

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

<b>BETTY SLAGLE MINTON, et al.,</b>	)	
<b>Plaintiffs</b>	)	
	)	<b><u>MEMORANDUM ORDER</u></b>
<b>v.</b>	)	<b>Case No. 2:13cv00036</b>
	)	
<b>NATHAN ALAN KENNEDY, et al.,</b>	)	
<b>Defendants</b>	)	

This case is before the court on the plaintiffs’ Motion To Amend, (Docket Item No. 32), (“Motion”), seeking leave to file a Second Amended Complaint for the following reasons: (1) to correct certain facts; (2) to add a party defendant; (3) to add “other miscellaneous details” mentioned in the plaintiffs’ Brief In Opposition To Officer Kennedy’s Motion To Dismiss Amended Complaint And Trooper Williams’ Motion To Dismiss & Plea Of Sovereign Immunity, (“Brief in Opposition”); (4) to add claims for malicious prosecution and abuse of process against Kennedy on behalf of Robinette; and (5) to add claims for failure to intervene against Williams on behalf of both plaintiffs. None of the parties has requested a hearing on the Motion. Based on the arguments and representations of counsel, and for the reasons stated herein, the Motion is **GRANTED in part** and **DENIED in part**.

Pursuant to Federal Rules of Civil Procedure Rule 15, a party may amend its pleading once as a matter of course, under certain circumstances not applicable here, but in all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. Rule 15 also states that the “court should freely give leave when justice so requires.” FED. R. CIV. P. 15(a). The

standards for determining whether to grant the Motion are governed by the standards articulated by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962). In *Foman*, the Court stated, in relevant part, as follows:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.”

371 U.S. at 182. The grant or denial of an opportunity to amend a complaint is within the court’s discretion. *See Foman*, 371 U.S. at 182.

Here, plaintiffs seek to correct certain facts, including that Robinette believed, even after he went outside of his residence, that someone was in *his* yard, either stealing gas out of his truck or attempting to steal his truck.<sup>1</sup> They further seek to correct the fact that Robinette requested that Minton call the police so that the police could investigate what Robinette saw or heard in *his own yard*. I will allow the plaintiffs to correct such facts in a Second Amended Complaint. Plaintiffs’ counsel assert that they must have incorrectly assumed that Robinette believed, after he went outside, that the disturbance was actually at a neighboring residence, because the Criminal Complaint against Robinette states that Kennedy was already at the neighboring residence because he had been “dispatched” to a “call” at this neighboring residence. However, plaintiffs’ counsel has since learned

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<sup>1</sup> I will not undertake to rehash all of the facts pertaining to this case, as they were sufficiently set out in the court’s November 14, 2013, Report and Recommendation. (Docket Item No. 48).

otherwise, and wishes to correct this mistake. There is no allegation that there has been any undue delay, bad faith or dilatory motive on the part of plaintiffs' counsel or any repeated failures to cure such deficiencies by amendments previously allowed. I further find that no undue prejudice would result to the defendants by allowing the amendment. Therefore, I will allow the amendment insofar as to allow the plaintiffs to correct this factual misunderstanding.

Next, plaintiffs' counsel seeks to add "other miscellaneous details" that were included in their Brief in Opposition, (Docket Item No. 20) ("Brief in Opposition"). A review of the Brief in Opposition reveals the following additional details that appear to differ or supplement the Amended Complaint. First, the plaintiffs state that Williams made a statement several months prior to the filing of the Motion, stating that when Minton came to the back door, her cane was thought to be a "rifle" or "shotgun." Next, the plaintiffs state that further investigation has produced a statement from Williams that the search of Robinette's house was not a "protective sweep" for "weapons," but "to make sure there were no other injuries of any people in there who might be injured." Also, plaintiffs state that the defendants were unaware of the 9-1-1 call when they "attacked" the plaintiffs, and before this incident, the only thing Kennedy heard Robinette say was "Get off my property" or words to that effect. Lastly, the plaintiffs would like to expressly state that both Kennedy and Williams were present and participated in the events that occurred outside of Robinette's residence. I, again, find that there is no allegation that the plaintiffs' request to add these facts has been unduly delayed, is made in bad faith or that there is any dilatory motive on the part of plaintiffs' counsel. Moreover, there is no allegation of repeated failure to cure any such deficiencies by previously allowed amendments, and there would be no undue prejudice to the defendants by allowing such an amendment. Therefore, I will allow the plaintiffs

to amend their Amended Complaint to add these facts.

Next, Robinette also seeks to add a claim for malicious prosecution against Kennedy.<sup>2</sup> I find that the underlying facts and circumstances relied upon by Robinette may form the proper basis for such. In order to make out a claim for malicious prosecution, a plaintiff must prove by a preponderance of the evidence that the prosecution was (1) malicious; (2) instituted by or with the cooperation of the defendant; (3) without probable cause; and (4) terminated in a manner not unfavorable to the plaintiff. *See Lewis v. Kei*, 708 S.E.2d 884, 889 (Va. 2011). For purposes of malicious prosecution under § 1983, “malice” is not an element, since reasonableness of a seizure under the Fourth Amendment jurisprudence “should be analyzed from an objective perspective.” *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 184 n.5 (4<sup>th</sup> Cir. 1996). In *Brooks*, although the court styled the claim as a § 1983 malicious prosecution claim and incorporated common law elements, it did not treat the claim as separate and distinct from the appellant’s constitutional allegations. Instead, the court made it clear that the foundation for the appellant’s claim was the allegation of “a seizure that was violative of the Fourth Amendment.” *Brooks*, 85 F.3d at 184.

I find that the facts as alleged by the plaintiffs sufficiently state the basis for a § 1983 malicious prosecution claim. There is no question that the prosecution was instituted by or with the cooperation of Kennedy. Also clear is that the prosecution terminated in a manner not unfavorable to Robinette, as he was found

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<sup>2</sup> In *Lambert v. Williams*, 223 F.3d 257, 260 (4<sup>th</sup> Cir. 2000), the Fourth Circuit held that common law malicious prosecution is not itself redressable under § 1983. Instead, a “malicious prosecution” claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure that incorporates certain elements of the common law tort. *See Lambert*, 223 F.3d at 261.

not guilty on the brandishing and obstruction charges, and a grand jury returned “not a true bill” on the felony charge of assault on a police officer. Finally, for the reasons stated in this court’s November 14, 2013, Report and Recommendation regarding the defendants’ Motions to Dismiss, I find that the facts sufficiently allege that Robinette lacked probable cause to institute the prosecution. That being the case, I find that Robinette should be given the opportunity to test his § 1983 malicious prosecution claim on the merits. Additionally, there is no allegation of undue delay, bad faith, dilatory motive or repeated failure to cure deficiencies by amendments previously allowed, and I find that the defendants would not be unduly prejudiced by allowing Robinette to add a § 1983 malicious prosecution claim against Kennedy. Therefore, I will allow Robinette to so amend the Amended Complaint.

Robinette also seeks to add a claim for abuse of process against Kennedy. Abuse of process is “the wrongful *use* of process *after* it has been issued.” *Triangle Auto Auction, Inc. v. Cash*, 380 S.E.2d 649, 650 (Va. 1989). The elements of an abuse of process claim are “(1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceedings.” *Donahoe Constr. Co., Inc. v. Mt. Vernon Assocs.*, 369 S.E.2d 857, 862 (Va. 1988). Therefore, “[a] legitimate use of process to its authorized conclusion, even when carried out with bad intention,” does not constitute abuse of process. *Donahoe Constr.*, 369 S.E.2d at 862; *see Ross v. Peck Iron & Metal Co.*, 264 F.2d 262, 268 (4<sup>th</sup> Cir. 1959). Instead, “[t]he gravamen of the tort lies in the abuse or the perversion of the process after it has been issued.” *Donahoe Constr.*, 369 S.E.2d at 862. In Virginia, even the issuance of a baseless process will not alone be sufficient to support a claim for abuse of process. *See Glidewell v. Murray-Lacy & Co.*, 98 S.E. 665, 668 (Va. 1919) (explaining that whether the

process is baseless is immaterial in an action for abuse of process).

Here, I find that the underlying facts and circumstances relied upon by Robinette cannot form the basis for an abuse of process claim because there is no allegation that Kennedy abused the process *subsequent* to its issuance. Instead, Robinette's allegations all revolve around the *initiation* of the criminal charges against him. That being the case, I will deny the Motion insofar as it seeks to add an abuse of process claim against Kennedy.

Plaintiffs also seek to add claims for failure to intervene against Williams. The Fourth Circuit has held that a law enforcement officer's omission to act, coupled with a duty to act, may provide a basis for liability under § 1983. *See Randall v. Prince George's County, Md.*, 302 F.3d 188 (4<sup>th</sup> Cir. 2002). A law enforcement officer may be held liable under § 1983 on a theory of bystander liability if he (1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act. *See Randall*, 302 F.3d at 204. In such instances, the officer is deemed an accomplice and treated accordingly. *See Randall*, 302 F.3d at 203 (citing *O'Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2<sup>nd</sup> Cir. 1988) (observing that officer who stands by and does not seek to assist victim could be a "tacit collaborator"))).

Here, I find that the underlying facts and circumstances relied upon by the plaintiffs could provide a basis for failure to intervene claims against Williams, especially now, given that the court is allowing plaintiffs to amend the Amended Complaint to expressly state that Williams was present and participated in the events that occurred outside of Robinette's residence. Therefore, I find that the

plaintiffs ought to be given the opportunity to test these claims on the merits. Moreover, there is no allegation of undue delay, bad faith or dilatory motive on the part of plaintiffs' counsel, nor is there an allegation of repeated failure to cure such deficiency by amendments previously allowed. I also find that no undue prejudice would be visited upon the defendants by allowing this amendment. All of this being the case, I will allow the plaintiffs to add claims for failure to intervene against Williams.

Lastly, the plaintiffs seek to add as a party defendant Pennington Gap police officer Louis Mavredes because they contend that they became aware in September 2013, less than one week before filing the Motion, through Kennedy's "Answers to Interrogatories and Responses to Request for Production," that Kennedy stated that the handwriting on the suspect waiver form and confession, was believed to be the handwriting of Mavredes, or "perhaps" that of Robinette. However, for the following reasons, I find that allowing the plaintiffs to add Mavredes as a party amendment would be futile. The addition of Mavredes is relevant only to Robinette's claim that his Fifth Amendment right against self-incrimination was violated by the coercion or forging of the waiver of rights form and the confession. In the November 14, 2013, Report and Recommendation regarding the defendants' Motions to Dismiss, however, the undersigned found that the Amended Complaint failed to state such a claim because any statements obtained from Robinette were never used against him in any criminal proceeding. Adding Mavredes as a party defendant would have no effect on this disposition. Therefore, I will deny the Motion, insofar as it seeks to add Mavredes as a party defendant, on futility grounds.

It is for all of the above-stated reasons, that the plaintiffs' Motion is granted

in part and denied in part, consistent with this Memorandum Order. Plaintiffs' counsel shall file a Second Amended Complaint conforming to this Memorandum Order within 10 days of the date of entry of this Order.

The Clerk is directed to send a certified copy of this Memorandum Order to all counsel of record.

ENTERED: December 2, 2013.

**Notice to Parties**

Notice is hereby given to the parties of the provisions of Federal Rules of Civil Procedure Rule 72:

...A party may serve and file objections to [this Order] within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

Failure to file timely written objections to this Order within 14 days could waive appellate review.

*/s/ Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE