[Cite as *Brown v. King*, 2009-Ohio-4957.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
BRIAN BROWN	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-00165
DON KING, ET AL	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2007CV02886
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 21, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
GREGORY L. GOLUB 1340 Market Ave., North #1 Canton, OH 44714	KEVIN L'HOMMEDIEU Assistant Law Director Canton Law Department 218 Cleveland Avenue S.W.

Gwin, P.J.

{¶1} Plaintiffs-appellant Brian Brown appeals from the July 18, 2008, Judgment Entry of the Stark County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee Don King.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 31, 2006, a report was made to the Police Department of Canton, Ohio that a theft occurred at Heritage Christian School. The items reportedly stolen were three (3) gifts cards for the GetGo gas station. Uniform Officer Debbie Geiger of the Canton Police Department took the initial report. The case was assigned to Detective Donald King, who received Officer Geiger's report. King, now retired, had been a detective since 2001 and a Canton police officer for 31 years.

{¶3} During Detective King's investigation, he spoke with Mr. Pizor, the principal of Heritage Christian School. The principal believed an individual named Brian Brown took the cards. The principal told Detective King that Brian Brown worked for the Held Company, which contracts to clean the school. The report indicated that Brian Brown was a white male, mid to late 20's, six feet one inches tall, weighing approximately 250 pounds, with brown hair and a long ponytail.

{¶4} During the course of the investigation, Detective King learned that the gift cards had been used at the GetGo gas station on Raff Road in Canton, Ohio, and reviewed the surveillance videotape of the suspect using the gift cards. The video tape[1] revealed that the individual who had used the stolen card was a heavy-set male driving a 1990's Chrysler, although the license plate was not visible. King believed the person

[1]Although an entry appears in the record indicating that the videotape was filed in the trial court case on or about July 11, 2008, the videotape itself was not made a part of the record and transmitted to this Court.

on the video tape appeared to fit the description of the Brian Brown identified in Geiger's report.

{¶5} In order to find the suspect named Brian Brown, Detective King searched photographs and records available to him on the Stark County Criminal Justice Information System (CJIS) and on the police OHLEG or Teletype system. King noticed there were several Brian Browns, but chose the one he felt most closely matched the description in Geiger's report. That individual ultimately turned out to be appellant, and not the suspect who worked at Heritage School. According to CJIS, appellant is 5'10", 260 pounds, and 26 years old – similar to the description of the suspect given to Officer Geiger.

{¶6} King then entered appellant's social security number in the teletype system and discovered that he owned a 2000 Chrysler, a car which Detective King believed was similar to the car on the security video.

{¶7} In an attempt to locate the suspect, Detective King called the Held Company at least twice, but no one from the company returned his call. King also called appellant and left him a message. Appellant claims to have returned the call, but King did not receive the message. King also went to appellant's home on 22nd Street in Canton two separate times, leaving his business card each time. Neither appellant nor his mother, with whom he lives, saw the business card. Based on King's experience, appellant's failure to contact him was consistent with the behavior demonstrated by those who had committed crimes.

{¶8} On September 29, 2006, King went to a Canton Municipal Court judge to obtain an arrest warrant for appellant on one charge of theft. The judge determined there was probable cause and issued the warrant[2].

{¶9} Between 9:30 and 11:00 p.m. on December 25, 2006, appellant was pulled over by a Jackson Township police officer. The officer arrested appellant on the warrant, transferring him to the custody of Canton police, who transported him to the Stark County Jail. He was released three hours later. The Canton municipal prosecutor discovered appellant was not the Brian Brown who stole the gift cards and dismissed the case.

{¶10} After the case against appellant was dismissed, Detective King, after speaking with the Held Company, was able to identify a different Brian Brown, one that actually worked for the Held Company, as the suspect in the theft of the gift cards.

{¶11} Appellant filed suit in the Stark County Court of Common Pleas against King alleging state law claims for false arrest and false imprisonment and federal law claims under 42 U.S.C. §1983 ("§1983") for arresting him without probable cause, claiming King's investigation was inadequate.

{¶12} In its entry filed June 25, 2008, the trial court granted King's motion for summary judgment, finding he was entitled to qualified immunity from appellant's federal claims and was immune from his state law claims under R.C. 2744.

{¶13} It is from this Judgment Entry that appellant has timely appealed, raising the following assignment of error:

{¶14} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S' MOTION FOR SUMMARY JUDGMENT."

[2] No transcript of Detective King's request to obtain an arrest warrant appears in the record.

Summary Judgment Standard

{¶15} Our standard of review following the entry of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 245, 1996-Ohio-336. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court is found to support it, even if the trial court failed to consider those grounds. See *Dresher,* supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327. A reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason. *State v. Lozier* (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶ 46, 803 N.E.2d 770, 775. [Citing State *ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.*(1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158.

{¶16} Summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46.

{¶17} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential

elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. Id. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. Id. However, once the moving party satisfies its initial burden, the nonmoving party bears the burden of offering specific facts showing that there is a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but, instead, must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E); *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

{¶18} It is based upon this standard that we review appellant's assignment of error.

I.

{¶19} In his sole assignment of error appellant argues that because genuine issues of material fact are in dispute, the trial court erred in granting the appellee’s motion for summary judgment on the basis that Detective King was entitled to qualified immunity. We disagree.

{¶20} In determining whether an individual is entitled to qualified immunity, Judge Shelia Farmer in *Herbert v. City of Canton,* Stark App. No. 2001CA00281, 2002-Ohio-906 wrote:

{¶21} "As noted by our brethren from the First District in *Cook v. Cincinnati* (1995), 103 Ohio App.3d 80, 85-86, 658 N.E.2d 814, qualified immunity in the context of a 1983 claim is a question of federal law, and is a question of law, not fact, when determining an issue under summary judgment. Public officials, including police officers, who perform discretionary functions are entitled to be shielded from liability for civil damages in a 1983 claim as long as their conduct does not violate clearly established federal rights of which a reasonable person would have known. *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410-416. The test is an objective one. *Id.* This right is known in law as qualified immunity.

{¶22} "Qualified immunity in this context is a question of federal law. State law immunity has no application to a 1983 claim. *Cooperman,* 32 Ohio St.3d at 198, 513 N.E.2d at 296. Qualified immunity is a question of law, not fact, which can be properly determined by summary judgment. *Harlow,* supra; *Dominique v. Telb* (C.A.6, 1987), 831 F.2d 673, 676.

{¶23} "Although qualified immunity is an affirmative defense, the ultimate burden is on the plaintiff to show that a defendant is not entitled to qualified immunity. *Wegener v. Covington* (C.A.6, 1991), 933 F.2d 390, 392. A defendant bears the initial burden of coming forward with facts to suggest that he was acting within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in the defendant's position would have clearly understood that he was under an affirmative duty to refrain from such conduct. Id.

{¶24} "Therefore, in our analysis, we must first determine whether appellee has established facts 'to suggest that he was acting within the scope of his discretionary authority during the incident' sub judice. To this question, we answer in the affirmative…" *Herbert* at *3.

{¶25} In the case at bar we answer in the affirmative. Appellee was a detective with the Canton Police Department. It was within appellee's discretionary authority to investigate the case, name a possible suspect, and request an arrest warrant.

{¶26} In *Herbert,* Judge Farmer continued, "The next level of inquiry is whether appellant has established that any official in appellee's position 'would have clearly understood that he was under an affirmative duty to refrain from such conduct.' In other words, did appellant establish that appellee's conduct violated a right so clearly established that any officer in appellee's position (objectively measured) would have clearly understood that he was under an affirmative duty to refrain from the conduct. *Guercio v. Brody* (C.A.6, 1990), 911 F.2d 1179." Id. at *3.

{¶27} Appellant argues, in essence, that Detective King failed to investigate thoroughly the evidence that appellant was not the Brian Brown who was suspected of committing the theft offense and therefore Detective King lacked probable cause to seek an arrest warrant for appellant.

