Acct # 73807401

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

JEREMY C. MYERS

Plaintiff,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police department, in his individual capacity;

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOCKET #230, FILED 09/24/2012)

Plaintiff, by and through his Attorney Randall R. Meyers, respectfully requests this Court deny Defendant's Motion for Summary Judgment (CM/ECF Docket #230, filed 09/24/2012). For his Response, Plaintiff states as follows:

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

Plaintiff's Counsel hereby certifies that he has read and complied with the Practice of Standards of this Court governing the formatting and marshaling of a response to a motion filed under Fed.R.Civ.P. 56.

II. INTRODUCTION

This is the second of two motions filed by Defendant that seeks dismissal based on qualified immunity. Defendant's motions are filed pursuant to Fed.R.Civ.P. 56. Defendant's latest motion discloses few new facts that are beneficial to his position. In

Defendant's second attempt, he continues to mischaracterize certain facts as "undisputed" and adds an additional list of facts he claims Plaintiff is "unable" to dispute, ostensibly to support his claim that he had probable cause. The stated "undisputed facts" in fact are disputed and Plaintiff addresses these disputed facts below.

III. PLAINTIFF'S STATEMENT OF FACTS

The following facts are what Plaintiff knows to be true from personal knowledge, review of the video surveillance, and his personal investigation. In addition, Plaintiff otherwise corrects or amends Defendant's STATEMENT OF UNDISPUTED FACTS (Defendant's Motion For Summary Judgment [#230] p. 4) as follows (Plaintiff's response corresponds to Defendant's statements by paragraph number):

1. Defendant's first paragraph contains three disputed statements. Defendant alleges that his probable cause arose from two sources, his own investigation and that information provided by a "reliable" informant. Finally, as his third statement of purported fact, Defendant asserts that the *in camera* interview of the CI by Magistrate Hagerty *confirms* the CI's existence and his/her reliability. (Defendant's Motion For Summary Judgment [#230] p. 5.)

a. Koopman's Investigation

Very little of Koopman's "own" investigation proved to provide probable cause as the record now shows. Much of Koopman's personal involvement in the investigation actually discredited the information provided by his CI. It is also revealing as to the reckless and malicious nature of his actions. Legally, only those investigative actions by

Koopman *prior* to the application for a search warrant will assist him on the issue of probable cause.

For instance, Koopman conducted a personal, physical surveillance of the subject property which occurred after he obtained the CI's report but prior to the installation of his surveillance cameras. **Exhibit A**, Koopman's deposition, at pg 21, ln 21-25, pg 22, ln 1-25. This pre-camera surveillance revealed nothing to confirm the CI's information other than that Plaintiff lived on the premises. **Exhibit A**, at pg 31, ln 10-21.

b. Informant's Reliability

Defendant has provided nothing to substantiate the reliability of his informant. Aside from the naked assertion in his affidavits and subsequent motions that his informant had previously provided accurate information *regarding the location of wanted fugitives* (Defendant's Motion For Summary Judgment [#230] p.5), the record is void of any specific information which would lend credibility to the informant's information and enable a magistrate to render an independent decision. First, the alleged prior truthful information used to substantiate the CI's reliability was of a type wholly unrelated to the subject matter in this case. The district court judge took the statement of reliability at face value and never required Koopman to provide the detailed and specific information legally required to support a claim that a confidential informant is reliable. Koopman can point to no single piece of evidence, outside of the information provided by his CI that provides probable cause or even substantiates the CI's information.

c. Magistrate's *In Camera* Interview of CI

Defendant improperly uses the Magistrate's interview of the CI as evidentiary support of 1) the CI's existence, and 2) the CI's information. Plaintiff believes that Magistrate Hagerty interviewed a person or persons. Plaintiff does not know what steps, if any, the magistrate took to verify that the person or persons was the same person or persons alleged to be the CI that provided the information as claimed by Koopman. In short, there is no information, due to the protective order [#54], from which anyone can reach any conclusions regarding the magistrate's interview. The magistrate's order only found that the CI was a "tipster" and that his identity disclosure "will not aid" Plaintiff's case.

