2015 IL App (1st) 140195-U

No. 1-14-0195

Fourth Division
February 19, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

OMAR VALDEZ, Plaintiff-Appellant, v. CHICAGO POLICE OFFICERS, Gilger (Star #21151), Valkner (Star #20111), Spanos (Star #21020), and the CITY OF CHICAGO, Defendants-Appellees.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 2011-L-001223 Honorable Jeffrey Lawrence, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in granting defendants' motion for summary judgment where the defendants had probable cause to believe that the accused had committed murder.

¶ 2 Plaintiff, Omar Valdez, filed a malicious prosecution complaint against detectives James Gilda, John Valkner and Nicholas Spanos (defendants), arising from his prosecution for the July 27, 2007 murder of Daniel Pina. Plaintiff alleged that the defendants targeted him and that they did so without probable cause and with malice. Defendants filed a motion for summary judgment arguing they had probable cause, which was granted by the circuit court

pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2012). For the reasons that follow, we affirm:

¶ 3 BACKGROUND

¶ 4 Daniel Pina was shot and murdered in a drive-by shooting that occurred at approximately 8:05 p.m. on July 27, 2007, while standing outside of 3841 West Hirsch Street in Chicago, Illinois. Chicago police officers immediately arrived and canvassed the scene. A witness, Hector Bustamante (Bustamante) told responding officers that the vehicle involved was a gray Ford Mustang. He further stated that he followed the vehicle to 3415-3417 West Beach Avenue, Chicago, Illinois, where he observed an individual exit the car and enter the gangway between the two buildings. Bustamante then returned to the scene. Officer George Artiga, one of the responding officers, did a computerized search for individuals with arrest histories on the 3400 block of West Beach and showed a series of photographs to Bustamante on a computer terminal. Bustamante identified plaintiff as the person he saw exiting the car. The database listed plaintiff's address as 3415 West Beach.

¶ 5 Based on Bustamante's eyewitness account, officers went to the address of 3417 West Beach, the home of Jay Cruz. The officers requested and received Cruz's permission to search the residence. During the search, police found a handgun. Cruz was then arrested for possession of a handgun and transported to area 5 detective division.

¶ 6 Other responding officers spoke with plaintiff's sister, Claudia Valdez, at the West Beach address. Ms. Valdez told the officers that plaintiff no longer lived there and had moved out six months prior. She then called plaintiff and told him the police were looking for him. Plaintiff, who then lived at 6306 West Diversey, Chicago agreed to accompany the officers to area 5 detective division were he was held for questioning.

¶ 7 Responding officers recorded the following three eyewitnesses' description of the shooter. Bustamante described the shooter as male, Hispanic, 26-27 years old, weighing 200 to 220 pounds, wearing a baby blue t-shirt with blue jeans. Dennis Ruiz, (Ruiz) a 15 year old witness, described the shooter as male, Hispanic, 17-18 years old, wearing a white t-shirt and long pants. He also stated that the shooter had graphics in his hair, wore earrings and was flashing Latin King gang signs. A third witness, Reynaldo Reyes, (Reyes) described the shooter as male, Hispanic, 25-30 years old with a dark complexion and a fade hairstyle.

¶ 8 Defendants became involved once Daniel Pina was pronounced dead and the investigation was transferred to homicide. They learned that plaintiff and Cruz were being transported to area 5 in connection with the investigation. Cruz requested an attorney and was not interviewed.

¶ 9 Defendants interviewed plaintiff at approximately 11:40 p.m. He denied any involvement in the shooting. Plaintiff stated that he worked in customer service at Jiffy Lube at 215 South Harlem Avenue, Oak Park, Illinois, and that he occasionally worked on cars. On the date of the shooting, he left work between 7:10 and 7:15 p.m. and caught a Pace bus at Harlem and Jackson. Plaintiff stated that he rode the bus to Grand and Harlem; walked 10 minutes to Diversey and Harlem; and, then took a CTA bus down Diversey to his home at 6303 West Diversey, arriving at home about 8:00 p.m. Plaintiff stated that he used a 7-day CTA bus pass for all his rides. A bus pass was never inventoried.

¶ 10 In the early morning of July 28, police officers administered gunshot residue (GSR) tests to plaintiff and Cruz. The officers also conducted lineups for eyewitnesses Bustamante and Reyes. Each lineup included plaintiff and Cruz. Neither was identified in the lineups.

Plaintiff was released without charges at 4:10 a.m. Cruz was charged with unlawful use of a gun and other weapon-related offenses.

