

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 6 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ARTHUR LOPEZ,

No. 18-56452

Plaintiff-Appellant,

D.C. No. 8:17-cv-00488-VBF-
MRW

v.

NEWPORT BEACH POLICE
DEPARTMENT; et al.,

MEMORANDUM*

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted February 4, 2020**

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

Arthur Lopez appeals pro se from the district court's summary judgment and dismissal order in his 42 U.S.C. § 1983 action alleging malicious prosecution and false arrest. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Smith v. Almada*, 640 F.3d 931, 936 (9th Cir. 2011) (summary judgment); *Barren*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appendix A

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v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (order) (dismissal under § 1915(e)(2)(B)). We affirm.

The district court properly granted summary judgment on Lopez's malicious prosecution and false arrest claims against defendant Vincelet because Lopez failed to raise a genuine dispute of material fact as to whether Vincelet acted with malice, and Lopez failed to overcome the presumption, created by the prosecutor filing a criminal complaint, that Vincelet acted with probable cause. *See Mills v. City of Covina*, 921 F.3d 1161, 1169 (9th Cir. 2019) (describing the elements of a malicious prosecution claim); *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008) (The filing of a criminal complaint establishes probable cause and “immunizes investigating officers [] from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused’s arrest exists at that time.”); *see also Dubner v. City and County of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001).

The district court properly dismissed Lopez’s Fourteenth Amendment equal protection claim against Vincelet because Lopez failed to allege facts demonstrating that Vincelet acted with a discriminatory purpose. *See Lacey v. Maricopa County.*, 693 F.3d 896, 920 (9th Cir. 2012) (an equal protection claim

Appendix 2 A

under the Fourteenth Amendment requires that the defendant was motivated by a discriminatory purpose).

The district court properly dismissed Lopez's malicious prosecution claim against defendant Miller because Lopez failed to allege facts sufficient to show that Miller acted with malice. *See Mills*, 921 F.3d at 1169.

The district court properly dismissed Lopez's claims against the Newport Beach Police Department and the City of Newport Beach because Lopez failed to allege facts plausibly demonstrating an unconstitutional policy, practice, or act by an official with policy-making authority. *See Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008) (setting forth elements of a municipal liability claim under § 1983).

The district court did not abuse its discretion in denying Lopez leave to amend his complaint to add claims under 42 U.S.C. § 1985 because the amendment was futile and allowing its addition would have caused prejudice to defendant Vincelet. *See Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999) (setting forth standard of review and factors for denial of a motion to amend).

The district court did not abuse its discretion in denying Lopez leave to add claims against Police Chief Jay Johnson because Lopez's proposed amended complaint was not accompanied by a motion. *See* E.D. Cal. Civ. R. 15-1.

Appendix 3 A

Lopez's motion to take notice of California Penal Code § 166 and another one of his cases in this Court, 18-55520, is granted. All other pending motions are denied.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 28 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ARTHUR LOPEZ,

Plaintiff - Appellant,

v.

NEWPORT BEACH POLICE
DEPARTMENT; et al.,

Defendants - Appellees.

No. 18-56452

D.C. No. 8:17-cv-00488-VBF-MRW
U.S. District Court for Central
California, Santa Ana

MANDATE

The judgment of this Court, entered February 06, 2020, takes effect this
date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rebecca Lopez
Deputy Clerk
Ninth Circuit Rule 27-7

Appendix 'A'

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9 ARTHUR LOPEZ,

10 Plaintiff,

11 v.

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13 NEWPORT BEACH POLICE DEPARTMENT,
14 CITY OF NEWPORT BEACH,
15 CONNOR MILLER, JOSH VINCELET
16 (Newport Beach Police Department, in his
17 individual capacity), and Does 1-100,

18 Defendants.

19 Case No. SA CV 17-488-
20 VBF-MRW

21 FINAL JUDGMENT

22 Final judgment is hereby entered in favor of all defendants and against
23 plaintiff Arthur Lopez. IT IS SO ADJUDGED.

24 Date: October 18, 2018

Valerie Baker Fairbank

25
26 Hon. VALERIE BAKER FAIRBANK
27 Senior United States District Judge

28
Appendix B

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

ARTHUR LOPEZ, Plaintiff,
v.
JOSH VINCELET (Newport Beach Police Department, in individual capacity), Defendant. }
Case No. SA CV 17-00488-VBF-MRW
ORDER
Overruling Plaintiff's Objections and Adopting the July 27, 2018 R & R; Granting Document #55 (Vincelet MSJ) Denying Document #68 as Moot
Dismissing the Action With Prejudice; Directing Entry of Separate Judgment; Terminating and Closing the Case (JS-6)

