UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0981

September Term, 2015

TERRENCE NOLTON

v.

BREJON, INC., ET AL.

Woodward,
Leahy,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: August 11, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Erick McCoy ("Erick") was robbed at gunpoint while working at the Exxon gas station owned by his father, Brent McCoy ("Brent"). Erick reported the robbery and told the investigating officer that the robber had come into the gas station a few days before to try to sell him tools. Erick turned over to the police security footage of both events.

Twenty-eight days after the robbery, Erick reported to the police that he saw the robber in a Subway restaurant, but lost sight of him. About an hour later, Erick saw Terrence Nolton, appellant, and called the police, reporting that he saw the robber again. Police briefly detained Nolton before letting him go, and then, after Erick confirmed that Nolton was the robber, arrested Nolton. Nolton was interviewed and then incarcerated on a $125,000 bond. About a month later, Nolton was indicted for robbery and related charges. Ten days after being indicted, Nolton was released after his charges were *nolle prossed*.

Nolton filed suit in the Circuit Court for Prince George's County against appellees, Erick and Brent, Brejon, Inc. d/b/a Cherry Hill Exxon (collectively, "the McCoy defendants"), and Prince George's County ("the County"). Nolton's complaint alleged false imprisonment, malicious prosecution, and negligence on the part of the McCoy defendants, and a violation of Nolton's state constitutional rights on the part of the County. The McCoy defendants and the County filed motions for summary judgment, which the court granted.

Nolton presents five questions for our review, which we have reordered and rephrased as follows:[1]

1. Did the trial court err in granting summary judgment for the McCoy defendants on the false imprisonment claim?

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[1] Nolton's questions, as stated in his brief, are:

1. Was it error to grant summary judgment on the false imprisonment count in favor of the McCoys who instigated the arrest of Mr. Nolton (hereinafter "Nolton") by telling the police that they were 100% certain that Nolton had committed the robbery although the McCoys were in possession of video evidence that Nolton was not the robber?

2. Was it error to grant summary judgment on the malicious prosecution count in favor of the McCoys who instigated the prosecution of Nolton without probable cause although the McCoys were in possession of video evidence that Nolton was not the robber?

3. Was it error to grant summary judgment on the negligence count in favor of the McCoys who failed to exercise reasonable care by insisting that the police arrest Nolton although the McCoys were in possession of video evidence that Nolton was not the robber?

4. Was it error to grant summary judgment on the Maryland Declaration of Rights count in favor of P.G. County when County officers arrested and incarcerated Nolton yet failed to pursue readily available exculpatory evidence despite the repeated requests of Nolton, all while the County was in possession of video evidence that Nolton was not the robber?

5. Does evidence of actual malice exist to support a punitive damages claim?

2. Did the trial court err in granting summary judgment for the McCoy defendants on the malicious prosecution claim?

3. Did the trial court err in granting summary judgment for the McCoy defendants on the negligence claim?

4. Does evidence of actual malice exist to support a punitive damages claim against the McCoy defendants ?

5. Did the trial court err in granting summary judgment for the County on Nolton's state constitutional rights claim?

For the reasons set forth below, we affirm in part and reverse in part the judgment of the circuit court, and remand for further proceedings consistent with this opinion.

BACKGROUND

On July 30, 2012, Erick was robbed at gunpoint while working at Brent's Cherry Hill Exxon gas station. On the same day following the robbery, police officer James Boulden interviewed Erick and obtained a copy of the gas station's security camera footage. Erick told Officer Boulden that he recognized the robber as a person who had come into the gas station offering to sell him tools four days before. Officer Boulden viewed the security footage for the robbery in the gas station with Brent and obtained a copy.

Detective Edwin Flores was assigned to the case within a week after the robbery. About a week after the robbery, Brent and Erick gave Det. Flores the security footage of the person offering to sell Erick tools. Upon receiving the case file, Det. Flores reviewed both videos, but determined that the videos were "extremely poor quality. So based on that, I

couldn't do anything with that." In his deposition, Det. Flores stated that he could not recall whether he reviewed the videos again after his initial viewing.

