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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000444-MR

TRISHA ANN WILLIAMS

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 10-CI-90269

RANDY CLINE AND
KEITH MCCORMICK

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Trisha Ann Williams appeals from an order dismissing her claims against the Appellees, Randy Cline and Keith McCormick,

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

for malicious prosecution, abuse of process, and negligence. On appeal, Williams argues that the Commonwealth cannot coerce a criminal defendant into signing a stipulation of probable cause and then later use that stipulation to avoid liability. Upon a review of the record, we affirm in part and reverse in part, with instructions for the trial court to conduct an evidentiary hearing and make specific findings on remand.

Facts and Procedural History

The preliminary facts in this case are not matters of evidence, but have been culled from the pleadings and exhibits, as discovery was not taken before the matter was dismissed. With that said, it appears that Detective Randy Cline of Operation UNITE, working in connection with local officials, swore out a criminal complaint alleging that “Trisha Wallace” of 620 Rock Fork Road sold oxycodone to a confidential source. The complaint also included a date of birth and social security number. A warrant of arrest was filed on that same date. Williams was arrested pursuant to that warrant on October 28, 2009. From the exhibits in the record, it appears she was released that same day on a \$5000 unsecured bond. Williams signed the bond as “Trisha Williams.” The same social security number and date of birth appearing thereon was the social security number on the complaint sworn out by Detective Cline.

On November 30, 2009, Williams, by counsel, entered a plea of not guilty to the above charges. The case was passed to January 4, 2010, for a hearing

and then rescheduled to January 11, 2010, after the Commonwealth's witness failed to appear.

On the January 11, 2010, hearing date, Assistant Rowan County Attorney, Keith McCormick, appeared and offered to dismiss the charges against Williams, without prejudice, in exchange for a stipulation from her that there was probable cause for believing she committed the crime of trafficking.² McCormick informed the court that his office had discovered there was a tremendous similarity in appearance between Williams (whom he referred to as Patricia Wallace) and the other "Patricia Wallace," whom he described as a cousin or relative of Williams. McCormick further advised the court that his office had lost contact with the principal witness in the case, the individual who had purchased the drugs and who presumably could have identified the seller.

Nonetheless, McCormick advised the court that he believed he could still proceed with a preliminary hearing, establish probable cause based on the officer's testimony, and have the charges referred to the grand jury. However, McCormick also stated that, if the witness could not later be found, he did not believe that the charges could be proven beyond a reasonable doubt and the Commonwealth would have to dismiss the charges. Williams's trial counsel agreed to stipulate to probable cause in exchange for a dismissal of the charges without prejudice.

² Although the district court hearing was not designated for the record, the audio recording of the hearing is present in the record as an exhibit to McCormick's original motion to dismiss.

Approximately six months later, Williams filed suit against McCormick and Cline, alleging abuse of process, malicious prosecution, and negligence. Williams alleged that she was jailed, interrogated at length, was told the Commonwealth had audio and video recordings of the alleged drug deals that were never produced to her, and was subjected to numerous drug tests while in detention, all of which were negative for drug use. She further stated that she was separated from her dependent children during that time and lost her job with the Army National Guard after being charged with drug trafficking. She alleged that McCormick used this situation to coerce a stipulation from her and to insulate himself and Cline from liability, despite knowing that she was innocent.

Instead of filing an answer, McCormick moved to dismiss under Kentucky Rules of Civil Procedure (CR) 12.02 on the grounds that he was immune from liability and/or that Williams did not state a claim for malicious prosecution or abuse of process. Cline then filed an answer and followed thereafter with his own motion to dismiss, or in the alternative, for summary judgment. The trial court granted McCormick's motion and dismissed the claims against him on January 14, 2011. On February 18, 2011, the court also dismissed all claims against Cline. Williams now appeals to this Court.

Standard of Review

In the present case, the Appellees filed CR 12.02 motions to dismiss for failure to state a claim. When ruling on a motion to dismiss under CR 12.02, the trial court is free to consider matters outside the pleadings, however doing so

converts the matter into a motion for summary judgment. *See, McCray v. City of Lake Louisville*, 332 S.W.2d 837, 840 (Ky. 1960); *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky. App. 2004). In the present case, McCormick attached several exhibits to the CR 12.02 motion to dismiss. Although it is unclear from the orders dismissing what information was considered, we will assume for the purposes of review that the court considered the exhibits to the motion because they were not specifically excluded. *McCray*, 332 S.W.2d at 840. Hence, we review the dismissal under the summary judgment standard. The standard on review of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Analysis

On appeal, Williams argues that her complaint alleged valid claims for abuse of process, malicious prosecution, and negligence; that her case was improperly dismissed at the pleadings stage before discovery was allowed to proceed,³ that dismissal agreements cannot be misused by prosecutors in a coercive matter, and that Cline and McCormick are not cloaked with immunity. As we are reversing and remanding, we will only address those issues not rendered moot by reversal.

Abuse of Process

We first address Williams's claim for abuse of process. Williams alleges that McCormick abused legal process when he requested her to stipulate to probable cause for improper reasons. Namely, Williams alleges that McCormick requested the probable cause stipulation, not in the interests of justice, but for the ulterior purpose of insulating himself from liability. Indeed, Williams claims the Commonwealth was in possession of exculpatory audio/visual recordings at the time they requested her stipulation.

An abuse of process claim exists where an individual "uses a legal process, whether criminal or civil, against another primarily to accomplish a

³ Specifically, Williams wants access to the audio and video tapes of the drug transaction. She pled in her complaint that detectives told her such tapes were in existence at the time of her interrogation. She further alleges that her counsel was informed the recordings clearly showed she was not involved with the crimes. She does not state how this information was obtained or where it was obtained from. Nonetheless, as we are required to accept the facts in her pleadings as true and view them in a light most favorable to her, we will assume that audio and video recordings exist for the purposes of review and that such tapes are exculpatory.

purpose for which that process is not designed[.]” *Sprint Communications Co., L.P. v. Leggett*, 307 S.W.3d 109, 113 (Ky. 2010). We find there is a genuine issue of fact as to whether McCormick requested a probable cause stipulation for improper reasons.

However, before determining whether a reversal is required, we must first consider whether McCormick is immune from suit on such a claim. Our Supreme Court held in *McCollum v. Garrett*, 880 S.W.2d 530 (Ky. 1994) that a public prosecutor sued in his official capacity has absolute immunity for all acts or omissions taken after the commencement of formal prosecution, where the prosecutor is acting within his lawful authority. *Id.* at 534-535. Indeed, “[a]bsolute immunity . . . extends to . . . prosecutors with respect to the initiation and pursuit of prosecutions[.]” *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2002). The rationale behind this immunity is to protect prosecutor’s offices “against the deterrent effect of a threat of suit alleging improper motives where there has been no more than a mistake or a disagreement[.]” *Id.*

However, as the *McCollum* Court noted, prosecutors sued in their individual capacities are only afforded qualified official immunity when acting as an investigator and in the period leading up to the bringing of criminal charges. *McCollum*, 880 S.W.2d at 534-535. Qualified immunity applies when an official is sued in an individual capacity and the act(s) in question were (1) discretionary in nature, (2) taken in good faith, and (3) were within the scope of the individual’s official duties. *Yanero*, 65 S.W.3d at 522.

In the present case, McCormick had already commenced prosecution at the time he requested the stipulation from Williams. Thus, he is entitled to absolute immunity so long as he was not acting outside of his lawful authority (such as by forging a judge's signature on an arrest warrant). *McCollum*, 880 S.W.2d at 537; *Dugger v. Off 2nd, Inc.*, 612 S.W.2d 756 (Ky. 1980). Regardless of the propriety of his motives, McCormick was not acting outside of his authority as a prosecutor when he offered to dismiss the charges for a stipulation of probable cause. Hence, McCormick is immune from suit on an abuse of process claim.

Accordingly, we affirm the trial court's dismissal of this claim.

Malicious Prosecution

We next consider Williams's claim for malicious prosecution. Under Kentucky law, in order to establish a claim for malicious prosecution, six elements must be established by the plaintiff: (1) the institution of judicial proceedings, (2) by or at the insistence of the Defendant, (3) the resulting termination of such proceedings in the claimant's favor, (4) malice in the institution of such proceedings, (5) want or lack of probable cause in such proceedings, and (6) injury or damages suffered by the plaintiff as a result thereof. *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597, 602 (Ky. App. 2006).

This Court has previously held that a dismissal without prejudice does not necessarily foreclose a later claim for malicious prosecution. *Davidson*, 202 S.W.3d at 605. In the present case, although the charges were dismissed without

prejudice, it does appear the dismissal was for want of evidence. Thus, we conclude that the termination was in Williams's favor under *Davidson*.

However, Williams stipulated to probable cause as a part of her dismissal agreement, and "want or lack" of probable cause is also a necessary element for a claim of malicious prosecution. Williams asks us to disregard the stipulation of probable cause because it was obtained by coercion.

At the outset, we note that this type of dismissal agreement was held constitutional by the United States Supreme Court in *Town of Newton v. Rumery*, 480 U.S. 386, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987). The *Rumery* court, applying "traditional common law principles" to federal law, held that a defendant who accepted a municipality's offer to dismiss criminal charges against him in exchange for a waiver of claims could not later repudiate the waiver and sue the municipality under 42 U.S.C. § 1983. The *Rumery* court rejected the argument that such waiver agreements are "inherently coercive" or that they are *per se* invalid. *Rumery*, 480 U.S. at 393, 107 S. Ct. at 1192. Nonetheless, the Court suggested that such agreements must be voluntary and procured in the absence of prosecutorial misconduct. *Id.* at 398.

In *Coughlen v. Coots*, 5 F.3d 970, 974 (6th Cir. 1993), the Sixth Circuit clarified the holding in *Rumery* by concluding that before a court may allow the enforcement of a release-dismissal agreement, it must first determine that "(1) the agreement was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement will not adversely affect

relevant public interests.” *Id.* The court noted that the burden falls upon the party seeking to invoke the dismissal agreement as a defense.

In the present case, the dismissal agreement did not require a waiver of claims (as in the § 1983 actions cited above), but instead required a stipulation of probable cause. Nonetheless, a stipulation to probable cause effectively precludes later suit for malicious prosecution in the Commonwealth. While this is not a § 1983 action, we are persuaded by the wisdom behind the Sixth Circuit’s reasoning in *Coughlen* and the Supreme Court’s reasoning in *Rumery* that a trial court must first make specific findings of fact that the agreement was voluntary, that there was no evidence of prosecutorial misconduct, and that public policy interests would not be affected before allowing the agreement to preclude suit for malicious prosecution.

Hence, we reverse and remand for an evidentiary hearing and a determination of whether the dismissal agreement met the above criteria. If the court chooses not to allow the dismissal agreement as a defense based upon its findings, it shall only consider actions taken by Cline⁴ or McCormick during the period in which they were acting as investigators, as delineated in *McCollum*, *supra*, and apply a qualified immunity analysis. Their actions taken subsequent to formal prosecution are cloaked with absolute immunity. *Id.*

Negligence

⁴ We note that Cline, as an agent of the Attorney General’s office and an officer working under the auspices of a local prosecutor’s office, is cloaked with the same immunity protections as McCormick. KRS 218A.240(1); KRS 15.020.

Finally, we reach Williams's claims of negligence against McCormick and Cline. Williams alleges that both Appellees breached the standard of ordinary care when deciding to bring charges of trafficking against her despite exculpatory evidence in their possession. During the period of investigation, McCormick had not "commenced prosecution," and thus his actions and Cline's during that period are not cloaked with absolute immunity. Thus, we must consider whether McCormick and Cline are insulated from liability under a theory of qualified immunity. *McCollum*, 880 S.W.2d 534-535. Officers and employees of the state, when sued for negligence in their individual capacities, are immune from suit for discretionary acts within the scope of their authority, so long as such acts are taken in good faith. *Yanero*, 65 S.W.3d at 521.

In the present case, it is clear that McCormick and Cline's actions were discretionary in nature (as the process of investigating a suspect and deciding whether to swear out a criminal complaint cannot be ministerial in nature) and were within the scope of their authority. Thus, the only remaining question is whether their actions were taken in good faith. We believe that there is an issue of material fact as to whether McCormick and Cline acted in good faith. Similar to *McCollum, supra*, the question here seems to be whether Cline and McCormick learned that Williams "was misidentified as the offender during the investigation and prior to prosecution, but nevertheless initiated the prosecution." *McCollum*, 880 S.W.2d at 535.

Hence, we reverse and remand to the Rowan Circuit Court on the issue of negligence. On remand, the court shall consider whether Cline and McCormick acted in good faith. As part of this analysis, the court should consider whether the Commonwealth was in possession of audio/video recordings that were exculpatory yet knowingly proceeded against Williams anyway.

In sum, we affirm the trial court's dismissal of the abuse of process claim and reverse and remand for an evidentiary hearing and for specific findings on the claims of malicious prosecution and negligence.

ALL CONCUR.

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