

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
APPELLATE DOCKET NO. 16-1868

MARC and TYRONE STEPHENS,

Plaintiffs/Appellants,

v.

CITY OF ENGLEWOOD, ENGLEWOOD POLICE
DEPARTMENT, DET. MARC MCDONALD, DET.
DESMOND SINGH, DET. CLAUDIA
CUBILLOS, DET. SANTIAGO INCLE, JR.,
DET. NATHANIEL KINLAW, Individually
and in official capacity, NINA C.
REMSON ATTORNEY AT LAW, LLC, and
COMET LAW OFFICES, LLC,

Defendants/Appellees.

On Appeal from the
United States District
Court for the District
of New Jersey

Docket No. Below
2:14-cv-05362-WJM-MF

BRIEF & SUPPLEMENTAL APPENDIX VOLUME I (PAGES SA 01-SA 35) ON
BEHALF OF DEFENDANTS/APPELLEES, DET. MARC MCDONALD, DET.
DESMOND SINGH, DET. CLAUDIA CUBILLOS, DET. SANTIAGO INCLE, JR.,
DET. NATHANIAL KINLAW

Dvorak & Associates, LLC
Attorneys for Defendants/Appellees,
DET. MARC MCDONALD, DET. DESMOND SINGH,
DET. CLAUDIA CUBILLOS, DET. SANTIAGO
INCLE, JR., DET. NATHANIEL KINLAW
390 George Street, 8th Floor
New Brunswick, New Jersey 08901
(732) 317-0130

MARC D. MORY, ESQ.
Of Counsel and on the Brief

GREGORY P. MATARRESE, ESQ.
On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES. -iii-

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION. . . . -1-

STATEMENT OF ISSUES.. . . . -1-

STATEMENT OF THE CASE.. . . . -1-

STATEMENT OF FACTS. -2-

STATEMENT OF RELATED CASES AND PROCEEDINGS. -11-

STATEMENT OF THE STANDARD OF REVIEW.. . . . -11-

SUMMARY OF THE ARGUMENT.. . . . -12-

LEGAL ARGUMENT. -14-

POINT I

THE DISTRICT COURT PROPERLY GRANTED
SUMMARY JUDGMENT TO THE ENGLEWOOD
DEFENDANTS, MCDONALD, SINGH, CUBILLOS,
INCLE, JR, AND KINLAW, AS TO PLAINTIFF'S
42 U.S.C. § 1983 BASED CLAIMS. -14-

POINT II

THE DISTRICT COURT PROPERLY GRANTED
SUMMARY JUDGMENT TO THE ENGLEWOOD
DEFENDANTS, MCDONALD, SINGH, CUBILLOS,
INCLE, JR, AND KINLAW, AS THE
PLAINTIFF'S CONSPIRACY CLAIMS ARE
WITHOUT MERIT.. . . . -24-

POINT III

THE ENGLEWOOD DEFENDANTS, MCDONALD, SINGH, CUBILLOS,
INCLE, JR. AND KINLAW RELY UPON THE ARGUMENTS SUBMITTED
BY THE CITY OF ENGLEWOOD ON APPEAL.
. -26-

CONCLUSION. -28-

CERTIFICATION OF ADMISSION TO THE BAR -29-

CERTIFICATION OF VIRUS SCAN.. -29-
 CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS.. -29-

TABLE OF AUTHORITIES

CASES:

Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970). 15
Boatner v. Hinds, 137 Fed. Appx. 499 (3d Cir. 2005).. 17
Brinegar v. United States, 338 U.S. 160 (1949). 16
Brower v. Cnty. of Inyo, 489 U.S. 593 (1989). 16,17
Carlson v. Green, 446 U.S. 14 (1980) ??????????
Carroll v. United States, 267 U.S. 132 (1925).. 16
Cronin v. W. Whiteland Twp., 994 F. Supp. 595 (E.D. Pa. 1998). 17
Currier v. Baldrige, 914 F.2d 993 (7th Cir. 1990). 16
Fields v. City of South Houston, Texas, 922 F.2d 1183 (5th Cir. 1991).. 16,17
Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009).. 15
Graham v. Connor, 490 U.S. 386 (1989).. 16
Groman v. Manalapan, 47 F.3d 628 (3d Cir.1995). 19
Halsey v. Pfeiffer, 750 F.3d 273, (3d Cir. 2014). 26
Henderson v. Hendricks, 2005 WL 3406434 (D.N.J. Dec. 13, 2005).25
Illinois v. Gates, 462 U.S. 213 (1983). 17
L.S. v. Mount Olive Bd. of Educ., 765 F. Supp. 2d 648 (D.N.J. 2011).. 15
Mann v. Cannon, 731 F.2d 54 (1st Cir. 1984).. 16
Marx v. Gumbinner, 905 F.2d 1503 (11th Cir. 1990).. 16
Mellott v. Heemer, 161 F.3d 117 (3d Cir. 1998). 16
Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782 (3d Cir. 2000).19
Paff v. Kaltenbach, 204 F.3d 425 (3rd Cir. 2000). 17

Piecknick v. Pennsylvania, 36 F.3d 1250 (3d. Cir. 1994).. . . 15

Popow v. City of Margate, 476 F.Supp. 1237 (D.N.J. 1979). . . 15

Powell v. Ridge, 189 F.3d 387 (3d. Cir. 1999).. 15-16

Rose v. Bartle, 871 F.2d. 331 (3rd Cir. 1989).. 19

State v. Cooper, 151 N.J. 326 (1997). 25

State v. Patton, 362 N.J. Super. 16 (App. Div. 2003). 25

Tennessee v. Garner, 471 U.S. 1 (1985). 16

U.S. ex. rel. Kern v. Maroney, 275 F. Supp. 435 (W.D. Pa. 1967).
. 25 25

United States v. Cruz, 910 F.2d 1072 (3d Cir. 1990).. . . . 16

Ware v. Reed, 700 F.2d 345 (5th Cir. 1983). 16

U.S. CONSTITUTION:

Fourth Amendment16

STATUTES:

42 U.S.C. § 1983 14 , 15 , 16 , 23

42 U.S.C. §1985.. -24-

42 U.S.C. §1986.. -24-

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Defendants/appellees Detectives Marc McDonald, Desmond Singh, Claudia Cubillos, Santiago Incle, Jr. and Nathaniel Kinlaw (collectively "the Englewood Detective Defendants") adopt the statement of jurisdiction by Defendant/appellee the City of Englewood.

STATEMENT OF ISSUES

The issues on appeal, as relate to the Englewood Detective Defendants, are whether they had probable cause to arrest plaintiff/appellant, Tyrone Stephens and whether the District Court properly dismissed plaintiffs' claims, including false arrest and imprisonment, "false evidence," malicious prosecution, and conspiracy, as related to that arrest.

STATEMENT OF THE CASE

This matter, as relates to the Englewood Detective Defendants, concerns the arrest of Tyrone Stephens, among others, for the attack of three individuals, who were beaten during an attempted robbery outside a 7-Eleven in Englewood, New Jersey, on Halloween 2012. During the course of an investigation into same, Tyrone Stephens was identified as one of the assailants, and arrested along with several other individuals, all of whom were minors.

After the investigation and arrests were concluded, the matter was turned over to the Bergen County Prosecutor's Office. During those proceedings, a grand jury indicted Tyrone Stephens and a

Superior Court Judge found probable cause for his arrest at more than one hearing. As set forth herein, as well as in the record below, plaintiff, Tyrone Stephens' claims arising out of his arrest are without merit, as are any claims plaintiff, Marc Stephens purports to have out of Tyrone's arrest. The District Court properly determined that the City of Englewood, its Police Department and the Englewood Detective Defendants were entitled to summary judgment as a matter of law.

STATEMENT OF FACTS

_____The undisputed facts below establish that Englewood Detectives Singh, McDonald, Cubillos, Kinlaw and Incle, Jr. are current or former members of the Englewood Police Department, each having graduated the Bergen County Police Academy, been certified by the Police Training Commission and having approximately 20 years of experience in the Englewood Police Department at the time of plaintiff, Tyrone Stephens, arrest related to the incident on Halloween 2012. [See SA 36 at Nos. 7 and 9; SA 44 At Nos. 7 and 9; SA 52 at Nos. 7 and 9; SA 60 at Nos. 7 and 9; SA 68 at Nos. 7 and 9]

The Incident and Subsequent Investigation

On October 31, 2012, shortly after Hurricane Sandy, and while parts of Englewood were still without power, an incident occurred, **at or around 10:12 pm**, when three individuals, Kristian Perdomo, Santiago Cortes and Jeisson Duque were assaulted outside

a 7-Eleven during a robbery.¹ [SA 89, 93]

As per an initial investigation report, victim Perdomo advised Englewood Police Officer Temple (a non-party) that he (Perdomo) and two other victims were approached by a group of 20-30 teenage males. When victim Duque refused to give his money and/or belongings to one of these males, he was struck in the chest, pulled to the ground, kicked and stomped. Perdomo and Santiago Cortes attempted to help Duque and suffered the same type of attack. [SA 89] At the hospital, a witness and Santiago Cortes' cousin, Natalia Cortes, stated she could identify some of the attackers, who she recognized from high school as underclassmen last year. [SA 89]

Based upon the foregoing, other members of the Englewood Police Department, including appellees, McDonald and Singh, conducted an investigation of what happened at the 7-Eleven. The crux of that investigation is set forth in a Supplementary Investigation Report prepared by McDonald, which report was reviewed by appellee, Cubillos. [SA 93] During the course of the investigation, the Englewood Detective Defendants interviewed more

¹ In 2012, and prior to this incident, plaintiff, Tyrone Stephens was arrested on several charges in Englewood, concerning an alleged robbery from a Shop Rite, an alleged assault and the alleged theft of a cell phone. He was represented by defendant, Nina C. Remson, Attorney at Law and, ultimately, entered a plea of guilty. [See SA 76 at 122:18-123:17; 79:19-80:4] Tyrone Stephens testified that the facts and circumstances regarding those incidents, as well as his representation by Remson, have nothing to do with his claims against any of the Englewood Defendants in the current litigation [SA 76 at 80:2-24]

than a dozen people, including the victims, witnesses and suspects, some of which individuals were minors, with their parent/guardian present. These interviews revealed descriptions of the alleged assailants and their clothing, and included the identification of suspects from the Department's Juvenile Bureau's photo ID book. [SA 97, 102, 111, 118, four witness/victim transcripts] During the initial interviews, witness, Cortes, confirmed that she identified attackers from the photo book, which per the Investigation Report, were Justin Evans, Tyrone Stephens and Derrick Gaddy. [See SA 111 at 5:17-6:15]]

During the course of the investigation, Dets. McDonald and Singh, interviewed Justin Evans, with his mother present. He flip-flopped multiple times either denying or admitting his involvement in the 7-Eleven incident, but, ultimately, admitted to striking one of the victims at the scene and also implicated others involved, including Tyrone Stephens, whom he identified as the one who initiated the attack. [See SA 138 at p7:4-11, 15:8-23, 19:23-20:19, 42:11-14, 50:20-55:22) and regarding initiating 43:10-18, 55:16-22, 62:20-64:16]

Thereafter, as part of the investigation, Tyrone was taken to the Police Department and, with appellee, Marc Stephens (his identified guardian) present, was advised of his Miranda rights, signed a waiver and made an audio recorded statement to Dets. McDonald and Singh. [See SA 93 and 159 (Transcript of Audio Statement of Tyrone Stephens, taken November 8, 2012) at 1:3-6:6

and SA 137 (waiver signed by Stephens)] Tyrone denied his involvement in the 7-Eleven incident. [See SA 93 and SA 159 at 6:16-19)]

Marc initially offered Tyrone an alibi, claiming Tyrone could not have been at the 7-Eleven at the time of the incident because he was home with Marc, after his nephew Cory was dropped off by the police from an incident that occurred earlier at the same 7-Eleven. [See SA 93 and SA 159 at 6:21-7:2)] At first, Tyrone tried to adopt this alibi by also claiming he was at home. [See SA 159 at 8:16-20] Tyrone later said he was in the area of the 7-Eleven (at the McDonalds down the street) and identified two other alibi witnesses. He could not provide any contact information for these witnesses and could not identify where he went after McDonalds. [See SA 93 and SA 159 at 14:18-15:2, 16:11-19, 22:23-24:22, 28:3-29:1)] Tyrone also indicated that he was wearing clothing that was consistent with that which was identified by witnesses. [See SA 93 and SA 159 at 41:10-22)]

Tyrone was taken into custody, charged with several offenses, processed and brought to the Bergen County Police Department by Detectives McDonald and Singh, to be transported to the Juvenile Detention Center in Union, New Jersey. [SA 93] Other than on November 8, 2012, and in the presence of his guardian/brother, no member of the Englewood Police Department took a statement from Tyrone related to the 7-Eleven Incident. [See SA 159 at 141:15-142:18]

The investigation continued after Tyrone's arrest and Detectives Kinlaw and McDonald drove another arrestee, Jahquann Graham, to the Bergen County Superior Court, Juvenile Section, where Graham was placed in the holding cells in the Juvenile Court. [See SA 93 and SA 176 (Supplementary Investigation Report of Kinlaw)]

Later that day, Det. Kinlaw prepared a Supplementary Investigation Report, that was reviewed by Det. Lt. Cubillos. [SA 176] In that report, Det. Kinlaw states while he was waiting by the cells for Graham to go before a Judge, Det. Kinlaw overheard a conversation between Graham, who had asked who else was in the cells, and Tyrone Stephens, who had responded. As per the report, Graham stated he did not know why he was in the holding cell, to which Tyrone stated:

I know why we are here, that f**king rat Derek told. He was brought to the police department and released, he's the only one wasn't arrested.

[SA 176]² At his deposition, Tyrone Stephens stated that he either did not remember having that conversation with Graham or denied same. [See SA 76 at 72:24-75:12]

On or about January 4, 2013, the Englewood Police investigation was administratively closed and turned over to the Bergen County Prosecutors Office ("BCPO") [See SA 198 (Case

² Derek Gaddy was originally contacted by the police on November 2, 2014 (prior to Stephens' and Graham's arrests), but not arrested until November 12, 2014, after coming to the Police Department with his mother. [SA 93]

Management Check List))

