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 RENEWED 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 renews "Defendant's Motion for Summary Judgment" [#230], filed 9/24/2012. In support hereof, Koopman states as follows:

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, STATEMENT OF FACTS AND PROCEDURAL HISTORY

Koopman previously moved for summary judgment based upon qualified immunity [#56], filed 4/20/2010. The Court, in its Order Concerning Motions for Summary Judgment [#126], filed 2/11/2011, 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.

Upon completion of discovery, Koopman again moved for summary judgment [#230], filed 9/24/2012. The Court, in its Order Granting Defendant's Motion for Judgment on the Pleadings [#244], filed 11/3/2012, denied as moot the Defendant's Motion for Summary Judgment [#230]. Subsequently, the United States Court of Appeals for the Tenth Circuit in *Myers v. Koopman*, ___F.3d___, ___ (10th Cir. 2013), affirming in part and reversing in part this Court's Order Granting Defendant's Motion for Judgment on the Pleadings [#244], stated that, "Koopman's arguments regarding absolute and qualified immunity should be addressed in the first instance by the district court."

This procedural history has therefore resurrected the foregoing issues previously deemed by this Court to be moot: (1) the existence of probable cause to support Plaintiff Jeremy C. Myers' ("Myers") arrest and subsequent prosecution; (2) absence of evidence of malice; and (3) Koopman's entitlement to qualified and absolute immunity.

For the remainder of this motion -- including the Statement of Allegations, Statement of Undisputed Facts, Argument and Legal Authority, and Conclusion -- Koopman hereby adopts and incorporates by reference his previously filed Defendant's Motion for Summary Judgment [#230], filed 9/24/12, in its entirety, including affidavits and attachments thereto, and Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment [#237], filed 10/29/12, in its entirety, including affidavits and attachments thereto. Koopman provides the following additional argument and legal authorities.

III. SUPPLEMENTAL ARGUMENT AND LEGAL AUTHORITY

A. Koopman is Entitled to Qualified Immunity

1. Analytical Framework Regarding Qualified Immunity

"'When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established.'" *Thomson v. Salt Lake County,* 584 F.3d 1304, 1312 (10th Cir. 2009)(quoting *Martinez v. Beggs,* 563 F.3d 1082, 1088 (10th Cir. 2009), *cert. denied,* ___ U.S. ___, 130 S.Ct. 259, 175 L.E. 2d 131 (2009)). "Qualified immunity is applicable unless the official's conduct violated a clearly

established constitutional right." *Thomson,* 584 F.3d at 1312 (quoting *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815-16 (2009)).[1]

In determining whether Myers has met his burden of establishing a constitutional violation that was clearly established, this Court must "construe the facts in the light most favorable to the plaintiff as the non-moving party." *Thomson*, 584 F.3d at 1312 (citing *Scott v. Harris,* 550 U.S. 372, 378 (2007); *see Riggins v. Goodman,* 572 F.3d 1101, 1107(10th Cir. 2009) ("The plaintiff must demonstrate *on the facts alleged* both that the defendant violated his constitutional or statutory rights, and that the right was clearly established at the time of the alleged unlawful activity.") (emphasis added). "It is only *if* and *when* the plaintiff succeeds in making this twofold showing—i.e., satisfies this 'heavy two-part burden' of demonstrating that the defendant is *not* entitled to qualified immunity—that the burden shifts to the defendant to make the usual summary judgment showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law." *Berglund v. Pottawatomie County Board of County Commissioners*, 350 Fed. Appx. 265, 268, 2009 WL 3381799 (C.A. 10 (Okla.)) (unpublished) (citing *Holland Ex Rel. Overdorff v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001) and *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001)).

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[1] The *Pearson* Court announced that courts have discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236, 129 S.Ct. at 818; *cf. Reichle v. Howards*, ___ U.S. ___ 132 S.Ct. 2088, 2093 (2012) ("courts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all.").

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality," *Ashcroft v. Al-Kidd*, ___ U.S. ___, 131 S.Ct. 2074, 2084, 179 L.Ed.2d 1149 (2011), explaining that "[t]he general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of *particular conduct* is clearly established." *Id.* (emphasis added). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*." *Id.* at ___, 131 S.Ct. at 2083 (emphasis added). Therefore, the Court's "inquiry into whether a constitutional right was clearly established '"must be undertaken in light of the *specific context of the case*, not as a broad general proposition."'" *Bowling v. Rector*, 584 F.3d 956, 964 (10th Cir. 2009) (emphasis added).

"This case-specific inquiry asks 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation.'" *Id.* In fact, according to the Supreme Court, "'a government official's conduct violates clearly established law when at the time of the challenged conduct the contours of the right are sufficiently clear' that *every* 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft*, ___ U.S. at ____, 131 S.Ct. at 2083 (emphasis added). "'Summary judgment based on qualified immunity is appropriate if the law did not put the officer on notice that his conduct would be clearly unlawful.'" *Bowling*, 584 F.3d at 964. While a prior Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts finding the law to be as the plaintiff maintains "need not address a situation factually identical to that of a defendant officer . . . it must 'provide

fair warning that [the] officer's conduct would violate constitutional rights.'" *Id.* Furthermore, "a conflict among the circuits 'is relevant' to [the court's] determination of whether a right is clearly established, [although] it is 'not controlling.'" *Howards v. McLaughlin,* 634 F.3d 1131, 1149 n. 14 (10th Cir. 2011).

Qualified immunity, once analyzed within this proper framework outlined above, "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft,* ___ U.S. at ___, 131 S.Ct. at 2085.

2. The Controlling Constitutional Law was "Murky Waters"

Myers has not alleged, and no facts exist, that a physical liberty-restricting "seizure" occurred after Myers' criminal prosecution (which ended in dismissal of charges in November 2007 before trial) had been initiated by a prosecutor's filing of a criminal information on September 13, 2007, in state court after Myers had already been arrested on a warrant on September 7, 2007, spent a weekend in jail, then posted bail and bonded out. No false arrest or imprisonment claim is asserted. The sole claim asserted is for the alleged constitutional tort of malicious prosecution.

At the time Koopman applied for the search warrant, conducted the search, arrested Myers and sought his criminal prosecution—all of which occurred in September 2007—a §1983-based malicious prosecution claim had only recently been described by

this Court on July 19, 2007, in *Becker v. Kroll*, 494 F.3d, 904, 913 (10th Cir. 2007), as "murky waters," an unlikely metaphor for "clearly established law."[2]

In addition to the murkiness of the constitutional underpinning of a §1983 malicious prosecution claim, "it is *unclear* how far the Fourth Amendment's protection against unreasonable 'seizures' can reach in the pretrial context." *Taylor v. Meacham*, 82 F.3d 1556, 1561 n.5 (10th Cir.), *cert. denied,* 519 U.S. 871, 117 S.Ct. 186 (1996) (emphasis added). In *Taylor*, the plaintiff remained jailed for seven weeks until DNA tests led county authorities to drop the criminal charges, after which he was released from custody. Taylor was therefore effectively "seized" throughout the time period in question, *id.*, unlike here where Myers' home was searched on September 6, he voluntarily surrendered at the police department and was arrested on September 7, bonded out of jail on September 10, was charged criminally on September 13, and remained out on bail until charges were dismissed on November 15, 2007, after a November 5, 2007 preliminary hearing.

The facts of the instant case are instead more analogous to those in *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), in which Mr. Albright had

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[2] Section 1983 malicious prosecution jurisprudence has been further characterized as a "minefield" in *Reed v. City of Chicago,* 77 F.3d 1049, 1053 (7th Cir. 1996), and as an object of "general confusion" in *Taylor v. Meacham,* 82 F.3d 1556, 1561 n. 2 (10th Cir.), *cert. denied,* 519 S.Ct. 871, 117 S.Ct. 186 (1996). The struggles of the many circuits—including the Tenth Circuit—in this area of the law has been said to result from "laxness," *see Castellano v. Fragozo,* 352 F.3d 939, 945 (5th Cir. 2003), *cert. denied,* 543 U.S. 808, 125 S.Ct. 31, 160 L.Ed.2d 10 (2004), "weak discipline," *id.,* and "inattentive[ness]," *id.* The state of the law concerning Fourth Amendment-based §1983 malicious prosecution jurisprudence has been described by the Supreme Court in *Albright, infra,* as an "embarrassing diversity of judicial opinion."

