[Cite as *Gonzales v. Dickson*, 2010-Ohio-2792.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Reynaldo Gonzales, et al.	Court of Appeals No. WD-09-071
Appellant	Trial Court No. 2008CV1124
v.	
Matthew Dickson	**DECISION AND JUDGMENT**
Appellee	Decided: June 18, 2010

* * * * *

George C. Rogers, for appellant.

Paul A. Dobson, Wood County Prosecuting Attorney, and
Linda F. Holmes, Assistant Prosecuting Attorney, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Wood County Court of Common Pleas which, on September 14, 2009, granted summary judgment to appellee, Matthew Dickson, against appellant, Reynaldo Gonzales,[1] with

[1]Dawn Gonzales was an original party plaintiff, but dismissed her claims on August 18, 2009, and, therefore, is not a party to this appeal.

respect to his claims of Civil Rights violations pursuant to Section 1983, Title 42, U.S. Code ("a 1983 action"), and malicious prosecution.

{¶ 2} On October 25, 2007, at 1:01 a.m., Dickson, a Wood County Sheriff's Deputy, stopped a van which appellant was driving in a commercial, industrial district in Fostoria, Ohio. Dickson was in Fostoria as he was also sworn as a deputy sheriff in Seneca and Hancock counties for the purpose of participating in the Tri-County Zero Tolerance Task Force in the Fostoria area. The task force was designed for the purpose of enforcing traffic laws and making "drug-interdiction-type" traffic stops.

{¶ 3} On the morning in question, Dickson noticed that the van's rear license plate was not illuminated. Dickson could not recall whether he was driving on patrol when he first noticed the equipment violation, or whether he was parked. Appellant, however, testified that Dickson was parked near an intersection prior to pulling appellant over. Dickson followed the van and turned off his headlights in order to verify his previous observation that the rear license plate was not illuminated. Dickson was further than 50 feet from the van when he conducted this test. Dickson then initiated his overhead lights and pulled appellant over. Dickson did not recheck the license plate light once he exited his cruiser because he was concerned about his safety and immediately wanted to approach the occupants of the van and assess the situation.

{¶ 4} Dickson asked appellant for his driver's license, proof of insurance and registration. Appellant informed Dickson that he did not have a driver's license. Dickson obtained identifying information from appellant and the passenger and returned to his

cruiser to run their information. Dickson was informed that appellant's driver's license had been suspended. Upon his return to the van, Dickson noticed two additional individuals under a blanket in the back of the van, which had no rear seats. Dickson obtained information from these people also. Ultimately, Dickson determined that none of the occupants had any warrants for their arrest and he brought appellant to his cruiser to sit in the back seat while he wrote a citation for violating R.C. 4510.21(A), failure to reinstate a license.

{¶ 5} Once they were outside of the cruiser, Dickson handed appellant the citation and told appellant that he was a member of the task force and explained its purpose. Thereafter, Dickson asked appellant for permission to search the vehicle. According to appellant, he stated to Dickson that he "didn't care" because it was not his vehicle. By that time, another task force member had arrived. All the occupants exited the vehicle and both the occupants and the van were searched. No contraband was found.

{¶ 6} Appellant failed to appear for his arraignment in Fostoria Municipal Court for his citation and a bench warrant was issued for his arrest. Eventually, appellant was arrested on the bench warrant. He was in jail for five days until being released on bond, on or about July 31, 2008. On October 8, 2008, a hearing was held on appellant's motion to suppress on the basis that Dickson had no probable cause to stop appellant. As a result of the municipal court's ruling on appellant's motion to suppress, on October 13, 2008, the state dismissed appellant's citation without prejudice due to its inability to meet the burden of proof at trial.

{¶ 7} On November 25, 2008, appellant filed this case claiming a 1983 action and malicious prosecution. Dickson filed a motion for summary judgment on August 10, 2009, asserting that he was entitled to qualified immunity and arguing that he did not violate appellant's Fourth Amendment rights because Dickson had reasonable suspicion to make the traffic stop when it appeared that the rear plate was not illuminated, had probable cause to issue appellant a citation once Dickson determined that appellant did not have a current driver's license, and received appellant's consent before searching the van. With respect to the malicious prosecution cause of action, Dickson argued that appellant failed to demonstrate (1) malice in initiating or continuing the prosecution, or (2) a lack of probable cause to initiate proceedings. Dickson also argued that he was immune from liability.

{¶ 8} Appellant responded on August 18, 2009, that Dickson did not have a reasonable articulable suspicion that a violation of R.C. 4513.05 was occurring because Dickson was further than 50 feet from the rear of the van when he turned off his lights to verify whether the rear registration plate was illuminated. R.C. 4513.05(A) states that every motor vehicle shall have either a tail light or a separate light which is "constructed and placed as to illuminate with a white light the rear registration plate, when such registration plate is required, and render it legible from a distance of fifty feet to the rear." As such, appellant argues that Dickson should not have stopped the vehicle and, therefore, all actions taken thereafter violated his Fourth Amendment rights. Appellant

also argued that the requisite malice, for a claim of malicious prosecution, can be inferred from the fact that the officer lacked probable cause to issue a citation.

{¶ 9} The trial court granted Dickson's motion for summary judgment and dismissed appellant's complaint on September 14, 2009. Appellant timely appealed the judgment of the trial court and raises the following assignments of error:

{¶ 10} "1. The trial court erred in granting summary judgment to defendant, Matthew Dickson, dismissing the 42 U.S.C. 1983 Civil Rights claims.

{¶ 11} "2. The trial court erred in granting summary judgment to defendant, Matthew Dickson, dismissing the state [sic] malicious prosecution action."

{¶ 12} In reviewing a motion for summary judgment, an appellate court must apply the same standard of law as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. As such, summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). This review is done by an appellate court de novo, *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, and requires the court to independently examine the evidence to determine, without deference to the trial court's determination, if summary judgment is warranted. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, 383, citing *Brown v. County Comm'rs* (1993), 87 Ohio App.3d 704, 711.

{¶ 13} A 1983 action requires proof that "(1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States." *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34, citing, *Parratt v. Taylor* (1981), 451 U.S. 527, 535. See, also, *Leasor v. Kapszukiewicz*, 6th Dist. No. L-08-1004, 2008-Ohio-6176, ¶ 12. It is clear that Dickson was acting in his official capacity as a deputy sheriff at the time he stopped appellant's vehicle. The question, therefore, is whether Dickson's actions deprived appellant of any constitutional right.

{¶ 14} In this case, Dickson asserts that he is entitled to qualified immunity for the discretionary actions he took. Qualified immunity in the context of a 1983 action is "a question of federal law, and is a question of law, not fact, when determining an issue under summary judgment." *Brown v. King*, 5th Dist. No. 2008-CA-00165, 2009-Ohio-4957, ¶ 21, citing, *Herbert v. City of Canton*, 5th Dist. No. 2001 CA00281, 2002-Ohio-906. Public officials, including police officers, "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818. The test for qualified immunity as applied to suits for civil damages, arising from actions within the scope of an official's duties, is an objective one, as explained by the United States Supreme Court in *Harlow* at 819:

{¶ 15} "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' *Pierson v. Ray*, 386 U.S. 547, 554 * * *. (Footnote omitted.)"

{¶ 16} Once the public official initially has demonstrated facts to suggest that he was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to establish that the official'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." *Herbert*, supra, citing *Wegener v. Covington* (C.A.6, 1991), 933 F.2d 390, 392. See, also, *Guercio v. Brody* (C.A.6, 1990), 911 F.2d 1179.

{¶ 17} The Fourth Amendment guarantees that government officials may not subject citizens to unreasonable searches or seizures without proper authorization. As recognized by this court in *State v. Beeley*, 6th Dist. No. L-05-1386, 2006-Ohio-4799, ¶ 13, "[t]here are two types of traffic stops, each with its own constitutional standard."

First, a non-investigatory stop occurs when an officer witnesses a traffic code violation and stops the motorist to issue a citation, warning, or to effect an arrest. *State v. Downs*, 6th Dist. No. WD-03-030, 2004-Ohio-3003, ¶ 11. In this type of stop, there must be probable cause or "a reasonable ground for belief of guilt." *State v. Moore* (2000), 90 Ohio St.3d 47, 49, and *Carroll v. United States* (1925), 267 U.S. 132, 161. "Probable cause is provided when an officer observes a traffic code violation." *State v. Mapes*, 6th Dist. No. F-04-031, 2005-Ohio-3359, ¶ 38, citing *Whren v. United States* (1996), 517 U.S. 806, 810. See, also, *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11.

