

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

STEVEN OGBORNE, OGBORNE WASTE :
REMOVAL, INC. AND OGBORNE TRASH :
REMOVAL, INC. :
 :
 : CIVIL ACTION
 v. :
 : NO. 97-4374
 :
COUNCILMAN WILLIAM R. :
BROWN III, BARBARA BOHANNAN- :
SHEPARD, THADDEUS KIRKLAND, :
CITY OF CHESTER POLICE, :
CITY OF CHESTER, MULENE MAYFIELD: :
(a/k/a ZULENE MAYFIELD), :
JAMES CLARK AND WENDELL BUTLER :

M E M O R A N D U M

WALDMAN, J.

October 13, 1999

I. Introduction

This case arises from the arrest and prosecution of Steven Ogborne by Delaware County Authorities for reckless endangerment in the manner he allegedly operated a truck when confronting protestors at a trash conversion facility. Plaintiff Steven Ogborne has asserted claims under 42 U.S.C. § 1983 for false arrest, malicious prosecution, false imprisonment and "violation" of his "property interests." The plaintiff corporations have asserted § 1983 claims for "violation" of their "property interests" allegedly occasioned by Mr. Ogborne's arrest and prosecution. Presently before the court is defendant Kirkland's motion for summary judgment.

II. Legal Standard

In considering a motion for summary judgment, a court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, but rather must present evidence from which a jury could reasonably find in his favor. Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999).

III. Facts

From the competent evidence of record as uncontroverted or otherwise taken in a light most favorable to plaintiffs, the pertinent facts are as follow.

The respective plaintiff corporations are, and at all pertinent times were, in the business of hauling and dumping waste and trash. Ogborne Trash Removal is owned and operated by plaintiff Steven Ogborne, his mother and his brother. Ogborne Waste Removal is owned by Carl Ogborne, Steven's father, who operates the business with the assistance of his son and wife.

Ogborne Waste Removal received a permit from the Delaware County Solid Waste Authority ("the Authority") to enter and dump at any of three authorized sites in the County, including the Westinghouse Trash to Steam Facility ("the Westinghouse facility") operated by Westinghouse Resource Energy, Inc. in Chester. It is not altogether clear whether such a permit was also given to Ogborne Trash Removal or whether it piggybacked on the Ogborne Waste Removal permit. In any event, it may fairly be inferred from the record that the Authority knowingly permitted Ogborne Trash Removal, as well as Ogborne Waste Removal, to enter and dump at the three designated sites.

On July 29, 1995, a group of about thirty people gathered at the Westinghouse facility to protest the operation of and disposal of trash at the facility. Zulene Mayfield, head of

Chester Residents Concerned for Quality Living ("CRCQL"), a Pennsylvania non-profit public service corporation, had organized the demonstration and sent out fliers advertising it. She also announced it at a City Council meeting. She invited defendant Kirkland to attend when she saw him on the street. He did so.¹ Among the others to attend were defendant Kirkland's administrative assistant Carl Fitzgerald, defendant Chester City Councilman William R. Brown III, Chester Mayor Barbara Bohannon-Shepard, Cindy deProphetis, a reporter for the Delaware County Daily Times, Reverend Gant and Ms. Mayfield herself. The protesters carried signs proclaiming their concerns and formed a picket line to prevent any trucks from unloading waste or trash at the facility. Some of those present knew defendant Kirkland was a state representative. Others simply knew him as "Reverend Kirkland."

Also at the facility were four or five Chester police officers who were parked on the opposite side of the street from the protesters. They did not participate in or attempt to break up the demonstration. General Chester City police policy is to intervene only when necessary to maintain law and order.

At about 10:00 a.m., a truck owned by plaintiff Ogborne Trash Removal and driven by one of its employees arrived to make

¹Plaintiffs contend that defendant Kirkland was invited at his legislative office, but there is no competent evidence of such.

a delivery at the facility. The truck stopped before the picket line. Defendant Kirkland and Mr. Brown approached the driver and requested that he "honor the picket line." Mr. Brown told the driver that the police "weren't going to do anything" because he was a city Councilman and director of finance who paid them. Defendant Kirkland did not identify himself. After this discussion, the driver decided to leave the facility without unloading.

Plaintiff Steven Ogborne met the driver a short distance away from the facility and exchanged places with him. Mr. Ogborne had successfully unloaded a couple of trucks at the facility earlier in the morning and believed the protesters would let him pass. When he re-entered the drive to the facility, the protesters moved to block the road. He slowed down when he approached the picket line to avoid hitting any of the protesters. After plaintiff Ogborne's truck crossed the picket line, he sped up and the protesters chased him. One of the protesters, Doreen Coleman, claimed to have been hit. Defendant Kirkland threw rocks at the truck and threatened that he would "Reginald Denny" plaintiff Ogborne.² Many of the protesters yelled at the police to charge plaintiff Ogborne with attempted murder.

²Defendant Kirkland denies ever making such a threat but for purposes of the instant motion, of course, the court assumes plaintiffs' version to be true.

After Mr. Ogborne crossed the picket line, Inspector Butler arrived at the scene in response to a call by one of the officers who was concerned that the crowd was becoming "unruly." When he arrived, Inspector Butler took control of the scene. Inspector Butler was told by Officer Blythe that Mr. Ogborne had driven "through" the protestors, causing them to jump out of the way. Officer Blythe was sufficiently concerned about the perceived danger from Mr. Ogborne's conduct that the Officer placed his hand on his gun when ordering Mr. Ogborne to stop. Officer Blythe told Inspector Butler that Mr. Ogborne should be arrested. Inspector Butler instructed that no arrest be made until he had conducted further inquiry as to what occurred.

Reverend LeRoy Carter, an employee of the Westinghouse facility, told plaintiff Ogborne that he could not unload his truck at the site dumping during the demonstration. Reverend Carter later apologized to the demonstrators on behalf of the Westinghouse facility for what he characterized as "the arbitrary ramming through the protest line by the truck driver" and stated that Westinghouse would take "stringent action" against plaintiff Ogborne's company.

Several of the protesters including defendant Kirkland had positioned themselves in the drive in front of plaintiff Ogborne's truck to prevent him from leaving. Inspector Butler had asked them to allow plaintiff Ogborne to leave, but they

refused. An officer gave plaintiff Ogborne several citations but allowed him to leave on a different road normally not for use by trucks.

Although defendant Kirkland had not seen Ms. Coleman get hit, he had seen her being led to an ambulance and had heard someone say she had been hit. Inspector Butler saw Ms. Coleman being placed in an ambulance.

Defendant Kirkland told Inspector Butler that plaintiff Ogborne could have killed someone and should be "locked up" for "attempted murder." He also told the police that he "had to get out of the way of the truck." He showed the inspector some skid marks which he had not seen before the incident and assumed had been made by plaintiff Ogborne's truck. They were not in fact made by his truck. Defendant Kirkland also suggested that plaintiff Ogborne had broken the law by leaving on a road not supposed to be used by trucks.

Inspector Butler told defendant Kirkland that he and the others present would have to give statements at the police station. Defendant Kirkland, Mr. Brown, Ms. Mayfield and others went to the police station to give statements. Some of the protesters met first with Chief Clark, although the usual procedure would involve meeting only with the investigating officer. There is no competent evidence that defendant Kirkland attended that meeting.

Defendant Kirkland gave a statement to Inspector Shoates stating that plaintiff Ogborne had "failed to stop or slow down" when he entered the drive and that his truck had struck Ms. Coleman. The statement contains no reference to Mr. Kirkland himself having to get out of the way of the truck. Ms. Coleman gave a statement to Inspector Butler stating that she had been struck by Mr. Ogborne's truck. Ms. Mayfield gave a statement to Inspector Shoates that Mr. Ogborne drove his truck through the crowd and struck "a female" protestor. Mr. Brown gave a statement to Inspector Butler that Mr. Ogborne drove through the crowd and protestors had to run to evade the truck.

Defendant Kirkland was later correctly quoted in the Delaware County Daily Times as saying that Mr. Ogborne should be charged with attempted murder.³ In that article, defendant Kirkland was referred to as a state representative.

Reverend Gant had called Ms. deProphetis before hand to let her know that they were going to give statements and told her there would be a press conference afterwards. Defendant Kirkland attended the press conference after giving his statement to the police.

The decision to file charges is usually made by the investigating officer. Detective Polites was the officer

³While the article itself would be hearsay and incompetent as evidence, Mr. Kirkland acknowledged making the attributed statement in his deposition.

assigned to the investigation. He felt "pressured" by his partner, Gordon Shoates, and Inspector Butler to file some charge against Mr. Ogborne. He was concerned about what charge to file and wanted to forward the case for assessment to the District Attorney. After consultation with Inspector Butler, Chief Clark directed that a warrant be issued immediately for Mr. Ogborne for reckless endangerment. Detective Polites did so on August 3, 1995.

