RENDERED: AUGUST 22, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000653-MR

CHARLES THOMAS LICKTEIG, II — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 11-CI-006897

SERGEANT JAMES M. SCHWAB, JR. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

CAPERTON, JUDGE: Charles Thomas Lickteig appeals from the trial court's grant of summary judgment in favor of Sergeant James M. Schwab, Jr., finding that there was probable cause for Lickteig's arrest and, thus, he could not prevail on his claim of malicious prosecution. After a thorough review of the arguments of the parties, the record, and the applicable law, we agree with Lickteig that

summary judgment was prematurely granted. Accordingly, we reverse and remand this matter for further proceedings.

On September 30, 2010, Sergeant Schwab filed a criminal complaint against Lickteig, charging him with indecent exposure in the second degree. Lieutenant Kevin Leet, Sergeant Schwab's supervisor, reviewed and approved the filing of the complaint. Assistant Jefferson County Attorney J. Metzmeir and the Jefferson District Court Judge D. Bowles also reviewed and authorized the criminal complaint/summons. The criminal complaint/summons stated:

> [B]ased upon the information contained herein, it is found that probable cause exists to believe a crime has been committed and that the defendant committed it. If you fail to appear at the stated time and place, you will be subject to the contempt power of the Court which may include an issuance of a warrant for your arrest.

The information contained in the summons was based upon the information found in the complaint issued by Sergeant Schwab:

> [That Lickteig] exposed his genitals to the victim, Theresa M. Roth, while he was in a vehicle at Limekiln Lane and US 42. The victim was stopped in traffic next to the deft's [sic] vehicle. When the victim looked over at deft, [sic] deft [sic] had his genitals exposed and was masturbating. Deft [sic] looked at victim and knew that she saw him. Deft [sic] then drove off. A short time later, the victim saw deft [sic] in nearly the same location in the same vehicle. The victim was able to obtain the license plate number of the vehicle deft [sic] was driving. LMPD was called. Deft [sic] is the registered owner of the vehicle he was driving. The victim was able to positively ID deft [sic] thru photo pack.

At a bench trial on July 14, 2011, Roth testified that at the time of the incident she worked in an administrative position in the Louisville Metro Police

Department. Roth called Sergeant Schwab because she knew he worked in the area of the incident. Roth was unable to reach him and left a message. Roth then called 911 and reported the incident.

Sergeant Schwab testified that after returning the call to Roth he made an incident report. Sergeant Schwab contacted the 911 dispatch to get a report number and informed the operator that he was going to "do a photo pack and get this guy locked up and in jail." He ran the license plate number and determined that Lickteig was the registered owner of the vehicle. Using Lickteig's driver's license photo, Sergeant Schwab made a photo pack. Lickteig's photo in the array was larger than the others and prominently placed in the middle. Sergeant Schwab informed Roth that the picture of the registered owner of the vehicle that she saw was in the photo pack. On August 26, 2010, Roth positively identified Lickteig as the individual involved in the incident.

Lickteig testified that he was involved in the incident but did not expose himself, instead describing the incident as road rage by Roth. Lickteig testified that Roth was angry at his driving and began riding his bumper, passing him and then slamming on her brakes, eventually forcing Lickteig off the road and into someone's yard. Another witness, Catherine Stone, observed the incident.[1] Stone stated that Roth had told her Lickteig exposed himself at a park, rather than in his vehicle, and that she was "going to get him."

[1] Ms. Stone was identified through Lickteig's investigator and not through an investigation by Sergeant Schwab.

After hearing the evidence the district court acquitted Lickteig, reasoning that even assuming Lickteig was masturbating in his vehicle in daylight hours while stopped at a traffic light as alleged, it did not appear as though he did anything to draw attention to himself and, thus, there was no intent. The court concluded that intent to bring the indecent exposure to someone's attention, as opposed to incidental contact, is a statutory requirement for indecent exposure in the second degree.

On October 21, 2011, Lickteig filed his civil action alleging his claim of malicious prosecution against Sergeant Schwab and the Louisville-Jefferson County Metro Government. The parties engaged in limited written discovery and answers were exchanged in mid-July 2012. Then Lickteig's attorney experienced complications with her pregnancy and was hospitalized for preterm labor at the end of July. After release from the hospital in August counsel was placed on bed rest for a week. As a result of the complications, counsel was forced to reduce her hours at the office for the remainder of her pregnancy. Counsel was then on maternity leave from November 12, 2012, through January 30, 2013. Schwab filed his motion for summary judgment on January 22, 2013, prior to the end of Lickteig's counsel's maternity leave. Given the circumstances, Lickteig was unable to complete discovery and no depositions had been taken. There was no scheduling order in place and no pretrial order setting forth a discovery deadline. There was no date set for a trial.

The court below concluded that counsel had fifteen months to engage in discovery and while the court was "sympathetic to Counsel's concerns, the Court finds that Sergeant Schwab's Motion for Summary Judgment is timely," i.e., that Lickteig had been given an opportunity to complete discovery.

The court, in considering Schwab's motion for summary judgment, concluded that Sergeant Schwab was not entitled to qualified immunity in his individual capacity,[2] but ultimately granted the motion finding that there were no issues of material fact concerning the claim of malicious prosecution. The court concluded that from the license plate number provided by Roth, Sergeant Schwab obtained a photograph of the registered owner of the vehicle, that the photograph was viewed by Roth, and that Roth positively identified Lickteig as the person involved in the incident. The court agreed with Lickteig that the photo pack presentation likely violated the standard operating procedure of the LMPD. However, the court concluded that while the photo pack was suggestive, Lickteig was not misidentified. The court noted that Lickteig admits to being at the scene.[3] The court concluded that the question before it was not whether the photo pack was unduly suggestive, but whether Sergeant Schwab had sufficient probable cause to file the complaint. The court ultimately decided that probable cause existed because a credible witness gave a statement to the police concerning a crime and

[2] This finding has not been appealed. Additionally, the court addressed privileged communication and advice of counsel; these rulings are not before us on appeal.
[3] We agree with Lickteig that unless such information was known at the time of the summons it was not relevant to the probable cause determination.

Sergeant Schwab found a suspect that matched the license plate and description.[4] Moreover, the court held that the finding of probable cause by Sergeant Schwab's supervisor, a prosecutor from the Jefferson County Attorney's Office, and by a Jefferson District Court Judge, raised a rebuttable presumption that probable cause existed which Lickteig failed to rebut. Thus, the court granted summary judgment. It is from this order that Lickteig now appeals.

On appeal, Lickteig argues: (1) Schwab's motion was premature; and (2) the court erred in granting summary judgment. In support thereof, Lickteig additionally argues: (1) the court erred in finding Schwab had probable cause because it improperly allowed him to rely on evidence he manufactured to invent probable cause; (2) whether Schwab failed to adequately investigate is a question of fact for a jury and cannot be resolved by the court on a motion for summary judgment; and (3) the court made factual determinations which is improper on summary judgment.

In response, Sergeant Schwab argues: (1) the motion was timely; and (2) summary judgment was properly awarded. In support thereof, Sergeant Schwab additionally argues: (1) the court properly found that Sergeant Schwab had probable cause to charge Lickteig with indecent exposure in the second degree establishing as a matter of law that the malicious prosecution claim could not prevail; and (2) the existence of an additional witness does not negate probable cause. With these arguments in mind we turn to our applicable standard of review.

[4] The court concluded that another witness, Stone, having a differing version of events was relevant to the ultimate finding of guilt or innocence, but not to the finding of probable cause.

At the outset, we note that the applicable standard of review on appeal of a summary judgment is, "Whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id*. However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra. See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. *Lewis v. B*

& R Corporation, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind we now turn to the parties' arguments.

First, Lickteig argues that summary judgment was prematurely granted. We agree. This Court addressed the use of summary judgment prior to completion of discovery in *Suter v. Mazyck*, 226 S.W.3d 837 (Ky. App. 2007):

> A summary judgment is a final order and, therefore, should not be entered "as a form of penalty for failure of the plaintiff to prove his case quickly enough." *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky.1965). It is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence. *Pendleton Bros. Vending, Inc. v. Com. Finance & Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky.App.1979)).
>
> In *Roberson v. Lampton*, 516 S.W.2d 838 (Ky. 1974), the court cautioned against the use of summary judgment as a means of luring a party into a "premature showdown" by forcing the opposing party to try his case on the merits. Citing *Conley, supra*, the court stated:
>
> > We think that it should be borne in mind that the motion for summary judgment is not a trick device for the premature termination of litigation. Its function is to secure a final judgment as a matter of law when there is no genuine issue of a material fact ... The burden is on the movant to establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied. *Id*. at 840.
>
> The holding in *Roberson* has been given a narrow construction in that the movant does not have to show that the party opposing a motion for summary judgment actually completed discovery but only that the opposing

> party had the opportunity to do so. *Hartford Ins. Group, supra.* Absent a sufficient opportunity to develop the facts, however, summary judgment cannot be used as a tool to terminate the litigation.
>
> . . . .
>
> Whether a summary judgment was prematurely granted must be determined within the context of the individual case. In the absence of a pretrial discovery order, there are no time limitations within which a party is required to commence or complete discovery. As a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties.
>
> . . . .
>
> *In the interest of judicial efficiency, there is, of course, a limitation on the time the parties have to complete discovery; in fairness to all parties such a limitation is most easily expressed in a pretrial order*. On remand, the court shall afford the Suters a reasonable time to complete discovery. Summary judgment motions by either party may then be properly considered.

Suter at 841-844 (internal footnotes omitted) (emphasis supplied).

Sub judice at the time of Sergeant Schwab's motion for summary judgment, no depositions had been taken. There was no scheduling order in place and no pretrial order setting forth the discovery deadline. There was no date set for a trial. Counsel for Lickteig informed the court the reason for the delay and requested discovery be completed in order to adequately defend against the summary judgment motion.

We reiterate that "[i]n the absence of a pretrial discovery order, there are no time limitations within which a party is required to commence or complete

discovery." *Suter* at 842. "[T]here is, of course, a limitation on the time the parties have to complete discovery; in fairness to all parties such a limitation is most easily expressed in a pretrial order." *Suter* at 844. We believe that given the absence of a pretrial discovery order[5] and counsel's extenuating circumstances, counsel should have been given the opportunity to complete discovery.[6] The circuit court having ruled otherwise, we must reverse and remand this matter for further proceedings.

In light of the aforementioned, we reverse and remand this matter for further proceedings.

ACREE, CHIEF JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. The majority opinion correctly states that "[w]hether a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter*, 226 S.W.3d at 842. In this case, I believe the majority opinion fails to discuss the elements of malicious prosecution against which Schwab's motion for summary judgment and the trial court's Opinion and Order must be examined.

---

[5] We note that Sergeant Schwab argued that as the defense of qualified immunity was presented the court was required to dispose of the case expeditiously. We decline to address such an argument as the ruling of the court denying qualified immunity was not appealed therefrom.

[6] We reiterate that discovery does not actually have to be completed, only that ample opportunity is provided for the parties to do so. *See Pendleton Bros. Vending, Inc. v. Com. Finance & Administration Cabinet,* 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.,* 579 S.W.2d 628 (Ky. App. 1979)).

The elements necessary to maintain a claim for malicious prosecution are as follows:

> (1)[T]he institution or continuation of original judicial 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.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981); *Craycroft v. Pippin*, 245 S.W.3d 804, 805 (Ky. App. 2008). Kentucky case law has long regarded malicious prosecution actions with disfavor, especially when the original judicial action involved a criminal offense. *F. S. Marshall Co. v. Brashear*, 238 Ky. 157, 161, 37 S.W.2d 15, 17 (1931); *see also Bazzell v. Illinois Cent. R.R. Co.*, 203 Ky. 626, 630, 262 S.W. 966, 968 (1924) (stating that the "disfavor with which the action is looked upon is especially marked in cases where the suit is being brought for the institution of criminal proceedings against the plaintiff, as public policy favors the exposure of crime, which a recovery against a prosecutor obviously tends to discourage[]"); *Faris v. Starke*, 42 Ky. (3 B. Mon.) 4, 6 (1842) (stating "[i]f every man who suffers by the perpetration of a crime, were bound under the penalty of heavy damages, to ascertain before he commences a prosecution, that he has such evidence as will insure a conviction, few prosecutions would be set on foot, the guilty would escape while conclusive evidence was sought for; offences of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter[]").

In the context of a malicious prosecution case,

> Probable cause . . . has been frequently defined by the courts as that which affords a reasonable ground of suspicion supported by circumstances sufficiently strong within themselves to warrant a cautious person in the belief that the person accused is guilty of the offense of which he is charged. And it has been held that while mere conjectures and suspicions will not warrant a prosecution, credible information received from others might well be enough to induce such action, although proof that the information came from an unreliable source would be important in showing that the information was such that a reasonable man would not act on it.

Goode v. Commonwealth, 199 Ky. 755, 252 S.W. 105, 106 (1923). In *Reid v. True*, 302 S.W.2d 846, 848 (Ky. 1957), the court held that "[w]here sufficient undisputed facts show probable cause, the question is one of law for the court." Tips from citizen informants, because they are eyewitness-victims, may support a finding of probable cause. *Garcia v. Commonwealth*, 335 S.W.3d 444, 451 (Ky. App. 2010).

In this case, Theresa Roth observed Lickteig allegedly masturbating in a car at a traffic light. Roth obtained his vehicle license plate number and contacted Schwab, a sergeant with the Louisville Metro Police, whom she knew. Based on Roth's statements, Schwab wrote up an incident report. Schwab ran the plate, discovered Lickteig was the owner of the vehicle and obtained Lickteig's driver's license photo. Schwab then prepared and presented a photo pack lineup to Roth. Roth identified Lickteig.[7] Schwab thereafter attempted to contact and

[7] The record discloses that Lickteig's picture was larger than that of the other five pictures in the photo pack lineup. But as pointed out by Schwab, Lickteig admitted to being involved in some

discuss the matter with Lickteig, but Lickteig declined. Schwab then filed a criminal complaint with the Jefferson District Court against Lickteig alleging Indecent Exposure in the Second Degree. The filing was reviewed and approved by Schwab's supervisor in the Louisville Metro Police Department. The Criminal Complaint/Summons was reviewed and authorized by both an assistant Jefferson County Attorney and by a Jefferson District Court judge. The Criminal Complaint/Summons indicates probable cause exists to believe a crime has been committed and that Lickteig committed it. Subsequently, a bench trial was held at which Roth, Schwab, Lickteig, and a fourth witness testified. Lickteig's defense was that he was the victim of road rage by Roth, who was apparently angry at Lickteig's driving, and the criminal allegation was her attempt "to get him." The fourth witness's testimony was that Roth told her that the exposure occurred in a park as opposed to at a traffic light. The trial court found Lickteig not guilty.

In this case, the majority opinion decides that Lickteig has had insufficient time to complete discovery, but it undertakes no analysis of the underlying case. The criminal proceedings began in September 2010, the bench trial was held in July 2011, this action was filed in October 2011, and the motion for summary judgment was filed in January 2013. Beyond the passage of time, however, Lickteig had the opportunity to call and question all the principal witnesses in his criminal trial and to uncover the events leading to the criminal

sort of incident with Roth on the day in question such that Lickteig's identity, *per se*, was never an issue in the subsequent criminal proceedings.

prosecution. In my view, the facts establishing probable cause are undisputed,[8] and the trial court properly ruled on Schwab's motion. I would affirm the trial court's Opinion and Order.

BRIEFS FOR APPELLANT:

Mellissa Eyre Yeagle
Thomas E. Clay
Louisville, Kentucky

BRIEF FOR APPELLEE:

Timothy D. Lange
Susan K. Rivera
Louisville, Kentucky

[8] In *Craycroft, supra*, this court held "that a prior finding of probable cause [in a criminal proceeding] merely raises a rebuttable presumption that probable cause exists in the defense of a malicious prosecution action." 245 S.W.3d at 806. The court, however, also noted that "'where there is no conflict in the evidence, whether the facts shown amount to probable cause, is ordinarily a question of law for the court.'" *Id.* (quoting *F.S. Marshall Co. v. Brashear*, 238 Ky. at 161, 37 S.W.2d at 17). A clear reading of *Craycroft* is that in making its probable cause determination, the trial court is to consider a prior criminal case determination of probable cause only as raising a rebuttable presumption of the existence of probable cause, and to the extent other evidence on this issue is present, "the circuit court must consider same before rendering a decision." 245 S.W.3d at 807. Lickteig points only to the suggestive photo pack lineup and the testimony of the fourth witness as rebutting the existence of probable cause. The trial court took both these matters into account in rendering its Opinion and Order. The trial court, thus, complied with the directive in *Craycroft* in making its probable cause decision.