

sentence in prison. The present suit arises from the following events, which followed Fontroy's January 14, 1985 preliminary hearing for aggravated assault and reckless endangerment:

Victoria Harris, the murder victim's mother, had testified for the prosecution at both the petitioner's preliminary hearing for murder and at the subsequent preliminary hearing for aggravated assault and reckless endangerment. After the conclusion of Fontroy's second preliminary hearing, as Fontroy was being escorted out of the building, he allegedly said to Ms. Harris "For this you're gonna pay, for this you're gonna die." Ms. Harris immediately reported the incident to an Assistant District Attorney and to defendant Alexander. Officer Alexander then deferred to Mark S. Gurevitz, of the District Attorney's Office's Charging Unit, who swore out a criminal complaint against Fontroy alleging that Fontroy intimidated, retaliated against, and made terroristic threats to a witness (hereinafter all three charges are referred to as "intimidation charges"). Mr. Fontroy was arrested on these charges by Officers Alexander and Bellows on January 18, 1985.

During Fontroy's murder trial, which took place in October, 1985, the prosecution questioned Ms. Harris regarding the threat Fontroy had made against her. Under direct examination Ms. Harris testified that Fontroy had said to her, as he was being escorted out of the building, "For this you're gonna pay, for this you're gonna die." See Defendants' Motion for Summary Judgment (Defts.' MJ), Exhibit I, p.644.

At both the preliminary hearing for intimidation and the

ensuing trial (intimidation trial), Ms. Harris again testified to the threat Fontroy had directed at her. See Defts.' MJ, Exhibit F, p.16; Exhibit G, p.18. According to Harris' testimony, she immediately reported the incident to the Assistant District Attorney who was prosecuting Fontroy for the murder charges. See Defts.' MJ, Exhibit G, p.18.

At the murder trial, Officer Alexander also testified that she had heard Fontroy say to Ms. Harris "for this you're gonna die." Officer Alexander further testified that she had then recommended to the District Attorney's Office's Charging Unit that Fontroy be charged for making "terroristic threats." See Defts.' MJ, Exhibit H, p.471. At the intimidation trial, Officer Alexander also testified that Ms. Harris reported the threat immediately after it happened. See Defts.' MJ, Exhibit G, p.24.

The intimidation case proceeded to bench trial on June 25, 1989, but Judge Avellino dismissed the case before completion, stating that the alleged threats were too equivocal to fit the statute's definition.¹ On May 14, 1987, almost a year after the intimidation charges were dismissed, Fontroy instituted the present civil actions of abuse of process and malicious prosecution.²

¹ Judge Avellino dismissed the charges stating: "[the statute] says a person commits the offense if, with the intent to, with the knowledge, his knowledge will intimidate or attempt to intimidate any witness to do one of five or six enumerated things. Refrain from informing. There is nothing in this threat. Give any false or misleading information. Nothing here. Withhold any testimony. Nothing here. Give any false misleading information. No. Elude or evade. Absent. Nothing here. This language, frankly, is just too equivocal." Intimidation Trial Transcript, Exhibit G, p.28.

² Fontroy's first complaint was dismissed for failure to state a claim. Fontroy filed an amended complaint on July 7, 1987, which was dismissed for the same reason on January

Plaintiff's complaint consists of the following counts: (1) wrongful use of civil proceedings (malicious prosecution) and (2) abuse of process. In the first count plaintiff alleges that the defendants lacked probable cause for his arrest and that the defendants purposefully provided falsified information to Mr. Gurevitz, who swore out the criminal complaint against Fontroy. In the second count Fontroy contends that the defendants pursued the intimidation charges in an effort to have plaintiff sentenced to death on the charges of murder.

On March 3, 1997, the instant case was referred to this court for all further proceedings and judgment. On March 13, 1997 the defendants moved for summary judgment against plaintiff under Rule 56 of the Fed. R. Civ. P. This motion is now considered.

II. DISCUSSION

A. Summary Judgment:

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis

24, 1989. Plaintiff submitted a second amended complaint on October 20, 1989. He then filed a motion for counsel, which was granted, and was given permission to file a third amended complaint through counsel. On January 21, 1994, counsel for Fontroy filed a third amended complaint which was served on Officer Alexander, and Detectives Ansell, Brignola and Hughes. Fontroy's third amended complaint is the basis of the present action.

on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law, id. at 248, and all inferences must be drawn, and all doubts resolved, in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.), cert. denied, 474 U.S. 1010 (1985).

On a motion for summary judgment, the moving party bears the initial burden of identifying for the court those portions of the record that it believes demonstrate the absence of dispute as to any material facts. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Specifically, the non-moving party must produce evidence such that a reasonable juror could find for that party. Anderson, 477 U.S. at 248. When considering how a reasonable juror would rule, the court should apply the substantive evidentiary standard -- in this instance, a preponderance of the evidence -- that the fact-finder would be required to use at trial. Id. at 252. A mere scintilla of evidence will not require the court to send the question to the fact-finder. Id. at 251 (citing Improvement Co. v. Munson, 14 Wall. 442, 448 (1872)).

B. Non-Cognizable Claim:

The Supreme Court has ruled out the possibility of bringing a malicious prosecution claim under the Fourteenth Amendment. Albright v. Oliver, 510 U.S. 266 (1994). The Albright court, however, did not consider whether a malicious prosecution claim could be brought under the Fourth Amendment. Id. In a concurring opinion, Justice Ginsberg noted that a malicious prosecution claim, brought under § 1983 against an arresting officer, is "properly analyzed" under the Fourth Amendment's provisions as to pretrial deprivations of liberty. Id.

The Supreme Court has determined that an arrestee's Fourth Amendment rights are violated when s/he is "'seized' for trial, so long as he is bound to appear in court and answer the states charges." Albright at 279 (Ginsberg, J., concurring). However, this district found no constitutional deprivation of liberty in a malicious prosecution claim where the plaintiff was required to appear in a preliminary hearing, an arraignment and trial.³ See Torres v. McLaughlin, No. CIV.A. 96-5865, 1997 WL 306445 (E.D. Pa. June 5, 1997). In Torres, the court reasoned that:

"Torres did not have to post bail to be released on the day he was arrested... nor was he prohibited from traveling outside the commonwealth.... Absent any constitutionally-significant pretrial restraints on Torres's liberty, the weight of federal authority holds that Torres may not maintain a § 1983 claim for malicious prosecution based on the pre-incarceration time period." Id., at *6.

³ Despite this apparent contradiction to Ginsberg's opinion in Albright, the Torres court noted that, given the lack of guidance "as to what constitutes a deprivation of liberty sufficient to support a § 1983 malicious prosecution claim," the district courts have "not viewed [Ginsberg's] concurrence favorably." See Torres, at *6.

In the instant case, plaintiff fails to make out a constitutional claim for the deprivation of his liberty for the following reasons: At the time of plaintiff's arrest for intimidation, his liberty had already been constrained because he was incarcerated, engaged in a trial on charges of murder and he had been denied bail. See Exhibit D, Investigation Report.

Plaintiff's claim for damages is based on his allegation that the defendants violated his Fourth Amendment liberty right. This court, however, is unable to discern an infringement of plaintiff's liberty that could form a § 1983 claim based on the Fourth Amendment. Because plaintiff had been incarcerated without bail at the time he was charged for intimidation, any additional limits placed on his person were of no moment.

Plaintiff claims that he suffered other injury as a result of the defendants conspiracy to bring charges against him for the crime of intimidation. He claims that individuals, who were scheduled to testify for him as character witnesses in his upcoming murder trial, chose not to do so upon learning of the impending intimidation charge. Thus, plaintiff claims that his murder trial defense was impaired. (Deposition D. Fontroy, 5/9/94, pp. 60-64). In Heck v. Humphrey, the Supreme Court severely limited the opportunity for a § 1983 plaintiff to seek redress of his constitutional claims where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 114 S.Ct. 2364, 2372 (1994). The Court held that

"in order to recover damages for harm caused by actions

whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983."

Id.

Thus, when a state prisoner seeks damages in a § 1983 suit, this court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id.

In the instant case, for this court to examine this issue as raised by the plaintiff it would have to question his underlying murder conviction. Pennsylvania Suggested Standard Criminal Jury Instructions provides that the court should give the following jury instruction with regard to a defendant's character:

The Law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.

Section 3.06(3). The Subcommittee Note states that § 3.06 subdivisions (1), (3) and (4) of this instruction are

"appropriate when the defendant has introduced testimony of his good character, as tending to prove innocence. If the defendant does introduce such evidence, then (1), (3) and (4) or an equivalent charge should be given whether or not requested by the defense counsel: counsel who fails to request a good character charge is usually ineffective."

Id. (referring to Commonwealth v. J.S. Wood, 432 Pa. Super. 183

(1994); Commonwealth v. Tippens, 409 Pa. Super. 536 (1991)).
Were a jury to find that plaintiff's proposed character witnesses declined to testify as to plaintiff's character as a result of the intimidation charges brought against plaintiff, that would necessarily undermine the validity of plaintiff's murder conviction. Accordingly, in order for the instant claim to be cognizable, plaintiff would first have to successfully demonstrate that his murder conviction or sentence has already been invalidated." See Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994). Accordingly, plaintiff's claims are not cognizable under § 1983.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK DALE FONTROY I,	:	CIVIL ACTION
Plaintiff	:	
	:	
VS.	:	
	:	
ELAINE ALEXANDER, et al.,	:	
Defendants	:	NO. 86-7492

ORDER

AND NOW, to wit, this day of , 1997,
upon consideration of Defendants' Motion for Summary Judgment and
plaintiff's response thereto, it is hereby ORDERED that Defendants'
Motion for Summary Judgment is GRANTED.

It is so ORDERED.

BY THE COURT:

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE