefferson County Police Department,[10] "Johnson presented the information to an official who saw fit to issue the warrant. The issuing magistrate made the determination that there was probable cause for the warrant. Neither Johnson or Officer Fisher actually made that decision, and there is no evidence that Johnson added any false information to support his complaint for the warrant."

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[8]Raine, supra at 901.

[9]Ky., 483 S.W.2d 133, 134 (1972).

[10]Ky.App., 569 S.W.2d 189, 191 (1978).

On February 3, 1998, Vance filed a response to these defendants' motion with a memorandum in support. Vance argued that due to Officer Artis' failure to disclose certain facts in his affidavit for the arrest warrant, she had presented sufficient questions of fact to show an "absence of probable cause and malice (which may be inferred)." Vance noted that in Myers,[11] "the Court held that there was [a] 'question[ ] of fact for the jury on the issue [of] whether the officers believed, and had probable cause to believe, that the appellant committed the offense of disorderly conduct." Vance argued that in her case there "is an issue of fact [of] whether Detective Artis believed, or had probable cause to believe, that Ms. Vance had committed the crime of theft by deception."[12] Vance argued that pursuant to Hale,[13] "probable cause" "is only a defense, if and only if, all relevant facts were clearly disclosed to the issuing Court."[14] Vance claimed that it was undisputed that Officer Artis failed to disclose to the court that issued the arrest warrant "the relevant facts concerning the security interest in the vehicle" and the fact that Vance claimed "Paulley was behind on his payments." Vance also claimed that the lien on the truck

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[11]Supra at 349.

[12]A critical distinction between Meyers and the case sub judice is that the police officer in Meyers made the arrest without an arrest warrant. This will be developed more throughly infra.

[13]Supra at 134.

[14]Hale involved a claim for malicious prosecution.

was recorded at the County Court Clerk's Office; that Officer Artis' affidavit made no mention of missing tools; and that "Artis informed Ms. Vance that he would return the vehicle to [ ] Paulley[.]"

As a second defense, Officer Artis argued before the trial court that he was entitled to qualified immunity and that our Supreme Court in McCollum v. Garrett,[15] had adopted the federal concept of "qualified immunity":

> [G]overnment officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Citation omitted.) In most cases, qualified immunity is sufficient to "protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[16]

Thus, Officer Artis claimed that the question before the trial court was whether he "violated any 'clearly established' rights of the Plaintiff, in seeking her arrest--under authority of a duly-issued arrest warrant--on the facts presented to him, namely the complaint of a citizen that Plaintiff had stolen the citizen's truck and tools, and the Plaintiff's refusal to cooperate even to the minimal extent of

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[15]Ky., 880 S.W.2d 530 (1994).

[16]Id. at 534 n.6 (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)).

disclosing where the truck was, based on an asserted security interest."

Officer Artis argued that the approach followed by various federal courts should be followed in Kentucky. He relied upon Hunter v. Bryant,[17]

> where the U.S. Supreme Court held that Secret Service agents were entitled to the protection of qualified [i]mmunity and dismissal of a lawsuit involving unlawful arrest, where the agents had reasonable although erroneous grounds to believe that the arrestee had threatened the President; the Court expressly stated that qualified immunity is a question to be decided by the court long before trial, rather than by a jury, and is based on whether the public officer acted reasonably under the circumstances rather than whether there was a more reasonable approach."[18]

Vance's response to Officer Artis' claim of qualified immunity was rather limited and basically asserted that Officer Artis had "failed to cite any controlling precedent applying qualified immunity to a police officer."

It was these defendants' third and final argument asserting sovereign immunity that was accepted by the trial court. The memoranda filed by the parties had been filed near

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[17]502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991).

