

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

CHRISTOPHER F. DONAHUE	:	CIVIL ACTION
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v.	:	
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JAMES GAVIN, et al.	:	NO. 98-1602
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O'Neill, J.	:	June , 2000

MEMORANDUM

This civil action arises out of the undercover investigation and criminal prosecution of plaintiff Christopher F. Donahue by the Berks County District Attorney's office and its detectives, the Montgomery County District Attorney's office and its detectives, and the Pennsylvania State Police. Plaintiff's complaint originally alleged nine separate federal and state claims against twelve defendants. By Memoranda and Orders dated December 8, 1998 and March 12, 1999 I dismissed all but one claim and most of the named defendants. Plaintiff's sole remaining claim, asserted under 42 U.S.C. § 1983, alleges that Berks County; Berks County District Attorney George Yatron; Berks County Assistant District Attorney James Gavin; and former State Police Officers James Girard and Gregory Pease violated plaintiff's constitutional rights by prosecuting him without probable cause. Presently before me are defendants' motions for summary judgment and plaintiff's responses thereto. For the reasons explained in this opinion, I will grant defendant's motions and enter judgment for defendants and against plaintiff.

In October 1990 an undercover investigation into a suspected drug ring was commenced by

the Berks County District Attorney's Office. As a result of the investigation, Donahue was arrested and charged on January 16, 1991 with two counts each of possession of a controlled substance, possession of a controlled substance with intent to deliver, corrupt organizations, and criminal conspiracy in connection with the sale of illicit drugs. At the conclusion of his trial in October of 1991, Donahue was convicted of two counts of possession of a controlled substance with intent to deliver, two counts of criminal conspiracy, and two counts of corrupt organizations. On August 27, 1993, the Pennsylvania Superior Court vacated Donahue's sentence and remanded for a new trial. A nolle prosequi was entered in the matter on April 3, 1997.

#### I.

Summary judgment is appropriate if the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, a court's responsibility is not to resolve disputed issues of fact but to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). The moving party bears the initial burden of identifying those portions of the record which it believes indicate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party must then point to specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). It must raise "more than a mere scintilla of evidence in its favor" to defeat the summary judgment motion; it must produce evidence on which a jury could reasonably find for the non-moving party. Liberty Lobby, 477 U.S. at 251. Though the non-moving party may not rely upon unsupported allegations or mere suspicions, id. at 248, it is entitled to have all reasonable inferences drawn in its favor. Id. at 255.

## II.

Though it is now clearly established that malicious prosecution is actionable under section 1983, the law governing the basis for such a claim is evolving. Prior to the Supreme Court's decision in Albright v. Oliver, 510 U.S. 266 (1994), a plaintiff in this circuit alleging a section 1983 claim for malicious prosecution was required to show only the elements of the common law tort. See Lee v. Mihalich, 847 F.2d 66, 69-70 (3d Cir. 1988). In Pennsylvania, as in most jurisdictions, a plaintiff alleging common law malicious prosecution claim must show : (1) the defendants initiated a criminal proceeding; (2) without probable cause; (3) with malice; (4) which was subsequently terminated in plaintiff's favor. See Hilferty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996).

In Albright, the Supreme Court examined whether malicious prosecution is actionable under section 1983 and, if it is, what particular provision of the Constitution such abuse violates. Writing for a four justice plurality, Chief Justice Rehnquist stated that “[w]e hold that it is the Fourth Amendment and not substantive due process under which petitioner Albright’s claim must be judged.” Albright, 510 U.S. at 271. “Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior,” he explained, “that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” Id. at 273, quoting Graham v. Connor, 490 U.S. 386, 395 (1989).

After Albright, many courts construed malicious prosecution claims to be based exclusively on the Fourth Amendment. See e.g. Murphy v. Lynn, 118 F.3d 938, 944 (2d Cir. 1997); Whiting v. Traylor, 85 F.3d 581, 584-86 (11<sup>th</sup> Cir. 1996); Taylor v. Meacham, 82 F.3d 1556, 1561 (10<sup>th</sup> Cir. 1996); Taylor v. Waters, 81 F.3d 429, 435-37 (4<sup>th</sup> Cir. 1996); Smart v. Board of Trustees, 34 F.3d 432, 434 (7<sup>th</sup> Cir. 1994). The Court of Appeals for the Third Circuit, however, interpreted Albright

more broadly. In Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998), the Court of Appeals held that Albright does not require that section 1983 claims for malicious prosecution be based on the Fourth Amendment but rather commands that “claims governed by explicit constitutional text may not be grounded in substantive due process.” 163 F.3d at 172. Some courts within this circuit interpreted Torres to allow section 1983 malicious prosecution claims not governed by an explicit constitutional provision to be based upon substantive due process. See e.g. Martin v. City of Philadelphia, no. 98-CV-5765, 2000 WL 11831, at \*4 (E.D. Pa. Jan. 7, 2000); Luthe v. City of Cape May, 49 F. Supp.2d 380, 392 (D. N.J. 1999). More recently, however, in Merkle v. Upper Dublin School District, No. 99-1613, 2000 WL 558985 (3d Cir. May 9, 2000), the Court of Appeals explained that “a section 1983 malicious prosecution claim could be based on a constitutional provision other than the Fourth Amendment, including the procedural component of the Due Process Clause, so long as it was not based on substantive due process.” Id. at \*7, citing Torres, 163 F.3d at 173.

Where a section 1983 claim for malicious prosecution is grounded in the Fourth Amendment, the Court of Appeals has required a plaintiff to establish --in addition to the elements of the common law tort-- a deprivation of liberty which is consistent with the concept of “seizure.” See Torres, 163 F.3d at 173-74; Gallo v. City of Philadelphia, 161 F.3d 217, 222 (3d Cir. 1998). In Torres, the Court of Appeals addressed the issue of whether a post-conviction incarceration is a “seizure” within the meaning of the Fourth Amendment. Noting that “[n]either we nor the Supreme Court has indicated that the Fourth Amendment should be expanded to include post-conviction incarceration,” the Court of Appeals held that Torres’ incarceration was not a Fourth Amendment seizure and thus did not violate his Fourth Amendment rights. Torres, 163 F.3d at 174.

In the present case, plaintiff alleges in his complaint that “defendants Berks County, Yatron,

Gavin, Girard, and Pease violated his right to be free of malicious prosecution ... pursuant to the Fourth Amendment.” Compl. ¶165. He seeks damages for, among other items, the two years and nine months he was incarcerated in state prison after his conviction. *Id.* at ¶174. Though not raised in the present motions, I first note that plaintiff is unable to recover damages for post-conviction incarceration based upon any alleged Fourth Amendment violation. *See Torres*, 163 F.3d at 173-74. Since I need not decide the issue, however, I express no view as to whether plaintiff’s post-conviction incarceration violates some other constitutional provision, such as the procedural component of the Due Process clause.

### III.

As prosecutors, defendants Gavin and Yatron contend that they are absolutely immune from suit for malicious prosecution. Absolute immunity from damages liability attaches to all actions in a “quasi-judicial” role. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The decision to initiate a prosecution is at the core of a prosecutor’s judicial role, and as a result a prosecutor is absolutely immune when making this decision. *Id.* at 430-31; *see also Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992). Absolute immunity also extends to “the preparation necessary to present a case,” including obtaining reviewing and evaluating evidence. *Kulwicki*, 969 F.2d at 1465 (citations omitted). Accordingly, the solicitation and use of false testimony in connection with a prosecution is absolutely protected. *Id.* Even a prosecutor’s failure to disclose material exculpatory evidence, whether intentional or inadvertent, is entitled to absolute immunity. *See Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir. 1995); *Carter v. Burch*, 34 F.3d 257, 262 (4<sup>th</sup> Cir. 1994).

Plaintiff attempts to avoid the defense of absolute immunity by alleging misconduct in

connection with the wiretap investigation prior to the initiation of criminal proceedings. Investigative activities, such as directing evidence-gathering, undertaken prior to any decision to initiate prosecution do not fall within a prosecutor's "quasi-judicial" role and thus are not absolutely protected. Kulwicki, 169 F.3d at 1465-66. Such allegations, however, state a claim for illegal search and seizure, not malicious prosecution. Plaintiff's claim for illegal search and seizure has already been dismissed. In my Memorandum and Order of March 12, 1999, I found that plaintiff was barred from asserting this claim both by the doctrine of claim preclusion as to some defendants and by the statute of limitations as to all.

As plaintiff's remaining section 1983 claim for malicious prosecution clearly involves alleged actions taken by defendants Gavin and Yatron which are at the core of a prosecutor's judicial role, I find that defendants are absolutely protected from suit. I will therefore enter judgment for defendants Berks County, Gavin and Yatron and against plaintiff.

The remaining defendants --Officers Pease and Girard-- contend that they possessed probable cause to initiate charges against plaintiff or, in the alternative, that their actions could have reasonably been thought consistent with the rights they are alleged to have violated and thus protected by qualified immunity. In his response plaintiff makes three specific allegations against defendants Pease and Girard which he claims are supported by the evidence. He alleges that they (1) committed perjury and submitted false and incomplete reports to the Pennsylvania Superior Court to obtain court authorization for the wiretap investigation and (2) filed false reports at the conclusion of the wiretap investigation which prevented the Superior Court from serving the Notice and Inventory upon plaintiff as required by 18 Pa. C.S.A. §5716, and (3) committed perjury during a pre-

trial hearing on plaintiff's suppression motion before the Berks County Court of Common Pleas.<sup>1</sup> Pl.'s Consolidated Opposition to Def.'s Motions, at 54-57.

However, even accepting plaintiff's allegations as true, defendants are still entitled to judgment as a matter of law with respect to any claims arising from such alleged conduct. As I have already noted, my Memorandum and Order of March 12, 1999 dismissed plaintiff's claim for illegal search and seizure. It also dismissed as untimely plaintiff's claims for violations of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. §§ 5701-5781. In addition, police officers, like other witnesses, enjoy absolute immunity from damages liability for giving perjured testimony in judicial proceedings. Briscoe v. LaHue, 460 U.S. 325, 341-44 (1983); Kulwicki, 969 F.2d at 1467.

Plaintiff also generally alleges that defendants Pease and Girard lacked probable cause to initiate criminal charges against him. He contends that genuine issues of material fact exist concerning the existence of probable cause since only Pease can allegedly identify the voices on the wiretap recordings as belonging to plaintiff and other alleged co-conspirators and plaintiff has

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<sup>1</sup> Plaintiff also alleges that "defendants" presented at trial the perjured testimony of Erwin Bieber, an alleged co-conspirator, and violated the Brady rule requiring prosecutors to disclose exculpatory evidence by failing to reveal the existence of an agreement between Bieber and the District Attorney's Office. Pl.'s Consolidated Opposition to Def.'s Motions, at 57-58. Such allegations, however, involve the conduct of defendants Gavin and Yatron and not that of defendants Pease and Girard.

As discussed above, defendants Gavin and Yatron enjoy absolute immunity from section 1983 claims premised upon such alleged conduct. See Kulwicki, 969 F.2d at 1465; see also Hill, 45 F.3d at 662; Carter, 34 F.3d at 262.

“sworn under oath that he did not say or do the things Defendants are claiming he said and did.”<sup>2</sup> Pl.’s Consolidated Opposition to Def.’s Motions, at 66-67. Finally, plaintiff also seems to argue that the Affidavit of Probable Cause signed by defendants Pease and Girard and used to obtain an arrest warrant for plaintiff was misleading because it fails to distinguish between actual quotations of intercepted communications and defendant’s interpretations of cryptic language and alleged code words. Id. at 8.

Public officials are immune from claims brought under 42 U.S.C. § 1983 if reasonable officials in their positions could have believed that their actions or decisions were lawful in light of existing law and the information they possessed at the time. Hunter v. Bryant, 503 U.S. 224 (1991). Pease and Girard are thus entitled to the defense of qualified immunity “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

When analyzing a qualified immunity defense, a court must first determine whether the plaintiff has alleged the deprivation of a constitutional or statutory right. An individual can be liable for malicious prosecution if he or she “fails to disclose exculpatory evidence to prosecutors, makes false or misleading reports to the prosecutor, omits material information from the reports, or

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<sup>2</sup> Plaintiff apparently misconstrues his burden as the non-moving party of pointing to specific facts showing that the existence probable cause is a genuine issue for trial. “Probable cause is proof of facts and circumstances that would convince a reasonable, honest individual that the suspected person is guilty of a criminal offense.” Lippay v. Christos, 996 F.2d 1490, 1502 (3d Cir. 1993). It means more than a mere suspicion, but does not require a police officer to have evidence beyond a reasonable doubt. See United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984).

The fact that a defendant denies having committed the crime with which he or she has been charged will not create a genuine issue of material fact as to whether police officers had probable cause to initiate a prosecution.

otherwise interferes with the prosecutor's ability to exercise independent judgment in deciding whether to prosecute." Telepo v. Palmer Township, 40 F. Supp. 2d 596, 610 (E.D. Pa. 1999), quoting Garcia v. Micewski, No. 97-5379, 1998 WL 547246, at \*6 (E.D. Pa. Aug. 24, 1998). See also Rhodes v. Smithers, 939 F. Supp. 1256, 1273 (S.D. W. Va. 1995) (collecting cases). By contrast, where a police officer presents all relevant probable cause evidence to an intermediary, such as a prosecutor, that intermediary's independent decision to seek a warrant or to return an indictment breaks the casual chain and insulates the officer from a section 1983 claim based on lack of probable cause for an arrest or prosecution. Id. at 1274 (collecting cases).

Here, plaintiff does not present any evidence showing that defendants Pease and Girard knowingly provided false evidence to the prosecutors or otherwise interfered with the prosecutors' decision to initiate a prosecution. The affidavit signed by defendants is not false or misleading. It clearly states, in reference to communications intercepted in the course of the wiretap investigation, that "[a]t times the persons speaking would use cryptic language and code words in an effort to disguise their illegal intentions from anyone who might be listening to said conversations." Affidavit of Probable Cause, ¶8. It quotes examples of alleged code words and cryptic language from the transcripts. Id. at ¶¶8(a); 8(c)(2); 8(h)(1); 8(I); 8(k)(2); 8(p); 8(s)(2); 8(s)(5); 8(t)(5); 8(v)(2); 8(y)(2); 8(bb); 8(dd)(1); 8(dd)(3); 8(dd)(8); 8(ee)(1); 8(ee)(8); 8(ee)(10). Plaintiff does not allege that defendants Pease and Girard failed to turn over the actual wiretap recordings which their affidavit summarizes. Indeed, plaintiff notes that a duplicate of the original recordings was in the custody of the Berks County District Attorneys Office. Pl.'s Consolidated Opposition to Def.'s Motions, at 24-25. Accordingly, I find that the actions of defendants Pease and Girard did not violate clearly established rights of which a reasonable person would have known and are thus entitled to qualified

immunity.

An appropriate Order follows.

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CIVIL ACTION

v.

JAMES GAVIN, et al.

NO. 98-1602

ORDER

AND NOW this            day of June, 2000, upon consideration of defendants' motions for summary judgment and plaintiff's response thereto, IT IS HEREBY ORDERED that defendants' motions are GRANTED. Judgment is entered in favor of defendants Berks County, George Yatron, James Gavin, James Girard, and Gregory Pease and against plaintiff Christopher Donahue.

IT IS FURTHER ORDERED that any other pending motions in the case are DENIED AS MOOT.

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THOMAS N. O'NEILL, JR.,        J.