The Charges and Prosecution by the BCPO

Detective McDonald arrested Tyrone Stephens and filed the Complaints against him for first degree robbery, second degree aggravated assault and fourth degree riot. [See SA 93 and SA 199 at 9:16-10:3] A probable cause hearing was conducted on December 20, 2012 before Superior Court Judge Wilcox. During the hearing, Det. McDonald described the incident based upon his investigation as well as the injuries suffered by the victims. [See SA 199 at 11:12-13:8] He testified that the victims and witness, N. Cortes described the clothes of people who attacked them and that Cortes identified three individuals, including Tyrone Stephens, Derek Gaddy and Justin Evans, and that another individual identified Gaddy.[SA 199 at 13:24-15:4] He testified that, thereafter, they spoke with Justin Evans, who named individuals, including Tyrone Stephens, who he identified as orchestrating the attack. [SA 199 at 15:13-16:8] Det. McDonald also testified to the statements attributed by Det. Kinlaw to Tyrone Stephens and Jaquan Graham, while they were in the holding cells, and as set forth in Kinlaw's report. [SA 199 at 18:1-19:1]

During the Probable Cause Hearing, Det. McDonald was cross-examined by Tyrone Stephens' defense attorney, Jordan Comet, Esq., who had possession of the police reports and audio statements prior to same, and also offered an alibi witness to testify on Tyrone's behalf. [SA 199 at pgs.19-56 and at 70:20-76:8]After

closing arguments, Judge Wilcox ruled:

Again, Mr. Comet, I think you've raised -- certainly raised enough valid issues I also realize I've not heard all the evidence the State has in the case. But I do believe that based on what I've heard today, the State has shown a well-grounded suspicion or belief that this juvenile did, in fact, commit the alleged offense. **So, I will make a finding of probable cause on all seven counts of the complaint.**

[SA 199 at 96:16-97:4 (emphasis added)]

On February 26, 2013, at another hearing before Judge Wilcox, he reaffirmed the Court has "...previously found probable cause in this matter." Despite same, he permitted Tyrone Stephens to offer the testimony of another witness, Natalia Cortes, prior to ruling on whether or not to waive Tyrone up as an adult. [See SA 231 at 3:10-24].

At the hearing, Ms. Cortes testified that she thought she was questioned by the police twice, but does not recall when that was. [SA 231 at 6:10-19]. She then testified that when she was asked whether she could identify any actors from the 7-Eleven incident, she

pointed out some, but I said I wasn't really sure. I said they might have been there, but - since it was really dark and most of the people had hoodies on. That's all I said.... [Individuals] that might have looked like they might have been there, like, from, like, my memories. But not really anyone that stood out, like, oh, I saw him right there - standing right there.

[SA 231 at 6:23-7:19]

Then after testifying to knowing Tyrone Stephens from high

school, she testified to a conversation in the hallway, which occurred prior to her taking the stand, as follows:

[Jordan Comet] Q. And just now in the hallway, when you first saw him -

[N. Cortes] A. Uh-huh.

Q. - what - what was - what was your reaction? What did you just say?

A. I said I'm not - I'm not really so sure that he wasn't there - that he was there.

Q. So, you're -

A. Like, I've seen him, but I was, like, I'm not really so sure that he was there.

Q. Was he one of the pictures that the officers showed you?

A. Yeah.

Q. And were you -

A. I think.

Q. Did - I'm sorry?

A. I think so. I think he was in one of the pictures.

Q. Okay. And was he one of the pictures that you pointed out saying it's possible he was there?

THE COURT: You have to say yes or no.

THE WITNESS. Yes.

Q. Are you saying yes or no?

A. Yes.

Q. So, you're saying you did point out and say my -

A. I said he might have been there, but I'm

not sure.

[SA 231 at 7:20-9:4] She later testified that he was not one of the people she identified as one of the faces that might have been at the 7-Eleven incident. [SA 231 at 16:20-17:3]

She also testified that while she remembered the police showing her the [ID] books she did "not really" remember what she said to the police that day in the hospital. [SA 231 at 20:16-21:13] After that hearing, Tyrone Stephens and Justin Evans are waived up from juveniles in Family Court to adults in Criminal Court, in accordance with a grand jury indictment. [See SA 76 at 137:17-19, SA237 (Grand Jury Indictment) and SA 239 (Complaint-Warrants dated March 4, 2013)] Thereafter, on both March 4, 2013 and March 22, 2013, Judge Wilcox found probable cause for the issuance of the Complaints against Tyrone Stephens. [See SA 239 (Complaint-Warrants dated March 22, 2012)]

On December 13, 2013, Tyrone's co-defendant, Justin Evans, withdrew his not guilty plea and entered a plea of guilty to the charges arising out of the 7-Eleven incident. [See SA 259 at 6:17-7:15] Evans admitted to being at the 7-Eleven with 20-30 other people and participating in hitting other individuals. He also admitted that, after he was arrested, he made a statement to the police incriminating Tyrone Stephens as being involved in the incident. [SA 259 at 8:6-9:19] After his guilty plea, Evans advised the Court that his statement incriminating Tyrone was false and that he identified Tyrone because "I thought he was one of the

people that said I was involved or told them...." [SA 259 at 9:20-10:3] Judge Guida asked Evans "was it out of the revenge?" to which Evans responded "yeah." [SA 259 at 10:5-6] During this hearing, and while under oath, Evans did not state that he identified Tyrone because the police coerced him or pressured him to do so. [See SA 259]

It appears that it was not until Evans recanted his accusations regarding Tyrone's involvement, that the BCPO determined to dismiss the indictment against him. [SA 263 at 4:18-5:7] Plaintiff was released from jail in December 2013 and an Order of Dismissal with prejudice as to the Indictment against Tyrone Stephens is filed by Judge Conte on February 18, 2014. [See SA 263 (Criminal Order of Dismissal, dated February 18, 2014)]

STATEMENT OF RELATED CASES AND PROCEEDINGS

These appellees are not aware of any other related cases or proceedings.

STATEMENT OF THE STANDARD OF REVIEW

On appeal from a District Court's Order granting summary judgment, the Third Circuit Court of Appeals exercises plenary review. See In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238, 257 (3d Cir.1983), *rev'd in part on other grounds sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Third Circuit Court of Appeals' standard of review is identical to the test the district court was to apply when ruling on Defendants'

Rule 56 summary judgment motion. See, e.g., Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). Specifically, the appeals court must review the record to determine whether the district court properly concluded that “no genuine issue as to a material fact remain[ed] for trial, and that [defendant] was entitled to judgment as a matter of law.” Id. (brackets added; See also Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2550, 81 L.Ed.2d 265 (1986).

The standard of review of a District Court’s order denying a motion for reconsideration is for an abuse of discretion. N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1203 (3d Cir. 1995). A District Court abuses its discretion when “its decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.” Danvers Motor Co., Inc. v. Ford Motor Co., 543 F.3d 141, 147 (3d Cir. 2008) (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

The District Court properly determined that there was probable cause for appellant, Tyrone Stephens’ arrest and that there was no conspiracy or due process violation. As there were no genuine issues as to any material facts, all of plaintiffs’ claims were properly dismissed via summary judgment.

In their motions for reconsideration below, as well as their appeal now, plaintiffs/appellants rely upon broad conclusory

statements, often with no citation to any evidential record. For the reasons set forth herein, as well as those set forth in co-defendant/appellee City of Englewood's submissions, the District Court's decisions below should be affirmed.

LEGAL ARGUMENT

POINT I

**THE DISTRICT COURT PROPERLY GRANTED
SUMMARY JUDGMENT TO THE ENGLEWOOD
DEFENDANTS, MCDONALD, SINGH,
CUBILLOS, INCLE, JR, AND KINLAW, AS
TO PLAINTIFF'S 42 U.S.C. § 1983
BASED CLAIMS**

Plaintiffs alleges civil rights violations against the Englewood Detective Defendants, under 42 U.S.C. §1983, asserting claims for false arrest (Count One), false imprisonment (Count Nine), malicious prosecution (Count Eight) and three separate counts alleging "false evidence" (Counts Three, Four, and Five), arising out of the arrest of plaintiff/appellant Tyrone Stephens. As set forth in the record below, and as properly determined by the District Court, Plaintiffs' proffered no evidence which could sustain any of the claims against the Englewood Detective Defendants, or the City of Englewood for that matter, as there was probable cause for Tyrone's arrest.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The purpose of §1983 was to provide a remedy for State action aimed at depriving persons of rights protected by the Constitution and Federal Laws. See Popow v. City of Margate, 476 F.Supp. 1237, 1243 (D.N.J. 1979). For a plaintiff to prevail against an individually named defendant under a §1983 claim, the plaintiff must establish each of the following elements: 1) that the conduct complained of was committed by a person acting under the color of state law; 2) that this conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States; and 3) that the defendant's acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff. See Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970); Powell v. Ridge, 189 F.3d 387, 400 (3d. Cir. 1999) (*overruled on other grounds by Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009); Piecknick v. Pennsylvania, 36 F.3d 1250, 1255-56 (3d. Cir. 1994); L.S. v. Mount Olive Bd. of Educ., 765 F. Supp. 2d 648, 656 (D.N.J. 2011). Regarding a claim of false arrest, the Fourth Amendment of the United States Constitution provides:

[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or

things to be seized.

To establish that defendant's conduct deprived plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States, a plaintiff must first prove that he was "seized" within the meaning of the Fourth Amendment. *Graham v. O'Connor*, 109 S.Ct. 1865, 1871 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985); *Mellott v. Heemer*, 161 F.3d 117, 124 (3d Cir. 1998)).

Obviously, an arrest without probable cause violates the Fourth Amendment. *Ware v. Reed*, 700 F.2d 345 (5th Cir. 1983). Conversely, if individual police officers have probable cause for an arrest, there is no constitutional violation. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989) (holding that a seizure alone is not enough for §1983 liability; the seizure must also be unreasonable); *Fields v. City of South Houston, Texas*, 922 F.2d 1183 (5th Cir. 1991); *Currier v. Baldrige*, 914 F.2d 993 (7th Cir. 1990); *Marx v. Gumbinner*, 905 F.2d 1503 (11th Cir. 1990); *Mann v. Cannon*, 731 F.2d 54 (1st Cir. 1984). This holds true even if the charges are later dismissed or the arrestee later acquitted. *Brower*, 489 U.S. at 599.

