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 REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DOC #232, FILED 10/15/2012]

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, Wick & Trautwein, LLC and the Loveland City Attorney's Office, hereby replies as follows to Plaintiff's Response to Defendant's Motion for Summary Judgment [#232, filed 10/15/2012] ("Response"):

I. GOVERNING LAW

While the Tenth Circuit appears to have assumed in various of its decisions that a constitutional malicious prosecution tort exists, *see, e.g., Wilkins v. DeReyes,* 528 F.3d 790 (10th Cir. 2008) and *Pierce v. Gilchrist,* 359 F.3d 1279 (10th Cir. 2004), it has not engaged in the same kind of in-depth analysis as was done by the Seventh Circuit in reaching the conclusion that a malicious prosecution claim against police officers is not a constitutional tort as would support a §1983 action. *Newsome v. McCabe,* 256 F.3d 747, 749-52 (7th Cir. 2001) (thoroughly analyzing *Albright v. Oliver,* 510 U.S. 266 (1994) and concluding that the question of whether there is a constitutional right not to

be prosecuted without probable cause was addressed and answered in the negative by seven Justices in *Albright)*. Given the Tenth Circuit's failure thus far to analyze *Albright* as thoroughly as did the Seventh Circuit in *Newsome, and especially given critical distinctions between the facts in the instant case, i.e., no liberty-restricting detention of Plaintiff Jeremy C. Myers ("Myers") after the allegedly "malicious" prosecution was initiated following Myers' release from a weekend stint in jail, after which criminal charges were dismissed before trial,* on the one hand, and the facts of *Wilkins* and *Pierce,* where both civil rights plaintiffs were tried, convicted and incarcerated based upon alleged fabricated evidence due to police misconduct, on the other hand, it cannot be said that Myers had a "clearly established" Constitutional right not to be prosecuted without probable cause, for purposes of Koopman's qualified immunity defense. *See Wilkins*, 528 F.3d at 798 ("Unlike a false arrest or false imprisonment claim, malicious prosecution concerns detention only '[a]fter the institution of legal process.'").

Moreover, the court – in examining the qualified immunity defense – must determine the probable cause "good faith" issue as a question of law. *See Donta v. Hooper,* 774 F.2d 716, 719 (6th Cir. 1985) (holding it improper for the district court to give the jury the issue of the defendants' objective good faith, citing *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) for the notion that "this is purely a legal question to be determined by the trial judge prior to trial" by "apply[ing] this purely objective test as a matter of law").

Even outside of the context of the qualified immunity defense, the issue of probable cause may in appropriate circumstances be decided as a question of law. According to *Miller v. Arbogast,* 445 Fed.Appx. 116, 119 (10th Cir. 2011),

> "[i]n a malicious prosecution action, '[t]he question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or true, and existed, is a matter of fact; but whether, *supposing them to be true,* they amount to probable cause, is a question of law.'"

(emphasis added) (quoting *Rouse v. Burnham,* 51 F.2d 709, 712 (10th Cir. 1931) (citing with approval *Smith v. Lamz,* 321 F.3d 680, 684 (7th Cir. 2003)).

According to *Smith*, "when a police officer receives information sufficient to raise a substantial chance of criminal activity from a person whose truthfulness he has no reason to doubt, that information is sufficient to establish probable cause." 321 F.3d at 685.

"Not all errors and omissions will negate probable cause, of course, and not all evidence known to the officer need be included in every affidavit used to secure an arrest warrant." *DeLoach v. Bevers,* 922 F.2d 618, 622-23 (10th Cir. 1990). Where the issue of probable cause arises in a damage suit, it is a proper issue for the jury "if there is room for a difference of opinion." *Id.* at 623. "However, the existence of probable cause may still be decided as a matter of law where there is only one reasonable determination regarding the issue." *Asten v. City of Boulder,* 652 F.Supp.2d 1188, 1201 (D.Colo. 2009) (citing, *e.g., Bruner v. Baker,* 506 F.3d 1021, 1028 (10th Cir. 2007), *West v. Keef,* 479 F.3d 757, 759-60 (10th Cir. 2007) and *Pino v. Higgs,* 75 F.3d 1461, 1468-69 (10th Cir. 1996)).

In *Bruner*, the Tenth Circuit rejected a reading of *DeLoach* that would mandate that anytime a plaintiff raises a Fourth Amendment claim under §1983 and alleges exculpatory evidence was omitted, a jury must decide whether the omission would have visciated probable cause, explaining: "that is not the holding of *DeLoach,* nor have we

followed such a practice." *Bruner,* 506 F.3d at 1028. Instead, *Bruner* explained that "*DeLoach's* holding is not intended to foreclose summary judgment in Fourth Amendment cases where there 'is no genuine issue of material fact' that the officers were not guilty of deliberate falsehood or reckless disregard for the truth." *Id.*

In performing its judicial function of determining whether only one reasonable determination exists concerning the existence of probable cause, "'[t]he court should ask whether the [government officials] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.'" *Pino,* 75 F.3d at 1468 (quoting *Hunter v. Bryant,* 502 U.S. 224, 228 (1991)(per curiam)).

In connection with this court's review of the underlying state district judge's review of Koopman's application for the search warrant, the court must apply the "totality-of-the-circumstances analysis that traditionally has informed probable cause determinations," instead of the long-since abandoned "two-pronged test" established in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). *See Illinois v. Gates,* 462 U.S. 213, 238-39, 245 n.13 (1983) (abandoning the two-pronged" test established in *Aguilar* and *Spinelli* and recognizing that "innocent behavior frequently will provide the basis for a showing of probable cause). [1]

[1] It should be noted that even though Koopman's affidavit in support of the search warrant need not have complied with the abandoned "two-pronged" test of informing the state district judge of some of the underlying circumstances from which the confidential informant concluded that the drugs were where he claimed they were, and some of the underlying circumstances from which Koopman concluded that the confidential informant was credible or reliable, Koopman's affidavit nevertheless provided such information. *See* Affidavit of Brian Koopman dated 4/20/2012, Attachment #1, in support of Defendant's Motion for Summary Judgment [#230, filed 09/24/2012] ("Motion") and Exhibit A thereto.

Thus, "affidavits for search warrants must be treated in a common sense and realistic manner, and warrants issues thereon should not be interpreted hypertechnically." *United States v. Hittle,* 575 F.2d 799, 801 (10th Cir. 1978) (citing *United States v. Ventresca,* 380 U.S. 102 (1965)).

Finally, an affidavit opposing a motion for summary judgment that conflicts with the affiant's prior sworn statements may be disregarded when the court concludes that it constitutes an attempt to create a "sham fact issue." *Law Co., Inc. v. Mohawk Constr. & Supply Co., Inc.,* 577 F.3d 1164, 1169 (10th Cir. 2009) (quoting *Franks v. Nimmo,* 796 F.2d 1230, 1237 (10th Cir. 1986)). To determine whether an affidavit creates a sham fact issue, courts "consider whether: (1) the affiant was cross-examined during his earlier testimony; (2) the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence; and (3) the earlier testimony reflects confusion which the affidavit attempts to explain." *Law Co., Inc.,* 577 F.3d at 1169 (quoting *Ralston v. Smith & Nephew Richards, Inc.,* 275 F.3d 964, 973 (10th Cir. 2001)).

The Tenth Circuit has upheld trial court decisions to disregard affidavits where a direct contradiction between the affidavit and the prior sworn statements is obvious. *Sumpter v. Ahlbrecht,* 2012 WL 252980 *5 (D. Colo.), although "a contradiction between an affidavit and prior sworn statements need not be direct to justify disregarding the affidavit." *Id.* (citing *Michael v. Intracorp, Inc.,* 179 F.3d 847, 854-55 (10th Cir. 1999)). The Tenth Circuit does, however, "explicitly require that a district court first 'determine whether the conflicting affidavit is simply an attempt to create a "sham fact issue"'

before excluding it from summary judgment consideration." *Law Co., Inc.,* 577 F.3d at 1169.

II. ARGUMENT

A. Koopman could not have violated a "clearly established" constitutional right of Myers

Koopman could not have violated a "clearly established" constitutional right of Myers, and is therefore entitled to qualified immunity, where it has never been established *on facts similar to those of the instant case* that there is a constitutional right not to be prosecuted without probable cause, *see Wilkins, supra*; *Pierce, supra*; *Newsome, supra*; *Albright, supra*, given that Myers has not alleged, and no facts exist, that a Fourth Amendment physical liberty-restricting "seizure" occurred after his criminal prosecution was initiated, *see Becker v. Kroll,* 494 F.3d 904, 914-16 (10th Cir. 2007), and no procedural due process protection exists under the Fourteenth Amendment due to the existence of adequate post-deprivation state tort remedies. *Id.* at 921; *Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir. 1997); *Mondragan v. Thompson*, 519 F.3d 1078, 1083 n.5 (10th Cir. 2008).

