THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 13-CP-37-138

LLOYD LASH ..... Appellant,

v.

OCONEE COUNTY SHERIFF'S DEPARTMENT, et al, ..... Respondent.

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

Whether the circuit court judge erred when he granted defendants' motion for summary judgment on the count of malicious prosecution because Officer Rory Jones failed to provide probable cause to the magistrate justifying the execution of the arrest warrants in violation of the 4th Amendment?

Whether the circuit court judge additionally erred when he found summary judgment was appropriate because the Grand Jury indicted Lash because the jury should be allowed to consider whether Jones fraudulently procured the indictments?

Whether the trial court judge erred when he concluded that defense counsel was entitled to summary judgment because the trial court judge denied defense counsel's motion for a directed verdict?

## STATEMENT OF THE CASE

Lloyd Lash filed suit against the Oconee County Sheriff's Department and Detective Rory Jones on February 20, 2013 arising from the Plaintiff's acquittal after a murder trial held on March 31, 2011. The City of Seneca was added as a Defendant in an amended complaint filed on March 15, 2013, and Oconee County Sheriff's Department was subsequently dismissed. The Complaint alleged the following causes of action: malicious prosecution, abuse of process, negligence, false arrest, false imprisonment, and intentional infliction of emotional distress.

A motion for summary judgement filed by Defendants was heard on July 28, 2014 before the Honorable R. Lawton McIntosh. On September 15, 2014, Judge McIntosh filed an Order Granting Summary Judgment to the Defendants. A notice of appeal was filed and this appeal timely follows.

## ARGUMENTS

**I. The circuit court judge erred when he granted defendants' motion for summary judgment on the count of malicious prosecution because Officer Rory Jones failed to provide probable cause to the magistrate justifying the execution of the arrest warrants in violation of the 4th Amendment.**

Lloyd Lash was arrested and charged with the murder of Arthur Roberts five years after the crime was committed. A cold case, Rory Jones, then a detective with the Seneca Police Department, re-opened the investigation and, using coercive and unlawful tactics, generated false statements from reluctant witnesses who implicated Lash in the crime. At trial, once these witnesses revealed what they had been subjected to, the jury acquitted Lash of all charges.

Lash subsequently brought a civil lawsuit against the Seneca Police Department and Jones. His complaint alleged (1) he "was improperly, illegally, and falsely arrested, without probable cause on May 25, 2009, (2) the prosecution "was maintained and continued by these defendants [] despite of these defendants' actual knowledge of Plaintiff's innocence and complete lack of evidence against Mr. Lash, and (3) the defendants "participated in the presentation of false and inaccurate evidence supporting the prosecution." R. *.

To prove malicious prosecution, Lash has to prove the following: (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant, (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage. *Jordan v. Deese*, 317 S.C. 260, 262, 452 S.E. 2d 838, 879 (1995) (quoting *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 528; 339 S.E.2d 887, 889 (Ct. App. 1986); see also *Barber v. Whirlpool Corp.*, 34 F.3d 1268 (4th Cir. 1994). The element of malice "may be inferred from a want of probable cause." *Law v. S.C.*

*Dep't of Corr.*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006), and it is generally a matter of fact to be resolved by the jury. See *Patterson v. Bogan*, 261 S.C. 87, 198 S.E.2d 586 (1973); *Margolis v. Telechk*, 239 S.C. 232, 122 S.E.2d 417 (1961).

After a hearing held on July 28, 2014, the Honorable R. Lawton McIntosh granted defendants' motion for summary judgment finding, *inter alia*, that "probable cause existed to arrest, detain and try the Plaintiff." Order, 5. In support of this finding the Court noted that Lash was arrested pursuant to warrants issued by the municipal court for the City of Seneca. Order, 5. The Court, however, fails to account for the fact that the magistrate simply rubber-stamped Jones's warrant without making the necessary finding of probable cause to believe that Lash committed the crime.

