

A Look at Evidence, Probable Cause and Qualified Immunity.

By: IMLA Editorial Board

Ignoring Sanctimony: Prosecutor Not Required to Consider Self-Serving Exculpatory Statements Where Documentary Evidence Indicates Otherwise

***Patterson v. Lawhorn,* No. 16-1936 (4th Cir. Apr. 21, 2017).**

Although the state ultimately dropped the prosecution of 13 counts of tax irregularities against a church president, there was sufficient documentary evidence to support probable cause and defeat the plaintiff's malicious prosecution and Fourth Amendment claims.

Denise Lawhorn (Lawhorn), a criminal investigator for the Virginia Department of Taxation, swore out six felony complaints and seven misdemeanor complaints against church president Leslie Patterson (Patterson), alleging that Patterson underreported his income, took credit for unpaid employee withholding taxes and failed to pay the church's quarterly withholding taxes. Virginia ultimately entered orders of *nolle prosequi* for all 13 complaints. Patterson sued Lawhorn for malicious prosecution under Virginia law and brought a §1983 claim for Fourth Amendment violations. The district court granted summary judgment to Lawhorn on both grounds.

The Fourth Circuit affirmed. The state law malicious prosecution claim required a showing that the prosecutor: (1) lacked probable cause, (2) possessed malice, (3) caused the case to be brought against the plaintiff or cooperated in that effort, and (4) terminated the prosecution in a manner favorable to the plaintiff.

The Circuit Court found that Patterson failed to show Lawhorn lacked probable cause for either the felony or misdemeanor complaints. Here, probable cause means that the prosecutor had "knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff [wa]s guilty of the crime of which he [wa]s suspected." Based on conversations with church personnel and a review of Patterson's own accounts, Lawhorn had probable cause for all the complaints. Contrary to Patterson's argument on appeal, Lawhorn did not need to consider Patterson's self-serving innocent explanations for his tax discrepancies; they were not credible when compared to contrary documentary evidence.

The same logic required denial of Patterson's Fourth Amendment claim. The record showed that Lawhorn had "enough evidence to warrant the belief of a reasonable [prosecutor] that an offense has been or is being committed."

http://www.ca4.uscourts.gov/Opinions/Unpublished/161862.U.pdf

Outside the Envelope: Search of Vehicle Parked 200 Yards from Address in Warrant is Not Objectively Reasonable

***Rogers v. Lee County,* no. 16-60537 (5th Cir. Apr. 3, 2017).**

Where officers found 190 grams of crack cocaine in a truck located 200 yards from the address specified in the warrant and allegedly attempted to expand the scope of the warrant via a telephone call to the court, their search of the vehicle described as "parked in back of the residence" was not objectively reasonable and did not support qualified immunity.

Kermit Rogers (Rogers) was arrested in 2009 after officers executed a search warrant for "320 CR 401, Shannon, Lee County, Mississippi, together with all approaches and appurtenances thereto. Also, all vehicles and out buildings on the property." Five grams of crack cocaine was found at that residence, but a much bigger amount--190 grams--was found in a red truck parked at an adjoining property some distance away, at 320A.

Rogers was sentenced under Mississippi law for cocaine sale, served time and was released on probation. But federal authorities also pressed charges under a statute criminalizing possession of more than 50 grams of crack. Rogers provisionally pled guilty, but moved to suppress. The district court agreed, based on "fruit of the poisonous tree" analysis. It had initially declined to consider Rogers' suppression argument based on the government's assertion that the crack had been found in a truck "parked behind the residence" at 320. The court found otherwise upon further study:

> The property where the red truck was located—320A CR 401—is in no way part of that description. It has a different address. It is owned by someone other than the defendant. It is at least 200 yards away from the property at 320.

Rogers had served 452 days under the federal charges before being released. He sued a variety of defendants under §1983, including Lee County, the City of Tupelo and various law enforcement officers, alleging violations under the Fourth and Fourteenth Amendments as well as under Mississippi law. The district court dismissed each of them based on qualified immunity.

