IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY

Plaintiff-Appellant,

v.

CITY OF CHICAGO, and
BRODERICK JONES,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

REPLY BRIEF OF PLAINTIFF-APPELLANT

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REPLY BRIEF OF PLAINTIFF-APPELLANT

ARGUMENT IN REPLY

I. A Wrongful Prosecution Resulting from a Police Frame-Up Is a Fourth Amendment Violation

Defendants concede (Def.Br. 5) that plaintiff's claim is that he was framed by a Chicago police officer, who fabricated the evidence upon which a judge made the post-arrest determination of probable cause required by *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). Notwithstanding this concession, defendants insist on arguing that plaintiff's claim must be limited to his arrest. (Def.Br. 10.) Defendants are mistaken in their characterization of plaintiff's claim.

In defendants' view, the Fourth Amendment is not implicated when the judicial determination of probable cause mandated by *Gerstein* is based on fabricated evidence. (Def.Br. 13.) This remarkable proposition flies in the face of *Franks v. Delaware,* 438 U.S. 154 (1978) and is not supported by any of the cases cited (Def.Br. 13) by defendants.

- *Lee v. City of Chicago,* 330 F.3d 456 (7th Cir. 2003) involved the seizure of an automobile;
- *Luck v. Rovestine,* 168 F.3d 323 (7th Cir. 1999) was an action for damages because the plaintiff had been held without a timely *Gerstein* hearing.
- In *Armstrong v. Squadrito,* 152 F.3d 564 (7th Cir. 1998), the plaintiff had been held at a county jail pursuant to a warrant. The validity of the warrant was not challenged; the claim in *Armstrong* was that prolonged detention violated due process.
- *Garcia v. City of Chicago,* 24 F.3d 966 (7th Cir. 1994) arose from an arrest for possession of narcotics which turned out not to be contraband. The plaintiff in *Garcia* did not challenge the legality of his arrest; nor did the plaintiff challenge the integrity of *Gerstein* hearing, other than to assert (without success) that he should have been present at that hearing.

24 F.3d at 969. The claim in *Garcia* was "that the Fourth Amendment requires that police officers perform tests on substances believed to be illegal drugs immediately at a police station, rather than ten to twenty days after arrests at a crime lab." Id. at 970.

- *Villanova v. Abrams,* 972 F.2d 792 (7th Cir. 1992), the final case cited by defendants, involved civil commitment standards and is not at instructive on any question relating to frame-ups.

Defendants are also mistaken in viewing plaintiff's frame-up claim as involving "tainted evidence." (Def.Br. 16.) Plaintiff does not complain about fruit of a poisonous tree — plaintiff's claim is simply that he was arrested and charged with an offense because he was framed by defendant Jones. Jones' wrongdoing corrupted the post-arrest judicial determination of probable cause mandated by *Gerstein v. Pugh,* 420 U.S. 103 (1975) and thereby caused a denial of rights secured to plaintiff by the Fourth Amendment: "'[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing.'" (emphasis in original) *Franks v. Delaware,* 438 U.S. 154, 164-65 (1978), quoting Judge Frankel in *United States v. Halsey,* 257 F.Supp. 1002, 1005 (S.D.N.Y.1966), *aff'd without published opinion,* 2d Cir., No. 31369, June 12, 1967.

Defendants are in error in asserting that damages from a false arrest continue to accrue "as long as criminal charges arising from an unlawful arrest remain pending." (Def.Br. 12.) Damages for a false arrest end when there has been a judicial determination of probable cause: "A claimant pleading false arrest can pursue damages only for the detention that occurred 'up until issuance of process or arraignment, but not more.'" *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892, 900 n.9 (7th Cir 2001), quoting *Heck v. Humphrey,* 512 U.S. 477, 484 (1994).

In defendants' view, this Court approved damage awards in *Whitley v. Seibel,* 613 F.2d 682 (7th Cir. 1980), *opinion following remand,* 676 F.2d 245 (7th Cir. 1982), and *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988), "because the prosecution was one of the consequences of an arrest without probable cause." (Def.Br. 31.) This is incorrect — in each of these cases, the prosecution was the result of a police officer's post-arrest misconduct in misrepresenting the facts. *Whitley,* 613 F.2d at 686; *Jones,* 856 F.2d at 994. Application of this rule in this case requires a reversal of the order of dismissal.

II. In the Alternative, a Prosecution Based on a Police Frame-Up Is a Denial of Due Process

This Court's recent decision in *McCann v. Mangialardi,* ___ F.3d ___ (7th Cir., No. 02-2409, July 22, 2003) teaches that if this case is analyzed under a due process theory, the question to be answered is whether the Fourteenth Amendment requires a complaining witness police officer to come forward with evidence within his (or her) possession which establishes that a defendant in a criminal case has been framed. This is quite different from the question posed by defendants of whether there can be a denial of a right to a fair trial when there has not been a trial.[1]

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1. Defendants argue that it is "well settled" that "individuals who were not convicted as a result of a constitutionally unfair trial cannot bring section 1983 claims based on their right to a fair trial." (Def.Br. 33.) None of the cases cited by defendants support this broad proposition.

   The claim at issue in *Morgan v. Gertz,* 166 F.3d 1307 (10th Cir. 1999) involved the "withholding or destruction of evidence." (*Morgan* stated in *dicta* the broad proposition urged by defendants here that when "all criminal charges were dismissed prior to trial . . . the right to a fair trial is not implicated." Id. at 1310.)