{¶28} The Fourth Amendment guarantees that government officials may not subject citizens to unreasonable searches or seizures without proper authorization. An intrusion that lacks such authorization is presumptively unreasonable, "subject only to a few specifically established and well-delineated exceptions." *See Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507. For example, police only need a reasonable

suspicion of criminal activity to conduct a brief investigatory detention. *See Terry v. Ohio* (1968), 392 U.S. 1, 30, 88 S.Ct. 1868. The determination of "reasonableness" in a *Terry* stop context depends on a balance between "the need to search [or seize] against the invasion which the search [or seizure] entails." Id. at 21, 88 S.Ct. 1868. When a detention rises to the level of a full-fledged arrest, however, the Fourth Amendment demands that the seizure be supported by probable cause. *See Dunaway v. New York* (1979), 442 U.S. 200, 212-14, 99 S.Ct. 2248.

{¶29} A determination of probable cause is made from the totality of the circumstances. The United States Supreme Court expounded on the concept of probable cause in *Brinegar v. United States* (1949), 338 U.S. 160, 175, 69 S.Ct. 1302 as follows: “In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.”

{¶30} Generally, probable cause exists when the police have "reasonably trustworthy information ... sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223. "'Probable cause determinations involve an examination of all facts and circumstances within an officer's knowledge at the time of an arrest.’ *See Dietrich,* 167 F.3d at 1012. In general, the existence of probable cause in a §1983 action presents a jury question, unless there is only one reasonable determination possible." *Pyles v. Raisor* (6th Cir 1995), 60 F.3d 1211, 1215.

{¶31} Here, viewing the facts in a light most favorable to the appellant, we must determine whether a jury could conclude that a reasonable officer could have believed that the appellant was the person who had probably committed the theft of the credit cards from the school.

{¶32} In *Gardenhire v. Schubert* (6th Cir 2000), 205 F.3d 303, the Court noted, "A police officer has probable cause only when he discovers reasonably reliable information that the suspect has committed a crime. *See Beck,* 379 U.S. at 91, 85 S.Ct. 223. In addition, in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if he has probable cause to make an arrest. *See Dietrich,* 167 F.3d at 1012.

{¶33} Officers are entitled to rely on a judicially secured warrant for immunity in a §1983 action claiming illegal search and seizure, unless the warrant is so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable. *Malley v. Briggs* (1986), 475 U.S. 335, 344-45.

{¶34} A police officer can only be held liable for requesting a warrant that allegedly led to a false arrest if he stated a deliberate falsehood or acted with a reckless disregard for the truth. Proof of negligence or innocent mistake is insufficient. *Ahlers v. Schebil* (6th Cir 1999), 188 F.3d 365, 373. The officer, therefore, faces liability under §1983 if he makes material false statements, knowingly, or in reckless disregard for the truth, in order to establish probable cause for the warrant's issuance. Id.

{¶35} "The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." *Malley*, 474 U.S. at 345-346.

{¶36} While it is true that '[a] valid arrest based upon then-existing probable cause is not vitiated if the suspect is later found innocent,' '[a] suspect's satisfactory explanation of suspicious behavior is certainly a factor which law enforcement officers are entitled to take into consideration in making the determination whether probable cause to arrest exists.' *Criss,* 867 F.2d at 262." *Gardenhire*, 205 F.3d at 318. However, "once a police officer *has* sufficient probable cause to arrest, he need not investigate further." *Klein,* 275 F.3d at 551 (emphasis in original);

{¶37} "The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted-indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights 'without limits.' *Patterson v. New York* (1977), 432 U.S. 197, 208, 97 S.Ct. 2319, 2326. '"Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an

innocent person.' *Ibid.*" *Baker v. McCollan* (1979), 443 U.S. 137,145, 99 S.Ct 2689, 2695.

{¶38} The Constitution is not violated by an arrest based on probable cause, even when the wrong person is arrested, if the arresting officer had a reasonable, good faith belief that he was arresting the correct person. *Hill v. California* (1971), 401 U.S. 797; *Blackwell v. Barton* (5th Cir), 34 F.3d 298, 303.

{¶39} 'Where qualified immunity is asserted, the issue of probable cause is one for the court since 'the entitlement is immunity from suit rather than a mere defense to liability.' *Hunter v. Bryant* (1991), 502 U.S. 224, 227-28, 112 S.Ct. 534, (quoting *Mitchell,* 472 U.S. at 511, 105 S.Ct. 2806)… Only where the evidence creates a genuine issue of material fact should the matter proceed to trial." *Vakilian v. Shaw* (6th Cir 2003), 335 F.3d 509, 517.

{¶40} In the case at bar, Detective King did not simply choose the appellant at random from a list of individuals with the same or similar name without any basis for distinguishing between them. "The question before us is not whether he exhausted every potential avenue of investigation. Rather, for purposes of qualified immunity, we must simply determine whether Detective [King's] actions were reasonable under the circumstances. That his efforts could have been more thorough, or even that his actions may have been mistaken, does not mean that they were *unreasonable.* As we stated in *Torchinsky* [*v. Siwinski* (4th Cir 1991), 942 F.2d 257, 264], 'If reasonable mistakes were actionable, difficult questions of discretion would always be resolved in favor of inaction, and effective law enforcement would be lost.' Id. at 261." *Watkins v. Arnold* (4th Cir 2000), 214 F.3d 535, 543.

{¶41} Detective King did not "fail to pursue" readily available information. Indeed, Detective King attempted on several occasions, without success, to contact both appellant and the Held Company, both in person and via telephone. *Watkins*, 214 F.3d at 541. He further reviewed the surveillance videotape and observed that the individual who had used the stolen card was a heavy-set male driving a 1990's Chrysler. Detective King believed the person on the video tape appeared to fit the description of the Brian Brown identified in Officer Geiger's report. Detective King discovered that appellant was the registered owner of a 2000 Chrysler, similar to the car used by the individual on the GetGo video.

{¶42} Even appellant acknowledged that he had no evidence to suggest King knowingly or recklessly disregarded the truth when requesting the arrest warrant. At his deposition, appellant admitted:

{¶43} "Q: Is there any evidence that you have that you can say demonstrates that [King] acted maliciously or in bad faith?

{¶44} A: Evidence? I don't now of any evidence. Whether he was doing it maliciously or not, I personally just feel that it was a lack of him doing a proper investigation.

{¶45} Q: Okay.

{¶46} A: Whether he was deliberately trying to hurt me, I don't have any proof of that." Brown dep. at 34:11-22.

{¶47} Based on the facts before us, we find that the trial court properly concluded that there were no genuine issues of material fact as to whether Detective King had sufficient probable cause to sustain appellant's arrest. At best, Detective

King's lack of thoroughness might support an inference of negligence, but it does not demonstrate knowing or intentional behavior to violate appellant's constitutional rights. *Ahlers*, 188 F.3d at 373-74.

{¶48} As we have found that Detective King's application for arrest warrant for appellant was based upon probable case, it necessarily follows that his conduct cannot be construed as being with malicious purpose, in bad faith, or that he acted in a wanton or reckless manner. *Radvansky v. City of Olmsted Falls*(6th Cir 2005, 395 F.3d 291, 315-316; *Village of Windham v. Vasquez*, 11th Dist. No. 2005-P-0068, 2006-Ohio-6342 at ¶¶40-41; *Baron v. Andolsek*, 11th Dist. No. 2003-L-005, 2004-Ohio-1159 at ¶ 32.

{¶49} Accordingly, no genuine issue of material facts is present to support appellant's state law claims.

{¶50} Pursuant to the foregoing, Detective King's actions satisfy the requirements of objective reasonableness upon which qualified immunity rests.

{¶51} Appellant's sole assignment of error is overruled.

{¶52} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

WSG:clw 0902

[Cite as *Brown v. King*, 2009-Ohio-4957.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BRIAN BROWN	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
DON KING, ET	:	
Defendant-Appellee	:	CASE NO. 2008-CA-00165

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY