UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION at COVINGTON
CASE NO. 08-CV-104-WOB

MICHAEL MARTIN,	:	
	:	**Memorandum Of Law**
Plaintiff	:	**Opposing Defendants' Motion**
	:	**For Summary Judgment**
vs.	:	
	:	
JOSEPH SCHUTZMAN, et al	:	
	:	
Defendants	:	**ELECTRONICALLY FILED**

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This is a case where a corrupt, lazy, incompetent and vengeful police officer, defendant Joseph Schutzman, withheld and misrepresented information and testified untruthfully in a successful effort to cause the unconstitutional arrest and prosecution of plaintiff Michael Martin. The felony charge filed by Schutzman against Martin was dismissed for lack of probable cause by the Kenton District Court. Because no probable cause existed to support the charge and because of Schutzman's misconduct, defendants' motion for summary judgment should be **DENIED.**

STATEMENT OF THE CASE

Plaintiff Mike Martin is a citizen of the City of Villa Hills, Kentucky and served it as a City Councilman from January 2005 to January 2009.

Schutzman works as a detective for the City of Villa Hills police department for whom he has been employed since 1995. (DE 21, Joseph Schutzman depo. at p. 8). In addition to this job as a police officer,

Schutzman runs a private business known as Schutzman Inspection Services, LLC through which he performs building inspection and zoning services for the cities of Villa Hills, Bromley, Kentucky, and Ludlow, Kentucky. (*Id.* at p. 14).

In mid-2005, information came to Martin's attention that led him to suspect that Schutzman was "double-dipping"; more specifically, that Schutzman at the same time that he was on the clock and being paid for supposedly working as a police officer for Villa Hills was actually working and being paid for his work on behalf of Schutzman Inspection Services. (Plaintiff's Answers to Defendants' Interrogatories and Document Requests 1-25 at pp. 1-3)(hereinafter referred to as "Plaintiff's Discovery Answers").[1] Martin relayed his concerns to Mike Duncan, Villa Hills' city attorney, who advised him that further investigation was appropriate, especially given Martin's position as chairman of the city council's Administration committee. (*Id.* at p. 3). In an attempt to maintain discretion and prevent any undue embarrassment to Schutzman, Martin had his sister, Cindy Koebbe, sign open records law requests sent to Bromley and Ludlow regarding Schutzman's work for those cities as a building/zoning inspector. (*Id.).* Schutzman was outraged at these communications and contacted Koebbe on several occasions demanding that she contact him at the Villa Hills police department. (*Id.* at pp. 6-10).

[1] A true copy of plaintiff's discovery answers are attached as Ex. A to this memorandum.

After receiving the information from Ludlow and Bromley, Martin related his concerns to the Villa Hills mayor, Mike Sadouskas, who, in essence, said he did not care if Schutzman was double-dipping. (*Id.* at pp. 10-12). Sadouskas also told Martin that he had told Schutzman that Cindy Koebbe was Martin's sister. (*Id.* at p. 12).

Schutzman vowed revenge and wrote Koebbe in December 2006 asserting and threatening, among other things, as follows:

> This letter is in response to the actions caused by your letter to the City of Bromley. My name is Joe Schutzman. I am currently on a fact-finding mission, which will result in civil litigation for compensatory and punitive damages. … It is my intent to include only the individuals or parties who have assisted or engaged in this effort to financially and emotionally harm my family and myself.
>
> …
>
> These activities have continued. It has led to a great deal of turmoil for me in doing my jobs. It has negatively affected the atmosphere within my employment. …
>
> I intend to have these personal malicious attacks stopped. Several people are actively working together to harm my family, myself and business. I have met with counsel to review these actions and only intend on including those parties responsible. ….
>
> I have spoken to my employer about this correspondence. ……

(DE 1-2, Ex. A to Complaint).

Schutzman was given and took his chance to retaliate against Martin in late 2007. He would lie and withhold information to pursue it.

The Estate of Marilyn Kuhl, Martin's Mother

Martin was a dutiful son and looked after the finances of his mother,

Marilyn Kuhl, and took care of her affairs. She passed away in August 2003. Martin probated her modest estate and himself paid off years before this case arose more than $29,000 in debts that his mother had outstanding at her death. (*See* DE 17-3, Supplemental Entry Relieving Estate From Administration; Plaintiff's Discovery Answers at pp. 13-16). Given that it was a modest estate, the probate court issued an order on November 14, 2003, relieving it from administration. (DE 17-3 at p. 27).[2] The Kuhl estate was insolvent and his mother would have left substantial unpaid bills had Martin not paid them off himself with no help from any of his siblings. (Plaintiff's Discovery Answers at pp. 13-14).

The Child Support Judgment On the Aged 40 Years Arrearage

The genesis of this case is a deadbeat dad, Charles Donald Martin, who has been and remains in arrears on his child support for now over 40 years. A 1972 Hamilton County, Ohio court order shows him in arrears greater than $18,000.00. (DE 18-3, Jeffrey Startzman depo. ex. 2). 37 years after entry of that judgment, Charles Donald Martin still has not fulfilled his legal and moral obligations and "[t]here is still an order in place for payments to be made." (DE 18, Startzman depo. at p. 9). Records of these long, long overdue payments being made in 2009 were introduced as exhibits to the depositions of both Mike Martin and Jeffrey Startzman. (DE 19-7, Mike

[2] Hamilton County, Ohio probate court records have been available online for many years. The court filings and records for Marilyn Kuhl's modest estate can be found through a simple case search using her name at http://www.probatect.org. Defendants also submitted Kuhl's probate court records as Ex. B to their motion. (*See* DE 17-3).