¶ 11 On August 29, 2007, during the course of their investigation, defendants learned the results of the ballistic and the GSR testing. The ballistic testing indicated that the gun found at Cruz's residence was the handgun used in the shooting. Further, testing revealed gunshot residue on plaintiff's left hand. On the same day, plaintiff and Cruz were arrested, brought to area 5 and charged with first-degree murder.

¶ 12 At that time, defendants asked and plaintiff agreed to take a polygraph test. Illinois state police forensic investigator Robert Tovar (Tovar) administered the polygraph test, which resulted in a finding of "deception indicated" as to two of ten questions. The questions which yielded the finding were: "Did you know about the shooting on Hirsch before your sister told you?" and "Did you ever handle the gun used in the shooting on Hirsch?" Plaintiff responded "no" to both questions. Based on the "deception indicated," finding, Tovar testified that he could not remove plaintiff from the investigation.

¶ 13 Scott Rochowicz (Rochowicz), an Illinois state police forensic scientist, testified at trial that a GSR test is positive when the results show three particles have three elements of GSR. He concluded that plaintiff either handled, was in close proximity to a firearm when it was discharged, or came in contact with particles of residue which are deposited in the environment where a firearm is discharged.

¶ 14 On August 30, 2007, defendants contacted Ruiz, one of the eyewitnesses to the shooting who had not previously viewed a lineup. Ruiz gave a statement to Assistant State's Attorney Russell Baker and was then shown a lineup which included both plaintiff and Cruz. Ruiz identified plaintiff as the shooter.

¶ 15 On August 27, 2007, Reyes, the third eyewitness, was arrested for possession of 1.5 grams of cannabis. He was charged with a class C misdemeanor and released on his own recognizance. On August 31, 2007, Reyes was interviewed by the defendants in relation to the shooting. At that time, Reyes identified plaintiff as the shooter from a photo array. In a written statement, taken by an assistant state's attorney, Reyes stated that he did not see the shooting but saw the gray Ford Mustang. He identified plaintiff as the front seat passenger and Cruz as the driver. On the night of the shooting he "recognized the shooter and driver but was afraid because he was not in a gang and he assumed this was a gang shooting." Reyes further stated that he had given the statement freely and voluntarily, and without threats or promises.

¶ 16 The case was submitted for felony review, and ultimately presented to the September 2007 Grand Jury of the Circuit Court of Cook County. The Grand Jury issued an eight count indictment against plaintiff.

¶ 17 Plaintiff was charged with first-degree murder and weapons offenses and was incarcerated from the date of his arrest until his trial date. Following a three day bench trial, on May 12, 2009, plaintiff was found not guilty of all charges. Cruz was also charged with first-degree murder and found not guilty in a separate bench trial.

¶ 18 On February 4, 2011, plaintiff filed a complaint alleging malicious prosecution against defendants. Discovery was lengthy, during which time plaintiff was deposed. On October 25, 2013, defendants filed a motion for summary judgment asserting their entitlement to judgment as a matter of law. Defendants argued that probable cause existed to charge plaintiff with murder based on Ruiz's and Reyes's identification, the GSR results, the failed polygraph test and the handgun being found at Cruz's house. In opposition, plaintiff filed a

response on December 9, 2013, arguing that there were factual disputes about whether defendants actually investigated plaintiff's whereabouts at the time of the shooting, the unreliability and inconsistency of the witnesses' identifications and descriptions, and reliability of the polygraph test and the GSR test.

¶ 19 On December 20, 2013, the parties appeared before the circuit court for a hearing on defendants' summary judgment motion. The circuit court, in granting the motion, specifically stated that: "I looked at the record very carefully, considering all the circumstances, and most particularly the way the case was refocused on [plaintiff] after receipt of the positive gun residue test, I'm unable to find a triable issue of fact regarding the existence of probable cause." It is from this order that plaintiff appeals.

¶ 20 ANALYSIS

¶ 21 Initially, defendants note that throughout plaintiff's brief, he does not contain proper citation to the record and authority in support of his claims in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) which mandates that the parties to an appeal shall make their argument "with citation of the authorities and the pages of the record relied on." The failure to provide proper citations to the record is a violation of this rule, the consequence of which is the forfeiture of the argument lacking citations. *Engle v. Foley & Lardner, LLP*, 393 Ill. App. 3d 838, 854 (2009). An issue that is merely listed or included in a vague allegation of error is not "argued" and will not satisfy the requirements of the rule. *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010) (see *People v. Phillips*, 215 Ill. 2d 554, 565 (2005)) (issue forfeited where defendant raised it but failed to make any argument or citation to relevant authority). Moreover, an argument that is developed beyond mere list or vague allegation may be insufficient if it does not include citations to authority. *Vancura*, 238 Ill. 2d

at 370 (see *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 493 (2002)) (three-paragraph argument insufficient to satisfy Rule 341 where argument did not include any citations to authority). We admonish plaintiff that supreme court rules are not advisory suggestions, but rules to be followed. Thus, in our review, we will disregard any inappropriate or unsupported statements in plaintiff's brief. We now turn to the substance of plaintiff's appeal.