On the morning of August 27, 2012, Erick called 911 and reported that he saw the robber in a Subway restaurant across the street from the gas station. Erick recognized the robber by his shoes, posture, "skinny legs," weight, and voice. While Erick was on the phone with the police, he saw the robber get into a white van with two women and drive away. About an hour later, Erick saw Nolton walking on the side of the road and called 911, saying that he had spotted the robber again. Police officer Nicholas Leonard responded and briefly detained Nolton to record his personal information. After Officer Leonard allowed Nolton to leave, Erick and Brent approached Officer Leonard and told him that Nolton was the robber. Officer Leonard detained Nolton again and called Det. Flores, who in turn called Erick to ask if Erick was certain as to his identification of the robber. Erick replied, "I am 100% that this is the guy because I saw his face." Det. Flores told Officer Leonard to arrest Nolton and bring him to the police station so that Det. Flores could interview him.

Nolton was arrested and transported to the police station, where he was interviewed by Det. Flores for approximately three hours. During the interview, Nolton repeatedly denied (1) that he was the robber; (2) that he had sold tools at the Cherry Hill Exxon, or had ever been in that Exxon; and (3) that he had been in the Subway restaurant that morning. Nolton also repeatedly asked Det. Flores (1) to have an "expert" review the videos so that he could

see that Nolton was not the robber, (2) to show Nolton the videos, (3) to "[b]ring the guy in" who identified him as the robber, and (4) to check his phone to corroborate his statement that he had been in his home all morning before going to the bus stop. Det. Flores did none of these things. Instead, after the interview, Det. Flores prepared a Statement of Probable Cause and Statement of Charges, and Nolton was transported to the Prince George's County Department of Corrections, where he was held on a $125,000 bond.

On September 25, 2012, Nolton was indicted for armed robbery, assault, theft, and charges related to the possession of a firearm. On October 5, 2012, Nolton was released after all of his charges were nolle prossed.

On April 4, 2014, Nolton filed a complaint against the McCoy defendants, Exxon Mobil Corp., and the County. On September 10, 2014, Nolton filed an amended complaint against the McCoy defendants and the County. (Exxon Mobil Corp. was dismissed by stipulation on September 17, 2014). The amended complaint alleged four counts: Count 1—false imprisonment of Nolton by the McCoy defendants; Count 2—malicious prosecution of Nolton by the McCoy defendants; Count 3—negligence on the part of the McCoy defendants; and Count 4—violation of Nolton's state constitutional rights under Articles 24, 25, and 26 of the Maryland Declaration of Rights by the County.

On May 11, 2015, the McCoy defendants filed a motion for summary judgment as to Counts 1 through 3. On May 18, 2015, Nolton filed an opposition to that motion. On May 26, 2015, the County filed a motion for summary judgment as to Count 4, to which

Nolton filed an opposition on June 5, 2015. On June 12, 2015, the County filed a reply to Nolton's opposition, and on July 2, 2015, the McCoy defendants filed a reply to Nolton's opposition.

After a hearing held on July 8, 2015, the circuit court issued a memorandum and order on July 13, 2015, granting summary judgment in favor of the McCoy defendants as to Counts 1, 2, and 3 and in favor of the County as to Count 4. On July 16, 2015, Nolton filed a notice of appeal.

STANDARD OF REVIEW

A trial court may grant a motion for summary judgment if (1) no genuine dispute as to a material fact exists, and (2) the party seeking summary judgment is entitled to judgment as a matter of law. *Tyler v. City of Coll. Park*, 415 Md. 475, 498 (2010). We perform an independent review of the record to determine whether there is a genuine dispute of material fact. *Id*. at 498-99. "A material fact is a fact the resolution of which will somehow affect the outcome of the case. Where a dispute regarding a fact can have no impact on the outcome of the case, it is not a dispute of material fact such that it can prevent a grant of summary judgment." *Meese v. Meese*, 212 Md. App. 359, 367-68 (2013) (citations and internal quotation marks omitted). Whether a trial court's grant of summary judgment was proper under Rule 2-501 is a question of law subject to *de novo* review. *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 14 (2004).

DISCUSSION

I. Tort Claims Against the McCoy Defendants

A. False Imprisonment

Nolton argues that, "[w]hen the McCoys instigated the arrest in this case by falsely telling the police that Nolton was the robber, they became liable for false imprisonment." According to Nolton, "[e]ffecting the arrest of an innocent person constitutes false imprisonment without regard to whether it is done with or without probable cause." Nolton contends that it is immaterial that the McCoy defendants did not personally detain him, because they instigated his arrest. Finally, Nolton argues that the assertions of the McCoy defendants that Nolton was the robber "is a question of fact for the jury and not dispositive of a false imprisonment claim." The McCoy defendants respond that the trial court correctly granted summary judgment in their favor on the false imprisonment claim, because there is no liability for false imprisonment for "merely giving information, in good faith, which leads to the wrongful arrest of an individual," and here, the McCoy defendants did not "knowingly give false information to the police."

This Court explained the tort of false imprisonment in *Allen v. Bethlehem Steel Corp.*:

> An action for false imprisonment arises when one unlawfully causes a deprivation of another's liberty against his will. It may also arise when one *knowingly* gives false information to a law enforcement officer which leads to another person's arrest. **Nevertheless, a person is not liable for false imprisonment when in good faith he or she provides information, however mistaken, to law enforcement officers.**

76 Md. App. 642, 649-50 (bold emphasis added) (italics in original) (citations omitted), *cert. denied*, 314 Md. 458 (1988). In other words, an eyewitness has no duty or obligation to verify his identification before reporting it to the police.

In the instant case, Erick, the robbery victim, made a positive identification of the robber at a Subway restaurant based on his shoes, voice, and physical appearance. Erick lost sight of the robber, but then, when he saw Nolton later the same day, he believed that Nolton was the robber based on his shoes, his build, and his posture. Erick's identification turned out to be mistaken, but the evidence adduced for summary judgment failed to show that the McCoy defendants *knowingly* provided a false identification of Nolton as the robber, or that the identification of Nolton as the robber was not in good faith. *See id*. at 649-50. Accordingly, Nolton's false imprisonment claim must fail.

B. Malicious Prosecution

Next, Nolton argues that the trial court erred in granting summary judgment on the malicious prosecution count, because the McCoy defendants instigated the prosecution of Nolton without probable cause. According to Nolton, the video footage of the robber and the person offering to sell tools to Erick, considered together, were conclusive as to Nolton's innocence, and "[t]he irrefutable evidence in the hands of the McCoys that Nolton was not the robber permits a finding of lack of probable cause and therefore an inference of malice." Nolton argues that the McCoy defendants' "mere assertion . . . that they believed their

accusation to be correct[] does not amount to probable cause when actual facts include an exculpatory video," and that "a failure to investigate may destroy probable cause." Nolton concludes that "there are no facts from which a jury could find probable cause."

The McCoy defendants respond that the trial court correctly granted summary judgment in their favor on the malicious prosecution claim, because the McCoy defendants did not institute criminal proceedings against Nolton, but merely provided information to the police. According to the McCoy defendants, Nolton failed to provide any evidence that Erick lacked probable cause to identify Nolton as the robber, or that Erick's identification of Nolton was unreasonable. The McCoy defendants contend that the grand jury's indictment of Nolton is prima facie evidence of probable cause, which defeats the "malice" element in malicious prosecution.

The elements of malicious prosecution stemming from a criminal charge are:

> 1. There has been a prosecution initiated or continued by the defendant against the plaintiff;
>
> 2. The prosecution has terminated in favor of the plaintiff;
>
> 3. The prosecution was brought by the defendant without probable cause; and
>
> 4. The prosecution was initiated with malice or with a purpose in mind other than bringing an offender to justice.

Bethlehem Steel, 76 Md. App. at 650-51 (citations and internal quotation marks omitted).

In the case *sub judice*, the trial court was correct in granting summary judgment for the McCoy defendants on the malicious prosecution count, because Nolton did not satisfy the first and fourth elements of malicious prosecution. As we stated in *Wood v. Palmer Ford, Inc.*:

> **The defendant may be liable either for initiating or for continuing a criminal prosecution without probable cause. But he cannot be held responsible unless he takes some active part in instigating or encouraging the prosecution.** He is not liable merely because of his approval or silent acquiescence in the acts of another, nor for appearing as a witness against the accused, even though his testimony is perjured, since the necessities of a free trial demand that witnesses are not to be deterred by fear of tort suits, and shall be immune from liability. On the other hand, if he advises or assists another person to begin the proceedings, ratifies it when it is begun in his behalf, or takes any active part in directing or aiding the conduct of the case, he will be responsible. The question of information laid before prosecuting authorities has arisen in many cases. **If the defendant merely states what he believes, leaving the decision to prosecute entirely to the uncontrolled discretion of the officer, or if the officer makes an independent investigation, or prosecutes for an offense other than the one charged by the defendant, the latter is not regarded as having instigated the proceeding**; but if it is found that his persuasion was the determining factor in inducing the officer's decision, or that he gave information which he knew to be false and so unduly influenced the authorities, he may be held liable.

47 Md. App. 692, 700-01 (1981) (emphasis added) (citations and internal quotation marks omitted).

In *Nasim v. Tandy Corp.*, the U.S. District Court for the District of Maryland dealt with a case similar to the facts in the case *sub judice*. 726 F. Supp. 1021 (D. Md. 1989),

aff'd, 902 F.2d 1566 (4th Cir. 1990). This Court described the District Court's decision in *Nasim* as follows:

> In *Nasim* . . ., the United States District Court for the District of Maryland considered the defendant's motion for summary judgment in a malicious prosecution case, in which the defendant claimed it did not institute or continue criminal proceedings against Nasim and there was probable cause to call the police to the Radio Shack store. Nasim had entered the Radio Shack store with a woman who attempted to use a stolen credit card and checks to make purchases. When the employee called to check the balance on the credit card, he was told by Master Card that the card was stolen and to call the police. At some point, the woman left the store and Nasim remained. The police were called and Nasim was arrested and charged with forgery and credit card offenses. The charging documents were filled out by the police. **In granting the motion for summary judgment [in favor of Tandy Corp.], the court found that Tandy employees did nothing more than call the police as Master Card suggested, identify Nasim as the holder of the stolen card, and testify at trial. The court also concluded that the police conducted their own independent investigation and that Tandy employees only provided truthful information to the police.**

Smithfield Packing Co., Inc. v. Evely, 169 Md. App. 578, 596-97 (emphasis added) (citations omitted), *cert. denied*, 396 Md. 10 (2006).

Here, as in *Nasim*, Erick merely identified Nolton as the robber, and left the decision to make an arrest, to conduct further investigation, to file charges, and ultimately to prosecute, to the police. *See* 726 F. Supp. at 1025-27 (D. Md. 1989) ("On the contrary, the police conducted their own investigation, including questioning [the appellant], before he was charged with any crime. . . . However, there has been no evidence presented that [the appellee] played any part in the determination of what charges were to be brought against

[the appellant]"). Therefore, providing a positive identification of a criminal suspect to the police does not, on its own, constitute initiation of proceedings for malicious prosecution purposes. *See Wood*, 47 Md. App. at 700 ("He is not liable merely . . . for appearing as a witness against the accused . . . ." (citing William L. Prosser, Law of Torts 836-37 (4th ed. 1971))).

Nolton also cannot establish the fourth element of malicious prosecution. As stated above, Erick believed that Nolton was the robber when he identified him. Because Erick and Nolton had no prior relationship and did not even know each other, there is no evidence that Erick had an ulterior motive when he identified Nolton as the robber. In other words, there are no facts in the record that suggest that the McCoy defendants had "a primary purpose in instituting the proceeding other than that of bringing an offender to justice"; rather, all the facts show is that Erick simply was mistaken in his identification of Nolton as the robber. *See Wood*, 47 Md. App. at 697 (citations and internal quotation marks omitted); *see also Montgomery Ward v. Wilson*, 339 Md. 701, 719 (1995) ("Mere negligence in instituting unjustified criminal proceedings against the plaintiff cannot satisfy the 'malice' element."). Accordingly, the trial court correctly entered summary judgment in favor of the McCoy defendants on the malicious prosecution count.

C. Negligence

Nolton argues that the trial court erred in granting summary judgment on the negligence count in favor of the McCoy defendants, because "[w]hen a person proactively

takes it upon himself to deprive another person of his liberty by having him arrested, he owes that person a duty to exercise reasonable care in doing so." According to Nolton, Erick breached that duty when he failed to compare Norton's appearance with the appearance of the robber in the videos in his possession.

The McCoy defendants respond that the trial court correctly granted summary judgment in their favor on the negligence claim, because Erick owed no duty to Nolton. According to the McCoy defendants, "[t]here is no Maryland case providing that a witness, who provides information to the police about a crime, can be sued for negligence if his identification is mistaken."

The elements of negligence are as follows:

> 1. the defendant owed a duty to the plaintiff;
> 2. the defendant breached that duty;
> 3. the plaintiff suffered actual injury; and
> 4. the injury proximately resulted from the defendant's breach.

Jones v. State, 425 Md. 1, 18 (2012).

In the case *sub judice*, Nolton has not cited to any Maryland case law, nor have we found any, that stands for the proposition that a witness who provides a positive identification of an alleged criminal to the police owes a duty to that alleged criminal. Nolton's reliance on *Brown v. Dart Drug Corp.*, 77 Md. App. 487 (1989), and *Montgomery Ward*, 339 Md. at 701, for the existence of such duty is misplaced.

In *Montgomery Ward*, the Court of Appeals stated:

> [A]lthough a false imprisonment action will not lie when the plaintiff was arrested by a police officer under a facially valid warrant wrongfully procured by a third party, a malicious prosecution action against the third party will lie if the latter acted out of malice, *i.e.*, acted from a wrongful or improper motive. Furthermore, if in this situation there was no malice, but the third party procured the warrant as a result of negligence, the wrongfully arrested plaintiff may recover damages from the procurer in an action for negligence.

339 Md. at 727. In the case *sub judice*, the McCoy defendants, the third party, did not "wrongfully procure[]" a "facially valid warrant"; all Erick did was provide a positive identification of Nolton as the alleged robber. *See id.*

In *Dart Drug Corp.*, the word "duty" does not appear. However, *Dart Drug Corp.* is similar to *Montgomery Ward*, and dissimilar to case *sub judice*, in that Dart Drug, the third party, "directly aided the conduct of the police investigation by examining witnesses and taking statements." 77 Md. App. at 492. Accordingly, the trial court did not err in entering judgment in favor of the McCoy defendants on the negligence count.

D. Punitive Damages

Finally, Nolton argues that actual malice is present in this case, which permits a punitive damages award. According to Nolton, the conduct of the McCoy defendants, "including a total lack of remorse, permits an inference of malice." Nolton argues that racial bias was a factor in this case, which makes summary judgment inappropriate.

The McCoy defendants respond that punitive damages are only available when a plaintiff proves actual malice by clear and convincing evidence. According to the McCoy defendants, Erick's mistaken identification of Nolton is not sufficient to sustain a claim for punitive damages, because there is no evidence of actual malice.

We agree with the McCoy defendants that there is no evidence of actual malice, meaning "conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill will or fraud." *Montgomery Ward*, 339 Md. at 729 n.5. The only evidence of actual malice identified by Nolton is that Erick had no regrets about causing the arrest of Nolton and that he would have done nothing different. From this evidence, Nolton claims that "a jury could infer malice." Such evidence, in our view, is woefully short of clear and convincing evidence of actual malice necessary for an award of punitive damages. *See Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 270-72 (2004).

II. State Constitutional Claims Against the County

Nolton argues that the trial court erred in granting summary judgment in favor of the County on the Maryland Declaration of Rights count, because the County did not have probable cause to incarcerate Nolton. According to Nolton, "[w]hen the government incarcerates a citizen while in possession of evidence that the person is innocent, the government becomes liable for a violation of that person's State Constitutional Rights." Nolton asserts that the two surveillance videos "contained irrefutable proof that Nolton was not the robber," and the County is liable for failing to consider this exculpatory evidence "in

spite of Nolton repeatedly begging them to look at that and other readily available exculpatory evidence." Nolton argues that "[t]he fact that the State's Attorney (a county employee), the very office in charge of conducting the grand jury proceeding, orchestrated the indictment before seeing the videos, and then *nolle pros'd* the case after seeing the videos, is powerful evidence in support of Nolton, not against him."

The County responds that the trial court did not err when it determined that County police officers had probable cause to arrest and charge Nolton, because Erick identified Nolton as the person who robbed him, and a positive identification is sufficient to establish probable cause. Furthermore, according to the County, "Nolton's claim that the police officers were required to do more is not supported by law or fact," because, "[i]n Maryland, police officers are not required to investigate and gather information to negate probable cause." The County argues that, according to Officer Boulden's and Det. Flores's professional judgment, the security video's quality was too poor to aid the investigation or exculpate Nolton as the robber, and "Nolton presented no material facts that a County employee had actual or constructive notice of Nolton's innocence yet maintained charges against him." Finally, the County contends that it is entitled to summary judgment, because Nolton (1) failed to establish the standard of care to support his claim that the County conducted an inadequate investigation, and (2) failed to cite any policy or custom that the County followed that violated Nolton's constitutional rights.

Maryland courts have "recognized that a common law action for damages lies when an individual is deprived of his or her liberty in violation of the Maryland Constitution." *Okwa v. Harper*, 360 Md. 161, 201 (2000). In his complaint, Nolton alleges that the County violated his state constitutional rights "[i]nsofar as County employees had access to the security footage and failed to review it while maintaining the wrongful incarceration of [Nolton]," and "insofar as County employees failed to reasonably investigate the crime including [Nolton's] witnesses."

Before going further, it is important to draw a distinction between the County's legal authority at the time of Nolton's arrest, and the County's legal authority to continue to detain Nolton after his arrest. It is settled law that a witness's positive identification of a suspect is sufficient to establish probable cause for an arrest. *See, e.g.*, *Kirby v. State*, 48 Md. App. 205, 210 (finding "that the requisite probable cause was supplied by the victim" when she informed police "that she had been sexually assaulted several weeks previously and that the gentleman walking westbound on the opposite side of the road was responsible for said assault"), *cert. denied*, 291 Md. 777 (1981). Because of Erick's positive identification of Nolton as the robber, the County had probable cause to arrest Nolton.

Such probable cause, however, is not perpetual. In *State v. Dett*, a police officer stopped Dett for a traffic violation on a Friday afternoon. 391 Md. 81, 85 (2006). The officer ran Dett's driver's license and discovered an outstanding arrest warrant for "Vanessa Hawkins 'AKA Evelyn Dett.'" *Id*. The warrant contained Hawkins's SID (State

Identification) number, which "is a unique number directly linked to an individual's fingerprints." *Id*. There was also a commitment order "directing the warden to receive into his custody the body of Vanessa Hawkins." *Id*. at 86. The officer arrested Dett and delivered her to central booking. *Id*. Dett was fingerprinted, and her prints were sent to the Central Records unit, which responded within a half hour with a SID number that was different from the one associated with the Hawkins arrest warrant. *Id*. "At some point during the evening, the discrepancy in SID numbers was noted," and the director of Central Records "sent a 'SID Problem Form' to the shift commander," noting the two SID numbers, pointing out "*that the problem would keep her from being released*, and asking 'Please clarify with fingerprint the correct # to be used.'" *Id*. at 86-87 (italics in original). Meanwhile, Dett was transferred to the Detention Center. *Id*. at 86. Central Booking also noticed discrepancies in dates of birth, social security numbers, height and weight between Hawkins and Dett. *Id*. at 87-88.

> Despite these unexplained inconsistencies . . . and the additional information that could have led to some clarification (the probation officer's number, the FBI number, the prior CBIC contact information) no further effort was made over the weekend to investigate whether the person being held, Ms. Dett, was, in fact, the Vanessa Hawkins who was the subject of the warrant and commitment order.

Id. at 88.

On Monday, Central Booking received a response that Dett and Hawkins were two different people. *Id*. On Tuesday, Central Records sent a request to the Circuit Court for a "court seal + true test" for Hawkins. *Id*. at 89. Within the hour, the sheriff sent an order to

release "Vanessa Hawkins . . . noting 'WRONG DEFENDANT.'" *Id*. Upon receipt of the order, Dett was released. *Id*.

The Court of Appeals held in *Dett* that the State may be found liable under Article 24 of the Maryland Declaration of Rights

> when (1) the plaintiff is arrested and brought to a State detention facility by a police officer in the mistaken belief that the plaintiff is the person against whom an arrest warrant has been issued, (2) the detention facility learns through its own investigation that the plaintiff is probably not the person named in the warrant or in an implementing commitment order issued by the local sheriff and there is no other legal basis for holding the plaintiff, and (3) the detention facility nonetheless continues to detain the plaintiff for a significant period of time.

Id. at 84-85.

The Court continued:

> **It is important to keep in mind . . . that the act of arrest is ordinarily a momentary event.** In *Bouldin v. State*, 276 Md. 511, 515-16 (1976), we defined an arrest as "the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested." In *State v. Evans*, 352 Md. 496, 514-15 (1999), we stressed the immediate physical nature of the encounter and held that whether the officer has any intent that the seizure lead to a prosecution has no bearing on whether an arrest has occurred. Once the physical requirements for an arrest have been met along with the intent to seize and detain, the arrest is complete, and, although the person may remain "under arrest," the arrest thereafter becomes a continued detention.

> **This becomes important because the legal justification for the arrest based on the identity of the arrestee can dissipate over time. The detaining authority may come into possession of information, not known at the time of arrest or not known at some earlier point in the detention, which, by establishing that the person being detained is not, in fact, the person authorized to be detained, may cause the legal justification relating to identity to disappear. The standards used to determine legal justification remain the same, but, in the course of a continuing detention, their application needs to be reexamined whenever changes in the factual underpinning of their application become known.** That, indeed, is what this case is all about.

Id. at 94 (emphasis added).

Similarly, in *Prince George's County v. Longtin*, Longtin was arrested, interrogated for over twenty-seven hours, and charged with the rape and murder of his wife. 419 Md. 450, 459-60 (2011). He was held in prison for over eight months. *Id*. at 462. During Longtin's imprisonment, the Prince George's County Police Department (the "Department") obtained exculpatory DNA evidence, as well as evidence of a serial rapist in the area where Longtin's wife was killed, but failed to inform Longtin or release him. *Id*. Only when the Department confirmed, through a DNA match, that the crime was committed by the other suspect, did the Department release Longtin from prison. *Id*. Longtin sued the police officers involved in his arrest and interrogation, as well as Prince George's County, for false arrest, malicious prosecution, constitutional violations, and other torts, and obtained a jury verdict totaling $6.2 million. *Id*. at 463-66.

The Court of Appeals affirmed the jury verdict for a constitutional deprivation, holding, among other things, that Longtin produced enough evidence to support a "pattern or practice" of unconstitutional policies. *Id*. at 498. The Court noted that

> Longtin clearly introduced evidence of unconstitutional actions committed *against him*. He called as witnesses his interrogating officers and elicited testimony regarding the illegal actions they took in arresting and interrogating him. **He introduced evidence about the exculpatory DNA tests, and established that the officers did little, if anything, after learning he was excluded. This evidence was sufficient to support a verdict of constitutional deprivation in his case.**

Id. at 496-97 (bold emphasis added) (italics in original).

In the case *sub judice*, the County police arrested and charged Nolton on the basis of Erick's identification of Nolton as the robber. Erick, however, told the police that the robber was the same man as the one who had entered his shop on July 26, four days before the robbery, and offered to sell Erick some tools; Erick also provided the police with video surveillance of both the robbery and the earlier attempt to sell him tools.

The County had no independent evidence to corroborate Erick's identification of Nolton as the robber—no fingerprints, no DNA evidence, no physical evidence, and no other witnesses. The July 26 video clearly shows that the man who tried to sell Erick tools appeared to be in his twenties, was not bald, and did not have a moustache. Nolton, on the other hand, is forty-four years old, bald, and has a moustache. Thus the July 26 video constituted exculpatory evidence, because that video conflicted with and undermined the

factual basis for the probable cause for the arrest, namely, Erick's positive identification of Nolton on August 27, 2012, nearly one month after the robbery. A reasonable jury could find that the County, which already had the video in its possession, failed to act upon that exculpatory evidence.

Furthermore, eyewitness identifications have been the subject of criticism regarding their reliability. As the Court of Appeals stated in *Gunning v. State*:

> **Not just psychologists but courts, including the United States Supreme Court, have recognized that eyewitness identifications are often inaccurate and unreliable and need to be viewed with some caution.** *See United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Branch v. State*, 305 Md. 177, 186-90, 502 A.2d 496, 500-02 (1986) (Eldridge, J., dissenting); Vitauts M. Gulbis, *Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony—state cases*, 23 A. L. R. 4th 1089 (1983).

347 Md. 332, 356 (1997) (emphasis added) (footnote omitted). Here, as previously stated, the County had no evidence to corroborate Erick's eyewitness identification of Nolton as the robber a month after the robbery.

Under the principles of *Dett* and *Longtin*, we conclude that there is sufficient evidence to create a genuine dispute of material fact as to whether the County's continued detention of Nolton constituted a violation of Article 24 of the Maryland Declaration of Rights. Again, the probable cause for Nolton's arrest was based solely on an eyewitness identification one month after the crime, with no independent, corroborating evidence to support that

identification. From the day of Nolton's arrest, the County was in possession of exculpatory evidence in the form of the July 26 and July 30 videos and failed to act on such evidence, even after Nolton repeatedly and consistently told Det. Flores that he was not the robber, that he had never been to the Cherry Hill Exxon station, and that he was not the person in either the July 26 or July 30 videos. In light of the aforesaid evidence, a reasonable jury could conclude that further investigation by the police would have removed any legal basis for continuing to detain Nolton. Accordingly, the trial court erred in granting summary judgment in favor of the County on Count 4 of Nolton's amended complaint.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED AS TO COUNTS 1, 2, AND 3, REVERSED AND REMANDED FOR TRIAL AS TO COUNT 4; COSTS TO BE PAID 75% BY APPELLANT AND 25% BY PRINCE GEORGE'S COUNTY.