Martin depo. ex. E; DE 18-7, Startzman depo. ex. 6).

When Marilyn Kuhl passed away in 2003, there was a formal judgment by the Hamilton County Court of Common Pleas regarding Charles Martin's arrearage. (DE 18, Startzman depo. at p. 10; DE 18-5, Startzman depo ex. 4). That formal judgment was redundant, because, as Startzman explained, "under Ohio law any arrearage owed in child support is by operation of law a judgment, whether or not it is formally reduced to a judgment by a motion." (DE 18, Startzman depo. at p. 10). Of course and as Startzman himself acknowledged, the unsatisfied judgment became an asset of Marilyn Kuhl's estate upon her passing. (*Id.* at p. 19).

Despite the fact that Charles Martin was and remains a deadbeat dad of decades long duration, despite Startzman's knowledge that Charles' Martin's arrearage was both officially and, as a matter of law, memorialized as a judgment and despite Startzman's own knowledge that the judgment was an asset of Kuhl's estate, when Charles Martin called Startzman's agency and complained that he was still being obligated to meet the legal and moral obligations that he had shirked for decades, Startzman jumped to action, believing – for reasons that defy common sense or rational explanation – that the deadbeat dad's complaints raised a red flag.[3]

[3] Tellingly, over the course of more than 40 years there is little indication that Startzman's agency did much of anything toward actually trying to collect from the deadbeat dad the owed child support. The formal judgment that was entered was done at the instigation of a lawyer hired by Kuhl and/or her family. (DE 19, Mike Martin depo. at p. 42). This contrasts strikingly and distressingly with the attention Startzman was willing to give the deadbeat dad's complaints.

After the deadbeat dad complained, Startzman reviewed online the probate court records for Marilyn Kuhl's estate, finding there the name and address of Mike Martin, the executor of the estate,[4] the names and addresses of Kuhl's other children,[5] as well as notice or waivers regarding notification of the estate's probate to all interested persons.[6] Although Startzman knew that Mike Martin was the executor of the estate, knew that the child support judgment was an asset of the estate, knew Mike Martin's address, and knew that the checks toward satisfying the judgment were being sent to Mike Martin's address, neither Startzman nor anyone else with his agency even attempted to contact Mike Martin. (DE 18, Startzman depo. at pp. 14-16). Incredibly, Startzman stated that there was no need to contact Mike Martin. (*Id.* at p. 15). Instead, Startzman – for reasons that surpass common sense and without even attempting to contact Mike Martin or any of the other children/heirs -- passed the matter on to the Villa Hills police department. (*Id.* at pp. 13-16). Unfortunately, it there fell into Schutzman's hands and thereby provided him opportunity to attack Martin.

Martin Informed Schutzman That He Was Executor of the Estate of Marilyn Kuhl

Schutzman interviewed Martin on November 2, 2007. During the course of the interview, Martin advised Schutzman repeatedly of his mother's death, that he was executor of her estate, that probate proceedings had occurred in

[4] (*See* DE 17-3 at pp. 4-7, 10, 26-28).
[5] (DE 17-3 at p. 2).
[6] (DE 17-3).

Ohio. Martin informs Schutzman near the beginning of the interview that he understood that the judgment became part of the estate's assets. (DE 17-4, Transcript of Interview of Martin by Schutzman at pp. 4-5)(hereinafter "Schutzman-Martin Interview Transcript"). The transcript also reveals the following statements by Martin regarding his mother's estate:

> I'm also the executor of her estate. (DE 17-4, Schutzman-Martin Interview Transcript at p. 4).
>
> I was the executor of her estate[.]. (*Id.* at p. 17).

Martin also advised Schutzman that his mother's estate had been modest and its probate proceedings had been minimal. (*Id.*).

Also on November 2, 2007, Schutzman spoke with Startzman. (DE 18, Jeffrey Startzman depo. at p. 24; DE 18-8 Startzman depo ex. 7). Schutzman informed Startzman that he had learned, during his interview of Martin, that Martin was executor of Kuhl's estate. (DE 18, Startzman depo. at p. 25). Nonetheless, according to notes taken by Startzman during his conversation with Schutzman, Schutzman stated that there was no estate for Kuhl in Hamilton County, that he thought none was ever opened and that Martin pocketed the money. (DE 18, Startzman depo. at p. 25; DE 18-8, Startzman depo. ex. 7). To highlight his motivation and interest in prosecuting Martin, Schutzman told Startzman that Martin was a Villa Hills councilman. (DE 18, Startzman depo. at p. 28; DE 18-8, Startzman depo. ex. 7).

Startzman Told Schutzman About Kuhl's Estate

Startzman informed Schutzman of the existence of Marilyn Kuhl's estate

in Ohio probate court. (DE 18, Startzman depo. at pp. 32-33).