In the affidavit signed by Detective Rory Jones, he said this:

> I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:
>
> THE DEFENDANT, LLOYD ANDREW LASH, DID WITH MALICE AFORETHOUGHT CAUSE THE DEATH OF ARTHUR ROBERTS. THIS DID OCCUR AT 517 LIVINGSTON CIRCLE WITHIN THE CITY OF SENECA AND **THERE IS A WRITTEN REPORT ON FILE WITH THE SENECA POLICE DEPARTMENT**, CASE NO. 04000529

R. *. (all caps original; bold added).

Describing his basis to believe that probable cause existed to charge Lash with murder, Detective Jones referred the magistrate to a file housed at the Police Department. At his deposition, which the trial court judge did not have in his possession at the time he ruled on the defendant's motion for summary judgment as it was not attached as an exhibit to the summary judgment motion, Jones failed to offer any additional information that he may have provided to the magistrate, or any

reason to believe that the magistrate inspected the file at the Seneca Police Department. Indeed, at the July 28, 2014 hearing, counsel for Lash stated:

> COUNSEL: . . . If you look at the arrest warrants in this case, there actually is no description of what the probable cause is. It just refers the magistrate to look at the case file that's stored in the sheriff's department. We don't believe that that is adequate. We're not sure what was presented. We don't feel that the full file may have been presented a magistrate for a magistrate to be able to look at all the evidence and decide if there was probable cause. That argument—
>
> THE COURT: That's just pure speculation on your part. . .
>
> COUNSEL: In Defendant Jones' deposition, we asked would he present it. He wasn't sure. He just referred that that's what the warrants said and that's what was told."

Tr. 20-21.

At the time the trial judge granted the defendant's motion for summary judgment, he had no knowledge of any information the former detective[1] told the magistrate about this case. The trial court judge committed an error of law when he found that probable cause existed to arrest Lash. See *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997) (finding no basis for probable cause where affidavit failed to set forth any basis to believe defendant committed crime). The issuance of these warrants violated Lash's rights under the 4th Amendment and this Court should remand for a trial on his malicious prosecution claim.

[1] Rory Johnson left the Seneca police department due to a formal complaint of sexual harassment. He now works for the Westminster Police Department.

## II. The circuit court judge additionally erred when he found summary judgment was appropriate because the Grand Jury indicted Lash because the jury should be allowed to consider whether Jones fraudulently procured the indictments.

Defendants also argued they were entitled to summary judgment because the grand jury indicted Lash for the crimes.[2] While it is true that generally, a true bill of indictment is prima facie evidence of probable cause, *McBride v. School District of Greenville County*, 389 S.C 546, 698 S.E.2d 845 (Ct. App. 2010), that conclusion does not take into account Lash's claim that Rory Johnson engaged in fraud in obtaining putatively inculpating statements. As counsel explained to the judge:

> Defendant Jones did confirm what we had been hearing from Mr. and Mrs. Whitener that they had been threatened with criminal prosecution if they didn't give up information. They stated at trial that they felt threatened and that is why they did that. Mr. Whitener said he only made that statement because he knew that he would continue to stay in jail unless he helped out Investigator Jones.
>
> Mrs. Whitener said she wanted to be done with it. She wanted him to leave her alone. That was the only way she did not want to lose her kids. She made that statement of her children."

Tr. 31, ll. 10-23.

The United States Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or "with reckless disregard for the truth" makes material false statements or omits material facts. *Franks v. Delaware*, 438 U.S. 154, 155

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[2] The indictment for murder merely recites the elements of the crime and alleges Lash "cause[d] the death of Arthur Roberts by shooting the victim with a handgun." R. *. The indictment for attempted armed robbery merely recites the elements of the crime and is devoid of any factual allegations. R. *. The indictment for possession of a weapon during the commission of a violent crime merely alleges Lash had "in his possession a pistol" when he committed the crime of murder. R. *. The indictments do not provide a factual basis for these conclusory statements. Nor did the defendants submit transcripts of the grand jury to demonstrate that the indictments resulted from anything other than false evidence. This Court can take judicial notice of the fact the county court grand jury proceedings are not recorded.

(1978). False evidence may not be considered when determining the existence of probable cause. *See e.g. State v. Jones*, 342 S.C. 121, 536 S.E.2d 675 (2000) (affidavit in support of search warrant, which contained false information, namely identification of informant as police officer, did not create probable cause for warrant). Plus, omission of exculpatory evidence from the probable cause determination must be considered. "*Franks* addressed an act of *commission* in which false information had been included in the [police officer's sworn presentation]. However, the *Franks* test also applies to acts of *omission* in which exculpatory material is left out." *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999).

"Whether probable cause exists is normally a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 436, 629 S.E.2d 642, 649 (2006) (citing *Parrott v. Plowden Motor Co.,* 246 S.C. 318, 323, 143 S.E.2d 607, 609 (1965). By granting the defendants' motion for summary judgment, the court below took that determination away from the jury. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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 a judgment as a matter of law." Rule 56(c), SCRCP. Here, however, the parties' pleadings materials supplied to the court below, and arguments create a genuine issue of material fact, to wit: whether the defendants used false evidence to arrest, indict, and try Lash in the absence of probable cause.

The Court should remand for a trial on the malicious prosecution claim.

## III. The trial court judge erred when he concluded that defense counsel was entitled to summary judgment because the trial court judge denied defense counsel's motion for a directed verdict.

And lastly, the trial court judge erred when he found that the defendants were entitled to summary judgment because the trial court judge (the same judge presided over trial and this motion for summary judgment by consent of the parties) denied defense counsel motion for a directed verdict at trial.[3] In making this finding, the judge committed another error of law because the standard for summary judgment is different than the standard for directed verdict. Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Café Assocs., Ltd. V. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). Further, summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom. *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980).

In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). When considering directed verdict motions, neither

[3] The entire directed verdict motion takes up only seven lines of transcript. It does not identify any facts supporting the denial of the motion. Nor is there any indication that the trial judge relied on anything other than the defendants' false evidence to deny the motion.

the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Creech v. S.C. Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). The trial judge, in fact, was required to submit the case to the jurors based on the false witness statements obtained by Rory Johnson during the investigation as "testimony of prior inconsistent statements [may] be used as substantive evidence when the declarant testifies at trial and is subject to cross examination." *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982).

Summary judgment is not appropriate in this case because there are still a number of highly disputed facts regarding, most centrally, Rory Johnson's actions in securing statements the witnesses claim were false and fraudulently procured. The trial court's decision not to grant a directed verdict only means that the state put forth enough evidence to support the elements of the crime; in no way could it be construed as a remark on the merits of a subsequent civil suit instituted after acquittal.

To prove malicious prosecution, Lash has to prove the following: (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant, (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage. *Jordan v. Deese*, 317 S.C. 260, 262, 452 S.E. 2d 838, 879 (1995) (quoting *Gaar v. N. Myrtle Beach Realty Co.,* 287 S.C. 525, 528; 339 S.E.2d 887, 889 (Ct. App. 1986); see also *Barber v. Whirlpool Corp.*, 34 F.3d 1268 (4th Cir. 1994). The element of malice "may be inferred from a want of probable cause" *Law v. S.C. Dep't of Corr.,* 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006), and it is generally a matter of fact to be resolved by the jury. See *Patterson v. Bogan*, 261 S.C. 87, 198 S.E.2d 586 (1973); *Margolis v. Telechk*, 239 S.C. 232, 122 S.E.2d 417 (1961).

Here, because the Officer failed to prove probable cause to the magistrate, there was no finding of probable cause sufficient to justify the issuance of the arrest warrants. The jury could easily infer malice from these circumstances. Lash was arrested on May 29, 2009. The Grand Jury did not true bill the indictment until August 24, 2009; for 87 days Lloyd Lash was detained without a finding of probable cause. Assuming, *arguendo*, that probable cause was established at the time of the grand jury proceeding for purposes of advancing his malicious prosecution claim, this Court should still remand the case for trial on the 87 days during which Lash was detained pre-trial and pre-indictment.

But additionally, this Court should remand the malicious prosecution claim because, even though the Grand Jury indicted the case, the jury should still be allowed to consider whether Rory Johnson lied to the grand jurors and therefore fraudulently procured the indictment against Lash. Finally, the Court should remand this case for trial because the trial court judge's claim that summary judgment is appropriate because the trial court judge denied defense counsel's motion for a directed verdict commits an error of law as it misconstrues the import of those standards at this point in the litigation.

## CONCLUSION

For the preceding reasons, this Court should reverse the trial court judge's grant of summary judgment to the defendants, and remand Lash's malicious prosecution claim for trial.

Respectfully submitted,

By 

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May 28, 2015 E.F.B.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of the Initial Brief of Appellant was served by first class United States mail, postage prepaid, this 28th day of May, 2015, upon the following:

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May 28, 2015



Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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RE: **Lloyd Lash v. Oconee County Sheriff's Department, *et al* (2013-CP-37-138).**

Dear Ms. Kitchings,

Please find enclosed, with certificate of service, the original and seven copies of the Initial Brief of Appellant in regards to the above captioned case. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Elizabeth Franklin-Best

Elizabeth A. Franklin-Best

cc: James D. Jolly, Jr., Esq.