[18]Officer Artis also relied upon Flatford v. City of Monroe, 17 F.3d 162 (6th Cir. 1994), where the Court stated that "the plaintiff suing a governmental official must establish an alleged violation which implicates clearly established law"; and Blackwell v. Barton, 34 F.3d 298 (5th Cir. 1994), where the Court stated that a false arrest claim should be viewed "under a 'reasonableness' test rather than a negligence standard."

the time Franklin County, Kentucky v. Malone,[19] had become final and this controversial opinion was not mentioned by either party. However, these defendants did cite the seminal case of Withers v. University of Kentucky.[20]

As to Officer Artis' claim of sovereign immunity, Vance argued that in Withers the Supreme Court at note 1 on page 342 clearly stated "we have firmly and repeatedly held that the immunity of the Commonwealth does not extend to its agents, servants and employees. Gould v. O'Bannon, Ky., 770 S.W.2d 220 (1989); Happy v. Erwin, Ky., 330 S.W.2d 412 (1959)."

However, on May 4, 1998, the trial court, through Judge McAnulty, applied the doctrine of sovereign immunity and dismissed all of Vance's claims against Jefferson County, the Jefferson County Police Department and Officer Artis. On appeal, we are only concerned with the claims against Officer Artis, which the trial court in dismissing referred to as follows:

> The Court now turns to the application of sovereign immunity as to the individual police officer. Generally, "[a]s long as the police officer acts within the scope of the authority of office, the actions are those of the government and the officer is entitled to the same immunity." Franklin County v. Malone, [supra]. There is no question that in swearing out a warrant and arresting the Plaintiff, Officer Artis was acting within the scope of the authority of his office. Therefore he, too, is entitled to summary judgment on the grounds of sovereign

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[19]Ky., 957 S.W.2d 195 (1998)(reh'g denied January 22, 1998)).

[20]Ky., 939 S.W.2d 340 (1997).

> immunity. Having so decided, it is unnecessary to address the remaining arguments of the Defendants.

On May 14, 1998, Vance filed a CR[21] 59 motion to alter, amend or vacate the judgment, wherein she argued that the trial court had misapplied the doctrine of sovereign immunity. Vance also filed a motion on May 20, 1998, seeking leave under CR 15.01 to amend her complaint. The proposed amended complaint included allegations against Officer Artis "in his individual capacity" as well as restating the allegations against him in "his capacity as a Jefferson County Police Officer." Vance also alleged that "[a]t all times relevant, [ ] Artis was acting outside the scope of his powers and/or duties and/or his employment as a police officer[;]" and "[t]hat the actions of [Artis] resulted in a violation of the state and federal constitutional rights of [ ] Vance, in that she was deprived of due process, and the right to be free from unreasonable search and seizure and/or was unlawfully deprived of her right to liberty."

The Jefferson County defendants and Officer Artis filed a response and memorandum opposing the motion to amend the complaint. Judge McAnulty's successor, Judge Abramson, denied the motion to amend in an order entered on August 17, 1999. The trial court concluded that "[w]hile CR 15.01 clearly does provide the court with discretion in granting leave to file an amended complaint, to do so in this matter would be futile and not in the

[21]Kentucky Rules of Civil Procedure.

interest of justice. First National Bank v. Hartman, Ky.App., 747 S.W.2d 614, 616 (1988)." The trial court then proceeded to address Vance's CR 59 motion and considered whether the previous order should be amended. The trial court denied that motion and stated:

> In ruling that sovereign immunity shielded the Defendants from liability and relying on Franklin County, Kentucky v. Malone, [supra], Plaintiff argues that the Court failed to properly apply the discretionary-ministerial distinction. With respect to the application of sovereign immunity as to an individual police officer, the general rule espoused in Malone is that as long as the police officer acts within the scope of his authority, that officer is entitled to the immunity. A determination has already been made that Officer Artis was in fact acting within the scope of his authority when he sought, obtained, and executed the arrest warrant. This Court having properly found that Officer Artis was acting within his authority as a police officer, Plaintiff cannot now allege otherwise in her amended Complaint.
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> As to Plaintiff's allegation that Officer Artis lacked probable cause in obtaining the arrest warrant, the record supports a contrary conclusion. Pursuant to the Fourth Amendment of the U.S. Constitution and [S]ection 10 of the Kentucky Constitution, a valid arrest warrant is predicated upon a showing of probable cause. See Sampson v. Commonwealth, Ky., 609 S.W.2d 355 (1980). The standard for determining whether probable cause exists is whether given the totality of the circumstances, the officer has reasonable grounds to believe that the arrestee has committed an offense. Illinois v. Gates, 462 U.S. 213 (1983); Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994). The question of probable cause is viewed from the perspective of the police officer and takes into account factual and practical considerations of every-day life on which reasonable and prudent persons, not

