

N.Y.S.D. Case #
04-cv-8437(PAC)

10-4398-cv
Jovanovic v. City of New York

MANDATE

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 20th day of June, two thousand twelve.

PRESENT: DENNIS JACOBS,
Chief Judge,
JOHN M. WALKER, JR.,
RICHARD C. WESLEY,
Circuit Judges.

USDC SDNY
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DR. OLIVER JOVANOVIC,
Plaintiff-Appellant,

-v.-

10-4398-cv

CITY OF NEW YORK, MILTON BONILLA,
SHIELD NO. 61, individually and in his
official capacity, LINDA FAIRSTEIN,
NEW YORK COUNTY ASSISTANT DISTRICT
ATTORNEY, individually and in her
official capacity,

Defendants-Appellees,

GAIL HEATHERLY, NEW YORK COUNTY
ASSISTANT DISTRICT ATTORNEY,

1 individually and in her official
2 capacity,

3
4 Defendant.

5 - - - - -X
6
7 **FOR APPELLANT:** Diarmuid White (Brendan White,
8 *on the brief*), White & White,
9 New York, NY.

10
11 **FOR APPELLEES:** Karen M. Griffin (Francis F.
12 Caputo, Arthur G. Larkin, *on the*
13 *brief*), for Michael A. Cardozo,
14 Corporation Counsel of the City
15 of New York, New York, NY.
16

17 Appeal from a judgment of the United States District
18 Court for the Southern District of New York (Crotty, 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 Plaintiff Oliver Jovanovic appeals from a judgment
25 entered by the United States District Court for the Southern
26 District of New York (Crotty, J.), dismissing on summary
27 judgment his civil rights claims against a police officer, a
28 prosecutor, and the City of New York. We assume the
29 parties' familiarity with the facts, procedural history, and
30 issues presented on appeal.
31

32 In the fall of 1996, Jovanovic, a PhD candidate at
33 Columbia University, spent the night with a 20-year-old
34 Barnard College student, Jamie Rzucek, who later accused him
35 of tying her up, pouring hot candle wax on parts of her
36 body, and sodomizing her with a baton-like object.
37 Defendant Milton Bonilla, a New York City police detective
38 assigned to the Manhattan Special Victims Unit, led the
39 police investigation; defendant Linda Fairstein was the
40 assistant district attorney in charge of prosecuting the
41 case.
42

43 A grand jury indicted Jovanovic on December 13, 1996
44 and added charges on December 19, 1996. Only Rzucek and
45 Bonilla testified before the grand jury. Subsequently

1 Jovanovic was convicted of kidnapping, sexual abuse, and
2 assault, and sentenced to fifteen years to life in prison.
3

4 On December 21, 1999--after Jovanovic had spent nearly
5 twenty months in prison--the Appellate Division, First
6 Department, of the New York Supreme Court vacated the
7 conviction because the trial court had excluded evidence
8 that disabled Jovanovic from proving that he "had reason to
9 believe, prior to their meeting, that they both had intended
10 to participate in consensual, non-violent sadomasochism that
11 night." People v. Jovanovic, 700 N.Y.S.2d 156, 164 (1st
12 Dep't 1999). The excluded evidence included emails and
13 chats suggesting that Ruczek was seeking such an encounter.
14 Id.
15

16 After the state declined to retry Jovanovic, he filed
17 this civil rights action pursuant to 42 U.S.C. § 1983,
18 alleging that his prosecution violated his civil rights. He
19 appeals the district court's grant of summary judgment in
20 favor of defendants on claims that: (1) Bonilla maliciously
21 prosecuted him; (2) Bonilla deprived him of his right to a
22 fair trial through the use of fabricated evidence and a
23 deeply flawed investigation; (3) Fairstein deprived him of a
24 fair trial by making inflammatory public statements that
25 both prejudiced the grand jury and caused witnesses to come
26 forward and give false testimony; and (4) the City failed to
27 properly train police regarding false rape claims.
28

29 Malicious Prosecution (Bonilla). An element of any
30 malicious prosecution claim is the absence of probable
31 cause. See Savino v. City of New York, 331 F.3d 63, 72 (2d
32 Cir. 2003). The detailed account given by Rzucek--without
33 any obvious reason for skepticism--provided sufficient
34 probable cause. See Curley v. Vill. of Suffern, 268 F.3d
35 65, 70 (2d Cir. 2001) ("When information is received from a
36 putative victim or an eyewitness, probable cause exists
37 unless the circumstances raise doubt as to the person's
38 veracity." (citation omitted)). The circumstances of this
39 case did not require further investigation to support
40 probable cause. See Panetta v. Crowley, 460 F.3d 388, 396
41 (2d Cir. 2006); Ricciuti v. N.Y.C. Transit Auth., 124 F.3d
42 123, 128 (2d Cir. 1997).
43

44 Fair Trial (Bonilla). Jovanovic claims that he was
45 deprived of a fair trial by Bonilla's alleged lie that
46 corroborative evidence had been removed from Jovanovic's
47 apartment between the time of his arrest and the time

1 Bonilla executed a search warrant.¹ He raises the issue in
2 only a perfunctory manner on appeal; but even if it were
3 properly raised it would be unavailing. A person suffers a
4 constitutional violation if an (1) investigating official
5 (2) fabricates evidence (3) that is likely to influence a
6 jury's decision, (4) forwards that information to
7 prosecutors, and (5) the plaintiff suffers a deprivation of
8 liberty as a result. See Jocks v. Tavernier, 316 F.3d 128,
9 138 (2d Cir. 2003); Ricciuti, 124 F.3d at 130. Probable
10 cause is not a defense. See Ricciuti, 124 F.3d at 129-130.
11 Jovanovic cannot show causation--i.e., that the alleged
12 fabrication of evidence led to a deprivation of his liberty.
13 That is because the only avenue by which the testimony could
14 reach the jury was through Bonilla's testimony, for which he
15 enjoys absolute immunity under Briscoe v. LaHue, 460 U.S.
16 325, 335-336 (1983); see also Rehberg v. Paulk, 132 S. Ct.
17 1497, 1505 (2012) (extending Briscoe to grand jury
18 proceedings). The cases relied upon by Jovanovic are not to
19 the contrary. Ricciuti addressed only whether qualified
20 immunity was available to police officers who willfully
21 fabricated evidence. Ricciuti, 124 F.3d at 130.
22 Furthermore, the allegedly fabricated admissions in Ricciuti
23 caused the plaintiffs to be charged with a more serious
24 crime and delayed their opportunity to be freed on bail.
25 See id. at 126. In Jocks, the statement at issue was a
26 written admission that was forwarded to prosecutors. Jocks,
27 316 F.3d at 138.

28
29 Fair Trial (Fairstein). Jovanovic contends that
30 Fairstein deprived him of his right to a fair trial by
31 making inflammatory public statements. In order to succeed
32 on such a claim, a plaintiff must prove (1) the prosecutor
33 made improper public statements or leaks (i.e., those that
34 contravene the canons of ethics or other standards for
35 prosecutorial conduct); (2) the improper disclosure in fact
36 deprived the defendant of a fair trial; and (3) other

¹ In a pair of footnotes, Jovanovic also argues that Bonilla deprived him of a fair trial by creating a misleading video tape in which he opened up Jovanovic's futon with a "flick of the wrist." Assuming that Jovanovic properly raised the argument, and assuming that Bonilla's production of the video could be considered misleading, it was not material to the jury's decision and therefore could not have caused a deprivation of liberty.

1 remedies like the use of voir dire and peremptory challenges
2 were either unavailable or ineffective to remedy the leaked
3 information. See Powers v. Coe, 728 F.2d 97, 105-06 (2d
4 Cir. 1984).

5
6 As to the impact on the grand jury, summary judgment
7 was appropriate. A less searching scrutiny of procedural
8 protections is warranted for grand jury proceedings than for
9 a criminal trial. See United States v. York, 428 F.3d 1325,
10 1331 (11th Cir. 2005); cf. United States v. Calandra, 414
11 U.S. 338, 349 (1974) (rejecting use of exclusionary rule in
12 grand jury proceedings and noting that "the grand jury does
13 not finally adjudicate guilt or innocence, it has
14 traditionally been allowed to pursue its investigative and
15 accusatorial functions unimpeded by the evidentiary and
16 procedural restrictions applicable to a criminal trial").
17 Jovanovic has not sustained his burden of addressing
18 evidence of prejudice. And it matters that the prosecutor
19 instructed the grand jury to disregard all media coverage
20 and that the law required it to base its conclusion solely
21 on the evidence presented.

22
23 Summary judgment was also appropriate on Jovanovic's
24 claim that the pretrial publicity caused a witness to come
25 forward and perjure herself at trial. Jovanovic must be
26 able to prove that the injury complained of "was not too
27 remote a consequence of the improper leaks to the press."
28 Powers, 728 F.2d at 105 (internal quotation marks omitted).
29 The witness's perjury--accepting Jovanovic's allegations--
30 was too remote of a consequence of Fairstein's statements.

31
32 Finally, because we found that Bonilla's investigation
33 was not so deficient as to render him potentially liable for
34 malicious prosecution, Jovanovic's municipal liability claim
35 necessarily fails. See Wray v. City of New York, 490 F.3d
36 189, 196 (2d Cir. 2007); see also City of Los Angeles v.
37 Heller, 475 U.S. 796, 799 (1986).

38
39 Finding no merit in Jovanovic's remaining arguments, we
40 hereby **AFFIRM** the judgment of the district court.

41
42 FOR THE COURT:
43 CATHERINE O'HAGAN WOLFE, CLERK

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe



Catherine O'Hagan Wolfe