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RECOMMENDED FOR
FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0170p.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ANDREA MILLER,
Plaintiff-Appellant,

v.

WOODSTON MADDOX,
Defendant-Appellee.

No. 17-5021

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:13-cv-01270 – Kevin H. Sharp, District Judge.

Decided and Filed: August 3, 2017

Before: MOORE, STRANCH, and DONALD,
Circuit Judges.

COUNSEL

ON BRIEF: Kyle F. Mothershead, Nashville, Tennessee, R. Andrew Free, Nashville, Tennessee, for Appellant. Keli J. Oliver, Melissa Roberge, DEPARTMENT OF LAW OF THE METROPOLITAN DEPARTMENT OF NASHVILLE AND DAVIDSON COUNTY, Nashville, Tennessee, for Appellee.

OPINION

BERNICE BOUIE DONALD, Circuit Judge. Andrea Miller was arrested, charged, and indicted on charges of reckless driving and resisting arrest, based on false statements made by officer Woodston Maddox. The district court granted summary judgment in Maddox's favor on Miller's malicious prosecution claim under 42 U.S.C. § 1983. We conclude that Maddox is not entitled to judgment as a matter of law and is not entitled to either absolute or qualified immunity. Accordingly, we **REVERSE** the district court's judgment.

I.

Miller brought a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983 against Maddox arising from her alleged reckless driving and resisting of arrest. The district court granted Maddox's motion for summary judgment and dismissed Miller's complaint, reasoning that Miller could not establish an exception to the general rule that the issuance of an indictment conclusively establishes probable cause, and that Maddox was entitled to absolute immunity from a § 1983 suit based on statements he made to the night court commissioner.

II.

This court reviews a district court's grant of summary judgment *de novo*. *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 775 (6th Cir. 2016). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 551 (6th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The moving party bears the initial burden of establishing that there are no genuine issues of material facts, which it may accomplish "by demonstrating that the nonmoving party lacks evidence to support an essential element of its case." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In response, the nonmoving party must present "significant probative evidence" that will reveal that there is more than "some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). The mere existence of a scintilla of evidence in support of the nonmovant's position will not suffice to avoid summary judgment. *Anderson*, 477 U.S. at 252.

III.

We have recognized that a plaintiff may bring a malicious prosecution claim under the Fourth

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Amendment based on a defendant officer's wrongful investigation, prosecution, conviction, and incarceration of a plaintiff. *Barnes v. Wright*, 449 F.3d 709, 715-16 (6th Cir. 2006). To succeed on such a claim, Miller must establish that (1) a criminal prosecution was initiated against her and Maddox made, influenced, or participated in the prosecution decision; (2) there was no probable cause to support the charges; (3) as a result of the legal proceedings, Miller suffered a deprivation of liberty "apart from the initial seizure"; and (4) the criminal proceedings ended in Miller's favor. *Sykes v. Anderson*, 625 F.3d 294, 308-09 (6th Cir. 2010). The last element is not in dispute in this case.

a.

Miller first insists that because, in affirming the denial of Maddox's motion to dismiss, this court found in her favor on the first and third elements, the law of the case doctrine conclusively establishes that those elements are met and precludes our review of those issues on summary judgment.

Initially, despite Miller's claims to the contrary, our prior decision did not resolve whether her allegations of post-process detention deprived her of liberty so as to satisfy the third element. Rather, it mentioned, in passing when rejecting Maddox's argument that Miller's claim should be construed as one for false imprisonment, that "the detention that Miller challenges is the three-to-four-hour period of confinement that resulted from the allegedly wrongful institution of this

legal process.” Order, R. 20 at 4, Case No. 14-6216. We noted that this was “the exact harm that a malicious-prosecution claim is intended to remedy.” *Id.* We therefore, did not resolve the third element.

Furthermore, the law of the case doctrine does not prohibit our review of these issues. Under the law of the case doctrine, “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Scott v. Churchill*, 377 F.3d 565, 569-70 (6th Cir. 2004) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Importantly, however, this doctrine is intended to enforce a district court’s adherence to an appellate court’s judgment, and so is applied only loosely when we reconsider our own decisions. *Williams v. McLemore*, 247 F. App’x 1, 7 (6th Cir. 2007) (citing *United States v. Dunbar*, 357 F.3d 582, 592 (6th Cir. 2004)); *see also Patterson v. Haskins*, 470 F.3d 645, 660-61 (6th Cir. 2006) (noting the prudential nature of the law of the case doctrine). Consistent with this latter principle, we have also held that this court’s prior “holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery.” *McKenzie v. Bell-south Tellemcomms, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000); *see also Williams*, 247 F. App’x at 7 (citing *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)) (observing that the denial of qualified immunity in a motion to dismiss does not trigger the law of the case doctrine following the denial of the defendant’s motion for summary judgment). So we may consider issues not

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expressly or impliedly decided by the previous opinion. *McKenzie*, 219 F.3d at 513 (quoting *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir. 1992)). Given the prudential nature of the law of the case doctrine and the fact that we previously decided these issues under a standard more favorable to Miller, we conclude that this doctrine does not bar us from revisiting these issues.

We now turn to the three elements of malicious prosecution at issue in this case.

b.

To succeed on her claim, Miller must first establish that a criminal prosecution was initiated against her and that Maddox made, influenced, or participated in the prosecution decision. *Sykes*, 625 F.3d at 308. Neither party disputes that a criminal prosecution was initiated against Miller. Rather, the dispute centers on whether Maddox made, influenced, or participated in the prosecution decision. “To 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.” *Sanders v. Jones*, 845 F.3d 721, 731 (6th Cir. 2017) (quoting *Webb v. United States*, 789 F.3d 647, 660 (6th Cir. 2015)). In *Sykes*, for instance, we concluded that an officer influenced or participated in the decision to prosecute the plaintiffs where the officer gave false testimony at a preliminary hearing, which was material because the officer was the only one to testify. 625 F.3d at 312-14. We further held that a second officer likewise

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participated or influenced the decision to prosecute the plaintiffs when the officer made misrepresentations and omissions in his application for an arrest warrant and investigative report, which were relied on by the prosecutors in proceeding against the plaintiffs. *Id.* at 314-17.

Here, Maddox swore as a “prosecutor” in an affidavit for an arrest warrant that Miller ran a stop sign, then proceeded to speed down the street, became verbally confrontational when Maddox asked her to get out of the vehicle, then jerked and twisted away from him when he tried to physically remove her. As a result, the night commissioner issued an arrest warrant. Later, at a preliminary hearing, Maddox testified to these same facts. Based on Maddox’s testimony, the court found sufficient evidence to bind Miller’s case over to the grand jury. It appears that Maddox was the only witness to testify during that hearing. Although it may be true that Maddox never directly spoke with the prosecutor regarding the case, because Maddox swore out the warrant affidavit that was submitted to the night commissioner and was the only witness to testify in the preliminary hearing, we conclude that he at least influenced or participated in the prosecution decision. *See id.* at 312-17.

c.

We next turn to the issue of whether there was probable cause to support the charges. The district court resolved the claim on this element, reasoning

that Miller could not rebut the general rule that an indictment conclusively establishes probable cause. However, our recent decision in *King v. Harwood*, 852 F.3d 568 (6th Cir. 2017), which creates an exception to that general rule, calls the district court's conclusion into question. In light of *King*, we conclude that the district court erred in granting summary judgment on this ground.

Shortly prior to our decision in *King*, we decided *Sanders*, which observed the apparent tension in our jurisprudence on the element of probable cause in a malicious prosecution case. There, we noted that an indictment, fair on its face, generally conclusively establishes the existence of probable cause, but also observed the exception to that rule when a defendant knowingly or recklessly presents false testimony to the grand jury to obtain an indictment. *Sanders*, 845 F.3d at 728-29. We examined the tension that this exception creates with the Supreme Court's decision in *Rehberg v. Paulk*, 566 U.S. 356 (2012), which held that absolute immunity extends to false testimony given by a grand jury witness. *Sanders*, 845 F.3d at 729-30. In particular, we analyzed "the tensions between *Rehberg* and our malicious prosecution cause of action to determine whether malicious prosecution remains a viable claim where a plaintiff was indicted by a grand jury, given that *Rehberg* lends absolute immunity to grand jury testimony." *Id.* at 731.

The plaintiff in *Sanders* argued that the officer was not entitled to absolute immunity because her malicious prosecution claim was not based on the officer's

grand jury testimony, but rather on his allegedly false police report. *Id.* at 730. We held that although the officer was not entitled to absolute immunity for his police report, the statements made therein could not overcome the presumption of probable cause because they could not be material to the grand jury’s finding of probable cause. *Id.* at 732-33. We so reasoned because “[f]alse statements could affect the grand jury’s determination of probable cause only if introduced through grand jury testimony, and if that testimony is by the defendant, he is absolutely immune under *Rehberg*.” *Id.*

In *King* we recognized the “harsh” result produced by *Sanders*, noting that to avoid that outcome, we would need to create an exception to the rule that an indictment conclusively establishes probable cause. *King*, 852 F.3d at 587. So, we created an exception, holding that:

where (1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grandjury testimony or preparation for that testimony . . . the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive.

Id. at 587-88. We, therefore, look first to whether the *King* exception applies to create a mere rebuttable presumption of probable cause.

First, Maddox accepts as true for the purpose of this appeal that his statements that Miller was speeding and subsequently resisted arrest were false. We conclude that these false statements were committed in the course of setting the prosecution of Miller in motion because, as discussed above, Maddox as the complaining witness filed the affidavit that led the night commissioner to issue a warrant for Miller. Additionally, he was the only witness at the preliminary hearing where it was determined there was probable cause to bind Miller's case over until trial. While, as Maddox insists, there may not be evidence that the "fabricated evidence [was] presented to the grand jury and relied upon in securing an indictment," R. 25, Appellee Br. at 18, his false statements were instrumental in the stages leading up to the ultimate indictment, so set the prosecution in motion.

Next, the false statements were material to Miller's prosecution because there is no indication of evidence in the record that would allow the charges against Miller to proceed to the grand-jury stage absent Maddox's false testimony. Finally, Maddox's false statements do not consist solely of grand jury testimony. To the contrary, as Maddox emphasizes, he did not testify during the grand jury proceedings and there is nothing but speculation to suggest that Maddox's statements were used during these proceedings.

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Accordingly, we conclude that the *King* exception applies to overcome the conclusive presumption that an indictment by the grand jury establishes probable cause. So, Miller is entitled to rebut the presumption of probable cause.

As noted, Maddox accepts for the purposes of his appeal that Miller did not physically resist his attempts to remove her from the vehicle. Maddox points to no other evidence in the record supporting probable cause for resisting arrest, so we conclude that there is no probable cause to support the charge against Miller for reckless driving in violation of Tenn. Code Ann. § 39-16-602.¹ Maddox also accepts that Miller was not speeding. The only other evidence to support the charge of reckless driving in violation of Tenn. Code Ann. § 55-10-205² is that Miller ran a stop sign. However, though his affidavit states that Maddox had “a clear unobstructed view” of Miller running the stop sign, based on the dash-cam video, no stop sign is visible that would indicate where Miller was supposed to stop. There is, therefore, at least a genuine issue of

¹ “It is an offense for a person to intentionally prevent or obstruct anyone known to the person to be a law enforcement officer . . . from effecting a stop, frisk, halt, arrest or search of any person. . . .” Tenn. Code Ann. § 39-16-602(a).

² “Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property commits reckless driving.” Tenn. Code Ann. § 55-10-205(a).

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material fact regarding whether Maddox had probable cause to arrest Miller for reckless driving.³

d.

Lastly, Miller must demonstrate not just that she was seized, but that she suffered a deprivation of liberty “apart from the initial seizure.” *Sykes*, 625 F.3d at 308-09. The record reflects that after Miller participated in the video conference with the night court commissioner who found probable cause, she remained detained for approximately forty-five minutes.⁴ Thereafter, she paid a \$35⁵ fee to be released and was required to participate in a pretrial release program, which mandated that she show up on time for all court appearances and call the pretrial case manager every

³ On appeal, Maddox also insists that the determination of probable cause at the preliminary hearing definitively establishes probable cause for the purposes of Miller’s malicious prosecution claim. However, before the district court, Maddox argued only that he was absolutely immune from testimony given at the preliminary hearing and that the indictment conclusively establishes probable cause. Maddox has, therefore, waived appellate review of this argument that was not presented before the district court. *Fed. Trade Comm’n v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630 (6th Cir. 2014) (“[T]he failure to present an issue to the district court forfeits the right to have the argument addressed on appeal.” (quoting *Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006))).

⁴ It appears that Miller contends that only the forty-five minutes she spent after the video conference with the commissioner, not the hour or so she spent beforehand, constituted a deprivation apart from the initial seizure.

⁵ Miller testified at her deposition that she paid a \$45 fee, but clarifies in her briefs on appeal that the fee was \$35.

week until the case was resolved. Participation in this program was an alternative to Miller posting a \$3,000 bond.

Miller's participation in the pretrial release program constitutes a deprivation of liberty separate from the initial seizure. In *Noonan v. County of Oakland*, we concluded that the plaintiff was not deprived of his liberty apart from his initial seizure because the plaintiff was "never arrested or incarcerated, required to post bail or bond, or subjected to any travel restrictions." No. 15-2192, 2017 WL 1102912, at *7-8 (6th Cir. Mar. 24, 2017) (unpublished). In that case, we concluded that the aggravation and costs associated with hiring an attorney and reputational harms were not "a deprivation of liberty as understood in our Fourth Amendment jurisprudence." *Id.* at *8. However, in *Johnson v. Moseley*, we "assume[d] that" conditions of pretrial release "represent a sufficient deprivation of . . . liberty to satisfy the third element" of *Sykes*. 790 F.3d 649, 654 (6th Cir. 2015). Also, in *Johnson v. City of Cincinnati*, we indicated that imposing restrictions designed to compel court appearance, "such as obligations to post bond, attend court hearings, and contact pretrial services" could constitute a seizure. 310 F.3d 484, 493 (6th Cir. 2002) (collecting cases).

Miller was not only arrested and incarcerated, but also required to pay \$35 to be accepted into the pretrial program, could have been required to post a \$3,000 bond, was required to attend court appearances, and required to check in with a case manager once per week. This case involves precisely the factors that were

missing in *Noonan* and that *Johnson v. City of Cincinnati* suggested could constitute a deprivation of liberty apart from the initial seizure. Additionally, after the night commissioner signed the arrest warrants and instructed that Miller could be released after paying the \$35 fee, Miller was detained for approximately an additional forty-five minutes while being screened for the program. The Conditions of Release Order states that Miller “SHALL be released” upon being accepted by the Pre-Trial Services Department for supervision. Conditions of Release Order, ECF No. 67-18, Page ID 607. Any extension of a seizure beyond the time reasonably required to carry out the seizure’s purpose is unlawful. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1613, 1616 (2015) (concluding that the extension of a traffic stop seven or eight minutes beyond the time reasonably required to complete the stop’s mission was unlawful); *see also Manuel v. City of Joliet*, 137 S. Ct. 911, 918-19 (2017) (confirming the applicability of the Fourth Amendment to pretrial detention that occurs after the legal process has begun). The purpose of Miller’s seizure was to determine probable cause and the conditions of her release. To the extent that Miller was detained for any amount of time after being accepted into the pretrial release program, that portion of her detention prolonged the seizure beyond the point necessary to carry out the seizure’s purpose. The parties do not point us to any place in the record stating how long, if at all, after acceptance into this program Miller remained detained. Accordingly, we find that there is a genuine dispute of material fact with respect to whether Miller suffered a deprivation of liberty by

being detained past the time necessary to enroll her in the pretrial services program.

For the aforementioned reasons, Maddox has not established the absence of genuine issues of material fact such that he is entitled to judgment as a matter of law on Miller's malicious prosecution claim.

IV.

As the district court concluded, Maddox contends that he is entitled to absolute immunity for his false statements. We disagree.

In *Briscoe v. LaHue*, the Supreme Court upheld absolute immunity from § 1983 suits for a police officer's testimony, even acknowledging that this could result in defendants being falsely convicted by knowing false testimony given by police officers. 460 U.S. 325, 341-46 (1983); *see also Rehberg*, 566 U.S. at 369, 375 (holding that a witness' false testimony in a grand jury proceeding is entitled to the same absolute immunity under § 1983 as that of a trial witness). However, the Court has gone on to distinguish the acts of an officer who simply falsely testifies in grand jury proceedings, and one whose false testimony plays a more active role in the initiation of litigation. In *Rehberg* for instance, the Court declared that "[o]f 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." *Id.* at 370 n.1. It reasoned that by simply "testifying

before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant.” *Id.* at 370-71 (comparing a grand jury witness, who is entitled to absolute immunity, with a complaining witness, who is not because the complaining witness procures an arrest warrant or otherwise “set[s] the wheels of government in motion by instigating a legal action” (citations omitted) (alteration in original)); see also *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997) (concluding that absolute immunity does not extend to testifying in an affidavit for a search warrant regarding the truth of the underlying facts); *Malley v. Briggs*, 475 U.S. 335, 340-45 (1986) (observing that we have accorded only qualified immunity to law enforcement officials who falsify affidavits). Therefore, an officer is not absolutely immune when he makes false statements in a warrant affidavit.

Maddox seems to suggest that he cannot be held liable for the false statements made in the warrant affidavits because his testimony before the judicial commissioner was based on the false statements. His logic is apparently that because he is absolutely immune from § 1983 liability based on his testimony, that he is also immune for the false statements previously made in the affidavits. In support of his proposition, he relies on *Sanders*. However, *Sanders* does not support his argument. In fact, *Sanders* held that the officer was *not* entitled to absolute immunity for his police report. *Sanders*, 845 F.3d at 733. In *Sanders*, we went on to note that absolute immunity would not extend to “falsifying affidavits and fabricating evidence.” *Id.* at 734.

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There is a “thin but conspicuous line between, on the one hand, law-enforcement officers who only provide grandjury testimony . . . and, on the other hand, law-enforcement officers who either (1) set the wheels of government in motion by instigating a legal action, or (2) falsify affidavits or fabricate evidence concerning an unsolved crime.” *King*, 852 F.3d at 584 (citations omitted) (internal quotation marks omitted). We confirmed in *King* that only qualified immunity extends to officers who engage in the latter acts. *Id.*; see also *Spurlock v. Satterfiled*, 167 F.3d 995, 1001 (6th Cir. 1999) (“[A]bsolute testimonial immunity does not ‘relate backwards’ to ‘protect a defendant for any activities he allegedly engaged in prior to taking the witness stand for his grand jury testimony.’” (alteration omitted) (quoting *Mastroianni v. Bowers*, 160 F.3d 671, 677 (11th Cir. 1998))). We conclude, therefore, that Maddox is not entitled to absolute immunity for the false statements he made in his warrant affidavit.

V.

Lastly, we address Maddox’s argument that he is entitled to qualified immunity. Government officials are entitled to qualified immunity for their actions unless (1) the plaintiff has established a violation of a constitutional right, and (2) the right at issue was clearly established at time of the incident. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The key inquiry is whether the defendants had “fair warning” of the unconstitutionality of their actions. *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005). The right also

“must be clearly established in a ‘particularized’ sense, so that ‘the contours of the right’ are clear enough for any reasonable official in the defendants’ position to know that what the official is doing violates that right.” *Danese v. Asman*, 875 F.2d 1239, 1242 (6th Cir. 1989) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “In other words, existing precedent must have placed the statutory or constitutional question confronted by the official beyond debate.” *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

Maddox spends a considerable portion of his brief illustrating why it is not clear that he should be liable for malicious prosecution, thus reasoning that he is entitled to qualified immunity. Yet, his claim that the contours of our jurisprudence concerning malicious prosecution are not entirely clear misses the point. Our inquiry is whether Maddox’s alleged actions – arresting and detaining Miller based on false pretenses and then seeking an arrest warrant based on these false statements – violated Miller’s clearly established constitutional rights. We conclude that they did.

In *Spurlock* for instance, we determined that the plaintiffs’ allegations were sufficient to allege a violation of their constitutional rights where their complaint stated “that [the defendants] wrongfully investigated, prosecuted, convicted and incarcerated them; that [an officer] fabricated evidence and manufactured probable cause; that they were held in custody, despite a lack of probable cause to do so; and that

[an officer] and others conspired to maliciously prosecute and convict them.” 167 F.3d at 1005. Turning to whether their rights were clearly established at the time, we held that “a reasonable police officer would know that fabricating probable cause, thereby effectuating a seizure, would violate a suspect’s clearly established Fourth Amendment right to be free from unreasonable seizures.” *Id.* at 1006. Likewise, we concluded that “a reasonable police officer would be on notice that unlawfully detaining a suspect, despite the fact that the evidence used to detain that individual was fabricated, would also be unlawful.” *Id.* at 1006-07. Thus, we held that the defendants were not entitled to qualified immunity. *Id.* at 1007. Similarly, in *King* we held that “individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has made, influenced or participated in the decision to prosecute the plaintiff by, for example, knowingly or recklessly making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants.” 852 F.3d at 582-83 (quoting *Webb*, 789 F.3d at 660, 665) (internal quotation marks omitted). In light of the foregoing, we conclude that Miller had a clearly established Fourth Amendment right to be free from seizure and prosecution based on fabricated evidence, and that Maddox violated these rights by using his false statements as a basis for establishing probable cause, resulting in the initiation of prosecution against her. Maddox is, therefore, not entitled to qualified immunity.