With his attorney, Mr. Ogborne met Inspector Butler for processing at the police station on or about August 13, 1999. Mr. Ogborne was placed in a holding cell for 30 minutes to an hour. He was then photographed, fingerprinted and released on his own recognizance.

A preliminary hearing was scheduled. Mr. Ogborne failed timely to appear because he thought the hearing had been postponed. The presiding judge issued a bench warrant for Mr. Ogborne for his failure to appear. Mr. Ogborne learned of the warrant and appeared at the courthouse about an hour later. At that time he was handcuffed and taken to a holding cell where he was detained for 45 minutes until his father arrived with \$2,500 to post bail.

A preliminary hearing was ultimately conducted on January 4, 1996. At the hearing, defendant Kirkland testified that several protesters were in "harm's way" and had to "jump out

of the way" when plaintiff Ogborne drove the truck through the picket line. Mr. Kirkland did not testify that he had to evade the truck. To the contrary, Mr. Kirkland testified that he did not feel he was in danger and did not view himself as a "victim" in the case. Ms. Coleman testified that she was struck by Mr. Ogborne's truck and was taken to a hospital. The presiding judge found probable cause to hold Mr. Ogborne for trial for reckless endangerment. Plaintiff Ogborne was tried and acquitted in the Delaware County Court of Common Pleas on August 28, 1996.

Reverend Carter, who witnessed the incident and who told Mr. Ogborne he could not unload at the Westinghouse facility that day, submitted a report of the incident to his supervisors. Westinghouse promptly requested that the Authority direct plaintiffs not to use the Westinghouse facility. By July 31, 1995, the Authority had advised the plaintiffs to cease dumping at the Westinghouse facility. The Authority continued to permit plaintiffs to dump at the other two locations, one of which was within a mile of the Westinghouse site. Only the Westinghouse site, however, maintained Saturday hours. Plaintiffs were permitted to return to the Westinghouse facility on or shortly after September 9, 1996.

Many officers at the scene of the incident recognized defendant Kirkland as a state representative. It is uncontroverted, however, that the City police officers did not

consider defendant Kirkland to be in the chain of authority over them and would not have followed any instructions or orders given by him.

Neither defendant Kirkland nor anyone in his office ever inquired with the police or the court regarding the status of plaintiff Ogborne's case. Defendant Kirkland never addressed the subject of plaintiff Ogborne in the state house and never used his authority as a legislator to take any action regarding the incident. He avers, without any competent evidence to the contrary, that except for providing a witness statement he never communicated with any of the officers involved in the investigation after the day of the incident and that he never exerted any pressure political or otherwise on any official to secure criminal charges against plaintiff Ogborne or to retaliate in any manner against plaintiffs.

IV. Discussion

To sustain a § 1983 claim, a plaintiff must show that the defendant deprived him of a federal right while acting under color of state law. See Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). The color of state law element requires "that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state." Id. at 638. "[T]he essence of section 1983's color of law requirement

is that the alleged offender, in committing the act complained of, abused a power or position granted by the state."

Bonenberger v. Plymouth Township, 132 F.3d 20, 24 (3d Cir. 1997).

A defendant whose interaction with the victim is unconnected with the execution of his official duties does not act "under color of law." Id. See also Mark v. Borough of Hatboro, 51 F.3d 1137, 1151 (3d Cir. 1995).

Plaintiffs assert that defendant Kirkland was acting under color of law because he was transported to the scene by his administrative assistant, he performed legislative duties at some later point in the day, he addressed persons who were constituents while at the protest and he approached trucks to turn them away. None of these things would support a finding that defendant Kirkland acted under color of law.

Plaintiffs also suggest that defendant Kirkland used his influence as an official to direct and mislead the law enforcement officials involved. There is no evidence that he used the authority of his office to pressure the investigating officers or otherwise to secure charges against plaintiff Ogborne. It is uncontroverted that neither he nor anyone in his office ever communicated with the police other than on the day of the incident and when he gave his statement. There is no evidence that he attempted to use his position as an elected official to exert pressure on the police. It is uncontroverted

that the officers involved in the investigation did not consider him to be in the chain of command and there is no evidence that he even attempted to give any orders to them. One simply cannot find from the competent evidence of record that defendant Kirkland was acting under color of state law at the scene of the protest, in giving a statement as a witness to the police or in testifying at the preliminary hearing.

Plaintiffs alternatively argue that defendant Kirkland was "acting under color of state law in his individual capacity." The gist of this argument appears to be that even though he was acting as a private citizen, defendant Kirkland's conduct should be deemed "state action." Plaintiff relies on cases where a "symbiotic relationship" existed between a private entity and the state, see Bloom v. Yaretsky, 457 U.S. 991, 1004-05 (1982); where a private party acted in concert with state officials, see Krynicky v. University of Pittsburgh, 742 F.2d 94, 98 (3d Cir. 1984); and, where a private entity exercised powers traditionally within the exclusive province of the state. See McKeesport Hosp. v. Accreditation Council for Graduate Med. Ed., 24 F.3d 519, 524 (3d Cir. 1994).

One cannot reasonably find on the record presented a "sufficiently close nexus between the state and the challenged action" of defendant Kirkland "that the action of the latter may be treated as that of the State itself." Krynicky, 742 F.2d at

98. There is no evidence of any agreement or conspiracy between defendant Kirkland and the police. Defendant Kirkland clearly was not exercising traditional state powers when he protested or when he gave a requested witness statement to the police.

Defendant Kirkland also argues that in any event, plaintiff Ogborne has not sustained his § 1983 malicious prosecution, false arrest and false imprisonment claims.

Plaintiff Ogborne predicates his § 1983 malicious prosecution claim on the Fourth and Fourteenth Amendments. Plaintiff's claim under the Fourteenth Amendment that he was "deprived of his liberty" as a result of a "prosecution without probable or reasonable cause" sounds in substantive due process. See Telepo v. Palmer Tp., 40 F. Supp.2d 596, 609-10 (E.D. Pa. 1999). A § 1983 malicious prosecution claim, however, may not be predicated on the Fourteenth Amendment substantive due process clause. See Albright v. Oliver, 510 U.S. 266, 270 n.4, 274 (1994). To sustain a § 1983 malicious prosecution claim under the Fourth Amendment, there must be a seizure or deprivation of liberty effected pursuant to legal process. See Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (3d Cir. 1995). Plaintiff Ogborne's detention, however brief, and his obligation to go to court and answer the charges against him constitute a sufficient restraint of liberty to satisfy this requirement. See Gallo v. City of Phila., 161 F.3d 217, 224-25 (3d Cir. 1998).

A plaintiff must also prove the elements of the common law tort of malicious prosecution, i.e., that "(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and, (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." Hilferty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996). Malice may be inferred from the absence of probable cause. See Lippay v. Christos, 996 F.2d 1490, 1502 (3d Cir. 1993); Lohman v. Township of Oxford, 816 F. Supp. 1025, 1031 (E.D. Pa. 1993).

When an arrest is made without probable cause, the arrestee may also assert § 1983 false arrest and false imprisonment claims based on the arrest and any subsequent detention resulting from that arrest. See Groman, at 634, 636. "A false imprisonment claim under § 1983 which is based on an arrest made without probable cause is grounded in the Fourth Amendment's guarantee against unreasonable seizures." Id. at 636.

Where probable cause exists to charge a plaintiff, however, he cannot sustain a § 1983 claim. See Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988). See also Groman, 47 F.3d at 624, 636. Probable cause exists where the totality of facts and circumstances are sufficient to warrant an ordinary prudent person to believe that the party is guilty of an

offense. See Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d Cir. 1997); Pansy v. Preate, 870 F. Supp. 612, 618 (M.D. Pa. 1994), aff'd, 61 F.3d 896 (3d Cir. 1995).

In determining whether probable cause to arrest an individual exists, police officers may rely on seemingly reasonable information from a citizen identifying himself as the victim of a crime. See Owens ex rel Young v. County of Delaware, 1996 WL 476616, at *14 (E.D. Pa. Aug. 15, 1996). See also Clay v. Conlee, 815 F.2d 1164, 1168 (8th Cir. 1987); Karr v. Smith, 774 F.2d 1029, 1032 (7th Cir. 1985); McKinney v. George, 725 F.2d 1183, 1187 (7th Cir. 1984). An officer who has probable cause to arrest is not required to conduct further investigation for exculpatory evidence or to pursue the possibility that the suspected offender is innocent. See Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th Cir.), cert. denied, 117 S. Ct. 179 (1996); Simkunas v. Tardi, 930 F.2d 1287, 1292 (7th Cir. 1991); Kompare v. Stein, 801 F.2d 883, 890 (7th Cir. 1986).

It clearly appears that Chief Clark, Inspector Butler, Inspector Shoates and Detective Polites were each warranted in the belief that probable cause existed to charge Mr. Ogborne with reckless endangerment based, inter alia, on the statements of Officer Blythe, Ms. Coleman, Ms. Mayfield and Mr. Brown. In any event, defendant Kirkland did not initiate plaintiff Ogborne's prosecution.

A private person initiates or procures the institution of criminal proceedings "by making a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused." Tomaskevitch v. Specialty Records Corp., 717 A.2d 30, 33 (Pa. Cmwlth. 1998), appeal denied, 1999 WL 462139 (Pa. July 2, 1999)(quoting Hess v. County of Lancaster, 514 A.2d 681, 683 (Pa. Cmwlth. 1986) and Restatement (Second) of Torts § 653 cmt. c (1977)). In defining "initiate" or "procure with regard to private citizen accusations in criminal proceedings, the courts have cited with approval the following portion of the Restatement:

[G]iving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. . . . If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes 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.

Id. (quoting § 653 cmt. g); Hess, 514 A.2d at 683 (same).

As noted, there is no evidence that defendant Kirkland used the authority of his office to pressure the investigating

officers or otherwise to secure charges against plaintiff Ogborne. It is uncontroverted that neither he nor anyone in his office ever communicated with the police other than on the day of the incident and when he gave his statement. There is no evidence that he attempted to use his position as an elected official to exert pressure on the police. It is uncontroverted that the officers involved in the investigation did not consider him to be in the chain of command and there is no evidence that he even attempted to give any orders to them.

There also is no competent evidence that defendant Kirkland knowingly made false statements which were a determining factor in the decision to charge plaintiff Ogborne.⁴ One also cannot reasonably find from the competent evidence of record that defendant Kirkland conspired with any official to arrest plaintiff Ogborne or to initiate his prosecution.

The corporate plaintiffs' property claim is predicated on a "loss of business and economic opportunity" resulting from the effective suspension of their dumping privileges at the

⁴Plaintiffs state in their brief that a contemporaneous videotape shows that no one was in danger of being struck by Mr. Ogborne's truck. They state that the videotape is "attached." No videotape was in fact submitted and none appears in the "List of Exhibits Attached to Plaintiffs' Response to Defendant Thaddeus Kirkland's Motion for Summary Judgment." In any event, it is uncontroverted that the presiding judge viewed the videotape at the preliminary hearing and explicitly found it did not refute probable cause to hold Mr. Ogborne for trial for reckless endangerment.

Westinghouse site for thirteen months. The individual plaintiff's property claim is premised on the "failure to permit plaintiff to conduct business on July 29, 1995."⁵

There is no competent evidence of record that defendant Kirkland was responsible for the effective suspension of the corporate plaintiffs' dumping privileges at the Westinghouse site, let alone that he took any action under color of state law to effect such a suspension. This action was taken by the Authority at the request of Westinghouse out of "concern for the safety of [its] employees and [that of] the citizens and also the Ogborne employees." Contrary to plaintiffs' assertion that "[i]f not for the arrest of Steven Ogborne the permit would not have been suspended," the Authority took this action before any decision by the police was made to charge Mr. Ogborne. Assuming that Mr. Kirkland's conduct at the protect contributed to Mr. Ogborne's inability "to conduct business on July 29, 1995" and that he had a cognizable property or liberty interest to do so,

⁵While the defendant has not asserted a lack of standing by Mr. Ogborne to maintain this claim, the court notes that he has not explained or offered competent evidence to show how he sustained an injury distinct from the corporations whose business was disrupted. The indirect injury often suffered by corporate owners and employees when a corporation is harmed does not support a direct cause of action by such owners or employees. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1278 (3d Cir. 1994); Gravelly v. City of Philadelphia, 1998 WL 47289, at *5 (E.D. Pa. Feb. 6, 1998), aff'd, 172 F.3d 40 (3d Cir. 1998); In re Phar-mor, Inc. Sec. Litig., 900 F. Supp. 777, 781 (W.D. Pa. 1994).

Mr. Kirkland did not, as noted, act under color of state law in participating in the events of that day.

One cannot reasonably find from the competent evidence of record that while acting under color of state law defendant Kirkland deprived, or conspired to deprive, any plaintiff of any federally secured right. He is entitled to summary judgment as to plaintiffs' claims against him.

Accordingly, defendant Kirkland's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of October, 1999, upon
consideration of defendant Thaddeus Kirkland's Motion for Summary
Judgment (Doc. #67) and plaintiffs' response thereto, consistent
with the accompanying memorandum, IT IS HEREBY ORDERED that said
Motion is GRANTED.

BY THE COURT:

JAY C. WALDMAN, J.