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TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-001961-MR

STEPHEN O'DANIEL — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CI-00820

MIKE SAPP,
GARY MARTIN, AND
BOBBY MOTLEY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Stephen O'Daniel appeals the trial court's grant of summary judgment in favor of three Kentucky State Police Officers, Lt. Colonel Mike Sapp, Detective Gary Martin, and Sergeant Bobby Motley, (hereinafter collectively, "the officers"). After a thorough review of the evidence, the

applicable law, and the parties' arguments, we reverse and remand this matter for further proceedings.

This case has previously been before this Court in the unpublished opinion, *Martin v. O'Daniel*, 2011 WL 1900165 (Ky. App. 2011)(2009-CA-001738-MR). As the facts addressed by this Court have not changed, we set them forth again:

> Three Kentucky State Police Officers, Det. Gary Martin (Det. Martin), Lt. Colonel Mike Sapp (Lt. Col. Sapp), and Sgt. Bobby Motley (Sgt. Motley) appeal from the circuit court's denial of their motion for summary judgment on the issue of qualified immunity. Having reviewed the record and the arguments of counsel, we affirm.
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> The underlying facts, generally, are not in dispute. However, because this is before us on a summary judgment issue, we construe disputed facts in a light most favorable to the appellee, Stephen O'Daniel (O'Daniel). *Steelvest, Inc., v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky.1991).
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> Sometime in early March 2006, O'Daniel, a retired Kentucky State Police (KSP) Officer, purchased what he thought was a 1974 Corvette from David Godsey (Godsey). At the time, O'Daniel worked as Executive Director of the Office of Investigations for the Justice & Public Safety Cabinet (the Cabinet). Shortly after purchasing the Corvette, O'Daniel took it to a Wal–Mart for an oil change where he discovered that the engine was not a 1974 Corvette engine. Because he suspected the Corvette might not be what he thought he had purchased, O'Daniel undertook an investigation and eventually came into contact with Detective Bill Riley (Det. Riley), who worked in the stolen vehicle division of the KSP. With O'Daniel's agreement and assistance, Det. Riley inspected the Corvette and determined that it was a 1975, not a 1974 model. Det. Riley also discovered that

the original 1975 vehicle identification number (VIN) plate had been replaced with a different VIN plate. Det. Riley then prepared a "confidential report,"[1] told O'Daniel that the Corvette appeared to have been stolen, and impounded the car. With further investigation, Det. Riley determined that the 1975 Corvette had been stolen in 1981; that State Farm had paid the original owner for the loss; and that the VIN plate belonged to a 1974 Corvette that had also been reported as stolen. Based on that information, Det. Riley believed that State Farm was the titular owner of the 1975 Corvette.

After discovering that the 1975 Corvette was a stolen car, O'Daniel told Luke Morgan (Morgan), general counsel for the Cabinet. Morgan told O'Daniel that the matter was personal and that he should not let it interfere with his duties as Executive Director of the Office of Investigations.

O'Daniel, who was insured by State Farm at the time, contacted his insurance agent. The agent referred O'Daniel to Rod Marshall in State Farm's Illinois office. Rod Marshall stated that State Farm could not find any documentation regarding the Corvette, was not interested in the Corvette, and that O'Daniel could have the car. At some point during this time period, O'Daniel also spoke with a State Farm representative in Kentucky, Kevin Root (Root). Contrary to what Rod Marshall said, Root advised O'Daniel that State Farm was interested in and would pursue a claim for the Corvette.

Based on these conversations, O'Daniel began to explore how he could get a "clear" title containing the correct VIN and model year, and he contacted an attorney, David Marshall (Attorney Marshall). Attorney Marshall spoke with Rod Marshall and Root and confirmed what they had told O'Daniel. Additionally, Attorney Marshall contacted Det. Riley, who stated that he would crush the Corvette before he would return it to O'Daniel. At some point after that conversation,

[1] The report is called a "confidential report" because it reflects information obtained from a review of the "confidential" or hidden VIN. It is not meant to be kept confidential.

O'Daniel took three steps that ultimately led to this litigation.

One, O'Daniel contacted personnel at the Department of Transportation (DOT) to find out how he could get a clear title to the Corvette. He was advised that he could not because the Corvette had been stolen.

Two, after speaking with DOT personnel, O'Daniel contacted the Jessamine County Clerk and asked her how he could obtain a "corrected" title and replacement VIN plate. The Clerk told O'Daniel that he needed a confidential report from the KSP indicating what the correct VIN and model year were for the Corvette. Several days later, O'Daniel returned to the Clerk's office with the confidential report that had been prepared by Det. Riley, and the Clerk completed an application for a title with the Corvette's correct VIN and model year and an application for a replacement VIN plate. When personnel at the DOT received O'Daniel's applications, they contacted the KSP and reported that they had received applications for title and replacement VIN plates from State Farm and O'Daniel. The KSP then began a criminal investigation regarding O'Daniel's applications. Sgt. Motley and Det. Martin were assigned to conduct that investigation under the supervision of Lt. Col. Sapp.

Three, O'Daniel told Morgan about Det. Riley's comment that he would rather crush the car than give it to O'Daniel. Morgan believed at that point the matter was purely a civil dispute between O'Daniel and State Farm regarding ownership of the Corvette. Because he wanted to avoid any appearance of impropriety, Morgan took steps to get the investigation regarding the Corvette out of the hands of the KSP and the Cabinet. These steps included calling a meeting with O'Daniel, Lt. Col. Sapp, Sgt. Motley, and Det. Martin; consulting with the Deputy Secretary of the Cabinet, the Secretary of the Cabinet, the Commissioner of the KSP, and the Governor's Chief of Staff; and asking the KSP to transfer the investigation and the Corvette to another police department. The preceding Cabinet members became involved in this

matter to various degrees and the KSP interpreted their involvement as interference with a criminal investigation and/or obstruction of justice. When the KSP did not abandon the investigation and only very reluctantly transferred the Corvette to the Jessamine County Sheriff, the Cabinet members interpreted behavior by the KSP officers as insubordination. We note that the record is replete with accusations of obstruction of justice and insubordination; however, the details of those accusations are largely irrelevant to the issue on appeal. Therefore, we do not recite them further herein.

Once Sgt. Motley and Det. Martin had completed their investigation into O'Daniel's alleged fraud, they presented their evidence to the Franklin Commonwealth Attorney, Larry Cleveland (Cleveland). According to O'Daniel, Cleveland indicated that he did not believe the evidence was sufficient to establish the intent necessary to successfully prosecute O'Daniel, and he refused to do so. O'Daniel further asserts that, because Cleveland refused to prosecute, the appellants then "shopped" for a prosecutor who would put the evidence against O'Daniel before a grand jury.

The appellants assert that Cleveland chose not to prosecute because he had a conflict and that he recommended bringing in a special prosecutor. Regardless, a special prosecutor reviewed the evidence presented by Det. Martin and Sgt. Motley and presented that evidence to a grand jury. The grand jury then indicted O'Daniel. The case went to trial and the jury acquitted O'Daniel. O'Daniel then brought a malicious prosecution action against Lt. Col. Sapp, Sgt. Motley, Det. Riley, and Det. Martin. The trial court dismissed O'Daniel's claims against Det. Riley; therefore, we address only those issues related to Lt. Col. Sapp., Sgt. Motley, and Det. Martin.

As to Lt. Col. Sapp, O'Daniel alleges that he: refused to comply with orders from Cabinet personnel to transfer the investigation of O'Daniel to another police agency; and orchestrated removing Cleveland and replacing him with another prosecutor. Furthermore,

> O'Daniel alleges that Lt. Col. Sapp failed to timely produce for O'Daniel's criminal defense attorney written evidence of his involvement in Cleveland's removal. As to Det. Martin, O'Daniel alleged that he: lied to the grand jury about how many times the Jessamine County Clerk had been interviewed; lied to the grand jury about the status of O'Daniel's civil case; and withheld the Clerk's first statement from O'Daniel's criminal defense attorney until the week before trial. As to Sgt. Motley, O'Daniel alleged that he withheld the statement he took from the Jessamine County Clerk. Finally, O'Daniel alleged that all three appellants conspired to wrongfully prosecute him.

*Martin v. O'Daniel* at *1 - *3 (internal footnotes removed).

After this Court affirmed the trial court's denial of the officers' summary judgment motion on the grounds of qualified immunity in *Martin v. O'Daniel*, the trial court entertained another motion for summary judgment by the officers and granted said motion on October 23, 2012.

In granting summary judgment the trial court noted that the criminal charge *sub judice* was instituted via the return of an indictment by the Franklin County Grand Jury upon submission of the matter by the special prosecutor, R. David Stengel, and his assistant, Thomas Van DeRostyne. Both prosecutors testified by deposition that it was Stengel who made the decision to go forward with the prosecution. Stengel determined the crime to be charged and presented the case to the grand jury and prosecuted the case at trial after the indictment was returned. None of the officers made an arrest prior to the indictment or filed a criminal complaint against O'Daniel. Thus, the court concluded that O'Daniel could not meet the first element of a malicious prosecution claim, the institution or

continuation of judicial proceedings by the officers. And, the court noted that it was well-settled in Kentucky that testimony before the grand jury is privileged and will not support a malicious prosecution claim even if the testimony was false; thus, the trial court concluded that the alleged perjury would not further O'Daniel's malicious prosecution claim.

The court then assessed the recent United States Supreme Court case of *Rehberg v. Paulk*, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012), and concluded that the officers were entitled to immunity based on their actions as law enforcement officers investigating and testifying in a case that was submitted to a grand jury by a prosecutor. Based on these reasons, the court granted summary judgment to the officers. It is from this order that O'Daniel now appeals.

On appeal, O'Daniel presents two arguments, namely: (1) the lower court erred in entering summary judgment on O'Daniel's malicious prosecution claim; and (2) the officers are not entitled to immunity. In support of his first argument, O'Daniel additionally asserts: (1) the officers do not necessarily need to make the decision to initiate prosecution to be liable for malicious prosecution; and (2) the officers influenced the decision to prosecute O'Daniel by providing inaccurate, false, and misleading information to the prosecutors. In response, the officers argue: (1) the trial court correctly granted summary judgment on O'Daniel's malicious prosecution claim; and (2) the officers were entitled to

immunity.[2] With these arguments in mind we turn to the first issue, whether the officers were entitled to immunity.

As noted, this Court previously addressed the trial court's denial of the officers' motion for summary judgment based on immunity claims. Therefore, we believe it important to set forth what this Court stated in regard to these claims:

> The appellants filed motions to dismiss on the pleadings and/or motions for summary judgment. In their motions, the appellants argued that O'Daniel had failed to set forth sufficient evidence to meet his burden of establishing the elements of malicious prosecution. They also argued that they are entitled to qualified immunity. The trial court, in summary fashion, denied the appellants' motions. It is from the trial court's denial of their motions for dismissal/summary judgment on the issue of qualified immunity that the appellants appeal.
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> ….
>
> Thus, we only address the trial court's denial of summary judgment on the issue of qualified immunity.

[2] In support thereof, Lt. Colonel Sapp argues: (1) he is entitled to qualified official immunity; (2) he did not initiate or continue the criminal proceedings against O'Daniel; (3) probable cause existed for the prosecution of O'Daniel; (4) he is entitled to immunity for claims premised upon his role as a supervisor for Detective Martin and Sergeant Motley; (5) he is entitled to immunity for his decision to open a criminal investigation; and (6) O'Daniel's hybrid *Brady*/malicious prosecution claim fails as a matter of law.

Detective Martin argues: (1) every action he undertook was pursuant to his assignment and duties in investigating the case; (2) he did not continue or initiate the original judicial proceedings against O'Daniel. Sergeant Motley argues: (1) the appeal should be dismissed against him for the failure of O'Daniel to properly serve Motley with a copy of his brief per Kentucky Rules of Civil Procedure (CR) 76.12(5) and, thus, the appeal has not been perfected per CR 76.02; (2) the trial court correctly found that Motley did not institute or continue the judicial proceedings against O'Daniel; (3) the court correctly found that Motley was entitled to immunity because he was engaged in his assigned investigative actions in relation to the forgery case.

We believe that this matter is properly before the court in regard to all appellees. Sergeant Motley timely obtained a copy of appellant's brief and timely filed a response thereto; thus, we do not believe that Sergeant Motley has suffered any prejudice by O'Daniel's failure to serve his appellant brief and, accordingly, review the merits of this appeal. *See Vander Boegh v. Bank of Oklahoma, N.A.,* 394 S.W.3d 917, 922 (Ky. App. 2013).

> Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment, id. § 322; (2) in good faith; and (3) within the scope of the employee's authority. *Id*. § 309; Restatement (Second) Torts, *supr*a, § 895D cmt. g. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed.

*Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001).

As noted by O'Daniel, the Supreme Court of Kentucky in *Yanero* limited the application of qualified immunity to claims of negligence. Therefore, to determine if the trial court erred in denying the appellants' motions for summary judgment on the issue of qualified immunity, we must determine if O'Daniel's claim sounds in negligence. We hold that it does not.

> Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action. They are: (1) the 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).

As noted by the Supreme Court in *Yanero*, a public official is not entitled to qualified immunity if "the officer or employee willfully or maliciously intended to

harm the plaintiff or acted with a corrupt motive." *Yanero,* 65 S.W.3d at 524. One of the key elements of malicious prosecution is malice, which, if proven, negates a public employee's claim to qualified immunity. Because the trial court determined that O'Daniel had produced sufficient evidence to go forward with his malicious prosecution claim, a claim involving the malicious intent to cause harm, the appellants are not entitled to qualified immunity. Therefore, we affirm the trial court's denial of the appellants' motion for summary judgment on the issue of qualified immunity.

We note that the appellants cited to *Smith v. Nesbitt*, 2003–CA–000331, 2003 WL 22462413 (Ky.App. Oct. 31, 2003), *Howell v. Sanders,* 2010 WL 2490343 (E.D. Ky. June 17, 2010), and *Caudill v. Felder*, 2010 WL 411474 (E.D.Ky. Jan. 29, 2010), in support of their position that they are exempt from liability based on qualified immunity. In *Smith,* Boyle County officials filed flagrant non-support charges against Smith. Those charges were ultimately dismissed and Smith filed a malicious prosecution claim against the officials because of the flagrant non-support charges. The circuit court found that the officials were entitled to qualified immunity and dismissed Smith's claim.

In affirming the circuit court, this Court agreed that the officials were entitled to qualified immunity because there was sufficient evidence to bring the charges against Smith and the defendants had acted in good faith. In fact, this Court specifically noted that there was no "evidence that [the officials] acted with a corrupt motive." *Id*. at *4. *Smith* is easily distinguished from the matter before us. Unlike in *Smith*, the trial court herein found that there was sufficient evidence of malicious intent to permit the matter to proceed.[3] Therefore, *Smith* is not persuasive.

*Howell* involved entitlement to immunity by a prosecutor, not police officers; and therefore is

[3] Interestingly, the officers in the current appeal continually rely on this unpublished case. However, this reliance is not persuasive to this Court. Indeed, the trial court did not address this finding in the grant of summary judgment currently before this Court.

> distinguishable. Furthermore, the federal district courts in *Howell* and *Caudill* found that the plaintiff had not established the elements necessary to make a claim for malicious prosecution. The circuit court herein, when it denied the appellants' motions for summary judgment on O'Daniel's malicious prosecution claims, came to the opposite conclusion. Therefore, *Howell* and *Caudill* are also not persuasive.
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> ….
>
> Qualified immunity is available in claims sounding in negligence; however, O'Daniel's claim of malicious prosecution does not sound in negligence. To the contrary, it is an intentional tort, requiring proof of malice; and the trial court believed there were genuine issues of material fact regarding malice on the part of the appellants. To reiterate what we said earlier, we might have found differently regarding the aforementioned; however, that issue is unfortunately not before us. Therefore, although we would like to see this matter come to an end, we hold that the appellants are not entitled to qualified immunity and we affirm.
>
> Finally, for the reasons set forth above, we deny O'Daniel's motion to dismiss this appeal.

*Martin v. O'Daniel* at *3 - *6.

We believe that our prior holding that the officers were not entitled to qualified immunity was not impacted by the recent decision of *Rehberg v. Paulk*, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012), and it was error for the trial court to find otherwise. Of import, *Rehberg* held that a grand jury witness was entitled to the same immunity as a trial witness in a § 1983 action. *Id.* at 1510. This comports with well-settled Kentucky law that, "testimony to the grand jury was privileged, Reed may not maintain a civil action against Isaacs for allegedly lying

to the grand jury." *Reed v. Isaacs*, 62 S.W.3d 398, 399 (Ky. App. 2000), citing *McClarty v. Bickel*, 155 Ky. 254, 159 S.W. 783, 784 (1913).

*Sub judice,* the trial court was correct that the testimony of Detective Martin to the grand jury could not result in a civil action as the testimony was privileged.[4] However, the court then concluded that all officers were entitled to immunity based on *Rehberg*. The *Rehberg* court made clear that a § 1983 action and a common law tort are not one and the same:

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[4] We note that only Detective Martin testified before the grand jury. However, the testimony before a grand jury often does not shield one from liability for the actions leading up to the testimony. *See Gregory v. City of Louisville*, 444 F.3d 725, 738-39 (6th Cir. 2006)(internal citations omitted):

> Subsequent testimony cannot insulate previous fabrications of evidence merely because the testimony relies on that fabricated evidence. This Court has never endorsed such a self-serving result. Merely because a state actor compounds a constitutional wrong with another wrong which benefits from immunity is no reason to insulate the first constitutional wrong from actions for redress.
>
> This Court has consistently held that nontestimonial, pretrial acts do not benefit from absolute immunity, despite any connection these acts might have to later testimony.

*Id. See also Hinchman v. Moore,* 312 F.3d 198, 205-06 (6th Cir. 2002):

> Immunity regarding testimony, however, does not "relate backwards" to events that transpired prior to testifying, even if they are related to subsequent testimony. *Id.* (noting that "constitutional wrongs completed out of court are actionable even if they lead to ... acts [subject to absolute witness immunity]").
>
> ….
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> Falsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional and has been so long before the defendants arrested Hinchman. *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir.1989) ("[O]nly if a false statement was made knowingly and intentionally, or with reckless disregard for the truth and if, with the [officer's] false material set to one side, the [defendant's conduct] is insufficient to establish probable cause, is there a constitutional violation under the Fourth Amendment.") (internal quotation marks and alterations omitted).

> While the Court has looked to the common law in determining the scope of the absolute immunity available under § 1983, the Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more. The new federal claim created by § 1983 differs in important ways from those pre-existing torts. It is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort. *See Kalina*, 522 U.S., at 123, 118 S.Ct. 502. But it is narrower in that it applies only to tortfeasors who act under color of state law. *See Briscoe, supra*, at 329, 103 S.Ct. 1108. Section 1983 "ha[s] no precise counterpart in state law.... [I]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson v. Garcia*, 471 U.S. 261, 272, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (internal quotation marks and citation omitted). Thus, both the scope of the new tort and the scope of the absolute immunity available in § 1983 actions differ in some respects from the common law.

*Rehberg* at 1504-05. Thus, we must conclude that *Rehberg* did not vitiate our prior holding in *Martin v. Daniel, infra,* and our reliance on *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). Having concluded otherwise, the trial court erred in granting summary judgment to the officers[5] based on *Rehberg.*

We now address the second basis for the trial court's grant of summary judgment: whether O'Daniel's failure to meet the first element of a malicious prosecution claim - the institution or continuation of judicial proceedings by the officers - is fatal to his claim.

[5] We do not address Lt. Colonel Sapp's argument that he is entitled to immunity premised upon his role as a supervisor for Detective Martin and Sergeant Motley as this argument was not addressed by the trial court in its order.

As previously noted by this Court:

> Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action. They are: (1) the 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).

Kentucky law is historically antagonistic toward allegations of malicious prosecution, *see Broaddus v. Campbell*, 911 S.W.2d 281, 285 (Ky. Ct. App. 1995) (citing *Reid v. True*, 302 S.W.2d 846 (Ky. 1957)), thus the elements of malicious prosecution are strictly construed, *Davidson v. Castner–Knott Dry Goods Co*., *Inc*., 202 S.W.3d 597, 602 (Ky. Ct. App. 2006) (citing *Prewitt v. Sexton*, 777 S.W.2d 891, 895 (Ky. 1989)).

At issue is whether the officers instituted or continued the original judicial proceedings when a prosecutor obtained an indictment from a grand jury.[6]

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[6] The officers assert that the indictment of O'Daniel by a grand jury establishes probable cause. We remind the officers that while the grand jury indictment raises a presumption of probable cause, this may be rebutted:

> Kentucky courts have expressed the role of a grand jury indictment as to the element of probable cause in malicious prosecution cases many times: "When a grand jury, upon other testimony than that of the prosecutor alone, find an indictment to be a true bill, the presumption is prima facie that, as they, on their oaths, have said that the person indicted is guilty, the prosecutor had reasonable grounds for the prosecution." *Conder v. Morrison*, 275 Ky. 360, 121 S.W.2d 930, 931 (1938); *see also Schott v. Indiana Nat. Life Insurance Co.,* 160 Ky. 533, 535, 169 S.W. 1023 (1914); *Garrard v. Willet*, 27 Ky. (4 J.J. Marsh.) 628, 630 (1830). Consequently,

Recently, the Western District of Kentucky undertook a learned discussion of a malicious prosecution claim,[7] a § 1983 action, and whether a police officer is liable when the decision to prosecute rests with the prosecutor:

> The seminal Sixth Circuit case discussing the elements of a federal malicious prosecution claim also explained that "very little case law [exists] discussing precisely what role an investigating officer must play in initiating a prosecution such that liability for malicious prosecution is warranted, but ... the fact that they did not make the decision to prosecute does not per se absolve them from liability." *Sykes*, 625 F.3d at 311. The *Sykes* Court stated that the term "participated" should be construed to mean "aided", so that "[t]o be liable for 'participating' in the decision to prosecute, the officer must participate in a way that aids in the decision, as opposed to passively or neutrally participating."

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> while a grand jury indictment raises a presumption of probable cause, this presumption can be rebutted by the plaintiff. *Conder,* 121 S.W.2d at 931–32.

*Davidson v. Castner-Knott Dry Goods* at 607.

[7] The Sixth Circuit recognizes that a malicious prosecution claim under the Fourth Amendment provides a cause of action for damages caused by "wrongful investigation, prosecution, conviction, and incarceration." *Barnes v. Wright*, 449 F.3d 709, 715–16 (6th Cir.2006). The Circuit has identified the following elements to maintain such an action:

> First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute. Second, because a § 1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. Fourth, the criminal proceeding must have been resolved in the plaintiff's favor.

*Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir.2010)(internal citations and quotations omitted). The Sixth Circuit does not require proof of malice.

*Phat's Bar & Grill v. Louisville Jefferson County Metro Government*, 918 F. Supp. 2d 654, 660 (W.D. Ky. 2013).

> *Sykes*, 625 F.3d at 309 n. 5. The Sixth Circuit has not provided any further explanation.
>
> Officer Smith argues that the Jefferson County Attorney made the decision to prosecute Williams, Jr. and that he did not influence this decision. However, "[i]f police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded." *Sykes,* 625 F.3d at 318 (quoting *Jones v. City of Chicago,* 856 F.2d 985, 994 (7th Cir.1988)).
>
> ….
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> Importantly, Plaintiffs could also satisfy this element by showing that the officer presented false information to the prosecuting authorities. *Id*. at 312. In such a circumstance, the plaintiff must provide evidence that the officer "(1) stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the alleged false or omitted information was material to the finding of probable cause." *Gregory v. City of Louisville*, 444 F.3d 725, 758 (6th Cir.2006).

*Phat's Bar & Grill v. Louisville Jefferson County Metro Government*, 918 F. Supp. 2d 654, 661 (W.D. Ky. 2013).

We find persuasive the reasoning in *Phat's Bar & Grill* and its reliance on *Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir. 2010), that a malicious prosecution action may be maintained *sub judice*. On remand, the trial court should consider the elements the Sixth Circuit set forth in *Sykes*:

> First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute. Second, because a § 1983 claim is premised

> on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. Fourth, the criminal proceeding must have been resolved in the plaintiff's favor.

*Sykes v. Anderson*, at 308–09 (internal citations and quotations omitted). [8]

In light of the aforementioned, we reverse and remand this matter for further proceedings.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

[8] Clearly such a claim does not run afoul of *Rehberg* as the Court noted:

> Of course, we do not suggest that absolute immunity extends to *all* activity that a witness conducts outside of the grand jury room. For example, we have accorded only qualified immunity to law enforcement officials who falsify affidavits, *see Kalina v. Fletcher*, 522 U.S. 118, 129–131, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997); *Malley v. Briggs*, 475 U.S. 335, 340–345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), and fabricate evidence concerning an unsolved crime, *see Buckle,* 509 U.S. at 272–276, 113 S.Ct. 2606.

*Rehberg* at 1507 n.1.

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