IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEEYONG HEEKIM KIM	:	CIVIL ACTION
VS.	:	
TROOPER ANTHONY M. GANT, et al.	:	NO. 95-2905

MEMORANDUM AND ORDER

Before the court for consideration are Defendants Gant, Pender, Brown and Harrison's Post Trial Motion for judgment as a matter of law and Motion for New Trial, pursuant to Federal Rules of Civil Procedure (Fed.R.Civ.P.) 50(b) and 59(e), respectively.

I. BACKGROUND

In this case, three African American Pennsylvania state troopers were involved in an undercover operation where they purchased identification cards under fictitious names on one day from a Korean woman in a store located in a predominantly Korean neighborhood in West Philadelphia. Six days later these troopers returned to the same store armed with a warrant and arrested a Korean woman for the alleged crime of fraudulently manufacturing false identification. The Plaintiff maintains that she sold no cards to these troopers but rather, the sale was made by another Korean woman named Connie Lee who has admitted to doing so.[1]

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1. *The Troopers explain that Pender, Brown and Harrison entered the store and left the store separately over a three hour time period; one trooper would not enter the store until the trooper before him had left. (N.T. 3-106). Trooper Gant then interviewed each of the troopers and developed the composite description that he filed on an Affidavit for Probable Cause for Arrest Warrant. He described the subject to be arrested as follows:*

(continued...)

Here then, we visit once more the decreased accuracy of cross-racial identification relative to same-race identification in eye-witness testimony.

Plaintiff, Meeyong Heekim Kim [Mrs. Kim], filed this action against defendants for malicious prosecution and violation of her Fourth Amendment and Fourteenth Amendment rights. Mrs. Kim's claims stem from the following facts: Mrs. Kim was arrested by the defendants and charged with state law violations for forgery and tampering with records by manufacturing photographic identification cards which could then be used fraudulently. A municipal court judge dismissed the charges against Mrs. Kim. Mrs. Kim was subsequently arrested a second time under new charges. These charges against Mrs. Kim were also eventually dismissed. Plaintiff claimed that with regards to this latter arrest, defendants maliciously caused the Philadelphia District Attorney's (D.A.) office to order her arrest on new charges, still alleging that Mrs. Kim had fraudulently manufactured identification cards as in the first arrest. Mrs. Kim's civil case was tried by this court before a jury which awarded the plaintiff $30,000: $12,000 from Trooper Gant and $6,000 from each of the other three defendants respectively.

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1. (...continued)

"White asian female, approx 25 y.o.a., 5'4", 120 lbs with brown hair..."

The troopers' testimony indicates that each of their descriptions varied slightly as to the weight and height of the suspect. (N.T. 3-106, 4-55). During trial, Mrs. Kim testified that she was 40 years old, 5' tall and 99 lbs.

In the jury's response to the special verdict interrogatories, it found that the state troopers had probable cause for their initial arrest of plaintiff and that the original arrest was done with no malice. The jury also found that subsequent to the initial arrest, in light of further information known to the officers, the officers acted maliciously and without probable cause in continuing the prosecution and rearrest of plaintiff.

Jae Han Kim [Mr. Kim], the plaintiff's husband, maintained his jewelry store on the first floor of a building owned by John J. Lee [Mr Lee]. Mr. Kim leased space from Mr. Lee and his jewelry store was located in the same large room with Mr. Lee's photograph and identification card store. According to Mrs. Kim's testimony the counters of Mr. Lee's and Mr. Kim's stores were about twenty feet apart and the only significant barrier between the stores was the Kim's jewelry store counter which was "L" shaped, connecting to the wall on the side of the counter facing Lee's store and extended out from the wall and then away from the Lee's counter on a right angle. Mrs. Kim maintained that on the day the I.D. cards were sold from the Lee's store to an undercover officer, it was Connie Lee [Mrs. Lee], Mr. Lee's wife, that produced and sold the cards, that a video tape recording from a surveillance camera showed Mrs. Kim was behind the jewelry store counter at the time of the sale and that, as evidenced by the video tape, she could not have been at the Lee's store counter to sell the I.D. cards. She claimed that the

defendants had knowledge of this information and that they nonetheless pursued her prosecution with malice.