> legal technicians, act. Illinois v. Gates [,] supra. The facts in this case reveal that, after a careful and diligent inquiry spanning several days, Officer Artis had probable cause to reasonably believe that Plaintiff had committed the offense of theft by unlawful taking. As such, Officer Artis' subsequent actions did not violate Plaintiff's constitutional right to due process, her right against unreasonable searches and seizures, or her right to liberty.[22]

In her prehearing statement and brief before this Court, Vance identifies her claim as one for "wrongful arrest and imprisonment." While Vance's initial complaint included an additional claim that "[t]he institution and continuation of these criminal proceedings against the Plaintiff . . . was without probable cause and motivated by malice" any claim for "malicious prosecution" has been abandoned on appeal.[23] Accordingly, our review is limited to determining whether the trial court erred in dismissing Vance's claim of "wrongful arrest and imprisonment" and in not allowing her to amend her complaint.

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[22]On August 24, 1999, Vance filed another CR 59 motion, wherein she asked the trial court to amend its order of August 17, 1999, on the grounds that the order should not be deemed final and appealable until damages payable by Paulley were determined. In an order entered on December 2, 1999, the trial court awarded Vance a judgment against Paulley "in the sum of $6,665[,] . . . consist[ing] of $1,665 in compensatory damages, $2,000 for humiliation, embarrassment and mental anguish, and $3,000 for punitive damages. Otherwise, the trial court denied CR 59 relief.

[23]Malicious prosecution has been defined as "maliciously causing criminal process to issue, without reasonable or probable cause[.]" Haynes, Kentucky Jurisprudence, Torts, §1-2 (1987). As we noted previously on page 7 of this Opinion, Broaddus, supra, and Raine, supra, set forth the essential elements for malicious prosecution.

We believe a general discussion of this area of the law will be of some assistance in understanding our decision. In Great Atlantic & Pacific Tea Co. v. Billups,[24] the Court stated that "'[f]alse arrest' or 'false imprisonment' is any unlawful physical restraint by one of another's liberty[.]" In Lexington-Fayette Urban County Government v. Middleton,[25] the Court stated:

> It probably should be pointed out at this juncture that in instances involving officers of the law there is simply no distinction between false arrest and false imprisonment. False imprisonment is always the result of a false arrest, since the individual is placed under restraint by the false arrest. . . [emphasis added].

In Haynes, Kentucky Jurisprudence, Torts, § 9-3 (1987), it is stated that "the essential elements of the tort of false imprisonment may be stated as [ ] [t]he (a) intentional, (b) unlawful, (c) involuntary, (d) restraint of the plaintiff's person or property, (e) by force or threat of force, (f) of which the plaintiff was aware." Of these elements, the only element that is in dispute in the case sub judice is whether Vance's arrest and imprisonment were unlawful. In Rader v. Parks,[26] it was stated:

> This Court, as well as most other jurisdictions, has always recognized an important distinction between the actions of false arrest or imprisonment and malicious prosecution. The former will lie only when

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[24]253 Ky. 126, 129, 69 S.W.2d 5 (1934).

[25]Ky.App., 555 S.W.2d 613, 619 (1977).

[26]Ky., 258 S.W.2d 728, 729 (1953).

> the arrest or imprisonment is without legal authority. Where the arrest is made under authority of a valid process, the remedy is an action for malicious prosecution. The distinction was recognized in the early case of Roberts v. Thomas, 135 Ky. 63, 121 S.W. 961, 962, 21 Ann.Cas. 456, where it was said:
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> > "An action for false imprisonment may be maintained where the imprisonment is without legal authority. But, where there is a valid or apparently valid power to arrest, the remedy is by an action for malicious prosecution. The want of lawful authority is an essential element in an action for false imprisonment. Malice and want of probable cause are the essentials in an action for malicious prosecution" [emphasis added].
>
> In this case, the appellant was arrested under valid warrant of arrest. The fact that the warrant and supporting affidavit had been amended to include appellant's name did not affect its validity. If appellant had been falsely accused and the false accusation set in motion the events leading to his ultimate arrest and imprisonment, his sole remedy was an action for malicious prosecution.
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> We have written in a number of cases that a person who instigates an arrest may be liable for false arrest, but it should be noted that none of these cases involved an arrest made under a valid process.

