

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14<sup>th</sup> day of November, two thousand eleven.

PRESENT: DENNIS JACOBS,  
Chief Judge,  
ROBERT D. SACK,  
REENA RAGGI,  
Circuit Judges.

- - - - -X  
THOMAS PACICCA,  
Plaintiff-Appellant,

-v.- 10-1069

JAMES STEAD, BRIAN ROBBINS, POLICE OFFICER, MICHAEL HANNON,  
POLICE OFFICER, LAVELLE LARRIER, POLICE OFFICER, ANDREW  
BLACK, POLICE OFFICER, PATRICK OGERRI, POLICE OFFICER, CITY  
OF WHITE PLAINS,  
Defendants-Appellees,

FRANK VESSA, POLICE OFFICER,  
Defendant.

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1  
2 **FOR APPELLANT:** Eugene B. Nathanson, New York,  
3 New York.

4  
5 **FOR APPELLEES:** Joseph J. Gulino, Nicoletti  
6 Gonson Spinner & Owen, LLP, New  
7 York, New York (Counsel for  
8 James Stead).

9  
10 Joseph A. Maria, White Plains,  
11 New York (Counsel for Brian  
12 Robbins, Michael Hannon, Lavelle  
13 Larrier, Frank Vessa, Andrew  
14 Black, Patrick Oggerri, and City  
15 of White Plains).

16  
17 Appeal from a judgment of the United States District  
18 Court for the Southern District of New York (Seibel, J.).

19  
20 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
21 **AND DECREED** that the judgment of the district court be  
22 **AFFIRMED.**

23  
24 Thomas Pacicca appeals from a judgment entered  
25 following a jury trial in the United States District Court  
26 for the Southern District of New York. We assume the  
27 parties' familiarity with the underlying facts, the  
28 procedural history, and the issues presented for review.

29  
30 Pacicca alleged false arrest and malicious prosecution  
31 under 42 U.S.C. § 1983 as well as state malicious  
32 prosecution claims against White Plains police officers who  
33 arrested him, the City of White Plains (invoking the  
34 doctrine of respondeat superior), and the neighbor who had  
35 lodged criminal complaints against him.

36  
37 **[1] Claims Against Police Officers.** The White Plains police  
38 officers were entitled to summary judgment based on  
39 qualified immunity. An officer is entitled to qualified  
40 immunity if arguable probable cause exists, meaning "either  
41 (a) it was objectively reasonable for the officer to believe  
42 that probable cause existed, or (b) officers of reasonable  
43 competence could disagree on whether the probable cause test  
44 was met." Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir.  
45 2004) (quoting Golino v. City of New Haven, 950 F.2d 864,  
46 870 (2d Cir. 1991)).

1           Pacicca's July 30 and August 28, 2004 arrests concerned  
2 his damage to a margin of grass separating the property of  
3 his neighbor, James Stead, from the road. Stead called  
4 police reporting damage to his property. Pacicca argues  
5 that there could be no probable cause for acting on the  
6 complaints because the property was owned by the City of  
7 White Plains, not Stead; but that distinction does not  
8 negate arguable probable cause. As to the July 30 arrest, a  
9 reasonable officer could believe that a person repeatedly  
10 moving rocks from city property gives rise to probable cause  
11 to arrest and prosecute that person for criminal tampering.<sup>1</sup>  
12 As to the August 28 arrest, a reasonable officer could  
13 believe that when a person repeatedly drives his car over a  
14 curb onto city property, there is probable cause to arrest  
15 and prosecute for violating an order of protection issued  
16 because the person had previously engaged in similar  
17 conduct.

18  
19           Pacicca was arrested for cursing at Stead on December  
20 23, 2004. Pacicca admits that he cursed (his rant was  
21 videotaped), but argues that he was not addressing Stead,  
22 who (Pacicca contends) was inside his own house at the time.  
23 A reasonable officer could nonetheless believe that there  
24 was probable cause to arrest Pacicca for violating an order  
25 of protection protecting Stead--particularly since their  
26 houses were the only ones in the immediate vicinity.

27  
28 **[2] Claims Against Stead.** The district court did not err in  
29 granting summary judgment in Stead's favor on all the § 1983  
30 claims and on the state malicious prosecution claim arising  
31 out of Pacicca's August 28, 2004 arrest. To support a claim  
32 against a private party on a § 1983 conspiracy theory, a  
33 plaintiff must show "(1) an agreement between a state actor

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<sup>1</sup> "A person is guilty of criminal tampering in the third degree when, having no right to do so nor any reasonable ground to believe that he has such right, he tampers with property of another person with intent to cause substantial inconvenience to such person or to a third person." N.Y. PENAL LAW § 145.14 (McKinney 2010). We need not analyze probable cause for the other two charges for which Pacicca was arrested on July 30 because probable cause for any crime is a defense to false arrest, Brown v. Kelly, 609 F.3d 467, 484 (2d Cir. 2010), and because Pacicca's malicious prosecution claims for the other charges proceeded to trial.

1 and a private party; (2) to act in concert to inflict an  
2 unconstitutional injury; and (3) an overt act done in  
3 furtherance of that goal causing damages." Ciambriello v.  
4 County of Nassau, 292 F.3d 307, 324-25 (2d Cir. 2002).  
5 Pacicca presents no evidence that Stead entered a  
6 conspiracy with White Plains police. To defeat a motion for  
7 summary judgment, "[t]he non-moving party may not rely on  
8 conclusory allegations or unsubstantiated speculation."  
9 Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998).

10  
11 To prevail on a claim of malicious prosecution, a  
12 plaintiff must prove "(1) the initiation of a proceeding,  
13 (2) its termination favorably to plaintiff, (3) lack of  
14 probable cause, and (4) malice." Colon v. City of New York,  
15 60 N.Y.2d 78, 82 (1983). "[E]ven if a civilian complainant  
16 is ultimately incorrect in his belief as to whether a person  
17 is committing a crime, he need only have had a reasonable  
18 basis for this belief in order to have the probable cause  
19 necessary to defeat a malicious prosecution or false arrest  
20 claim." TADCO Const. Corp. v. Dormitory Auth., 700 F. Supp.  
21 2d 253, 275 (E.D.N.Y. 2010) (citing Williams v. Town of  
22 Greenburgh, 535 F.3d 71, 78-79 (2d Cir. 2008)).

23  
24 Given the order of protection prohibiting Pacicca from  
25 harassing Stead, it was reasonable for Stead to believe that  
26 the repeated encroachment of Pacicca's car over the curb  
27 constituted a crime. Even though Stead did not own the  
28 property onto which Pacicca drove, he was responsible for  
29 its maintenance, so was harmed by damage done.

30  
31 **[3] Jury Instructions.** The jury was charged that "[t]he  
32 exercise of independent judgment by the public prosecutor  
33 and his active role in initiating the criminal prosecution  
34 may break the chain of causation between the officer's  
35 actions and the criminal prosecution"--with the caveat that  
36 "if the public prosecutor relies on information conveyed by  
37 the officer that the officer knows is false and has no other  
38 independent basis for prosecuting the case, the officer is  
39 liable for causing the prosecution." Pacicca argues that  
40 the charge was erroneous. "[G]enerally in malicious  
41 prosecution actions alleging that a police officer provided  
42 false information to a prosecutor, what prosecutors do  
43 subsequently has no effect whatsoever on the police  
44 officer's initial, potentially tortious behavior." Cameron  
45 v. City of New York, 598 F.3d 50, 63 (2d Cir. 2010); see  
46 also Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 130 (2d  
47 Cir. 1997) ("[A] jury could clearly find that [the police

1 officer] started the assault prosecution because no one  
2 disputes that he started the prosecution by filing the  
3 charges of second-degree assault."). Here, however, the  
4 prosecutor testified that he consulted with Stead and  
5 independently decided to prosecute. The charge was sound.  
6

7 Pacicca also challenges the instruction on the element  
8 of malice, arguing that absence of probable cause should  
9 suffice to support an inference of malice. "[M]alice does  
10 not have to be actual spite or hatred, but means only 'that  
11 the defendant must have commenced the criminal proceeding  
12 due to a wrong or improper motive, something other than a  
13 desire to see the ends of justice served.'" Lowth v. Town  
14 of Cheektowaga, 82 F.3d 563, 573 (2d Cir. 1996) (citation  
15 omitted). "[P]robable cause to initiate a criminal  
16 proceeding may be so totally lacking as to reasonably permit  
17 an inference that the proceeding was maliciously instituted.  
18 Hence, a jury may, but is not required to, infer the  
19 existence of actual malice from the fact that there was no  
20 probable cause to initiate the proceeding." Martin v. City  
21 of Albany, 42 N.Y.2d 13, 17 (1977).  
22

23 The jury instructions closely tracked these precedents.  
24 The jury was informed that malice is established if the  
25 plaintiff proves by a preponderance of the evidence that the  
26 defendant "commenced criminal proceedings for a wrong or  
27 improper motive; that is, something other than a desire to  
28 see the ends of justice served" and that it could find  
29 malice if probable cause was "so lacking that it tends to  
30 show the defendant did not believe that plaintiff was guilty  
31 of a particular crime" or if the defendant "lacked any  
32 reasonable grounds to believe that plaintiff was guilty."  
33

34 Finding no merit in Pacicca's remaining arguments, we  
35 hereby **AFFIRM** the judgment of the district court.  
36  
37

38 FOR THE COURT:  
39 CATHERINE O'HAGAN WOLFE, CLERK  
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