Therefore, the basis of Plaintiff's premise in this case, that no such CI existed, remains unchanged in that the alleged information provided to Koopman was so substantially false that Plaintiff is only left to dispute that the CI, in the manner alleged by Koopman, ever existed. The inaccuracy of the CI's information is more readily apparent now after the search then it was to Plaintiff prior to the search.

2. Koopman's next statement of "fact" in his motion is that due to legitimate safety concerns he sought a "no-knock" search warrant. However, the warrant affidavit only references one prior event in 2002 and describes what Myers was 'charged" with (**Exhibit B** - Affidavit For a No Knock Search Warrant, p.3). At the time of the statement in the warrant affidavit and again in his motion for summary judgment, Koopman would have been fully aware of the factual circumstances and the disposition of the 2002 event. Koopman failed to reveal to the court, in either 2007 or now in 2012, that

Plaintiff's criminal record reflects no more than a misdemeanor conviction. Koopman also failed to reveal then, as now, that the illegal possession of a weapon charge involved the attempted manufacture of a gun silencer that was both amateurish and likely inoperable (**Exhibit C** – Supplemental Field Incident Report, p.2, ¶4). This methodology of information twisting employed by Detective Koopman is deceitful and misleading, since he is in possession of the full factual circumstances surrounding his claims. Jeremy Myers was convicted of a misdemeanor only in the 2002 event. Jeremy Myers has no conviction record of "drug related criminal offenses" stemming from that incident, contrary to Defendant Koopman's insinuation (CM/ECF Docket #230 Exhibit A-1, p. 2, ¶ 5). No other criminal charges have been filed against Mr. Myers since that incident. Affidavit of Jeremy C. Myers at p. 9, ¶ 24; **Exhibit D**.

3. Again, as in the preceding paragraph, Koopman deceives and thereby misleads the court in his expression of concern about the safety of law enforcement. Mr. Myers has never discharged a firearm on the premises since 2005 and has never been questioned by any law enforcement officer regarding any claim that a discharge had occurred. He has never had any complaint from any neighbor about such sounds. Douglas Stotz, a business neighbor, confirms that. Affidavit of Jeremy C. Myers at p. 9, ¶ 25; **Exhibit D**; Affidavit of Douglas Stotz; **Exhibit E**, (original filed as an attachment to Plaintiffs' Response to Defendants' Motion for Summary Judgment [#64].

Moreover, Koopman is or should be aware of the basis for the spray painted warnings on the buildings. There are numerous police reports in existence indicating,

and confirming the existence of the painted warnings years before the investigation by Koopman in 2007.

The premises have been the subject of extensive vandalism, theft, burglary, and gang graffiti since Jim Myers and his business partner have owned the property. The Myers' have taken steps they believed would discourage trespassers, which included painting signs on the buildings and spreading spent shell casings around the ground for effect. This decision had nothing to do with any drug operation on the premises because there never was any such operation. Affidavits of Jeremy C. Myers, **Exhibit D,** p. 11-12 ¶ 31-32 and James B. Myers, **Exhibit F,** p. 9 ¶ 28. Had Defendant been diligent in his pre-warrant investigation this information could have been easily discovered. To the extent that it was not, Koopman either intentionally or recklessly misled the court.

4. This statement is opinion, self-serving, and lacks factual support.

5. This assertion is inaccurate. The Affidavit for a No Knock Search Warrant (**Exhibit** B) describes the place to be searched as 1101 N. Madison St., Loveland, Colorado. The correct address is Madison *Avenue* rather than Street. Koopman's search encompassed the "white building" adjacent to the Myers' property at 1101 N. Madison Ave. The address of this adjacent property is 1149 N. Madison Ave. and is owned separately, locked, and not accessible by Plaintiff (**Exhibit F** - p. 9 ¶ 27). Much of the "incriminating evidence" seized that Koopman used to validate his search was seized from this property. This error by Koopman and his entourage was reckless,

careless, amateurish, and potentially fatal to their criminal investigation. **Exhibit A**, Koopman's deposition, at pg 116, ln 12-25, pg 117, ln 1-25, pg 118, ln 1-21.

