

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CIVIL ACTION NO. 3:21-cv-00549-RGJ-RSE**

KENNETH THOMAS

PLAINTIFF

vs.

**MEMORANDUM IN SUPPORT OF DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**
(electronically filed)

DETECTIVE WILLIAM MAYO, *et al.*

DEFENDANTS

* * * * *

Come the Defendants, William Mayo, Jonathan Robbins, Curt Flynn, Robert King, Steve Conrad, and Louisville-Jeferson County Metro Government (“Metro”), by counsel, and in support of their Motion for Summary Judgment, state as follows:

FACTS

The claims in this action stem from a traffic stop in which Plaintiff, Kenneth Thomas (“Thomas”) was the driver. The traffic stop was conducted on October 4, 2018 by members of the former 9th Mobile unit within the Louisville Metro Police Department (“LMPD”). That unit was primarily focused on violent crime and patrolled areas based on where crimes were occurring. The vehicle was pulled over for failure to properly wear seatbelts. *See* Curt Flynn Body Camera Video, 1:25-1:28, conventionally filed as Exhibit 1. Body camera evidence confirms that no one in the vehicle was wearing a seatbelt. Officers determined that Thomas had an out of state warrant. Detective Mayo (“Mayo”) had Thomas get out of the vehicle while other officers checked to see if the warrant was extraditable. *See* William Mayo Body Camera Video, 8:44-9:00, conventionally filed as Exhibit 2. Sergeant King (“King”) arrived on scene and looked in the vehicle. He saw an open container and began a search of the vehicle. *See* Robert King Body Camera, 3:04-6:10, conventionally filed as Exhibit 3. King located the gun inside a motorcycle vest after he moved

the vest and noticed its weight. *Id.* Thomas and a passenger were both arrested because they were convicted felons.

Thomas was ultimately charged federally with being a felon in possession of a handgun. During the criminal action, a suppression hearing was held where Thomas argued that the gun should not have been found because an open container does not provide a justification to search a vehicle. Mayo testified that he would have searched the car if King did not because he smelled marijuana while interacting with Thomas. On January 22, 2020, the Court suppressed the gun evidence, finding that an open container does not justify a search as it is a violation not a crime in Kentucky. *See* US v. Thomas, DN 36, attached as Exhibit 4. In the same order, the Court found that Mayo's testimony that he smelled marijuana was not credible. *Id.* While Mayo vehemently denies ever being untruthful in his testimony, this is a non-issue. The search was initiated by King when he saw an open container in the vehicle. *See* Exhibit 3. The prosecution argued that the vehicle would have been searched based on Mayo having smelled the marijuana and the evidence should not be dismissed based on the inevitable discovery doctrine. However, as this did not form the basis of the search that led to criminal charges against Thomas, whether or not Mayo smelled marijuana is not at issue in this action.

Thomas filed this action on August 27, 2021, two years and ten months after the traffic stop at issue and one year and seven months after the court suppressed the evidence in the criminal action. Thomas raised §1983 claims asserting the following claims: *Monell* failure to train and racially motivated traffic stops, selective enforcement, unlawful search and seizure, false arrest, malicious prosecution, fabrication of evidence, and failure to intervene as well as state claims of battery, false arrest, malicious prosecution, negligent supervision and training, negligence, and

false light. For the reasons that follow, Defendants request that this Court dismiss Thomas' claims against them.¹

STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, ‘show that there is no genuine issue as to any material fact’ such that ‘the movant is entitled to judgment as a matter of law.’” *Villegas v. Metropolitan Government of Nashville*, 709 F.3d 563, 568 (6th Cir., 2013) quoting *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 324 (6th Cir. 2011) (quoting Fed. R. Civ. P. 56(a).) “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Barnes v. Kerr Corp.*, 418 F.3d 583, 588 (6th Cir. 2005) quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). “A dispute over a material fact cannot be ‘genuine’ unless a reasonable jury could return a verdict for the nonmoving party.” *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005) citing to *Anderson*, 477 at 248.

“The burden is generally on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by ‘showing - that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party’s case.’” *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) quoting to *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A plaintiff “may not rest upon mere allegations or denial of his pleadings, but...must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

¹ This motion is limited in scope as to the arguments raised herein. No additional discovery is necessary to address these issues which should be dispositive of the action in its entirety. However, discovery is currently stayed while the parties attempt settlement negotiations. This motion does not waive any other legal arguments or defenses that Defendants may have, and Defendants reserve the right to file additional dispositive motions on those issues in the event that discovery proceeds.

In this case, Thomas cannot put forth any probative evidence to establish a genuine issue of material fact to support his claims. Thomas committed the crime for which he was charged, as evidenced by the gun being found in his vehicle. This fact is a bar to both his state and federal claims of malicious prosecution and false arrest. The remaining claims asserted by Thomas are time barred and should be dismissed pursuant to the relevant statute of limitations.

ARGUMENT

I. Plaintiff's Malicious Prosecution and False Arrest Claims Must be Dismissed Due to the Existence of Probable Cause

The Fourth Amendment False Arrest claims should be dismissed as Thomas' arrests resulted from probable cause. "In order for a wrongful arrest claim to succeed under §1983, a plaintiff must prove that the police lacked probable cause." *Brooks v. Rothe*, 577 F.3d 701, 706 (6th Cir. 2009), *quoting Fridley v. Horrigs*, 291 F.3d 867, 872 (6th Cir. 2002). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Id.*, *internal quotations omitted*. "To determine whether probable cause existed, courts must view 'the totality of the circumstances at the time of the Plaintiffs' arrest and through the time that the criminal proceeding against them commenced.'" *Phat's Bar & Grill v. Louisville Jefferson Cty. Metro Gov't*, 918 F. Supp. 2d 654, 662 (W.D. Ky. 2013), *quoting Sykes*, 625 F.3d at 311.

A claim of malicious prosecution is recognized within the Sixth Circuit under the Fourth Amendment. *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). In order to make a §1983 Fourth Amendment case for malicious prosecution, Thomas must be able to prove that: (1) there was an initiation of a criminal prosecution against him that Defendants either made, influenced, or participated in, (2) there was no probable cause, (3) he consequently suffered a deprivation of

liberty apart from the initial seizure, and (4) the criminal proceeding was resolved in his favor. *Sykes v. Anderson*, 625 F. 3d 294, 308-309 (6th Cir. 2010). It is undisputed both that Thomas is a convicted felon and that at the time of the traffic stop at issue, there was a gun in his car. Consequently, there was adequate probable cause to charge him with being a felon in possession of a handgun.

The existence of probable cause is fatal to both the false arrest and malicious prosecution claims. The only argument to support these claims could be that the gun cannot support probable cause for the criminal charge because the search was unlawful. However, “that would be an improper application of the fruit of the poisonous tree doctrine.” *Davis v. Baker*, No. CV 5:19-107-KKC, 2019 WL 6112837, at *7–8 (E.D. Ky. Nov. 18, 2019). “The fruit of the poisonous tree doctrine is an extension of the exclusionary rule of criminal procedure that ‘bars the admissibility of evidence which police derivatively obtain from an unconstitutional search or seizure.’” *Id.* (internal quotations and citations omitted).

The District Court in *Davis* looked to the Second Circuit for guidance in the absence of established Sixth Circuit law. The Second Circuit concluded that the fruit of the poisonous tree doctrine applies only to criminal trials and cannot be invoked to support a §1983 claim. *See Townes v. City of New York* 176 F.3d 138 (2nd Cir. 1999). The *Townes* Court determined that the purpose of the fruit of the poisonous tree doctrine and exclusionary rule is “‘to deter future unlawful police conduct’ and protect liberty by creating an incentive—avoidance of the suppression of illegally seized evidence.” *Id.* citing *United States v. Calandra*, 414 U.S. 338, 347 (1974); see also *United States v. Peltier*, 422 U.S. 531, 536–39, 95 (1975). “Like the exclusionary rule, the fruit of the poisonous tree doctrine ‘is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a

personal constitutional right of the party aggrieved.” *Id.* citing *Calandra*, 414 U.S. at 348; see also *United States v. Janis*, 428 U.S. 433, 446–47 (1976). *Townes* noted that “the Supreme Court has refused . . . to extend the exclusionary rule to non-criminal contexts, including civil tax proceedings, grand jury proceedings, deportation proceedings, and parole revocation proceedings. *Id.* (internal citations omitted). Here, as in *Townes*, the deterrence objective has already been achieved through the suppression of the gun evidence and ultimate dismissal of the criminal charges. Also as in *Townes*, Thomas seeks damages for his time served in custody “on top of the benefit he enjoys as a result of the suppression. That remedy would vastly overdeter police officers and would result in a wealth transfer that ‘is peculiar if not perverse.’” *Id.* (internal citations omitted).

