IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-0111

NORMAN LAUNI, II,

Petitioner, Plaintiff Below,

Appeal from the orders of the
Circuit Court of Mineral County
(19-C-15)

THE HAMPSHIRE COUNTY PROSECUTING ATTORNEY'S OFFICE; COUNTY OF HAMPSHIRE, WEST VIRGINIA, et al

Respondents, Defendants Below.

Brief of Respondent Corporal Scott Nazelrod

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C. The trial court's decision to dismiss the Petitioner's claim of civil conspiracy was appropriate in that the Respondents had not engaged in unlawful conduct.

II. STATEMENT OF THE CASE

A. Background

The Petitioner included his original Complaint as part of the Appendix Record despite the fact that he filed an Amended Complaint and the parties filed a stipulation requesting that the trial court consider the then pending Motions to Dismiss in light of the Amended Complaint. However, because the Amended Complaint is not before this court, the Respondent's citations to the record in his Statement of Facts and throughout this brief will be to the Petitioner's original Complaint.

The Respondent submits that the Petitioner's Statement of the Case includes numerous embellishments of the facts alleged in both his original and Amended Complaints. The following is a proper representation of the facts as alleged that were considered by the Circuit Court of Mineral County in forming the basis for its dismissal of the Petitioner's claims asserted against the Respondent.

1. Factual Background

Petitioner alleged that in January of 2017, his previous live-in girlfriend, Penny Hartman, contacted then-Hampshire County Prosecuting Attorney Dan James to advise "that she was in possession of some video recordings which supposedly depicted Petitioner committing domestic violence against her." [A.R. pp. 7-8 ¶ 28.] After receiving the call, Petitioner claims that Prosecuting Attorney James "directed" Cpl. Scott Nazelrod of the West Virginia State Police to investigate the claims. [Id; A.R. p. 15 ¶49(k)(i).] In February of 2017, after being directed by James to investigate the claims, Cpl. Nazelrod interviewed Hartman about the events. [A.R. p. 8, ¶ 35.] Approximately one week after her interview with Cpl. Nazelrod, Ms. Hartman filed a petition for a domestic violence protective order ("DVPO") against Petitioner. [A.R. p. 9, ¶¶ 40–43.] Petitioner claims the DVPO was "filed at the direction of Cpl. Nazelrod" and that, prior to its issuance, Cpl. Nazelrod contacted the assigned magistrate judge "to request that [the] DVPO be issued against [him]." [A.R. p. 9, ¶¶ 40, 44.] On that same date, the DVPO issued and, as a result, Petitioner was required to relinquish his firearms. [A.R. p. 9-10 ¶ 45.]

Following issuance of the DVPO, and as part of his investigation, Cpl. Nazelrod conducted an interview of Petitioner regarding the instances of domestic violence alleged

by Hartman, during which Petitioner denied "physical assault of any kind." [*See* A.R. pp. 12-13, ¶ 48(f)(i).] Approximately one week after Cpl. Nazelrod's interview of Petitioner, Ms. Hartman requested that the DVPO be terminated. [A.R. p. 16 ¶50.] Notwithstanding the DVPO's termination, the criminal prosecution against Petitioner moved forward. [A.R. pp. 17-18 ¶¶ 58, 59.]

In April of 2017, Cpl. Nazelrod filed a criminal complaint against Petitioner alleging three counts of domestic battery and one count of domestic assault. [A.R. p. 17, ¶ 58.] Petitioner contends that Cpl. Nazelrod's narrative attached to the criminal complaint lacked "many exculpatory statements, alibis, witnesses, and facts" that were relayed to him by Petitioner. [A.R. pp. 21 ¶ 60.] On April 7, 2017, following his arraignment on the criminal charges, Petitioner "had to relinquish his gun and badge." [A.R. p. 22 ¶ 62.]

During the summer of 2017, the criminal charges against Petitioner proceeded toward trial. [A.R. p. 22 ¶ 70.] As the case progressed, Ms. Hartman, "repeatedly requested that the matter be dismissed." [A.R. p. 22-23 ¶71; *see also* p. 25 ¶ 91.] The prosecution denied her request and continued to prosecute Petitioner for his criminal offenses. [A.R. p. 23 ¶ 72.]

Petitioner alleges that prior to his trial, he learned that certain exculpatory evidence—specifically, "36 minutes" from his "February 10th interview with Cpl. Nazelrod"—had been wrongfully withheld from the prosecution's discovery productions [A.R. p. 27 ¶¶ 101, 102, 104], even though Petitioner admits he had his own copy of the missing section [A.R. p. 26 ¶ 120]. Petitioner claims that the State's special prosecutor and Cpl. Nazelrod knew about the missing portion of the interview "and suppressed said

evidence at the behest of [Prosecuting Attorney] James." [A.R. p. 28 ¶ 107.] Nevertheless, the magistrate ordered the case to proceed to trial, but allegedly "reprimanded Cpl. Nazelrod as being 'negligent' in his duties." [A.R. p. 27 ¶ 106.]

Petitioner's criminal trial occurred in October of 2017. Petitioner claims that during his trial, Hartman testified that he did not abuse her, but he also claims that "every single witness" except Cpl. Nazelrod "indicated that Penny Hartman was not credible." [A.R. p. 28 ¶ 111.] On October 27, 2017, after hearing all of the evidence presented against Petitioner, the jury returned a verdict of not guilty. [A.R. p. 28 ¶ 114.] Petitioner avers that, following his trial, Hartman stated that Cpl. Nazelrod and another WVSP officer, Cpl. Spence, intimidated her into pursuing the domestic violence charges against him. [A.R. p. 23 ¶ 77.] Petitioner claims that the "unfounded prosecution" caused him to be "ineligible for promotion" and to lose "wages and retirement contributions valued at approximately $160,000.00." [A.R. p. 29 ¶ 115.] He faults the Respondents for these damages because of their alleged malicious prosecution (Counts I, V, XI), abuse of process (Counts II, VI and XII) and the civil conspiracy between the two prosecutors and Respondent Cpl. Nazelrod (Counts III, VII and XIII).

2. Procedural History

Petitioner filed this civil action against the numerous defendants, including Corporal Scott Nazelrod in his capacity as a West Virginia State Trooper in the Circuit Court for Morgan County, West Virginia on October 29, 2018. By Agreed Order dated March 22, 2019, the case was transferred to the docket of the Circuit Court for Mineral County. The Complaint contained four counts as to Corporal Nazelrod: Count XI –

Malicious Prosecution and Count XII – Abuse of Process by Defendant Nazelrod; Count XIII Civil Conspiracy; Alternative Count VI - Negligence.[1] Thereafter, Respondent Scott Nazelrod filed his Motion to Dismiss on March 22, 2019. Motions to Dismiss were filed on behalf of all of the other Respondents on March 25, 2019. (A.R. pp. 44-80). Petitioner opposed the motions. (A.R. pp 81-145).[2] The Respondents submitted reply briefs. (A.R. pp. 146-251). The parties agreed by stipulation to permit the Petitioner to file an Amended Complaint and the Petitioner then served a document still styled "Complaint" which added a number of new factual allegations. Oral argument on all of the motions was conducted on December 12, 2019. [See Transcript at A.R. pp 283-337]. On August 12, 2020, the Circuit Court for Mineral County entered a series of Orders dismissing all counts of the Complaint as to each of the Respondents except for Respondent James. [A.R. pp. 252-275]. As to Respondent James, the trial court's order reflected that all counts "except of the portion of the count alleging IIED which alleges defamatory statements" were dismissed. Respondent James filed a Rule 59(e) Motion to Alter or Amend Judgment on August 26, 2020. That Motion was denied by the order entered on October 1, 2020.

The Petitioner appealed the August 12, 2020 dismissal orders to this court and the Respondents filed a Joint Motion to Dismiss Appeal for Lack of Jurisdiction on

[1] Petitioner's appeal does not address the dismissal of Alternative Count VI against Respondent Nazelrod. Accordingly, the Respondent will not address that issue.

[2] Petitioner's appeal appears limited to the dismissal of the claims against Respondents James, Ours and Nazelrod and not the named County Commission defendants.

October 22, 2020. This court dismissed the appeal as premature by its Order of January 28, 2021.

Thereafter, Petitioner moved the Circuit Court for Mineral County for the entry of an order of certification of judgment to pursue the present appeal. That motion was granted on January 14, 2022 and this appeal followed on February 11, 2022. The briefing schedule was entered on February 11, 2022. The Petitioner submitted a Rule 7(e) list on April 11, 2022 but failed to serve undersigned counsel. The Petitioner perfected his appeal on May 16, 2022.

Of note is the fact the Petitioner filed a second action against the West Virginia State Police arising out of the same facts but claiming negligent training and supervision and vicarious liability. That case was dismissed on August 12, 2020 by the Circuit Court for Mineral County on the West Virginia State Police's Motion to Dismiss. The Petitioner's appeal of that dismissal was docketed in this court at Docket No. 20-703. The appeal was dismissed on March 11, 2021 upon the court's denial of the Petitioner's motion to enlarge the deadline for perfecting the appeal.

The Petitioner also filed suit in the U.S. District Court for the Northern District of West Virginia based on the same set of facts with the factual allegations in his Amended Complaint being nearly identical to those in the case before this court. That case was dismissed in the entirety and an appeal was filed with the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the district court's decision in an unpublished decision on November 15, 2021.

The Respondent respectfully submits that the August 12, 2020 Order of the Circuit Court for Mineral County should be affirmed as correctly and properly granted.

III. SUMMARY OF ARGUMENT

The Circuit Court for Mineral County correctly dismissed the claims asserted against Corporal Nazelrod in the Petitioner's Complaint as set forth below. The evidence of domestic abuse as alleged in the Complaint provided probable cause for the Petitioner's prosecution. The process used by Respondent Nazelrod in investigating and filing a criminal complaint and in his interactions with the magistrate as to a domestic violence protection order and service of a subpoena were all within the lawful scope of his duties and for a proper purpose. Because the trial court found that the Petitioner's complaint failed to state a claim for malicious prosecution and abuse of process, the dismissal of the claim for civil conspiracy as to those causes of action was also warranted.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there was no prejudicial error committed below.

V. ARGUMENT

A. STANDARD OF REVIEW

"Appellate review of circuit court's order granting a motion to dismiss a complaint is *de novo.* Syllabus Point 2, *State ex rel McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). At Syllabus Point 2 of *Roth v. Defelicecare, Inc.*, 226 W. Va. 214, 700 S.E.2d 183 (2910), the Court noted that "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (citing Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977)).

In *Brown v. City of Montgomery*, 233, W. Va. 119, 127, 755 S.E.2d 663, 661 (2014), this Court further observed that:

> On a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff. However, a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations.
>
> Although a plaintiff's burden in resisting a motion to dismiss is a relatively light one, the plaintiff is still required at a minimum to set forth sufficient information to outline the elements of his/her claim. If plaintiff fails to do so, dismissal is proper....
>
> Whether a complaint states a claim upon which relief may be granted is to be determined solely from the provisions of such complaint. Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6)....
>
> Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, § 12(b)(6)[2], at 384–88 (4th ed. 2012) (footnotes omitted).

B. Discussion

1. The Circuit Court Correctly Found that the Criminal Complaint and Prosecution of the Petitioner Were Supported By Probable Cause.

The Petitioner asks this court to infer a greater degree of wrongful conduct as to Respondent Nazelrod than was alleged in his Complaint in order to conflate it to the level that would allow him to rebut the existence of probable cause based on his misstatement of Syllabus Point 5 of *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010). Both his factual and legal arguments must be rejected. This Respondent submits that the trial court properly resolved this issue by dismissing the Petitioner's claim for malicious prosecution as the complaint did not properly allege the lack of probable cause. That ruling should be affirmed.

The Petitioner's Complaint sets forth the following predicate for the Petitioner's malicious prosecution claim against Corporal Nazelrod: "by falsifying and suppressing evidence relating to allegations made against [Plaintiff], and by failing to communicate exculpatory evidence when presenting the complaint" before the Mineral County Magistrate Court in violation of state and federal law, committed police misconduct with the intention to procure a prosecution against Plaintiff without probable cause. [A.R. p. 35, ¶159]. Petitioner now asserts that his pleadings should be interpreted such that the evidence on which probable cause was based "was either directly fabricated or fraudulent by omission..." However, the paragraphs of his pleading cited in his brief are merely references to the contentions made by the Petitioner in his statement given to this Respondent, the narrative of the underlying criminal complaint and the deposition

testimony of Ms. Hartman given after the prosecution was initiated. Nowhere is it claimed that any evidence was "fabricated" or that any "fraudulent omission" occurred.

The issue of whether Respondent Nazelrod had probable cause for the prosecution of the Petitioner was thoroughly addressed by the Fourth Circuit in the Petitioner's appeal of his federal suit. See *Launi v. James*, 2021 WL 5294933 (4th Cir. 2021). The Fourth Circuit analyzed his conduct to determine whether Nazelrod "'deliberately or with a reckless disregard for the truth made material false statements in his affidavit or omitted from that affidavit material facts with the intent to make, or with reckless disregard of whether they thereby made, the affidavit misleading.' *Miller v. Prince George's County*, 475 F.3d 621, 627 (4th Cir. 2007)." That court further noted that:

> "'[o]missions are made with reckless disregard when the evidence demonstrates that a police officer failed to inform the judicial officer of facts [he] knew would negate probable cause." *Humbert v. Mayor & City Council of Balt. City*, 866 F.3d 546, 556 (4th Cir. 2017) (internal quotation marks omitted). Further, Launi must show "that the false statement or omission is material." Id. In assessing materiality, courts "must excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the corrected warrant affidavit would establish probable cause." Id. (internal quotation marks omitted). "Probable cause is 'a probability or substantial chance of criminal activity, not an actual showing of such activity,' and it is assessed based on the totality of the circumstances." *Nero v. Mosby*, 890 F.3d 106, 130 (4th Cir. 2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 230, 243 n.13 (1983)).

In affirming the dismissal of the petitioner's claim for illegal search and seizure against the Respondent herein based upon the alleged lack of probable cause, the *Launi* court found that:

> the amended complaint contains no allegations supporting that Nazelrod knew of facts allegedly omitted from his criminal complaint that "would negate probable cause." *Humbert*, 866 F.3d at 556 (internal quotation marks omitted). Most of those facts, as alleged, were merely Launi's own denials of the charges against him. Others, concerning Launi's claims that his alleged victim had harassed him and describing James's role in the investigation, appear at most tangential to assessing

> probable cause for Launi's own potential criminal conduct. See *Evans v. Chalmers*, 703 F.3d 636, 651 (4th Cir. 2012) ("Affiants are not required to include every piece of exculpatory information in affidavits."). And as the amended complaint alleges, Nazelrod's criminal complaint relied on the victim's own statements, as corroborated by video and photographic evidence, that Launi had battered and assaulted her. None of this negates probable cause for Launi's arrest and prosecution, much less shows that Nazelrod acted with the requisite reckless disregard or intent to mislead. Accordingly, we affirm the district court's dismissal of count nine.

The Petitioner's citation to *Wearry v. Foster*, 33 F.3d 260 (5th Cir. 2022) is misplaced as to Respondent Nazelrod. First, notwithstanding the fact that it is not binding precedent in this court, the *Wearry* case has nothing to do with this issue of probable cause in a state law claim for malicious prosecution. Instead, the case addressed the application of absolute prosecutorial immunity asserted by a prosecuting attorney and the derivate claim of the same immunity by a police detective involved in the prosecution of the plaintiff. The Fifth Circuit rejected the argument of the two civil defendants that their conduct was advocatory (and thus protected) rather than investigatory (not protected), because it occurred after the plaintiff was indicted by a grand jury. The "bright-line" rule quote cited by the Petitioner was offered by the court in that context. The record in this matter demonstrates that Respondent Nazelrod has never asserted that he is entitled to absolute prosecutorial immunity.

As to Petitioner's citation to the *Jarvis* case, while it is a West Virginia case, he misquotes Syllabus Point 5 by adding the word "only": "...prima facie evidence of the existence of probable causes only attaches when such finding is made by a grand jury who issues an indictment." The Syllabus Point actually reads as follows:

> In a claim for retaliatory prosecution in which a plaintiff alleges that he or she was criminally prosecuted in retaliation for exercising a right protected by the state or

> federal constitution, a grand jury indictment is prima facie evidence of probable cause for the underlying criminal prosecution, and a plaintiff may rebut this evidence by showing that the indictment was procured by fraud, perjury, or falsified evidence.

This Respondent acknowledges that the *Jarvis* court found that the cause of action of retaliatory prosecution is similar to that of malicious prosecution. In so holding, the *Jarvis* court made the following key observation:

> Further, this Court believes that bringing an action alleging retaliatory criminal prosecution action should require more than bringing a retaliation claim for adverse action occurring in a noncriminal context. This is due to the fact that criminal prosecutions should be encouraged in appropriate cases "without fear of reprisal by civil actions, criminal prosecutions being essential to the maintenance of an orderly society."

Jarvis, 227 W. Va. at 479, 711 S.E.2d at 549.

The Petitioner builds on the erroneous citation of *Jarvis* by suggesting that because he was not indicted by a grand jury prima facie evidence of probable cause cannot exist. This is plainly wrong. Moreover, the underlying factual predicate of the cases cited in *Jarvis* and offered by the Petitioner are far removed from the nature of conduct at issue in the case at bar. The facts in those cases ranged from perjury before grand juries to planting evidence and withholding and misstating the key testimony of an expert witness as the suspected cause of death of a child. See *White v. Frank*, 855 F.2d 956, 961–62 (2d Cir. 1988)(perjured testimony); *Gonzalez Rucci v. INS*, 405 F.3d 45, 49 (1st Cir. 2005) (perjured testimony and baseless search warrant and arrest in retaliation for rebuffed romance); *Riley v. City of Montgomery, Alabama*, 104 F.3d 1247, 1254 (11th Cir. 1997)(planted evidence and falsified identification by informant); *Rose v. Bartle*, 871

F.2d 331, 353 (3d Cir. 1989) (subornation of perjury); *Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997) (perjured grand jury testimony); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (perjured grand jury testimony); *DeLoach v. Bevers*, 922 F.2d 618, 620–21 (10th Cir. 1990) (admitted retaliatory actions including deliberate concealment and mischaracterization of exculpatory expert opinion before a grand jury).

In its Order granting the Motion to Dismiss filed by Respondent Nazelrod, the Circuit Court expressly noted that the Mineral County Magistrate found probable cause on all four counts listed in the criminal complaint three time: in issuing a warrant, "when the State's case was presented, which included a recantation by Ms. Hartman and rigorous cross-examination by counsel for [Petitioner], and [when] the motion for judgment of acquittal was denied..." [A.R. at pp. 274-75, ¶¶7-8]. The Petitioner failed to note that the trial court further declared that "[a]lthough [Petitioner] argues that [Respondent] Nazelrod failed to include information in his complaint that would have been exculpatory or otherwise positive for the [Petitioner], there still would have remained enough evidence to establish probable cause." [A.R. p. 275, ¶9].

In support of its conclusions, the trial court recited the elements of a claim of malicious prosecution as set forth in *Norfolk Southern Rwy. v. Higginbotthom:* (1) that the prosecution was conducted to its termination, resulting in plaintiff's discharge; (2) that the prosecution was caused or procured by defendant; (3) that it was without probable cause; and (4) that it was malicious. *Norfolk S. Ry. Co. v. Higginbotham*, 228 W. Va. 522, 528, 721 S.E.2d 541, 547 (2011); *see also* Syl. Pt. 3, *Truman v. Fid. & Cas. Co. of N.Y.*, 146 W. Va. 707, 123 S.E.2d 59 (1961). The trial court further found that the Complaint lacked

any allegation that Corporal Nazelrod knew the Petitioner to be innocent and helped in the prosecution or that he did anything to control the prosecution other than what is typically expected from a law enforcement officer, thus discounting any claim that the Respondent procured the prosecution. As the trial court declared that the Complaint and the prosecution of the Petitioner was based on probable cause, it could not be malicious, citing *Bailey v. Gollehon*, 76 W. Va. 322, 85 S.E. 5566 (1915).

The critical issue before this Court is whether probable cause existed and how this is assessed. The facts Petitioner claims demonstrate a lack of probable cause must be viewed through the lens of whether or not they would show if he committed the subject offense of three counts of domestic battery and one count of domestic assault. The Circuit Court and the Fourth Circuit both analyzed the facts and addressed them in reaching its decision, including the facts that the Petitioner contended then were "recklessly" omitted from Respondent Nazelrod's criminal complaint, and now labels as "fraudulently omitted" and concluded that even if all of the information had been made part of the criminal complaint, "there would still have remained enough evidence to establish probable cause." [A.R. p. 275, ¶9.] *See also Launi*, at *2.

The trial court had all of the allegations in the Petitioner's Complaint (and Amended Complaint) before it. The Circuit Court considered this information, particularly the Petitioner's denials of culpability, and astutely observed that especially in "domestic cases to have an accused to express a different version of facts from the accuser. This contradiction of evidence does not negate probable cause, and, here, there was plenty of other evidence to establish probable cause for the complaint." [A.R. p. 275, ¶11].

The Petitioner now characterizes the alleged conduct of Respondent Nazelrod in a more aggressive fashion in support of his argument that probable cause did not exist. The alleged evidence which was "directly fabricated or fraudulent by omission" was the exculpatory evidence consisting of the Petitioner's denial of the claims of domestic violence, his alibi, the alternative explanation of one of the incidents, and a strained interpretation of the deposition testimony of Penny Hartman. The minutiae of whether Ms. Hartman lied about sending pictures of the assault does not mean that the assault did not occur or that there was not probable cause for the issuance of the criminal complaint. Finally, the Petitioner now would characterize Respondent's description of a sound on one of the audio recordings as being consistent with a what sounded like a gun as the direct falsification of facts. This was not described in the Complaint as such and the Petitioner cannot alter his claims in his appellate brief to save his claim. [See A.R. pp. 18-19 ¶¶59(e) and (f)].

This Respondent submits that a *de novo* review of the allegations contained in the Petitioner's Complaint can only lead to the same result as that reached by the Circuit Court. Probable cause existed for the issuance of a criminal complaint against the Petitioner for domestic battery and domestic assault. As a result, the ruling of the trial court finding that the Petitioner had failed to state a claim for malicious prosecution should be affirmed.

2. The Circuit Court correctly held that the Petitioner could not maintain a claim for abuse of process

The Petitioner's challenge to the trial court's order on the abuse of process claim is essentially that he disagrees with the holding because he feels that the conclusory

allegations in his Complaint support his claim. The sole case cited by the Petitioner is *Preiser v. McQueen*, 177 W. Va., 352 S.E.2d (1985), which he rejects as to not being "binding precedential authority" on the issue of the parameters of a claim for abuse of process. In that case, the court considered the applicable statute of limitations for the torts of malicious prosecution and abuse of process. In so doing, the two claims were contrasted as to frequency they were considered on appeal. The court clarified the definition of the tort by citing Black's Law Dictionary, and in footnote 8, quoted a well-accepted treatise on torts:

> As stated in W. Prosser, Handbook of the Law of Torts § 121 (1971):
>
> Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause.
>
> ....
>
> The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

To withstand a motion to dismiss, a complaint must contain more than "sweeping legal conclusions cast in the form of factual allegations." *Brown*, supra. Petitioner claims that his Complaint state a claim under this cause of action because he included the allegation in his Complaint that "[b]y seeking a DVPO on behalf of Penny Hartman despite the fact that there was no evidence to suggest that she had any plausible fear of Plaintiff so as to deprive Plaintiff of his ability to work as a police officer and by other acts as set forth in the allegations of fact above, Defendant Nazelrod engaged in a willful and knowing misapplication of lawfully issued process for a purpose not intended or warranted by that process. [A.R. p. 35, ¶181.] The characterization of the Respondent as motivated by ill intent does not establish the "intentional and willful perversion of a law process that results in the unlawful injury of another" necessary to sustain a claim of abuse of process. As established by the trial court, the Respondent "conducted an investigation which led him to compile and file a criminal complaint against the [Petitioner] in which probable cause was found by a magistrate; he informed Ms. Hartman of her right to file for a DVPO, which is standard protocol for law enforcement in domestic violence cases, and contact the magistrate to let him know that Ms. Hartman wanted to file a petition for DVPO, also standard practice, but otherwise had nothing to do with the issuance of the DVPO, and he served Ms. Hartman with a subpoena, also standard practice." [A.R. p. 275, at ¶14][3] The trial court concluded that "even if [Respondent] Nazelrod had bad intentions, he did nothing more than use standard process to its natural conclusion." [Exhibit 1, at ¶16].

[3] Please note that the Petitioner did not include a complete copy of August 12, 2020 order granting Respondent's Motion to Dismiss. A copy is attached as Exhibit 1.

The Petitioner has not established that Circuit Court for Mineral County erred in its application of the law in dismissing his claim and that ruling must be upheld.

3. The Circuit Court Properly Dismissed The Petitioner's Claim Of Civil Conspiracy

The trial court properly dismissed the claim of civil conspiracy against Respondent Corporal Nazelrod as a result of its conclusion reached on theories of malicious prosecution and abuse of process. The Petitioner raises a new argument on appeal, that his claim for conspiracy goes beyond the underlying torts of malicious prosecution and abuse of process. He now asserts that Complaint is "replete with allegations of other unlawful conduct, particularly with regard to Petitioner's allegations of tampering with and destruction of evidence." However, the citations to these allegations in his Complaint do not accomplish that mission of establishing an alternative basis for his civil conspiracy claim. Paragraphs 102-104 of the Complaint, in fact, simply reference the allegation that Respondent Prosecutor Ours "suppressed exculpatory evidence" in the form of the transcript of the second part of Respondent Nazelrod's interview of the Petitioner, which was in his possession at all times and was a fact dutifully noted in the trial court's decision. The trial court recognized the allegations that the magistrate judge had referred to Respondent Nazelrod as negligent in his duties, presumably the duty to have kept the recording. The remaining paragraphs are the conclusory allegations against each of the three Respondents, ironically, in the malicious prosecution counts of the Complaint.

The case cited by the Petitioner also offers no support for the claim. In *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), this court addressed the destruction

of evidence in terms of its impact on a criminal defendant's due process rights under the West Virginia Constitution. This is not a criminal case, the Petitioner is not claiming violation of his constitutional rights and unlike the circumstances in *Osakalumi*, the evidence was not lost as the Petitioner had made his own recording of the interview.

The ruling below on the Petitioner's claim for civil conspiracy was a correct application of the law to the facts alleged and should stand.

VI. CONCLUSION

In light of the foregoing, Respondent Corporal Scott Nazelrod respectfully requests that this Court affirm the ruling of the Circuit Court for Mineral County dismissing all claims against him.

Respectfully submitted,

Respondent Corporal Scott Nazelrod
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THE HAMPSHIRE COUNTY PROSECUTING ATTORNEY'S OFFICE; COUNTY OF HAMPSHIRE, WEST VIRGINIA, et al,

Respondents, Defendants Below.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2022, I served a true and accurate copy of the foregoing **"Brief of Respondent Corporal Scott Nazelrod"** by depositing the same in the U.S. mail, postage paid, addressed to the following:

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EXHIBIT 1

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

NORMAN LAUNI, II,
PLAINTIFF,

v. CASE NO. 19-C-15 (Judge Courrier)

THE HAMPSHIRE COUNTY PROSECUTING ATTORNEY'S OFFICE, and COUNTY OF HAMPSHIRE, WEST VIRGINIA, and THE MORGAN COUNTY PROSECUTING ATTORNEY'S OFFICE, and COUNTY OF MORGAN, WEST VIRGINIA, and THE MINERAL COUNTY PROSECUTING ATTORNEY'S OFFICE, and COUNTY OF MINERAL, WEST VIRGINIA, and DAN JAMES, JR., individually and in his official capacity as Prosecuting Attorney for Hampshire and Morgan Counties, and JOHN OURS, individually and in his official capacity as Special Prosecutor in Mineral County, and CORPORAL SCOTT NAZELROD, individually and in his official capacity as a West Virginia State Trooper,
DEFENDANTS.

FILED
CLERK CIRCUIT COURT
AUG 12 2020
MINERAL COUNTY
KEYSER, WV

ORDER ON MOTION TO DISMISS OF DEFENDANT CORPORAL SCOTT NAZELROD

This matter came before the Court upon consideration of Defendant Corporal Scott Nazelrod's Motion to Dismiss for failure to state a claim upon which relief can be granted. After reviewing the written filings of the parties, considering the prior arguments of counsel, and thoroughly examining the issues before the Court, the Court FINDS the following:

1) On March 22, 2019, this matter was filed in the Mineral County Circuit Court following an agreed transfer of the case from the Circuit Court of Morgan County;
2) Plaintiff Norman Launi, II (hereafter "Plaintiff") alleges in his Complaint that he suffered damages from the acts or omissions of the various named defendants, including claims against Defendant Corporal Scott Nazelrod (hereafter "Defendant

J. Mitchell
A. Strimel
N. Liddell
D. Button
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Nazelrod") of malicious prosecution; abuse of process; civil conspiracy (along with Defendants Dan James, former Hampshire County Prosecuting Attorney and now Morgan County Prosecuting Attorney (hereafter "Defendant James"), and John Ours, Grant County Prosecuting Attorney serving as Special Prosecuting Attorney for Mineral County (hereafter "Defendant Ours")); and an alternative count of negligence;

3) The claims arise from the Plaintiff's prosecution in Mineral County for three counts of domestic battery and one count of domestic assault alleged to have been committed against Penny Hartman (hereafter "Ms. Hartman");
4) Defendant Ours is the duly elected prosecutor of Grant County and was assigned by the West Virginia Prosecuting Attorney's Institute as the special prosecutor to handle the prosecution of Plaintiff in Mineral County after Mineral County Prosecuting Attorney F. Cody Pancake, III, was recused from the case;
5) At the time of Defendant Ours' appointment to the case, the criminal complaint against the Plaintiff had already been accepted by the Mineral County magistrate and the matter was an active case before the Mineral County Magistrate Court;
6) During all relevant times for this case, Defendant James was the Prosecuting Attorney for Hampshire County until his appointment as Morgan County Prosecuting Attorney in September 2017;
7) Defendant Nazelrod is a corporal with the West Virginia State Police;
8) In January 2017, Defendant James received information from Ms. Hartman, the Plaintiff's previous girlfriend, that she had been the victim of domestic violence from

the Plaintiff, and, thereafter, Defendant James directed Defendant Nazelrod to investigate Ms. Hartman's allegations against the Plaintiff;

9) Ms. Hartman filed for a Domestic Violence Protective Order (DVPO) against Plaintiff, which the Plaintiff contends was done at the direction of Defendant Nazelrod;

10) Plaintiff further alleges that Defendant Nazelrod also called the on-call magistrate to encourage him to grant Ms. Hartman's petition for a DVPO;

11) At some point in the investigation, it was determined that the alleged crimes happened in Mineral County, rather than Hampshire County;

12) In April 2017, at the conclusion of his investigation, Defendant Nazelrod presented a criminal complaint to a Mineral County magistrate alleging three counts of domestic battery and one count of domestic assault against Plaintiff;

13) The magistrate found probable cause on all four counts;

14) The Plaintiff alleges that the complaint presented by Defendant Nazelrod was defective in that it failed to include certain potentially exculpatory information that was provided to Defendant Nazelrod in a recorded interview with Plaintiff;

15) Plaintiff also contends that Ms. Hartman made multiple attempts to have the criminal case against Plaintiff dismissed, but that the State refused to do so;

16) Plaintiff further alleges that Defendant Nazelrod knowingly withheld exculpatory evidence from him and his counsel, specifically this being a portion of a recorded interview between Plaintiff and Defendant Nazelrod, and that this resulted in the magistrate verbally reprimanding Defendant Nazelrod for being negligent in his

duties; it should be noted that Plaintiff had his own recording of the portion of the interview that Defendant Nazelrod did not disclose;

17) The underlying criminal prosecution against the Plaintiff proceeded to trial in October 2017, and, after the magistrate denied a motion for judgment of acquittal, the matter was submitted to the jury, which, following a brief deliberation, found the Plaintiff not guilty;

18) Plaintiff contends that Defendant Nazelrod intimidated Ms. Hartman into continuing to prosecute Plaintiff despite her repeated efforts to dismiss the case and her testimony at trial in which she claimed the domestic violence never happened;

19) Plaintiff also states that every witness at the trial except Defendant Nazelrod testified that Ms. Hartman was not credible;

20) After the present case was transferred to Mineral County, Defendant Ours, through counsel, filed a motion to dismiss the complaint based on Rule 12(b)(6) of the West Virginia Rules of Civil Procedure;

Based on these findings, the Court makes the following CONCLUSIONS:

1) In *Norfolk S. Ry. Co. v. Higginbotham,* 228 W.Va. 522, 721 S.E. 2d 541 (2011), the Court recited the factors necessary for proving the claim of malicious prosecution: 1) the prosecution was conducted to its termination and resulted in Plaintiff's discharge; 2) the prosecution was caused or procured by the Defendant; 3) the prosecution was without probable cause; and 4) the prosecution was malicious;

2) If a prosecution is based on probable cause, it cannot be malicious (see *Bailey v. Gollehon*, 76 W.Va. 322, 85 S.E. 556 (1915));

3) Procurement of a prosecution can be established by: 1) advancing or actively assisting in the prosecution of a defendant that the law enforcement officer knows to be innocent or 2) the "assert[ion] [of] control over the pursuit of the prosecution." *Norfolk S. Ry. Co. at 528.*

4) While Plaintiff here alleges that he was innocent, there is no allegation that Defendant Nazelrod knew Plaintiff to be innocent and helped prosecute him anyway;

5) Also, there is no showing that Defendant Nazelrod did anything to control the prosecution other than doing what is typically expected from a law enforcement officer in a criminal case;

6) After Ms. Hartman initiated a complaint with Defendant James, Defendant Nazelrod was directed by the prosecuting attorney to investigate the matter, which included speaking with both Ms. Hartman and the Plaintiff and reviewing evidence; after concluding his investigation, Defendant Nazelrod presented a criminal complaint to a magistrate (but notably Plaintiff contends Defendant Nazelrod did not even draft the complaint); Defendant Nazelrod provided information to Ms. Hartman that she could seek a DVPO with a magistrate, and Defendant Nazelrod alerted the magistrate that the petition from Ms. Hartman was being sought; Defendant Nazelrod served Ms. Hartman with a subpoena; and he then testified at trial—all of these things are typical of law enforcement and do not indicate a control over the prosecution;

7) As to another factor in *Norfolk S. Ry. Co.*, probable cause was established when the magistrate reviewed the complaint and issued a warrant based on probable cause;

8) Probable cause was established a second time when the State's case was presented, which included a recantation by Ms. Hartman and rigorous cross-examination by

counsel for the Plaintiff, and the motion for judgment of acquittal was denied and the magistrate allowed the case to proceed to the jury;

9) Although Plaintiff argues that Defendant Nazelrod failed to include information in his complaint that would have been exculpatory or otherwise positive for the Plaintiff, there would have still remained enough evidence to establish probable cause;

10) A law enforcement officer is not required to put the denials of culpability from the accused in the complaint, and it is exceedingly common, especially in domestic cases, to have an accused express a different version of the facts from the accuser;

11) This contradiction of evidence does not negate probable cause, and, here, there was plenty of other evidence to establish probable cause for the complaint;

12) To establish abuse of process, the Plaintiff must show that Defendant Nazelrod engaged in "the willful or malicious misuse or misapplication of [a] lawfully issued process to accomplish some purpose not intended or warranted by that process." See *Wayne Cty. Bank v. Hodges,* 175 W.Va. 723, 726, 338 S.E. 2d 202, 205 (1985);

13) The Court expounded upon this principle in *Williamson v. Harden,* 214 W.Va. 77, 80, 585 S.E. 2d 369, 372 (2003), when it noted that " there must be...an intentional and willful perversion" of a lawful process that results in the "unlawful injury of another," and in *Preiser v. MacQueen,* 177 W.Va. 273, 279 n. 8, 352 S.E. 2d 22, 28 n. 8 (1985) when it said "there is no liability [for abuse of process] where the defendant has done nothing more than carry out [a lawful] process to its authorized conclusion, even though with bad intentions";

14) In the present case, Defendant Nazelrod conducted an investigation which led him to compile and file a criminal complaint against the Plaintiff in which probable cause

was found by a magistrate; he informed Ms. Hartman of her right to file for a DVPO, which is standard protocol for law enforcement in domestic violence cases, and contacted the magistrate to let him know that the Ms. Hartman wanted to file a petition for a DVPO, also standard practice, but otherwise had nothing to do with the issuance of the DVPO; and he served Ms. Hartman with a subpoena, also a standard practice of law enforcement;

15) The Court also finds no merit in the argument that the troopers exceeded their jurisdiction and abused process by serving Ms. Hartman in Mineral County, even though the troopers were assigned to a State Police detachment outside of Mineral County. First, these officers are state troopers and have jurisdiction in every county of the state. Second, even though the prosecution was occurring in Mineral County, Defendant Nazelrod was still the investigating officer for the case;

16) So, even if Defendant Nazelrod had bad intentions, he did nothing more than use standard process to its natural conclusion;

17) The Court concludes that there has been no showing of malicious prosecution or abuse of process against Defendant Nazelrod, and, therefore, because there is no underlying liability for these, there also cannot be a conspiracy to commit malicious prosecution or abuse of discretion;

18) The Plaintiff's alternate negligence claim is predicated on Defendant Nazelrod's failure to disclose and turn over evidence alleged to be exculpatory and failure to provide exculpatory facts in the criminal complaint;

19) For a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), for failing to disclose exculpatory evidence, there must be a showing that the accused was somehow prejudiced by the failure to disclose;

20) In *Mead v. Shaw*, 2016 WL 316870, at 7, 8 (W.D. N.C. Jan. 25, 2016), (citing *Fullwood v. Lee*, 290 F. 3d. 663, 685 (4th Cir. 2002)), the court found that a defendant is only prejudiced from a *Brady* violation if he is actually convicted, and the mere fact of having to endure a trial is not enough to equal prejudice;

21) In the present case, the Plaintiff was not convicted in his underlying criminal case, so he therefore cannot be considered to have been prejudiced under *Brady;*

22) Moreover, as discussed previously, an officer does not have an obligation to place all exculpatory or otherwise positive factors for the accused in his application for probable cause;

23) Consequently, the Plaintiff's negligence claim must also fail.

WHEREFORE, based on the above, the Court GRANTS Defendant Nazelrod's motion to dismiss the claims against him of malicious prosecution, abuse of process, civil conspiracy, and negligence.

The Court notes the objection of counsel to adverse rulings of the Court. This matter against Defendant Nazelrod is now dismissed.

The Clerk is hereby directed to forward a copy of this Order to James W. Marshall, III and Adam K Strider; Christian Riddell and Dylan Batten; Tracey B. Eberling and Katherine M. Smith.

ENTERED this the 12th day of August, 2020.

James W. Courrier Jr.

JUDGE JAMES W. COURRIER, JR.

TESTE COPY

Clerk Circuit/Family Court of Mineral County, W. Va.