6. Defendant's statement in this paragraph is inaccurate and disputed. The method used by Defendant in conducting the search, including the use of the SWAT team, was completely unnecessary. Jeremy Myers had not lived on the premises for over a month prior to the search, and Defendant Koopman was offered the keys to enter the building more than once by Jim Myers. Mr. Myers offered to let him in and tour the premises with him. Mr. Myers specifically advised Defendant Koopman that Jeremy had not lived on the property for over a month and was not there. The surveillance tapes, had Koopman reviewed them, would have confirmed that Plaintiff was not there. The force used caused extensive property damage that could have easily been avoided. Affidavit of James B. Myers at ¶ 23, p. 8, ¶ 24-26, p. 9; **Exhibit F.**

7. Plaintiff concurs with Defendant's statement in paragraph 7 of his Motion.

8. As previously noted, it is disputed that Defendant searched the proper premises identified in his Affidavit. Moreover, any belief Koopman held regarding "incriminating" evidence based on presumptive positive field test results was misplaced. Koopman misused and misread the field tests (**Exhibit G**, p. 11, ln 22-25, p. 12, ln 1-8.) he used despite acknowledging the multiple times he has used them. **Exhibit A**, Koopman's deposition, at p. 105, ln 24-25, p. 106, ln 1-14.

9. It is actually known only to Koopman as to why Plaintiff was arrested and jailed by Defendant other than to presume it was done maliciously. Myers, with counsel, had arranged to turn himself in on a warrant with a pre-set bond amount. It

information cited by the CI and contained in the warrant affidavit of Koopman has been shown to be false.

c. thru e. This is, apparently, Defendant's very laborious way of stating that Plaintiff at one time had resided on the premises at 1101 N. Madison. A fact not disputed by Plaintiff.

f. thru g. These statements are only partially correct. As previously noted, the statement made in paragraph g. is made without context in that any weapons possessed by Plaintiff were legal and therefore provides no basis for Defendant in establishing probable cause.

h. This is a false statement as is the content of Defendant's fn5. (Defendant's Motion For Summary Judgment [#230] p. 12.) Defendant checked the NCDTF intelligence database based on questions Plaintiff posed to Koopman at his deposition (Koopman Deposition, **Exhibit A,** p. 80, ln 15-25.) and the subsequent issuance by Plaintiff of a subpoena *duces tecum* to the drug task force to ascertain the accuracy of Defendant's assertion in the warrant affidavit **(Exhibit I)**. Of course, Koopman would know that there was no such information in the task force records, hence the footnote to his motion. In fact, the response to the subpoena revealed only two records on Shane McWhorter, one was an investigation into a stolen rabbit and the other involved a careless driving incident **(Exhibit J)**. Clearly then, the LCDTF records on Mr. McWhorter were not purged as indicated because two records continue to exist. Perhaps more telling is the fact that if the records were purged every 5 years they would have been purged already by the investigation in 2007. Even giving Koopman the

j. As previously noted, Plaintiff moved from 1101 Madison Ave. on July 28, 2007. Trash searches made subsequent to that date would most definitely not be attributable to Plaintiff. This is an additional consequence of Koopman's poor investigation. Both personal observation and video surveillance would have confirmed this. Affidavit of Jeremy C. Myers, **Exhibit D**, p. 10, ¶ 29.

l. thru m. The results of Koopman's trash search is the product of poor investigation, wrong conclusions, improper or intentional misuse of field tests and malice in that Defendant had a predetermined conclusion he was attempting to reach.

n. Plaintiff has disputed these facts. Affidavit of Jeremy C. Myers, **Exhibit D**, p. 5-6, ¶ 13-14.

o. Again, disputed by Plaintiff. Affidavits of Jeremy C. Myers, **Exhibit D**, p. 8, ¶ 20, and James B. Myers, **Exhibit F**, p. 5, ¶13B-14.

p. Plaintiff does not dispute the fact of the paintings. Plaintiff, his father, and previous sheriff's reports confirm these paintings were in existence well before this investigation. Affidavits of Jeremy C. Myers, **Exhibit D**, p. 11, ¶ 31, and James B. Myers, **Exhibit F**, p. 9, ¶ 28.

q. This is a false statement. After further discovery responses, Koopman was able to identify only one person he allegedly spoke to. Clearly the statement is either false or a misleading exaggeration. Affidavit of Jeremy C. Myers, **Exhibit D**, p. 9, ¶ 25.

r. Plaintiff disputes this statement. Affidavit of Jeremy C. Myers, **Exhibit D**, p. 12, ¶ 33.

As noted, very little, if any, of the facts stated in Koopman's warrant affidavit and the results of his ensuing search are undisputed.

V. ARGUMENT AND LEGAL AUTHORITY

A. Introduction

Defendant's most recent Motion for Summary Judgment [#230], appears to argue a mix of his first motion on qualified immunity, his subsequent motion for Judgment on the Pleadings, and his current motion which, by all accounts, is a hybrid of a motion for summary judgment and a motion for summary judgment based on qualified immunity. Irrespective of what it is titled, Defendant seeks summary judgment on the dual issues of probable cause and malicious prosecution.

This Court has already resolved many of the constitutional issues that Defendant argues. In the Order Concerning Defendants' Motion to Dismiss [#140], this Court stated, ". . . .given the analysis of the Tenth Circuit in ***Mondragon,*** I conclude that Myers has stated a potentially viable procedural due process claim under the Fourteenth Amendment". Likewise, as to Plaintiff's Fourth Amendment claim, this Court found, "Assuming these specific factual allegations [in the amended complaint] about Koopman to be true, it is plausible that Myers can establish the malice element of a Fourth Amendment malicious prosecution claim".

B. Probable Cause

Plaintiff first addresses the issue of probable cause because, as a threshold issue, the Plaintiff's claim for malicious prosecution fails if probable cause exists.

Novitsky v. City of Aurora, 491 F.3d 1244, 1258 (10th Cir. 2007), **Order Concerning Motions For Summary Judgment** [#126], at p. 10.

Summary judgment is a remedy intended to be used sparingly. "A court grants summary judgment for the moving party only where there is no genuine issue as to any material fact in the pleadings, depositions, answers to interrogatories, admissions, and affidavits." ***Barton v. City and County of Denver***, 432 F.Supp.2d 1178, 1188 (D.Colo. 2006) citing Fed.R.Civ.P. 56. As to the matter of probable cause, given that this is a civil action brought under §1983, the determination of whether probable cause existed is not a proper subject for summary judgment: it is a matter of fact to be tried. "We have long recognized that it is a jury question in a civil rights suit whether an officer had probable cause to arrest." ***DeLoach v. Bevers***, 922 F.2d 618, 623 (10th Cir. 1990). "Where there is a question of fact or 'room for a difference of opinion' about the existence of probable cause, it is a proper question for a jury." ***Asten v. City of Boulder***, 652 F.Supp.2d 1188, 1201 (D.Colo. 2009), *quoting* ***Bruner v. Baker***, 506 F.3d 1021, 1028 (10th Cir. 2007).

Here, Koopman's erroneous determination of probable cause was based almost entirely on information received from his CI. The record indicates that Koopman was able to corroborate very little of the informant's information other than the fact that Plaintiff resided there at 1101 N. Madison Ave. at the beginning of the investigation Koopman's Deposition, **Exhibit A,** p. 31, ln 13-21.