For the following reasons, defendants' motions are granted in part and denied in part.

II. DISCUSSION

A. Motion for Judgment as a Matter of Law Pursuant to Fed.R.Civ.P. 50(b)

In reviewing a motion for judgment as a matter of law, the court must "view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict." Marino v. Ballestas, 749 F.2d 162, 167 (3d Cir. 1984); Bhaya v. Westinghouse Electric Corp., 832 F.2d 258, 159 (3d Cir. 1987), aff'd, 922 F.2d 184 (3d Cir. 1990), cert. denied, 501 U.S. 1217 (1991) (citations omitted). Judgment as a matter of law may be granted "only if, as a matter of law, 'the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief.'" Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 101 (3d Cir. 1977) (quoting Denney v. Siegal, 407 F.2d 433, 439 (3d Cir. 1969)). In considering the defendants' motion, the court is "not free to weigh the evidence, pass on the credibility of the witness, or substitute [its] judgment of the facts for that of the jury." Blair v. Manhattan Life Ins. Co., 692 F.2d 296, 300 (3d Cir. 1982).

Defendants claim, incorrectly, that where the jury "found that the troopers' conduct [with regard to the first arrest] was

supported by `probable cause', they could not find that the troopers then compelled the Philadelphia County District Attorney's Unit to make the decision to rearrest plaintiff on new charges." Defendants first argue that "if an arrest is done with `no malice' and that arrest is supported by `probable cause'.... then a claim for a later allegedly malicious prosecution based upon intent will not lie."[2] Defendants' Brief, pp. 2-3, (citing Albright v. Oliver, 510 U.S. 266 (1994)). In addition, the defendants argue, that once the jury found probable cause to exist with regard to the first arrest, the jury could not then find that probable cause was lacking with regard to the second arrest; therefore, the plaintiff's claim regarding the second arrest must be based solely upon the substantive due process provision of the Fourteenth Amendment. Defendants cite Albright for the proposition that a claim for an arrest violating an arrestees' substantive due process rights is not actionable under section 1983.

Defendants also contend that the D.A.'s decision to prosecute plaintiff was a superseding cause of plaintiff's alleged injuries. Accordingly, defendants claim that none of them had personal involvement in the decision to prosecute the plaintiff and that therefore, none of them can be found liable. Defendants' Brief, p. 5 (citing, Rode v. Dellarciprete, 845 F.2d

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2. *The Troopers contend that they were unaware that the District Attorney's unit had decided to arrest plaintiff anew.*

1195, 1207 (3d Cir. 1988)). Based upon this reasoning, the defendants move for judgment as a matter of law in their favor. In the alternative, they claim that they are entitled to a new trial.

1. Kim's malicious prosecution claim is cognizable.

In Albright, Justice Rehnquist writing for the plurality rejected the claim that an arrest performed without probable cause could be actionable as a violation of substantive due process. However, he left open the question of whether such a claim would succeed under the Fourth Amendment.[3] Justice Ginsburg, writing in concurrence, explained that an arrest without probable cause would be governed by the Fourth Amendment's prohibition on "unreasonable . . . seizures." Albright, 510 U.S. at 277-78 (Ginsburg, J., concurring). She further opined that to the extent that a malicious prosecution claim is actionable under section 1983, it is to be evaluated under the liberty interests protected by the Fourth Amendment, which had been specifically intended to address the problems

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3. *The plurality observed that it "has always been reluctant to expand the concept of substantive due process because ... guideposts for responsible decision making in this unchartered area are scarce and open-ended." Albright, 510 U.S. at 271-72, (quoting Collins v. City of Harker Heights, 503 U.S. 115, 124 (1992)). Thus, "where a particular amendment `provides an explicit textual source of constitutional protection' against a particular sort of government behavior, `that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Albright, 510 U.S. at 272 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)(internal quotations omitted).*

associated with pretrial deprivations of liberty. Albright, 510 U.S. at 273.[4]

