IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

C.A. No. 2013-CP-37-138
Appellate Case No. 2014-002296

LLOYD LASH, ... Appellant,

v.

OCONEE COUNTY SHERIFF'S DEPARTMENT, SENECA POLICE DEPARTMENT, and DETECTIVE RORY JONES, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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Date: July 28, 2015

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STATEMENT OF ISSUES ON APPEAL

Did the circuit court err in granting Respondents' motion for summary judgment on the count of malicious prosecution, finding that Appellant failed to show lack of probable cause?

STATEMENT OF THE CASE

Appellant Lloyd Lash filed suit against the Oconee County Sheriff's Department and Detective Rory Jones on February 20, 2013 arising from the Appellant'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 the Oconee County Sheriff's Department was subsequently dismissed. The Amended 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 judgment filed by the Respondents 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, finding that all causes of action, except malicious prosecution, were barred by the statute of limitations. In addition, Judge McIntosh dismissed the malicious prosecution cause of action, finding that there was probable cause to arrest, detain and try the Appellant.

A notice of appeal, based solely on the malicious prosecution claim, was timely filed.

STATEMENT OF FACTS

On or about February 10, 2004, George Arthur "Butch" Roberts was murdered in the City of Seneca. (Amended Complaint, p. 2.) After the Respondents reopened the case in 2009, the Municipal Court for the City of Seneca issued warrants for the Appellant's arrest for murder (Memorandum in Support of Motion for Summary Judgment by Defendants, Exhibit 1), attempted robbery while armed with a deadly weapon (Memorandum in Support of Motion for Summary Judgment by Defendants, Exhibit 2), and possession of a weapon while in commission of a crime (Memorandum in Support of Motion for Summary Judgment by Defendants, Exhibit 3). On August 24, 2009, the Oconee County Grand Jury returned true bill indictments against the Appellant on all three (3) of the charges. (Memorandum in Support of Motion for Summary Judgment by Defendants, Exhibit 4.) On March 30, 2011, during the Appellant's criminal trial, the trial court denied the Appellant's motion for a directed verdict, finding that "there is more than enough evidence for the Jury to decide." (Memorandum in Support of Motion for Summary Judgment by Defendants, Exhibit 5.) At the close of the trial on or about March 31, 2011, a jury found the Appellant not guilty of all charges. (Amended Complaint, p. 3.)

ARGUMENT

The only issue on appeal is the lower court's grant of summary judgment as to the Appellant's cause of action for malicious prosecution, which was granted based on the Appellant's failure to show a lack of probable cause. "While actions for malicious prosecution may be maintained in the courts, they have never been regarded with favor and are not encouraged as it is in the best interest of good order that criminals be brought to justice; and it is generally held that the prosecutor is free from damage if there be probable cause of the accusation made, the burden being upon the plaintiff to show the absence of probable cause as a part of the cause of action." *Prosser v. Parsons,* 245 S.C. 493, 141 S.E.2d 342 (1965). *See also White v. Coleman,* 277 F.Supp. 292 (D.S.C.1967). "Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion." *Law v. S.C. Dept. of Corrections,* 368 S.C. 424, 629 S.E.2d 642 (2006) (citing *Parrott v. Plowden Motor Co.,* 246 S.C. 318, 143 S.E.2d 607 (1965)).

There is no dispute that lack of probable cause is a required element of the Appellant's cause of action for malicious prosecution. *See Jordan v. Deese,* 317 S.C. 260, 452 S.E.2d 838 (1995) ("There are six elements which must be proven in a malicious prosecution action," including a "lack of probable cause."); *Barber v. Whirlpool Corp.,* 34 F.3d 1268 (4th Cir.1994) ("To establish malicious prosecution under South Carolina law, plaintiff must show that defendant ... instituted proceedings without probable cause ... ."); *Law v. S.C. Dept. of Corrections, supra* (An "essential element of malicious prosecution is the institution of judicial proceedings

without probable cause against the plaintiff."). In fact, the Appellant acknowledged at the summary judgment hearing that the "main issue really is was there probable cause." (Transcript of Summary Judgment hearing, pp. 16, 17, 24.)

"Probable cause only requires enough evidence to warrant a man of reasonable caution in the belief that an offense has been ... committed." *Wilkes v. Young,* 28 F.3d 1362 (4th Cir.1994) (citing *Brineger v. U.S.,* 338 U.S. 160, 69 S.Ct. 1302 (1949) (internal quotations and citations omitted). In determining probable cause, the facts must be "regarded from the point of view of the party prosecuting; the question is not what the actual facts were, but what he honestly believed them to be." *Law v. S.C. Dept. of Corrections, supra* (citing *Eaves. v. Broad River Elec. Co-op., Inc.,* 277 S.C. 475, 289 S.E.2d 414 (1982)). "Probable cause does not turn on the plaintiff's guilt or innocence of the criminal charge; it depends on whether the [investigator] had at the time knowledge of facts and circumstances as would excite the belief in a reasonable mind that the person charged was guilty of the crime charged." *White v. Coleman, supra* (citing *Parrot v. Plowden Motor Co., supra.*). In essence, the question for the Court is: did the Respondents have information that they reasonably relied on in arresting and charging the Appellant?

In order to survive the motion for summary judgment, Appellant was required to "show significantly probative evidence that a reasonable officer in [Jones'] position would have known that probable cause to support the arrest ... was lacking." *See Villeda v. Prince George's Cnty., MD,* 219 F. Supp. 2d 696 (D. Md. 2002) *aff'd sub nom. Villeda v. Prince George's Cnty., Maryland,* 70 F. App'x 720 (4th Cir. 2003). It was the Appellant's burden to show that the Respondents lacked

probable cause to pursue the criminal action against him. *See Law v. S.C. Dept. of Corrections, supra; Parrott v. Plowden Motor Co., supra.* Appellant failed to meet his burden of proof, and the circuit court acted properly in granting summary judgment to the Respondents. "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including ... probable cause." *Id.*

Essentially, the Appellant's argument is that certain witness statements were unreliable (i.e. not credible) based on the fact that some of the witnesses changed their earlier statements or were "threatened" or "coerced" by Respondent Rory Jones prior to making those new statements.[1] However, even taking the Appellant's claims in the light most favorable to the Appellant, the "facts" support a finding that Respondents had probable cause to pursue criminal charges, as they undeniably had statements from various individuals implicating the Appellant in the crimes.[2] The worst that can be said based on the evidence and arguments

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[1] Although the Appellant refers repeatedly to these written statements and the criminal trial transcript, such were not submitted to the circuit court and are not part of the record and therefore not part of the evidence before this Court. "When ruling on a motion for summary judgment, the trial judge must consider *all* of the documents and evidence *within the record ... .*" *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct.App.1997) (emphasis original). "Factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be considered by trial court in determining whether genuine issue of material fact exists in considering motion for summary judgment." *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986).

[2] During the summary judgment hearing, the Appellant's attorney admitted that the Respondents had the following statements at the time of the Appellant's arrest: Tonette Whitener (Appellant's sister) said "she thought maybe [Appellant] had something to do with it" (Transcript of Summary Judgment hearing, p. 18); Terrell Whitener provided "information that [he] was involved in a conversation with the [Appellant] which was highly prejudicial which did look like [Appellant] was involved in the murder" (Transcript of Summary Judgment hearing, p. 19); and Andrew Holland "made several statements that implicated [Appellant], including giving information "that [Appellant] may have had a gun, the same kind of gun that was involved in the murder." (Transcript of Summary Judgment hearing, pp. 15, 19). The Appellant admitted that these three statements were "evidence" which linked him to this crime and that "there may have been some minor statements which really didn't give any further information." (Transcript of Summary Judgment hearing, p. 25). In his Memorandum in Opposition to the Motion for Summary Judgment, Appellant admits that Andrew Holland's statement constitutes "actual evidence linking

presented to the circuit court is that when Respondent Rory Jones was assigned the cold case four (4) years after the murder, he re-examined witnesses who had previously been questioned by other investigators and truthfully told two of them (Appellant's sister and brother-in-law) that "charges could follow" and that "DSS could potentially get involved" if they were proven to be part of this incident. (Memorandum in Opposition, pp. 18, 19, 20.) There was nothing improper or "fraudulent" about Respondent Jones' investigation, and there is no evidence that he told the witnesses what to say or that he knew they were (allegedly) lying and falsely implicating their brother/brother-in-law until they testified at the criminal trial. The fact that the witnesses changed their statements is certainly not unusual in a criminal investigation and does not, in and of itself, prove coercion or unlawful tactics by the police.

There was no evidence submitted to the circuit court during the civil case to support the allegations that the statements were procured by fraud or undue coercion or that the Respondents had "actual knowledge of Plaintiff's innocence" (as alleged by the Appellant). Although the criminal jury ultimately found that the State had not proven guilt beyond a reasonable doubt, there was clearly probable cause at the time of the Appellant's arrest. *See State v. Green,* 318 S.C. 426, 458 S.E.2d 73 (Ct.App.1995) (officers "clearly" had probable cause to arrest Green after an accomplice named Green as the owner of crack cocaine found on the accomplice); *Durham v. Horner,* 690 F.3d 183 (4th Cir.2012) ("evidence sufficient to

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[Appellant] to the crime." (Memorandum in Opposition, p. 1) In addition, there was additional evidence and factors that led to the Appellant's arrest, but such were not in evidence before the circuit court and therefore will not be addressed herein.

convict is not required"); *Thompson v. Smith,* 289 S.C. 334, 345 S.E.2d 500 (Ct.App.1986), *overruled in part on other grounds by Jones v. City of Columbia,* 301 S.C. 62, 389 S.E.2d 662 (1990) (probable cause may be found somewhere between suspicion and sufficient evidence to convict). As stated by the lower court herein, the "[e]xistence or nonexistence of probable cause ... is different from [judging the] credibility of witnesses. It is a different analysis." (Transcript of Summary Judgment hearing, p. 40.)

Not only is probable cause for his arrest shown by the evidence and the Appellant's own rendition of the "facts," probable cause is also established by the issuance of the arrest warrants and the true bill indictments and by the criminal court's denial of the Appellant's motion for directed verdict, as discussed separately below.

First, the Appellant was arrested pursuant to warrants issued by the Municipal Court for the City of Seneca. The Fourth Amendment precludes the issuance of a warrant in the absence of a showing of probable cause. 5 Am. Jur. *Arrest* §14 (2015). A reviewing court must accord great deference to the municipal judge's determination on the issue of probable cause, and resolve any doubts in favor of upholding the warrant. *See State v. Viard,* 276 S.C. 147, 276 S.E.2d 531 (1981). The Appellant argues that sufficient evidence was not provided to the circuit court for a determination as to what information was given to the municipal judge. It is the Respondents' position that the arrest warrant is facially valid and that, therefore, it was not necessary to show what, if any, additional information was presented to the municipal judge. However, the Respondents acknowledge that

no evidence, other than the arrest warrants themselves, was provided to the circuit court regarding the issuance of the arrest warrant. Regardless, probable cause is shown by numerous other factors in this case, even if the arrest warrant affidavit was defective.

Second, the circuit court properly found that the grand jury indictments establish probable cause and that the Respondents were thus entitled to summary judgment as a matter of law. "*South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution.*" *McBride v. School District of Greenville County*, 389 S.C. 546, 698 S.E.2d 845 (Ct.App.2010) (citing *Law, supra*) (emphasis in original).[3] "[W]here the grand jury have returned a true bill upon the charge made, such finding amounts to a judicial recognition that probable cause does exist ... and infers prima facie probable cause for the prosecution, which ... may be rebutted by proof of false or fraudulent testimony before the grand jury." *White v. Coleman, supra* (internal citations omitted). The federal courts place an even greater emphasis on grand jury indictments, finding that an indictment "conclusively determines the existence of probable cause." *Kaley v. United States*, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014) (citing *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975)). As stated very succinctly by the U.S. Supreme Court in *Kaley*:

> "We have found no 'authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof.' To the contrary, 'the whole history of the grand jury institution' demonstrates that 'a challenge to the reliability or competence of the evidence' supporting a grand jury's

[3] "'Prima facie evidence of a fact' is such as in law is sufficient to establish the fact and if not rebutted remains sufficient evidence of it." *U.S. v. Wiggins*, 39 U.S. 334, 10 L.Ed. 481 (1840).

> finding of probable cause 'will not be heard.' The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." (Internal citations omitted.)

There is no dispute that the Oconee County Grand Jury returned true bill indictments against the Appellant on all three (3) charges, which establishes at least *prima facie* evidence of probable cause. (Memorandum in Support of Motion for Summary Judgment by Defendants, Exhibit 4.) The only evidence presented to the circuit court by the Appellant to rebut this *prima facie* evidence was a few random pages from the deposition transcript of Rory Jones.[4] However, these excerpts from Jones' deposition clearly do not provide sufficient evidence to rebut the indictments. The circuit court correctly found that "a true bill indictment is *prima facie* evidence of probable cause" and correctly granted the Respondents' Motion for Summary Judgment based thereon.[5]

Finally, summary judgment is also valid based on the criminal trial court's denial of the Appellant's motion for directed verdict.[6] As stated by the circuit court, "[t]he standard for ruling on a motion for a directed verdict by a Defendant in a criminal case requires the trial judge to submit a case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or

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[4] Although the Appellant refers repeatedly to the criminal trial transcript, such was not in evidence before the circuit court and is not part of the record before this Court. In addition, the conclusory statements of the Appellant's attorney to the circuit judge or this Court are not evidence sufficient to overcome the *prima facie* effect of the indictments.

[5] The fact that the indictments were true billed several months after the Appellant's arrest and incarceration is irrelevant. *See Law v. S.C. Dept. of Corrections, supra,* where the Appellants were arrested six (6) months before they were indicted, and the S.C. Supreme Court upheld the lower court's grant of summary judgment on the malicious prosecution claim, finding that the indictments were prima facie evidence of probable cause.

[6] Note: Judge Lawton McIntosh, the presiding judge herein, also presided over the criminal trial. At the summary judgment hearing, he offered to recuse himself from the civil matter, but the parties agreed for him to hear the motion. (Transcript of Summary Judgment hearing, pp. 4-7.)

from which his guilt may be fairly and logically deduced.'" (Order Granting Summary Judgment, p. 6.) (citing *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000)). In ruling on a motion for directed verdict, a criminal trial court is to be concerned only with the existence or nonexistence of evidence, not with its weight. *State v. Mitchell, supra.* The trial court does not have authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *See Harvey v. Strickland,* 350 S.C. 303, 566 S.E.2d 529 (2002). Here, after listening to the testimony and evidence at the Appellant's criminal trial (which presumably included the witnesses' statements implicating the Appellant as well as their trial testimony to the contrary and their allegations of coercion) the trial judge determined that there was sufficient evidence to present the case to the jury. Such finding, in and of itself, supports the circuit court's finding that there was probable cause for the Appellant's arrest, detention, and trial.

CONCLUSION

There is no dispute that the Appellant's claim for malicious prosecution fails if he cannot show a lack of probable cause for his arrest. Even the Appellant's recitation of the "facts" conclusively shows that there was sufficient evidence to "warrant a man of reasonable caution in the belief" that the Appellant had committed the criminal offenses, and thus establishes probable cause. In addition, the arrest warrants, the Grand Jury indictments, and the criminal trial judge's denial of the Appellant's motion for a directed verdict each separately and independently establish probable cause for the Appellant's arrest, detention, and trial. Based thereon, the lower court's finding that the Appellant failed to establish a lack of probable cause and its grant of summary judgment based thereon should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Initial Brief of Respondent was served by first class mail, postage prepaid this 28 day of July, 2015, upon the following:

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Re: Lloyd Lash, Appellant, v. Seneca Police Department, Respondent
Appellate Case No. 2014-002296

Dear Ms. Kitchings:

Please find enclosed for filing the Respondent's Initial Brief, Designation of Matter to be Included in the Record of Appeal and the Certificate of Service in the above referenced matter. Please return a clocked in copy of the same to me in the enclosed self addressed stamped envelope.

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

With kind regards, I remain,

Yours very truly,

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