In *Taylor v. City of Saginaw*, 620 F.Supp. 3d 655 (E.D. Mich. 2022), a District Court in the Eastern District of Michigan determined that damages could not be recovered for parking tickets that were issued when evidence of a parking violation was uncovered following unlawful searches. Although *Taylor* dealt with parking tickets rather than incarceration, that Court turned to a Seventh Circuit case that is strikingly similar to this lawsuit.

In *Martin v. Marinez*, 934 F.3d 594 (7th Cir. 2019), Martin alleged that police lied about him having a broken taillight to pull him over. After pulling Martin over, officers asked him to step out of the car, patted him down, handcuffed him, searched the car, and ultimately found crack cocaine and a semiautomatic handgun in his car. He was charged with being an armed habitual criminal, being a felon in possession of a firearm, possessing a firearm with a defaced serial number, and possessing cocaine. *Id.* at 596. Martin was incarcerated for 65 days, and as in this case, his criminal charges were dismissed after the district court suppressed the evidence. *Id.* Martin then filed a civil lawsuit seeking, in part, damages for the time that he spent incarcerated.

The district court allowed the §1983 claims to proceed with respect to the “stop of his car and seizure of his person – before the defendants discovered the illegal gun and cocaine – [however] he could not seek damages for conduct post-dating the discovery of contraband, including his 65 day incarceration.” *Id.* at 597. Martin was awarded \$1.00 in compensatory damages at trial. *Id.*

Martin appealed the granting of partial summary judgment and argued that the district court erred in concluding that a §1983 claimant may not recover damages as a result of the ‘fruit of the poisonous tree’ doctrine;” arguing instead that the illegal stop was the proximate cause of his arrest, which should allow him to recover damages for his time in custody. *Id.* at 598. The Court found that he could not recover damages under malicious prosecution or false arrest claims because the police had probable cause to arrest him. The Seventh Circuit concluded that “a claim for false arrest cannot succeed because it is undisputed that officers discovered an illegal handgun and cocaine in Martin’s vehicle, which gave them probable cause for his arrest, notwithstanding the previous unlawful stop.” *Id.* (internal citations omitted). The Court went on to find,

Moreover, the fact that the evidence was the fruit of an illegal detention does not make it any less relevant to establishing probable cause for the arrest because the exclusionary rule does not apply in a civil suit under §1983 against police officers. . . . And although Martin’s complaint is limited to claims for false arrest and unlawful search, it bears noting that the existence of probable cause would also bar recovery on a theory of malicious prosecution.

Id. (internal citations and quotations omitted).

The *Martin* court also turned to *Townes*, *supra*, in rejecting Martin’s proximate cause argument. Both *Townes* and *Martin* noted the disconnect between the right to be free from unreasonable searches and seizures and the recovery sought for subsequent incarceration. “The evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all.” *Id.* at 601 quoting *Townes*, 176 F.3d at 148. “[T]he right in question,”

the Seventh Circuit explained, “[was] Martin's right not to be stopped by officers without reasonable suspicion,” which “was vindicated by the nominal damage the jury awarded.”

Martin, 934 F.3d at 605. *See also Hector v. Watt*, 235 F.3d 154 (3d. Cir. 2000)(also looking to *Townes* to conclude that in cases such as this, recovery may be had only for “damages directly related” to the unreasonable search and seizure; “but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution.”).

Here, Thomas has attempted circumvent the fact that probable cause existed when the gun was found in his car by alleging that Defendants provided false information to the prosecutor, which was the moving force behind the criminal prosecution. *See* DN 1, ¶ 174. This allegation can only be based on the finding that Mayo’s testimony that he would have searched the vehicle even absent the open container because he smelled marijuana was not credible. However, this is misleading and not at issue. As stated above, Mayo strongly disagrees with the court’s finding with respect to his testimony; however, it is immaterial in this action. The only true issue is the search that was actually conducted, not what may have been in that search’s absence.

The search that resulted in locating the handgun in Thomas’s vehicle was begun by King based on the presence of an open container. *See* Exhibit 3. The gun was found by King during this search. This, not the smell of marijuana, is what provided the basis for the search, which led to the discovery of the gun and formed the basis of the prosecution. This fact is recognized in the suppression order from the criminal action. *See* Exhibit 4. Although the search was found to be unlawful and the evidence suppressed because an open container is a violation rather than a crime in Kentucky, it does not form the basis of a § 1983 claim for malicious prosecution or false arrest as probable cause for the crime clearly existed once the gun was found. Thomas had the gun in

his car, this is an undisputable fact. It was not fabricated by Defendants. Consequently, these claims should be dismissed.

II. The State Claims of False Arrest and Malicious Prosecution also Fail Due to the Existence of Probable Cause

In Kentucky, false arrest (also referred to as false imprisonment) “requires that the restraint be wrongful, improper, or without a claim of reasonable justification, authority, or privilege.” Here, Thomas’ arrest and criminal charges were initiated based on probable cause, the existence of which has been established.

As with a §1983 claim of malicious prosecution, lack of probable cause is an essential element in a Kentucky malicious prosecution claim. To maintain a state claim of malicious prosecution, Thomas must establish that:

- 1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary proceeding against the plaintiff;
- 2) the defendant acted without probable cause;
- 3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice; and in the civil context, means seeking to achieve a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based;
- 4) the proceeding, except in ex parte civil actions, terminated in favor of the person against whom it was brought; and
- 5) the plaintiff suffered damages as a result of the proceeding.

Martin v. O'Daniel, 507 S.W.3d 1, 11–12 (Ky. 2016). Here, the essential element of acting without probable cause is lacking. “Historically, the tort of malicious prosecution is not one that has been favored in the law. . . Accordingly, one claiming malicious prosecution must strictly comply with the elements of the tort.” *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597, 602 (Ky.App. 2006). For the reasons set forth above, probable cause existed for the arrest and criminal charges brought against Thomas.

As in federal courts, evidence that is found during an unlawful search may be suppressed. This is the remedy when evidence of criminal activity is found in a manner that is inconsistent with the Fourth Amendment. Thomas has already received the benefit of the evidence being suppressed and his charges therefore dismissed. However, this does not negate the probable cause that existed upon finding the gun in the car. Consequently, the state claims of malicious prosecution and false arrest must be dismissed.

III. Plaintiff Failed to Timely File This Action With Respect to all Remaining Claims

In Kentucky, §1983 actions are limited by the one-year statute of limitations set forth in KRS 413.140(1). *Fox v. DeSoto*, 489 F.3d 227, 233 (6th Cir. 2007) and *Collard v. Ky. Bd. of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). A claim accrues “when the plaintiff has ‘a complete and present cause of action.’” *Wallace v. Kato*, 127 S.Ct. 1091, 1095 (2007) (internal citations omitted). Here, Thomas’ claims related to the alleged unlawful search and seizure accrued on October 4, 2018. The malicious prosecution claim is the only claim asserted in Thomas’ complaint that did not begin to run until his criminal charges were dismissed. As Thomas did not file this lawsuit until August 27, 2021, all his §1983 claims stemming from this incident must be dismissed.

Thomas’ state law claims of battery, negligent supervision and training, negligence, and false light must also be brought within one year after the cause of action accrued in Kentucky. *Ky. Rev. Stat. Ann.* §413.140. See *Grego v. Meijer, Inc.*, 187 F.Supp. 689, 694 (W.D. Ky. 2001)(“[T]he statute of limitations to be applied to a negligent supervision claim is the limitations period applicable to the underlying tort committed by the employee.”) As this action was filed more than one year after accrual, the state claims similarly must be dismissed.

CONCLUSION

Seeking monetary compensation when Thomas did commit the crime for which he was charged is indeed a “perverse transfer of wealth.” That is why the claims of malicious prosecution and false imprisonment are barred in this context. Because Thomas’ action was not timely filed with respect to the remaining claims, Defendants respectfully request this Court grant their Motion for Summary Judgment and enter the attached order dismissing Thomas’ claims against them.

Respectfully Submitted,

MIKE O’CONNELL
JEFFERSON COUNTY ATTORNEY

/s/ Susan K. Rivera

Susan K. Rivera
Assistant Jefferson County Attorney
First Trust Centre
200 S. Fifth Street, Suite 300N
Louisville, Kentucky 40202
PHONE: (502) 574-3076
FAX: (502) 574-5573
EMAIL: susan.rivera@louisvilleky.gov
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

It is hereby certified that on August 18, 2023, the foregoing was electronically filed with the clerk of the court by using the ECF system, which will send copies to all counsel of record.

/s/ Susan K. Rivera

Susan K. Rivera