This Court reviewed the Complaint, CM/ECF Document (“Doc”) 1; First Amended Complaint (“FAC”) (Doc 13); May 1, 2017 Report and Recommendation (“2017 R&R”) (Doc 16) and this Court’s May 24, 2017 Order Adopting the 2017 R&R (Dismissing All Claims in the FAC and Returning the Case to the Magistrate for Proceedings on Original Complaint’s Surviving Claims Against Vincelet). The Court also reviewed defendant Vincelet’s Answer (Doc 28); Vincelet’s motion for summary judgment (Docs 55-56), plaintiff’s opposition (Doc 60), and Vincelet’s reply (Doc 67); the Magistrate’s July 27, 2018 R&R (“the 2018 R&R”) (Doc 72) and plaintiff’s objections (Doc 73); and the applicable law.

As required by 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b), the Court has engaged in de novo review of the portions of the 2018 R&R to which plaintiff has objected and finds no defect of law, fact, or logic in the 2018 R&R. The Federal Magistrates Act and Fed. R. Civ.

1 P. 72 do not require a district judge to discuss a party's objections to an R&R, *see MacKenzie*
2 *v. Calif. AG*, 2016 WL 5339566, *1 (C.D. Cal. Sept. 21, 2016), "particularly . . . where, as
3 here, the objections are plainly unavailing", *Smith v. Calif. Jud. Council*, 2016 WL 6069179,
4 *2 (C.D. Cal. Oct. 17, 2016). Accordingly, the Court will accept the Magistrate Judge's
5 factual findings and legal conclusions and implement his recommendation.

6

7

ORDER

8

Plaintiff Lopez's objection [Doc # 75] is **OVERRULED**.

9

The Report and Recommendation [Doc # 72] is **ADOPTED**.

10

Defendant Vincelet's motion for summary judgment [Doc # 55] is **GRANTED**.

11

Plaintiff Lopez's motion for summary judgment [Doc # 68] is **DENIED** as moot.

12

Summary judgment is granted to defendant Vincelet on all claims against him.

13

14

Final judgment consistent with this order will be entered separately as required by

15

Fed. R. Civ. P. 58(a). *See Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013).

16

This action is **DISMISSED** with prejudice.

17

The case SHALL BE TERMINATED and closed (JS-6).

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IT IS SO ORDERED.

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Dated: October 18, 2018

Valerie Baker Fairbank

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Hon. Valerie Baker Fairbank

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Senior United States District Judge

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**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

ARTHUR LOPEZ,
Plaintiff,
v.
NEWPORT BEACH POI
DEPARTMENT, et al.,
Defendant

Case No. SA CV 17-488 VBF (MRW)
**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE**

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, Senior United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

SUMMARY OF RECOMMENDATION

This is a pro se civil rights action. Plaintiff sued a local detective who investigated a claim that Plaintiff violated a restraining order. Plaintiff contends that the criminal charge that resulted from the detective's

1 investigation – which was later dismissed – constituted an unconstitutional
2 malicious prosecution and false arrest.

3 The Court concludes that the detective is entitled to summary judgment
4 on these causes of action. The undisputed facts could not lead any rational jury
5 to conclude that the detective’s actions rose to the level of constitutional
6 violations under settled Ninth Circuit law.

7 The Court therefore recommends that judgment be entered against
8 Plaintiff and the action dismissed.

9 **FACTS AND PROCEDURAL HISTORY**

10 **Plaintiff’s Wife Complains to the Police**

11 Plaintiff’s former wife obtained a restraining order against him in early
12 2016. The order required Plaintiff to stay more than 100 yards away from her
13 and their children.¹ (Docket # 55-2 at 31.)

14 In July 2016, the ex-wife attended a work event at a beach park in
15 Newport Beach. As she and a colleague left the event, she saw Plaintiff in his
16 vehicle. Plaintiff’s vehicle pulled in front of the women several minutes later
17 when they began to drive off. Plaintiff then drove “super slow” in front of the
18 women on the Pacific Coast Highway, which the ex-wife took to be suspicious.
19 (Id. at 11.)

20 The ex-wife went to the Newport Beach Police Department the next day
21 to report Plaintiff’s apparent violation of the restraining order. She recited
22 these facts in a written complaint that she submitted to the police.

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27 ¹ Plaintiff denies that this is a “restraining” order, but acknowledges
28 that he was the subject of a “protective” order. (Docket # 62-1 at 5.)

1 **Detective Vincelet Interviews Plaintiff and Forwards a Report to**
2 **County Prosecutors**

3 Defendant Vincelet is a detective with the Newport Beach Police
4 Department. He was assigned to investigate the incident. (*Id.* at 15.)

5 The detective conducted a recorded telephone interview of Plaintiff
6 several days after Plaintiff's ex-wife submitted her complaint.² In that
7 discussion, Plaintiff acknowledged that he lived in Riverside County.
8 However, Plaintiff stated that he visited Newport Beach several times per week
9 for physical therapy or to exercise at the beach. Plaintiff did not admit that he
10 saw or interacted with his ex-wife on the day in question. If they were near
11 each other on the road, Plaintiff stated that this was a "coincidence." (*Id.* at 26.)

12 Detective Vincelet wrote a summary of his interview with Plaintiff. The
13 report also contained information regarding Plaintiff's criminal history. The
14 detective determined that Plaintiff "had several contacts and arrests for
15 domestic related issues" and was "currently on informal probation for spousal
16 battery." (*Id.*) Defendant Vincelet then submitted the report of the interview
17 with Plaintiff and the ex-wife's complaint to the county's district attorney.³ (*Id.*
18 at 17.)

19 ² The recording is manually lodged with the Court on a "thumb
20 drive" at Docket # 56. The Court listened to the entirety of the interview
21 (approximately 10 minutes). The device also contains a longer recording of a
22 Superior Court proceeding at which Plaintiff was detained by court order
23 related to this matter. The defense failed to provide the Court with a transcript
24 (or any meaningful summary) of either audiorecording.

25 ³ There is no evidence in the record that Detective Vincelet
26 interviewed the ex-wife's work colleague (Ms. Tsimbalev (the driver of the
27 vehicle)), although she was identified on a police report under the category
28 "Others Involved" in the incident. (Docket # 62 at 9.)

29 Plaintiff offers a statement purporting to be from Ms. Tsimbalev
30 regarding the incident as part of his evidentiary submission. (Docket # 62
31 at 15.) The document is unsigned, undated, unsworn, and unauthenticated in
32 any way. The defense's objections to this document are sustained under
33

1 The district attorney's office filed a criminal complaint against Plaintiff
2 in September 2016. The complaint alleged a criminal violation of the existing
3 protective order (Cal. Penal C. § 166(c)(1) (willful and knowing violation of
4 "stay away order" after conviction involving domestic violence)). (Docket # 62
5 at 20.) Detective Vincelet did not communicate with the prosecutor or the
6 judge involved in that criminal case after submitting his report. He also did not
7 arrest Plaintiff when Plaintiff appeared in court on the charge later in
8 September. (Docket # 55-2 at 17.) (The Court is anecdotally aware that
9 Plaintiff spent several weeks in custody on the protective order violation
10 charge. The case was dismissed before trial and Plaintiff was released.)

11 **The Summary Judgment Submissions**

12 The Court screened Plaintiff's pro se civil rights complaint pursuant to
13 28 U.S.C. § 1915(e)(2). The Court permitted Plaintiff to serve his complaint

14 Federal Rule of Civil Procedure 56(c)(2), 56(e), and Federal Rule of Evidence
15 901.

16 At the hearing on the summary judgment motion, Plaintiff asked
17 the Court to consider this material and show him leniency based on Haines v.
18 Kerner, 404 U.S. 519 (1972). That decision stands for the noncontroversial
19 proposition that a pro se complaint should be held to "less stringent standards
20 than formal pleadings drafted by lawyers." See also Lopez v. Smith, 203 F.3d
21 1122 (9th Cir. 2000) (same). However, a pro se litigant "is expected to abide
22 by the rules of the court in which he litigates." Carter v. CIR, 784 F.2d 1006,
1008 (9th Cir. 1986); United States v. Merrill, 746 F.2d 458, 465 (9th Cir.
1984) (pro se litigant "is subject to the same rules of procedure and evidence as
defendants who are represented by counsel"). Plaintiff has not come close to
satisfying the basic procedural / evidentiary rules of establishing that the Court
may consider this statement.

23 And even if it did, the Tsimbalev statement hardly supports Plaintiff's
24 claims against Detective Vincelet. Ms. Tsimbalev firmly corroborated the
25 crucial portions of the ex-wife's statement that led to the presentation of
26 criminal charges against Plaintiff: he "drove very slowly[,] going unnaturally
27 slow[,] kept braking, as if he knew we were behind him, waiting for us to pass.
28 It felt uncomfortable." (Docket # 62 at 15.) Whatever minor quibbles Plaintiff
has with other aspects of the statement, this information obviously supports a
finding of probable cause based on Plaintiff's suspicious conduct (discussed
below).

1 and pursue his confusingly-pled “Fourth Amendment claims of malicious
2 prosecution / false arrest / false imprisonment” against Detective Vincelet.
3 (Docket # 4 at 1 (screening order).) The remainder of the complaint and other
4 proposed amended complaints were dismissed with prejudice. The district
5 judge affirmed those rulings. (Docket # 19, 51.)

6 After the close of discovery, the defense moved for summary judgment.
7 (Docket # 55.) The gist of the defense motion is that Defendant Vincelet
8 cannot be held liable for Plaintiff’s arrest and prosecution given the
9 independent decision of the district attorney’s office to pursue criminal charges.
10 The defense also contends that Vincelet is entitled to qualified immunity for his
11 conduct. The key materials in support of the summary judgment motion (as
12 cited above) are the initial complaint from the victim, the audio and written
13 records of Vincelet’s interview of Plaintiff, the documentary and declaratory
14 proof that Vincelet transmitted these items to the prosecutor, and the
15 uncontested declaration that Vincelet had no further involvement with
16 Plaintiff’s case after the initial investigation.

17 In response to the motion, Plaintiff filed several submissions. (Docket
18 # 59-64.) These items are a combination of “legal” arguments, first person
19 narratives, and a hodge-podge of unauthenticated documents. However,
20 Plaintiff offered no non-hearsay proof of these facts from any competent
21 witness.⁴

22 As best as the Court understands Plaintiff’s written materials and his
23 argument at the hearing on the motion, he contends that the Vincelet

24 ⁴ As with Plaintiff’s submissions in his earlier action involving
25 another local police agency (SA CV 17-297 VBF (MRW)), the Court
26 disregards Plaintiff’s statement of controverted facts. (Docket # 61.) That
27 submission consists of Plaintiff’s handwritten “disputes” scrawled on the
28 defense’s statement of uncontroverted facts. Plaintiff’s submission neither
constitutes nor points the Court to relevant, admissible evidence.
FRCP 56(c)(1, 4).

1 submission to the prosecution did not properly establish probable cause for his
2 arrest. Plaintiff also claims that Vinculet “lied” by failing to credit Plaintiff’s
3 denials of misconduct, misstated the extent of Plaintiff’s criminal history, or
4 failed to explore alleged inconsistencies with the ex-wife’s allegations. (Docket
5 # 59 at 2-7; 60 5-8.) He also broadly complains that there was an insufficient
6 basis to conclude that he “willfully” violated the restraining order. (Docket #59
7 at 7.)

8 **RELEVANT FEDERAL LAW AND ANALYSIS**

9 **Standard of Review**

10 Under Federal Rule of Civil Procedure 56(c), summary judgment is
11 appropriate when there is no genuine issue as to any material fact and the
12 moving party is entitled to judgment as a matter of law. A “genuine issue”
13 exists only if there is a sufficient evidentiary basis upon which a reasonable jury
14 could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

16 The party seeking summary judgment must present admissible evidence
17 that establishes that there is no genuine, material factual dispute and that he is
18 entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317,
19 323 (1986). The Court views the inferences drawn from the underlying facts in
20 a light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “Where the record taken
21 as a whole could not lead a rational trier of fact to find for the nonmoving
22 party,” there is no genuine issue for trial. Ricci v. DeStefano, 557 U.S. 557,
23 586 (2009) (quoting Matsushita); Zetwick v. Yolo County, 850 F.3d 436, 441
24 (9th Cir. 2017) (to defeat summary judgment, non-moving party must present
25 evidence “such that a reasonable juror drawing all inferences in favor of the
26 respondent could return a verdict in the respondent’s favor”).

1 The nonmoving party must present more than “a mere ‘scintilla’ of
2 evidence[;] rather, the nonmoving party must introduce some significant
3 probative evidence tending to support the complaint.” Summers v. Teichert &
4 Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997) (quotation omitted, emphasis
5 added); Blankenbaker v. Progressive Cas. Ins. Co., 620 F. App’x 579, 582 n.4
6 (9th Cir. 2015) (“party opposing summary judgment must come forward with
7 significant probative evidence as to each element of the claim on which it bears
8 the burden of proof”). The nonmoving party may not rest on its own conclusory
9 allegations or mere assertions; it must set forth non-speculative evidence of
10 specific facts. Emeldi v. University of Oregon, 673 F.3d 1218, 1233 (9th Cir.
11 2012).

12 A court need not find a genuine issue of fact where the non-moving
13 party’s “self-serving” presentation puts forward “nothing more than a few bald,
14 uncorroborated, and conclusory assertions rather than evidence.” FTC v.
15 Neovi, Inc., 604 F.3d 1150, 1159 (9th Cir. 2010). Specifically, a court may
16 “disregard a self-serving declaration for purposes of summary judgment” when
17 the declaration states “facts beyond the declarant’s personal knowledge and
18 “provide[s] no indication how [the declarant] knows [these facts] to be true.”
19 SEC v. Phan, 500 F.3d 895, 910 (9th Cir. 2007) (quotations omitted); see also
20 Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1063 (9th Cir. 2012)
21 (declarations “must be made with personal knowledge; declarations not based
22 on personal knowledge are inadmissible and cannot raise a genuine issue of
23 material fact”).

24 **Malicious Prosecution and False Arrest**

25 To maintain a civil rights action for malicious prosecution, “a plaintiff
26 must show that the defendants prosecuted her [a] with malice and [b] without
27 probable cause, and that [c] they did so for the purpose of denying her [a]

1 specific constitutional right.” Smith v. Almada, 640 F.3d 931, 938 (9th Cir.
2 2011) (quotation omitted); Bartlett v. Nieves, 712 F. App’x 613 (9th Cir. 2017)
3 (same). A claim for false arrest or imprisonment⁵ “is cognizable under § 1983
4 [] provided the arrest was without probable cause or other justification.”
5 Dubner v. City and County of San Francisco, 266 F.3d 959, 964 (9th Cir.
6 2001).

7 A finding of probable cause “is an absolute defense to malicious
8 prosecution” and false arrest claims. Lassiter v. City of Bremerton, 556 F.3d
9 1049, 1054-55 (9th Cir. 2009); Fortson v. Los Angeles City Attorney’s Office,
10 852 F.3d 1190, 1194 (9th Cir. 2017) (same). The filing of a criminal complaint
11 – which establishes probable cause – “immunizes investigating officers [] from
12 damages suffered thereafter because it is presumed that the prosecutor filing the
13 complaint exercised independent judgment in determining that probable cause
14 for an accused’s arrest exists at that time.” Smiddy v. Varney, 665 F.2d 261,
15 266 (9th Cir. 1981).

16 The Smiddy presumption may be overcome by “evidence of material
17 omissions or inconsistent police or eyewitness accounts.” Newman v. County
18 of Orange, 457 F.3d 991, 995 (9th Cir. 2006); Awabdy v. City of Adelanto, 368
19 F.3d 1062, 1067 (9th Cir. 2004) (same). “If a plaintiff establishes that officers
20 either presented false evidence to or withheld crucial information from the
21 prosecutor,” the “presumption of prosecutorial independence” is defeated.
22 Caldwell v. City and County of San Francisco, 889 F.3d 1105, 1116 (9th Cir.
23 2018). The presumption may also be overcome by proof that an officer
24 “pressured the prosecutor or caused the prosecutor to act contrary to the
25 prosecutor’s independent judgment.” Crain v. Nevada, 724 F. App’x 591, 592

26 _____
27 ⁵ There does not appear to be any meaningful difference between the
28 tort iterations of false arrest and false imprisonment. Cabrera v. City of
Huntington Park, 159 F.3d 374, 380 (9th Cir. 1998).

1 (9th Cir. 2018) (citing Blankenhorn v. City of Orange, 485 F.3d 463, 482 (9th
2 Cir. 2007)).

3 However, an arrestee’s “account of an incident, by itself, is unlikely to
4 influence a prosecutor’s decision” and overcome the presumption. Newman,
5 457 F.3d at 995; Collins v. City of Colton, ___ F. App’x ___, 2018 WL
6 3203424 at *1 (9th Cir. June 29, 2018) (same). Also, a plaintiff must present
7 “more than conclusory allegations of the falsehood” of information provided to
8 prosecutors to demonstrate malice or the absence of probable cause. Caldwell,
9 889 F.3d at 1116.

10 **Discussion**

11 Defendant Vincelet is entitled to summary judgment on Plaintiff’s claims
12 that the detective violated his constitutional rights. The only admissible
13 evidence before the Court fails to demonstrate that Defendant acted with
14 malice, without probable cause, or in any way to rebut the conclusion that the
15 arrest decision was independently made by officials other than the detective.
16 No jury could plausibly return a verdict for Plaintiff on this evidence.

17 Anderson, 477 U.S. at 249; Zetwick, 850 F.3d at 441.

18 As an initial matter, there is no factual dispute regarding the extent of
19 Detective Vincelet’s actions here. He: (1) reviewed the written complaint of
20 Plaintiff’s ex-wife describing his suspicious behavior; (2) interviewed Plaintiff
21 regarding the incident; and (3) conveyed this information to the prosecutor for
22 evaluation and a charging decision. A jury’s consideration of Defendant’s
23 conduct would necessarily be limited to these acts, not Plaintiff’s unfocused
24 allegations regarding his own conduct on the day of the encounter or events that
25 occurred when Plaintiff later appeared in court. (Docket # 59.)

26 From this, there is no evidence that Defendant acted with any apparent
27 malice toward Plaintiff. Plaintiff has no proof that the detective coerced the ex-
28

1 wife to falsely report Plaintiff's conduct. Additionally, based on the Court's
2 independent review of the police recording of the Lopez-Vincelet interview, the
3 detective and Plaintiff had a polite, professional discussion about the incident.
4 Plaintiff failed to offer any non-speculative proof that Vincelet acted with
5 malice toward him, which is a key element of the constitutional claim. Smith,
6 640 F.3d at 938; Bartlett, 712 F. App'x at 613.

7 Moreover, Plaintiff presents no evidence sufficient to rebut the
8 presumption that the prosecutor "exercised independent judgment" in finding
9 probable cause to pursue a criminal charge against Plaintiff. Smiddy, 665 F.3d
10 at 266. Plaintiff admits that, at the time of the incident, he was the subject of an
11 order that required him to stay 100 yards away from his ex-wife. The ex-wife
12 gave a statement to the police describing Plaintiff's undeniably suspicious
13 behavior when driving in close proximity to her. When the detective contacted
14 Plaintiff to get his version of events, Plaintiff was not able to provide Vincelet
15 with any evidence to disprove that he was in the vicinity. Indeed, Plaintiff
16 admitted that he likely was at the beach that day, but offered a non-inculpatory
17 interpretation of his conduct. Even when viewed in the light most favorable to
18 Plaintiff, the prosecutor was entitled to find probable cause that Plaintiff
19 willfully violated the protective order by "reverse tailgating" (deliberately
20 driving slowly in front of) his ex-wife. That probable cause finding "is an
21 absolute defense" to Plaintiff's constitutional claims against Detective Vincelet.
22 Lassiter, 556 F.3d at 1054-55; Fortson, 852 F.3d at 1194.

23 And, for purposes of Plaintiff's claims against the investigating officer,
24 there is no non-speculative evidence that Vincelet falsified any important
25 information in his limited communication with the prosecutor. Caldwell, 889
26 F.3d at 1116. There were no "inconsistent police or eyewitness accounts" that
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1 Vincelet possessed or withheld from the prosecutor's consideration.⁶ Newman,
2 457 F.3d at 995; Awabdy, 368 F.3d at 1067. With this evidence in hand, there
3 is no proof that the detective "pressured" the prosecutor or had any additional
4 contact that caused the prosecutor to bring charges here. Crain, 724 F. App'x at
5 592. The only version of events that contradicted the ex-wife's complaint was
6 Plaintiff's own exculpatory denial of misconduct. But that denial was "unlikely
7 to influence a prosecutor's decision" and cannot overcome the Smiddy
8 presumption as a matter of settled Ninth Circuit law. Newman, 457 F.3d at
9 995; Collins, 2018 WL 3203424 at *1.

10 Plaintiff failed to carry his evidentiary burden of presenting "more than
11 conclusory allegations" about Detective Vincelet's conduct.⁷ Caldwell, 889
12 F.3d at 1116. Based on the limited evidence that Plaintiff presented, the Court
13 must presume that the local prosecutor independently found probable cause to
14 pursue a criminal charge against Plaintiff. There is also no evidence to create a
15 triable issue of fact regarding Detective Vincelet's alleged malice toward

16 ⁶ Indeed, even though there is no proof that Vincelet learned of the
17 alleged statement of the ex-wife's friend (Tsimbalev), that information is
entirely consistent with the complainant's recitation of the events.

18 And if Plaintiff contends that the officer somehow violated the
19 Constitution by not interviewing the corroborating witness, neither he nor the
20 defense has directed the Court to any clear legal authority on this topic. That
21 by itself, could properly support a finding of qualified immunity in favor of
22 Detective Vincelet. Such immunity "shields government officials from civil
23 damages liability unless the official violated a statutory or constitutional right
24 that was clearly established at the time of the challenged conduct." Reichle v.
Howards, 566 U.S. 658, 664 (2012). "To be clearly established, a right must be
25 sufficiently clear that every reasonable official would have understood that
what he is doing violates that right." Id. Plaintiff does not come close to
meeting this daunting standard to demonstrate that Vincelet was
constitutionally required to interview a secondary witness.

26 ⁷ Plaintiff's claims that Vincelet "lied" to the prosecutor boil down
27 to the lack of acceptance of Plaintiff's denial of guilt and minor critiques of the
detective's summary of Plaintiff's criminal record. (Docket # 61 at 3-6; 62
28 at 13.) These unsupported contentions do not create a dispute over any material
fact in this Court's summary judgment review. Neovi, 604 F.3d at 1159.

Plaintiff; there is none. Finally, given the prosecutor's independent probable cause determination and Vinculet's undisputed non-involvement in the matter after the initial presentment, there is no basis for the malicious prosecution or false arrest charges to proceed to federal trial. No reasonable jury could fairly conclude that Vinculet's actions violated Plaintiff's Fourth Amendment rights.

* * *

Throughout Plaintiff's written materials and oral presentation in court, he emphasizes his factual innocence to the charge that he violated the protective order. He also relies heavily on the dismissal of those charges before trial as "proof" that he was wrongfully arrested.

But the legal claims he seeks to pursue in this civil action require considerably more than that. Plaintiff has not backed up his claims of constitutional misconduct by the investigator who merely forwarded the evidence regarding Plaintiff's conduct to the prosecutor for evaluation. Plaintiff utterly failed to present "significant probative evidence" that Detective Vincellet materially misled the prosecutor in making that probable cause determination. Summers, 127 F.3d at 1152. Summary judgment in favor of the defense is appropriate because there is no genuine dispute for trial.⁸ Ricci, 557 U.S. at 586.

⁸ The defense will not be required to respond to Plaintiff's affirmative motion for summary judgment (Docket # 68) until further order of the Court. It's likely moot should the recommendations above be accepted.

1 **CONCLUSION**

2 IT IS THEREFORE RECOMMENDED that the District Judge issue an
3 order: (1) accepting the findings and recommendations in this Report;
4 (2) granting the defense motion for summary judgment; and (3) dismissing the
5 action with prejudice.

6

7 Dated: July 27, 2018



8 HON. MICHAEL R. WILNER
9 UNITED STATES MAGISTRATE JUDGE

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**Additional material
from this filing is
available in the
Clerk's Office.**