

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Richard Lee Gravely
Plaintiff Below, Petitioner**

vs.) **No. 11-0892** (Kanawha County 11-CAP-10)

**Macy's, Scott McNealy, and Zenna Kalwar
Defendants Below, Respondents**

FILED
October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Richard Lee Gravely, pro se, appeals the May 4, 2011, order of the Circuit Court of Kanawha County granting a motion to dismiss his civil action for malicious prosecution. Respondents, by Melissa M. Barr, their attorney, filed a summary response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was apprehended by Scott McNealy, the Macy's Loss Prevention Manager, leaving the store with chocolate bars in his pants pockets. Mr. Gravely was charged with shoplifting under §78-101 of the Charleston, West Virginia Municipal Code. After his conviction in Charleston municipal court, petitioner appealed to the Circuit Court of Kanawha County which conducted a trial de novo. The Macy's Sales Manager, Zenna Kalwar, testified that while being detained in the store office, petitioner asked her whether the chocolate bars had any price tags on them. She further testified that she told petitioner that the chocolate bars had bar codes on them reflecting that they had a value of approximately \$24.89 each. Petitioner then testified in his own defense and did not contest the fact that he placed the chocolate bars into his pockets.

Petitioner's defense was that the chocolate bars did not have a "stated price" on them, which he argued was a necessary prerequisite for a shoplifting conviction under §78-101 of the municipal code. In its order, the circuit court found petitioner guilty of shoplifting under §78-101. The circuit court sentenced petitioner to a fine of \$200 plus \$62 in court costs and \$50 in restitution for a total of \$312, as had originally been ordered by the municipal court. Petitioner's appeal from his conviction in the circuit court is pending before this Court in a separate case.

In the case sub judice, petitioner sued Macy's, Mr. McNealy, and Ms. Kalwar (hereinafter collectively "respondents") for malicious prosecution in the Magistrate Court of Kanawha County. In an amendment to his complaint, petitioner alleged that as a result of his "unlawful arrest" for shoplifting, he had "sustained mental and emotional damages, suffered embarrassment, humiliation, annoyance, inconvenience, deprivation of liberty." The magistrate court conducted both a trial and a hearing on a motion to dismiss filed by respondents. After the hearing, the magistrate court granted the motion to dismiss petitioner's civil action.

When petitioner appealed, the circuit court also provided him with both a trial and a hearing on the motion to dismiss. At the hearing, the circuit court heard arguments of the parties, took "the sworn proffer of the *pro se* [petitioner]" and questioned him "regarding his claim."

The circuit court held that to prevail on his claim of malicious prosecution, petitioner had to show the following: "(1) That the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff." Syl. Pt. 3, *McCammon v. Oldaker*, 205 W.Va. 24, 516 S.E.2d 38 (1999) (Internal quotations and citations omitted.). The circuit court determined that petitioner would have been able to show neither the second nor the third element required to prove malicious prosecution. First, the circuit court determined that the criminal prosecution did not terminate favorably to petitioner "as he was fined and ordered to pay restitution." Second, the circuit court found from the testimony and the record that "there was probable cause to have [petitioner] arrested for shoplifting for purposes of criminal prosecution." Accordingly, the circuit court dismissed petitioner's civil action against respondents with prejudice.

STANDARD OF REVIEW

The circuit court took petitioner's sworn proffer and questioned him regarding his claim. Therefore, the circuit court's order granting the respondents' motion to dismiss is construed as an order granting summary judgment in respondents' favor. *See Shaffer v. Charleston Area Medical Center, Inc.*, 199 W.Va. 428, 433, 467 S.E.2d 12, 17 (1997) (stating that a court order granting a Rule 12(b)(6) motion to dismiss shall be construed as an order granting summary judgment under Rule 56 when "the circuit court receive[s] evidence outside the pleading, in the form of witness and expert witness testimony . . ."). Rule 56 of the West Virginia Rules of Civil Procedure provides in pertinent part that summary judgment shall be granted when it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), W.V.R.C.P.

DISCUSSION

On appeal, petitioner maintains that the chocolate bars he placed in his pants pockets did not have a "stated price" on them, which he argues is a necessary prerequisite for a conviction under the City of Charleston's shoplifting statute, §78-101 of its municipal code. Petitioner further argues that this Court should not rule on his appeal of the dismissal of his civil action for malicious prosecution until the Court rules on his appeal of his criminal conviction. Respondents argue that

this Court can proceed to rule on the instant appeal because petitioner's criminal conviction is not an essential basis for rendering judgment in their favor. Respondents argue that the circuit court's ruling that probable cause existed to initiate a prosecution for shoplifting constituted a sufficient basis on which to rule that respondents are entitled to judgment in petitioner's malicious prosecution action. Given that petitioner never disputed the fact that he placed the chocolate bars into his pants pockets, this Court concludes that the circuit court did not err in determining that petitioner could not prove the "without probable cause" element of a malicious prosecution. *See* Syl. Pt. 3, *McCammon*, supra. (listing the three elements of malicious prosecution).*

For the foregoing reasons, we find no error in the decision of the Circuit Court of Kanawha County and affirm its summary judgment in respondents' favor.

Affirmed.

ISSUED: October 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

* Respondents additionally argue that petitioner failed to perfect his appeal; however, based upon this Court's disposition of the case, there is no need to address that argument.