The only two sources that Schutzman consulted, Martin and Startzman, both told him of the probate court proceedings pertaining to Marilyn Kuhl's estate. Nonetheless, Schutzman would lie in both his investigative file submitted to the Commonwealth Attorney's office and to the Kenton District Court regarding his knowledge of the Kuhl estate.

Schutzman's Lies About His Knowledge of Kuhl's Estate

Schutzman began his lies regarding his knowledge of Kuhl's estate in the investigative report he prepared. Schutzman affirmed that he prepared it with the expectation that the Commonwealth Attorney's office would rely on it as truthful. (DE 21-2, Schutzman depo. at p. 89).[7] First, Schutzman's report falsely reports that "[n]o notification was made to the courts of [Kuhl's] death." (DE 17-2, Ex. A to Defendant's motion for summary judgment, Investigative File at p. 1). This is clearly false and Schutzman knew it to be false when he wrote it. Second, Schutzman falsely claimed that Martin affirmed, during their interview, that he had never notified Ohio of his mother's death. (*Id.* at p. 2). The probate court records show otherwise.

Third, Schutzman fabricated the following: "Mr. Martin stated the will was never probated because all of his mother's assets were in his name, including her home in Ohio." (*Id.*). This is patently false and made with the intent to mislead. A review of the transcript of the Schutzman-Martin

[7] Defendants submitted Schutzman's report and materials he claims were part of it as Ex. A to their motion for summary judgment. It is DE 17-2.

interview shows that this assertion by Schutzman is simply untrue. (*See* 17-4).

Fourth, Schutzman also fabricated the following: "I asked if his family knew of his arraignments (sic). He said he was not sure." (*Id.*). This too is patently false and made with the intent to mislead. Not only did Martin not say anything like this, he would not have said anything like this because, as the probate court records show that defendants have submitted, full and complete notice of the probate proceedings was provided all the children in 2003, some four years earlier. (*See* DE 17-3, the probate court file record).

Fifth, Schutzman falsely reported that "a will [for Marilyn Kuhl] could not be located nor any evidence the estate was probated." (DE 17-2 at p. 2). This is patently false and made, like Schutzman's other lies, with the intent to mislead.

Schutzman has attempted to justify and obscure his lies by falsely claiming that he relied on Startzman and other personnel in his agency for information regarding the probate of Kuhl's estate. First, he claims that Startzman told him that no probate court records for Kuhl could be located. (DE 21, Schutzman depo. at p. 37). Startzman testifies directly to the contrary. (DE 18, Startzman depo at p. 34). Second, Schutzman claims that he asked Startzman where he could find probate court records, including a will, pertaining to Kuhl. (DE 21, Schutzman depo. at p. 38). Startzman denies this and observed that his notes regarding his conversations with

Schutzman do not reflect any such request. (DE 18, Startzman depo. at pp. 35-36). Third, Schutzman claims that Startzman referred him to what Schutzman claims he understood was the Hamilton County prosecutor's office regarding locating probate court records for Kuhl. (DE 21, Schutzman depo. at 43-44; DE 21-2, Schutzman depo. at pp. 52-54).[8] Not only does Startzman deny doing so but he affirms he would not have had to do so because Hamilton County, Ohio probate court records are and were then available on line and he had no need to refer Schutzman to Cade or anyone else regarding how to locate such records. (DE 18, Startzman depo. at pp. 35-37).

Schutzman's False Testimony In Kenton District Court Regarding His Knowledge of Kuhl's Estate

Schutzman continued his lies regarding his knowledge of Kuhl's estate in his testimony before the Kenton District Court. In direct response to questions from the presiding judge, Hon. Douglas J. Grothaus, Schutzman denied any knowledge of Kuhl's estate:

> THE COURT [to Schutzman]: Okay. And was her estate probated? Was an estate opened up? Do you know?
>
> MS. SCOTT:[9] Your Honor, I would be prepared to call Mr. Len Rowekamp to testify to that effect.
>
> THE COURT: Well, do you know if there's ---

[8] Schutzman claimed that he eventually spoke with a Dan Cade and an Amy Emerson in the Hamilton County prosecutor's office. (DE 21, Schutzman depo. at pp. 43-44). Cade was and is employed at the chief legal counsel for Startzman's agency, the Hamilton County Jobs and Family Services agency and Emerson was his administrative assistant. (DE 18, Startzman depo. at pp. 37, 40).

[9] Martin was represented in the Kenton District Court by Hon. Tasha Scott.

A: No, sir. (answer by Schutzman).[10]

Schutzman's Testimony About His Communications With The Commonwealth Attorney's Office

Schutzman explained that his initial contact to the Commonwealth Attorney's office regarding Martin was to investigator Wayne Wallace. (DE 21-2, Schutzman depo. at p. 60). Wallace identified a number of additional, follow-up investigative steps that he directed Schutzman to take and explained his rationale: "notoriously the biggest problem in the office was lackadaisical work." (DE 20, Wayne Wallace depo. at p. 25). Wallace advised Rob Sanders, the Commonwealth Attorney, of his instructions to Schutzman. (*Id.* at pp. 25-26).

In a subsequent discussion about two weeks later, Schutzman indicated to Wallace that he had not completed the tasks earlier identified by Wallace. (*Id.* at pp. 27, 30-32). Wallace determined that the case was not ready to request an arrest warrant. (*Id.* at pp. 31-32). He told Schutzman to complete the tasks earlier identified, a direction with which Schutzman indicated his disagreement and displeasure. (*Id.* at p. 32).

Wallace also indicated that the investigation pertaining to Martin was not the first time he had found Schutzman less than diligent in completing a thorough investigation. (*Id.* at 35). Moreover and just as Martin initially suspected, Schutzman's double-dipping was interfering with his police work:

[10] A certified transcript of the proceedings and testimony before the Kenton District Court in *Commonwealth v. Michael Martin,* Kenton Dist. Court No. 07-F-01827, on January 15, 2008, is submitted herewith as Ex. B to this memorandum.

Schutzman informed Wallace on a prior occasion that he was having difficulty concluding his police investigations because to the work he had going on as a building and zoning inspector. (*Id.*).

Neither Schutzman nor anyone else ever attempted to contact any of Martin's siblings regarding the monies. (DE 21-2, Schutzman depo. at p. 88; DE 18, Startzman depo. at pp. 13, 16).

Schutzman disregarded and bypassed Wallace's well-founded objections to going forward. Contrary to defendants' unfounded assertions, Schutzman directly caused the unconstitutional arrest and prosecution of Martin by signing a criminal complaint charging Martin with a felony, forgery in the second degree. (DE 21-4, Schutzman depo. ex. 2). There is no mention in Schutzman's criminal complaint of Kuhl's estate, Martin's status as its executor, the estate's entitlement to continue receiving the payments toward satisfaction of a judgment or Schutzman's inexcusable and wholly unexplained failure to even attempt to contact any of the parties that were supposedly being harmed. As Wallace noted, the commonwealth attorney's biggest problem "was notoriously … lackadaisical work." (DE 20, Wallace depo. at p. 25). That combined here with a desire for revenge.

A preliminary hearing on the felony charge against Martin initiated by Schutzman was held in Kenton District Court. On February 28, 2008, the court dismissed the charge for lack of probable cause.[11]

[11] A true copy of a certified copy of the Kenton District Court's order is submitted herewith and marked Ex. C.

Schutzman is unaware of any evidence that could have or should have been presented to the Kenton District Court but was not. (DE 21, Schutzman depo. at p. 6). He has not learned of any evidence since the dismissal that he wishes could have been presented during the preliminary hearing. (*Id.* at p. 7). Schutzman believes that any and all evidence that could be presented in support of Schutzman's felony charge against Martin was presented at the preliminary hearing. (DE 21, Schutzman depo. at pp. 7-8; DE 21-2, Schutzman depo. at p. 83). He has not been contacted about appearing before a grand jury as part of an effort by the Commonwealth Attorney to obtain an indictment. (*Id.* at 78-79).

Goodenough claims full responsibility for the criminal charge that Schutzman filed against Martin. (DE 22, Dan Goodenough depo. at p. 20). Both Goodenough and Schutzman affirm that the decision to criminally charge Martin was a joint decision between Goodenough and Martin and represented the official position of the Villa Hills Police Department. (*Id.*; DE 21-2, Schutzman depo. at pp. 84-85). Goodenough, notwithstanding the dismissal of the unfounded charge by the Kenton District Court, continues to defend his decision to charge Martin. (DE 22, Goodenough depo. at p. 20).

Factual Misstatements in Defendants' Memorandum

It is axiomatic that on a motion for summary judgment the factual records is viewed in the light most favorable to the non-moving party,

Martin.[12] Defendants have failed to heed that axiom in numerous respects including but not limited to the following:

1. *Needless to say, Charles Martin's complaint "raised a red flag[.]"* Defendants' memo at 2.

Defendants do not and probably cannot offer an explanation for the decades long lassitude of HCJFS an agency roused to action only by the complaints of a deadbeat dad. A red flag is raised by this reaction.

2. *If there were an open estate for Marilyn Kuhl, it could explain why the child support arrearage checks were still being paid after her death. (Startzman depo. at p. 45).* Defendants' memo at p. 3.

First, defendants have not fairly or accurately recited Startzman's testimony. Second, the checks were paid to satisfy a judgment. Third, the judgment was an asset of the estate as a matter of Ohio law. (DE 18, Startzman depo. at p. 18). Fourth, the reason why the money should still be paid is that it had been and remains owed for many decades now; it remains unsatisfied and despite the utterly incomprehensible and misdirected efforts of Startzman's agency, Martin is again receiving the checks toward satisfying the judgment, albeit having himself paid, despite the absence of legal obligation to do so, his mother's outstanding debts exceeding $29,000 and been subjected to a groundless criminal prosecution. (DE 19-7, Mike Martin depo. ex. E; DE 18-7, Startzman depo. ex. 6).

3. *In addition, Plaintiff told Schutzman that the checks were for past due child support from his father, Charles Martin.* Defendants' memo at p. 5.

This too in inaccurate: Martin informed Schutzman that the judgment

[12] *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 587 (1986).

was an asset of the estate. (DE 17-4, Schutzman-Martin Interview Transcript at pp. 4-5). This was correct as Startzman has confirmed. (DE 18, Startzman depo. at p. 10).