{¶ 18} The second type of stop is the investigatory stop, or the *Terry* stop. See *Terry v. Ohio* (1968), 392 U.S. 1. To justify a *Terry* stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* at 21. Reasonable articulable suspicion is a lesser evidentiary burden to satisfy in comparison with a probable cause determination. *State v. Cowan*, 6th Dist. No. WD-05-090, 2006-Ohio-6177, ¶ 9. In making an assessment regarding the existence of "reasonable articulable suspicion," the facts must be judged pursuant to an objective standard, i.e., whether those facts available to the officer, at the time of the search, would warrant a reasonable man in the belief that the action taken was appropriate. *Terry* at 21-22.

{¶ 19} Additionally, the Ohio Supreme Court has stated that, "where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless

of the officer's underlying subjective intent or motivation for stopping the vehicle in question." *Erickson*, 76 Ohio St.3d at 11-12. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus.

{¶ 20} In this case, according to appellant, appellant passed Dickson's cruiser while it was parked at an intersection. Although Dickson could not remember where he was when he first saw appellant's vehicle, Dickson testified that he observed that the rear plate was not illuminated. Dickson attempted to verify that appellant was in violation of R.C. 4513.05 by turning off his lights while following appellant. Dickson testified that he saw no illumination.

{¶ 21} We recognize that Dickson was further than 50 feet from the rear of appellant's vehicle when he attempted to verify his previous observation. Nevertheless, we find that Dickson had a legitimate basis to stop appellant's vehicle for a perceived violation of R.C. 4513.05. The statute requires illumination of the rear registration plate and legibility of the plate from a distance of fifty feet to the rear. Even though he was in excess of 50 feet from the rear of the vehicle when he attempted to verify his prior observation, Dickson believed that an utter lack of illumination violated R.C. 4513.05. Having observed twice that there was no illumination of the rear plate area of vehicle, we find that Dickson had an objectively reasonable belief that a violation of R.C. 4513.05 was occurring.

{¶ 22} Appellant, however, argues that Dickson should have checked whether the rear plate was illuminated when he stopped appellant's vehicle prior to approaching appellant. We disagree. For his safety, rather than turning off all his lights after stopping appellant's vehicle or stooping down to block the light from his vehicle when approaching the van to examine the rear plate, we find that it was reasonable for Dickson to immediately make contact with the driver.

{¶ 23} Once he approached appellant and was informed that appellant had no operator's license, Dickson had probable cause to issue a citation to appellant. Once the citation was issued and appellant was no longer inside Dickson's cruiser, Dickson explained about his involvement with the task force and its objectives. Dickson obtained consent to search the vehicle and its occupants. There is no evidence that Dickson used any form of coercion or duress to force compliance with his request. Accordingly, we find that appellant's consent to search the vehicle was freely and voluntarily given. See *State v. Rozier*, 11th Dist. No. 2009-T-0074, 2010-Ohio-1454, ¶ 25, citing, *State v. Brown* (Dec. 10, 2001), 12th Dist. No. CA2001-04-047.

{¶ 24} Based upon a review of the totality of the circumstances, we find that appellant failed to establish that any official in Dickson's position would have clearly understood that he was under an affirmative duty to refrain from stopping appellant for a perceived violation of R.C. 4513.05. As such, we find that Dickson did not violate appellant's constitutional rights by instituting a stop of appellant's vehicle for an equipment violation, issuing a citation to appellant for driving without a license, or

searching the vehicle with appellant's consent. Additionally, we note that appellant's five day incarceration was due to his own failure to appear in court and was not as a result of Dickson's actions. Accordingly, we find that the trial court correctly granted Dickson's motion for summary judgment with respect to appellant's claim of civil rights violations. Appellant's first assignment of error, therefore, is found not well-taken.

{¶ 25} In order to prevail on a claim of malicious criminal prosecution, appellant must prove the following elements: "(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused." *Criss v. Springfield Twp.* (1990), 56 Ohio St.3d 82, 84, citing, *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142, 144. The requirement of malice turns directly on the defendant's state of mind. Id. "Malice is the state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse and with the intent to inflict injury or under circumstances from which the law will infer an evil intent. (Citations omitted.)" Id. at 84-85. For purposes of malicious prosecution, malice means having an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice. Id. at 85.

{¶ 26} There is no evidence of malice in this case. As we held above, Dickson believed he was lawfully stopping appellant's vehicle for an equipment violation and, based upon appellant's admission that he had no driver's license, had probable cause to issue appellant a citation. Thus, although appellant prevailed in the trial court, he failed to establish the other two elements of malicious prosecution. Accordingly, we find that

the trial court correctly granted Dickson's motion for summary judgment in this regard. Appellant's second assignment of error, therefore, is found not well-taken.

{¶ 27} On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE