FELIX.WPD-Civil Rights - False Arrest (4/2/2004)
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARC A. FELIX,
Plaintiff,

v. CIVIL ACTION NO.
00-12225-DPW

TROOPER JEFF LUGAS, et al.,
Defendants.

REPORT AND RECOMMENDATION RE: DEFENDANTS BURKE, FULLER AND RUMBLE'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED.R.CIV.P. 56(C) (DOCKET ENTRY # 368); DEFENDANTS, OFFICERS THOMAS FOLEY, DANIEL MACDONALD, AND DARLENE LAGOA'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED.R.CIV.P. 56(B) (DOCKET ENTRY # 373)

March 2, 2004

BOWLER, Ch.U.S.M.J.

Of the remaining 12 defendants in this case (Docket Entry # 258, App. A), six move for summary judgment. Defendants Rodney Rumble ("Chief Rumble"), Police Chief of the Town of Weymouth, and Officers Fuller ("Officer Fuller") and Burke ("Officer Burke") of the Weymouth Police Department (collectively: "the Weymouth police officers") filed a motion for summary judgment in June 2003. (Docket Entry # 368). Defendants Officer Thomas Foley ("Officer Foley"), Officer Darlene Lagoa[1] and Officer

[1] The spelling of the names of these defendants are taken from their brief. The amended complaint names "Officer Foley" as opposed to Officer Thomas Foley and "Officer Lagos" as opposed to Officer Darlene Lagoa. The amended complaint identifies both

MacDonald ("Officer MacDonald"), all Boston police officers (collectively: "the Boston police officers"), filed a summary judgment motion in October 2003.[2] (Docket Entry # 368). Having allowed plaintiff Marc A. Flix ("Felix") up until February 28, 2004, to file an opposition, the motions (Docket Entry ## 368 & 373) are ripe for review.

PROCEDURAL BACKGROUND

Felix initially sued more than 100 defendants asserting 28 causes of action in an amended complaint containing 807 paragraphs. (Docket Entry # 8). In a March 28, 2002 Memorandum

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individuals as Boston police officers. (Docket Entry # 8, ¶¶ 60 & 62). They are sued in their individual and official capacities. The parties appear the same, notwithstanding the misnomers, and the aforementioned defendants were properly served and filed answers. (Docket Entry ## 297 & 298). Any difference in the party's name is one of form rather than substance.

[2] The deadline for filing dispositive motions expired on January 31, 2003. Under this court's inherent power to manage cases on its docket as well as Rule 16, Fed. R. Civ. P., this court will allow the late filing of these two summary judgment motions. See Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 51 (1st Cir. 2000) (approving late filing of summary judgment motion by lower court given court's finding of good cause); see also Perez v. Miami-Dade County, 297 F.3d 1255, 1263 n.21 (11th Cir. 2002) (assuming that lower court found good cause when it ruled on late filed motion on the merits), cert. denied, 537 U.S. 1193 (2003). Good cause exists for extending the deadline solely to allow the late filing of the two summary judgment motions. Felix received notice of the motions pursuant to this court's Procedural Order (Docket Entry # 378) and sought an enlargement of time to respond to them (Docket Entry # 381), which this court allowed. Felix has had an ample opportunity to respond and object to the late filing. Moreover, issuing recommendations upon the motions may expedite a final resolution of this action.

and Order ("the March Order"), the district judge dismissed the bulk of the claims as well as numerous defendants. (Docket Entry # 258). As a result, only 12 defendants and the second cause of action remain. (Docket Entry # 258). The March Order describes the remaining claims in the second cause of action as substantive and joint venture claims of false imprisonment, false arrest and malicious prosecution based upon a conspiratorial agreement to coerce Felix through the use of groundless prosecutions.[3]

Although the March Order dismissed the 42 U.S.C. § 1985 ("section 1985") claim,[4] it is debatable whether the court's

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[3] The relevant portion of the March Order acknowledges the presence of "minimally asserted substantive and joint venture claims of false imprisonment, false arrest and malicious prosecution sufficient to permit [Felix] to go forward against a number of the individual police officers." (Docket Entry # 258). Elsewhere, the court describes the cause of injury applicable to these claims as follows:

> That pursuant to a conspiratorial agreement, various law enforcement officers have sought to coerce the plaintiff into cooperating in investigations through the use of groundless prosecutions.

(Docket Entry # 258).

[4] The second cause of action makes a conclusory reference to a federal claim under 42 U.S.C. § 1985 ("section 1985") by citing the statute in paragraph 155 and in the caption. The described "conspiracy" in the caption is a "conspiracy to commit *these* wrongs" (Docket Entry # 8, p. 23; emphasis added), to wit, abuse of process, false imprisonment, deceit and fraudulent misrepresentations. It is not a conspiracy to deprive Felix of his civil rights based upon a discriminatory animus, which is required by the only arguably relevant paragraph of section 1985. See Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (under section 1985, conspiratorial conduct should be "propelled by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus'"); see generally Landrigan v. City of

dismissal included the federal claim under 42 U.S.C. § 1983 ("section 1983") set forth in the second cause of action. On the one hand, the March Order permitted the second cause of action to proceed only "as reflected specifically in paragraphs 156 through 198." (Docket Entry # 258). It is paragraph 155 that alleges a violation of section 1983. Paragraphs 156 through 198 neither cite section 1983 nor refer to a violation of constitutional rights. On the other hand, the caption of the second cause of action includes a section 1983 claim. The March Order also describes the remaining claim as including a "joint venture"

Warwick, 628 F.2d 736, 739 n.1 (1st Cir. 1980). That claim appears in the 21st cause of action.

In a deposition taken after the March Order, Felix himself frames the remaining federal claim as based upon the pattern of malicious prosecution and false arrests against him in particular not because he is black but because he filed a complaint in the "State Police Internal Affairs Division." (Docket Entry # 369, Ex. B, pp. 252 & 281-282). The Boston and Weymouth police officers also limit their discussion of Felix's federal claim to one under section 1983 based upon malicious prosecution. Both parties therefore interpret the March Order as dismissing the section 1985 claim.

The Order itself neither mentions nor eludes to a discriminatory animus claim under section 1985 when discussing the remaining claims. Rather, it dismisses all counts, except for the second cause of action, including the 21st cause of action. The latter cause of action alleges a violation of section 1985 (as well as section 1983) because of the concerted effort on the part of the Weymouth police officers acting in concert with the Boston police officers "to deprive [Felix] of [his] civil rights based on racially discriminatory motive." (Docket Entry # 8, ¶ 694). The March Order also expressly disregards the conclusory assertions in the amended complaint, i.e., the conclusory assertion of a section 1985 violation. Hence, this court concludes that under the law of this case the March Order dismissed any section 1985 claim set forth in the second cause of action.

claim based upon false arrest and malicious prosecution and the corresponding "basic cause[] of injury" as a "conspiratorial agreement . . . to coerce the plaintiff . . . through the use of groundless prosecutions." (Docket Entry # 258). Because the issue is debatable and the "trial court ordinarily is the best expositor of its own orders," Iacobucci v. Boulter, 193 F.3d 14, 19 (1st Cir. 1999) (deferring to district judge's interpretation of her own order denying summary judgment as not including a denial of section 1983 false arrest claim), this court will defer to any interpretation made by the district judge. Accordingly, this opinion assumes arguendo the existence of a section 1983 claim against the Weymouth and Boston police officers based upon a conspiracy to violate Felix's constitutional rights through the use of groundless arrests and prosecutions.

FACTUAL BACKGROUND[5]

The claims in the second cause of action against the Boston police defendants revolve around Felix's arrest for malicious destruction of property of more than $250 on April 14, 2000, in violation of section 127 of Massachusetts General Laws chapter

[5] The summary judgment record is construed in Felix's favor. The amended complaint, however, is not verified. An unverified complaint primarily shows "the nature of the cause of action . . . and the opposing party can take advantage of any admissions in it." Ratner v. Young, 465 F.Supp. 386, 389 & n.5 (D.V.I. 1979). The unverified amended complaint is not the equivalent of an affidavit and therefore does not form part of the summary judgment record. See Fed. R. Civ. P. 56(c); cf. Sheinkopf v. Stone, 927 F.2d 1259, 1262-1263 (1st Cir. 1991).

266 ("section 127"). The claims against the Weymouth police defendants concern only the arrest occurring on May 23, 2000,[6]

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[6] The Weymouth police defendants additionally address allegations concerning arrests on May 19, 2000 and May 25, 2000. They cite to paragraphs 691 and 693 as reflecting these allegations. These paragraphs appear in 21st cause of action. In no uncertain terms, however, the district judge dismissed this cause of action and allowed these proceedings to continue only under the second cause of action. In addition, although the second cause of action refers to May 22, 2000 and May 25, 2000 charges involving the Weymouth police, the amended complaint describes these two cases as "pending." Again, the district judge only allowed those cases in the second amended complaint "alleged to have been terminated in plaintiff's favor" to proceed. (Docket Entry # 258, p. 3). Accordingly, adhering to the law of this case, the claims based upon the May 19 and 25, 2000 arrests have been dismissed.

Even if such claims remained, they are void of merit. Felix admits by deposition that he was convicted of the charges involved in the May 19, 2000 arrest and that he pled guilty to the charges involved in the May 25, 2000 arrest. He therefore lacks a constitutional claim, see Heck v. Humphrey, 512 U.S. 477, 487 (1994) (a section 1983 plaintiff must prove that the conviction has been reversed or declared invalid in order to pursue a section 1983 claim for an unconstitutional imprisonment), as well as state law claims for malicious prosecution, see Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001) (stating elements of malicious prosecution claim which requires, inter alia, a "termination of the proceeding in favor of the accused"). Although lack of probable cause is not an element to a false arrest claim, Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 3 n.6 (1st Cir. 1995), its absence provides a sufficient basis to dismiss a false imprisonment or false arrest claim. See Singer v. Fulton County Sherif, 63 F.3d 110, 118-119 (1st Cir. 1995); see also Santiago v. Fenton, 891 F.2d 373, 382 (1st Cir. 1989) ("at the foundation of all the claims [including false arrest and section 1983] is the necessity that the arrest be supported by probable cause"); Coblyn v. Kennedy's, Inc., 268 N.E.2d 860, 862-863 (Mass. 1971) (discussing probable cause or "'reasonable grounds'" as defense to false imprisonment).

wherein they executed a warrant from the Boston Police Department.

I. The April 14, 2000 Arrest

On April 14, 2000, the Boston police department received a report of a suspicious black male going in and out of a motor vehicle in the area of Randolph Park. Officers Lagoa, MacDonald and Foley responded to the call and arrived at the scene of the reported activity.

Upon arrival at approximately 9:00 p.m. and after looking around the area, Officers Lagoa and MacDonald saw a gray two-door Nissan 300ZX automobile parked at the back of Randolph Park. The vehicle was approximately 100 yards from the street where the reported activity originated. Felix acknowledged pushing the vehicle to the back of the park with the assistance of another individual.

Officers Lagoa, MacDonald and Foley approached the vehicle and observed a black male sitting in the front seat. Inside the vehicle, the steering column had been pulled part, according to the three officers. Felix, however, testified that the steering column was intact. The dashboard had also been pulled apart and Felix admits he was working on the starter part of the transmission. The ignition also appeared damaged. A pointed hammer and screwdriver were located on the front seat. Felix also had possession of a number of welding tools when the officers approached, including the hammer and an electrode.

When the officers asked Felix for identification, he stated

that his name was Michael Phillips and provided a February 8, 1972 birth date. When asked, he could not produce a driver's license or any other identifying documents.

Felix explained to the officers that he was trying to fix the automobile which was having mechanical problems. He also told the officers that his girlfriend, Carrie Knox ("Knox"), owned the automobile and provided them with her telephone number. Officer Foley then telephoned Knox who told him that the automobile was not damaged at the time that she had lent it to Felix[7] at approximately 3 p.m. that day and that she did not know what had happened.[8] Knox particularly noted that the vehicle did not have any damage to the dashboard or to the ignition.

The officers then noticed papers on the backseat of the automobile in the name of Marc A. Felix. When they asked Felix if that was his real name, he replied, "'If you are going to lock me up, go ahead. I have nothing to say.'" (Docket Entry # 374, Ex. C & D). At that point, the officers placed Felix under arrest for malicious destruction of property over $250 and took him to a Boston police station for booking. The charges were

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[7] Officers Lagoa and MacDonald aver that Knox said she had given the vehicle "to her boyfriend." (Docket Entry # 374, Ex. C & D). Foley attests that Knox said she had lent the car "to the Plaintiff." (Docket Entry # 374, Ex. E). The record is construed in Felix's favor.

[8] This court does not consider this statement for the truth of the matter asserted. Rather, this court considers this statement, as well as certain other statements, to show what knowledge and information the officers had available to them at the time of the arrest.

later dismissed on July 13, 2000.[9] Prior to April 14, 2000, none of the officers had heard of or seen Felix.

II. The May 23, 2000 Arrest

On May 19, 2000, Felix was residing at the Boston Motel in Weymouth. Officers Fuller and Burke arrested Felix at the motel and he was placed in jail until May 22, 2000. (Docket Entry # 369, Ex. B, p. 256). In December 2001, Felix was convicted of the charges which he describes as operating an "uninsured motor vehicle, operating after suspension." (Docket Entry # 369, Ex. B, pp. 253 & 279).

On the evening of May 23, 2000, at around 6:00 p.m., Officers Burke, Fuller and Greeley[10] of the Weymouth Police Department knocked on Felix's motel door while Chief Rumble sat outside in an unmarked police cruiser. When Felix opened the door, Officers Burke, Greeley and Fuller informed him that he was under arrest based upon an outstanding warrant from the Boston Police Department. They did not say anything about "the brotherhood" of police officers or that "you can't go around suing cops," as they had during the May 19, 2000 arrest. (Docket Entry # 369, Ex. B, pp. 252 & 266). Felix was told that the warrant stemmed from a 1999 charge of "driving after

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[9] During booking, it was revealed that Felix had another alias and a suspended driver's license. An assessment of probable cause to arrest, of course, does not take this subsequently aquired information into account.

[10] The record fails to reflect a first name for Officer Greeley.

suspension."[11] (Docket Entry # 369, Ex. B, p. 259).

Felix spent the night in jail in Weymouth and, on May 24, 2000, was taken to the Quincy Division of the District Court Department (Norfolk County). Due to the absence of a police report, the court's probation department telephoned the Weymouth Police Department and learned about the outstanding warrant out of Boston. Felix was then transported to the Dorchester Division of the District Court Department (Suffolk County) ("Dorchester District Court"). When Felix arrived at Dorchester District Court, he admits there was a warrant signed by Boston Police Officer Ruckanskas. He states that he was released from the Dorchester District Court. The amended complaint alleges that the charges stemming from the May 23, 2000 arrest were dismissed on November 15, 2000, for want of prosecution.

On May 25, 2000, as Felix was driving out of the motel, Officer Greeley stopped Felix. There was another police cruiser driven by State Police Trooper John B. Nunes in the vicinity. Officer Greeley asked Felix for his driver's license and placed him under arrest. In September 2002, Felix pled guilty to the charge[s] stemming from the May 25, 2000 arrest.[12]

DISCUSSION

[11] The Weymouth police officers do not attach the warrant to their papers.

[12] The May 19 and 25, 2000 arrests are provided in order to set forth a more complete summary judgment record.

I. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Carroll v. Xerox Corporation, 294 F.3d 231, 236 (1st Cir. 2002) (quoting Rule 56(c)). A "genuine" factual issue exists where "the evidence relevant to the issue, viewed in the light most flattering to the party opposing the motion, [is] sufficiently open-ended to permit a rational fact finder to resolve the issue in favor of either side." National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995). A "material" fact "means that a contested issue of fact has the potential to alter the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant." Smith v. Morse & Company, Inc., 76 F.3d 413, 428 (1st Cir. 1996). Inferences are drawn in favor of the nonmoving party and genuinely disputed facts are resolved in favor of the nonmoving party. Mullin v. Raytheon Company, 164 F.3d 696, 698 (1st Cir. 1999); accord Barbour v. Dynamics Research Corporation, 63 F.3d 32, 36 (1st Cir. 1995) (facts and reasonable inferences therefrom drawn in favor of nonmovant). In general, "the essential role of summary judgment is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.'" Mullin v. Raytheon Company, 164 F.3d at

698.

II. Malicious Prosecution

In order to succeed on a malicious prosecution claim, the plaintiff must establish the following elements: "(1) the commencement or continuation of a criminal proceeding against the eventual plaintiff at the behest of the eventual defendant; (2) the termination of the proceeding in favor of the accused; (3) an absence of probable cause for the charges; and (4) actual malice." Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001).

A. The Boston Police Officers

The Boston police defendants point to the absence of evidence to support a finding in Felix's favor relative to the third and fourth factors. With respect to the former and in the context of the warrantless April 14, 2000 arrest, the appropriate inquiry is whether there was probable cause to institute the criminal charges against Felix as opposed to make the warrantless arrest.[13] See Meehan v. Town of Plymouth, 167 F.3d 85, 89-90 (1st Cir. 1999) (distinguishing between malicious prosecution based on warrantless arrest versus arrest with a warrant); Gutierrez v. Mass. Bay Transport Authority, 772 N.E.2d 552, 562 (Mass. 2002) (describing the necessary probable cause to establish malicious

[13] In order to initiate legal proceedings under Massachusetts law, "mere application for a criminal complaint, without issuance of the complaint, is insufficient to support a cause of action" for malicious prosecution. Fletcher v. Wagner, 221 F.Supp.2d 153, 154 (D.Mass. 2002). This court assumes, arguendo, that at least one of the Boston police officers signed a criminal complaint stemming from the April 14, 2000 arrest and that the complaint issued.

prosecution claim as probable cause "to 'believe the criminal proceeding could succeed and, hence, should be commenced'"). The necessary probable cause, which is judged by an objective standard, Gouin v. Gouin, 249 F.Supp.2d 62, 71 (D.Mass. 2003), is "defined as 'such a state of facts in the mind of the [defendant] as would lead a [person] of ordinary caution and prudence to believe, or entertain an honest and strong suspicion,' that the plaintiff has committed a crime." Bednarz v. Bednarz, 542 N.E.2d 300, 302 (Mass.App.Ct. 1989).

With respect to the fourth element, the plaintiff must demonstrate that the accuser knew "there was no probable cause for the prosecution and" that he "personally acted with an improper motive or he knew that [the other accusing party] was motivated by malice." Beecy v. Pucciarelli, 441 N.E.2d 1035, 1039 (Mass. 1982) (citing Nelson v. Miller, 607 P.2d 438 (Kan. 1980), and Restatement (Second) of Torts § 674 cmt. d (1977)); accord Gouin v. Gouin, 249 F.Supp.2d at 71 (same). As expressed by the court in Nelson, a person acts with malice when he acts "primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based." Nelson v. Miller, 607 P.2d at 442.

Other than allegations in the amended complaint, there is insufficient evidence to show that the Boston police officers acted with malice or for a purpose other than to properly determine whether Felix had committed a malicious destruction of property. There is no showing that the Boston police officers

knew that the proceedings were meritless or that they instituted the proceedings primarily because of hostility or ill will. See Restatement (Second) of Torts § 676, cmt. c (1977). Indeed, they investigated Felix's story by telephoning Knox. See Carroll v. Gillespie, 436 N.E.2d 431, 435 (Mass.App.Ct. 1982) (recognizing that information known to the defendant may be "sufficiently unreliable or incomplete to support a finding that it was unreasonable to rely upon it without additional information"). Further, Officers Foley, MacDonald and Lagoa uniformly aver that they had never seen Felix before April 14, 2000. They also attest to never having heard of Felix before April 14, 2000. Accordingly, there is an absence of evidence to support a jury finding of the necessary element of malice for a malicious prosecution claim.

Examining the underlying offense, which requires a showing of malice that is different from that required for malicious prosecution, confirms that a reasonable police officer could entertain a good faith belief that Felix was in the course of maliciously destroying property in excess of $250. See Mass.Gen.L. ch. 266, § 127. A conviction under section 127 requires proof that the defendant's actions were "both wilful and malicious." Commonwealth v. Rumkin, 773 N.E.2d 988, 992 n.3 (Mass.App.Ct. 2002); Commonwealth v. Redmond, 757 N.E.2d 249, 252 (Mass.App.Ct. 2001). In this regard, "A wilful act is done intentionally and by design, in contrast to that which is thoughtless or accidental" and "[a] malicious act is done with

cruelty, hostility, or revenge in mind." Commonwealth v. Rumkin, 733 N.E.2d at 992 n.3.

The Boston police officers were responding to a report of suspicious activity by a black individual engaged in an activity similar to the activity that Felix was engaged in when the officers located him. The dashboard was pulled apart and the ignition damaged. In addition to the foregoing, the purposeful nature of Felix's acts, his evasive conduct, his lack of identification including conduct indicative of having an alias, and the fact that Officer Foley investigated Felix's story by telephoning Knox who stated that the car was not damaged and that she knew nothing about what had happened, suffices to make it more probable than not that a reasonable police officer would believe that Felix was (or had been) purposefully and maliciously destroying property in excess of $250 within the meaning of section 127. Although the evidence supporting the malice element is weaker than the evidence supporting the wilful element, the necessary showing for a probable cause finding is less than the showing required for a conviction. See Roche v. John Hancock Mutual Life Insurance Co., 81 F.3d 249, 254 (1st Cir. 1996).

Felix fails to offer any contrary evidence other than the allegations in the amended complaint. It is beyond peradventure that, "As to issues on which the summary judgment target bears the ultimate burden of proof, [he] cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute."

Navarro v. Pfizer Corporation, 261 F.3d 90, 983 (1st Cir. 2001). Summary judgment is therefore warranted in favor of the Boston police officers with respect to the state law claim of malicious prosecution.

2. The Weymouth Police Officers

Summary judgment on the state law claim of malicious prosecution for the Weymouth police officers is likewise warranted. The Weymouth police officers argue that they merely executed the arrest warrant issued by the Boston police department and that the elements of malicious prosecution require an initiation of a criminal proceeding that was terminated in the plaintiff's favor without probable cause and for an improper purpose.

The tort of malicious prosecution allows damages for the deprivation of liberty "pursuant to a legal process." Nieves v. McSweeney, 241 F.3d at 54. The institution of legal process generally takes "the form of an arrest warrant . . . or a subsequent charging document." Nieves v. McSweeney, 241 F.3d at 54.

There is no showing that the Weymouth police officers knew they were without authority to make the arrest. Cf. Davet v. MacCarone, 973 F.2d 22, 25 n.3 (1st Cir. 1992) (Cranston, Rhode Island police executed arrest warrant in Providence). Nor is there any indication that the arrest warrant was facially invalid. See Hansel v. Bisard, 30 F.Supp.2d 981, 990 (E.D.Mich. 1998) (no liability for malicious prosecution where the defendant

police officer arrested the plaintiff pursuant to facially valid arrest warrant issued following probable cause hearing wherein judge found probable cause). Rather, the Weymouth police officers simply executed an arrest warrant originating with the Boston Police Department. The Weymouth police officers took no part in procuring the arrest warrant and Felix admits to the existence of the warrant. (Docket Entry # 369, Ex. B, pp. 264-265).

Accordingly, there is an absence of evidence to show that the Weymouth police officers acted with malice and that they lacked probable cause. Summary judgment is therefore warranted on the malicious prosecution claim.

B. False Arrest and False Imprisonment

"False imprisonment requires unlawful confinement by force or threat." Ortiz v. County of Hampden, 449 N.E.2d 1227, 1228-1229 (Mass.App.Ct. 1983) (citing Wax v. McGrath, 151 N.E. 317 (Mass. 1926), and Restatement (Second) of Torts § 35 (1963)).[14] If the confinement or restraint is wrongful it amounts to a false imprisonment unless the defendant shows a justification for the

[14] The First Circuit in Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 3 n.6 (1st Cir. 1995), cites this same section of the Restatement (Second) of Torts § 35 (1965) as exemplifying the tort of false arrest. In the present circumstances where Felix was both arrested and imprisoned on both relevant occasions, this court finds little, if any, distinction between the claims of false arrest and false imprisonment. See Restatement (Second) of Torts § 118 cmt. b (1965) ("arrest usually involves a confinement (see § 112) and, in such case, the actor unless privileged is liable for 'false imprisonment'"). Hence, they are discussed interchangeably.

confinement. See Wax v. McGrath, 151 N.E. 317, 318 (Mass. 1926). For example, if the police officer "had reasonable cause to suspect that the plaintiff was guilty of a felony he had the right to arrest him without a warrant." Wax v. McGrath, 151 N.E. at 318; see Julian v. Randazzo, 403 N.E.2d 931, 934 (Mass. 1980) (action for false imprisonment wherein court noted that, "If the police had sufficient information to constitute probable cause to believe, and did believe, that a person had committed a felony, even though not in their presence, they had the right to arrest him without a warrant"). Although the "burden [is] on the defendants to prove justification," they do "not need to show that a felony had actually been committed; it [is] enough if they believed upon reasonable cause that the person being arrested had committed a felony." Julian v. Randazzo, 403 N.E.2d at 934.

The elements of a false arrest are "that: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the defendant had no privilege to cause the confinement." Calero-Colon v. Betancourt-Lebron, 68 F.3d at 3 n.6 (citing Restatement (Second) Of Torts §§ 35, 118 cmt. b (1965), and further noting that "[n]either actual malice nor lack of probable cause is an element of false arrest"). Unlike a section 1983 claim, the defendant in a false arrest claim based upon a warrantless arrest bears the burden of proving the presence of probable cause to justify the arrest. Gutierrez v. Mass. Bay Transport Authority, 772 N.E.2d at 564. "'Probable

cause to arrest exists when, at the moment of arrest, the facts and circumstances known to the police officers were sufficient to warrant a person of reasonable caution in believing that the defendant had committed or was committing a crime.'" Jenkins v. Chief Justice of the District Court Department, 619 N.E.2d 324, 337 (Mass. 1993).

Turning to the April 14, 2000 arrest, the Boston police officers provide sufficient evidence of justification. Felix fails to counter such evidence.

The circumstances of the arrest, as described by Felix, evidence no excessive use of unnecessary force to effectuate the arrest. See Restatement (Second) of Torts § 132 (1965) (no privilege against false imprisonment where arresting actor uses force in excess of the force he "reasonably believes to be necessary"). The purposeful nature of Felix's act, his evasive conduct, the existence of a report of suspicious activity in the area of a black male going in and out of a vehicle, Felix's inability or refusal to produce identification as well as Officer Foley's telephone conversation with Knox who stated that, although she had lent the car to Felix, the car was not damaged and that she knew nothing about what had happened, suffice to show probable cause. Stated otherwise, the Boston police officers proffer sufficient evidence to warrant a belief on the part of a reasonable police officer that Felix had or was committing the felony of maliciously destroying property in excess of $250 within the meaning of section 127.

As to the May 23, 2000 arrest, executing a facially valid warrant generally amounts to justification sufficient to insulate the arresting officer from common law liability for false imprisonment. As explained by the court in David v. Larouchelle, 5 N.E.2d 571 (Mass. 1936):

> "As a general rule, the officer is bound only to see that the process, which he is called upon to execute, is in due and regular form, and issues from a court having jurisdiction of the subject. In such case, he is justified in obeying his precept, and it is highly necessary to the due, prompt and energetic execution of the commands of the law, that he should be so" . . . The principle to be deducted from the cases is that the officer is entitled to rely upon the face of his precept. He is not expected to inquire into extrinsic facts which might render it invalid in the particular instance or to govern himself in executing it by his belief as to what those facts are.

David v. Larouchelle, 5 N.E.2d at 572 (citations omitted); accord Morrill v. Hamel, 148 N.E.2d 283, 285 (Mass. 1958) (same but also citing Restatement (Second) Of Torts §§ 122, 124 cmt. b (1965), which sets forth privilege afforded arresting officer executing arrest warrant fair on its face). The Weymouth police officers established the existence of a warrant to justify their arrest and confinement of Felix. Felix admits that there was a warrant by a Boston police officer.[15] See, e.g., Furbush v. Connolly, 62 N.E.2d 595, 596 (Mass. 1945) (no liability for tort of "false arrest and imprisonment" where the plaintiff did not deny that the defendant deputy tax collector acted under valid warrant); David v. Larouchelle, 5 N.E.2d at 572; Rodriguez v. Ritchey, 556

[15] The allegation in the amended complaint of a "false warrant" (Docket Entry # 8, ¶ 119) is simply that, an allegation.

F.2d 1185, 1193 (5th Cir 1977) (summarily rejecting common law false imprisonment claim because "most basically, an arrest made under authority of a properly issued warrant is simply not a 'false arrest', it is a 'true' or valid one"). The Weymouth police officers therefore provide sufficient evidence of justification which Felix fails to rebut. Summary judgment is therefore warranted on the false imprisonment and false arrest claims.

C. Section 1983

In order to establish a violation of section 1983 based upon a conspiracy to violate Felix's civil rights, it is necessary not only to establish a conspiratorial agreement but also the deprivation of a constitutional right. Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980). Liberally viewing the second cause of action, it potentially encompasses a section 1983 malicious prosecution claim, see, e.g., Nieves v. McSweeney, 241 F.3d at 53-57 (section 1983 malicious prosecution claim); Meehan v. Town of Plymouth, 167 F.3d at 88-92 (same), as well as a section 1983 false arrest claim, see, e.g., Sheehy v. Town of Plymouth, 191 F.3d 15, 19 (1st Cir. 1999) (section 1983 false arrest claim discussing qualified immunity); Abraham v. Nagle, 116 F.3d 11, 13-15 (1st Cir. 1997) (section 1983 false arrest claim); Logue v. Dore, 103 F.3d 1040, 1044 (1st Cir. 1997) (same).

The Fourth Amendment provides the necessary constitutional foundation. Massachusetts' recognition of the tort of malicious

prosecution bars a procedural due process claim. Meehan v. Town of Plymouth, 167 F.3d at 88. Likewise, "'there is no substantive due process right under the Fourth Amendment to be free from malicious prosecution.'" Meehan v. Town of Plymouth, 167 F.3d at 88; accord Nieves v. McSweeney, 241 F.3d at 53-54 (same). Nevertheless, the Fourth Amendment protects against unreasonable seizures such as arrests and also provides a possible basis for a section 1983 malicious prosecution claim.[16] Meehan v. Town of Plymouth, 167 F.3d at 88.