Thus, this case centers on whether Vance's arrest and imprisonment were with legal authority pursuant to a valid process. At 32 Am.Jur.2d False Imprisonment §91 (1995), it is stated:

> When the same officer provides the information to obtain a warrant and then executes the warrant, the officer is in a position to control the flow of information to the magistrate on which the probable cause determination is made; so an officer who

> knowingly withholds facts in order to obtain a warrant may not assert the facial validity of the warrant as an absolute defense; that officer must prove to the jury's satisfaction the existence of probable cause to arrest under the circumstances [footnote omitted].

From the case law that we have reviewed, the case most similar to our case is Bender v. City of Seattle,[27] where the Supreme Court of Washington reversed the Court of Appeals and reinstated "an unsegregated verdict of $80,000 against the City." "Bender, a Seattle jeweler, instituted [an] action for damges alleging he had been subjected to false arrest, false imprisonment, malicious prosecution, libel and slander by employees of the [ ] City." Two counts of grand larceny by possession had been dismissed against Bender after the key prosecution witness refused to testify. "[T]he Court of Appeals held that a verdict should have been directed in favor of the City on the false arrest and false imprisonment claim because [Bender's] arrest was pursuant to a facially valid warrant." At trial, "Bender's primary contention was that a full disclosure of all known information and a proper investigation by the police would have persuaded the prosecution not to file criminal charges because of a lack of probable cause." The Supreme Court observed:

> In an action for false arrest the general rule is that an officer is not liable if he makes an arrest under a warrant or process which is valid on its face, even though there are facts within his knowledge

[27]99 Wn.2d 582, 664 P.2d 492 (1983).

> which would render it void as a matter of law. Pallett v. Thompkins,[10 Wn.2d 697, 118 P.2d 190 (1941)]; Cavitt v. McCrite, 194 Wash. 684, 688, 79 P.2d 637 (1938). This rule serves to protect officers who execute warrants, because those officers generally are not in a position to fully know the underlying facts giving rise to the issuance of the warrant. Certainly, we should not require officers to question the authority of courts issuing such facially valid warrants. Thus, when one officer seeks a warrant and another officer executes it, as in Pallett and Cavitt, the arresting officer is insulated from liability for false arrest.
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> A different situation is presented, however, when the same officer provides information to obtain the warrant and then also executes the warrant. When one officer serves both functions, he is not merely directed to fulfill the order of the court; he is in a position to control the flow of information to the magistrate upon which probable cause determinations are made. We see no distinction between an officer who makes an invalid, warrantless arrest and one who knowingly withholds facts in order to obtain a warrant. No policy is served by extending the nonliability rule of Pallett and Cavitt in false arrest cases when an officer simply interposes a magistrate between himself and the arrested individual. When the same officer seeks the warrant and executes it, he should not be allowed to "cleanse" the transaction by supplying only those facts favorable to the issuance of a warrant. n3[28]. The exception we now announce

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[28]n3. According to Dean Prosser, one may be liable for false arrest or false imprisonment even if he or she is not the person who physically restrains the plaintiff:

> One who participates in an unlawful arrest, or procures or instigates the making of one without proper authority, will be liable for the consequences; but the defendant must have taken some active part in bringing about the unlawful arrest itself, by some "affirmative
>
> (continued...)

> to the general nonliability rule of Pallett and Cavitt only prevents an officer from asserting the facial validity of a warrant as an absolute defense to a false arrest or false imprisonment action. The officer can still establish a defense to such an action by proving, to the satisfaction of the jury, the existence of probable cause to arrest under the circumstances.

While the trial court in its order entered on May 4, 1998, dismissing this action clearly relied upon the doctrine of sovereign immunity and Malone, supra, we do not believe sovereign immunity can be applied to Officer Artis. Instead, we have concluded that the trial court's dismissal of Vance's complaint was proper because Officer Artis is protected by the doctrine of qualified immunity. Accordingly, we affirm even though we do so for a different reason.[29]

Attempts at establishing liability in the face of immunity seem to perpetrate continuing confusion.[30] While there are many immunities known to the law, in matters of government it

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[28](...continued)
> direction, persuasion, request or voluntary participation."

(Footnotes omitted.) W. Prosser, Torts § 11, at 47 (4th ed. 1971). Thus, since an officer can be liable for false arrest for merely procuring the arrest of another falsely, there is even less reason for extending the defense of the facial validity of a warrant to an officer who obtains and executes a warrant.

[29]Kentucky Farm Bureau Mutual Insurance Co. v. Gray, Ky.App., 814 S.W.2d 928, 930 (1991).

[30]Much of the following discussion was adapted from Judge Miller's unpublished opinion in General Motors Acceptance Corp. v. Hullette, 1993-CA-000499-MR.

may be helpful to distinguish three: sovereign immunity relating to the state and its subdivisions (e.g. counties); governmental immunity relating to municipal corporations (e.g. local government entities); and official immunity relating to certain persons employed by either. These broad classifications are often used interchangeably, but a judicious differentiation may be of some help in determining tort liability in the face of an immunity defense. All of these immunities are part of our English heritage; none is without limitation.[31]

Sovereign immunity, which is constitutionally founded,[32] has been applied frequently in this jurisdiction.[33] This immunity applies to both intentional and unintentional torts,[34] and can only be expressly waived by the Legislature.[35]

Governmental immunity relating to municipalities is a product of the common law. Municipal corporations enjoy no constitutional protection from tort liability.[36] The common law immunity afforded cities was judicially abolished in this

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[31]57 Am.Jur.2d Municipal, Etc., Tort Liability §1 et seq. (1988); 63 Am.Jur.2d Public Officers & Employees §§358-406 (1984).

[32]Ky. Const. §§ 230-231.

[33]See Malone, supra; Withers, supra; and Cullinan v. Jefferson County, Ky., 418 S.W.2d 407 (1967).

[34]See Calvert Investments v. Sewer District, Ky., 805 S.W.2d 133 (1991).

[35]Withers, supra.

[36]See Bolden v. City of Covington, Ky., 803 S.W.2d 577 (1991).

Commonwealth in the case of Haney v. City of Lexington.[37] However, there remain certain functions of a city for which a city is not accountable in tort, not because of immunity, but because, under the law, the acts are not considered actionable in tort--these acts are quasi-legislative or quasi-judicial in nature. The rationale underlying this exception needs no explanation.[38]

Finally, turning to official immunity, the policy of early common law accorded public servants no immunity. While they were once accountable for their own torts, the policy has shifted. Now, the prevailing view is that a public official may enjoy qualified immunity. A distinction is drawn as to whether the duty performed by the official is ministerial as opposed to discretionary.[39] For the former, liability may be imposed; for the latter, it may not. The obvious basis for the distinction is that to not afford immunity for discretionary acts would have a chilling and detrimental effect on the free operation of government, while, on the other hand, to grant immunity for ministerial duties would deny recompense to a private citizen who suffers loss when an official acts negligently.

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[37]Ky., 386 S.W.2d 738 (1964).

[38]See Bolden, supra.

[39]See Thompson v. Huecker, Ky.App., 559 S.W.2d 488 (1977); Restatement (Second) of Torts §895D (1977); 63 Am.Jur.2d Public Officers & Employees §358 et seq. (1984). Cf. Moore v. Babb, Ky., 343 S.W.2d 373 (1960)(citing CR 9.01).

The case at hand involves neither sovereign immunity nor governmental immunity, but rather official immunity. A public official is not necessarily cloaked with any immunity that his governmental employer may enjoy. His immunity, if any, stems not from his employer's status, but rather from the nature of the duty he performs. Whether a defendant acts in his personal or individual capacity, as opposed to his official capacity, is a matter of defense and, or course, relevant in determining liability.

Apparently, confusion has arisen in this area because of the holdings in federal civil rights actions.[40] In cases arising under §1983, judgment against a public servant "in his official capacity" may result in liability of the governmental entity he represents, provided that entity has notice and opportunity to defend the action.[41] We think the rule in these civil rights cases unique to such cases and not necessarily dispositive of ordinary tort claims against public servants.

Returning to the case sub judice, since Officer Artis was properly sued for alleged acts and omissions growing out of his official duty, the question becomes whether said acts and omissions occurred in the performance of a ministerial or

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[40]Federal Civil Rights Act 1871; 42 U.S.C. §1983.

[41]See Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

discretionary duty. In her first CR 59 motion, Vance argued that the trial court had failed to properly apply the test for discretionary duties versus ministerial duties. We believe Judge Park was correct in Thompson, when he so elegantly wrote "[t]here can be no single test for determining whether a public officer is immune from tort liability because he is engaged in the exercise of a discretionary function." Consideration must also be given to "the degree of immunity or privilege afforded the officer. If the officer is entitled to absolute immunity, he is not liable so long as he acts within the general scope of his authority. If the officer is entitled to only a limited or qualified immunity, the officer is not liable if he acts in good faith."[42] As Judge Park did, we also find guidance from comment e. to §895D of the Restatement (Second) of Torts, wherein it is stated that "[t]he cases have usually gone on the assumption that if the function in which the officer is engaged is characterized as discretionary, an immunity for tort liability applies and he is not liable. The problem is not so simple. . . . '[I]mmunity]' may be treated as meaning that the officer is not liable if he made his determination and took the action that harmed the other party in good faith, in an honest effort to do what he thought the exigencies before him required. . . . '[I]mmunity' may mean that the officer is not liable if his determination to take or not to take the action was reasonable. In a tort action against him,

[42]Thompson, supra at 496.

there is thus another issue of fact--the reasonableness of his decision, if he is acting in good faith."

Thus, from the above discussion, it is this Court's belief that sovereign immunity does not extend to Officer Artis and that the question of qualified immunity must be addressed. Unfortunately, we find little guidance from Kentucky case law on this question. The most recent case of significance on this issue is McCollum.[43] Vance attempts to explain why McCollum is not applicable herein, but we believe she is incorrect in her argument that "qualified immunity does not extend to protect [Officer] Artis [because] [ ] qualified immunity for prosecutors is based on their position as [a] quasi-judicial officer." The guidance McCollum provides in applying the doctrine of qualified immunity is helpful in deciding the case sub judice. Since McCollum holds that prosecutorial immunity for a prosecutor functioning as an "investigator" "is limited to qualified immunity[,]" it follows that a police officer functioning as an investigator would also be subject to qualified immunity. In McCollum our Supreme Court stated, "[t]he point is a prosecutor possessing qualified immunity may not be held liable for a mistake or negligence. There must be a showing of knowing misconduct or reckless disregard."

In the case sub judice, we fail to see where Vance has alleged a factual basis to support a finding by a jury that

[43]Supra at n.15.

Officer Artis' acts or omissions constituted "knowing misconduct or reckless disregard." At worst, Officer Artis' failure to disclose Vance's claimed security interest in the vehicle or to investigate that claim further constituted a "mistake or negligence." Other than to claim that Officer Artis "apparently [became] upset with [ ] Vance's refusal to disclose the whereabouts of the vehicle [whereby he] resorted to obtaining a warrant [ ] despite the facts revealed in his investigation[,]" Vance has not alleged any facts that would support this mere speculation. Accordingly, under the doctrine of qualified immunity Officer Artis is immune from Vance's claims since she has failed to allege a material fact to support her claim that Officer Artis' acts or omissions constituted knowing misconduct or reckless disregard for her rights.

The orders of the Jefferson Circuit Court dismissing Vance's claims are affirmed.

HUDDLESTON, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN RESULT ONLY.

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