UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02802-REB- MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, in his individual capacity,

Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, Wick & Trautwein, LLC and the Loveland City Attorney's Office, and pursuant to Fed.R.Civ.P. 56, respectfully moves that the Court grant him summary judgment. In support hereof, Koopman states as follows:

REB Civ. Practice Standard V. I. 1. Certification

Undersigned defense counsel hereby certifies, in accordance with REB Civ. Practice Standard V. I. 1., that the submitting party has read and complied with the Practice Standards of this Court governing the formatting and marshaling of a motion filed under Fed.R.Civ.P. 56.

I. JURISDICTIONAL STATEMENT

This civil rights action arises under the Constitution and laws of the United States, including Article III, Section 1 of the United States Constitution and 42 U.S.C. §1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331, 1343 and

2201. Removal to this Court from the state court was properly and timely taken pursuant to 28 U.S.C. §§1331, 1441 and 1446, and Fed.R.Civ.P. 81(c) (CM/ECF Docket #1, filed 12/1/2009).

II. INTRODUCTION

Koopman previously moved for summary judgment based upon qualified immunity [#56, filed April 20, 2010]. The Court, in its Order Concerning Motions for Summary Judgment [#126, filed February 11, 2011], denied without prejudice Koopman's motion for summary judgment, explaining that discovery tailored narrowly to determine only those facts needed to resolve the qualified immunity claims would first be permitted. *Id.* at 8-9, 24 and 25. The Court in its Order observed:

> I note also that there is substantial evidence to support the defendants' contention that there was probable cause to support Myers' arrest. If that is true, then Myers' malicious prosecution claims fails, of course. However, Myers' contends that Koopman, a member of the Loveland Police Department, knowingly included false information in the warrant affidavit and that, absent the false information, there was not probable cause for the search or for Myers' arrest. That issue is yet to be resolved.

Id. at 11.

Discovery has been completed. The issues consisting of the existence of probable cause to support Plaintiff Myers' ("Myers") arrest—which is fatal to Myers' sole malicious prosecution claim—and, alternatively, qualified immunity to which Koopman is entitled, are ripe for reconsideration.

III. STATEMENT OF ALLEGATIONS

Myers alleges that on September 5, 2007, Koopman, a detective with the Loveland Police Department ("LPD"), executed an Affidavit in Support of No Knock

Search Warrant which later was executed at a property that had been occupied by Myers. Myers alleges that Koopman "maliciously, intentionally and/or recklessly made false and misleading statements" in the affidavit, Plaintiff's Amended Complaint and Jury Demand [#127], ¶ 14. Allegedly, Koopman's false and misleading statements in the warrant affidavit included a representation that "an unnamed confidential informant indicated that a methamphetamine lab existed in the attic" of a building occupied by Myers and that various other facts indicative of a methamphetamine lab existed on the premises. *Id.*, ¶ 14 (A – M). Myers alleges that Koopman knew that "the information given by his confidential informant . . . was false." *Id.*, ¶ 41 (a). That Koopman had two video surveillance cameras installed to monitor Myers' property. Myers alleges that one camera was installed in late May 2007, and the other was installed in mid-August 2007. *Id.*, ¶¶ 12-13. According to Myers, the information captured by those cameras was inconsistent with much of the information contained in Koopman's Affidavit. *Id.*, ¶ 15.

Myers alleges that on September 5, 2007, Koopman obtained a no-knock search warrant for Myers' property based on the allegedly false and malicious statements in Koopman's affidavit. On Thursday, September 6, 2007, members of the Larimer County Drug Task Force ("LCDTF")[1] along with the Larimer County and Loveland Special Weapons and Tactics teams ("SWAT Teams") executed the no-knock warrant at Myers' property. At the time of the search, seven field tests were conducted on suspected drugs found in the course of the search, and each test showed a presumptively positive result for the presence of an illegal drug. These positive results

[1] The task force is now known as the North Colorado Drug Task Force ("NCDTF").

were later determined to have been false positives. Myers alleges that Koopman "fabricated the results maliciously or the [test] strips were intentionally and/or improperly used to achieve a malicious pre-determined goal." *Id.*, ¶ 37(h). After the search was completed, Koopman allegedly prepared or endorsed an affidavit in support of a warrant for the arrest of Myers. *Id.*, ¶ 34. The affidavit allegedly contained false statements to support the issuance of an arrest warrant, and Koopman allegedly "acted maliciously, recklessly, knowingly, intentionally, willfully and wantonly" in preparing or endorsing the affidavit.

Myers was arrested on September 7, 2007, and was detained in the Larimer County Detention Center until Monday, September 10, 2007. Criminal charges were filed against Myers, and several hearings were held in his criminal case between September 7, 2007 and November 15, 2007. Ultimately, testing conducted by the Colorado Bureau of Investigation ("CBI") demonstrated that no controlled substances were recovered from Myers' property or from the neighboring buildings that were searched on September 6, 2007. The district attorney dropped all charges against Myers on November 15, 2007.

IV. STATEMENT OF UNDISPUTED FACTS

The following facts are or should be considered undisputed:

1. Koopman sought, by sworn affidavit, a no-knock search warrant from a disinterested, neutral State District Judge for the search of 1101 North Madison Street, Loveland, Colorado, specifically seeking evidence of the manufacture of methamphetamine, based upon Koopman's belief that probable cause existed that a methamphetamine manufacturing laboratory existed at said premises, which probable-

cause belief arose from his own investigation and information provided by a previously reliable confidential informant ("CI"). Affidavit of Brian Koopman at ¶¶4-7, 10; ***Exhibits A-1 through 5, B-1 through 42, and C-1 through 2*** *(Originally filed as attachments to Defendants Koopman and Hecker's Motion for Summary Judgment Based Upon Qualified Immunity [#56, filed April 20, 2010]).*[2] The existence of the confidential informant, and presumably the information given by the CI to Koopman, have been confirmed by Magistrate Judge Michael Hagerty's interview of the CI as outlined in the Court's Order [#211, filed May 21, 2012], in which Magistrate Judge Hagerty found and concluded that the disclosure requested by Myers of the CI's identity would not aid Myers in his case. The previously reliable nature of the CI is established by the fact that the CI previously accurately and successfully assisted Koopman in locating wanted fugitives, ***Exhibit A*** at 2; **Videotape deposition of Brian Koopman, Exhibit F** at p. 15, lns. 2-7, a fact Myers is unable to dispute, although remarkably Myers still insists that the CI does not actually exist despite Magistrate Hagerty's interview of such individual. **Deposition of Jeremy C. Myers, Exhibit G** at p. 95, ln. 20, through p. 97, ln. 7.

2. Koopman sought a "no knock" search warrant due to his legitimate concerns—based upon prior drug and firearm related criminal activities at the premises and, according to the CI, the pre-search presence of known methamphetamine dealers and users on the premises—that firearms might be present at the premises to be searched and that the occupants were known to discharge firearms at other persons in the past, resulting in firearms and drug-related charges having previously been made

[2] Koopman's affidavit and exhibits are again attached hereto for the convenience of the Court.

against Myers and an associate. Affidavit of Brian Koopman at ¶¶5-7; ***Exhibit A1 through 7, Exhibit B-1 through 42***; ***Exhibit G*** at p. 46, ln. 5, through p. 52, ln.16; p. 57, ln. 12, through p. 59, ln.8.

3. Koopman arranged for the participation of the SWAT Teams in the execution of the no-knock search warrant based upon Koopman's reasonable concern for the safety of law enforcement personnel, citizens in the surrounding community and any occupants of the premises on account of prior activities at the premises involving the discharge of firearms and warnings and threats spray painted on the property threatening acts of violence toward persons entering the premises. Affidavit of Brian Koopman at ¶13; ***Exhibits A, B and D.***

4. The condition and layout of the grounds surrounding the area to be searched made a safe entry by law enforcement personnel challenging. Affidavit of Brian Koopman at ¶¶8-9.

5. The search warrant issued by the disinterested State District Judge, based upon Koopman's oath or affirmation, particularly described the place to be searched and the persons or things to be seized. Affidavit of Brian Koopman at ¶¶4, 10; ***Exhibit C-1 through 2.***

6. Koopman announced the presence of law enforcement officers before seeking entry despite possession of a "no knock" search warrant. Affidavit of Brian Koopman, at ¶11. Myers' father, James B. Myers, appeared at the site of the search while the operation was in progress, but was uncooperative and was unable to confirm Myers' whereabouts, and the execution of the search warrant therefore proceeded

according to plan including the use of the SWAT Teams. *Id.* at ¶14; ***Exhibit F*** at p. 124, ln. 13, through p. 127, ln. 8.

7. No occupant was present at the premises during execution of the search warrant, no shots were fired, and no one was injured. *Id.* at ¶11.

8. Koopman seized from the premises described in the search warrant substances which he believed were chemicals to support the manufacture of methamphetamine based upon presumptive positive field test results. Affidavit of Brian Koopman at ¶¶12,15; ***Exhibit B-1 through 17***; ***Exhibit F*** at p. 103, ln. 13, through p. 106, ln. 6.

9. Koopman arrested Myers the next day after the search was conducted based upon the presumptive positive for amphetamine field test results of the substances seized during the September 6, 2007 search. Affidavit of Brian Koopman at ¶16.

10. Koopman first learned on November 5, 2007, during a preliminary hearing for Myers in the Larimer County District Court, that the CBI had ascertained that the substances seized during the search did not contain amphetamines or methamphetamines. Affidavit of Brian Koopman at ¶17; ***Exhibit E-11 through 14***; ***Exhibit F*** at p. 112, ln. 11, through p. 115, ln. 15; ***Exhibit G*** at p. 85, ln. 21, through p. 86, ln. 15.

11. Koopman learned after Myers' criminal case had been dismissed that the single ampule test kits which he used to perform the field tests on seized substances can produce "false positives" when testing sugar, a fact Koopman was unaware of at the time of the field testing performed on the substances seized during the search.

Affidavit of Brian Koopman at ¶18; ***Exhibit F*** at p. 103, ln. 13, through p. 107, ln. 7; p. 112, ln. 11, through p. 115, ln. 15; Report of David Stewart, Ph.D., ***Exhibit K***, and Dr. Stewart's deposition transcript, ***Exhibit L***.

12. Koopman is an experienced drug detective, having personally investigated approximately 50 different illegal methamphetamine laboratories and participated in the execution of approximately 200 search warrants in his career before the subject search. Affidavit of Brian Koopman at ¶7.

13. Koopman is a Rocky Mountain High Intensity Drug Trafficking Area ("RMHIDTA") court-certified meth lab expert and meth lab instructor. Affidavit of Brian Koopman at ¶1; ***Exhibit F*** at p. 13, ln. 13, through p. 14, ln. 8.

14. The following allegations as set forth in Koopman's Affidavit for a No Knock Search Warrant, ***Exhibit A***, have, through discovery, either been confirmed by Myers as undisputed, or it has been established that Myers is unable to dispute such factual allegations:

a. The CI told Koopman that the old brick building located at 1101 North Madison, Loveland, Colorado contained laboratory glassware, ***Exhibit F*** at p. 16, lns. 10-23;

b. The following information set forth in the Affidavit for a No knock Search Warrant, attributed by Koopman to the CI, has presumably been confirmed by Magistrate Hagerty as having been told to Koopman, in the Restriction Level 2 documents found at docket #189 and #194:

> On May 4, 2007 a reliable confidential informant (CI), who wishes to remain confidential for fear of retaliation, told me that there is a methamphetamine lab located in the attic area of an old brick

building located at 1101 N. Madison, Loveland CO. The CI said that they saw this lab and described it as consisting of "expensive" looking laboratory glassware with a large round bottom flask seated inside of a large heating mantle, flat bottom glass flasks with red liquids, hoses, tubes and coiled glassware. *Based on my training and experience, I believe the coiled glassware to be that of a distillation process I have seen used in methamphetamine labs before.*[3] The CI said that they typically produce 12 ounce batches of methamphetamine from each cook and that they conduct these cooks primarily on weekends and in the very early hours of the morning. The CI said that there are at least two wireless cameras at 1101 N. Madison, Loveland CO which face down the driveway towards Madison Ave. and one that faces the Loveland Police Department. The CI stated said [sic] that Jeremy Chad Myers, the primary resident, has several dogs, possible Rottweilers, at 1101 N. Madison, Loveland CO that are trained to attack anyone wearing a uniform. The CI described specific areas at 1101 N. Madison, Loveland CO where Myers has been dumping waste product from the methamphetamine cooks *in which I was able to verify the existence of these locations as being a concrete type shed with a metal grate catwalk inside and the floor drops approximately twenty feet into the ground which is filled with approximately ten feet of water.* Additionally, Myers is allegedly dumping waste into an old molasses silo west of the home. *I was able to verify the existence [of] this spot as being an old silo with a square hole cut into the side and can be accessed by a ladder about ten' off the ground. Inside of the silo, it is filled almost to the edge of the hole with a dark liquid having the consistence of water. The informant that provided this information has historically provided information that has been verified as true and has assisted the Loveland Police Department in the location of known Felony fugitives.*

The CI identified Jeremy Chad Myers, who is known to the CI as either "Jeremy" or "Red," as the primary person living at 1101 N. Madison Street, Loveland, CO. The CI said that Myers is the primary person cooking the methamphetamine in the attic and owns all of the glassware that is being used in the process there.

. . .

The CI told me that a subject who they only know as "Worm" and who was later identified by the CI as Shane McWhorter is one of several individuals assisting in the cooking of methamphetamine in

[3] Observations and conclusions of Koopman are in italics.

> the attic area of the home. The CI said that they have seen McWhorter wearing a painter's mask and actively being involved in the manufacture process. The CI also stated that McWhorter, at times, will take a SKS rifle equipped with a scope and hide inside the top of one of the outbuildings on the property and watch for police or other civilian traffic in the area while methamphetamine is being cooked inside of the brick home.
>
> . . .
>
> The same CI that provided the information on this methamphetamine lab told me that Myers will sometimes bury finished product in various places on the property as well as hide different components of his methamphetamine lab in different areas on the property to avoid detection or discovery by the police or other methamphetamine users.
>
> . . .
>
> The CI said that Myers has suspected people of looking in his windows recently and has fired shots at the windows from inside the brick building when he sees this. *I have noted seeing several windows broken out of the brick building in the past few weeks.* The CI said that Myers has fired his shotgun at his/her direction in the past, but did not hit them.

Koopman, in his deposition, confirmed that the foregoing factual information was in fact provided to him by the CI at the inception of the investigation in May 2007. ***Exhibit F*** at p. 14, ln. 5, through p. 15, ln. 7; p. 16, ln. 10, through p. 18, ln. 24; p. 54, ln. 24, through p. 55, ln. 5; p. 81, ln. 9, through p 82, ln. 6; p. 144, ln. 16, thorugh p. 147, ln. 20; p. 151, ln. 16, through p. 152, ln. 5.

c. Koopman, while conducting surveillance at 1101 N. Madison,

Loveland, CO, was able to identify Myers as routinely[4] being present at 1101 N. Madison, Loveland, CO, ***Exhibit F*** at p. 31, lns. 10-18; p. 54, ln. 24, through p. 55, ln. 5; p. 63, ln. 25, through p. 64, ln. 2, which was confirmed by Myers, ***Exhibit G*** at p. 23, ln. 14, through p. 24, ln. 5.

d. Koopman saw Myers walking around the property and identified him driving a black Ford pickup truck which was listed to Jeremy Myers that was regularly parked on the west side of the brick home. ***Exhibit F*** at p. 25, ln. 24, through p. 26, ln. 7; p. 27, lns. 7-9; p. 31, lns. 10-18 [validating that Jeremy Myers was the person that was residing at the property]; ***Exhibit G*** at p. 26, ln. 13, through p. 27, ln. 25.

e. Koopman, for several months, monitored a video surveillance system that had been placed by the LCDTF to observe the activity on the east, west and north sides of the brick building located at 1101 N. Madison and noted seeing Myers there on a regular basis. ***Exhibit F*** at p. 32, ln. 20, through p. 46, ln. 22; p. 58, lns. 18-25; p. 63, ln. 25, through p. 64, ln. 2; ***Exhibit G*** at p. 23, ln. 14, through p. 24, ln. 5.

f. A criminal history check on Myers revealed that he had been charged with Dangerous Drugs in September 2002 and received a three year deferred sentence. He was also charged with Felony Possession of a weapon during that case as well as possession of marijuana and

[4] Koopman clarified in his Defendant's Answers to Plaintiff's First Set of Interrogatories, Interrogatory No. 10, ***Exhibit H***, that in retrospect, he should have used the word "routinely," instead of "on almost a daily basis" in the affidavit to describe the frequency of Myers' presence on the property but that the essence remained the same.

hallucinogenic mushrooms. ***Exhibit E*** at p. 46, ln. 5, through p. 54, ln. 24; p. 57, ln. 12, through p. 59, ln. 8; ***Exhibit G*** at p. 46, ln. 5, through p. 52, ln. 16; p. 57, ln. 12, through p. 59, ln. 8.

g. Myers had shotguns and rifles, including rifles with scopes, on the premises. ***Exhibit G*** at p. 39, ln. 25, through p. 40, ln. 15; p. 55, ln. 22, through p. 56, ln. 1.

h. Since 2002, the LCDTF had received information that McWhorter was distributing methamphetamine throughout the Larimer County area. ***Exhibit F*** at p. 72, ln. 14, through p. 74, ln.7; p. 74, ln. 15, through p. 75, ln. 4.[5]

i. McWhorter had been arrested by the LPD in the past while in possession of methamphetamine. Defendant's Third Fed.R.Civ.P. 26(e) Supplemental Disclosure dated August 28, 2012 at attached LPD Offense Report dated March 15, 2004, Activity No.: 2004-002010, ***Exhibit I***.[6]

j. Koopman collected the trash that had been placed into a dumpster and placed out for pick up at 1101 N. Madison on several occasions, including on July 24, August 21 and September 4, 2007. ***Exhibit F*** at p.

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[5] Koopman has recently checked the NCDTF intelligence database and determined that the intelligence information the LCDTF previously held on McWhorter has been purged in accordance with policy that calls for intelligence information to be expunged if no new information has been provided about the intelligence subject within the prior 5 years. See ***Exhibit F*** at p. 74, lns. 2-14; p. 77, lns. 8-18.

[6] Other than relying upon a "background check" to dispute the statement in the search warrant affidavit that McWhorter had been arrested by the LPD in the past while in the possession of methamphetamine, Myers was unable to contradict the information about McWhorter's prior arrest while in possession of methamphetamine as definitively confirmed in ***Exhibit I***. See ***Exhibit G*** at p. 123, lns. 2-7.

91, ln. 14, through p. 92, ln. 4. Myers is unable to dispute these facts. ***Exhibit G*** at p. 123, lns. 8-19. Myers disposed his own refuge and garbage into the trash receptacle while residing at 1101 N. Madison. ***Exhibit G*** at p. 61, lns. 5-17; ***Exhibit F*** at p. 141, ln. 12, through p. 142, ln. 18.

k. During several of the collections of trash, Koopman found items suspected of being used or that are part of a methamphetamine lab. Specifically, on July 24, 2007, Koopman found a plastic water bottle wrapped in blue painter's tape that was contorted in a fashion to lead him to believe that a chemical reaction was possibly conducted inside of it. There were no fluids to test inside of this container, and it appeared to be very dry, as if a solvent had been inside of it, while the remaining bottles found in the trash had condensation built up inside of them. Koopman also found rolling papers and a green stem from a suspected marijuana plant that Koopman field tested and found that it tested presumptive positive for the presence of marijuana. Koopman also found business cards with the name "Jeremy Myers" printed on them as well gun targets that had been shot. ***Exhibit F*** at p. 92, ln. 5, through p. 93, ln. 20; p. 151, ln. 16, through p. 152, ln. 5; Myers is unable to dispute these facts. ***Exhibit G*** at p. 123, ln. 20, through p. 128, ln. 12.

l. On August 21, 2007, Koopman found a Q-tip with black residue that field tested presumptive positive for the presence of amphetamines, a thick paper towel that had a brown circular stain on it that field tested

presumptive positive for ephedrine, ID documents for Myers, and rolling papers. In addition, Koopman found orange "target spots" that are commonly used on shooting targets for sighting in a rifle scope. ***Exhibit F*** at p. 93, ln. 21, through p. 95, ln. 17. Myers is unable to dispute these facts. ***Exhibit G*** at p. 128, ln. 13 – p. 129, ln. 20; p. 130, lns. 2-6.

m. On September 4, 2007, Koopman found a blue paper towel that had a similar stain to that of the paper towel found on August 21, 2007 that he field tested for ephedrine, and the test was inconclusive for the presence of ephedrine. Koopman believed it was inconclusive because the color change for ephedrine is purple, which is similar to the color of the paper towel, making it extremely difficult to note a color change. The fluid surrounding the sample of blue paper towel did, however, have a slight color change to purple, leading Koopman to believe that ephedrine may have been located on this paper towel. ***Exhibit A*** at p. 4. Myers is unable to dispute these facts. ***Exhibit G*** at p. 129, ln. 21, through p. 130, ln. 1; p. 131, lns. 7-17.

n. During a review of the video surveillance of 1101 N. Madison, Loveland, CO, and during stationary surveillance near this property, Koopman had seen multiple vehicles making short-term stops there at all times throughout the day and night, which amount and duration of stops was, to Koopman, indicative of drug trafficking. ***Exhibit F*** at p. 24, lns. 2-11; p. 25, ln. 24, through p. 26, ln. 3; p. 45, lns. 1-24, p. 46, lns. 3-10, lns. 17-22; p. 47, lns. 19-24; p. 47, ln. 25, through p. 51, ln. 1; p. 66, ln. 12,

through p. 67, ln. 21; p. 69, lns. 15-21; p. 70, lns. 3-8; p. 70, ln. 21, through p. 71, ln. 7. Myers is unable to dispute these facts. ***Exhibit G*** at p. 31, ln. 18, through p. 32, ln. 19; p. 133, lns. 11-16; p. 133, ln. 24, through p. 134, ln. 19.

o. During use of the surveillance camera pointed at the west side of the brick building, Koopman saw at least one large Rottweiler dog roaming the premises. ***Exhibit F*** at p. 55, ln. 20, through p. 58, ln. 16. Myers is unable to dispute this fact. ***Exhibit G*** at p. 35, lns. 4-16; p. 134, ln. 20, through p. 135, ln. 8.

p. Painted on the sides of the brick building and on a white colored outbuilding located to the north of the brick building are the words "No Trespassing," "Trespassers Will Be Shot," and "No Photographers, This Means You!". ***Exhibit F*** at p. 118, ln. 22, through p. 119, ln. 6; p. 126, lns. 17-18. Myers and his father admit having spray painted these and other threats of violence on the buildings. ***Exhibit G*** at p. 31, ln. 5, through p. 32, ln. 4; p. 32, lns. 8-15; p. 60, lns. 7-10; Deposition of James B. Myers dated June 20, 2012 at p. 41, lns. 3-6, ***Exhibit J.***

q. Koopman spoke to several people who were employed in close proximity to 1101 N. Madison, Loveland, CO and they had all reported hearing gun shots late at night coming from the property. Defendant's Answers to Plaintiff's First Set of Interrogatories, Interrogatory No. 12 at 5-6, ***Exhibit H.***

r. Koopman noted seeing several windows broken out of the brick building in the past few weeks before submission of his Affidavit in Support of the Search Warrant. ***Exhibit F*** at p. 119, lns. 7-15. Myers confirmed the existence of broken windows in the red brick building, and cannot dispute that some of the windows may have been shot out. ***Exhibit G*** at p. 28, ln. 7, through p. 30, ln. 3; p. 55, lns. 11-21.

Careful comparison of Koopman's Affidavit for a No Knock Search Warrant, ***Exhibit A***, to the aforementioned discovery responses and deposition testimony reflects that only the following "facts" as asserted in the said affidavit may *arguably* be considered as disputed:

- Koopman's statement that he had seen Myers entering a large circular concrete structure located on the southwest corner of the brick building that has a small entryway as well as looking at unknown objects potentially buried in the ground near the brick building. *Compare* ***Exhibit F***, p. 59, ln. 1 – p. 63, ln. 24 *with* ***Exhibit G***, p. 28, lns. 1-6; p. 59, lns. 9-18.

V. ARGUMENT AND LEGAL AUTHORITY

A. Koopman is entitled to summary judgment as to the sole malicious prosecution claim because probable cause existed as a matter of law.

1. Standard of review/burden of proof.

An affidavit establishes probable cause for a search warrant if the totality of the information it contains establishes the "fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Roach,* 582 F.3d 1192, 1200 (10th Cir. 2009). The affidavit must show a "nexis between . . . suspected criminal

activity and the place to be searched . . . ." *Id.* "Searches conducted pursuant to a warrant are favored, and, as such the magistrate's determination that probable cause exists is entitled to great deference." *Id. Cf. Ashcroft v. Al-kidd,* ____ U.S. _____, _____, 131 S.Ct. 2074, 2080 (2011) ("Fourth Amendment reasonableness 'is predominantly an objective inquiry' by which the court must ask whether the circumstances, viewed objectively, justify the challenged action. If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials.") (emphasis in original). ("This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts.") ("Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.") Law enforcement officers' judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. *United States v. Watson*, 423 U.S. 411, 423, 96 S.Ct. 820, 827 (1976). "A judicial officer's 'judgment call' in determining probable cause, although not conclusive, is entitled to substantial evidentiary weight in suits seeking to impose personal liability on the police officer." *Malley v. Briggs,* 475 U.S. 335, 354, 106 S.Ct. 1092, 1103 (1986).

In a malicious prosecution action, whether a given set of facts "supposing to be true . . . amount[s] to probable cause, is a question of law" for the court, not a question of fact for the jury. *Miller v. Arbogast,* 445 Fed.Appx. 116, 123 (10th Cir. 2011); *Rouse v. Burnham*, 51 F.2d 709, 712 (10th Cir. 1931). Probable cause for an arrest warrant is established by demonstrating a substantial probability that a crime has been committed and that a specific individual committed the crime. *Wolford v. Lasater,* 78 F.3d 484, 489 (10th Cir. 1996). Of course, it is a violation of the Fourth Amendment for an arrest

warrant affiant to "knowingly, or with reckless disregard for the truth," include false statements in the affidavit, or to knowingly or recklessly omit from the affidavit information which, if included, would have vitiated probable cause. *Id.* Where, however, false statements have been included in an arrest warrant affidavit, the existence of probable cause is determined by setting aside the false information and reviewing the remaining contents of the affidavit. *Id.* In a case involving information omitted from an affidavit, the existence of probable cause is determined "by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant." *Id.; Miller*, 445 Fed. Appx. at 119-20; *Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir. 2006).

Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raises a "fair probability," or a "substantial chance" of discovering evidence of criminal activity. *Safford Unified School District #1 v. Redding,* 557 U.S. 364, 371, 129 S.Ct. 2633, 2639 (2009). "We determine the existence of probable cause to arrest based on the totality of the circumstances." *United States v. Gordon,* 173 F.3d 761, 766 (10th Cir. 1999). "Probable cause rests on a reasonable probability that a crime has been committed, *not on certainty that illegal activity is afoot." Id. Cf. Pierson v. Ray,* 386 U.S. 547, 555, 87 S.Ct. 1213, 1218 (1967). ("A peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."); *Bruner v. Baker,* 506 F.3d 1021, 1026 (10th Cir. 2007) (An arrest warrant is valid and does not violate the Fourth Amendment if the warrant underlying it

was supported by probable cause *at the time of its issuance* even if later events establish that the target of the warrant should not have been arrested.)

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Fogarty v. Gallegos,* 523 F.3d 1147, 1159 (10th Cir. 2008); *Weigel v. Blank*, 544 F.3d 1143, 1152 (10th Cir. 2008); *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1872 (1989). Instead, in evaluating the existing probable cause, the court must consider whether the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Id.* at 1156. Thus, an officer's own subjective reason for the arrest is irrelevant, and it does not matter whether the arrestee was later charged with a crime. *Id.*

Police officers are entitled to a defense of "good faith and probable cause," even though an arrest might subsequently be proved to be unconstitutional. *Butz v. Economou,* 438 U.S. 478, 496, 98 S.Ct. 2894, 2905 (1978). It is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present. *Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 3039 (1987). In such cases those officials should not be held personally liable. *Id.,* 107 S.Ct. at 3040.

2. Myers cannot meet his burden of proving a Section 1983 malicious prosecution cause of action because probable cause for the search and arrest existed as a matter of law.

In this Circuit, when addressing §1983 malicious prosecution claims, the court must use the common law elements of malicious prosecution as the "starting point" of its analysis; however, the ultimate question is whether Myers has proven the deprivation of a constitutional right as to which the court must look to both the Fourth and Fourteenth Amendments.[7] *Novitsky v. City of Aurora,* 491 F.3d 1244, 1247-58 (10th Cir. 2007). *But see Becker v. Kroll*, 494 F.3d 904, 920 (10th Cir. 2007) (if anything, it's the Fourth Amendment—not the procedural due process protection of the Fourteenth Amendment—that supports a §1983 malicious prosecution claim because the Fourth Amendment adequately protected Myers' constitutional liberty interests, and Myers therefore has no *procedural* due process claim based on pre-trial deprivations of physical liberty).

The elements of the common law tort of malicious prosecution, as applicable in a §1983 claim, are: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) there was no probable cause to support the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages. *Novitsky,* 491 F.3d at 1258.

Here, based upon the aforementioned undisputed facts, Myers cannot meet his burden of proving the claim for malicious prosecution because there <u>was</u> probable cause *as a matter of law* to support the search, arrest, weekend confinement and

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[7] Koopman preserves all his arguments as set forth in his pending Motion for Judgment on the Pleadings [#167, filed 03/08/2012] that neither the Fourth nor the Fourteenth Amendments provides an adequate constitutional basis for his §1983 malicious prosecution claim.

prosecution sufficient to satisfy the requirements of Fourteenth Amendment due process and the Fourth Amendment, assuming, *arguendo,* that such constitutional provisions even apply to a malicious prosecution claim involving no post-trial deprivation of liberty. In other words, there is no genuine issue of material fact that the facts and circumstances within Koopman's knowledge in September 2007, and of which he had reasonably trustworthy information, raised a "fair probability" or a "substantial chance" of discovering evidence of criminal activity at Myers' premises involving Myers. *See* Statement of Undisputed Facts, ¶¶1-14. Even after disregarding the only remaining factual disputes concerning whether or not (1) Myers entered a large circular concrete structure located on the southwest corner of the brick building and (2) was seen by Koopman looking at unknown objects potentially buried in the ground near the brick building, it is patently obvious that probable cause still existed *as a matter of law. Roach,* 582 F.3d at 1200 (An affidavit establishes probable cause for a search warrant if the totality of the information it contains establishes the fair probability that contraband or evidence of a crime will be found in a particular place, which affidavit must show a "nexis between . . . suspected criminal activity and the place to be searched . . . .").

Because probable cause existed as a matter of law, Myers cannot, as a matter of law, establish the third element of a malicious prosecution claim—lack of probable cause. Koopman is therefore entitled to summary judgment as to the sole malicious prosecution claim.

B. <u>Myers cannot, as a matter of law, prove that Koopman acted with malice.</u>

Fourth Amendment reasonableness is "predominantly an objective inquiry," *Ashcroft,* ____ U.S. at ___, 131 S.Ct. at 2080, by which the court asks whether "the

circumstances, viewed objectively, justify [the challenged] action." *Id.* "If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials. This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts . . . ." *Id.* (emphasis in original) (citation omitted); *accord, id.,* at 2083 ("efficient and even handed application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer."); *Wren v. United States,* 517 U.S. 806, 116 S.Ct. 1769 (1966) (cited in *Reichle v. Howards,* ___ U.S. ____, 132 S.Ct. 2088, 2012 WL 1969351 *5, n.5 (2012)) (holding that a traffic stop supported by probable cause did not violate the Fourth Amendment regardless of the officer's actual motivations); *Ashcroft,* ___ U.S. at ___, 131 S.Ct. at 2090, *Sotomayor, J. concurring* ("a government official's subjective intent is generally 'irrelevant in determining whether that officer's actions violate the Fourth Amendment . . .'"). Therefore, the subjective intent of Koopman is constitutionally irrelevant notwithstanding that the common law tort of malicious prosecution requires proof of "malice."

Alternatively, *if* Koopman's alleged "malicious motive" remains a viable constitutional factor, Myers has failed to demonstrate the existence of sufficient evidence that Koopman acted with a malicious motive, or that the contradicted facts outlined in the Statement of Undisputed Facts, bulleted ¶, were in fact false statements included by Koopman in the affidavit in support of the search warrant and that Koopman's failure to recognize the mistake was intentional "rather than out of negligence or inadvertence." *Novitsky,* 491 F.3d at 1258; *Taylor v. Meacham,* 82 F.3d 1556, 1563 (10th Cir. 1996). Thus, Myers has failed to set forth sufficient evidence of

the fourth element (malice) of a malicious prosecution claim. *See Novitsky,* 491 F.3d at 1258.

Indeed, when questioned during his deposition regarding Myers' relationship to Koopman and any evidence of "malice" on Koopman's part, Myers acknowledged he had no previous dealings with Koopman, ***Exhibit G*** at p. 108, lns. 4-7; that he first met Koopman when Myers turned himself in at the LPD on September 7, 2007, *id.* at p. 107, ln. 20, through p. 108, ln. 3; and that Myers had no evidence of "malice" on Koopman's part besides Myers being the subject of the investigation and search, *id.* at p. 109, ln. 2, through p. 110, ln. 4, and Myers' speculation that Koopman may have targeted Myers to seek a promotion or look good in the community, *id.* at p. 136, ln. 12, through p. 138, ln. 11, although Myers is unaware of any promotion that Koopman received. *Id.*

Therefore, as a matter of law, Myers has failed to demonstrate the existence of disputed facts that could arguably prove that Koopman acted with "malice" in connection with Koopman's role in the alleged malicious prosecution of Myers, thereby entitling Koopman to summary judgment on this basis alone.

C. Koopman is, alternatively, entitled to summary judgment based upon qualified immunity.

1. Standard of review/burden of proof.

A motion for summary judgment asserting qualified immunity must be reviewed differently from other summary judgment motions. See *Saucier v. Katz,* 533 U.S. 194, 201 (2001), *overruled in part, Pearson v. Callahan,* 555 U.S. 223, 129 S. Ct. 808 (2009); *Holland v. Harrington,* 268 F.3d 1179, 1185 (10th Cir. 2001), *cert. denied,* 535 U.S. 1056 (2002). After a defendant asserts qualified immunity, the burden shifts to the plaintiff.

Scull v. New Mexico, 236 F.3d 588, 595 (10th Cir. 2000). To overcome a claim of qualified immunity, the plaintiff first must establish "that the defendant's actions violated a constitutional or statutory right." *Albright v. Rodriguez,* 51 F.3d 1531, 1534 (10th Cir. 1995); *Wilson v. Layne,* 526 U.S. 603, 609 (1999). This burden means coming forward with specific facts establishing the violation. *Taylor v. Meacham,* 82 F.3d 1556, 1559 (10th Cir.1996).

If the plaintiff establishes a violation of a constitutional or statutory right, then he must demonstrate that the right at issue was clearly established *at the time* of the defendant's alleged unlawful conduct. *Albright,* 51 F.3d at 1534. To demonstrate clearly established law, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts," which find the law to be as the plaintiff maintains. *Medina v. City and County* of *Denver,* 960 F.2d 1493, 1498 (10th Cir.1992), *overruled in part, Williams v. City & County* of *Denver, 99* F.3d 1009, 1014 - 1015 (10th Cir. 1996). The plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law establishing that the defendant's actions clearly were prohibited. *Hilliard v. City and County* of *Denver,* 930 F.2d 1516, 1518 (10th Cir. 1991) (citing *Hannula v. City* of *Lakewood,* 907 F.2d 129, 131 (10th Cir. 1990)). In determining whether the right was "clearly established," the court assesses the objective legal reasonableness of the action at the time and asks whether "the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Wilson v. Layne,* 526 U.S. at 615. However, the plaintiff need not establish a '"precise factual correlation between the then-existing law and the case at hand . . . ." *Patrick v. Miller,* 953 F.2d 1240,1249 (10th Cir.1992) (quoting *Snell v.*

Tunnell, 920 F.2d 673, 699 (10th Cir. 1990)). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (quotations and citations omitted).

If the plaintiff satisfies both of these elements, then the burden shifts to the defendant. Unless the defendant demonstrates that there is no disputed issue of material fact relevant to the immunity analysis, a motion for summary judgment based on qualified immunity must be denied. *Salmon v. Schwarz,* 948 F.2d 1131, 1136 (10th Cir.1991). If the plaintiff fails to satisfy either part of the two-pronged inquiry, then the court must grant qualified immunity. *Albright,* 51 F.3d at 1535; *Goss v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001). In short, although the court must review the evidence in the light most favorable to the plaintiff, a defendant's assertion of qualified immunity may be overcome only when the record demonstrates clearly that the plaintiff has satisfied his heavy two-part burden. The Court may, in its discretion, consider the two parts of the test in the sequence it deems best "in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236, 129 S.Ct. at 818. In civil rights cases, a defendant's unlawful conduct must be demonstrated with specificity. *Davis v. Gracey,* 111 F.3d 1472, 1478 (10th Cir. 1997).

To satisfy the "heavy two-part burden" to avoid summary judgment, "merely pointing to an unsworn complaint is not enough. A plaintiff has an obligation to 'present some evidence to support the allegation; mere allegations, without more, are insufficient to avoid summary judgment.'" *Serna v. Colorado Department of Corrections*, 455 F.3d

1146, 1150-51 (10th Cir. 2006). "Unsubstantiated allegations carry no probative weight in summary judgment proceedings." *Id.* at 1151. Conclusory statements and testimony based merely on conjecture or subjective belief are not competent summary judgment evidence. *Rice v. United States,* 166 F.3d 1088, 1092 (10th Cir.), *cert. denied,* 120 S.Ct. 334 (1999).

2. Koopman is entitled to summary judgment based upon qualified immunity as to the malicious prosecution claim for alleged Fourth and Fourteenth Amendment violations.

As noted in Section A, Subsection 2, above, in this circuit, when addressing §1983 malicious prosecution claims, the court must use the common law elements of malicious prosecution as the "starting point" of its analysis; however, the ultimate question is whether plaintiff has proven the deprivation of a constitutional right as to which the court must look to both the Fourth and Fourteenth Amendments. *Novitsky,* 491 F.3d at 1257-58. *But see Becker,* 494 F.3d at 914-16 (suggesting that even if a Fourth Amendment-based §1983 malicious prosecution claim exists in the abstract, Myers' failure to plead a physical liberty-restricting "seizure" occurred after he was criminally charged renders the Fourth Amendment unavailable as a ground for his §1983 malicious prosecution claim) and at 920-21 (holding that post-deprivation state tort remedies are adequate to satisfy due process requirements, agreeing that a "state tort remedy 'knocks out any constitutional tort of malicious prosecution' based on [Fourteenth Amendment] due process"). *See Montgomery Ward & Co. v. Pherson,* 129 Colo. 502, 272 P.2d 643 (1954) (recognizing cause of action under Colorado law for tort of malicious prosecution).

As set forth in more detail in Defendant's Motion for Judgment on the Pleadings [#169, filed 03/08/2012], there is no Fourth or Fourteenth Amendment constitutional basis for a §1983 malicious prosecution claim.[8] If, *arguendo,* such a claim exists, there was no deprivation of Myers' liberty sufficient to constitute a seizure that would trigger the Fourth Amendment's protections after criminal charges were filed against Myers following a weekend detention in jail from which Myers bonded out, and after which criminal charges were later dismissed. *See* Amended Complaint filed 03/02/11, ¶¶ 24-28 at 10-12 [#127]; ***Exhibit G*** at p. 82, lns. 3-16; Becker, 494 F.3d at 914-16 ("A groundless charging decision may abuse the criminal process, but it does not, in and of itself, violate the Fourth Amendment absent a significant restriction on liberty."); ("standard conditions of pretrial release" are insufficient to constitute a Fourth Amendment "seizure").

Therefore, Myers cannot, as a matter of law, satisfy his burden of proving a violation of a constitution right, much less one that was "clearly established."

Alternatively, assuming *arguendo,* that Myers can prove a violation of a constitutional right that was "clearly established," Koopman is nevertheless entitled to qualified immunity as a matter of law due to the fact that he reasonably and objectively possessed probable cause when he swore out the affidavit in support of the request for the search warrant and later sought the arrest and prosecution of Myers. *See* Statement of Undisputed Facts, ¶¶1-14. *See Bowling*, 584 F.3d at 966.

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[8] Koopman incorporates herein by reference Defendant's Motion for Judgment on the Pleadings [#169, filed 03/08/2012] in its entirety.

The affidavit sworn out by Koopman in support of the request for a search warrant set forth in detail facts and circumstances within Koopman's knowledge and of which he had reasonably trustworthy information, both from a previously reliable CI and from his own investigation, sufficient to warrant a man of reasonable caution in the belief that an offense had been or was being committed by Myers. ***Exhibit A*** at ¶¶ 4-7; Statement of Undisputed Facts, ¶¶1-14. A disinterested State District Judge signed the search warrant, based upon Koopman's oath or affirmation, and issued a search warrant which particularly described the place to be searched and the persons or things to be seized. ***Exhibit A*** at ¶¶ 4-10, and ***Exhibit C*** thereto. This indisputably satisfied the Fourth Amendment's requirements. *See Bowling,* 584 F.3d at 967, 969 (Fourth Amendment requirements are "satisfied where . . . officers obtain a warrant, grounded in probable cause and phrased with sufficient particularity, from a magistrate of the relevant jurisdiction authorizing them to search a particular location . . . .") ("As specifically applied to searches, [p]robable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

Therefore, even if Myers has proven that a clearly established constitutional right was violated, Koopman is nevertheless entitled to qualified immunity based upon the fact that there is no genuine issue of material fact that the affidavit for search warrant, the search warrant itself, and the arrest warrant were based upon probable cause, thereby entitling Koopman to judgment as a matter of law notwithstanding that, as it turned out, no illegal drugs were seized, and the prosecution of Myers was abandoned by the district attorney. *See Gross,* 245 F.3d at 1156; *Redding,* 129 S.Ct. at 2639; *Weigel,* 544 F.3d at 1152.

Only where the warrant application is so lacking *in indicia* of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. *Malley v. Briggs,* 475 U.S. 335, 344-45, 106 S.Ct. 1092, 1098 (1986). Here, a reasonably well-trained officer in Koopman's position would – like Koopman – have believed that his affidavit did establish probable cause sufficient to apply for the search warrant. Presumptive positive field tests, which, as it turned out, consisted of a "false positive"[9] examination of sugar, also constituted probable cause for Koopman to seek Myers' arrest and prosecution until such time as the results of CBI's testing demonstrated the absence of controlled substances, which information did not become available to Koopman until during Myers' preliminary hearing. ***Exhibit F*** at p. 112, ln. 11, through p. 115, ln. 15; ***Exhibit G*** at p. 85, ln. 21, through p. 86, ln. 15.

Finally, when the qualified immunity inquiry turns on a subjective element, as it does when examining motive (*e.g.*, "malice"), the qualified immunity analysis is "modified slightly." *McBeth v. Hines*, 598 F.3d 708, 724 (10th Cir. 2010). The defendant must make a "prima facia showing of the objective reasonableness of the challenged conduct." *Id.* "If the defendant makes this prima facia showing, the plaintiff must then produce *specific evidence* of the defendant's culpable state of mind to survive summary judgment." *Id.* at 724, 725 (emphasis added). This Myers has failed to do as argued above in Section B.

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[9] See attached report of David Stewart, Ph.D., ***Exhibit K,*** and Dr. Stewart's deposition transcript, ***Exhibit L***; ***Exhibit F*** at p. 103, ln. 13, through p. 106, ln. 6; p. 106, ln. 22, through p. 107, ln. 7.

VI. CONCLUSION

Koopman respectfully moves that the Court grant him summary judgment as to the sole §1983 malicious prosecution claim because the undisputed facts demonstrate that Koopman acted with probable cause as a matter of law and without a malicious motive, or alternatively on the basis of the doctrine of qualified immunity.

DATED this 24th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, I electronically filed the foregoing DEFENDANT'S MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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