

RENDERED: AUGUST 20, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002169-MR

DONNA J. BARKER

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00203

EDSEL D. SPARKS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, THOMPSON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Donna J. Barker (formerly Sparks), appeals the October 20, 2009, order of the Lawrence Circuit Court dismissing her complaint against the Appellee, Edsel D. Sparks, as well as an October 27, 2009, order declining to reconsider the previous order of October 20th. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

The facts in the matter *sub judice* occurred approximately seventeen years ago. As of March 2, 1993, Sparks and Barker had been separated approximately two years, and Sparks filed an EPO against Barker for threats Barker allegedly made on Sparks's life. Approximately two months later, Barker came to Sparks's residence and shot him three times. Barker was arrested and tried for attempted murder. She was ultimately convicted of first degree assault in 1994, for which she was sentenced to ten years in prison.¹

Sparks also filed a civil suit against Barker.² The jury awarded Sparks \$30,000. Barker filed a CR 60.02 motion, on which a hearing was held on April 30, 2009. The court declined to overturn the conviction in an order entered on May 5, 2009, and Barker did not appeal that ruling.³ Barker then filed the instant matter against Sparks on June 4, 2009. In that complaint, Barker accused Sparks of malicious prosecution which she states began when Sparks filed for the EPO and arrest warrant against Barker. Barker accused Sparks of making fraudulent statements in the EPO⁴ and in the warrant issued for her arrest, as well as during the course of the original trial and thereafter.

¹ This was criminal action No. 93-CR-00029.

² Our review of the record indicates that there were apparently two civil matters, 91-CI-00007, and 93-CI-00125. From our review of the record, it appears that although Sparks was awarded \$30,000 by the jury as a result of the civil suit he filed against Barker, an order entering the verdict apparently remains pending due to the fact that no trial judgment was entered by the presiding judge. Barker apparently also filed a counterclaim in that matter, which also remains pending at this time to the best of the knowledge of this Court.

³ Barker has asserted that she filed the complaint in the matter *sub judice* instead of appealing the ruling on the 60.02 motion.

⁴ Namely, that Sparks was not actually afraid of Barker, as the two attended a function together after Sparks had filed for the EPO.

In the same complaint, Barker also alleged that the detective involved in the investigation of the case gave testimony that he knew to be false to the grand jury.⁵ Barker asserts that the detective and his wife conspired to help Sparks prevent Barker from finding out about the charges he had made against her with the Department of Social Services, that the detective refused to listen to her side of the story, and that the detective did not adequately investigate the circumstances of the shooting. In essence, Barker contends that “if not for the perjury, fraud, corruption, malice, willful and wanton disregard for the rights of others,”⁶ she would not have been convicted and sentenced to ten years in prison.

Sparks, through counsel, filed a motion to dismiss this action. Therein, Sparks argued that Barker was collaterally estopped from making the same allegations in her complaint in the matter *sub judice* as she had previously made in the CR 60.02 motion made after the judgment against her in the civil suit filed by Sparks.⁷ Sparks further asserted that Barker’s claim in the matter *sub judice* was frivolous and unfounded. Sparks also argued that Barker’s claim for malicious prosecution should be dismissed, as the prosecution was initiated by the Commonwealth, and not by Sparks. Finally, Sparks asserted that Barker’s complaint should be dismissed because the cause of actions she asserted were

⁵ Specifically, Barker alleges that the detective falsely stated that Barker maliciously shot Sparks four times through a door, when that testimony was refuted by Sparks himself, and also provided false testimony in stating that Barker stalked Sparks.

⁶ See Record on Appeal, p. 4.

⁷ As we are affirming the court below on the alternative grounds discussed *infra*, we do not address this argument further herein.

subject to a one-year statute of limitations and were therefore time-barred. The court granted Sparks's motion to dismiss on October 20, 2009. It is from that order that Barker now appeals to this Court.

On appeal, Barker makes numerous arguments. First, she accuses Sparks's attorney, who made but one appearance for Sparks and offered various filings to the court on Sparks's behalf, but declined to further represent Sparks, of attempting to misuse his position as an attorney to "trick" the judge into dismissing this case. Upon review of the record, we find no merit in that contention, and decline to address it further herein.

Barker next engages in what seems to be a review of the evidence from the previous civil matter and a review of Barker's perspective as to the events that occurred. Apparently, she asserts that the jury was led to believe a different version of events than what Barker alleges is the truth, and to render an unsound verdict because Sparks committed perjury during the course of the trial.

Barker next makes arguments to this Court concerning the EPO which was obtained prior to the time the criminal charges were filed against her. She argues that Sparks fraudulently filed the EPO, and believes that this should serve as a basis for vacating the order of dismissal and hearing her claim for malicious prosecution. Finally, Barker again attempts to review matters concerning the trajectory of the bullets fired from her gun on the day of the shooting, as well as the actions Sparks took leading up to the moment in which he was shot. Barker

asserts that these various “facts” prove that Sparks committed perjury below, and that this led the jury to render an unsound verdict.

In addressing the arguments made by Barker, we believe that a brief review of the applicable law is in order. Barker describes her action as an action for “malicious prosecution”. Certainly, our case law recognizes that malicious prosecution claims are necessary to deter persons from procuring the arrest of another “maliciously and without probable cause.” *See Davis v. Brady*, 218 Ky. 384, 291 S.W. 412, 412-13 (Ky.App. 1927). Further, we have held that to win a malicious prosecution claim, the plaintiff must show six basic elements: (1) the institution or continuation of original judicial proceedings, administrative, or disciplinary proceedings, (2) by, or at the insistence of the plaintiff, (3) the termination of such proceedings in the 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. *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981).⁸

First, we do not find Barker to have met many of these elements based upon our review of the record. Regardless, we note that pursuant to KRS 413.140, an action for malicious prosecution is to be brought within one year from the time

⁸ We note that malicious prosecution is intended to pertain to criminal proceedings, and that “wrongful use of civil proceedings” would be the appropriate action to bring had Barker wished to challenge the basis for the civil suit brought by Sparks. The elements of such a proceeding include: (a) action without probable cause, and primarily for the purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought. *See Mapother and Mapother, P.S.C. v. Douglas*, 750 S.W.2d 430 (Ky. 1988).

the cause of action accrued. Barker is certainly well beyond this statutorily prescribed limit. Accordingly, we find that her complaint was not timely, and was therefore, correctly dismissed.

In so finding, we nevertheless feel it appropriate to address Barker's claims of perjury, and to remind the parties that this Court is not the appropriate forum to reweigh evidence that was already presented to and deliberated upon by a jury. It is the jury alone who must weigh the evidence and determine the credibility of the witnesses. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763 (Ky.App. 1941). It is not for this Court to second-guess the jury.

Furthermore, we remind the parties of the one-year statute of limitations for perjury claims, and find that Barker is well beyond her statute of limitations to file a complaint based on such claims. For that reason, we again affirm the lower court's dismissal of her complaint.

Wherefore, for the foregoing reasons, we hereby affirm the October 20, 2009, order of the Lawrence Circuit Court dismissing Barker's complaint against Sparks, as well as the October 27, 2009, order declining Barker's motion for reconsideration, the Honorable John David Preston, presiding.

ALL CONCUR.

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