A section 1983 malicious prosecution claim "based upon a deprivation of Fourth Amendment rights requires a showing of the absence of probable cause to initiate proceedings." Meehan v. Town of Plymouth, 167 F.3d at 89; accord DiNicola v. DiPaolo, 25 F.Supp.2d 630, 637 (W.D.Pa. 1998) ("lack of probable cause is an essential element" to section 1983 malicious prosecution claim based upon Fourth Amendment). On summary judgment the inquiry devolves into whether a jury could not reasonably conclude that the police officers lacked probable cause to institute the criminal proceedings. DiNicola v. DiPaolo, 25 F.Supp.2d at 637.

The First Circuit in Meehan equated the probable cause showing under section 1983 to the probable cause showing under the state law malicious prosecution claim. See Meehan v. Town of Plymouth, 167 F.3d at 89 (citing Lincoln v. Shea, 277 N.E.2d 699,

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[16] The existence of a section 1983 malicious prosecution claim is "an open question" in the First Circuit. Nieves v. McSweeney, 241 F.3d at 53-54.

702 (Mass. 1972)); see also Guenther v. Holmgreen, 738 F.2d 879 (7th Cir. 1984) (probable cause standard the same, i.e., "whether the facts and circumstances were sufficient to warrant a reasonable person in believing that the suspect had or was committing a crime"). Viewed from an objective standpoint, probable cause exists "if 'the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.'" Alexis v. McDonald's Restaurants of Massachusetts, Inc., 67 F.3d 341, 349 (1st Cir. 1995); see also DiNicola v. DiPaolo, 25 F.Supp.2d at 637 (probable cause exists where the facts and circumstances sufficiently "'warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense'"). In short, the plaintiff bears the underlying burden of showing the deprivation of Fourth Amendment rights which, in turn, "requires a showing of the absence of probable cause to initiate proceedings." Meehan v. Town of Plymouth, 167 F.3d at 89. The section 1983 malicious prosecution claims founder for the same reasons the malicious prosecution claims based upon the April 14 and May 23, 2000 arrests founder, to wit, the existence of probable cause to initiate or continue legal proceedings as a matter of law.

Turning to the warrantless April 14, 2000 arrest, the arrest antedated the legal process. See Nieves v. McSweeney, 241 F.3d at 54 (the plaintiffs' "arrests--which antedated any legal

process--cannot be part of the Fourth Amendment seizure upon which they base their section 1983 [malicious prosecution] claims"). Accordingly, the relevant inquiry, as noted above, is whether the Boston police officers had probable cause to initiate the criminal proceedings charging Felix with maliciously destroying property of another in violation of section 127. For reasons similar to those stated in part II(A), the Boston police officers had probable cause to prosecute Felix for violating section 127 as a matter of law.

First, they were responding to a report of suspicious activity by a black individual. Upon arriving in the area, they saw Felix, a black individual, engaged in similar activity. They uniformly observed that the dashboard of the Nissan 300ZX was pulled apart and that the ignition appeared damaged. Felix could not supply identification and gave what appeared to be an incorrect name to the officers. Later, he refused to acknowledge that his name was Marc Felix. Upon telephoning Knox, Officer Foley learned that she had given the automobile to Felix in an undamaged condition and knew nothing about what had happened. No reasonable juror could conclude that the officers lacked probable cause to institute proceedings against Felix for maliciously destroying property in excess of $250 within the meaning of section 127.

As to the May 23, 2000 arrest made with an arrest warrant, there is no indication that the arrest warrant was not facially valid or that the Weymouth police officers lacked the authority

to execute the warrant or that Felix was not the person named in the warrant. Other than executing the warrant, there is no evidence that the Weymouth police officers otherwise took part in the legal process. Felix's section 1983 malicious prosecution claim against the Weymouth police officers fails to survive summary judgment.

Addressing the section 1983 false arrest claims, the existence of probable cause likewise terminates these claims. The necessary probable cause for a section 1983 false arrest claim in the context of a police officer's warrantless arrest "rests on 'whether, at the moment the arrest was made, . . . the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that [the defendant] had committed or was committing an offense.'" Santiago v. Fenton, 891 F.2d 373, 384 (1st Cir. 1989); see Roche v. John Hancock Mutual Life Insurance Co., 81 F.3d at 254 (stating same standard). Gaged by an objective standard, probable cause to arrest exists "as long as the circumstances surrounding the event warrant the officer's reasonable belief that the action taken is appropriate." Logue v. Dore, 103 F.3d at 1044. Furthermore, probable cause is based upon probabilities, in other words, a standard of proof less demanding than that required for a conviction. Roche v. John Hancock Mutual Life Insurance Co., 81 F.3d at 255 ("probable cause determination is made at a different point in time by a different, less demanding methodology, and

requires less proof than a conviction"); see also Gerstein v. Pugh, 420 U.S. 103, 121 (1975) ("'[d]ealing with probable cause, however, as the very name implies, . . . deal[s] with probabilities").