¶ 22 Plaintiff challenges the circuit court's grant of summary judgment against him on his claim of malicious prosecution against defendants. Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that 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." 735 ILCS 5/2-1005(c) (West 2012). The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. *Lee v. Six Flags Theme Park, Inc.*, 2014 IL App (1st) 130771, ¶ 61 (citing *Adams v. Northern Illinois Gas Company*, 211 Ill. 2d 32, 42-43, (2004)). In determining whether a genuine issue of material fact exists, "a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Lee*, 2014 IL App (1st) 130771, ¶ 61 (quoting *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008)).

¶ 23 We recognize that summary judgment is a drastic means of disposing of litigation and should only be awarded when the moving party's right to judgment as a matter of law is clear and free from doubt. *Lee*, 2014 IL App (1st) 130771, ¶ 61 (citing *Williams*, 228 Ill. 2d at 417). However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Lee*, 2014 IL App (1st) 130771, ¶ 61 (quoting *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999)). A defendant moving for summary judgment

bears the burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may meet its burden of proof either by affirmatively showing that some element of the case must be resolved in its favor, or by establishing that there is an absence of evidence to support the non-moving party's cause of action. *Fabiano v. City of Palos Heights*, 336 Ill. App. 3d 635, 640-41. In either case, the defendant must produce evidence that would clearly entitle him to judgment as a matter of law. *Id*. at 641. Once the defendant satisfies his initial burden of production, the burden shifts to the plaintiff to present some factual basis that would arguably entitle the plaintiff to a favorable judgment. *Id*.

¶ 24 We review grants of summary judgment *de novo*. *Lee*, 2014 IL App (1st) 130771, ¶ 62 (citing *Williams*, 228 Ill. 2d at 417). Accordingly, the reviewing court "must independently examine the evidence presented in support of and in opposition to a motion for summary judgment" to determine whether a genuine issue of material fact exists. *Lee*, 2014 IL App (1st) 130771, ¶ 62 (citing *Groce v. South Chicago Community Hospital*, 282 Ill. App. 3d 1004, 1006 (1996)). Given this court's independent review, "we may affirm the trial court's grant of summary judgment for any reason that is supported by the record, regardless of whether that reason formed the basis for the trial court's judgment." *Lee*, 2014 IL App (1st) 130771, ¶ 62 (citing *Hess v. Flores*, 408 Ill. App. 3d 631, 636 (2011)) (quoting *Bovan v. American Family Insurance Company*, 386 Ill. App. 3d 933, 938 (2008)).

¶ 25 In order to prevail on a claim of malicious prosecution under Illinois law, plaintiff must establish: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such a proceeding; (4) the presence of malice; and (5) damages. *Fabiano*, 336 Ill. App. 3d at 641 (citing *Swick v. Liautaud*, 169 Ill. 2d 504, 512

(1996)). If one element is missing, the plaintiff is barred from pursuing the claim. *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 96 (2008) (citing *Swick*, 169 Ill. 2d at 512). The failure to establish any one of these elements precludes recovery for malicious prosecution. *Fabiano*, 336 Ill. App. 3d at 641.

¶ 26 Because this case comes to us on summary judgment, we need only decide whether the defendants carried their burden of demonstrating, as a matter of law, that probable cause existed. Plaintiff argues that the circuit court erred in finding that no genuine issue of material fact existed as to whether defendants had probable cause to arrest him and charge him with murder.

¶ 27 In the context of a malicious prosecution case, probable cause is a state of facts that would lead a person of ordinary care and prudence to believe or to entertain an honest and sound suspicion that the accused committed the offense charged. *Fabiano*, 336 Ill. App. 3d at 642. Probable cause is determined at the time of subscribing a criminal complaint: "[there must be] an honest belief by the complainant at the time of subscribing a criminal complaint that another is probably guilty of an offense; it is immaterial that the accused may thereafter be found not guilty." *Howard v. Firmand*, 378 Ill. App. 3d 147, 150 (2007) (citing *Ely v. National Super Markets, Inc*., 149 Ill. App. 3d 752, 758 (1986)) (quoting *Mangus v. Cock Robin Ice Cream Co*., 52 Ill. App. 3d 110, 116 (1977)). It is the state of mind of the one commencing the prosecution, and not the actual facts of the case or the guilt or innocence of the accused, that is at issue. *Howard*, 378 Ill. App. 3d at 151 (citing *Rogers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 348 (2000)). A defendant has probable cause to arrest if, at the time of the arrest, after pursuing reasonable avenues of investigation, the defendant knew facts that would have led a person of ordinary prudence to entertain an

honest and strong suspicion that the person arrested was guilty. *Lappin v. Costello*, 232 Ill. App. 3d 1033, 1042 (1992). A reasonable ground for belief in the accused's guilt may be on information from other persons as well as on personal knowledge. *Kim v. The City of Chicago*, 368 Ill. App. 3d 648, 654 (2006) (citing *Johnson v. Target Stores, Inc*., 341 Ill. App. 3d 56, 72 (2003). The complainant is not required to verify the correctness of each item of information obtained; it is sufficient to act with reasonable prudence and caution. *Id*. The existence of probable cause is a mixed question of law and fact. *Fabiano*, 336 Ill. App. 3d at 642.

¶ 28 In particular, plaintiff argues that the circuit court erred in finding no genuine issue of material fact existed as to whether defendants had probable cause to arrest him and charge him with murder. Plaintiff has asserted over 26 errors in his appellate brief. Defendants point out, and we agree, that the claimed errors can be narrowed to the following issues. In essence, plaintiff contends that genuine issues of material fact exist with regard to: (1) whether it was unreasonable for defendants to rely on the results of the GSR test; (2) whether the polygraph results relied upon actually established probable cause or innocence; (3) whether the eyewitness statements relied upon were unreliable and contradictory so as to preclude probable cause; and (4) the whereabouts of plaintiff at the time of the shooting. We find Plaintiff's contentions insufficient to defeat defendants' motion for summary judgment and affirm the judgment of the circuit court.

¶ 29 We now turn to plaintiff's argument that a positive test for GSR, standing alone, does not rise to probable cause. Plaintiff asserts that the finding of one particle found on his non-dominant hand is clearly insufficient for probable cause. He further alleges that defendants fabricated the significance of the GSR results. He contends that the presence of GSR on

someone does not tie him to firing a weapon and does not tie him to a certain weapon. Plaintiff maintains that whether he served in a customer service role or fixed cars, he was still around oil, chemicals and particles which could have lead to a false positive of which the defendants were well aware. Plaintiff further maintains that the circuit court's statement that: "I don't understand how you get gunshot residue from working in a body shop," and unless plaintiff's "practice was limited to getaway cars," was error in resolving this disputed evidence. Plaintiff contends that he presented evidence that a positive GSR can come from the back seat of a police car, may have been the result of plaintiff's work environment, does not connect a person to a specific weapon and may be the result of a person doing something other than firing a weapon. Plaintiff argues that the failure of the circuit court to credit his evidence that a positive GSR test could come from several different sources, and that a positive GSR test was thereby meaningless, was error.

¶ 30 Defendants respond that although a positive GSR can come from other sources, the fact that, within hours of the shooting and during the interrogation of plaintiff on the night of the murder, he tested positive for gun residue was one of the significant factors in finding probable cause. At trial, Illinois state police forensics expert Rochowicz testified that GSR is any residue which is emitted from a firearm when it is discharged. Defendants maintain they correctly found that the results of the GSR led them to believe that plaintiff either handled, or was in close proximity to, a firearm when it was discharged. Defendants point out that plaintiff has brought forward no specific facts or evidence concerning the GSR source, just mere speculation, conclusions and opinions. Defendants argue that plaintiff's claim of other theoretical possibilities that the GSR came from some other source does not suffice for evidence of such.

¶ 31 Moreover, defendants argue that plaintiff's unsupported contention that the GSR test showed a single particle is contrary to the record. Rochowicz testified at trial that a positive GSR test requires three particles that contain three elements of GSR. Further, defendants point out that plaintiff testified in his deposition that he did not work on the cars and was more involved with customer service, thus self-defeating his argument that the GSR could have come from his work environment.

¶ 32 At the hearing on the motion for summary judgment, the following colloquy regarding the GSR occurred:

> "THE COURT: Do you get gunshot residue from handling a gun, or do you actually have to fire the gun in order to get the residue?
>
> COUNSEL FOR DEFENDANTS: I think you could get it from handling a gun that had been fired. ***
>
> COUNSEL FOR PLAINTIFF: Right. ***"

Here, the court recognized that the undisputed fact that plaintiff had GSR on his hand contributed to whether that would lead a person of ordinary caution to believe or to entertain an honest and sound suspicion that plaintiff committed the crime. See *Fabiano*, 336 Ill. App. 3d at 642.

¶ 33 Next, we turn to plaintiff's contention that the circuit court erred because there is a material dispute of fact whether the polygraph test results supported defendants' alleged probable cause. Plaintiff maintains that defendants distorted the findings of the polygraph test and that the test results were actually evidence of his innocence. He argues that 8 of the 10 questions answered in the polygraph were without a finding of deception. The questions which were noted to show "deception indicated," were "whether he had heard about the

shooting prior to his sister's call" and "whether he had handled a gun." He contends that these questions do not provide probable cause because they were unrelated to the crime. Plaintiff further argues that whether the defendants believed the polygraph results, the importance of the polygraph results, whether the results were genuine and whether the results were exculpatory were all questions of fact and therefore the circuit court erred in granting summary judgment.

¶ 34 Defendants respond that the polygraph examination results further implicated plaintiff and demonstrate that the defendants had reason to believe that plaintiff was involved in the shooting. They point out that forensics investigator Tovar testified that there was "deception indicated" precluding him from removing plaintiff as a suspect. Contrary to Plaintiff, Defendants posit that plaintiff's deception on the two questions referenced above do not exonerate him. Rather, the deception on those questions was a contributing factor in finding probable cause.

¶ 35 Plaintiff relies on *Aguirre*, 382 Ill. App. 3d at 102, for the proposition that the polygraph process is too unreliable to establish probable cause. In *Aguirre*, after an investigation into a kidnapping and murder, plaintiffs were charged, tried and found guilty of murder. *Id*. at 95. Five years after the investigation someone admitted committing the kidnapping and murder. *Id*. Upon this confession, the cases against the plaintiffs were *nolle prosequi*. *Id.* at 96. Plaintiffs filed a complaint against defendants alleging malicious prosecution. *Id.* at 90. Following a trial, the jury returned a verdict for plaintiffs and, in answer to special interrogatories, found that defendants lacked probable cause and acted with malice when they prosecuted plaintiffs. *Id.* Defendants appealed arguing that the circuit court abused its discretion in admitting testimony of the confessed murderer in describing the crime and that

the circuit court erroneously excluded evidence of the defendants use of polygraph examination to facilitate their investigation of the crime. *Id*. Defendants maintained that the jury was not able to hear the full story. *Id*.

¶ 36 The circuit court in *Aguirre* did not bar all evidence of the polygraph or its results, but only the explicit reference to the fact of the polygraph examination and its results. *Id*. In doing so, the court reasoned that because the case was tried by a jury, a jury is more apt to attribute too much weight to polygraph examination results and thus, abdicate its own role as assessor of credibility than a seasoned trial judge who understands the inherent unreliability of such examinations. *Id*. at 103. The reviewing court held that the circuit court did not abuse its discretion in balancing the prejudice against the probative value and denying explicit reference to polygraph evidence. *Id*. at 104.

¶ 37 Relying on *Aguirre*, plaintiff here contends that if a polygraph test result is too unreliable for a jury to consider, it is hard to imagine that a court could find it provided probable cause to the defendants.

¶ 38 We find *Aguirre* factually distinguishable from the instant case and therefore, unavailing. We note initially that the procedural posture of the present case is completely different than that in *Aguirre*. As defendants point out, the ruling in *Aguirre* was limited to the facts of that case where the standard of review was abuse of discretion regarding evidence to be presented to a jury. Here, the case was decided on a motion for summary judgment and involves whether police officers could rely upon polygraph results as contributing to probable cause to arrest. Also, the court in *Aguirre* noted the high probability that a jury might improperly consider the polygraph evidence. 382 Ill. App. 3d at 104. Here, in contrast, the polygraph evidence was considered by a circuit court judge.

¶ 39 Defendants maintain that *Moskos v. National Ben Franklin Insurance Company*, 60 Ill. App. 3d 130, 131 (1978), is more analogous to the case at bar. In *Moskos*, the insured plaintiff brought an action for damages based on the insurer-defendants alleged bad-faith denial of liability on fire policies. *Id*. The defendants contended that the plaintiff willfully and maliciously caused the fire in order to collect on the insurance policies and defraud the defendants. *Id*. The trial court entered summary judgment in favor of the defendants. *Id*. at 132-33. In deciding the summary judgment motion, the trial court considered the results of a polygraph examination given to the plaintiff, which indicated deception. *Id*. at 132. The reviewing court affirmed the trial court's order, holding that the trial court properly considered the polygraph results because it helped establish that the defendants did not act in bad faith in believing the plaintiff committed arson. *Id*. at 134.

