RENDERED: JANUARY 20, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000062-MR

ARTHUR WHITLOCK | APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 08-CI-00027

LARRY W. HANEY, SR. | APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE,[1] JUDGES.

WINE, JUDGE: Arthur Whitlock appeals from an order of the Carter Circuit Court granting a directed verdict and dismissing his malicious prosecution claim against Larry Haney, Sr. Whitlock argues that there were issues of fact concerning whether Haney lacked probable cause to bring a criminal charge against him. We

[1] Judge Thomas B. Wine authored this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

agree with Whitlock that Haney's omission of material facts in his grand jury testimony may support a finding that he lacked probable cause to bring the criminal charge. Because this is an issue of fact, we conclude that the trial court erred by granting a directed verdict for Haney. Therefore, we reverse and remand for a new trial on this issue.

On March 11, 2008, Whitlock filed this malicious prosecution action against Haney. The cause of action arose out of a criminal indictment involving Whitlock's disposition of an automobile belonging to Haney's father, Sanford Haney. On August 22, 2000, and September 11, 2002, respectively, Sanford Haney executed documents granting his power-of-attorney to his daughter, Deborah Jones, and her husband, James Jones. Since Deborah and James Jones lived in North Carolina, they gave Whitlock written authorization to enter Sanford Haney's real property in Carter County "for purposes of inspection of the residence and to assist in showing the residence to prospective buyers."

Pursuant to this authorization, the Joneses provided Whitlock with a copy of the keys to the residence and to Sanford Haney's 1976 Chevrolet Monte Carlo. In April of 2004, the Joneses directed Whitlock to take possession of the Monte Carlo. Shortly thereafter, he delivered the car to the Joneses, who then took the car to North Carolina.

Sanford Haney died intestate on January 1, 2006, and Haney, his son, was appointed as one of two personal representatives of the estate. On May 12, 2006, Haney filed a motion in District Court to require Whitlock to return Sanford

Haney's personal property, including the automobile. On May 18, the District Court entered the order directing Whitlock to return the property. Although the service list on the order set out Whitlock's name and address, Whitlock states that the address was not correct and he did not receive a copy of the order.

Armed with the court order, Haney and a deputy sheriff went to Whitlock's property to retrieve the automobile. Whitlock admitted taking the automobile and delivering it to the Joneses. Thereafter, Haney contacted the Carter County Attorney and Commonwealth Attorney, who presented the matter to the grand jury. Haney was the sole witness before the grand jury. Based on his testimony, the grand jury indicted Whitlock on the charge of theft by failure to make required disposition of property with a value greater than $300. Whitlock was arrested on the charge and detained overnight until he posted bond. The charge was subsequently dismissed without prejudice prior to trial.

Whitlock then filed this action for malicious prosecution, alleging that Haney had given false testimony to the grand jury for the sole purpose of harassment. The matter proceeded to a jury trial in September of 2010. Haney moved for a directed verdict at the close of Whitlock's case and again at the end of the presentation of all of the evidence. The trial court granted the latter motion, finding no evidence that Haney had made any false statements to the grand jury. Consequently, the court determined that Whitlock had failed to show that the indictment was returned without probable cause. Whitlock now appeals.

In *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204 (Ky. App. 2009), this Court stated the appropriate standard of review of a ruling on a motion for a directed verdict:

> When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18–19 (Ky. 1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988), citing *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944).
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> Clearly, if there is conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *National*, 754 S.W.2d at 860 (citing *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952)).
>
> In order to review the trial court's actions in the case at hand, we must first see whether the trial court favored the party against whom the motion is made, including all inferences reasonably drawn from the evidence. Second, "the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the answer to this inquiry is affirmative, we must affirm the trial court granting the motion for a directed verdict. *Id.* Moreover, "[i]t is well argued and documented that a motion for a directed verdict raises only questions of law

> as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968). Further, "a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman*, 967 S.W.2d at 18.

Id. at 215.

As the trial court correctly recognized, there are six basic elements necessary to the maintenance of an action for malicious prosecution:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981). Historically, the tort of malicious prosecution is one that has not been favored in the law. *Prewitt v. Sexton*, 777 S.W.2d 891, 895 (Ky. 1989); *Reid v. True*, 302 S.W.2d 846, 847–848 (Ky. 1957). Accordingly, one claiming malicious prosecution must strictly comply with the elements of the tort. *See Prewitt*, 777 S.W.2d at 895; *Raine*, 621 S.W.2d at 899.

In granting the directed verdict for Haney, the trial court concluded that Whitlock had failed to show that Haney lacked probable cause for bringing the criminal complaint. Where the indictment is based upon other testimony than that of the prosecutor alone, the indictment creates a rebuttable presumption of probable cause. *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597, 607 (Ky. App. 2006), citing *Conder v. Morrison*, 275 Ky. 360, 121 S.W.2d 930,

931 (Ky. App. 1938). The trial court analyzed Haney's grand jury testimony and found nothing which could be characterized as untrue.

Whitlock concedes this point, but contends that Haney omitted material facts which rendered his testimony misleading. In particular, Whitlock notes that Haney failed to tell the grand jury that Whitlock took the car more than two years before the entry of the district court order. Haney also failed to disclose that Whitlock took the car at the direction of the Joneses, who had authority to control the property. Whitlock maintains that these omissions misled the grand jury to believe that he had taken and disposed of the Monte Carlo without proper authorization – in effect that he stole the car. Consequently, he argues that the issue of probable cause should have been submitted to the jury.

The plaintiff in a malicious prosecution action has the burden of establishing a lack of probable cause. *Collins v. Williams*, 10 S.W.3d 493, 496 (Ky. App. 1999). Where the facts are undisputed, whether probable cause is generally a question of law for the court to decide. *Id.* However, the trial court essentially concluded that Haney's omission of facts would not rebut the grand jury's finding of probable cause. We disagree.

In the criminal context, the omission of material facts from a search warrant affidavit may undermine a finding of probable cause when it is alleged that police officers procuring the warrant purposefully or recklessly omitted material facts with the intent to make the affidavit misleading, and when the affidavit, when supplemented by the omitted facts, would not have been sufficient to support a

finding of probable cause. *Guth v. Commonwealth*, 29 S.W.3d 809, 810 (Ky. App. 2000), citing *Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky. App. 1995). Since the underlying determination of probable cause is the same for a claim alleging malicious prosecution, we see no reason to apply a different standard in this case.

Here, Whitlock alleges that Haney omitted material facts about when he removed the Monte Carlo from Sanford Haney's property and the circumstances surrounding his actions. The trial court found that while these facts may have provided Whitlock with a defense to the theft charge, the omission of the facts did not eliminate the existence of probable cause. However, the fact that Whitlock was acting at the direction of the Joneses, who had valid power of attorney over Sanford Haney's property, is more than a mere defense to the theft charge.

Under Kentucky Revised Statutes (KRS) 514.070,[2]

> (1) A person is guilty of theft by failure to make required disposition of property received when:
>
> > (a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and
> >
> > (b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

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[2] While the indictment actually charged Whitlock with theft by failure to make required disposition of property, the indictment incorrectly cited KRS 511.030, the statute setting out burglary in the second degree.

By failing to mention that Whitlock was acting at the apparently lawful direction of the Joneses, Haney's testimony to the grand jury clearly suggested that Whitlock improperly took possession and disposed of the vehicle. Likewise, Haney's failure to mention that these events took place in 2004, more than two years before the entry of the probate court order, suggested that Whitlock purposefully defied the probate court's order directing him to return the vehicle. These omissions are clearly material to the elements of the charge, rather than simply being defenses to the charge.

The trial court suggested that the matter would not have gone so far as criminal charges if Whitlock had gone before the District Court and explained the circumstances upon his receipt of the notice directing him to turn over the property. While this may be true, it is irrelevant to a determination of whether probable cause existed for the return of the indictment. Rather, the controlling issue concerns the facts of which Haney was aware at the time he testified before the grand jury. If Haney was aware of these facts and omitted them with the intent to mislead the grand jury, then the grand jury's finding of probable cause is rebutted. Since this is clearly an issue of fact, the trial court erred by granting a directed verdict for Haney.

Whitlock also argues that the trial court considered evidence outside of the record when granting the directed verdict. The trial judge noted that she had been present at the time when the criminal charges against Whitlock were dismissed, and she took exception to the manner in which Haney and his counsel

characterized that dismissal. The trial court also noted that Whitlock appeared before the grand jury after the dismissal of his charges. Following that appearance, the grand jury indicted Haney for perjury, but that charge was also dismissed prior to trial. Whitlock contends that these matters were outside of the evidence presented at trial and were therefore not proper for the court to consider.

Trial courts may take judicial notice of court records of the same court when the records concern the same parties and the same issues. *Adkins v. Adkins,* 574 S.W.2d 898 (Ky. App. 1978). The trial court's observations about the circumstances about the dismissal of the charges against Haney are problematic because they implicate the trial judge as a witness. Kentucky Rules of Evidence (KRE) 605. But while the trial judge noted that her recollection of these events conflicted somewhat with Whitlock's account, the judge stated that her memory confirmed Whitlock's central argument – that the theft charges were dismissed due to lack of evidence. Thus, Whitlock was not prejudiced by the trial court's consideration of this evidence.

On the other hand, the trial court's statements about Whitlock's appearance before the grand jury and the perjury charge against Haney merely involved matters within the court's record. We question whether it was appropriate for the court to speculate about the content of Whitlock's grand jury testimony, since no evidence was entered about that proceeding. The tone of the court's comment suggests, without any foundation, that Whitlock may have given false testimony to the grand jury. Trial courts should avoid such gratuitous

speculation. Nevertheless, the trial court's opinion does not suggest that it considered this speculation in its probable cause determination about the charges against Whitlock. Therefore, the inclusion of the comment was, at most, harmless error. On remand, however, we would suggest that the trial court avoid such comments.

Accordingly, the judgment of the Carter Circuit Court granting a directed verdict is reversed and this matter is remanded for a new trial in accord with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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