

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Presiding Judge

Case No. 2013-001909

William R. Ferrara Appellant,

v.

Michael E. Hunt, Sheriff of Aiken County; Aiken County Sheriff's Department,
Charles Cain in his individual capacity as Deputy Sheriff
and the Aiken County Sheriff's Department Defendants,

Of whom Charles Cain in his individual capacity as Deputy Sheriff is the Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE PROBABLE CAUSE ISSUE WAS NOT FULLY LITIGATED; THEREFORE, THE ISSUE IS NOT PRECLUDED.

The Respondent asserts that Appellant failed to establish evidence of the absence of probable cause. Respondents also assert that Judge Gergel's probable cause finding is entitled to preclusive effect based upon the doctrine of collateral estoppel. However, the issue of probable cause was not fully litigated in district court. Therefore, the Appellant was not precluded from litigating the issue in state court.

The specific issue of probable cause, as Respondents points out in his initial brief, is critical to Appellant's claim. Appellant did not have the opportunity to litigate this issue in federal court. Since the state claims were not litigated in federal court but remanded, Appellant fully expected to be able to litigate the issue in state court. He has not yet had this opportunity. Rather, the courts have used the faulty, unlitigated reasoning of the federal court to apply *res judicata* to this issue.

The 2nd Circuit has reasoned that an appropriate showing of probable cause is composed of two elements: "To prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. *Brubaker v. King*, 505 F.2d 534, 537 (7th Cir. 1974). In that case, the Respondent was claiming that since the issue of probable cause had been decided in a state court, the Appellant was precluded from litigating the issue in federal court. The court stated that:

the test of probable cause in criminal proceedings is not the test to be applied in actions for damages, we find that a state court

determination that there was probable cause to arrest made in the course of a criminal prosecution is not collateral estoppel in a subsequent action for damages under § 1983 or the Fourth Amendment since the issues involved are not identical. Collateral estoppel operates only if the ‘very fact or point now in issue’ was determined in prior litigation.

Id. at 537-38 (internal citations omitted). The *Brubaker* court held that “the question is not whether there was, in fact, probable cause for the arrest, but whether the defendant officers had a reasonable, good faith belief that probable cause existed.” The court stated that it was necessary for “the federal district court ... independently to review the facts to determine whether defendants had proved that their actions were undertaken in good faith with a reasonable belief in their constitutional validity.” *Id.* at 538.

In the federal case, Judge Gergel did not conduct such an analysis. Instead, he focused solely on whether the actions of the officer were reasonable according to an objective standard. Judge Early failed to conduct his own analysis of probable cause in the state court, choosing simply to quote the findings of the district court. This was in error.

The analysis of probable cause includes more than an objective standard. The 6th and 7th circuits agree that determination of probable cause is not as simple as the Respondent asserts. In *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir.2001), the court held that a finding of probable cause in a prior criminal proceeding does not bar a plaintiff in a subsequent civil action from maintaining a claim for malicious prosecution under Michigan law where the claim is based on a police officer's supplying false information to establish probable cause. An analysis must also include an examination of the officer's state of mind, and whether he had a good faith belief that his conduct was lawful. Therefore, the issue to be litigated is not whether probable cause exists, but the integrity of that evidence. *Id.*; see also *Hinchman v. Moore*, 312 F.3d 198, 204 (6th Cir. 2002) (finding that summary judgment was inappropriate where the “facts as related by

[the plaintiff,] which we must accept for the purposes of reviewing the grant of summary judgment against her[,] do not establish probable cause to arrest and prosecute her,” and she was not precluded from raising the probable cause issued at a §1983 hearing). The 7th circuit decided similarly in *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987), stating that if the determination of probable cause evaluated the “sufficiency, but not the integrity, of the evidence,” then a defendant is *not* collaterally estopped from bringing a §1983 action which challenges the *integrity* of the evidence.

A probable cause determination requires “a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that ... evidence of a crime will be found in a particular place.” *State v. Herring*, 387 S.C. 201, 212, 692 S.E.2d 490, 495–96 (2009) (internal quotations omitted). A magistrate must have a substantial basis for concluding probable cause existed. 387 S.C. at 212, 692 S.E.2d at 495; *see also State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997).

The affidavit must set forth *facts* as to why the police believe the suspect is the person who committed the crime. *See State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding an affidavit defective because it “sets forth no facts as to *why* police believed Smith” committed the robbery) (emphasis added). In *State v. Baccus*, 367 S.C. 41, 52, 625 S.E.2d 216, 222 (2006), the South Carolina Supreme Court held that affidavits must contain these facts. “The language in the affidavit [must not lack] specificity and [must not contain] conclusory statements.” *Id.* “The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter.” 367 S.C. at 50–51, 625 S.E.2d at 221 (citing *Franks v. Delaware*, 438 U.S. 154, 165, 98

S.Ct. 2674, 57 L.Ed.2d 667 (1978)). The affidavit in this case fails to meet the requirement of showing why the police believed Appellant committed the crime.

The Respondent argues that because the case involved a sexual crime, that no corroboration of the informant's allegations was needed. However, the *Jenkins* court disagrees: The magistrate's "action cannot be a mere ratification of the bare conclusions of others." *Id.*

In addition, the affidavits in used in Appellant's case do not contain a conclusory assertion that the information or its source is reliable. "Without any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime...." *State v. Johnson*, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990) (citation and quotation marks omitted).

The affidavits were defective. An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. *State v. Viard*, 276 S.C. 147, 276 S.E.2d 531 (1981).

Mr. Ferrara did not have an opportunity to fully litigate this issue in federal court. He expected to be able to litigate the complete issue in state court. However, in Judge Early's order, there was no analysis on whether the officers undertook the arrest in good faith with a reasonable belief in their constitutional validity. Since the issue was not fully litigated, summary judgment was inappropriate in this case and issue preclusion does not apply.

II. THE COURT ERRED IN FINDING THAT THE RESPONDENT HAD IMMUNITY BECAUSE EVIDENCE OF ACTUAL MALICE WAS PRESENT.

Respondent asserts that Appellant fails to identify any facts which show actual malice. However, the facts show that Defendant Cain swore he had probable cause to arrest Mr. Ferrara when in fact no probable cause existed. Despite his training and experience as a law

enforcement investigator, and despite the incredibly serious nature of the allegations, Defendant Cain conducted an investigation lasting little more than three hours that involved taking two substantive statements from a single informant. He did nothing whatsoever to corroborate the statements of the informant and he did nothing to investigate the informant's truthfulness or reliability, each of which is required to establish probable cause. (See Appellants Federal Court Memorandum in Opposition to Summary Judgment Exhibit 3, R. ____). As a trained and experienced law enforcement officer, he knew this was an incompetent investigation and he knew he did not have probable cause to arrest Mr. Ferrara. In light of the facts most favorable to Mr. Ferrara, when Defendant Cain then swore to probable cause in the arrest warrant, he committed perjury. There was nothing objectively legally reasonable about these actions.

By committing perjury to obtain an arrest warrant against Mr. Ferrara, Defendant Cain transgressed the bright line rules of Due Process and probable cause to the extreme harm of Mr. Ferrara. Because of these transgressions, Defendant Cain has failed to exercise his power responsibly and has strayed from the protection of qualified immunity. He is thus not entitled to qualified immunity, and this Court must deny his motion for summary judgment in this regard.

When the privilege is qualified ... the plaintiff may recover if he shows that it was actuated by malice. *Bell v. Bank of Abbeville*, 208 S.C. 490, 493, 38 S.E.2d 641, 642 (1946). In *Bell*, the court also stated that summary judgment would be inappropriate in such a case:

On the face of the amended complaint, the alleged defamatory statements appear to have been made upon a privileged occasion. But whether or not the privilege was exceeded is an issue to be met upon the trial of the case, in which the burden will be upon the plaintiff to show express or actual malice. This question cannot be decided upon a demurrer to the complaint. The defendant cannot get the benefit of the defense of qualified privilege without setting it up as an affirmative defense.

Id. at 493-94, 38 S.E.2d at 642-43.

Under the affirmative defense of qualified privilege, “one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused.” *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126, 134 (S.C.1999). “The privilege may be lost ... by the manner of its exercise.” *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743, 749 (S.C.App.2001). The person invoking the privilege must not exceed the scope of the occasion, engage in any unnecessary defamation, or act with actual malice. *Id.*

“The effect of the qualified privilege defense is to cast upon the plaintiffs the burden of proving malice in fact on the part of the defendant.” *Austin v. Torrington Co.*, 810 F.2d 416, 423-24 (4th Cir. 1987). Therefore, even though “actual malice” is listed as an exception to liability, our courts have stated that when this malice is part of a defamation analysis the exception does not apply.

The court erred in granting summary judgment to the defendants. Under *Bell*, whether or not the privilege was exceeded was a question of fact and could not be decided on demurrur.

III. THE APPELLANT'S APPEAL IS TIMELY, BECAUSE NOTICE WAS PROVIDED PROMPTLY UPON RECEIPT OF THE ORDER AND BECAUSE NO PREJUDICE WILL RESULT.

Respondent moves to dismiss this appeal on the ground the notice of appeal was not timely served. Appellant timely served his notice of appeal within thirty days after receiving written notice of the lower court's order as required by Rule 203 (b)(1), SCACR. The Appellant noted in his notice of appeal, dated August 26, 2013, that he received notice of entry of the order on August 20, 2013.

Appellant received an order from Judge Early on April 8, 2013, regarding summary judgment. There had been one hearing on the motions from the Defendants. The order the

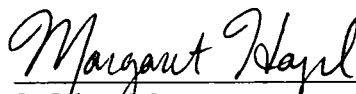
Appellant received did not state "Order as to Defendant Hunt," it simply stated "Order." Apparently, a month later, another order was written and titled "Order as to Defendant Cain," which the Appellant did not receive until August. Because an order had already been received in the matter in April, Appellant was not expecting a second order regarding only one of the Defendants. However, as soon as he received notice that there was a second order, he immediately complied with Rule 203(b)(1). Therefore, this appeal should not be dismissed because the Appellant complied with the time requirements to serve his Notice of Appeal.

In addition, no prejudice will result if the appeal goes forward. The Record on Appeal has not been file, and it is likely that the Appeal of Respondent Cain will be consolidated with the Appeal of Respondent Hunt. This appeal should not be dismissed because the Appellant timely filed his Notice of Appeal within 30 days of receiving notice of the order.

CONCLUSION

Based on the foregoing, this court should reverse the May 16, 2013 Order of Judge Early granting summary judgment to the Respondents and remand this case to be heard by a jury in the Aiken County court of Common Pleas.

Respectfully submitted,



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