B. Koopman acted "objectively reasonably" as a matter of law in his belief that probable cause existed

Myers' arguments, as set forth in his Response, are best characterized at nit-picking, but do nothing to undermine the objective reasonableness as a matter of law of Koopman's belief in the existence of probable cause to support the search warrant and arrest of Myers. For instance, Myers alleges that the prior truthful information used to substantiate Koopman's confidential informant's ("CI") reliability was of a type wholly unrelated to the subject matter in this case. However, there is no legal requirement that

the prior reliability of the CI have involved drugs or a drug investigation. The fact is the CI previously provided accurate and reliable information that led to the capture of wanted fugitives. Myers cannot dispute this. The information Koopman received from his CI was itself "sufficient to establish probable cause" because Koopman had no reason to doubt the truthfulness of the CI's information, *Smith,* 321 F.3d at 685, and Myers cannot dispute the CI's prior reliability. Instead, Myers, in a desperate move, implies that Koopman and his counsel, after having been directed by Magistrate Judge Hagarty to produce the CI for an *in camera* interview, instead brought forth an imposter. This scandalous suggestion is inaccurate and, in any event, only detracts from Myers' arguments. The fact of the matter is that the actual CI was produced and was interviewed by Magistrate Hagarty *in camera.* The Magistrate Judge's finding that disclosure of the CI's identity "will not aid" Myers' case obviously demonstrates that the CI must have confirmed to Judge Hagarty that he told Koopman the very things Koopman attributed to the CI in the affidavit in support of the search warrant. This can be confirmed by reviewing the recorded interviews of both CIs interviewed by Judge Hagarty [#189 and #194] maintained under Restriction Level 2.

In addition to the information provided Koopman by the previously reliable CI, Koopman undertook his own extensive investigation as outlined in his Affidavit For a No Knock Search Warrant, Exhibit A to Affidavit of Brian Koopman in support of the Motion [#230, Attachment #1]. This investigation included the knowledge gained by Koopman of Myers' prior criminal record. Koopman accurately stated in the search warrant affidavit that Myers possessed firearms and, based upon information from the CI, was willing to fire them at people. Knowledge of Myers' prior criminal record was based

upon Koopman's review of the 2002 investigation and criminal charges brought against Myers as reflected in Exhibit B to Koopman's Affidavit [#230] demonstrating that Myers was previously investigated, charged with and convicted of drug and firearm offenses, as admitted by Myers in his deposition, Exhibit G to Motion [#230] at p. 46, ln. 5 – p. 52, ln. 16; p. 57, ln. 12 – p. 59, ln. 8, including his guilty pleas to a (1) Class 5 felony of obtaining a controlled substance by fraud and deceit under a deferred sentence agreement, and (2) a Class 2 misdemeanor for prohibited use of a weapon. *Id.*

Myers' numerous statements throughout his Response that he and his father spray-painted threats of violence on the buildings at the old sugar beat factory where Myers lived, and spread spent shell casings about the ground for "effect" to discourage trespassers, vandals and thieves, is, as pertains to Myers' motives for having done so, all after-the-fact information not known to Koopman when he sought the search warrant, and is therefore irrelevant to the issue of the existence of probable cause, or at the very least, Koopman's objectively reasonable, good faith belief in the existence of probable cause, and his belief that Myers posed a danger justifying application for a "no-knock" search warrant. *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.").

Notably, while Myers repeatedly argues that Koopman "should have" known Myers' reasons for making threats of violence due to the fact that Myers' father had previously made reports to law enforcement of thefts and vandalism, no such reports

are attached to the Response, and nowhere does Myers argue that any such reports would have revealed that the actual motive behind the graffiti containing threats of violence was as a deterrent directed toward would-be thieves, trespassers or vandals.

The same applies to the fact that the so-called "white building" adjacent to the red brick building where Myers lived was, as it turned out, not legally part of 1101 North Madison – a fact not known by Koopman at the time, but that was first learned by him during discovery in this suit, Videotaped Deposition of Brian Koopman, p. 116, ln. 18 -- p. 118, ln. 11, **Exhibit M**. Koopman, however, in September 2007, reasonably believed the white building to have been part of the to-be-searched premises because of its close proximity to the main "red brick building" (the house) and the fact that similar threats of violence were spray-painted on both buildings. Exhibit E to Motion [#230] at p. 9, ln. 13 – p. 11, ln. 1; **Exhibit M** at p. 117, lns. 3-7.

Myers' arguments that Koopman "misused and misread the field tests" to come to the conclusion there was incriminating evidence of the presence of methamphetamine[2] ignores the fact that Koopman had never before obtained a "false positive" from the particular field tests used, and did not learn that sugar could produce the colorimetric change in the field tests he misread as "positive" for meth until well *after* the fact. Exhibit F to Motion [#230] at p. 112, ln. 11 -- p. 115, ln. 15.

Whether or not it was Colorado Bureau of Investigation's ("CBI") protocol to notify the submitting officer of test results via CCIC to the officer's agency, as stated in the Tim Gosar Affidavit, Exhibit H to the Response, this affidavit does not state that

[2] Two other detectives participated in the testing and came to the same conclusion as did Koopman. **Exhibit M,** p. 102, ln. 20 – p. 104, ln. 7.

Koopman was *in fact* so notified. Furthermore, CBI's Amy Beatty, according to the Gosar Affidavit, admitted to Mr. Gosar that she "does not have any present recollection of ever knowing or speaking with Brian Koopman," and "usually had limited contact with the officers who submitted evidence." *Id.* at 5. In any event, Mr. Gosar's statements attributed to Ms. Beatty constitute inadmissible hearsay and therefore cannot serve as the basis for demonstrating the existence of material disputed issues of fact in opposition to a motion for summary judgment. *Riggs v. Airtran Airways, Inc.*, 497 F.3d 1108, 1121 (10th Cir. 2007) ("Hearsay testimony is inadmissible 'in support of, or opposition to, summary judgment.'"). Indeed, Mr. Gosar's affidavit is inadmissible in its entirety for this reason.

Notwithstanding Myers' convoluted reasoning in his arguments with respect to information known to Koopman about Shane McWhorter as set forth in the affidavit in support of the search warrant, Koopman's Exhibit I to the Motion [#230] unequivocally and conclusively establishes that McWhorter was – just as the CI told Koopman – involved with methamphetamine, inasmuch as McWhorter had been arrested by the Loveland Police Department while in possession of meth, although he was not charged with a felony. Moreover, intelligence records at North Colorado Drug Task Force ("NCDTF") are not *always* purged. If new information arises prior to the five year deadline, the intelligence report remains in the system. For example, if NCDTF had received information in 2002 on McWhorter and nothing else thereafter, it would have been purged in 2007. However, if intelligence information had been received in 2002 and then again in 2006, the clock was reset to 2006, carrying the reports forward until 2011. If nothing new was reported on McWhorter since 2006, all records were purged

in 2011 and would not be (and in fact were not) available in 2012. The fact that McWhorter was not charged with possession of methamphetamine based upon a decision by the district attorney does not negate the well-documented information that he possessed meth, *see* Exhibit I to Motion [#230], which was supportive of information provided by the CI to Koopman.

Koopman never saw McWhorter at the sugar beat factory and was therefore not pursued by Koopman. The information about McWhorter set forth in the affidavit for the search warrant was provided as historical information only, and McWhorter may well have no longer been in Colorado at the time Koopman was surveilling the premises. This, however, does not undermine the factual accuracy of the affidavit for the search warrant. All the affidavit stated with respect to McWhorter's possession of meth was that he "has been arrested by the Loveland Police Department in the past while in possession of methamphetamines," Affidavit of Brian Koopman [#230], Exhibit A, which was a completely true statement as confirmed by Exhibit I to the Motion [#230].

Myers has submitted no evidence to demonstrate that Koopman knew that plaintiff had moved away from 1101 North Madison Avenue on July 28, 2007, when Koopman sought the search warrant. This, like most of Myers' arguments, pertains to after-the-fact information that is not relevant to determination of the accuracy and objective reasonableness of Koopman's statements made in pursuit of the search warrant. *Pierce, supra; Fogarty, supra.*

The so-called "independent professional evaluation" of the property having shown that methamphetamine was never present, besides inaccurately characterizing

Dr. Dennison's opinion,[3] is after-the-fact evidence not relevant to the question of the existence of probable cause in 2007. *Pierce, supra; Fogarty, supra.*

Myers essentially admits that he has no evidence to support the allegation that Koopman acted maliciously, stating in his Response at 7: "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." (emphasis added). Myers has thereby acknowledged that he cannot produce "specific evidence" of the "defendant's culpable state of mind to survive summary judgment," *McBeth vs. Hines,* 598 F.3d 708, 724, 725 (10th Cir. 2010).

Most of the remainder of Myers' challenges to Koopman's STATEMENT OF UNDISPUTED FACTS, as set forth in his Motion, either do not pertain to *material* factual issues, or are based upon sham affidavits submitted by Myers and his father, James Myers, as critiqued in depth in Koopman's Reply Affidavit, **Exhibit O.**

C. Myers' sham affidavits should be disregarded

The excerpt of Myers' deposition, submitted in support of the Motion, Exhibit G thereto [#230], demonstrates that Myers was cross-examined during his earlier testimony. Numerous citations to Myers' deposition testimony support Koopman's STATEMENT OF UNDISPUTED FACTS, including the many instances Myers acknowledged in his deposition that he was unable to dispute various facts put forth by Koopman. Myers, as an affiant, had access to the pertinent evidence consisting of the

[3] Dr. Dennison actually found detectable meth on furniture on the second floor of the red brick building. Deposition of Dr. James Dennison at p. 52, ln. 15, through p. 55, ln. 20, **Exhibit N**.

surveillance videos at the time of his earlier deposition testimony, given his father's acknowledgement during his own deposition, which occurred a month before Myers was deposed, that James Myers had already obtained Koopman's surveillance tapes from the district attorney, reviewed a significant portion of them, and provided them to Myers. Deposition of James B. Myers, p. 131, ln. 12 – p. 144, ln. 18, **Exhibit P**. The deposition testimony of Myers submitted in support of the Motion does not reflect confusion on his part which his and James Myers' affidavits attempt to explain. Therefore, this court can easily conclude that the Affidavits of Jeremy C. Myers and James B. Myers attached to the Response, Exhibits D and F thereto, constitute attempts to create sham fact issues and should be disregarded and excluded from summary judgment consideration. *See Law Co., Inc., supra; Sumpter, supra.* Furthermore, the surveillance videos reviewed and discussed by Meyers and his father James Myers in their affidavits are incomplete—missing large segments of days and times--as more fully discussed in Koopman's Reply Affidavit, **Exhibit O.** The portable hard-drive containing the incomplete surveillance videos is being conventionally filed with the court as **Exhibit Q.**

III. CONCLUSION

Myers has failed to demonstrate the existence of material factual issues sufficient to overcome Koopman's entitlement to summary judgment on the basis of qualified immunity, the existence of probable cause as a matter of law based upon the objective reasonableness standard, and the absence of specific evidence of malice, Myers' sham affidavits notwithstanding. Koopman is therefore entitled to summary judgment.

DATED this 29th day of October, 2012.

WICK & TRAUTWEIN, LLC

By: *s/Kent N. Campbell*
Kent N. Campbell
Kimberly B. Schutt
323 S. College Avenue, Suite 3
Fort Collins, Colorado 80524
Telephone: (970) 482-4011
Fax: (970) 482-8929
kcampbell@wicklaw.com
kschutt@wicklaw.com
Attorneys for Defendant Brian Koopman

LOVELAND CITY ATTORNEY'S OFFICE

By: *s/John R. Duval*
John R. Duval
500 East 3rd Street
Loveland, Colorado 80537
Telephone: (970) 962-2540
Fax: (970) 962-2900
john.duval@cityofloveland.org
Attorneys for Defendant Brian Koopman

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, I electronically filed the foregoing **DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DOC #232, FILED 10/15/2012]** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Randall R. Meyers, Esq.
425 West Mulberry Street, Suite 201
Fort Collins, CO 80521
randy.meyers@att.net
Attorney for Plaintiff

s/Jody L. Minch