Albright does not bar the plaintiff's lawsuit because she brought her malicious prosecution claim under the Fourth Amendment. She claimed that the defendants acted with malice and without probable cause in effecting her second arrest, thereby violating her Fourth Amendment rights. Furthermore, plaintiff presented sufficient evidence at trial to indicate a deprivation of her Fourth Amendment liberty interests. The Court Report form for preliminary arraignments in Philadelphia Common Pleas and Municipal Court indicates that an individual released on her own recognizance without bail is required to report to the pretrial services division of the Philadelphia Court system and should she fail to do so bail would be revoked and that individual would be rearrested and returned to jail. This requirement creates a restriction on the released individual's liberty. See, Murphy v. Lynn, No.CIV.A.96-2392, 1997 WL 371091, at *4-6 (2nd Cir. July 8, 1997)(holding that "liberty deprivations regulated by the Fourth

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4. "*Although no other member of the Court formally joined Justice Ginsburg's opinion, three other Justices appeared to agree with her reading of the Fourth Amendment. These were Justice Souter, who wrote in concurrence, Justice Stevens, who wrote the dissent, and Justice Blackmun, who joined Justice Stevens' opinion. See Albright, 510 U.S. at 306-07. Nor did any of the other Justices express any disagreement with Justice Ginsburg's views. Chief Justice Rehnquist, who wrote the plurality opinion, appeared to view the task presented by Albright sufficiently narrowly that he had no occasion to address the issues Justice Ginsburg raised. See Albright, 510 U.S. at 275. Justice Scalia, who joined Justice Rehnquist's plurality opinion, also wrote a brief concurring opinion on subjects that did not touch on those raised by Justice Ginsburg. Finally, Justice Kennedy, who wrote an opinion concurring in the judgment that was joined by Justice Thomas, followed a line of reasoning (which focused on the availability of state tort laws as a remedy) under which he had no occasion to consider the issues raise by Justice Ginsburg." Cyprus v. Diskin, 936 F.Supp. 259, 263 (E.D. Pa. 1996).*

Amendment are not limited to physical detention").

In the instant case, plaintiff executed a Court Report form when the court released her on her own recognizance after her first arrest. When the Philadelphia District Attorney's office reinstituted the charges against Mrs. Kim, the court imposed requirements were also reimposed; Mrs. Kim again was free on her own recognizance and required to be available for the court. The Honorable Joseph Papalini held a rearrest preliminary hearing on August 20, 1993 in which he held plaintiff over for a remand hearing on one of the three counts against her and dismissed the other two. Three months later, on November 23, 1993, the Philadelphia Court of Common Pleas dismissed the last count against plaintiff as a result of pretrial oral argument. During this three month period plaintiff's liberty was sufficiently restrained to constitute a deprivation of Mrs. Kim's Fourth Amendment rights. Thus, Kim's claim with regard to her second arrest was cognizable under the Fourth Amendment.

2. Kim presented evidence that would support a jury finding of malicious prosecution.

Our court of appeals has instructed that one's responsibility for the initiation of a criminal proceeding is determined by reference to section 653, comment (g) of the Restatement (Second) of Torts. The Restatement distinguishes between cases where someone files a complaint or demands a prosecution and scenarios in which someone merely provides information to the police. The Restatement notes:

> ". . . The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.
>
> If, however, the information is known by the giver to be false an intelligent exercise of the officer's discretion become impossible, and a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false."

Other courts have held that police officers may be liable under section 1983 for prosecution without probable cause if they fail to disclose exculpatory evidence to prosecutors, make false or misleading reports to the prosecutor, omit material information from the reports, or otherwise interfere with the prosecutor's ability to exercise independent judgment. See Sanders v. English, 950 F.2d 1152, 1162-1164 (5th Cir. 1992) (deliberate concealment or deliberate failure to disclose patently exculpatory evidence to prosecutor exposes officer to liability for malicious prosecution under § 1983); Barlow v. Ground, 943 F.2d 1132, 1136-1137 (9th Cir. 1991), cert. denied, 505 U.S. 1206, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992) (officer may be liable under § 1983 where his omission of crucial information prevented prosecutor from making independent judgment); Robinson v. Maruffi, 895 F.2d 649, 655 (10th Cir. 1990) (officer may be liable under § 1983 for malicious

prosecution if he purposefully concealed and misrepresented material facts which may have influenced prosecutor's decision to prosecute); McMillian v. Johnson, 878 F.Supp. 1473, 1502-1503 (M.D. Ala. 1995) (police officers have a clearly established duty to turn exculpatory evidence over to the prosecutor for disclosure to the defendant); Rhodes v. Smithers, 939 F.Supp. 1256, 1273-1274 (S.D.W.Va. 1995) (citing Mahoney v. Kesery, 976 F.2d 1054, 1061 (7th Cir. 1992)) (officer may be liable under § 1983 if he procures a prosecution by lying to the prosecutor). This circuit has stated:

> "Where a police officer causes an arrest to be made pursuant to a warrant which he obtained on the basis of statements he knew to be false or on the basis of statements he makes in reckless disregard of the truth, a plaintiff may recover damages under section 1983 for "unreasonable seizure" of his person in violation of the Fourth Amendment."

Lippay v. Christos, 996 F.2d 1490, 1502 (3rd Cir. 1993); citing, Forster v. County of Santa Barbara, 896 F.2d 1146, 1148 (9th Cir. 1990) (per curiam) (adopting the standard of determining the validity of search warrants enunciated by Franks v. Delaware, 438 U.S. 154 (1978), in permitting § 1983 plaintiffs to recover for violations of the Fourth Amendment); Haupt v. Dillard, 794 F.Supp. 1480, 1490 (D. Nev. 1992) (same).

In the instant case, the jury found that subsequent to the initial arrest, in light of further information known to the officers, the officers acted maliciously and without probable cause in continuing the prosecution of plaintiff. Therefore, the relevant question is whether, as a matter of law, considering the

facts learned by the defendants after Kim's first arrest, the jury could conclude that the troopers interfered with the prosecutor's ability to exercise his judgement by making statements known to be false or in reckless disregard of the truth.

This court must inquire whether, as a matter of law, there was evidence sufficient to support the jury's verdict. All four defendants were present for and participated in the initial arrest of Mrs. Kim and were present for her preliminary hearing. Furthermore, the jury heard trial testimony regarding the officers' communications with the D.A.'s office that could have evidenced their pursuit of prosecution and showed that the officers were aware that the Assistant District Attorney (A.D.A.) was considering prosecuting Mrs. Kim further. Also, the jury viewed a video recording of the events which occurred in the subject jewelry store on the day Mrs. Kim was supposed to have sold the fraudulent identification to the defendant officers. Mrs. Kim alleged that this tape showed that she could not have sold the I.D.s to the officers.

The evidence presented to the jury at trial included the following:

a. Defendants' Investigation and First Arrest of Mrs. Kim.

On December 9, 1982, on three different occasions during a three hour period, defendants Pender, Brown and Harrison entered the store front where Mr. Lee maintained an I.D. production business for the purpose of purchasing identification under

fictitious names thus implicating the producer and owner of the store in fraud. (N.T. 4-9 - 4-11). These three defendants were sold I.D.s by an asian woman. They then left the store and provided a very basic description of the woman who sold the identification to Gant who was leading the investigation. Gant then used the description in an application for an arrest warrant for the asian woman who sold the I.D.s. (N.T. 4-11). The description was as follows:

> "White asian female, approx 25 y.o.a., 5'4", 120 lbs with brown hair..."

Affidavit for Probable Cause for Arrest Warrant, P-4.

Having obtained an arrest warrant, the officers returned to the subject store front two days later to arrest the woman who had sold them the I.D.s. Though the defendants acknowledge that they could have performed a buy-bust, a sale constituting a crime followed by an arrest, on that occasion to confirm that they were about to arrest the correct woman, the officers admittedly did not do so. (N.T. 4-13, 4-14). The officers explained that they believed that the three trooper eye witnesses to the previous sales would be enough to obtain a conviction.

Before the arrest, only one of the same three troopers who purchased the identification, Trooper Pender, entered the store to confirm that the person who had sold him the identification was present. Mrs. Kim was behind the Jewelry store counter when they entered the store. She was the only asian woman in the store at the time. Nevertheless, the police arrested Mrs. Kim as

the woman who had sold the troopers the identification. At the time of the arrest Mr. Lee informed Gant that Mrs. Kim had never worked for him selling I.D.s from his counter. (N.T. 2-71, 2-80).

b. Information Defendants Learned After Mrs. Kim's First Arrest

Charles Williams, City of Philadelphia, First Deputy Clerk of Quarter Sessions, responsible for record keeping for the court system for the Common Pleas Court and the Municipal Court testified as to eight listed dispositions involving Mrs. Kim included a hearing on July 9th, 1993, before the Honorable Felice Stack. Williams testified that in that hearing all charges against Kim were discharged. He further stated that the Honorable Joseph Papalini held a rearrest hearing on August 20, 1993, in which he discharged the charges as to forgery and tampering and remanded the case back to Municipal Court on the false ID charge. That was followed by a remand hearing on October 13, 1993, held by the Honorable Louis Presenza. On November 23, 1993, Judge Presenza honored a motion to dismiss and the case was discharged. (N.T. 1-87).

After one of the numerous criminal hearings involving Mrs. Kim, an A.D.A. asked Pender to pick the picture of the woman who sold him the I.D. from two pictures which he presented to Pender. The A.D.A. told him that "they look very close to me." At that point Pender identified Mrs. Kim's picture as the woman from whom he made the purchase. (N.T. 4-16). On cross examination defense

counsel pointed out that Pender made this photo identification after an "eight hour" criminal hearing in which Mrs. Kim was the Defendant. (N.T.4-28). This event evidenced some concern on the part of the prosecution as to the correct identification of the woman from whom the troopers purchased the I.D.s.

After Mrs. Kim's first hearing, Mrs. Kim's attorney gave the video tape recording to the A.D.A. who in turn presented it to Gant. The tape was recorded by a security camera located in the jewelry store above and in front of the counter. The camera was able to capture on tape all of the comings and goings from behind the Jewelry store counter. The time of the recording is evident on the tape because there is a clock in clear view of the camera.

The appearance of the investigating and arresting troopers on the tape make it clear that the video tape presented in court was taken on two days: the first was taken on December 9, the day that three of the defendants appeared and purchased the I.D.s. The second was recorded on December 15, the day that the defendants arrested Mrs. Kim for the first time. Mrs. Kim also appears on the tape during the time of the purchase of the I.D.s and the arrest. Most significantly, Mrs. Kim appears behind the jewelry store counter during the length of the tape taken on December 9, and does not leave her counter as the tape shows the defendant officers enter the store and passed the Jewelry store on their way to the Lee's counter to purchase the I.D.s.

Gant testified that ". . . the defense counsel for the Kims presented a videotape to the D.A.'s office. The D.A. then

asked the troopers involved to review that tape," and that he reviewed the tape as did the other defendant officers. (N.T. 3-40 - 3-42). When asked whether he talked to the other defendant troopers about Mrs. Kim's case, Gant stated that he "talked with the other troopers [about the case]. . . because the video was at issue at that time." Id.

Both Mr. Lee and Mr. Kim testified that they attempted to talk with Gant, between the time of the first and second arrest of Mrs. Kim, to inform him that it was not Mrs. Kim but Mrs. Lee who had sold the I.D.s in question (N.T. 2-68, 2-69) and that Mrs. Kim had never sold the I.D.s in question but that Gant refused to speak with them. (N.T. 2-71, 2-80). When confronted with this allegation by plaintiff's counsel, Gant stated that he would not talk to the defendants or their representatives about the matter, and that it is the role of the D.A. to do so. (N.T. 3-100).

c. Defendant Troopers' Pursuit of Prosecution

When defense counsel asked Gant whether he had any "input" or "involvement" in the decision to rearrest Mrs. Kim, Trooper Gant stated that the A.D.A. informed him of the allegation that he had arrested the wrong woman at the same time that the A.D.A. gave him the videotape. (N.T. 3-40 - 3-42).

Trooper Gant further testified under cross-examination that at the time of the preliminary hearing, after the initial charges against Mrs. Kim had been dismissed, he spoke with the assigned A.D.A. about a rearrest of Mrs. Kim. While Gant testified that

he did not encourage the rearrest, he stated that the A.D.A. told him that he intended to rearrest Mrs. Kim. Gant told the A.D.A. that he felt there was a charge to be pressed against Kim, that the D.A. asked his opinion and that he gave his opinion to the A.D.A. (N.T. 3-165).

Mrs. Kim was accompanied at her first appearance by more that one other Korean woman who sat next to her in the back of the court room before trial. Gant testified that he thought this was an obvious attempt to thwart the defendants' identification of Mrs. Kim as the woman who had sold the I.D.s to the defendants. He testified that this had angered him and it was a factor in his determination not to communicate with representatives, friends and family of Mrs. Kim when they approached him to give him information regarding the case.

Mary Ennis, Esquire, who represented Mrs. Kim in preliminary criminal matters involving her first arrest, testified that after getting a continuance, they were walking out of the courthouse going to their cars when Officer Pender standing on the corner yelled at them "f--- you," and he looked at Mrs. Kim and said I'm going to get you sooner or later. Mr. Kim stated that he saw the officers follow them out of court and he thought that it was Gant who yelled the epithet at them. (N.T. 1-175).

Trooper Michael A. Pender and Officer Stanley Brown were two of the three officers who first purchased the identification from the photo I.D. counter in question and then gave a description of

the woman who sold the I.D. to Trooper Gant for the purposes of drafting the affidavit for the first arrest warrant. (N.T. 3-139, 4-07 - 4-15). When Trooper Pender was asked "was there ever a conversation among [the defendant officers] as to whether or not you chose the right lady?," he answered, "only on one occasion we might have talked about that and we all felt as though we picked the right person." When plaintiff's counsel attacked Pender's answer, he responded, "during the course of going to court on numerous occasions to numerous continuances and everything, probability, [sic] we talked about it more than once, we probably discussed it more than once, standing in the hallway." (N.T 4-23, 4-24). Pender also stated on cross examination that he was aware before the time of the second arrest that Mrs. Lee had admitted to selling the defendant officers the I.D.s.

Trooper Reginald A. Harrison testified that Gant led the investigation involving the subject store. Harrison admitted on cross-examination that he had stated in a deposition that he "encouraged" the A.D.A. to re-arrest Mrs. Kim. He went on to state that "the D.A. told us that he was a bit angry at it being thrown out" and that "he was going to file the charges, that's when I said, okay, go ahead." (N.T. 3-156).

Ennis further testified that she talked with an A.D.A. Sybil Scott and her supervisor, an A.D.A. named Mr. Arnold Gordon, about the possibility of dropping charges against Kim. According to her testimony Mr. Gordon had looked at the video and that he

was going to drop the charges but the state police wouldn't agree to it. (N.T. 1-176).

Furthermore, Charles Williams, First Deputy Clerk of Quarter Sessions, testified that the D.A.'s office prosecutes cases in Philadelphia and that in determining whether to prosecute a case, an A.D.A. will rely on the facts relayed to the attorney by a police officer. He also testified that an A.D.A. will not discontinue the prosecution of a case unless he has the acquiescence of the police officers involved. (N.T. 1-96).

Viewing all of the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict, this court must deny the defendants' motion for judgment as a matter of law in part. Clearly, plaintiff has presented the "minimum quantity of evidence from which a jury might reasonably afford relief" as required by Dudley, supra, on her claim of malicious prosecution. The motion is denied with regard to defendants Harrison and Gant. Testimony showed that they had personal communications with the prosecution in Kim's case and the jury could find that the troopers interfered with the prosecutor's ability to exercise his judgment by making statements known to be false or in reckless disregard of the truth as required by Lippay v. Christos, supra. Therefore defendants' motion for judgement as a matter of law is denied.

d. Personal Involvement

A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated

solely on the operation of respondeat superior. Parratt v. Taylor, 451 U.S. 527, 537 n. 3 (1981); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976). Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Rhode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988).

In the instant case, plaintiff did not present a minimum quantity of evidence that would show that the defendants, Pender or Brown had personal communications with the prosecution in Kim's case so that the jury could find that the troopers interfered with the prosecutor's ability to exercise his judgment. Although the two troopers viewed the video tape that the plaintiff claims would show she could not have sold the I.D.s in question, there was no evidence that these two officers knew that the District Attorney's office would or did in any way base its conclusion to rearrest Mrs. Kim on their determination of whether they thought they had arrested the right woman in their first arrest. Therefore, evidence upon which to base a jury finding that Brown and Pender influenced the District Attorney's office in its decision to rearrest Mrs. Kim is lacking. Accordingly, defendants motion for judgment as a matter of law is granted inasmuch as it applies to Pender and Brown. Judgment will be so amended.

B. Motion for New Trial Pursuant to Fed.R.Civ.P. 59

Rule 59 of the Federal Rules of Civil Procedure does not specifically enumerate the grounds for a new trial. Courts,

however have established that a new trial may be granted when: (1) the verdict is against the clear weight of the evidence; (2) damages awarded are excessive; (3) the trial was unfair; and (4) substantial errors were made in the admission or rejection of evidence or the giving or refusal of instructions. Northeast Women's Center Inc. v. McMonagle, 689 F.Supp. 465, 468 (E.D. Pa. 1988), aff'd, 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901 (1989).

In addition, where there is legally sufficient evidence to support the verdict, thus foreclosing judgment as a matter of law, but the verdict is nonetheless contrary to the great weight of the evidence, a new trial may be necessary to prevent the miscarriage of justice. Roebuck v. Drexel University, 852 F.2d 715, 735-36 (3d Cir. 1988).

In evaluating a motion for a new trial on the basis of trial error, the court must determine, (1) whether an error was made, and (2) whether the error "was so prejudicial that refusal to grant a new trial would be `inconsistent with substantial justice'." Bhaya, 709 F.Supp. at 601 (citation omitted). In reviewing a motion for a new trial, the court must "view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict." Marino, 749 F.2d at 167 (citation omitted).

In the instant case, defendants present no basis upon which such a motion should be granted. For the aforementioned reasons, defendants' motion for a new trial is denied.

C. Qualified Immunity

I must now address the issue of the officers' defense of qualified immunity, in the context of a jury trial.

The United States Supreme Court provided the current standard for "good faith" or "qualified" immunity in Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982):

> ". . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

This circuit has adopted the approach that officials must know and apply general legal principles in appropriate factual situations. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Pro v. Donatucci, 81 F.3d 1283, 1291-92 (3rd Cir. 1996) (citing Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). Although officials need not predict the future course of constitutional law, they are required to relate established law to analogous factual settings. See Pro v. Donatucci, supra, at 1292; see also Young v. Keohane, 809 F.Supp. 1185, 1191 (M.D. Pa. 1992). In the absence of a case applying established principles to the same facts, this court must inquire whether, in light of decided case law, reasonable officers would have believed that their conduct would be lawful. Lattany v. Four Unknown U.S. Marshals, et al., 845 F.Supp. 262, 265 (E.D. Pa. 1994).

While the qualified immunity defense is frequently determined by courts as a matter of law, a jury should decide disputed factual issues relevant to that determination. Abdul-Akbar v. Watson, 4 F.3d 195, 201 (3d Cir. 1993); Deary v. Three Un-named Police officers, 746 F.2d 185, 190-92 (3d Cir. 1984); White v. Walker, 950 F.2d 972, 976 (5th Cir. 1991); see also, Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir. 1994) (holding that while qualified immunity should normally be decided by the court, where facts concerning the availability of the defense are disputed "jury consideration is normally required"), cert. denied, ___ U.S. ___, 115 S.Ct. 721, 130 L.Ed.2d 627 (1995).

In order to analyze defendants' claim of qualified immunity, this court must determine whether the law was clearly established at the time of the alleged violation, and we must also decide whether, given the law at that time, a reasonable officer could have believed his conduct to have been reasonable under the law. See Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991). The first part of this test is purely a question of law, but the latter part of the test requires application of the law to the particular conduct at issue, an inquiry which may require factual determinations if the nature of the conduct is disputed. Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992).[5]

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5. *In Anderson v. Creighton, 483 U.S. 635, 643 (1987), the plaintiffs argued that "it is inappropriate to give officials alleged to have violated the Fourth Amendment and thus necessarily to have unreasonably searched or seized--the protection of a qualified immunity intended only to protect reasonable official action. It is not possible , that is, to say that one 'reasonably' acted unreasonably." The Court rejected this argument. The*

(continued...)

Accordingly, the defendants are entitled to qualified immunity as a matter of law if the applicable law was not clearly established at the time of the alleged constitutional violation. Anderson, 483 U.S. at 483. The right not to be arrested in the absence of probable cause is undoubtedly well-established. As cited above, the Third Circuit has clearly established the law in cases where police officers have allegedly maliciously prosecuted a case:

> "Where a police officer causes an arrest to be made pursuant to a warrant which he obtained on the basis of statements he knew to be false or on the basis of statements he makes in reckless disregard of the truth, a plaintiff may recover damages under section 1983 for "unreasonable seizure" of his person in violation of the Fourth Amendment."

Lippay v. Christos, 996 F.2d 1490, 1502 (3rd Cir. 1993). Since the law was clear at the time of the alleged violation, defendants can be granted qualified immunity only if their conduct in furthering the prosecution of Mrs. Kim was a violation that a reasonable officer could have made. Here the Special Jury interrogatories not only asked whether the jury thought the officers acted without probable cause, but also whether they acted with malice in further prosecuting the case in light of the information they learned after the first arrest of Kim. It is

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5. (...continued)
Court's response was that qualified immunity seeks to measure whether the officer was reasonable in his understanding (albeit mistaken) of what was lawful under the Fourth Amendment Id. at 643-44. There is no conflict in saying a police officer who acted unreasonably nevertheless reasonably (but mistakenly) believed his conduct was reasonable.

this latter factor which is so very significant here. This court instructed the jury that "probable cause to effectuate an arrest exists when facts and circumstances within knowledge of an arresting officer, are reasonable and sufficient to justify a person of reasonable caution in believing that the arrestee has committed an offense." (N.T. 4-145). Malice was defined to the jury as follows: "malice includes ill-will in the sense of spite, lack of belief by the actor himself in the propriety of his prosecution, where it's used for an extraneous or improper purpose -- malice."[6] (N.T. 4-145).

The jury found that the defendant officers continued the prosecution and rearrest of Mrs. Kim "maliciously and without probable cause." The jury having made this factual determination there can be no question as to the reasonableness of the officers' conduct. This court can not consistently hold that the officers caused Kim's arrest without probable cause and with malice and at the same time that such an act constituted a reasonable mistake or that reasonable officers would believe their conduct was lawful. Accordingly, defendants do not qualify for qualified immunity. See Anderson, supra; Lattany, supra.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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6. *The jury asked for the instruction on malice to be read to them a second time and this court read the following: "Malice includes ill-will in the sense of spite, the use of a prosecution for an extraneous improper purpose or the reckless and oppressive disregard of plaintiff's right -- any one of those things." (N.T. 4-154).*

MEEYONG HEEKIM KIM	:	CIVIL ACTION
	:	
VS.	:	
	:	
TROOPER ANTHONY M. GANT, et al.	:	NO. 95-2905

ORDER

AND NOW, to wit, this day of , 1997, upon consideration of Defendants' Motion for Judgment as a Matter of Law Pursuant to Federal Rule of Civil Procedure 50(b) and Motion for New Trial Pursuant to F.R.Civ.P. 59(e) (Docket No. 71), and Plaintiff's Response to Defendants' Post-Trial Motions (Docket No. 78), it is hereby ORDERED that:

(1) Defendants' motion for judgment as a matter of law is GRANTED in part inasmuch as it applies to defendants Pender and Brown and DENIED in part inasmuch as it applies to defendants Gant and Harrison.

(2) Defendants' motion for new trial is DENIED.

It is FURTHER ORDERED that Defendants' Motion to Supplement Brief in Support of Defendants' Post-Trial Motions is GRANTED.

It is ALSO ORDERED that Plaintiffs' Request for Extension of Time to Reply to Defendants' Motion to Supplement is DENIED.

It is so ORDERED.

BY THE COURT:

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE