IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM D. BROWN,	§
	§ No. 370, 2012
Plaintiff Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
TROOPER CORPORAL DAY,	§ C.A. No. N11C-11-126
STATE OF DELAWARE,	§
	§
Defendants Below-	§
Appellees.	§

Submitted: January 18, 2013 Decided: February 26, 2013

Before HOLLAND, BERGER and JACOBS, Justices

ORDER

This 26th day of February 2013, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The plaintiff-appellant, William D. Brown, filed an appeal from the Superior Court's June 26, 2012 order granting the motion of the defendants-appellees, Trooper Corporal Day and the State of Delaware, for summary judgment.¹ We find no merit to the appeal. Accordingly, we affirm.

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¹ Brown also appeals the Superior Court's denial of his request for a transcript at State expense. He does not appeal the Superior Court's denial of his motion for default judgment.

- shoplifting incident that occurred at the Sears store in the Concord Mall, Wilmington, Delaware, on June 4, 2010. On June 7, 2010, in a separate incident, Corporal John Day, of the Retail Theft Unit of the Delaware State Police, responded to a report of shoplifting at the same Sears store. Corporal Day determined from video surveillance, witness statements and personal knowledge that it was Brown who stole a pair of sunglasses from the store on that date. Corporal Day obtained an arrest warrant for Brown, who was arrested on June 10, 2010. In addition to shoplifting, Brown also was charged with criminal trespass in connection with the June 4, 2010 incident, since he had been banned from the Concord Mall due to previous shoplifting incidents.
- June 18, 2010. At trial, witnesses identified Brown as the shoplifter and Day testified that Brown was a "prolific shoplifter." Ultimately, Brown was acquitted due to a typographical error in the warrant, which listed both the shoplifting and trespassing offenses as occurring on June 4, 2010. Corporal Day later arrested Brown under a new warrant dated June 18, 2010, which correctly listed the date of the shoplifting offense as June 7, 2010. That case subsequently was transferred from the Justice of the Peace Court to the

Court of Common Pleas. On March 16, 2011, the case was dismissed prior to trial when the victims failed to appear.

- (4) In January 2011, Brown filed a complaint in the Court of Common Pleas against Corporal Day and the State of Delaware alleging violations of 42 U.S.C. §1983, double jeopardy, prosecutorial misconduct, defamation and false arrest. Subsequently, the defendants filed a demand for a jury trial and the case was transferred to the Superior Court. In June 2012 the defendants moved for summary judgment. A hearing took place in the Superior Court on June 26, 2012 at which the Superior Court granted the defendants' motion for summary judgment.
- (5) In this appeal, Brown claims that a) the Superior Court erred when it granted the defendants' motion for summary judgment; and b) the Superior Court abused its discretion when it denied his motion for a free transcript of the June 26, 2012 hearing on the defendants' motion for summary judgment.
- (6) This Court reviews an appeal from the Superior Court's grant of summary judgment *de novo*.² Like the Superior Court, this Court must examine the record to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that

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² Hazel v. Delaware Supermarkets, Inc., 953 A.2d 705, 708-09 (Del. 2008).

there are no material facts in dispute and that the moving party is entitled to judgment as a matter of law.³ The moving party is entitled to summary judgment where the non-moving party fails to make a sufficient showing of proof on an essential element of the case on which he has the burden of proof.⁴

- (7) On a claim under §1983, the plaintiff must demonstrate that the defendant has taken an action under color of law that deprives him of a constitutional right.⁵ The alleged constitutional violation underlying Brown's §1983 complaint is his claim that he was charged and tried twice for the same shoplifting incident, which, according to Brown, amounted to double jeopardy in violation of the Fifth Amendment of the United States Constitution. Brown also alleged prosecutorial misconduct in connection with his double jeopardy claim.
- (8) The constitutional protection against double jeopardy is intended to protect a defendant from successive prosecutions for the same crime, multiple charges under separate statutes requiring proof of the same factual events, and multiple charges under the same statute.⁶ The test to determine whether separate counts constitute one or more offenses for

³ Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991).

⁴ Id. (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

⁵ Snell v. Engineered Systems & Designs, Inc., 669 A.2d 13, 22 (Del. 1995) (citing Gomez v. Toledo, 446 U.S. 635, 640 (1980)).

⁶ Spencer v. State, 868 A.2d 821, 822-23 (Del. 2005) (en Banc).

double jeopardy purposes is whether each count requires proof of at least one element that the other does not.⁷ In a bench trial, jeopardy does not attach until the first witness is sworn.⁸ On a claim of prosecutorial misconduct, the defendant must demonstrate that comments by the prosecutor prejudicially affected his substantial rights at trial.⁹

(9) The record in this case reflects that Brown was charged in two separate shoplifting incidents---one that occurred on June 4, 2010 and another that occurred on June 7, 2010. Because of a typographical error in the warrant that identified the June 7th shoplifting incident as occurring on June 4th, Brown was acquitted of the charge relating to the June 7th incident. Once the warrant was corrected, the matter was scheduled for trial. However, the charge relating to the June 7th incident was dismissed prior to trial because the victims did not show up. We find no double jeopardy violation on these facts, nor is there any evidence in the record of prosecutorial misconduct. Morever, a §1983 claim may only be brought against a "person" and, under both federal and Delaware case law, the State of Delaware is not a "person" for purposes of §1983.¹⁰ Because there is no

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⁷ Guinn v. State, 2010 WL 4812795 (Del. Nov. 24, 2010) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

⁸ State v. Dennis, 306 A.2d 729, 731 (Del. 1973).

⁹ Dailey v. State, 956 A.2d 1191, 1195 (Del. 2008) (en Banc).

¹⁰ State v. Sheppard, 2004 WL 2850086 (Del. Dec. 10, 2004) (citing Lapides v. Bd. of Regents, 535 U.S. 613, 617 (2002)).

dispute of material fact and the defendants are entitled to judgment as a matter of law, we conclude that the Superior Court properly granted summary judgment to the defendants on Brown's constitutional claims.

- (10) Brown's complaint also contained claims of defamation and false arrest. Brown's defamation claim is based upon testimony given by Day at Brown's shoplifting trial that Brown was a "prolific shoplifter." In Delaware, a communication is defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community or deter others from associating or dealing with the person. 11 On a claim of false arrest against a police officer, the plaintiff must establish that the officer is not entitled to the qualified immunity granted in the State Tort Claims Act, which protects State employees from civil liability for acts or omissions in the course of their duties, if undertaken in good faith, without gross or wanton negligence.¹²
- (11) There is no evidence in the record that Day defamed Brown when Day testified that Brown was a "prolific shoplifter." Brown had, in fact, been barred from the Concord Mall as the result of several previous

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Spence v. Funk, 396 A.2d 967, 969 (Del. 1978).
 Del. Code Ann. tit. 10, §4001.

shoplifting incidents.¹³ Nor is there any evidence that Day acted with gross or wanton negligence when he arrested Brown. Based upon the undisputed facts, the only reasonable inference to be drawn is that Day arrested Brown based upon his good faith belief that Brown had committed a crime.¹⁴ Because there is no dispute of material fact and Day is entitled to judgment as a matter of law, we also conclude that the Superior Court properly entered summary judgment in favor of Day on Brown's claims of defamation and false arrest.¹⁵

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

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¹³ The record reflects that Brown has been arrested 25 times and convicted 7 times on shoplifting charges.

¹⁴ *Tippitt v. Pope*, Del. Supr., No. 42, 1996, Berger, J. (Oct. 31, 1996) (while questions of negligence and bad faith are normally left to the jury, where, on a motion for summary judgment, the facts permit reasonable persons to draw but one inference, which is adverse to the non-moving party, the moving party is entitled to judgment as a matter of law). ¹⁵ We, likewise, find no abuse of discretion on the part of the Superior Court in denying Brown's request for a transcript of the June 26, 2012 hearing at State expense. *Guest v. Guest*, 2003 WL 22931400 (citing *United States v. MacCollum*, 426 U.S. 317, 330 (1976)). Brown's request in his opening brief for a copy of that transcript is moot, since the State attached a copy to its answering brief.