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VI.

For the reasons discussed above, we **REVERSE** the grant of summary judgment in Maddox's favor and **REMAND** for further proceedings consistent with this opinion.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5021

ANDREA MILLER,
Plaintiff-Appellant,

v.

WOODSTON MADDOX,
Defendant-Appellee.

Before: MOORE, STRANCH, and DONALD,
Circuit Judges.

JUDGMENT

(Filed Aug. 3, 2017)

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the
district court and was submitted on the briefs without
oral argument.

IN CONSIDERATION THEREOF, it is OR-
DERED that the grant of summary judgment in Wood-
ston Maddox's favor is REVERSED, and the case is
REMANDED for further proceedings consistent with
the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ANDREA MILLER	)	
	)	NO. 3-13-1270
v.	)	JUDGE SHARP
WOODSTON MADDOX	)	

MEMORANDUM AND ORDER

(Filed Jan. 4, 2017)

Pending before the Court are a Report and Recommendation of the Magistrate Judge (Docket No. 76), Objections filed by the Defendant (Docket No. 77), and a Response to Objections filed by the Plaintiff (Docket No. 78). The Magistrate Judge recommended that Defendant's Motion for Summary Judgment (Docket No. 60) be denied.

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b)(3) and Local Rule 72.03(b)(3), the Court has reviewed *de novo* the Report and Recommendation, the Objections, the Response, and the file. The Court finds that the Objections of the Defendant are well-taken, and the Report and Recommendation is rejected. Accordingly, Defendant's Motion for Summary Judgment (Docket No. 60) is GRANTED, and this action is DISMISSED.

INTRODUCTION

Plaintiff Miller's Amended Complaint alleges, pursuant to 42 U.S.C. § 1983, a claim for Fourth Amendment malicious prosecution against Defendant Maddox. She contends that Defendant charged her with reckless driving and resisting arrest without probable cause, falsely testified against her before the grand jury and at her preliminary hearing, and intentionally swore out false affidavits resulting in her being booked into jail.

Defendant has filed a Motion for Summary Judgment, contending that he is entitled to judgment as a matter of law because the grand jury returned an indictment against Plaintiff, which conclusively establishes that Defendant had probable cause to arrest Plaintiff. Defendant also argues that he did not testify before the grand jury in Plaintiff's case; another officer did. Defendant represents that there is no record of the grand jury testimony which was given, and the officer who gave it does not remember what he said, so Plaintiff cannot show that anyone presented false testimony. Defendant further contends that Plaintiff's allegations are more appropriately characterized as a false arrest claim, not a malicious prosecution claim, and that Plaintiff did not suffer the deprivation of liberty required to sustain a malicious prosecution claim. Finally, Defendant argues that he did not participate in the prosecution of Plaintiff and he is entitled to qualified immunity.

MALICIOUS PROSECUTION

To succeed on a malicious prosecution claim under Section 1983 when the claim is premised on a violation of the Fourth Amendment, a plaintiff must prove that (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor. *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). The tort of malicious prosecution is entirely distinct from that of false arrest, as the malicious prosecution tort remedies detention accompanied not by *absence* of legal process, but by *wrongful institution* of legal process. *Id* at 307.

There is no dispute that a criminal prosecution was initiated against Plaintiff Miller. The parties dispute whether Defendant made, influenced or participated in the decision to prosecute. To 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. *Sykes*, 625 F.3d at 309. The Magistrate Judge stated that Defendant's submission of affidavits to a General Session Court Commissioner for the purpose of obtaining arrest warrants and criminal charges constituted more than passive or neutral participation in the decision to

prosecute.¹ In so finding, he relied upon the Sixth Circuit Court of Appeals' decision in this case (Docket No. 47) wherein the appellate court affirmed this Court's denial of Defendant's Motion to Dismiss on qualified immunity grounds.

Defendant correctly points out that the Sixth Circuit made that statement in ruling on a motion to dismiss, not a motion for summary judgment, and the legal standards are different. On a motion to dismiss, the court is simply determining whether the plaintiff has alleged sufficient facts to proceed with the lawsuit, and the court must accept all the allegations of the Complaint as true. On summary judgment, a plaintiff must do more – she must show that, after discovery, there is a genuine issue of material fact and that the defendant is not entitled to judgment as a matter of law. Moreover, the Sixth Circuit was determining whether Plaintiff had sufficiently alleged her claims to overcome a qualified immunity defense only – not whether Plaintiff had demonstrated sufficient facts to prove a malicious prosecution claim.²

Plaintiff must also show that there was no probable cause for the prosecution. Defendant argues that the grand jury indictment in this case conclusively

¹ There was also a preliminary hearing on the charges against Plaintiff, at the conclusion of which, the judge bound Plaintiff over to the grand jury.