4. *When asked whether or not his mother's estate had been probated, Plaintiff appeared unsure about his response.* Defendants' memo at p. 5.

This ignores the following declarative statements by Martin to Schutzman:

> I'm also the executor of her estate. (DE 17-4, Schutzman-Martin Interview Transcript at p. 4).
>
> I was the executor of her estate[.]. (*Id.* at p. 17).

5. *Schutzman contacted a manager at the Fifth Third Bank in Crescent Springs, Kentucky to ask whether the bank would have told Plaintiff to sign checks with his deceased mother's name. (Schutzman depo. pp. 32-33). The manager told Schutzman that the bank's employees would never have told Plaintiff to sign the name of a deceased person to a check. (Schutzman depo. p. 33).* Defendants' memo at p. 6.

This assertion fails on numerous grounds. First, it does not accurately recite Schutzman's testimony, which was that the unknown, unnamed manager said, according to Schutzman, that such an instruction would have been contrary to bank policy. (DE 21, Schutzman depo. at p. 33). Schutzman specifically acknowledged that the unknown bank manager did not make the categorical assertion that defendants now claim was made. (*Id.*). Second, the statements attributed to the unknown, unnamed bank branch manager are hearsay and cannot be relied upon by defendants in support of their motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 225-26 (6th Cir.1994) ("[H]earsay evidence cannot be considered on a motion for

summary judgment."). Third, nowhere in Schutzman's investigative file is there any reference to any conversation with any branch manager of Fifth Third or any other bank, which given Schutzman's affirmative misrepresentations in his investigative file and his false testimony to the Kenton District Court renders him unreliable.

6. *Wallace confirmed that Plaintiff's conduct appeared to constitute forgery under Kentucky law. (Ex. A p. 17).* Defendants' memo at p. 6.

Wallace's deposition testimony does not comport with Schutzman's investigative file, which is known to contain other misrepresentations. Wallace testified that he told Schutzman that he should continue investigating. (DE 20, Wallace depo. at p. 18). Wallace identified for Schutzman specific, additional investigative steps that Schutzman needed to take. (*Id.* at p. 12-14). Schutzman failed to follow through, leaving Wallace with the correct conclusion that the investigation would not support a charge. (*Id.* at 31-32). Wallace had found Schutzman's work subpar in the past. (*Id.* at 35). In fact, Schutzman had explained previously that he could not timely complete his police work because he was tied up doing zoning and building inspection work. (*Id.* at 35).

ARGUMENT

1. Defendants Caused Martin's Unconstitutional Seizure (Responding to Point III.A. of Defendants' Memo)

Defendants caused Martin's unconstitutional arrest and seizure. Martin's surrender to the state's show of authority – the arrest warrant for him – constituted a seizure for purposes of the Fourth Amendment. *Albright v.*

Oliver, 510 U.S. 266, 271 (1994), *citing Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Terry v. Ohio,* 392 U.S. 1, 19 (1968). Thus, Martin's surrender to the arrest warrant was a seizure within the meaning of the Fourth Amendment. Defendants do not challenge or discuss these authorities. Their assertion that Martin was not unlawfully seized incorrectly states the law and the facts and is without merit.

Schutzman's signing of the criminal complaint was the *sine qua non* for Martin's unconstitutional arrest. Under Kentucky law execution of a sworn criminal complaint is necessary before an arrest warrant can issue. Ky.R.Crim.Pro. 2.02; Ky.R.Crim.Pro 2.04; *see* Abramson, 8 *Kentucky Practice: Criminal Practice & Procedure* § 1.1 at p. 2 ("The method of applying for a warrant requires the signing of a written document called a complaint."); *Id.* § 1.13 at p. 6 ("The complaint, a written document required to obtain a warrant, is an affidavit which must allege, under oath, that a person has committed an offense and the essential facts constituting the offense charged."). Thus, but for Schutzman's signing of the criminal complaint Martin's unconstitutional seizure would not have occurred.

Goodenough does not argue that he should be exonerated because only Schutzman signed the criminal complaint. He could not do so in any event. First, although Goodenough did no investigation and relied totally on Schutzman, he fully supported, as he explained in this deposition, the filing of the criminal complaint by Schutzman against Martin. (Goodenough depo.

at p. 20). Second, Schutzman confirms that his actions were with (and would not have occurred without) Goodenough's approval. (Schutzman depo at pp. 84-85). Accordingly, because a reasonable jury could find that defendants caused Martin's unconstitutional seizure, their motion for summary judgment on the ground advanced in Point III.A of their memo should be denied.

2. Defendants Caused Martin's Unconstitutional Prosecution (Replying to Point III.B of Defendants' Memo)

Point III.B of defendant's memo flies in the face of the record, ignoring that but for Schutzman's execution of a criminal complaint there could not have been either Martin's unconstitutional arrest or his unconstitutional prosecution.

Defendants assertion that the only role they "played in Plaintiff's prosecution was an investigative one" is contrary to the facts under any conceivable construction, interpretation or argument. The record here shows that defendants, as set forth in Point 1 above, caused both Martin's arrest and prosecution because Schutzman's execution of the criminal complaint was a but for predicate to both. There is no merit to defendants' ungrounded and unfounded assertion that they were passive participants in a prosecution caused by the Commonwealth Attorney.

Commonwealth Attorney Sanders' affidavit does not excuse defendants. First, both Schutzman and Goodenough have testified that they made the decision, prior to visiting the Commonwealth Attorney's office, to charge

Martin. (DE 22, Goodenough depo. at p. 20; DE 21-2, Schutzman depo. at pp. 84-85). Second, if Mr. Sanders was so persuaded by Schutzman's investigation, he could have signed the criminal complaint and caused Martin's prosecution. There is no restriction or rule preventing him from doing so. Notably, there is no explanation in Sanders' affidavit as to why he did not sign the criminal complaint. The fact of the matter is that Schutzman, not Sanders, signed the criminal complaint charging Martin.

Third, there is compelling and disturbing evidence that (a) Schutzman misled Sanders about the probate proceedings as to Marilyn Kuhl and Martin's status as her estate's executor, **or** (b) that Schutzman gave false testimony to the Kenton District Court, that Sanders knew to be false and let stand without correction. Before the Kenton District Court on January 15, 2008, Schutzman denied any knowledge of any kind regarding Kuhl's estate and/or probate court proceedings related to it:

> THE COURT [to Schutzman]: Okay. And was her estate probated? Was an estate opened up? Do you know?
>
> MS. SCOTT:[13] Your Honor, I would be prepared to call Mr. Len Rowekamp to testify to that effect.
>
> THE COURT: Well, do you know if there's ---
>
> A: No, sir. (answer by Schutzman).[14]

Schutzman's testimony to the Kenton District Court that he knew

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[13] Martin was represented in the Kenton District Court by Hon. Tasha Scott.

[14] Since it is manifest the Schutzman knew an estate had been probated for Marilyn Kuhl, his foregoing testimony appears to violate KRS 523.040, which criminalizes false swearing in an official proceeding such as a preliminary hearing.

nothing of Kuhl's estate is contrary to the information that Martin provided him in their interview, (*See* DE 17-4 at pp. 4-5, 17), contrary to Startzman's testimony and the information he provided Schutzman regarding Kuhl's estate, (*See* DE 18, Startzman depo. at pp. 32-38), and Schutzman's own discussions with Wallace. Schutzman informed Wallace that Martin had told him that he was executor of his mother's estate. (DE 20, Wallace depo. at p. 16). Indeed, so extended was their discussion that Wallace exclaimed, "I think Joe believed he was executor." (*Id.* at p. 17). And yet to the court under oath Schutzman denied any knowledge whatsoever of Kuhl's estate. Furthermore, the investigative file that he provided Sanders and expected Sanders to rely on as complete and true contains numerous misrepresentations and outright lies regarding Kuhl's estate and Martin's statements regarding its assets and his role as executor.

Ordinarily, the arrest warrant for Martin issued by the Kenton District Court would resolve the issue of whether probable cause supported it issuance. *Yancey v. Carroll County,* 876 F.2d 1238, 1243 (6th Cir.1989) (citations omitted). However, "an officer [or investigator] cannot rely on a judicial determination of probable cause if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant ." *Id; see also Ahlers v. Schebil,* 188 F.3d 365, 373 (6th Cir.1999); *Hill v. McIntyre,* 884 F.2d 271, 275 (6th Cir.1989).

Schutzman may be held liable under § 1983 for making material false statements either knowingly or in reckless disregard for the truth to establish probable cause for an arrest. *Ahlers,* 188 F.3d at 373. To overcome an officer's entitlement to qualified immunity, however, a plaintiff must establish: (1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was material to the finding of probable cause. *See Hill,* 884 F.2d at 275 (applying test set forth in *Franks v. Delaware,* 438 U.S. 154 (1973), to evaluate a § 1983 claim); *see also Wilson v. Russo,* 212 F.3d 781, 786-87 (3d Cir.2000); *Hervey v. Estes,* 65 F.3d 784, 789 (9th Cir.1995); *Packer v. City of Toledo,* 1 Fed.Appx. 430, 433-342 (6th Cir. 2001) (unpublished opinion) (noting that the materiality of the false information used to procure a search warrant was a key issue in deciding whether to grant qualified immunity).

As the Sixth Circuit said in *Hinchman v. Moore,* 312 F.3d 198, 205-06 (6th Cir.2002), "[f]alsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional." When an affidavit contains false statements or material omissions, the question becomes whether, once the false statements are omitted and the omitted facts are inserted, the "corrected affidavit" is still sufficient to establish probable cause. *Wilson,* 212 F.3d at 789. *See also Hill,* 884 F.2d at 275 (a Fourth *571 Amendment violation exists if, "with the affidavit's false material set to one

side, the affidavit's remaining content is insufficient to establish probable cause" (quoting *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978))).

An assertion is made with reckless disregard when 'viewing all the evidence, the affiant ... entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.' " *Wilson,* 212 F.3d at 788 (quoting *United States v. Clapp,* 46 F.3d 795, 801 n. 6 (8th Cir.1995)). Omissions are made with reckless disregard if an officer withholds "a fact in his ken" that "any reasonable person would have known ... is the kind of thing the judge would wish to know." *Wilson,* 212 F.3d at 788 (quoting *United States v. Jacobs,* 986 F.2d 1231, 1235 (8th Cir.1993).

The record supports the conclusion that Schutzman engaged in willful, deliberate and intentional disregard for the truth regarding Kuhl's estate, his knowledge of its probate proceedings and Martin's role as its executor. First, the tape of Schutzman's interview of Martin indicates that Martin told him of both. (DE 17-4, Schutzman-Martin Interview Transcript). Second, contrary to Schutzman's testimony, Startzman has testified that he told Schutzman of Kuhl's estate. (DE 18, Startzman depo. at pp. 32-38). Third, Schutzman discussed Kuhl's estate and Martin's status as its executor at length with Wallace. (DE 20, Wallace depo. at pp. 16-17). Fourth, on the other hand and notwithstanding this testimony, view of these repeated discussions since the

record must be viewed in the light most favorable to Martin, Schutzman was told by Martin of Kuhl's estate and his status as its executor. it must be assumed that Schutzman was told by Startzman of Kuhl's estate and the probate court proceedings related to it the record on this motion must be viewed in the light most favorable to Martin.

Any reasonable police officer would know that a judge should have been told of Kuhl's estate, that the checks were being sent to abate a judgment that was part of the estate and that Martin was the estate's executor. About this there was no confusion by Schutzman: the information had been provided him by both Martin and Startzman. Confusion is a very charitable – to the point of being inaccurate – description of Schutzman's willful disregard and concealment of true facts. Every judge must be able to expect every police officer who swears out a criminal complaint to be truthful and forthright. Schutzman's concealment of information and affirmatively false testimony is inexcusable. Accordingly, defendants' motion should be denied.

The cases cited and relied upon by defendants do not support their position. First, in none of the cases defendants cite was a police officer responsible for causing an unconstitutional arrest and prosecution by signing a criminal complaint. The lead case cited by defendants, *Darrah v. City of Oak Park*, 255 F.3d 301 (6th Cir. 2001), does not discuss or consider the point for which it is cited; it provides no support for defendants.

In *McKinley v. City of Mansfield,* 404 F.3d 418, 425 (6th Cir. 2005), a prosecutor, not the defendant police officer, filed the criminal charges against the plaintiff. Here, of course, Schutzman, the police officer, was responsible for filing the criminal charge against Martin not the prosecutor. Furthermore, the evidence here indicates, as discussed above, that Schutzman misled both the prosecutor and testified falsely to the Kenton District Court.

Similarly, in *Skousen v. Brighton High School*, 305 F.3d 520, 525 (6th Cir. 2002), the prosecutor's office was responsible for charging the plaintiff. The court noted that the police officer merely turned in an investigative report, fingerprinted the plaintiff and later testified at her trial. *Id.* Unlike Schutzman the police officer in *Skousen* did not cause the unconstitutional arrest and prosecution of the plaintiff by signing a criminal complaint, the but for predicate for both. Accordingly, *Skousen* does not help defendants.

There was no crime of any kind committed or attempted by Martin. Only a corrupt police officer accustomed to "double dipping" and intent on (as he said in letter to Koebbe) would have allowed a warrant application to be presented to a judge. Schutzman knew all along that Martin's role and responsibilities regarding his mother's estate obviated any possibility of criminal wrongdoing. Yet Schutzman deliberately withheld this information from the warrant application in order to secure the warrant. He lied to the Kenton district court when asked by Judge Grothaus about the estate and he

lied in his deposition regarding his knowledge of the estate. Accordingly, because a reasonable jury could find that Schutzman withheld and misrepresented information that a reasonable police officer acting in good faith would know should be disclosed fully and truthfully and because a reasonable jury could find that Schutzman testified untruthfully to the Kenton District Court, defendants' motion should be denied.

3. No Probable Cause Existed For The Charge Against Martin (Responding to Point IV of Defendant's Memo).

The Kenton District Court dismissed the prosecution against Martin for lack of probable cause. Ex. C. hereto. Defendants neither cite any change in the law nor any additional facts. Indeed, both Schutzman and Goodenough both testified that all the facts that could have been presented at the preliminary hearing to support the charge against Martin were presented. (DE 21, Schutzman depo. at pp. 6-8; DE 22, Goodenough depo. at p. 20). Furthermore, Schutzman denies knowledge of any facts that have come to light since the charge was dismissed for lack of probable cause that would support it.

Defendants simply request that this Court disregard principles of comity and the judgment of the Kenton District Court. As the Sixth Circuit has observed, "the rule of comity also applies to the recognition of federal and state courts of their respective judgments in our federal system of governance." *Michigan Comm. Services, Inc. v. N.L.R.B.*, 309 F.3d 348, 356 (6th Cir. 2002); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586,

(1999) ("Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design."). Because defendants offer no factual or legal basis for this Court to disregard the rule of comity, the defendants' motion should be denied.

The Kenton District Court correctly decided that no probable cause supported the charge against Martin. First, it was and remains indisputable that Martin at all times and for every last penny of every last check was entitled to do as he did. Even though he was under no legal obligation to do so, Martin paid off more than $29,000 in debts that his mother left when she passed away. He was always the estate's creditor and entitled to every penny of every check wrung from the deadbeat dad; even now after the inexcusable and groundless attempt to criminally prosecute him he remains so.

There was never any evidence (or attempt to gather any) that Martin was attempting or intending to defraud anyone. Neither Schutzman nor Goodenough nor anyone else ever made any attempt to even contact a single person that they believed at any time might be entitled to the money from the checks instead of Martin. There was never even any attempt by Schutzman to identify a single person that was entitled to any of the money. Instead, Schutzman fabricated information in his investigative file regarding Kuhl's estate and Martin's status as its executor and then testified falsely to the Kenton District Court. No reasonable officer could form a reasonable

ground for belief of guilt where he must conceal and misrepresent information and testify falsely in support of the charge he has brought. Schutzman did not merely fail to "include a copy of Marilyn Kuhl's probate file in his investigation file," he lied about it in that investigation file and lied about his knowledge of it to the Kenton District Court. Accordingly, because a reasonable jury could find that no reasonable police officer with Schutzman's knowledge could form a reasonable belief in Martin's guilt, defendant's motion should be denied.

4. Schutzman Is Not Entitled To Qualified Immunity (Responding to Point VI of Defendant's Memo)

As defendants recite, "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Dorsey v. Barber,* 517 F.3d 389, 400 (6th Cir. 2008). Schutzman, however, is both.

First, contrary to defendants' assertions, see defendants' memo at p. 18, there is proof that "Schutzman knew of the probate estate and intentionally failed to include this information in his investigation file and warrant application." First, both Martin and Startzman informed Schutzman of the probate estate. (See DE 17-4, Schutzman-Martin Interview Transcript; DE 18, Startzman depo. at pp. 32-38; DE 18-8, Startzman depo. ex. 7). Second, not only did Schutzman not include this information in his investigation file, he fabricated information regarding it. Specifically, Schutzman reported that Ohio was never informed of Kuhl's death, the probate of her estate showing that lie. Schutzman fabricated a statement by Martin that "the will was

never probated because all of his mother's assets were in his name, including her home in Ohio." A review of the interview transcript shows this to be a lie. DE 17-4. Schutzman also falsely reported that Martin did not notify his family members of Kuhl's passing, which is shown to be a lie by the notices sent from the probate court. (*See* DE 17-3). Schutzman reported that no will for Kuhl could be located or evidence that her estate was probated. This too was a lie because Startzman informed him otherwise. Third, Schutzman lied about his knowledge of Kuhl's probate estate to the Kenton District Court. Immunity, qualified or otherwise, is not intended to protect this type of malfeasance.

Defendants' argument that "Schutzman's failure to obtain the probate file cannot be viewed as plainly incompetent" is without merit. Schutzman's testimony that he relied Startzman and his agency to determine the existence of a probate estate for Kuhl is directly contradicted by Startzman. (DE 18, Startzman depo. at pp. 32-38). Furthermore, there was no need for any reliance; the probate court documents were readily available to Schutzman online. Schutzman's testimony on this issue is incredible. That it conflicts with Startzman's is at most a fact issue for a jury to decide at trial. *Hale v. Kart,* 396 F.3d 721, 728 (6th Cir. 2005)("If disputed factual issues underlying probable cause exist, those issues must be submitted to a jury for the jury to determine the appropriate facts."). Accordingly, Schutzman is not entitled to summary judgment and his motion should be denied.

5. Goodenough Is Not Entitled To Summary Judgment (Responding to Point V of Defendants' Memo)

Goodenough and Schutzman both have testified that Goodenough and Schutzman jointly decided to file a felony charge against Martin, that it represented their decision and the official policy of the Villa Hills police department. (DE 21-2, Schutzman depo. at pp. 84-85; DE 22, Goodenough depo. at p. 20). This is not a case where Goodenough "played a passive role" or "tacitly approved of Schutzman's conduct"; rather it is a case where Goodenough's direct role was a causative factor in Martin's unconstitutional arrest and prosecution. Liability under 42 U.S.C. § 1983 arises where the supervisor directly participates in the wrongful conduct. *Shehee v. Luttrell,* 199 F.3d 295, 300 (6th Cir. 1999). These criteria are met here as Goodenough has affirmed his full participation, as has Schutzman. Accordingly, because a reasonable jury could find that Goodenough participated in causing Martin's unconstitutional arrest and prosecution, he is not entitled to summary judgment. His motion should be denied.

6. Defendants Instituted the Criminal Charge Against Martin (Responding to Point VI of Defendants' Memo)

The *sine qua non* for both Martin's unconstitutional arrest and prosecution, as explained above in Point 1, was Schutzman's execution of the criminal complaint. (DE 21, Schutzman depo. ex. 2). As set forth in Point 5 above, a reasonable jury could find that Goodenough participated in causing the institution of Martin's malicious prosecution without probable cause. Defendants' argument that they did not institute Martin's prosecution is not

supported by the facts. A reasonable jury could find that defendants caused institution of Martin's unconstitutional and malicious prosecution. Accordingly, defendants' contention in Point VI of their memo is without merit. Their motion should be denied.

CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment should be, in its entirety, denied.[15]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 10, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to the following: All Counsel of Record.

BY: s/Robert L. Abell
Robert L. Abell
COUNSEL FOR PLAINTIFF

[15] A proposed order is tendered herewith.