"Probable cause exists where 'the facts and circumstances within . . . [the police officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'" *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267

U.S. 132, 162 (1925)); see also United States v. Cruz, 910 F.2d 1072, 1076 (3d Cir. 1990). A "common sense approach [must be taken] to the issue of probable cause." Paff v. Kaltenbach, 204 F.3d 425,436 (3rd Cir. 2000); Cronin v. W. Whiteland Twp., 994 F. Supp. 595, 600 (E.D. Pa. 1998). "Probable cause is determined by the totality of the circumstances," Boatner v. Hinds, 137 Fed. Appx. 499 (3d Cir. 2005) (*citing Illinois v. Gates*, 462 U.S. 213, 233 (1983)), as those circumstances are "understood by those versed in the field of law enforcement." Gates, 462 U.S. at 231-32; see also Paff, 204 F.3d at 436. Probable cause has been liberally defined as "a fluid concept turning on the assessment of probabilities in particular factual context not readily, or even usually, reduced to a neat set of legal rules." Gates, 462 U.S. at 232.

In the instant matter, the District Court appropriately followed this analysis. Indeed, as noted by the Judge Martini below:

While probable cause requires more than mere suspicion, it does not require the type of evidence needed to support a conviction. ... Put simply, the relevant inquiry is whether, after considering the totality of the circumstances, there was a "fair probability" that the arrestee committed the crime at issue.

[SA 4 at pg 7 (citations omitted)]

In accordance with this standard, and "viewing the evidence in a light most favorable to the non-movants, the Court conclude[d]that the Englewood Detectives had probable cause to

arrest Tyrone.” [SA 4 at pg 7]. As the undisputed facts below showed, there was probable cause for plaintiff’s arrest based upon the investigation conducted by the Englewood Police Department. Det. McDonald, along with the other defendants, conducted an exhaustive investigation, interviewing the victims, witnesses, and other individuals, including Tyrone Stephens, who were identified as being present at the time of the 7-Eleven incident on Halloween Night 2012.

Although Tyrone denied any involvement, as many potential suspects do, Det. McDonald had a good faith basis to arrest him for several reasons including, but not limited to, the identification provided by the witness N. Cortes; the statements and identification made by co-defendant, Justin Evans; the report of Det. Kinlaw; and the inconsistencies proffered by Tyrone over his “alibi.” [See SA 4] Indeed, as found by the District Court, the Englewood Detectives had “four main pieces of evidence” and plaintiffs’ effort to attack one of those pieces of evidence, did not negate the existence of the others. [SA 4 at pg 8] Moreover, during Tyrone’s criminal proceedings, a Judge found probable cause at a hearing and a grand jury indicted him. As stated by the District Court:

Under Third Circuit precedent, the indictment provides an independent basis for concluding that the Englewood Detectives had probable cause to arrest Tyrone. See, e.g. Trabal v. Wells Fargo Armored Serv. Corp., 269 F.3d 243, 251 (3d Cir. 2001) (grand jury indictment “establishes probable cause by definition”).

[SA 4 at pg 8]

Given that plaintiffs' false arrest claim is defeated upon this finding of probable cause, plaintiffs' claims for malicious prosecution were similarly deemed without merit and properly dismissed. [SA 4 at pg 8] Where "the police lack probable cause to make an arrest, the arrestee has a claim under §1983 for false imprisonment based on a detention pursuant to that arrest." Groman v. Manalapan, 47 F.3d 628, 636 (3d Cir.1995). However, as argued below, "an arrest based on probable cause could not become the source of a [§1983] claim for false imprisonment." Id.

A claim of malicious prosecution under 42 U.S.C. §1983 is defined as follows:

A civil action for § 1983 malicious prosecution requires that: (1) the defendant initiate a criminal proceeding; (2) which ends in plaintiff's favor; (3) which was initiated without probable cause; and (4) the defendant acts maliciously or for a purpose other than bringing the defendant [sic] to justice.

Rose v. Bartle, 871 F.2d. 331 (3rd Cir. 1989); see also Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 786 (3d Cir. 2000).

Here, separate and apart from the finding of probable cause, the undisputed factual evidence shows that such a cause of action is not sustainable. Initially, the Bergen County Prosecutor's Office conducted the criminal proceedings against Tyrone Stephens after his arrest and, of the defendants, only Det. McDonald, as the primary detective during the investigation, testified during the

pendency of the charges. None of the other individual Englewood Detective Defendants testified at or participated in same. Moreover, as set forth above, since the actions taken against Tyrone Stephens were based upon probable cause, plaintiff's claim must fail. Indeed, the actions taken by any of the Englewood Detective Defendants, as related to plaintiff, were based upon an exhaustive investigation, including, but not limited to, the identification provided by the witness N. Cortes, the statements and identification made by co-defendant, Justin Evans, the report of Det. Kinlaw; and the inconsistencies proffered by Tyrone over his "alibi."

Finally, there is no evidence in the record upon which one could even insinuate that any of the Englewood Detective Defendants acted with malice or for a purpose other than to bring plaintiff, and others, to justice regarding the 7-Eleven incident.

In their brief, the appellants repeatedly cite to the District Court ECF docket in support of their arguments. In fact sometimes they cite to their brief, ECF No. 85, which was filed in opposition to the Englewood Detective Defendants' summary judgment motion below. However, this amounts to appellants attempting to support their argument on appeal by citing the argument they made below, and not to any evidentiary record.

Throughout appellants' brief, they repeatedly reference the difference in the reported time of the 7 Eleven incident, i.e.- 10:00 pm versus 10:12 pm. They repeatedly state, with certainty,

that since the 7 Eleven incident took place at precisely 10:00 pm the twelve (12)minute differential is dispositive on the issue of Tyrone's lack of involvement in the 7 Eleven incident. His reasoning is that he was seen in front of McDonalds at approximately 10:00 pm by defendant, Kinlaw, and therefore, the Englewood Defendants knew he could not have been involved in the 7 Eleven incident. This argument on appeal must fail for three (3) reasons.

First, all of these times are approximates. Even assuming arguendo, the defendant, Kinlaw, did see Tyrone Stephens in front of the McDonalds at approximately 10:00 pm, the victims indicated that the assault took place at approximately 10:12 pm. [See SA 89 Englewood Police Investigation Report of Police Officer Temple, dated October 2, 2012] Accordingly, there is no way to prove that the time of both the sighting of the Appellant at McDonalds, and the occurrence of the 7 Eleven incident, were at the same, exact time.

Second, the Appellants acknowledge, at page 13 of thier brief, in the third sentence of the first paragraph, that the McDonalds is only 5 to 6 minutes away from the 7 Eleven. Accordingly, even if the Appellant was sighted at the McDonalds at approximately 10:00pm it left him more than enough time to get to the 7 Eleven by 10:12 pm, the reported time of the incident by the victim.

Third, and of greatest significance, is that a probable cause hearing was conducted on December 20, 2012 before Judge Wilcox and

there was a grand jury indictment.

The Appellant further alleges malicious intent due to the fact that a witness, Justin Evans, later recanted his statement. The Appellant makes conclusory allegations, without factual basis in the record, to the effect that the Englewood Detective Defendants made "suggestions" to Mr. Evans to implicate Appellant. However, as the Appellants acknowledge at page 7 of their brief, line 4, paragraph 1, Mr. Evans himself gave his motive for making the false statement as "revenge". The record is void of any claim by Mr. Evans of having been coerced by any of the Englewood Detective Defendants to issue that statement.

Finally, as to Plaintiff/Appellants claim of §1983 "false evidence" a review of case law revealed no specific civil rights cause of action for such a claim. To the extent plaintiff is alleging the falsification of evidence, which is wholly denied by defendants, such claims would be subsumed by those regarding the causes of action of false arrest and/or malicious prosecution.

The Appellants on appeal makes bold, unsubstantiated allegations of falsifying evidence without directing the Court to any proofs on this record. Statements such as "The defendant fabricated sworn statements, testimony and police reports...", citing to their brief filed below in opposition to the motion for summary judgment (ECF Docket No 85) and "The defendant officers cooked up their own evidence to arrest Tyrone..." citing to the investigative records filed below. (ECF. Doc. No 71)

In reality, the Appellant is asking this Court to come to the conclusion that if any information obtained during the course of an investigation turns out, in fact, to be less than completely accurate, the policing agency has "fabricated" or "cooked up" evidence. Obviously, the policing agency is not a guarantor of witness' recollection, statements or photo identifications. If that were the case, law enforcement would grind to a halt. Stated simply, on this record there is no proof to support a determination that any evidence was fabricated by the Englewood Defendants.

Indeed, in granting summary judgment herein, Judge Martini below concluded:

Tyrone also brings a claim for "false evidence" under Section 1983....aside from his own self-serving claim that he never made incriminating statements to Graham, Tyrone has not offered a shred of evidence undermining the credibility of the Kinlaw Report...

[SA 4 at pg 8 (citations omitted)]

Accordingly, and for the reasons set forth previously, plaintiff's "false evidence" causes of action are without merit and the District Court properly granted summary judgment to the Englewood Defendants.

POINT II

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE ENGLEWOOD DEFENDANTS, MCDONALD, SINGH, CUBILLOS, INCLE, JR, AND KINLAW, AS THE PLAINTIFF'S CONSPIRACY CLAIMS ARE WITHOUT MERIT.

In his Complaint, plaintiff, Tyrone Stephens references a conspiracy by the Englewood Defendants with regard to unsupported allegations of falsifying evidence and/or making false statements about plaintiff resulting in his alleged false arrest. As argued below, plaintiffs failed to assert conspiracy claims under 42 U.S.C. §1985 or §1986, but, plaintiff herein asserts same under §1983. Regardless of the method he seeks to use, plaintiff's conspiracy claim is without merit.

Independent of any applicable federal statute which Plaintiff must follow in framing his conspiracy claims, Plaintiff fails to proffer any facts to sustain a claim of conspiracy. Indeed, his allegations, as per the Complaint, concern falsifying evidence and/or making false statements. However, the evidence shows that McDonald's report and/or testimony were based upon the extensive investigation into the incident at the 7-Eleven in Englewood, New Jersey. Moreover, to the extent Plaintiff bases his claims on the false statements that were allegedly made to Plaintiff's co-defendant, Justin Evans, and his mother, during Evans' interrogation, such claims are without merit. Indeed, it is well settled that a police officer's use of trickery or strategic

deception during interrogations is not only permissible, but justified as a necessary and proper means of ensuring effective law enforcement and crime control. See Henderson v. Hendricks, 2005 WL 3406434 (D.N.J. Dec. 13, 2005); U.S. ex. rel. Kern v. Maroney, 275 F. Supp. 435 (W.D. Pa. 1967); State v. Cooper, 151 N.J. 326, 355-56 (1997); State v. Patton, 362 N.J. Super. 16, 25 (App. Div. 2003).

The Appellants on appeal suggest that the investigative tactics employed by the Englewood Defendants constitute denial of due process under Halsey v. Pfeiffer, 750 F.3d 273, (3^d Cir 2014) However, the record is void of any evidentiary proof that the Englewood Detective Defendants knowingly used perjured testimony or deliberately suppressed evidence so Halsey is not applicable to the case at bar.

As properly ruled below, "the Englewood Detectives are entitled to summary judgment on Tyrone's conspiracy claim because without an actual deprivation, there can **[be]** no liability for conspiracy under Section 1983." [SA 4 at pgs 8-9 (citing Holt v. Cargo Sys. V. De. River Port Auth, 20 F. Supp. 2d 803, 843 (E.D.Pa 1998))

Accordingly, there is no factual basis to support a claim of a conspiracy against any of the Englewood Defendants and the District Court properly granted summary judgment to the Englewood Defendants.

POINT III

**THE ENGLEWOOD DEFENDANTS, MCDONALD, SINGH,
CUBILLOS, INCLE, JR. AND KINLAW RELY UPON THE
ARGUMENTS SUBMITTED BY THE CITY OF ENGLEWOOD
ON APPEAL.**

To the extent applicable, the Englewood Detective Defendants respectfully adopt and aver the arguments submitted on behalf of the City of Englewood on Appeal. Indeed, plaintiff Tyrone Stephens seeks relief against all of the Englewood Defendants in each of his causes of action, independent of the fact of whether or not such a claim is appropriate against them. (For example, plaintiff seeks relief from the individual Englewood Detective Defendants on his *respondeat superior* claim even though such a claim, to the extent it is even cognizable, is more appropriately asserted against the City itself.) Moreover, and in the interests of brevity, the Englewood Detective Defendants have sought not to duplicate arguments, and will rely upon the City's submission on Appeal as to the appropriate dismissal of the Plaintiff/Appellant's state law claims on summary judgment.

As such, and to the extent applicable, the City of Englewood's arguments on appeal are specifically incorporated by reference herein and relied upon by defendants McDonald, Cubillos, Incle Jr., Kinlaw and Singh. This includes all arguments as related tot he District Courts' award of summary judgment, denial of the motions for reconsideration and as related to the Plaintiff/Appellant's proposed motion to amend the Complaint.

Accordingly, it is respectfully requested that the District

Court's Order granting summary judgment in favor of the Englewood Defendants was proper and the decision should be affirmed.

CONCLUSION

For the foregoing reasons, defendants/appellees the Englewood Defendants, **MCDONALD, SINGH, CUBILLOS, INCLE, JR. AND KINLAW** submit that the Order granting their motion for summary judgment be affirmed and the instant appeal be dismissed in its entirety with prejudice.

Respectfully submitted,

/s/ Marc D. Mory

MARC D. MORY

For the Firm

DATED: October 10, 2016

CERTIFICATION OF ADMISSION TO THE BAR

Marc D. Mory, certifies as follows:

1. I of am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. I am aware that if the foregoing statements made by me are willfully false, I may be subject to punishment.

s/ Marc D. Mory

MARC D. MORY

CERTIFICATION OF VIRUS SCAN

I certify that this Brief was scanned by Malwarebytes Anti-Malware, Version V2015-09.30.05, for any viruses and none were found.

s/ Marc D. Mory

MARC D. MORY

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I hereby certify that the PDF format and hard copy are identical.

s/ Marc D. Mory

MARC D. MORY