² As noted by the Sixth Circuit, Defendant's appeal was an interlocutory appeal challenging only the district court's determination that he was not entitled to qualified immunity. Docket No. 47.

determines the existence of probable cause. The finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause. *Barnes v. Wright*, 449 F.3d 709, 716 (6th Cir. 2006). There is an exception to this general rule when a defendant deliberately or recklessly presents false testimony to a grand jury in order to obtain an indictment. *Robertson v. Lucas*, 753 F.3d 606, 616 (6th Cir. 2014). Thus, Plaintiff's burden on this motion was to adduce evidence that Defendant knowingly or recklessly presented false testimony to the grand jury. Plaintiff has failed to meet this burden.

Plaintiff has not disputed Defendant's claim that he did not testify before the grand jury in this case; another officer testified. No matter who testified, however, there is no record of the grand jury proceedings, so the Court cannot discern the content of any presumed testimony, much less whether it was deliberately or recklessly false. *See, e.g., Snow v. Nelson*, 634 Fed. Appx. 151, 157 (6th Cir. 2015). The other officer has testified that he does not remember the substance of his testimony or his preparation for giving that testimony. The Court cannot speculate as to what testimony was before the grand jury. *Tinney v. Richland County*, 2016 WL 397963 at * 13 (N.D. Ohio February 2, 2016).

Plaintiff cannot sustain her burden of showing an exception to the general rule that an indictment conclusively determines the existence of probable cause because she cannot show that anyone deliberately or recklessly presented false testimony to the grand jury

in her case. There is no record from which an inference could be drawn that Plaintiff's indictment was secured through false testimony, so Plaintiff has not shown a lack of probable cause.

Alternatively, even if Defendant's statements to the night court commissioner (rather than testimony before the grand jury) are considered the initiation of allegedly false charges, as Plaintiff argues, Defendant is entitled to immunity for those statements.³ In *Briscoe v. LaHue*, 103 S.Ct. 1108 (1983), the Supreme Court held that witnesses alleged to have given false testimony, including police officers, are absolutely immune from a suit for damages under Section 1983. *Id.* at 1119-20; *see also Rehberg v. Paulk*, 132 S.Ct. 1497, 1498-99 (2012) ("A witness in a grand jury proceeding is entitled to the same absolute immunity from suit under Section 1983 as a witness who testifies at trial."). The Supreme Court also made clear that this broad immunity applies not only to a witness's actual testimony to the grand jury, but also to preparatory activities leading up to the grand jury testimony. *Id.* at 1506-07; *Cross v. Metropolitan Govt. of Nashville/Davidson County*, 2014 WL 7240132 at * 6 (M.D. Tenn. Dec. 18, 2014).

³ The Sixth Circuit opinion does not address witness immunity in its opinion in this case. Docket No. 47.

CONCLUSION

For these reasons, the Court finds that Defendant's Motion for Summary Judgment (Docket No. 60) is GRANTED, and this action is DISMISSED. Any other pending Motions are denied as moot. The pretrial conference set for March 13, 2017, and the jury trial set for March 21, 2017, are canceled. This Order shall constitute the final judgment in this case pursuant to Fed. R. Civ. P. 58.

IT IS SO ORDERED.

/s/ Kevin H. Sharp

KEVIN H. SHARP
UNITED STATES
DISTRICT JUDGE

App. 29

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

Andrea Miller

Plaintiff,

v.

Case No.: 3:13-cv-01270

Woodston Maddox

Defendant,

ENTRY OF JUDGMENT

(Filed Jan. 4, 2017)

Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure on 1/4/2017 re [79].

Keith Throckmorton, Clerk
s/ Elaine Hawkins, Deputy Clerk

App. 30

No. 17-5021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREA MILLER,	)	
Plaintiff-Appellant,	)	
v.	)	ORDER
WOODSTON MADDOX,	)	(Filed Nov. 8, 2017)
Defendant-Appellee.	)	

BEFORE: MOORE, STRANCH, and DONALD,
Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk
