

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARDELL KENNEDY,

*Plaintiff,*

v.

CITY OF PHILADELPHIA, *et al.*,

*Defendants.*

CIVIL ACTION  
NO. 19-01076

PAPPERT, J.

June 15, 2020

**MEMORANDUM**

Ardell Kennedy sued the City of Philadelphia and four Philadelphia Police officers for violating his constitutional rights. The defendants move for partial summary judgment. The Court grants the Motion in part and denies it in part.

I

A

One evening in July of 2018, Kennedy came to a DUI checkpoint while driving home. *See* (Mot. for Partial Summ. J. Ex. C, at 15:4–13, ECF No. 38-4) (Kennedy Dep.). At the checkpoint, Officer Hugo Lemos asked to see Kennedy’s license and registration. *See* (*id.* at 18:15–18); (*id.* Ex. G, at 29:12–20, ECF No. 38-9) (Lemos Dep.). Kennedy provided the requested documents and answered Lemos’s questions without incident. *See* (*id.* at 31:25–32:4). During this brief encounter, Lemos allegedly noticed Kennedy’s “red, glassy eyes” and “the smell of burnt marijuana coming from inside the vehicle.” (*Id.* at 29:16–18.) Kennedy rejects Lemos’s observations as groundless. *See* (Resp. Opp’n Summ. J. 2–3, ECF No. 40). For example, Kennedy later admitted to smoking

marijuana, not that day, but rather in a house about nine or ten days earlier. *See* (Kennedy Dep. 24:4–6, 32:5–14).

Although Lemos never saw Kennedy driving in an unsafe manner, the officer asked Kennedy to get out of the car. *See (id. at 18:23–19:1); (Lemos Dep. 30:6–14)*. As Lemos detained Kennedy, his partner, Officer Joseph Koger, moved Kennedy’s car to a safe location. *See (id. at 52:4–8)*. Other than parking the car, Koger was uninvolved with Kennedy’s arrest. *See (id. at 52:9–22)*. Indeed, he never interacted with Kennedy. (Kennedy Dep. 32:22–33:1.) That said, Koger did stand nearby as Kennedy performed field sobriety tests for Lemos. *See (Lemos Dep. 52:9–22)*.

The first test, known as the “HGN” test, involves the officer holding a pen or other object a foot from the subject’s nose and slowly moving it up and down and side to side. *See (id. at 20:24–21:9)*. As the subject’s eyes follow the object, the officer looks for an involuntary jerking of the eyeballs, which may indicate impairment. *See (id. at 23:4–24:7)*. The walk-and-turn test was second. There, the subject walks heel-to-toe in a straight line for nine paces, counting with each step, and then doing the same backward. *See (id. at 24:14–25:5)*. For the last test, known as the one-leg stand, the subject raises one leg “about 6 inches from the ground” while counting from 1,000. (*Id.* at 26:12–16.) Before each test, the officer asks the subject whether any medical issues might prevent them from performing the test. *See (id. at 22:4–6, 26:4–9)*.

It is undisputed that Kennedy performed the HGN and one-leg-stand tests. *See (id. at 40:4–46:16); (Kennedy Dep. 22:21–24, 23:19–22)*. The results of the former were inconclusive. *See (Lemos Dep. 40:4–21, 41:2–3)*. Before the one-leg-stand test, Lemos learned that Kennedy had had a metal rod surgically implanted in his leg. *See (id. at*

39:8–11); (Kennedy Dep. 23:6–18). Although Lemos knew that the surgery could taint the testing, he neglected to note Kennedy’s surgery in his investigative report. *See* (Lemos Dep. 39:15–40:3). According to Kennedy, even with his limitation, he easily passed the one-leg-stand test. *See* (Kennedy Dep. 23:23–25). On Lemos’s retelling, however, Kennedy struggled with his balance and counted “2,001, 2,002 and so on” rather than “1,001, 1,002.” (Lemos Dep. 46:8–12); *see (id. at 44:18–22)*. Even so, Lemos testified that Kennedy had explained “that it was hard for him to balance because of [his leg] surgery.” (Mot. for Partial Summ. J. Ex. F.1, at 38:13–14.) Lemos also denied Kennedy’s counting from 2,000 rather than 1,000 was “a sign that he was high.” (*Id. at 39:1.*)

Whether Kennedy performed the walk-and-turn test is unclear. Kennedy testified repeatedly that he did. *See* (Kennedy Dep. 22:21–24, 23:19–25). Although Lemos testified at a suppression hearing that Kennedy did not do the walk-and-turn test, *see* (Mot. for Partial Summ. J. Ex. F.1, at 29:7–10), he twice claimed at his deposition that Kennedy performed all three tests, *see* (Lemos Dep. 30:21–31:1). Reversing course again, Lemos later insisted that Kennedy never did the walk-and-turn test. (*Id. at 43:24.*) That said, Lemos’s most recent version had Kennedy struggling with his balance “[d]uring the instruction stage” of the test. (*Id. at 42:5.*) Kennedy denied having any trouble with his balance at any point. *See* (Kennedy Dep. 22:19–23:25).

After the field sobriety tests, Lemos arrested Kennedy for driving under the influence. *See* (Lemos Dep. 34:22–35:1). The arrest hinged entirely on Lemos’s observations that Kennedy and the car smelled of marijuana, Kennedy’s supposedly

red, glassy eyes and the tests. (Mot. for Partial Summ. J. Ex. F..2, at 41:1–5, ECF No. 38-8.) The search of Kennedy and his car turned up no evidence of alcohol or marijuana consumption. *See* (Lemos Dep. 48:25–49:8).

## B

The Commonwealth charged Kennedy with violating 75 Pa. Cons. Stat. Ann. § 3802(a)(1). (Resp. Opp’n Summ. J. Ex. A, at 2, ECF No. 40-2.) That provision prohibits an individual from operating “a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely” driving. After his arrest, Kennedy remained in custody until his arraignment the next day. *See* (Kennedy Dep. 30:8–31:11).

At his arraignment, Kennedy was released on his own recognizance and without bail on the DUI charge but was held on a parole detainer. (*Id.* at 31:7–14.) In notifying Kennedy of the detainer, the Pennsylvania Board of Probation and Parole listed his arrest as the sole reason for the detainer, which would last “pending disposition of [the] criminal charges.” (Resp. Opp’n Summ. J. Ex. B, at 1, ECF No. 40-3.) That is, had Lemos not arrested Kennedy, the parole detainer would never have been lodged; that Kennedy may have smoked marijuana a week or so before the arrest was immaterial. *See (id.)*; (Hr’g Tr. 12:23–24, ECF No. 44).

Kennedy’s detention lasted just over six months. *See* (Resp. Opp’n Summ. J. Ex. A, at 2). In the interim, the state court ruled that Lemos lacked probable cause to arrest Kennedy. *See* (Mot. for Partial Summ. J. 71:14–72:6). The Commonwealth withdrew all charges against Kennedy about two months later. *See* (Resp. Opp’n Summ. J. Ex. A, at 4). Kennedy was released from custody a week after that, but as a

new condition of parole, he was required to live in a halfway house. *See* (Defs.’ Statement of Facts ¶ 26, ECF No. 38-1).

After his release, Kennedy, acting *pro se*, sued Lemos, Koger and other Commonwealth and city officials. *See* (Compl. 2–3, ECF No. 2). Once represented by counsel, Kennedy amended his complaint, naming as defendants Lemos, Koger, Lieutenant Gregory Brown, Officer Ronald Jackson and the City of Philadelphia. *See* (Am. Compl. ¶¶ 2–6, ECF No. 25). In the Amended Complaint, Kennedy asserted a smattering of state<sup>1</sup> and federal constitutional claims against the individual defendants, as well as claims for conspiracy and bystander liability. *See* (*id.* at ¶¶ 31–50). He added a municipal-liability claim against the City. *See* (*id.* at ¶¶ 51–60).

