

RENDERED: OCTOBER 19, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000997-MR

TERRY WILLIAMS, JR.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CI-03810

KENTON COUNTY POLICE
CHIEF ED BUTLER; KENTON
COUNTY OFFICER GREG
SANDEL; KENTON COUNTY
OFFICER ROBERT FULTZ;
KENTON COUNTY OFFICER
DARRIN GILVIN; KENTON
COUNTY OFFICER DARREN
SMITH; AND KENTON COUNTY
COMMONWEALTH ATTORNEY
ROB SANDERS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Terry Williams, Jr., brings this appeal from a May 13, 2010, order of the Kenton Circuit Court dismissing his complaint alleging malicious prosecution against Kenton County Police Chief Ed Butler, Kenton County Officer Greg Sandel, Kenton County Officer Robert Fultz, Kenton County Officer Darrin Gilvin, Kenton County Officer Darren Smith, and Kenton County Commonwealth Attorney Rob Sanders (collectively referred to as appellees). We affirm.

On July 7, 2007, Williams was discovered walking naked in the median of Interstate Highway 75 in Kenton County, Kentucky. Williams, who was under the influence of drugs, exited the vehicle he was riding in, removed his clothing and proceeded to walk down the median of the interstate. During the arrest of Williams, Kenton County Police Officers Greg Sandel, Robert Fultz, Darrin Gilvin, and Darren Smith struck, tased and pepper sprayed Williams.

A Kenton County Grand Jury indicted Williams upon fleeing or evading police (first degree), wanton endangerment (first degree), resisting arrest, and disorderly conduct. Following a trial, the jury found Williams guilty of disorderly conduct; however, the jury was unable to reach a verdict upon the remaining three offenses of fleeing or evading police, resisting arrest, and wanton endangerment. The Commonwealth then proceeded to a retrial of Williams upon the three offenses. On the day of trial, the Commonwealth and Williams reached a plea agreement. Thereunder, Williams agreed to enter an Alford Plea of guilty to the charge of resisting arrest and a guilty plea to an amended charge of wanton

endangerment in the second degree. In exchange, the Commonwealth agreed to dismiss the fleeing or evading police charge.

After the conclusion of the criminal proceeding against Williams, he filed a civil complaint in the Kenton Circuit Court against appellees alleging malicious prosecution in the institution of the criminal proceeding. Appellees moved to dismiss Williams' complaint for failure to state a claim pursuant to Kentucky Rules of Civil Procedure (CR) 12.02. By order entered May 13, 2010, the circuit court granted the motion and dismissed Williams' complaint:

In the case before this Court, the fact that [Williams] was found guilty by a jury of Disorderly Conduct and subsequently entered a guilty plea to Resisting Arrest and Wanton Endangerment in the Second Degree precludes a finding that the criminal proceedings were terminated in his favor. The fact that Count I of the Indictment, First Degree Fleeing, a Felony, was dismissed on the Motion of the Commonwealth is of no consequence. The dismissal of that felony charge was on condition that Williams enter a plea to two misdemeanor charges. All of the charges arose from the incident of July 7, 2007. In short, [Williams] cannot establish that the proceedings against him were terminated in his favor and therefore his claim for malicious prosecution must be dismissed.

This appeal follows.

To begin, CR 12.02 provides for dismissal of a complaint where the plaintiff has failed to state a claim upon which relief can be granted. In considering a CR 12.02 motion to dismiss, the circuit court may only consider the pleadings filed in the case. Where a circuit court considers evidence outside the pleadings, the order must be treated as one for summary judgment under CR 56.

Ferguson v. Oates, 314 S.W.2d 518 (Ky. 1958). In our case, a review of the order dismissing Williams' complaint demonstrates that the circuit court clearly considered matters outside of the pleadings. Thus, we will review the circuit court's order dismissing Williams' complaint under the summary judgment standard. When summary judgment has been granted, we must determine whether there were any issues of material fact and whether movant was entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991); *Sexton v. Taylor County*, 692 S.W.2d 808 (Ky. App. 1985). Our review proceeds accordingly.

Williams contends that the circuit court erred by dismissing his complaint alleging malicious prosecution. For the foregoing reasons, we disagree.

To establish an action for malicious prosecution, the plaintiff must demonstrate the following six elements:

(1) [T]he institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981). In this case, the third element – the termination of such proceedings in defendant's favor – is at issue. In its order dismissing, the circuit court determined that Williams' underlying criminal action

had not been terminated in his favor, thus precluding his claim for malicious prosecution as a matter of law.

In the underlying criminal proceeding, the jury found Williams guilty of disorderly conduct. Although the jury was unable to reach a verdict on the three remaining charges, the Commonwealth went forward with a retrial on the three remaining charges. Before the second trial, the Commonwealth and Williams reached a plea agreement. Under the plea agreement, Williams entered an Alford plea of guilty to resisting arrest and plea of guilty to the amended charge of second-degree wanton endangerment. As part of the agreement, the Commonwealth dismissed the charge of fleeing or evading police. Williams argues that the dismissal of the offenses for fleeing or evading police was a termination of the proceeding in his favor.

It is well-established that where a criminal charge is dismissed pursuant to a plea agreement it cannot be considered a “termination favorable to the accused” as required to prove malicious prosecution. *Broaddus v. Campbell*, 911 S.W.2d 281, 284 (Ky. App. 1995) (citing *Restatement (Second) of Torts* § 606(a) (2012)). In fact, our Court has specifically held:

[I]t is settled that a dismissal by compromise of the accused is not a termination favorable to the accused. [*Restatement \(Second\) of Torts* § 660\(a\)](#) provides:

A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if

(a) the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused;. . . .

The reasoning for this rule is stated in Comment C to this section:

Although the accused by his acceptance of a compromise does not admit his guilt, the fact of compromise indicates that the question of his guilt or innocence is left open. Having bought peace the accused may not thereafter assert that the proceedings have terminated in his favor.

Broaddus, 911 S.W.2d at 285 (citation omitted).

The law is clear that dismissal of a criminal charge under a plea agreement is not a termination in Williams' favor. Therefore, as the charge of fleeing or evading police was dismissed under a plea agreement, the criminal proceeding was not terminated in Williams' favor. Accordingly, we conclude the circuit court properly dismissed Williams' complaint alleging malicious prosecution.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Eric C. Deters
Independence, Kentucky

BRIEF FOR APPELLEES KENTON
COUNTY POLICE CHIEF ED
BUTLER; KENTON COUNTY
OFFICER GREG SANDEL;
KENTON COUNTY OFFICER
ROBERT FULTZ; KENTON
COUNTY OFFICER DARRIN
GILVIN; KENTON COUNTY
OFFICER DARREN SMITH:

Christopher S. Nordloh
Covington, Kentucky

BRIEF FOR APPELLEE
KENTON COUNTY
COMMONWEALTH ATTORNEY
ROB SANDERS:

Wm. T. Robinson III
Michael E. Nitardy
Florence, Kentucky