¶ 40 Here, defendants assert that the polygraph results contributed to probable cause by corroborating the GSR result, which was reliable, admissible evidence. Defendants additionally point out that no Illinois case has held evidence concerning polygraphs inadmissible for this purpose as a matter of law in a malicious prosecution case. We agree and find that the circuit court did not err in finding the polygraph results supported a finding of probable cause.

¶ 41 We next address plaintiff's contention that the circuit court erred in finding that the statements from Ruiz and Reyes were sufficiently reliable to support a probable cause finding at the summary judgment stage. Plaintiff asserts that defendants could not have reasonably relied on Ruiz's and Reyes's statements because they were inconsistent. In support of his argument, plaintiff notes that Ruiz and Reyes gave descriptions of the shooter that were at odds with each other and at odds with his actual appearance, which suggest

inaccurate identifications. In that regard, plaintiff notes that when the police arrived at the scene, Bustamanate described the shooter as having short hair, age 26-27 years old, 200-220 pounds, and 5'6". Also, at the scene, Ruiz, described the shooter as having graphics in his hair, wore earrings, flashed Latin King gang signs, was male, Hispanic, age 17-18 years old, wearing a white t-shirt and long pants. In a general progress report, Reyes described the shooter as male, Hispanic, with a fade haircut, 25-30 years old with a dark complexion. Plaintiff maintains that at the time of the shooting he was 21, 5'5", 150 pounds, with a light complexion and short hair. The numerous inconsistencies in the identifications by the various witnesses, plaintiff argues, do not support a finding of probable cause.

¶ 42 Plaintiff relies on *Fabiano*, 336 Ill. App. 3d 642, in support of his argument that whether a witness statement bears sufficient indicia of reliability to support a finding of probable cause in a malicious prosecution case is a question of fact to be resolved by the jury. In *Fabiano*, the plaintiff owned and operated two day-care centers. 336 Ill. App. 3d at 639. A three-year-old child who attended one of the centers made a statement to her mother, and later to an emergency room physician that she had been sexually assaulted by the plaintiff. *Id.* An investigation ensued during which more than 100 children who attended the centers were interviewed. *Id.* A number of the children made statements to the interviewers accusing the plaintiff and another teacher of committing a variety of acts of sexual abuse. *Id.* at 639-40. The plaintiff was indicted for aggravated sexual assault; tried in criminal court before a jury and found not guilty. *Id.* at 640. Subsequently, the plaintiff filed a civil complaint for malicious prosecution. *Id.* The defendants moved for summary judgment. *Id.* Following a hearing, the trial court granted the motion finding probable cause existed. *Id.* The plaintiff appealed. *Id.*

¶ 43 In its analysis, the reviewing court noted that because the case was based on hearsay statements of the children, such statements must be shown to be reliable. *Id* at 642. Accordingly, the children's statements must bear sufficient indicia of reliability, such as independent corroboration, to support a probable cause determination. *Id* at 644. The court noted that the [test] for probable cause is an objective one. *Id*. (citing *Cervantes v. Jones*, 188 F. 3d 805, 811 (1999)). The court found that none of the affidavits submitted by defendants in support of their motion for summary judgment provided specific facts known to the police prior to obtaining the indictments which would support an objective determination as to either the veracity of each child or the reliability of each child's statement. *Id.* at 645.

¶ 44 The court stated that when addressing probable cause, the defendants' state of mind is at issue, not the actual facts of the case. *Id.* at 646; (citing *Burghardt v. Remiyac*, 207 Ill. App. 3d 402, 405-06 (1991)). The court held that viewing the evidence presented in support of defendants' motion for summary judgment in the light most favorable to the [plaintiff], the undisputed facts do not compel a conclusion that the allegations of abuse were corroborated by medical evidence or that any of the statements proffered to support probable cause were otherwise reliable. *Id.* The court concluded that the defendants had utterly failed to present competent evidentiary matter sufficient to meet the defendants' initial burden of establishing that probable cause existed as a matter of law. *Id.*

¶ 45 We reject plaintiff's argument and find his reliance on *Fabiano* misplaced. The issue in *Fabiano* dealt with hearsay statements and supporting affidavits to prove sufficient reliability of statements to support a finding of probable cause. Conversely, the instant case involves independent corroboration by three eyewitness statements, and forensic evidence to support probable cause.

¶ 46 Although Ruiz's description may differ from Reyes's and from plaintiff's actual appearance, it does not necessarily render Ruiz's identification unreliable. See *Slim v. People*, 127 Ill. 2d 302, 312 (1989) (noting discrepancies in descriptions of height and weight not decisive factors on review because few persons can make accurate estimations of those characteristics). Further, Ruiz positively identified plaintiff in a lineup as the shooter.

¶ 47 Plaintiff contends that the time between the shooting and the identifications support his argument that the eyewitnesses were not credible. Defendants counter that the identifications were made within a month of the shooting. Our supreme court and the appellate court have held that similar and even longer lapses between the crime and the identification are not significant. See *Slim*, 127 Ill. 2d at 313 (holding that lapse of 11 days is not significant); *People v. Rogers*, 53 Ill. 2d 207, 214 (1972) (identification made two years after the crime); *People v. Malone*, 2012 Il App (1st) 110517, ¶ 36 (upholding identification made one year and four months after the crime occurred). Thus, we find plaintiff's argument unavailing.

¶ 48 Additionally, we note plaintiff's suggestion that Ruiz's positive identification may have been compromised by seeing a photo of him before viewing a line-up that included plaintiff. Plaintiff contends that this fact alone makes Ruiz's eyewitness identifications unreliable. Defendants contend Ruiz's testimony at trial was that he was shown five photographs. We point out that there is no evidence which would indicate who was in the photos.

¶ 49 Plaintiff further contends that Reyes's identification is suspect because it was done in exchange for leniency on his misdemeanor charge. In support of his argument, he relies on *Kincaid v. Ames Department Stores, Inc.*, 283 Ill. App. 3d 555, 565 (1996), for the proposition that an offer of leniency makes the purported information suspect. In *Kincaid*, the defendants relied on the written statements of two criminal suspects to establish probable

cause. *Id*. The criminal suspects were told they would be "let go" if they made their statements. *Id*. The suspects both specifically detailed how the defendants told them to accuse the plaintiff in their statement, even though the plaintiff had done nothing wrong. *Id*. The court noted that if a criminal suspect is offered leniency in exchange for information against others, that information is clearly suspect because of the obvious motivation to shift blame to someone else. *Id*.

¶ 50 Defendants characterize the argument as yet another one of plaintiff's theories, unsupported by fact or evidence. Defendants point out that the record contains Reyes's statement, in which he averred that "[n]o threats or promises have been made to get him to make this statement and he is giving this statement freely and voluntarily". Defendants maintain that no promise of leniency was ever offered Reyes and there is no evidence to the contrary. Accordingly, we find plaintiff's reliance on *Kincaid* inapplicable in this case.

¶ 51 We next turn to plaintiff's argument that his alibi as to his whereabouts at the time of the shooting was a disputed fact that did not support probable cause. Plaintiff maintains that whether he was on a bus or in a gray Ford Mustang is disputed and thus not proper to be decided in a motion for summary judgment. Plaintiff claims that his testimony, alone, as to his whereabouts at the time of the shooting is enough to defeat summary judgment. Consistent with the Seventh Circuit holding in *Darchak v. City of Chicago Board of Education*, 580 F.3d 622, 631 (2009), that "uncorroborated, self-serving testimony cannot support a claim if the testimony is based on speculation, intuition, or rumor or is inherently implausible," defendants respond that self serving testimony cannot support plaintiff's claim.

¶ 52 We find plaintiff's argument unavailing as he has presented no evidence of his whereabouts other than his own testimony. He has no corroborating evidence other than a co-

worker observing him get on a bus at 7 p.m. on the night of the shooting. Plaintiff claims that his bus pass "which went missing" when he was interrogated on July 27, 2007, would be exculpatory evidence of his whereabouts on that night. He maintains that because the pass was not inventoried, defendants must have destroyed it. However, he has produced no evidence that the bus pass was confiscated by defendants; he has offered only his theory of what happened to it. Further, as defendants point out, plaintiff has not produced evidence of what exactly that bus pass would prove. On the other hand, defendants have produced three witnesses who put plaintiff in a gray Ford Mustang at the scene of the crime. Thus, we find it was proper for the circuit court to find that there was no genuine issue of material fact as to plaintiff's whereabouts on the night of the shooting.

¶ 53 Plaintiff also maintains that he informed defendants on July 27, 2007 that he traveled on two buses between work and home, and that the videos from the buses would have supported his alibi. Defendants testified that they did request the videos, but only after they got the results of the GSR test. Prior to receiving the GSR evidence, and based on the July 28, 2007, lineup results, defendants were not focused on plaintiff. As the circuit court noted, defendants only refocused on plaintiff after the GSR returned positive results, at which time, the defendants learned that the videos were not available. Although the video might have aided defendants in their investigation, in the face of all the other evidence discovered, we cannot conclude that defendants' failure to contact the bus companies to preserve the video is fatal to a finding of probable cause. See *Kim*, 368 Ill. App. 3d at 658 (Police are not required to follow all possible leads in the course of an investigation to establish probable cause).

¶ 54 We are also unconvinced by plaintiff's argument that his testimony, based on his personal knowledge, is sufficient to defeat summary judgment. Plaintiff misconstrues the law. The

question on summary judgment is whether plaintiff adduced evidence creating a genuine issue of material fact whether a reasonable detective would have believed his alibi, such that defendants lacked probable cause. *Fabiano*, 336 Ill. App. 3d at 641. Plaintiff failed to meet this burden. The existence of probable cause is measured based on the facts known to the officers at the time of the arrest. *Aboufariss*, 305 Ill. App. 3d at 1060. Here, in the course of their investigation, the defendants discovered corroborating eyewitness testimony, forensic evidence in the form of positive GSR results and supporting evidence based on the "deception indicated" result of plaintiff's polygraph test. Thus, the facts known to the arresting officers did not contradict their reasonable belief that plaintiff had committed a crime.

¶ 55 Plaintiff makes the additional argument that defendants did not contact his coworkers or his parents in the course of their investigation, which may have led to exculpatory evidence. However, plaintiff has cited no requirement that police must interview all potential witnesses before determining probable cause exists, and our research has revealed no holdings to that effect. When making a determination regarding the existence of probable cause, courts must be guided by common sense and practical consideration. *Kim*, 368 Ill. App. 3d at 658 (citing *People v. Harris*, 352 Ill. App. 3d 63, 66-67 (2004)). We conclude that it would be impractical and contrary to common sense to require the police to follow all possible leads in the course of an investigation to establish probable cause. In the instant case the record reveals that probable cause was based on a combination of factors upon which the defendants relied.

¶ 56 As a final matter, we find no basis in the record to support plaintiff's accusation that defendants fabricated evidence, destroyed evidence, targeted plaintiff and knew that plaintiff

did not commit the murder. A trial court is not required to entertain unreasonable inferences raised in opposition to a motion for summary judgment. *Thede v. Kapsas*, 386 Ill. App. 3d 396, 401 (2008) (citing *Purdy Co. v. Transportation Insurance Company Inc.*, 209 Ill. App. 3d 519, 527 91991)).

¶ 57 To defeat defendants' motion for summary judgment, plaintiff needed to adduce a factual basis to support the elements of his claim, including that defendants lacked probable cause. See *Aguirre*, 382 Ill. App. 3d at 96 (If one element is missing, plaintiff is barred from pursuing the claim). His failure to present evidence to establish the lack of probable cause supports the circuit court's grant of summary judgment. See *Fabiano*, 336 Ill. App. 3d at 641 (Once the defendant satisfies his initial burden of production, the burden shifts to the plaintiff to present some factual basis that would arguably entitle the plaintiff to a favorable judgment).

¶ 58 Based on all of the information, which was known to defendants at the time of arrest, we conclude that defendants held an objectively reasonable belief, that plaintiff had committed murder. See *Aboufariss*, 305 Ill. App. 3d 1054, 1062 (1999)) (in malicious prosecution case, summary judgment was proper on question of probable cause where defendants held an objectively reasonable belief that plaintiff had committed a crime).

¶ 59 We find that there is no genuine issue of material fact regarding the existence of probable cause in this case, and therefore, also find the circuit court did not err in granting defendants' motion for summary judgment on the allegations of malicious prosecution. Moreover, as noted in defendants brief, the record does not indicate that defendants engineered plaintiff's prosecution or prevented the assistant state's attorney from exercising her independent

discretion to proceed with charges and the prosecution. Accordingly, plaintiff's arguments must fail.

¶ 60 CONCLUSION

¶ 61 For the reasons explained above, we affirm the judgment of the circuit court. Summary judgment was properly granted for defendants and against plaintiff on the claim of malicious prosecution because there was no genuine issue of material fact as to whether probable cause existed at the time of the arrest and defendants were entitled to judgment as a matter of law.

¶ 62 Affirmed.