

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 IN LIMINE

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, Wick & Trautwein, LLC and the Loveland City Attorney's Office, respectfully submits this Motion in Limine, requesting the Court to exclude from evidence, mention, comment or argument at trial the following topics, testimony and evidence:

D.C.COLO.LCivR 7.1 CERTIFICATION

Undersigned defense counsel hereby certifies that he has conferred with counsel for Plaintiff. Plaintiff is opposed to this motion.

A. Evidence concerning Koopman's subsequent investigation into whether the seized items constituted evidence of an explosives lab should be excluded.

Shortly before drug-related criminal charges against Plaintiff Jeremy C. Myers ("Myers") were dismissed on motion of the prosecutor, Koopman pursued a secondary investigation, including testing by a forensic laboratory at Colorado State University-Pueblo ("CSU-Pueblo") of the seized substances, pursuant to a separate search warrant obtained by Koopman on November 9, 2007, as part of an investigation to

determine whether the seized items constituted evidence of an explosives lab. While the CSU-Pueblo testing revealed that glycerol was present in some of the tested items, and glycerol is a component of the manufacture of nitroglycerin, which could be consistent with the manufacture of explosives (and thereby consistent with Myers' history of manufacture of weapons, *i.e.*, a homemade gun silencer), glycerol is also something that could have easily been properly found in a sugar plant, and, therefore, upon consultation with a deputy district attorney, no further action was taken against Myers with respect to this secondary investigation and the matter was dropped. Myers was unaware of this secondary investigation until after this suit was filed.

A malicious prosecution claim is only actionable if it results in seizure or confinement. *Miller v. Arbogast*, 445 Fed. Appx. 116, 119 (10th Cir. 2011) (citing *Nieler v. Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1164-65 (10th Cir. 2009)) (holding that the scope of the plaintiff's claims was limited to allegations connected with his 2001 arrest and indictment because he was not seized or confined as a result indictment attempts in 1999 or 2002). Myers was not seized or charged as a result of Koopman's subsequent investigation into whether the seized items constituted evidence of an explosives lab. Therefore, such evidence is irrelevant to the sole federal malicious prosecution claim arising from Myers' arrest and prosecution for methamphetamine-related charges. F.R.E. 401. Even if marginally relevant, the same should be excluded due to the fact that any minimal probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting of time. F.R.E. 403.

B. Koopman's testimony at Myers' preliminary hearing must be excluded.

Myers alleges that Koopman testified falsely during Myers' criminal preliminary hearing held on November 5, 2007. However, Koopman is entitled to absolute immunity in connection with his testimony during the preliminary hearing, see *Rehberg v. Paulk*, 566 U.S. ___, 132 S.Ct. 1497 (2012), thereby making his testimony there irrelevant to the malicious prosecution claim. The Supreme Court in *Rehberg* held that a "complaining witness" in a grand jury proceeding is entitled to the same absolute immunity in an action under 42 U.S.C. § 1983 as a witness who testifies at trial. 566 U.S. at ___, 132 S.Ct. at 1507-09. The Court recognized that "[i]n States that permit felony prosecutions to be initiated by information, the closest analog to a grand jury witness is a witness at a preliminary hearing." *Id.* at ___, 132 S.Ct. at 1509. The Court then commented favorably upon the fact that "[t]he lower courts have held that witnesses at a preliminary hearing are protected by the same immunity accorded grand jury witnesses . . .," *id.* at ___, 132 S.Ct. at 1510 (citing *Brice v. Nkaru*, 220 F.3d 233, 239 n.6 (4th Cir. 2000) and *Curtiss v. Bembenek*, 48 F.3d 281, 284-85 (7th Cir. 1995)). The Supreme Court, in conclusion, affirmed a decision of the Court of Appeals for the Eleventh Circuit that extended absolute witness immunity to a "complaining witness" before a grand jury. *Id.* *Rehberg* overrules *sub silencio* *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992) (denying absolute immunity to a police officer at grand jury proceeding or preliminary hearing on complaining witness theory).

C. Evidence from Myers' industrial hygienist, Dr. James Dennison, and hair sample test results should be excluded.

Myers, upon information and belief, intends to present evidence through the testimony of an industrial hygienist, James Dennison, PhD, of Century Environmental Hygiene, LLC, that a final assessment for methamphetamine contamination on the subject property conducted between September and November 2007, *after* the search and seizure, arrest of Myers and during his criminal prosecution, concluded that methamphetamine had not been manufactured on the premises for many years prior to testing. Myers further intends to introduce evidence of testing of Myers' hair follicles--also conducted after the fact--performed by Rocky Mountain Instrumental Laboratories, Inc., which analysis was negative for methamphetamine or amphetamine. However, such evidence is not relevant to the issues to be tried concerning whether Koopman sought the criminal prosecution of Myers based upon facts and circumstances that arguably led Koopman to believe he had probable cause to search Myers' premises and arrest him for what Koopman believed to be possession of methamphetamine or amphetamines, which factual determinations must be based upon knowledge that Koopman had at the time of the events in question, and not based upon later-discovered evidence concerning whether Myers had actually been involved in the manufacture of methamphetamine. *Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir. 2004) ("Probable cause must be evaluated as of the events in question."); *see also Fogarty v. Gallegos*, 523 F.3d 1147, 1159 (10th Cir. 2008) ("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.").

WHEREFORE, Koopman respectfully prays that the Court enter an order *in limine* excluding from evidence, comment or argument at trial any and all of the aforementioned topics and evidence.

DATED this 25th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2012, I electronically filed the foregoing DEFENDANT'S MOTION IN LIMINE with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail address:

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