   Rogala v. District of Columbia, 161 F.3d 44 (D.C.Cir. 1998) has nothing to do

In *McCann v. Mangialardi, supra,* the Court cited *United States v. Ruiz,* 536 U.S. 622 (2002) as setting out the test for analyzing due process claims applicable to a criminal proceeding. The Court in *Ruiz* cited (536 U.S. at 631), *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985) for the three part test that "due process considerations include not only (1) the nature of the private interest at state, but also (2) the value of the additional safeguard, and 3) the adverse impact of the requirement upon the Government's interests."

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with fair trial rights; the issue before the court of appeals concerned detention of a automobile passenger while the driver was evaluated for sobriety. The pages in *Rogala* cited by defendants are to portions of the district court opinion that relate to fanciful federal claims asserted by the passenger, who was neither arrested nor charged with an offense.

Taylor v. Waters, 81 F.3d 429 (4th Cir. 1996) held that the officer was entitled to qualified immunity for an arrest based on probable cause. The Fourth Circuit also held that "the failure of an officer to disclose exculpatory evidence after a determination of probable cause has been made by a neutral detached magistrate does not render the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment." 81 F.3d at 437. The Court intimated that a different rule would be applicable if there had been a trial. 81 F.3d at 436 n.5.

There had been a trial in *White v. Moulder,* 30 F.3d 80 (8th Cir. 1994). The Court's conclusion was that "After considering Officer White's trial as a whole, we conclude Officer White has failed to show a constitutional violation because his trial was not fundamentally unfair." 30 F.3d at 82. As to the plaintiff's claim about the delayed disclosure of exculpatory evidence, the Court found that "the delay did not impair White's right to a fair trial." 30 F.3d at 82.

In *McCune v. City of Grand Rapids,* 842 F.2d 903 (6th Cir. 1988), the Court upheld a federal malicious prosecution claim and held that a claim for suppression of exculpatory evidence could not go forward because "the underlying criminal proceeding terminated in appellant's favor." Id. at 906.

Analyzed under this three part test, it is an easy task to support a rule that the prosecution must come forward with evidence within its possession that establishes that a defendant in a criminal case has been framed: there is a strong private interest for an individual in not being prosecuted on fabricated evidence; the additional safeguard would result in the immediate discontinuation of the wrongful prosecution, and the added requirement would not have any adverse impact on the government's interests.

In this case, however, there is no need to consider any due process claim because "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier,* 520 U.S. 259, 272 n. 7 (1997). A police frame-up deprives the criminal defendant of the post-warrantless arrest judicial determination of probable cause required by *Gerstein v. Pugh,* 420 U.S. 103 (1975) and is actionable as a Fourth Amendment violation.

III. Heck v. Humphrey Requires a Successful Resolution of the Criminal Case before the Criminal Defendant May Seek Damages from a Police Frame-Up

Plaintiff's claim that he was framed is a straightforward challenge to the validity of the criminal prosecution and — until the successful resolution of the criminal case — could not be asserted in a civil case under *Heck v. Humphrey,* 512 U.S. 477 (1994). Defendants acknowledge that this Court reached this result in *Okoro v. Callaghan,* 324 F.3d 488, 489-90 (7th Cir. 2003), but argue that plaintiff's "frame-up" claim that Officer Jones planted the drugs is different from the claim advanced in *Okoro* "that there were no drugs, that he was framed." Id. at 490. This attempt to distinguish *Okoro* is wholly without merit.

Equally without merit is defendants' claim that plaintiff could be lawfully convicted of possession of narcotics even if defendant Jones had planted those drugs on plaintiff. (Def.Br. 17-21.) Since at least *Mooney v. Holohan,* 294 U.S. 103 (1935) and *Pyle v. Kansas,* 317 U.S. 213 (1942) it has been plain that a conviction based on fabricated evidence violates the Constitution. Moreover, a prosecutor who learned that Jones had planted drugs on plaintiff would abandon the criminal prosecution. The Illinois Supreme Court long ago recognized that a prosecutor has a "duty to safeguard the constitutional rights of the defendant as those of any other citizen." *People v. Cochran,* 313 Ill. 508, 526, 145 N.E.2d 207, 214 (1924). Rule 3.8 of the Illinois Rules of Professional Conduct mandates that a prosecutor "shall not institute or cause to be instituted criminal charges when such prosecutor or lawyer knows or reasonably should know that the charges are not supported by probable cause." This principle is also contained in the ABA Standards Relating to the Administration of for Criminal Justice 3-3.9(a), which provides that "It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."

There is little difference between application of *Heck v. Humphrey* to the Fourth Amendment claim that plaintiff raises in this case and the application of *Heck* that the Court recognized in *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir 2001). There, the plaintiff had been arrested pursuant to a warrant, which formally commenced the criminal prosecution. The Court held that because the arrest had been authorized by a warrant, a §1983

claim challenging the arrest did not accrue until after the criminal prosecution had been resolved in favor of the civil rights plaintiff. Id. at 900. In this case, plaintiff was arrested without a warrant; the criminal prosecution was based on the post-arrest judicial determination of probable cause required by *Gerstein v. Pugh,* 420 U.S. 103 (1975) and plaintiff's claim is that this judicial finding was corrupted by a police frame-up. In both settings, *Heck v. Humphrey,* 512 U.S. 477 (1994) requires a successful resolution of the criminal proceeding before any civil rights claim accrues.

CONCLUSION

For the reasons above stated and those previously advanced, the Court should reverse the order dismissing plaintiff's complaint and remand for further proceedings.

Respectfully submitted,

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CIRCUIT RULE 31(e) CERTIFICATE

The undersigned, attorney of record for plaintiff-appellant, certifies that he filed a digital version of the foregoing reply brief via the Internet this 4th day of August, 2003.

____
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