

<b>Wilkinson v City of New York</b>
2019 NY Slip Op 33301(U)
November 1, 2019
Supreme Court, New York County
Docket Number: 153808/2018
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 52

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DON RONALD WILKINSON,

Index No. 153808/2018

Plaintiff,

- against-

DECISION AND ORDER

THE CITY OF NEW YORK, and CYRUS R. VANCE  
in his capacity as District Attorney of  
New York County of the State of New York,

Defendants.

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**ALEXANDER M. TISCH,, J.S.C.:**

In this action for wrongful arrest and malicious prosecution, defendant Cyrus R. Vance (DANY) moves to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7).

The arrest and prosecution that plaintiff Don Ronald Wilkinson (Wilkinson) alleges was wrongful was on a charge of criminal sale of a controlled substance in the third degree (Penal Law § 220.39.1). It arose from an alleged sale of crack cocaine to an undercover officer in the vicinity of 142<sup>nd</sup> Street and Amsterdam Avenue in the County, City and State of New York on November 5, 2013. According to the affirmation and memorandum of law of DANY, an undercover officer gave Wilkinson \$30 in marked bills. Wilkinson entered a building and returned with a plastic bag containing crack cocaine and was arrested moments later with

\$10 of marked money still in his possession (*id.*, ¶¶ 1-2).

The grand jury returned an indictment on November 12, 2013. According to DANY, the case proceeded through motion practice and was adjourned to part 52 "for a possible disposition on consent" (*id.*, ¶ 4). Plaintiff plead guilty on July 8, 2014, but withdrew his plea upon learning of the potential collateral consequence of deportation because of his status as a non-citizen.

On September 24, 2014, Wilkinson's case was transferred to Manhattan Drug Court, part 92 upon DANY's consent, however, that court rejected Wilkinson's case, and the case was referred back to Justice Farber in Part 52.

Justice Farber's decision dismissing the indictment noted several grounds for his decision, primarily the fact that a guilty plea would leave Wilkinson open to deportation. The decision also noted that Wilkinson was disabled from a workplace injury, was dependent on prescription drugs, and was currently enrolled in a treatment program operated by Daytop Village. The decision also noted that Wilkinson was willing to plead guilty to a class B felony, but DANY would not consent. The foregoing conclusively demonstrates that Wilkinson did not meet the standard for asserting a malicious prosecution claim under 42 USC § 1983, which requires a showing that the underlying criminal proceeding "ended in a manner that affirmatively indicates his innocence" (*Lanning v. City of Glens Falls*, 908 F3d 19, 22 [2d Cir

2018)).

The following elements are required for a cause of action sounding in malicious prosecution: four elements:

"(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice"

(*Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000] [internal quotation marks and citations omitted]).

The complaint fails to state a cause of action and the documentary evidence (CPLR 3211 [a] [1]) conclusively establishes that the termination of the proceeding was not in favor of the accused because

"if the charge is withdrawn or dismissed out of mercy requested or accepted by the accused, there is no favorable termination. Mercy, it is reasoned, would not be appropriate if the prosecution were groundless; rather, mercy implies a belief in the guilt of the accused or at the least in the possibility that he may be guilty". Again, applying the exception to the common-law rule, we have held that the dismissal of a prosecution in the interest of justice did not constitute a favorable termination"

(*Smith-Hunter v Harvey*, 95 NY2d at 197 [internal citations omitted]; *Ward v Silverberg*, 85 NY2d 993 [1995]).

The Court of Appeals

"has consistently held that a criminal action is 'terminated in the accused's favor' for purposes of a malicious prosecution claim

where a judicial determination of the accused's innocence on the merits of the action has been made"

(*id.* at 994 [citation omitted]).

The Court of Appeals further held that

"any termination of a criminal prosecution, such that the criminal charges may not be brought again, qualifies as a favorable termination, so long as the circumstances surrounding the termination are not inconsistent with the innocence of the accused"

(*Cantalino v Danner*, 96 NY2d 391, 395 [2000]; see also *Bellissimo v Mitchell*, 122 AD3d 560 [2d Dept 2014]).

In *Bellissimo*, the Appellate Division, Second Department, stated that in *Cantalino*, the Court of Appeals

"explained that there was no per se rule that a dismissal in the interest of justice can never constitute a favorable termination (*id.* at 396). Rather, the Court set forth a case-specific rule, whereby the courts are to determine whether, under the circumstances of each case, the disposition was inconsistent with the innocence of the accused (*id.*). In the case before it, the Court of Appeals concluded that the interest-of-justice dismissal constituted a favorable termination, citing the Criminal Court's indication that it was dismissing the charges because they were unfounded (see *id.* at 396). It contrasted the case before it with a prior case, *Ward v Silverberg* (85 NY2d 993 [1995]), in which it had found that an interest-of-justice dismissal was not a favorable termination of the criminal proceeding. The Court explained that, in *Ward*, unlike in *Cantalino*, the Criminal Court had recognized that [the] plaintiff had committed the charged conduct, [but] it did not believe a criminal sanction was

appropriate" (*Cantalino v Danner*, 96 NY2d at 396). Thus, the criminal charges in *Ward* were dismissed out of mercy (*id.*). A dismissal out of mercy is fundamentally inconsistent with the accused's innocence".

(*Bellissimo*, 122 AD3d 561-562 [internal quotation marks and citations omitted]).

Under the circumstances of this case, the documentary evidence conclusively demonstrates that the termination of the criminal proceeding was not favorable to plaintiff because it was based on mercy not innocence.

Accordingly, it is ORDERED that the motion of defendant Cyrus R. Vance, in his capacity of District Attorney, New York County, to dismiss the complaint as against him, is granted and the complaint is dismissed insofar as asserted against him; and it is further

ORDERED that the action against the City of New York is severed and shall proceed; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in DCM, located in Room 106 of 80 Centre Street, on November 20, 2019 at 2:00 p.m.

This constitutes the decision and order of the Court.

Dated: November 1, 2019

E N T E R:



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J. S. C.