

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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EVAN ZIMMERMAN,

Plaintiff,

v.

MEMORANDUM and ORDER  
06-C-85-S

CITY OF EAU CLAIRE, ERIC LARSEN,  
DONN ADAMS, GARY FOSTER and  
TODD TRAPP,

Defendants.

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Plaintiff Evan Zimmerman commenced this civil action against defendants City of Eau Claire, Eric Larsen, Donn Adams, Gary Foster and Todd Trapp pursuing constitutional and state law claims arising from his arrest and conviction for murder. Plaintiff claims that the defendants denied him due process, falsely imprisoned him, conspired to violate his constitutional rights and failed to intervene to prevent constitutional violations. Plaintiff pursues state law claims of malicious prosecution, civil conspiracy, intentional infliction of emotional distress, false arrest/false imprisonment, respondeat superior and indemnification.

On August 1, 2006 defendants City of Eau Claire, Eric Larsen, Donn Adams and Gary Foster moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

Defendant Todd Trapp moved for summary judgment on September 1, 2006. Although plaintiff has not had the opportunity to respond to the motion, the Court will decide it since it is based on the same facts and law as the motion for summary judgment filed by defendants City of Eau Claire, Larsen, Foster and Adams to which the plaintiff has responded. Defendants City of Eau Claire, Larsen, Foster and Adams have also moved to strike plaintiff's expert and dismiss his claim for medical damages.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is

not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

#### FACTS

For purposes of deciding defendants' motions for summary judgment the Court finds that there is no genuine dispute as to the following material facts.

Plaintiff Evan Zimmerman is an adult resident of LaCrosse, Wisconsin. Defendant City of Eau Claire is a municipal entity and local government as defined by Wisconsin law. Defendant Eric Larsen has been a police officer for the City of Eau Claire for twenty three years and is presently the Deputy Chief of the Detective Division of the Department. Defendant Donn Adams is a Detective with the Eau Claire Police Department and has been employed by the Department for 26 years. Defendant Gary Foster worked for the Department for 33 years before his retirement and was the Deputy Chief of the Detective Division. Defendant Todd Trapp was a police officer with the Eau Claire police department from 1984 through May 16, 2006.

On February 25, 2000 Kathy Thompson and Robert Miles were married. At about 1:50 a.m. on February 26, 2000 Thompson and Miles had a physical altercation at their apartment with Thompson hitting Miles with a phone or hanger causing him to bleed onto her. The police were called and Thompson was arrested for the domestic

incident. Miles was taken to jail on an unrelated Probation hold and remained in jail.

Thompson signed a Waiver of Rights at the police station at 2:40.a.m. and signed her prepared statement at 2:44 a.m. on February 26, 2000. Thompson was then released from jail around 3:00 a.m. and began walking toward her home. At that time she had some of Miles' blood matted in the front portion of her hair.

At 5:45 a.m. on February 26, 2000 her body was found strangled to death on Laurel Avenue, approximately one half block from the intersection of Margaret Street. Eau Claire Police Officers Pionkowski and Staniszewski responded to the scene. Thompson's death was thought to have been murder by asphyxia due to ligature strangulation. When her body was found Thompson did not have blood in her hair and it appeared her hair had been brushed.

Sgt. Venaas, who had responded to the earlier call at Thompson's residence, went to the residence to see if there was any sign that she had returned home after being released from jail. He reported that there were no signs that she had returned home.

After the body was discovered, plaintiff Evan Zimmerman immediately became the focus of the murder investigation. He had dated Thompson from sometime in 1998 until May of 1999. He resided about one and one-half blocks from Thompson and remained friendly with her. There were reports that plaintiff was obsessed with Thompson.

On February 26, 2000 at 1:45 p.m. Eau Claire Police Officers Southworth and Slaggie located Zimmerman at the VFW bar and informed him of Thompson's death. They did not provide details of the investigation.

Initially the police investigating the crime knew only that Thompson had been killed by ligature strangulation. They did not know what had been used as the ligature.

A search of Zimmerman's vehicle on February 27, 2000 revealed a hairbrush above the front passenger visor. DNA tests on two strands of hair found in the hairbrush confirmed that the hair was Thompson's.

A telephone cord was found in plaintiff's van. Dr. McGee, the medical examiner who performed the autopsy, stated it was possible that the telephone cord could have been the ligature used in the murder.

On or about March 3, 2000 defendant Trapp conducted a polygraph of Zimmerman. Based upon Trapp's scoring of Zimmerman's polygraph chart, Trapp interpreted the polygraph as "deception indicated."

On March 3, March 6 and April 4, 2000 defendant Adams interviewed Jim Stefanic, a friend plaintiff had mentioned in his statements. Defendants Larsen and Foster interviewed Stefanic on April 4, 2000 concerning any knowledge he had concerning the Thompson murder. Stefanic reported being in Thompson's house some

day before the murder. He chose not to take a polygraph examination. Stefanic's alibi was not documented by the police officers.

On March 15, 2000 the Eau Claire Police Department organized a traffic canvas in the neighborhood where Thompson's body had been found at the same time they believed the crime had occurred. Officer Piontowski stopped several individuals including Brice Rene. Rene specifically recalled driving through that area on the morning of February 26, 2000. He reported that at 5:30 a.m. that day he had seen a white van drive up the hill and turn onto Lee Street. Rene mentioned that he had seen a female passenger in the van who appeared to be either asleep or passed out. Officers then showed him a picture of Zimmerman's van, a white 1990 Dodge Caravan van. Rene was not certain that it was the van he saw.

A few days later Rene met with Detective Adams. Rene could not recall seeing the driver of the van but stated again that he had seen a female passenger either asleep or passed out. He believed that the female passenger was in her late thirties.

On or about May 15, 2000 Eau Claire police officers transported Rene to Madison, Wisconsin to undergo hypnosis to see if he could remember any additional details about the morning of February 26, 2000. Rene's recollections under hypnosis did not vary much from his previous statements. Rene stated in his

affidavit that he was not coerced or pressured into making statements concerning his observation of the white van.

In June 2000 Officer Larsen met with Maureen Horne, plaintiff's neighbor. Horne advised Larsen that at 3:00 p.m. February 26, 2000 Zimmerman appeared at her home near crying and with his hands shaking. He informed her that Kathy had died, that her body had been found on Margaret Street, that she had been strangled and that she had been disemboweled. Larsen asked Horne if she was sure about the information and she said she was. Horne prepared a written statement on June 13, 2000 recounting her February 26, 2000 conversation with plaintiff.

Horne stated in her affidavit that she had not been coerced or unduly pressured to make this statement. She also testified that she did not recall whether she had previously reported to police officers that plaintiff had told her the afternoon of February 26, 2000 that Thompson had been strangled.

On February 2, 2001 defendant Larsen swore out a criminal complaint charging Zimmerman with murder. The same date Circuit Court Judge Lenz found that probable cause existed that the crime of First Degree Intentional Homicide was committed by the defendant and issued a warrant for his arrest. The complaint included evidence showing plaintiff's obsession with Thompson, his inconsistent statements, his knowledge of the manner of death and location of the body prior to it being made public and testimony

that a van similar to his had been seen in the area with a female passenger who was either asleep or passed out.

Zimmerman was arrested for murder and was questioned as to his numerous recollections as to his whereabouts the morning of February 26, 2000. At that point he said he could not remember but that he was going to continue to say that he had gone home and gone to bed. He also said it was possible he had blacked out.

On February 12, 2001 plaintiff had a preliminary hearing before Judge Eric Wahl. Maureen Horne testified that on the afternoon of February 26, 2000 plaintiff had told her that Thompson had been strangled. Brice Rene testified that at about 5:30 a.m. on the morning of February 26, 2000 he saw a white van with a woman passenger who looked like she was sleeping or passed out in the neighborhood where Thompson's body was found. After testimony of 15 witnesses, Judge Wahl found sufficient evidence to bind plaintiff over for trial. The Court explained as follows:

There was a relationship, there was some testimony although admittedly it was some time prior but some evidence of some physical abuse. It was in September of '98. Some threats. There was obviously upset over a wedding and events. Probably the most important evidence at this point is the fact that he, Mr. Zimmerman, apparently knew circumstances about Miss, about the death of Miss Thompson and her body location, so forth, that wasn't public at the time or weren't public at the time he was having the conversation about the fact that the body was found up by Margaret Street, the fact that there had been a strangulation so I do find



that there is probable cause to bind Mr. Zimmerman over and do bind him over.

On May 8, 2001 Kenneth B. Olson, a Forensic Scientist/Trace Evidence Examiner with the State of Wisconsin Crime Lab, submitted a report which was forwarded to the City of Eau Claire Police Department on or about May 15, 2001. This report indicated that the tape lifts of the injured area of Kathleen Thompson's neck contained very short fiber fragments of blue and black cotton. Shortly thereafter the report was provided to the District Attorney who provided it the same day to plaintiff's defense counsel.

At plaintiff's trial on May 15, 2001 Maureen Horne testified that plaintiff had told her on the afternoon of February 26, 2000 that Thompson had been strangled. On May 16, 2001 Brice Rene testified that the morning of February 26, 2000 at around 5:30 a.m. he had seen a white van with a female passenger who was either asleep or passed out in the vicinity where Thompson's body was found.

At the May 2001 trial defendant Larsen testified that he had located cigarette butts in the vicinity of Thompson's body. He testified that testing was done but that no evidence was generated that provided insight into the crime. Larsen also testified that all of the prison inmates with whom Thompson had corresponded had been incarcerated the time of her murder. One inmate was not officially incarcerated but was basically under house arrest which meant he was prohibited from leaving the facility during the time

that the murder had occurred. The jury convicted plaintiff of murder.

At the sentencing hearing Judge Wahl stated as follows:

So although I firmly believe Mr. Zimmerman is guilty as charged I'm persuaded that the combination of his destructive relationship with Ms. Thompson fueled by substantial amounts of alcohol that were consumed before, after and during this period caused these tragic events to occur.

On appeal the Wisconsin Court of Appeals found in its August 12, 2003 decision that the evidence introduced at the trial was sufficient to sustain the jury's guilty verdict. The Court of Appeals also found that plaintiff's trial counsel was ineffective "due to his failure to present DNA evidence that excluded Zimmerman, offer alternative medical testimony and challenge Rene's hypnotically refreshed testimony." The Court found plaintiff was entitled to a new trial because the cumulative effect of trial counsel's deficiencies prejudiced plaintiff's defense.

Before the second trial in December 2004 animal hairs on Kathy Thompson's sports bra which was evidence in the case were tested. These animal hairs were found to be consistent with hair from Evan Zimmerman's dog. Although not analyzed for the previous trial, the hairs had been noted by Kenneth Olson at the Crime Lab in 2000.

After the second criminal trial was commenced in April 2005, a decision was made by the District Attorney to not continue the

prosecution of the matter. Since jeopardy had attached plaintiff can no longer be prosecuted for Thompson's murder.

The City of Eau Claire Police Department's rules prohibit police officers from failing to report to the Department any information concerning any crime or other unlawful actions or for making a false report. The rules of conduct also directed that officers communicate accurate and factual accounts of witness statements.

Plaintiff never filed a Notice of Injury or written claim under Wis. Stats. § 893.80(1)(a).

#### MEMORANDUM

Plaintiff claims that he was denied due process when the defendants withheld exculpatory evidence from him. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A failure by the police to disclose exculpatory evidence would violate due process. Newsome v. McCabe, 256 F.3d 747, 752(7th Cir. 2001)

Plaintiff argues that the defendants withheld exculpatory evidence concerning the testimony of Maureen Horne. Horne testified at both the preliminary hearing and at plaintiff's trial that plaintiff had told her on the morning of February 26, 2000

that Thompson had been strangled. She also signed a statement to this effect on June 13, 2000.

Plaintiff argues that there is no report prior to June 13, 2000 indicating that Horne advised police that plaintiff had told her on February 26, 2000 that Thompson had been strangled. Accordingly, he concludes that Larsen coerced her into making this statement in June 2000 and that her earlier written statements to police which did not include this information were destroyed.

This argument is highly speculative. Plaintiff has submitted no testimony by the witness Maureen Horne which supports his argument that she made an earlier written statement or that her statement was coerced. In fact, Horne testified that she was not coerced to make the statement. Further, her sworn testimony both at the preliminary hearing and trial was consistent with her statement that plaintiff told her on February 26, 2000 that Thompson was strangled. There is no evidence in the record that an earlier statement by Horne existed and was destroyed or that she was improperly coached by defendant Larsen. Plaintiff has failed to show that there was any statement by Horne that was exculpatory which was destroyed or suppressed by the defendants.

Plaintiff also argues he was denied due process because Rene's testimony was coerced and that this fact was withheld from plaintiff. Id., at 749-753. It is undisputed that on March 15, 2000 Brice Rene volunteered information that on February 26, 2000

he had seen a white van in the vicinity where the victim was found. He saw a female passenger in the van who appeared to be either asleep or passed out. Rene was hypnotized but his recollections did not vary much from his previous statements. This information which may or may not have been exculpatory was all provided to plaintiff's counsel. There is no evidence that any of Rene's statements were coerced or improperly coached. Plaintiff's attorney had the opportunity to cross examine Rene concerning his statements and the hypnosis. Rene's statements did not deny plaintiff due process.

Plaintiff argues that defendants' failure to document Stefanic's alibi for the time of the murder and to canvas the victim's neighborhood denied plaintiff due process. Plaintiff has not shown that had defendants taken these actions they would have discovered exculpatory evidence. These actions did not deny plaintiff due process because he had not shown that exculpatory evidence was withheld from him.

Plaintiff argues that the prosecution's theory that Thompson was strangled by a telephone cord denied plaintiff due process because defendants Larsen and Trapp failed to disclose evidence that black and blue cotton fibers were found in Thompson's neck wound. This evidence was not consistent with the suspicion that the telephone cord found in plaintiff's van was the murder weapon. This possibly exculpatory evidence was disclosed to defendant's

counsel around May 15, 2001 in time for him to cross examine Dr. McGee or any witness that testified concerning an opinion that the strangulation had occurred with a telephone cord. No exculpatory evidence concerning the fibers was withheld from plaintiff.

Plaintiff also claims that defendant Trapp falsified plaintiff's polygraph report but has presented no evidence to show that the report was false. In addition the report was not used against him so it was not material to his guilt or innocence.

Plaintiff's claim that he was denied due process because of the coercion of witnesses or the denial of exculpatory evidence must fail. All the evidence was provided to plaintiff's trial counsel. Any discrepancies in witness recollections or time accounts could have been addressed by plaintiff's counsel at trial. As a result of plaintiff's trial counsel failure to do so, the Wisconsin Court of Appeals found counsel ineffective and granted plaintiff a new trial. Plaintiff was not denied due process by the defendants.

Plaintiff also contends that defendants Larsen and Trapp manufactured evidence of animal hairs on Thompson's black bra before his second trial. There is absolutely no evidence to show that defendant Larsen or defendant Trapp manufactured this evidence. Instead defendant Larsen tested evidence which had been filed in the first case but never analyzed. Any claim that the animal hair was planted by defendants Larsen and Trapp in 2004 is

not believable because the animal hairs were in evidence in 2000. These animal hairs were found to be consistent with hair on Evan Zimmerman's dog. In addition this evidence was never used against plaintiff at his first trial and his second trial was dismissed. The testing of this evidence did not violate plaintiff's due process rights.

Plaintiff further contends that defendant Larsen lied under oath. Larsen testified that DNA testing of cigarette butts found at the scene of the crime did not provide any evidence that provided insight into the case. This was not a lie but an opinion of the evidence. Plaintiff's counsel had the DNA results and could have cross examined Larsen to determine that the DNA test specifically precluded plaintiff.

Plaintiff also claims that defendant Larsen lied at trial when he said that a person who had corresponded with Thompson was incarcerated. This was not in fact perjured testimony because the person was under house arrest while on parole and therefore confined at the time the murder occurred.

Plaintiff argues that he was imprisoned without probable cause. The existence of probable cause is an absolute bar to a § 1983 claim for false imprisonment. Fernandez v. Perez, 937 F.2d 370 (7th Cir. 1991). Judge Lenz found based on defendant Larsen's criminal complaint that there was probable cause that plaintiff committed the murder of Kathy Thompson. Judge Wahl found at the

preliminary hearing that there was probable cause to bind the plaintiff over for trial. A jury convicted plaintiff of the murder and the Court of Appeals found that the evidence introduced at trial was sufficient to sustain the jury's verdict.

Plaintiff has not presented any evidence to dispute the facts upon which probable cause was found. Since the facts are not disputed and there is no evidence presented of any false or fabricated evidence the Court finds as a matter of law that there is a reasonable basis for the existence of probable cause to arrest and imprison plaintiff for the murder of Thompson. Beauchamp v. City of Noblesville, 320 F.3d 733, 746 (7<sup>th</sup> Cir. 2003). Defendants are entitled to judgment as a matter of law on plaintiff's false arrest claim.

Plaintiff's constitutional rights were not violated by defendants. Accordingly, plaintiff's claims of conspiracy to violate his constitutional rights and failure to intervene to prevent a violation of his constitutional rights must also be dismissed.

In the interests of justice the Court will address defendants' motion for summary judgment on plaintiff's state law claim. To pursue state law claims, plaintiff is required under Wis. Stats, §893.80(1) to serve a written Notice of Circumstance of the claim and a Written Claim containing an itemized statement of relief sought before commencing an action. Plaintiff concedes that he did



not file either the notice or claim. Accordingly, plaintiff's state law claims must be dismissed.

ORDER

IT IS ORDERED that the defendants' motions for summary judgment are GRANTED.

IT IS FURTHER ORDERED that the motion of defendants City of Eau Claire, Larsen, Foster and Adams to strike and dismiss claims are DENIED as moot.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants and against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 12<sup>th</sup> day of September, 2006.

BY THE COURT:

s/

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JOHN C. SHABAZ  
District Judge