voluntarily submitted to the arrest process and was released after he posted bail. The Supreme Court did not decide there, as it did not need to, whether Albright remained effectively "seized" in that situation, and therefore neither *Taylor* nor *Albright* clearly established the law governing Koopman. This is especially true considering that the Court in *Becker*, 494 F.3d at 915, explicitly declined to adopt a non-custodial concept of "continuing seizure" in order to take into account under the Fourth Amendment the harms incident to the control exercised by the state over a citizen before trial. *Cf. Cummisky v. Mines*, 248 Fed. Appx. 962, 2007 WL 2828928 (C.A. 10 (Okla.)) (unpublished) (noting that the question of whether a "*de minimis*" unreasonable seizure of a person is actionable appears to be "unsettled in this circuit").

It was not until the court's decision in *Miller v. Spiers*, 339 Fed. Appx. 862, 2009 WL 2219256 (C.A. 10 (N.M.)) (unpublished), issued on July 27, 2009, that the Tenth Circuit explicitly stated that where confinement was preceded by an arrest pursuant to a warrant, that "an analogous cause of action is indeed malicious prosecution, grounded in the Fourth Amendment guarantee to be free from unreasonable seizures." (citing *Wilkins,* 528 F.3d at 797-99). *Wilkins*—decided in 2008—first implied that, in the Tenth Circuit, either a warrantless arrest or an arrest pursuant to a warrant could constitute the initiation of legal process under the Fourth Amendment sufficient to support a §1983 malicious prosecution cause of action, constituting a "second Fourth Amendment claim" to come on the heels of the first one consisting of false arrest or false imprisonment. *Id.* at 798 and n.5. Yet *Wilkins* did not clarify whether a pretrial release from custody would interfere with the Fourth Amendment undergird of the malicious prosecution claim.

The United States Supreme Court had, as of its February 21, 2007, decision in *Wallace v. Kato*, 549 U.S. 384, 390 n.2, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), "never explored the contours of a Fourth Amendment malicious-prosecution suit under §1983," and did not do so there. *Id.* And as far as other circuit courts of appeal are concerned, "[i]t is an *open question* whether the Constitution permits the assertion of a section 1983 claim for malicious prosecution on the basis of an alleged Fourth Amendment violation." *Nieves v. McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001) (emphasis added); *contra*, *Newsome,* 256 F.3d at 749-51, 753 (expressly holding that seven Justices in *Albright* had concluded that there is no constitutional right to be prosecuted without probable cause as seen through the lens of malicious prosecution, thereby rendering malicious prosecution "not tenable" as an independent constitutional theory); *see* Note, *Who's on First, What's on Second, And I Don't Know About the Sixth Circuit: A §1983 Malicious Prosecution Circuit Split that would Confuse Abbott and Costello*, 36 Suffolk U.L. REV. 513 (2003) (collecting cases); 1 M. Schwartz, Section 1983 Litigation §3.18[C], pp. 3-605 to 3-629 (4th ed. 2004) (noting a range of approaches in the lowers courts) (cited in *Wallace*, 549 U.S. at 389 n.2).

Given the state of the law as outlined above, the law was not clearly established in September – November 2007 that the Fourth Amendment's right to be free from unreasonable seizures provided a constitutional basis for a §1983 malicious prosecution claim *within the factual context of this case.*[3] Koopman is therefore entitled to qualified

[3] "The plaintiff bears the burden of articulating clearly established law." *Novitsky v. City of Aurora*, 491 F.3d 1244, 1255 (10th Cir. 2007).

immunity on this basis as against the sole malicious prosecution claim to the extent it purports to ground itself in the Fourth Amendment. *See Messerschmidt v. Millender*, ___U.S. ___, 132 S.Ct. 1235 (2012).[4]

B. Myers Cannot, as a Matter of Law, Prove that Koopman Acted with Malice

In addition to those reasons set forth in Defendant's Motion for Summary Judgment [#230] showing as a matter of law that Myers cannot prove that Koopman acted with malice, Myers made a judicial admission that he has no evidence to support the allegation that Koopman acted maliciously, stating in Plaintiff's Response to Motion for Summary Judgment [#237], filed 10/15/12, at 7, ¶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." (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 v. Himes,* 598 F.3d 708, 724, 725 (10th Cir. 2010).

[4] The question in *Messerschmidt* was whether the police were entitled to qualified immunity even if the search warrant should not have issued. The Court there focused on the fact that the police officers acted appropriately in many respects, including going before a judge to get the warrant. *Id.* at ___, 132 S.Ct. at 1249-50. The case suggests that a warrant is given great weight in supporting a claim of qualified immunity, regardless of whether the Court determined the plaintiff had a constitutional right violated. While avoiding the merits question of whether, on the particular facts of the case, there was probable cause to support the scope of the warrant issued, "the Court made it clear that reasonable conduct by the police will go a long way towards supporting a finding of qualified immunity." Blum, *et al., "Qualified Immunity Developments: Not Much Hope Left for Plaintiffs,"* 29 Touro L. Rev. 633, 655 (2013).

C. Koopman is Entitled to Absolute Immunity in Connection with his Testimony at Myers' Criminal Preliminary Hearing

The recent United States Supreme Court decision in *Rehberg v. Pulk,* __ U.S. ___, 132 S.Ct. 1497 (2012), should be interpreted to extend absolute immunity to a law enforcement officer witness testifying in a criminal preliminary hearing despite the historical distinction between a "complaining witness" and any other witness. According to *Rehberg,* "a detective . . . , unlike a complaining witness at common law, does not make the decision to press criminal charges. . . . It would thus be anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor who is shielded by absolute immunity, who is actually responsible for the decision to prosecute." *Rehberg,* ___ U.S. at ____, 131 S.Ct. at 1508. Because "a complaining witness cannot be held liable for perjurious *trial* testimony, . . . there is no more reason why a complaining witness should be subject to liability for testimony before a grand jury." *Id.* at ____, 131 S.Ct. at 1507 (emphasis in original).

That being the case, this Court should follow the strong *dicta* in *Rehberg* instructing that its holding should also be read as applying to testimony by law enforcement personnel at a preliminary hearing. *See* ___ U.S. at ____, 131 S.Ct. at 1509-10 (impliedly overruling *sub silencio Anthony v. Baker,* 955 F.2d 1395 (10th Cir. 1992) (denying absolute immunity to a police officer at grand jury proceeding or preliminary hearing on "complaining witness" theory)). Furthermore, the rule announced in *Rehberg* "many not be circumvented by . . . using evidence of the witness testimony

to support any other §1983 claim concerning the initiation or maintenance of a prosecution." *Id.* at ___ U.S. at ____, 131 S.Ct. at 1506.

Koopman is therefore entitled to absolute immunity as against the sole §1983 malicious prosecution claim to the extent it purports to base itself upon Koopman's testimony at Myers' criminal preliminary hearing, thereby entitling Koopman to partial summary judgment on this issue at the very least.

IV. CONCLUSION

Koopman respectfully renews his motion that the court grant him summary judgment as to the sole §1983 malicious prosecution claim grounded in the Fourth Amendment 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. Koopman also moves that the Court grant him partial summary judgment as to the sole §1983 malicious prosecution claim grounded in the Fourth Amendment to the extent said claim is based upon alleged perjurious testimony by Koopman at Myers' criminal preliminary hearing due to the fact that Koopman is entitled to absolute immunity in connection with his preliminary hearing testimony.

DATED this 12th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2014, I electronically filed the foregoing **DEFENDANT'S RENEWED 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 address:

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