IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT KNOXVILLE

NELSON STAFFORD,	)	Carter County Circuit Court
	)	No. 6347
Plaintiff/Appellant.	)	
	)	
VS.	)	C. A. No. 03A01-9509-CV-00306
	)	
LARRY VANCE,	)	
	)	
Defendant/Appellee.	)	
	)	

FILED

March 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

From the Circuit Court of Carter County at Elizabethton.
Honorable Thomas J. Seeley, Jr., Judge

H. Randolph Fallin, Mountain City, Tennessee
Attorney for Plaintiff/Appellant.

T. J. Little, Jr., Elizabethton, Tennessee
Attorney for Defendant/Appellee.

OPINION FILED:

REVERSED AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)
HIGHERS, J. : (Concurs)

This appeal is from the trial court's grant of summary judgment in favor of the defendant in a suit for malicious prosecution.

It is alleged in the complaint and admitted in the answer that the defendant, Larry A. Vance, instituted criminal proceedings against the plaintiff, Nelson Stafford, charging him with the criminal offense of theft of property under $500. Stafford was tried and acquitted of the charge. The motion for summary judgment was supported by five affidavits and the deposition of Vance. In response to the motion, Stafford filed five affidavits, including his own, and the transcript of the trial on the criminal charges.

On September 24, 1994, Vance discovered copper flashing missing from a cabin he was constructing. The flashing had been specially fabricated according to specific measurements and specifications in the sheet metal shop of his business. He then went to Roan Mountain and conferred with a Mr. Morgan and, after inquiry, was advised by Morgan that no one had sold any scrap sheet copper to him recently.

On September 26, 1994 at approximately 11:00 a.m., he went to Elizabethton Herb and Metal Company, Inc. in Elizabethton and inquired of the president, Mr. David Wilson, whether anyone had recently sold any sheet metal copper there. He advised Wilson that his copper flashing had been fabricated to specific specifications, had been stolen and was easily recognizable by him because of the fabrication measurements. Vance and Wilson made inquiry of two employees, Mr. Smalling and Mr. Oliver, who stated that an individual had sold twenty-three pounds of sheet copper to Elizabethton Herb and Metal earlier that morning. Upon examining it Vance identified it as his. Both Smalling and Oliver stated that they could identify when the copper was brought in and sold because the man who had brought it in had been there that morning and had brought it in two five-gallon buckets. Wilson and his employees showed Vance the sales receipt for the pieces of sheet copper which he had identified. The ticket number was 34276, dated September 26, 1994, indicating 23 pounds of sheet copper sold by Mr. Nelson Stafford, Box 124, Plum Tree. Wilson also advised Vance that a search of the business records of his firm revealed no other purchases of sheet copper during a one week period prior to September 26, 1994.

Vance then went to the Carter County Sheriff's Department where he met with Captain Tom Harrald. He related to Captain Harrald what had occurred and showed him a copy of the sales receipt. Harrald wrote out an affidavit of complaint, had it typed at the sheriff's department and instructed Vance to proceed to the circuit court clerk's office to secure a warrant to prosecute Stafford for the offense of theft under $500.[1]

The documents filed in opposition to the motion for summary judgment state that Lloyd McKenney accompanied Nelson Stafford from Plum Tree, North Carolina to Elizabethton, Tennessee on September 26, 1994 where they sold a quantity of copper scrap. The copper was contained in two five-gallon buckets, neither more than three quarters full and no piece of copper protruded over the top of either bucket. The employees of Elizabethton Herbs weighed the two buckets, then dumped the contents into one of several 55 gallon drums, all of which were either full or practically full of scrap copper. According to McKenney, the copper that Stafford sold that day was copper that McKenney had seen him save over approximately two years. Having been shown certain pieces of copper that belonged to Mr. Vance, McKenney said these were not in the quantity of copper that he and Stafford sold on September 26, 1994.

Nelson Stafford's affidavit adopts the facts contained in McKenney's deposition and further states that, at no time prior to being contacted by Captain Harrald advising him of the charges, had anyone contacted him to inquire about how or under what circumstances he acquired the copper that he sold on September 26, 1994. He further states that the copper identified by Vance at Stafford's trial would not fit into the five-gallon buckets that he used to transport his copper.

Summary judgment is proper if it is shown there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56.03 T.R.C.P. In determining whether or not a genuine issue of material fact exists, the court must consider the matter in the same manner as a motion for a directed verdict made at the close of plaintiff's proof, i.e., the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party,

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[1]In a subsequent affidavit attached to the response to motion for summary judgment, Captain Harrald states neither he nor, to his knowledge, anyone in the department conducted an investigation, nor did he express an opinion to Vance as to probable cause.

allow all reasonable inferences in favor of that party, and discard all countervailing evidence. If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied. ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn. 1993).

Prior to the decision of ***Roberts v. Federal Express Corp.***, 842 S.W.2d 246 (Tenn. 1992), the question of probable cause was held to be a mixed question of law and fact. Whether the circumstances alleged to show it are true and existed was a question of fact for the jury. Whether the facts found to be true constitute probable cause was a question of law for the court. ***Logan v. Kuhn's Big K Corp.***, 676 S.W.2d 948 (Tenn. 1984); ***Lewis v. Williams***, 618 S.W.2d 299 (Tenn. 1981). Our supreme court held in ***Roberts*** that the question of probable cause is a question to be determined by the trier of fact. The court went on to say:

> Probable cause is established where "facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe the accused was guilty of the crime charged." ***See Logan v. Kuhn's Big K Corp.***, 676 S.W.2d 948, 951 (Tenn.1984); ***Lewis v. Williams***, 618 S.W.2d 299, 303 (Tenn.1981). However, this Court has also stated that "[t]he prosecutor must in good faith have honestly believed the accused was guilty of the crime charged." ***See Logan***, 676 S.W.2d at 951; ***Lewis***, 618 S.W.2d at 303. We now conclude that the existence of probable cause does not depend on the subjective mental state of the prosecutor.
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> A malicious prosecution is one brought in the absence of probable cause, and with malice. These two elements are distinct. Whereas malice concerns the subjective mental state of the prosecutor, appraisal of probable cause necessitates an objective determination of the reasonableness of the prosecutor's conduct in light of the surrounding facts and circumstances. ***Accord Sheldon Appel Co. v. Albert & Oliker***, 47 Cal.3d 863, 765 P.2d 498, 506, 254 Cal.Rptr. 336, 344-45 (1989); Dobbs, ***Belief and Doubt in Malicious Prosecution and Libel***, 21 Ariz.L.Rev. 607 (1979) (rejecting Restatement (Second) of Torts § 662 comment c. (1977)).
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> Properly defined, probable cause requires only the existence of such facts and circumstances sufficient to excite in a reasonable mind the belief that the accused is guilty of the crime charged. While a mind "beclouded by prejudice, passion, hate and malice" is not "reasonable," ***see Poster v. Andrews***, 183 Tenn. 544, 554, 194 S.W.2d 337, 341 (1946), the question whether a particular prosecutor is so motivated goes only to the element of malice. Probable cause is to be determined solely from an objective examination of the surrounding facts and circumstances.

Roberts, 842 S.W.2d at 248.

Significant to the case before us, the ***Roberts*** court further says that "Plaintiff asserts that a reasonable preprosecution investigation would have revealed certain exculpatory facts. Where such an allegation is made and there is evidence to support it, the jury is to determine the facts a reasonable investigation would have disclosed, and then base its probable cause determination considering those facts." ***Id***. at 249.

Stafford contends that a reasonable preprosecution investigation would have included interviewing Stafford and Lloyd McKenney. According to their affidavits, this would have revealed that the copper Stafford sold on September 26 was copper that he had saved and which McKenney had observed him save over an approximate two year period. That had they been shown certain pieces of copper that Mr. Vance identified, they could have stated positively that those pieces were not among the quantity of copper that Stafford sold. In addition, Vance's sheets of copper would not have fit into the two five-gallon buckets used by Stafford to transport his copper to Elizabethton Herb.

Based on the holding in ***Roberts***, we have determined that there is evidence to support an assertion that a reasonable preprosecution investigation would have revealed certain exculpatory facts. The trier of fact is to determine the facts a reasonable investigation would have disclosed, and then base its probable cause determination considering those facts.

It results that the judgment of the trial court granting summary judgment in favor of the defendant is reversed and this cause is remanded to the trial court for a trial on the merits. Costs of this appeal are taxed to the appellee, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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HIGHERS, J. (Concurs)