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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001846-MR

JASON PALMER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CI-02413

PAUL CARTER, JR.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, J. LAMBERT AND K. THOMPSON, JUDGES.

COMBS, JUDGE: Jason Palmer appeals from a judgment of the Fayette Circuit Court entered on August 15, 2017. A jury found Palmer, a Kentucky State Police (KSP) trooper, responsible for the malicious prosecution of Paul L. Carter, Jr., following an October 14, 2006, traffic stop, search, and arrest at the corner of Maxwell Street and South Broadway in Lexington. After our review, we reverse.

During the traffic stop, Carter admitted that he swerved on the roadway. When asked to produce his driver's license, he furtively put something in his mouth. As a result, Palmer asked Carter to exit the vehicle. Palmer frisked Carter and searched the vehicle. Carter was arrested by Palmer for possession of marijuana; possession of drug paraphernalia; tampering with physical evidence; and operating a motor vehicle under the influence. After he was received at the detention center, Carter was cited for a second charge of possession of marijuana; possession of cocaine; and promoting contraband. Carter spent twelve days in jail before posting bond and being released.

On October 24, 2006, the Fayette District Court conducted a preliminary hearing. Palmer testified at the hearing. On December 28, 2006, Carter was indicted by the grand jury on each charge and the status offense of being a persistent felony offender in the first degree. His case was set for trial.

Carter filed a motion to suppress the evidence seized from his person and vehicle. He contended that Palmer lacked a reasonable and articulable basis for the traffic stop. A suppression hearing was conducted on March 28, 2007. Palmer testified that no dashboard video recording of the traffic stop existed. The trial court denied the motion to suppress.

Following the hearing, and upon Carter's request, a KSP supervisor located on-board video of the traffic stop. Carter moved to reopen the motion to

suppress on the basis of the recovered video. The trial court ordered Palmer to be produced for further examination and commented that the Commonwealth may want to dismiss the case to “save a State Trooper’s hide.”

On May 16, 2007, the parties presented an agreed order of dismissal, which was subsequently entered. This order referenced the suppression testimony and dismissed all charges against Carter with prejudice.

On May 15, 2008, Carter filed a civil action against Palmer and two state police commanders, Tom Porter and Nathan Kent, both in their official and individual capacities, for claims arising out of his arrest and detention. The complaint alleged numerous federal and state law causes of action, including: unlawful detention; denial of equal protection; failure to train; negligent hiring and retention; false arrest; false imprisonment; intentional infliction of emotional distress; and malicious prosecution. Carter sought compensatory and punitive damages.

On June 2, 2008, Palmer and the other defendants removed the case to federal district court. They also filed a motion to dismiss the claims asserted against them except for the state and federal malicious prosecution claims. The motion was granted.

Thereafter, Palmer filed a motion for summary judgment as to the remaining federal and state and malicious prosecution claims. Porter and Kent filed a motion to dismiss the complaint or, alternatively, for summary judgment.

In an opinion and order rendered on March 1, 2011, the federal district court granted the motion of Porter and Kent to dismiss the federal malicious prosecution claims asserted against them. The court concluded that the complaint failed to provide notice to either of them of any specific factual allegations underlying the claims asserted against him. The court observed that Porter and Kent were not even mentioned in the malicious prosecution count of the complaint except for a generic incorporation of prior allegations in the complaint. The court also granted Palmer's motion for summary judgment on the **federal** malicious prosecution claim, concluding that Carter's prosecution on each of the charged offenses was indisputably supported by probable cause. By establishing probable cause for Carter's prosecution, Palmer defeated Carter's federal claim as a matter of law.

With respect to the state law malicious prosecution claims, the federal court declined to exercise its supplemental jurisdiction. Since all the federal claims were dismissed and judicial economy did not dictate that the federal court should decide the state law issue, it remanded the claims to Fayette Circuit Court. The federal district court observed that the motions before it were dispositive ones and

that the motions had been based, in part, upon qualified immunity, which might indicate that the defendants were not amenable to suit. The court indicated that the “progress of discovery, to date, should enable prompt disposition of the matter in the state courts.” *Carter v. Porter*, No. 5:08-CV-246-REW, 2011 WL 778408, at *15 (E.D. Ky. Mar. 1, 2011).

Upon remand, Palmer, Porter, and Kent filed a joint motion for summary judgment with respect to the only remaining claim. They contended that Carter’s state law claim for malicious prosecution against each of them was barred by the doctrine of collateral estoppel. In the alternative, they argued that they were immune from suit. Carter opposed the motion, arguing that the question as to whether the traffic stop and his subsequent prosecution were supported by probable cause was one for a jury and that the doctrine of collateral estoppel was inapplicable.

In an order entered on September 18, 2012, the Fayette Circuit Court granted the motion of Kent and Porter and dismissed the malicious prosecution claims asserted against them. The circuit court concluded that there was no support in the record for the claims against them because there was no evidence to indicate that either Kent or Porter was involved in Carter’s prosecution.

In an order entered on February 21, 2013, the Fayette Circuit Court granted Palmer’s motion for summary judgment and dismissed the only remaining

count of Carter's complaint. The circuit court correctly observed that the malicious prosecution claim "focuses on the propriety of the state legal proceedings and is distinct from any legal theory to recover based on the propriety of the October 14, initial stop and Palmer's handling of the case." It determined that the analysis of the malicious prosecution claim by the federal district court "foreclose[ed] any possible recovery" because the elements of a state law malicious prosecution claim -- including a lack of probable cause -- are the same as the elements of a federal law malicious prosecution claim.

In an order entered on June 11, 2013, the Fayette Circuit Court granted Carter's motion to reconsider and vacated the summary judgment previously entered. Palmer filed a notice of appeal.

On appeal, a panel of this court affirmed in part, reversed in part, and remanded the matter to the Fayette Circuit Court. In the opinion rendered on September 5, 2014, we agreed with Palmer that a lack of probable cause is an essential element of a state law malicious prosecution claim and that our standard for determining probable cause is the same as the federal standard. However, we concluded as follows:

to the extent that Palmer is asking this Court to determine that an essential element of Carter's malicious prosecution suit now fails due to collateral estoppel, we have no authority to make such a determination at this point in time even though we very likely would have decided the issue differently from the lower court.

Reluctantly our hands are tied on this because while a denial of summary judgment based upon a claim of immunity is subject to interlocutory appeal, a denial of summary judgment based upon collateral estoppel is not. Consequently, we lack jurisdiction to review the merits of the collateral estoppel issue.

Palmer v. Carter, 2013-CA-001123-MR, 2014 WL 4377874, at *2 (Ky. App. Sept. 5, 2014) (citations omitted).

This Court rejected Palmer's argument that qualified immunity can apply to a claim of malicious prosecution and affirmed the trial court on this issue. However, we held that absolute immunity protected him from a malicious prosecution claim based upon testimony he had offered at any judicial proceeding.

We concluded as follows:

Generally speaking, pertinent and relevant testimony given in judicial proceedings cannot supply a basis for a civil action. *Smith v. Hodges*, 199 S.W.3d 185, 193 (Ky. App. 2005). This type of immunity applies even when a witness willfully and maliciously gives false testimony, and it further applies to suits for malicious prosecution based solely upon allegations that a police officer lied to a grand jury, or in some other pretrial proceeding, in order to secure an indictment. *See Reed v. Isaacs*, 62 S.W.3d 398 (Ky. App. 2000) (citing *McClarty v. Bickel*, 155 Ky. 254, 159 S.W. 783, 784 (1913)). Thus, to the extent that Carter's malicious prosecution suit against Palmer is based upon the substance of any testimony Palmer offered at the preliminary hearing, grand jury hearing, or suppression hearing described earlier in this opinion, Palmer was absolutely immune from suit. This would necessarily include any discrepancies in Palmer's testimony over the course of these hearings, along with Palmer's statement that a

video recording of his stop and arrest of Carter did not exist. Therefore, we reverse the circuit court in this respect.

That is not to say that the entirety of Carter's suit should be dismissed on grounds of absolute testimonial immunity, however. Carter's complaint and other pleadings indicate that his suit is also based upon a non-testimonial, pretrial act, namely, Palmer's authoring of a citation charging him with offenses which—according to Carter and his interpretation of the stop and arrest video—Palmer knew were baseless. *See Gregory v. City of Louisville*, 444 F.3d 725, 739 (6th Cir. 2006) (“[N]ontestimonial, pretrial acts do not benefit from absolute immunity, despite any connection these acts might have to later testimony.”)

Id. at *4.

In summary, we emphasized that our interlocutory review of the circuit court's order had been limited to the immunity defense issues decided by the circuit court. We concluded that any statement given by Palmer over the course of the preliminary hearing, grand jury hearing, or suppression hearing could not be used as a basis for Carter's malicious prosecution claim. We also concluded that the questions of whether Carter's allegations amounted to a legally cognizable claim against Palmer for malicious prosecution -- or whether the record could sustain such a claim -- were beyond the scope of our jurisdiction in the appeal.

Upon remand, the matter was tried to a jury. Based upon the evidence presented, the jury found that Palmer had “initiated, continued, or procured a criminal charge against [Carter]” and that he had acted with malice and *without*

probable cause. Jury Instructions at 2. The jury awarded Carter compensatory and punitive damages. The judgment of the Fayette Circuit Court was entered on August 15, 2017. Palmer's motion for judgment notwithstanding the verdict was denied, and this appeal followed.

On appeal, Palmer argues that the trial court made several errors so serious as to require reversal. We conclude that the trial court erred by failing to grant Palmer's motion for judgment notwithstanding the verdict. Because our resolution of this allegation of error is dispositive, we need not address the remaining arguments presented on appeal.

The tort of malicious prosecution is not favored in the law. *Prewitt v. Sexton*, 777 S.W.2d 891 (Ky. 1989). One asserting a claim for malicious prosecution must strictly comply with the elements of the tort. *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597 (Ky. App. 2006). The Kentucky Supreme Court defined the elements of the tort of malicious prosecution as follows:

Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action. They are: (1) the 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.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981).

The federal court granted Palmer's motion for summary judgment with respect to the federal malicious prosecution claim after it concluded that probable cause indisputably supported the criminal proceedings instituted against Carter. Kentucky's standard for determining probable cause is the same as the federal standard. *Palmer*, 2014 WL 4377874, at *2 (citing *Williams v. Commonwealth*, 147 S.W.3d 1, 12 (Ky. 2004) (applying standard for probable cause described in *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145 (1964))). The court reviewed the evidence and discussed the facts in a light most favorable to Carter.

With respect to Carter's prosecution for possession of marijuana in his vehicle, the court observed that Carter admitted to Palmer during the traffic stop that he had marijuana cigarettes in the door handle recess of the car. Palmer collected that evidence. The federal court concluded that this evidence supported Palmer's probable cause determination made during the traffic stop. Moreover, the findings of probable cause made by the Fayette District Court and the grand jury shielded Palmer from responsibility for Carter's prosecution thereafter.

The federal court concluded that no genuine dispute remained with respect to whether probable cause existed for the second charge of possession of marijuana. This charge arose as a result of the search of Carter's person upon his arrival at the detention facility. Detention facility officers found marijuana hidden in Carter's underwear. Carter eventually admitted that he possessed marijuana and cocaine at the time that he was taken into the detention facility. The federal court concluded that this evidence supported the probable cause determination made by Palmer at the detention facility. And, again, the subsequent findings of probable cause made by the Fayette District Court and the grand jury shielded Palmer from further responsibility.

The federal court concluded that there was no genuine dispute that probable cause existed for Palmer's charge against Carter for possession of drug paraphernalia at the traffic stop. Carter did not dispute that he had marijuana wrapped in rolling papers in his vehicle at the traffic stop, and Palmer collected the evidence at the scene. The federal court concluded that the probable cause findings of the Fayette District Court and the grand jury were also amply supported by the evidence, thus shielding Palmer from further liability.

The federal court concluded that Palmer indisputably had probable cause to charge Carter for tampering with physical evidence. Palmer personally observed Carter put material into his mouth and begin chewing. Although Carter

arguably recanted later, he admitted to Palmer during the traffic stop that he had eaten the remainder of marijuana cigarettes when Palmer approached his vehicle. Palmer acted reasonably in charging the offense, and he was shielded from further liability by the subsequent probable cause findings of the district court and the grand jury.

Next, the federal court concluded that there was no genuine dispute that probable cause supported Palmer's decision to charge Carter with operating a motor vehicle under the influence. Although he denied being impaired, Carter openly admitted that he had smoked marijuana before driving. He also explained that his eyes often appear bloodshot and that they must have been in that condition on the day of his arrest. Palmer indicated that Carter's eyes were red and glassy and that he smelled of marijuana.

Carter confirmed that a vehicle enforcement officer had appeared at the scene and tested him in numerous ways regarding potential impairment. After these tests were completed, the officer advised Palmer that Carter was under the influence of marijuana. Having reviewed the video record, we agree with the federal court's description of Carter's behavior during the traffic stop. He appears distracted and slow to respond to basic instructions from Palmer -- such as where Carter was to place his hands. Despite a string of apologies to Palmer, Carter was -- at best -- noncompliant with Palmer's simple instructions. The charge of driving

under the influence was amply supported by probable cause, and Palmer was shielded from any subsequent liability by the probable cause findings of the district court and the grand jury.

The federal court next concluded that there was no genuine dispute that probable cause existed to support Palmer's charge of promoting contraband. Palmer explained the basis for this charge as follows: "He brought an amount of marijuana and crack cocaine into a secure area at the Fayette County Detention Center." There is no dispute that the events related to the detention facility search occurred after Carter entered the facility doors. Again, Carter admitted that he was in possession of marijuana and cocaine. Facility staff indicated to Palmer that they recovered a plastic baggie containing marijuana and cocaine during a strip search. A video recording of the search supports this report. Carter indicated that he hoped to place the drugs in an amnesty box or flush them. As to the undisputed facts, probable cause existed for the charge. And Palmer was shielded from subsequent liability by the probable cause findings of the Fayette District Judge and the grand jury.

Finally, the federal court concluded that there was no genuine dispute as to the facts underlying Palmer's finding of probable cause for the charge of possession of cocaine. Carter openly admitted that he had marijuana and cocaine in his possession. Palmer's uncontested account indicates that the cocaine was

found as a result of the strip search conducted at the detention facility. On these undisputed facts, probable cause existed for the charge. Once again, Palmer was shielded from subsequent liability by the probable cause findings of the Fayette District Judge and the grand jury.

Lack of probable cause is an essential element of a malicious prosecution claim. *See Palmer*, 2014 WL 4377874, at *2 (citing *Phat's Bar & Grill v. Louisville Jefferson County Metro Gov't*, 918 F.Supp.2d 654, 660 and 664 (W.D. Ky. 2013) (discussing elements of both malicious prosecution actions)). The existence of probable cause for Carter's prosecution foreclosed the single, remaining claim that he had asserted against Palmer. There is ample support in the record for each charge that Palmer lodged against Carter. The determinations of the Fayette District Court and the grand jury confirm that conclusion.

Both the Fayette Circuit Court and the federal court observed that whether Palmer had a reasonable and articulable basis for the initiation of the traffic stop was debatable -- primarily because of his later testimony about the lack of an on-board video. We agree that that point is indeed debatable and arguable. However, we are not persuaded that Palmer's potential mishandling of the stop defeats the fact that he had probable cause to arrest Carter and to participate in his subsequent prosecution. The tort of malicious prosecution focuses on the legitimacy of the arrest and prosecution -- **not the initial traffic stop.**

Furthermore, any tort connected with the viability of the stop was dismissed by the federal court based on the applicable statute of limitations. That decision was not appealed.

Palmer also argues that Carter failed to show that the proceedings terminated in his favor, the third requirement of a malicious prosecution action. Palmer contends that the dismissal of the criminal complaint with prejudice is not a “favorable termination” because it does not establish or confirm the defendant’s innocence on the merits. We agree.

Once again, we reiterate that the tort of malicious prosecution is not favored in the law and that one claiming malicious prosecution must strictly comply with the elements of the tort. The determination of whether a termination is sufficiently favorable to the accused is generally a matter of law for the court to decide. *Davidson*, 202 S.W.3d 597.

The termination of the proceedings against the defendant must go to the merits of the accused’s professed innocence in order for the dismissal to be deemed “favorable” to him. *See Alcorn v. Gordon*, 762 S.W.2d 809 (Ky. App. 1988) (dismissal on grounds of statute of limitations defense not a termination in favor of the plaintiff because it did not address the merits of the claim). Only where the dismissal indicates that the accused may be innocent of the charges have Kentucky courts found that the termination of the proceedings were favorable to

the party bringing a malicious prosecution claim. Moreover, in determining whether a dismissal is a termination in favor of the accused, the court must not consider whether the plaintiff is actually innocent of the charges -- but rather whether the dismissal of the proceedings established his innocence as a matter of legal consequence. Nothing in the dismissal of the criminal complaint against Carter indicated that the inculpatory evidence against him was unreliable. The dismissal of the criminal complaint here did not exonerate Carter; it merely released him from subsequent liability. Thus, as a matter of law, the dismissal of the criminal complaint does not qualify as a termination in his favor.

In summary, we hold that Carter failed to establish the elements of malicious prosecution. Therefore, he was entitled to judgment notwithstanding the jury verdict. We reverse the judgment in this case and remand for entry of a judgment consistent with this opinion.

ALL CONCUR.

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