The Fifth Circuit reversed as to officer Sam Warren of the Lee County Sheriff's Department and Paul Howell of the Tupelo Police

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Department, disagreeing that a "good faith" exception applied to their actions. Although the officers had allegedly called the court to expand the scope of the warrant, there was no record of the call, and such a tactic would not have been legitimate under federal or Mississippi law. And although the good faith exception can rescue certain inconsistencies between an underlying affidavit and an actual search, law enforcement officials cannot establish objective good faith when the warrant is based on an affidavit "so lacking in indicia of probable cause as to render the official's belief in its existence entirely unreasonable." The Circuit disagreed with the lower court that the warrant for the 320 property might conceivably have been construed to include an "outbuilding" 200 yards away and not even visible from the primary residence. The search of the red truck was effectively warrantless and violated the Fourth Amendment.

http://www.ca5.uscourts.gov/opinions/unpub/16/16-60537.0.pdf

Selective Memory: No Qualified Immunity where Officer Omits Material Discrepancies from Probable Cause Affidavit
***Andrews v. Scuilli,* No. 15-3393 (3d Cir. Apr. 10, 2017).**

Where an officer omitted from his affidavit in support of a warrant that the complainant's descriptions of an alleged sexual predator's vehicle were inconsistent, there were material questions as to whether the resulting warrant and subsequent arrest were supported by probable cause—requiring denial of qualified immunity.

A fifteen-year old was approached by a man in a vehicle while she walked in Stowe Township, Pennsylvania. He asked her to get into his car, and she refused. Her mother contacted police whereupon the girl described the driver (about 35, with dark hair); the vehicle (a red four-door sedan); and a partial license plate number to Officer Robert Scuilli (Scuilli). The next day she believed that she saw the same vehicle at a local shopping center, watched as the driver exited the car, and then contacted Scuilli, who immediately drove to the location.

The shopping center vehicle was owned by 51-year old Robert Andrews (Andrews). When Scuilli presented the girl with various line-up photographs, the girl identified Andrews. Scuilli wrote a probable cause affidavit in support of a warrant, but neglected to state that the shopping center vehicle was only a three-door model, not the four-door vehicle the girl had described the day before. Andrews was arrested for attempted luring of a juvenile, stalking and harassment. He was subsequently acquitted of all charges, and sued Scuilli for false arrest and malicious prosecution. The district court granted Scuilli summary judgment based on qualified immunity.

The Third Circuit reversed. While the discrepancies between the girl's original description of the driver and Andrews' actual appearance might be within acceptable tolerances, the difference between a three-door and four-door vehicle was significant enough to require mention in Scuilli's affidavit. Failure to do so meant that the probable cause underlying the arrest warrant was suspect. This undermined Scuilli's qualified immunity argument that he had not violated any clearly established Fourth Amendment right of Andrews, and required remand for a trial.

http://www2.ca3.uscourts.gov/opinarch/153393p.pdf

Wrong Place, Wrong Time: Probable Cause Can Arise from Mistaken Inference that Transporting Known Drug Suspect Means Driver is Also Engaged in Illicit Activity
***Sampson v. Village of Mackinaw City,* no. 16-1919 (6th Cir. Apr. 6, 2017).**

The arrest of a driver who was unknowingly transporting the subject of a police drug sting operation did not constitute malicious prosecution or support Fourth Amendment claims based on lack of probable cause.

Darryl Sampson (Sampson) agreed to drive Darryl Duncan (Duncan) to various locations around Mackinaw City, Michigan (City). Duncan, who was the subject of an outstanding warrant for drug charges, was being tailed by a confidential informant, allowing City police to follow Sampson's vehicle and pull Sampson over when he rolled through a stop sign. Sampson allowed a search of the vehicle, whereupon the police found heroin behind his seat. They arrested both Sampson and Duncan. All charges against Sampson were later dropped. He sued under §1983, claiming false arrest and malicious prosecution by the officer, and sought municipality liability by the City for failure to properly train and supervise.

The Sixth Circuit affirmed the lower court's dismissal of each of Sampson's claims. Although Sampson argued that his driving was not sufficiently haphazard to provide probable cause for a traffic stop, both courts found that factor irrelevant: probable cause to stop Sampson stemmed from the outstanding warrant for Duncan, a passenger in Sampson's vehicle.

Given the outstanding warrant for Duncan, the arresting officer had reasonable grounds to assume that stopping the vehicle and arresting the occupants was a lawful activity. As the lower court had phrased it "In the context of a drug case, ... an officer may reasonably infer a common enterprise between the driver of a vehicle and a passenger under certain circumstances...." Here Sampson's chauffeuring Duncan to a hotel and other locations at 3 am supported such an inference, even if it was ultimately mistaken: "The fundamental question remains: Did Officer Klave have cause for a reasonable—even if mistaken—belief that Sampson had committed a crime based on the totality of the facts and circumstances within his knowledge? The record here establishes that he did."

The officer's dismissal on qualified immunity grounds was upheld, as was dismissal of the action against the City based Sampson's inability to establish any deficient policy or practice by the City its oversight of officers. http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0205n-06.pdf