The defendants now move for partial summary judgment.<sup>2</sup> They acknowledge that Kennedy’s claims against Lemos for false arrest and unlawful stop should go to trial but seek summary judgment on all other claims. *See* (Mot. for Partial Summ. J. 1, ECF No. 38). Kennedy agrees that the Court should enter judgment on all claims against Brown, Jackson and the City of Philadelphia, as well as certain claims against Lemos. *See* (Resp. Opp’n Summ. J. 1 n.1, ECF No. 40). After oral argument, the only claims in dispute are those against Lemos for false imprisonment, malicious

<sup>1</sup> During oral argument, counsel for both parties agreed that the Court should address only the federal claims and that the parties would reach a stipulation regarding the state claims. *See* (Hr’g Tr. 39:9–14).

<sup>2</sup> The defendants style their Motion as one invoking qualified immunity. *See, e.g.*, (Mot. for Partial Summ. J. 7, ECF No. 38). But the Motion argues only that Kennedy suffered no constitutional violation; it never contests that, if a violation occurred, a reasonable official would know his actions were unlawful. *See* (*id.* at 7–18). In fact, at oral argument defense counsel conceded that if a constitutional violation occurred, “a reasonable official in Lemos’s or Koger’s position would have known that their conduct violated the law.” (Hr’g Tr. 41:8\_13.) The Court accordingly treats the Motion as what it is—a standard summary-judgment motion arguing that the plaintiff cannot make out a *prima facie* case.

prosecution and conspiracy and the conspiracy and failure-to-intervene claims against Koger. *See (id. at 7 n.2); (Hr'g Tr. 27:25–28:3).*

## II

Summary judgment is proper if the movant proves that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 288 (3d Cir. 2018). A fact is “material” if it may affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A “genuine dispute” exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* A mere scintilla of evidence supporting the nonmoving party, however, will not suffice. *Id.* at 252. Rather, the nonmovant must “set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 256.

At summary judgment, a court may consider any record evidence that may be admissible at trial. *See Fed. R. Civ. P. 56(c); Pamintuan v. Nanticoke Memorial Hosp.*, 192 F.3d 378, 387–88 & n.13 (3d Cir. 1999). In doing so, a court “must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party’s favor.” *Prowel v. Wise Bus. Forms*, 579 F.3d 285, 286 (3d Cir. 2009). But it need not credit “[u]nsupported assertions, conclusory allegations, or mere suspicions.” *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 252 (3d Cir. 2010). Nor may a court make credibility determinations or weigh the evidence. *See Parkell v. Danberg*, 833 F.3d 313, 323 (3d Cir. 2016).

## III

## A

A false-imprisonment claim under 42 U.S.C. § 1983 for “an arrest made without probable cause is grounded in the Fourth Amendment’s guarantee against unreasonable seizures.” *Groman v. Twp. of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995). To maintain such a claim, a plaintiff must show “(1) that she was detained; and (2) that the detention was unlawful.” *James v. City of Wilkes-Barre*, 700 F.3d 675, 682–83 (3d Cir. 2012). Although the common-law tort of false imprisonment encompasses only “detention without legal process,” *Wallace v. Kato*, 549 U.S. 384, 389 (2007), the Supreme Court has clarified that “the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process,” *Manuel v. City of Joliet*, 580 U.S. ----, 137 S. Ct. 911, 920 (2017). But if probable cause exists for an arrest, the resulting detention is lawful and thus “cannot become the source for a claim for false imprisonment.” *Groman*, 47 F.3d at 636.

Officer Lemos is not entitled to summary judgment on the false-imprisonment claim. He concedes that a genuine dispute exists as to whether he had probable cause to arrest Kennedy. *See* (Hr’g Tr. 12:5–16, 21:23–22:2). He also concedes that once he asked Kennedy “to step out of the vehicle [Kennedy] was not free to leave.” (Lemos Dep. 30:12–13). And there is no dispute that Kennedy remain detained on the DUI charge for around twelve to thirty-six hours. *See* (Hr’g Tr. 20:25–21:5, 35:14–16). In fact, Lemos admits that the false-imprisonment claim should go to trial at least for the time Kennedy was detained before the parole detainer lodged. (*Id.* at 12:14–16.) As for the post–parole detainer period, Lemos admits that his arrest of Kennedy triggered the detainer. (*Id.* at 12:23–24.) A reasonable juror could therefore find that the allegedly

false arrest was the proximate cause of Kennedy’s entire six-month detention. *See Monroe v. Pape*, 365 U.S. 163, 187 (1961) (explaining that § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions”). For this reason, the Court cannot enter summary judgment on any portion of the false-imprisonment claim against Lemos. *See Johnson v. City of Philadelphia*, 837 F.3d 343, 352 (3d Cir. 2016) (noting that “proximate causation is generally a question of fact”); *Thabault v. Chait*, 541 F.3d 512 525 (3d Cir. 2008) (holding that district court “correctly concluded that the record contained factual disputes as to proximate cause and whether any intervening events cut off [defendant’s] liability”).

## B

A malicious-prosecution claim under § 1983 has five elements. The plaintiff must show that: “(1) the defendant initiated a criminal proceeding”; (2) the proceeding ended in the plaintiff’s favor; (3) “the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.” *Halsey v. Pfeiffer*, 700 F.3d 272, 296–97 (3d Cir. 2014). Police “officers who conceal and misrepresent material facts to the district attorney” have initiated a criminal proceeding for purposes of the first element. *Id.* at 297.

Lemos challenges only the first and last prongs. (Hr’g Tr. 16:17–23.) Yet he acknowledges that a reasonable juror could find that he misrepresented facts to the prosecutor in his investigation report. (*Id.* at 19:20–20:2.) He likewise admits that Kennedy “suffered a deprivation of liberty as a result of the initiation of the

proceeding”—namely, the arraignment on the DUI charge. (*Id.* at 21:11–13.) Those concessions prevent the Court from granting summary judgment on the malicious-prosecution claim.

### C

A § 1983 conspiracy claim arises when two or more persons acting under the color of state law “conspire to deprive any person” of his constitutional rights. *Jutrowski*, 904 F.3d at 294 n.15 (quoting *Barnes Foundation v. Twp. of Lower Merion*, 242 F.3d 151, 162 (3d Cir. 2001)). At least one conspirator must perform an “overt act in furtherance of the conspiracy,” and that overt act must injure the person or his property or deprive him “of any right or privilege of a citizen of the United States.” *Id.* (quoting *Barnes Foundation*, 242 F.3d at 162). The plaintiff must offer “some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action.” *Id.* at 295 (quoting *Capogrosso v. Supreme Court of N.J.*, 588 F.3d 180, 184–85 (3d Cir. 2009)). Absent direct proof, a plaintiff may carry this burden by proffering circumstantial evidence from which a reasonable factfinder could infer “a meeting of the minds.” *Id.* (quoting *Startzell v. City of Philadelphia*, 533 F.3d 183, 205 (3d Cir. 2008)).

The record lacks any evidence to support the conspiracy claims against Lemos and Koger. There is no evidence that Lemos and Koger discussed the encounter with Kennedy ahead of time or after the fact. *See* (Hr’g Tr. 31:5–23); *cf.* *Jutrowski*, 904 F.3d at 295 (noting that “an alleged conspiracy among police officers . . . may manifest as ‘conversations’ between officers about the incident”). Kennedy points to nothing hinting that Koger knew what Lemos wrote in the investigation report or ratified that document. *See (id.)*; (Mot. for Partial Summ. J. Ex. A, at 2–3). At bottom, he relies on

nothing more than Koger's mere presence at the scene. *See* (Kennedy Dep. 32:22–33:1). This dearth of any evidence forecloses the inference that Koger and Lemos conspired to deprive Kennedy of his constitutional rights. *See Jutrowski*, 904 F.3d at 295.

#### D

Police officers have “a duty to take reasonable steps” to intervene when another officer violates a plaintiff's constitutional rights. *Smith v. Mensinger*, 293 F.3d 641, 650 (3d Cir. 2002). An officer who fails to do so “is directly liable under Section 1983.” *Id.* (quoting *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986)). But to be liable, the officer must have had “a realistic and reasonable opportunity to intervene.” *Id.* at 651. Likewise, the evidence must support an inference that the officer knew of the unlawfulness of the offending officer's conduct. *See id.* at 652.

Kennedy's failure-to-intervene claim against Koger falls short. He claims that Koger had a duty to stop Lemos from arresting him without probable cause. *See* (Hr'g Tr. 32:8–11). This claim turns on the premise that Koger knew that Lemos lacked probable cause for the arrest. But that premise lacks any support in the record. At best, one could infer that Koger watched as Lemos administered the field sobriety tests. *See* (Kennedy Dep. 32:22–33:1). Yet there is nothing to support an inference that Koger was close enough to see that Kennedy's eyes did not jerk during the HGN test or that Kennedy did not slur his speech, smell of marijuana, have red, glassy eyes or struggle with his balance. Even Kennedy concedes that the record is devoid of any such evidence. *See* (Hr'g Tr. 32:19–23). In the end, there is no evidence that Koger had any reason to doubt that Lemos had probable cause for Kennedy's arrest. Absent such evidence, Kennedy cannot proceed on his failure-to-intervene claim.

An appropriate Order follows.

BY THE COURT:

*/s/ Gerald J. Pappert*  
GERALD J. PAPPERT, J.

IN THE UNITED STATES DISTRICT COURT  
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ARDELL KENNEDY,

*Plaintiff,*

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CITY OF PHILADELPHIA, *et al.*,

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CIVIL ACTION  
NO. 19-01076

**ORDER**

**AND NOW**, this 15th day of June 2020, upon consideration of Defendants' Motion for Partial Summary Judgment (ECF No. 38), Ardell Kennedy's Response (ECF No. 40) and Defendants' Reply (ECF No. 42) and following oral argument by counsel for the parties (ECF No. 44), it is **ORDERED** that the Motion is **GRANTED in part and DENIED in part**.<sup>1</sup> Specifically:

- 1) The Motion is **GRANTED** and judgment **ENTERED** in Defendants' favor on:
  - a) All federal claims against Lieutenant Gregory Brown, Officer Ronald Jackson and the City of Philadelphia;
  - b) All federal claims against Officer Hugo Lemos and Officer Joseph Koger in their official capacities;<sup>2</sup>

<sup>1</sup> This Order applies only to the federal claims against the Defendants; the parties have agreed to stipulate to the disposition of all state-law claims. *See* (Hr'g Tr. 39:9–14, ECF No. 44).

<sup>2</sup> A suit against a municipal employee in his official capacity "is, in all respects other than name, to be treated as a suit against the [municipal] entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Because Kennedy concedes his claims against the City cannot survive summary judgment, his claims against the individual defendants in their official capacity likewise fail. *See Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 150 n.11 (3d Cir. 2017) (vacating claims against individuals in their official capacities because "the analysis as to the [entity] applies" to the official-capacity claims).

- c) The federal conspiracy claims against Lemos and Koger;
  - d) The federal failure-to-intervene claim against Koger.
- 2) The Motion is **DENIED** as to the federal false-imprisonment and malicious-prosecution claims against Lemos. All other federal claims against Lemos—other than the false-arrest claim—are deemed **WITHDRAWN**.

BY THE COURT:

*/s/ Gerald J. Pappert*  
GERALD J. PAPPERT, J.