With respect to the warrantless April 14, 2000 arrest and as previously explained in part II(B), the Boston police officers had probable cause to arrest Felix for maliciously destroying property in excess of $250. They were responding to a report of suspicious activity. Upon arriving in the reported area, they observed Felix engaged in similar activity. With the dashboard pulled apart and the ignition damaged, he was unable to produce identification. After giving the name Michael Phillips, he refused to respond to the officers' question of whether Marc Felix was his real name, given their discovery of papers with that name on the back seat of the vehicle. Although Knox stated she had lent the car to Felix, the car was not damaged and she knew nothing about what had happened. Felix fails to offer any contrary evidence indicating the lack of probable cause to arrest him. A prudent person would necessarily believe that Felix was in the process of maliciously destroying the property of another. Summary judgment is therefore proper in favor of the Boston police officers with respect to the section 1983 false arrest claim grounded upon the April 14, 2000 arrest.

With respect to the section 1983 false arrest claim based upon the May 23, 2000 arrest, the Weymouth police officers had a valid warrant. With the Weymouth police officers having pointed

to the absence of evidence to support a finding that they lacked probable cause, Felix fails to offer any facts that the warrant or any supporting affidavit objectively lacked indicia of probable cause. The Weymouth police officers did not employ excessive force in effectuating the arrest. Nor was there a question that Felix was not the person named in the warrant. Felix's section 1983 false arrest claim based upon the May 23, 2000 arrest likewise fails to survive summary judgment.

Finally, in the alternative, the Boston police officers are entitled to qualified immunity as a matter of law for their conduct in arresting and/or instituting proceedings against Felix stemming from the April 14, 2000 arrest.[17] "Government officials performing discretionary functions are generally shielded from civil damages so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" McDermott v. Town of Windham, 204 F.Supp.2d 54, 61 (D.Me. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The First Circuit employs a three part test to assess the presence of qualified immunity. That test determines: "(1) whether plaintiff's allegations, if true, establish a constitutional violation; (2) whether that right was clearly established at the time of the alleged violation; and (3) whether a similarly situated reasonable official would have understood that the challenged action

[17] The Weymouth police officers did not assert a qualified immunity defense in their summary judgment papers.

violated the constitutional right at issue." Mihos v. Swift, 2004 WL 258670 at *6 (1st Cir. Feb. 13, 2004).

"It has been clearly established for a very long time that the Fourth Amendment requires that arrests be based on probable cause." Abreu-Guzman v. Ford, 241 F.3d 69, 71 (1st Cir. 2001) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964)); accord Rivera v. Murphy, 979 F.2d 259, 263 (1st Cir. 1992); see also Vargas-Badillo v. Diaz-Torres, 114 F.3d 3, 5 (1st Cir. 1997) (noting lack of dispute "that at the time of Vargas' arrest, clearly established Fourth Amendment law required that the defendants have probable cause to support Vargas' warrantless arrest"). The inquiry therefore distills into "whether an objectively reasonable officer would have understood that the arrest of [Felix] violated these clearly established constitutional rights." Abreu-Guzman v. Ford, 241 F.3d at 73. More specifically, the inquiry reduces to whether a reasonable police officer, standing in the shoes of the Boston police officers, would have known that arresting Felix for maliciously destroying property in excess of $250 would contravene clearly established law "under all the attendant circumstances." Iacobucci v. Boulter, 193 F.3d 14, 22 (1st Cir. 1999). The inquiry proceeds "in light of the commonly held understanding that probable cause exists only if the facts and circumstances within the arresting officer's knowledge 'are sufficient to lead an ordinarily prudent officer to conclude that an offense has been, is being, or is about to be committed.'" Iacobucci v.

Boulter, 193 F.3d at 22.

Given the circumstances, a reasonable police officer, armed with the information held by the Boston police officers and having investigated the information given by Felix by telephoning Knox, would believe that Felix had committed or was committing the statutory offense prescribed in section 127. See Sheey v. Town of Plymouth, 191 F.3d at 19. When the Boston police officers arrived at the scene, they discovered Felix, an individual matching the description given from the report engaged in similar activity. The dashboard was pulled apart and the ignition damaged. Although Felix described the owner of the vehicle as his girlfriend, she knew nothing about the damage to the dashboard or ignition. He was evasive with the officers, failed to produce identification and gave a name inconsistent with papers found in the backseat of the vehicle. Probable cause to arrest as well as to initiate prosecution for a violation of section 127 was more than arguable. Accordingly, viewed objectively, the Boston police officers are entitled to qualified immunity from damages resulting from the alleged violation of section 1983.

CONCLUSION

In accordance with the foregoing, this court **RECOMMENDS**[17]

[17] Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten days of receipt of the Report and Recommendation to which objection is made and the basis for such objection. Any party may respond to another party's objections within ten days after service of the

that the Boston police officers' motion for summary judgment (Docket Entry # 373) and the Weymouth police officers' motion for summary judgment (Docket Entry # 368) be **ALLOWED**.

_____S/S_____
MARIANNE B. BOWLER
Chief United States Magistrate Judge

objections. Failure to file objections within the specified time waives the right to appeal the order. United States v. Escoboza Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).