Plaintiff starts first with his complaint that no probable cause existed for the issuance of the search warrant. This argument consists of two components.

1. Defendant initiated this investigation based solely on information provided by an undisclosed CI. He claimed the informant to be reliable, but failed to offer the court sufficient detail as to this determination. Koopman's only claim is that the CI had previously given him reliable information and that the topic of the previous information was information on known fugitives, not meth labs. This might support the conclusion that the CI is a "snitch" but provides the reviewing court with no information as to the basis of the CI's knowledge. For instance, would the CI know what a meth lab looked like, would the CI know what meth is, can the CI identify sources of distribution, etc. The CI is not a citizen or victim informant and, thus, the relaxed standard applicable to those types of informants do not apply here.

In ***Sumpter, et al. v. Elbert County Sheriff's Office, et al.***, 10-cv-00580-WYD-MJW (D.Colo. 2012) the Court commented on the more stringent analysis applicable when considering information received from an informant for probable cause. In pertinent part, the court stated, "When examining informant evidence used to establish probable cause. . . the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu . . . . . ." (citing ***Easton v. City of Boulder***, 776 F.2d 1441 (10th Cir 1985). This was not the particular issue addressed by the ***Sumpter*** court but is a local, contemporaneous, illustration of the general view regarding "criminal" informants. It is clear that this standard, nor anything close to it, was employed here.

The affidavit also fails to reach the standards dictated by ***Illinois v. Gates***, *103 S.Ct. 2317, 462 U.S. 213 (1983).* The affidavit submitted by Koopman lacks the

required detail as to the veracity or reliability of the CI, lacks sufficient corroboration any of the informant's information and lacks the personal investigation required to pass the test set out in ***Gates*** or ***Aguilar v. Texas***, 378 U.S. 108, 12 L. Ed.2d 723, 84 S. Ct 1509. **United States v. Hittle**, 575 F.2d 799 (10th Cir. 1978).

2. Plaintiff's second prong is that much of the information in the affidavit is false, and/or at best an intentional or reckless misrepresentation of the facts. For instance, Plaintiff believes the CI's representations regarding Shane McWhorter, as an alleged accomplice, should have been investigated by Koopman. Aside from the argument that McWhorter was just as subject to arrest and prosecution as Plaintiff, Koopman made no effort to locate McWhorter. Koopman's Deposition, **Exhibit A**, p. 83, ln 3-15. Had he done so, he would have discovered what Plaintiff discovered, which was that McWhorter had left the state more than a year earlier and had since not returned. Gosar Affidavit, **Exhibit H, ¶** 4. An officer cannot rely on a judicial determination of probable cause if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant. ***Malley v. Briggs*** 475 U.S. 335, 106 S.Ct. 1092 (1986). See ***Donta v. Hooper***, 774 F.2d 716, 718-19 (6th Cir. 1985).

Koopman falsified his information on McWhorter in that there is no known information, received by the drug task force, since 2002 or at any time before or after that McWhorter was distributing methamphetamine in the Larimer County area.

Koopman's wording of the statement that McWhorter was arrested "while in possession of methamphetamine" is carefully crafted to avoid giving the court the

complete information on this incident in much the same manner as his statement regarding the 2002 arrest of Plaintiff. To be sure, certainly at a minimum this information was of the type of "intelligence" the drug task force purportedly had on McWhorter as was the CI's allegations that McWhorter was involved in the present case. Yet, neither event made its way into the drug task force records. (See Koopman Deposition, **Exhibit A,** p. 72, ln 22-25; p. 73, ln 1-25; p. 74, ln 1-20).

Koopman also avoided complete and forthright information on the spent shell casings and warnings painted on the buildings. This information was available to Koopman prior to the application for the search warrant. This detective had no problem searching records for a criminal history on Myers that he recklessly used in his affidavit, but exculpatory or mitigating information failed to make its way onto paper. Lastly, Koopman argues that his observations during stationary surveillance and via two remote cameras definitively show probable case. This now appears blatantly false.

Thus, armed with an affidavit of false statements, false impressions, and reckless information, Koopman obtained his warrant from an unsuspecting magistrate.

Genuine issues as to material facts as to whether probable cause existed for Defendant Koopman's actions clearly exist. (1) Defendant Koopman misrepresented the incident in 2002. No reasonable officer would interpret as he did what transpired in 2002 and rely on it as he did for probable cause. (2) Nothing stated by Koopman in his affidavit as to the information from the alleged confidential informant proved to be true other than Myers resided there at one time. Much of what he claimed could have been disproved by a reasonable review of the video surveillance he took of the premises. (3)

Substantive factual disputes exist between his affidavit, statements in his deposition and those of Jeremy Myers and James Myers. (4) He did not search the correct property yet claimed existence of inculpatory evidence that came from property not owned or accessible by Plaintiffs. Affidavit of Jeremy C. Myers at ¶¶ 3, 5 - 20; **Exhibit I** (original filed as an attachment to Plaintiffs' Response to Defendants' Motion for Summary Judgment [#64].; Affidavit of James B. Myers at ¶¶ 2, 4, 9 – 12, 14 - 16; **Exhibit J.** (original filed as an attachment to Plaintiffs' Response to Defendants' Motion for Summary Judgment [#64]. (5) All seven of his field tests produced false positives as shown by the CBI results, a 100% failure rate from an "experienced" drug investigator who has used the identical test kits hundreds of times. Koopman's Deposition, **Exhibit A**, p107, ln 2-10. An independent professional evaluation of the property shows there never was any presence of meth. Affidavit of James E. Dennison, Ph.D., CIH, **Exhibit K.**

Plaintiff respectfully submits Defendant Koopman did not have any probable cause to execute the search warrant. No reasonable officer would have taken the actions Defendant Koopman took. At a minimum, a genuine issue exists as to this material fact. For that reason, Defendants' Motion should be denied.

D. Plaintiffs' Claim of Malicious Prosecution

The Tenth Circuit has recognized the "viability of malicious prosecution claims under § 1983." ***Taylor v. Meacham***, 82 F.3d 1556, 1560 (10th Cir. 1996). But the decisions have made it clear that while common law elements are a "starting point," the "core inquiry" is "whether the plaintiff has alleged an actionable constitutional

intrusion on the individual's Fourth Amendment interests." *Id.*, at 1190. The inquiry into this claim must focus on whether the force used "was reasonable under the facts and circumstances presented." ***Fogarty v. Gallegos***, 523 F.3d 1147, 1159 (10th Cir. 2008). Thus, a factual not a legal determination is required. Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers and others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* Applying this standard, Plaintiff has clearly raised a genuine issue as to these material facts.

The "crime at issue" was a significant allegation but not one that automatically presupposes a threat to anyone, particularly given the reality of the facts as they existed at 1101 Madison Avenue. The "suspect" was not on the property and had not been living there for over a month. Defendant Koopman was given this information prior to the initiation of the SWAT team actions, and he could have independently verified that prior to September 5, 2007 by simply reviewing his own surveillance tapes. The record from the 2002 incident, known and cited by Koopman, repeatedly noted that Jeremy Myers cooperated with officers and caused no problem whatsoever.

A close review of Defendant Koopman's affidavit for the search warrant reveals very little support for advocating the use of the SWAT team. He must have been concerned about that, as he tried to trump up "concern" over public safety, knowing that was essential to a determination of reasonableness. He painted a far more vivid, less accurate description of what transpired in 2002 than the record or the facts support. But that is no help. "An otherwise insufficient affidavit cannot be rehabilitated by testimony

DATED the 15th day of October, 2012.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 15th day of October 2012, I electronically filed the foregoing Response to Defendant Koopman'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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