C.A. No. 07-15931

D. Ct. No. CV-04-00264-TUC-JMR

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Terrence Bressi,

Plaintiff-Appellant,

v.

Michael Ford; Eric O'Dell; George Traviolia; Richard Saunders, and the United States of America,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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Date Mailed: October 18, 2007

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A. District Court Jurisdiction

The district court had subject matter jurisdiction as to the malicious prosecution claim under the Federal Tort Claims Act (FTCA) based on 28 U.S.C. § 1346(b) and 28 U.S.C. § 2674 *et seq.*

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on May 21, 2007. (CR 132; SER/USA 198.) 1/

C. Timeliness of Appeal

Following the entry of the judgment on May 21, 2007, plaintiff filed an amended notice of appeal on June 1, 2007. (CR 134; SER/USA 200-01.) The notice was timely pursuant to Fed. R. App. P. 4(a).

1/ The abbreviation "CR" refers to the Clerk's Record and will be followed by the pertinent document number. The abbreviation "SER/USA" refers to the Defendant-Appellee United States of America's Excerpts of Record.

IV. ISSUES PRESENTED

A. WHETHER PLAINTIFF HAS WAIVED HIS MALICIOUS PROSECUTION CLAIM ON APPEAL BECAUSE HE FAILED TO PROVIDE ARGUMENT OR SUPPORT FOR THAT CLAIM.

B. WHETHER THE DISTRICT COURT CORRECTLY GRANTED DEFENDANT UNITED STATES OF AMERICA SUMMARY JUDGMENT ON PLAINTIFF'S MALICIOUS PROSECUTION CLAIM UNDER THE FEDERAL TORT CLAIMS ACT.

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings.

Plaintiff initially filed a complaint in Pima County Superior Court in Tucson alleging Constitutional claims and malicious prosecution against the four individual defendant officers of the Tohono O'odham Police Department. This action was removed by the United States to U. S. District Court in Tucson by the filing of a notice of removal on May 19, 2004. (CR 1; SER/USA 1-12.)

The district court dismissed the action without prejudice as to the United States on January 7, 2005, based on Plaintiff's failure to comply with the administrative claim requirement of the FTCA. (CR 21, SER/USA 13-27.)

On September 22, 2005, Plaintiff filed a motion for leave to file his Third Amended Complaint alleging Constitutional claims against the individual officers and a malicious prosecution claim against the United States. (CR 60, 66; SER/USA 28-32; 50-54.) On September 27, 2005, the district court granted the motion. (CR 65; SER/USA 48-49.) Defendant United States filed an answer on January 12, 2006. (CR 71; SER/USA 55-58.)

On February 2, 2007, Defendant United States filed a motion for summary judgment. (CR 115, 116; SER/USA 59-64; 65-139.) Plaintiff filed a response on

March 5, 2007. (CR 118, 119, 120.) Defendant filed a reply on April 3, 2007. (CR 126; SER/USA 155-189.)

On May 18 and 21, 2007, the district court entered an order and judgment granting summary judgment for the United States. (CR 131, 132; SER/USA 193-98; 199.)

Plaintiff filed an amended notice of appeal on June 1, 2007. (CR 134; SER/USA 200-01.)

B. Statement of Facts.

On December 20, 2002, Plaintiff Terrence Bressi was stopped at a sobriety checkpoint on Arizona State Route 86. The traffic checkpoint was operated by the Tohono O'odham Police Department (TOPD). (CR 66, Complaint, p. 2, ¶¶ 2, 4; SER/USA 51.) Plaintiff Bressi was directed to present his driver's license to the officers at the checkpoint and he did not comply. (CR 116, Defendant United States' Statement of Facts in Support of Motion for Summary Judgment ("USMSJ/SOF") Exhibit A, Deposition of Michael Ford ("Ford Dep."), pp. 32-36; SER/USA 81-85; Exhibit B, Deposition of George Traviolia II ("Traviolia Dep."), pp. 34- 36; SER/USA 99-101; pp. 81- 82; SER/USA 104-05; p. 99; SER/USA 109.)

Since traffic was backing up and an accident had occurred, Plaintiff was directed to either pull his vehicle over to the side of the road or get out of his vehicle;

he refused and went limp, forcing the officers to physically remove him and then move his truck. (CR 116, USMSJ/SOF, Exhibit C, Deposition of Eric O'Dell ("O'Dell Dep."), pp. 28 - 30; SER/USA 135-37; Exhibit B, Traviolia Dep., pp. 82 - 83; SER/USA 105-06.)

Officer Traviolia issued Bressi a citation for two misdemeanor offenses: failure/refusal of operator to exhibit driver's license in violation of Arizona Revised Statutes (A.R.S.), Section 28-1595(B), and failure to obey an officer while directing traffic in violation of A.R.S. §28-622(A). (CR 116, USMSJ/SOF, Exhibit B, Traviolia Dep., p. 36-38; SER/USA 101-103; Exhibit 1 to deposition, p. 4, SER/USA 113.) [2/]

The district court found that the officers had probable cause to issue Plaintiff the two citations based on the clear failure of the Plaintiff to (1) present his driver's license on demand of the officer, and (2) move or exit his vehicle as directed by the officer. (CR 124, pp. 6-7; SER/USA 145-46; CR 131, pp. 4-5; SER/USA 196-97.)

[2/] A.R.S. § 28-1595(B) provides, in pertinent part: "After stopping as required by subsection A of this section, the operator of a motor vehicle who fails or refuses to exhibit the operator's driver license as required by § 28-3169 ... is guilty of a class 2 misdemeanor."

A.R.S. § 28-3169(A) provides, in pertinent part: "A licensee shall have a legible driver license in the licensee's immediate possession at all times when operating a motor vehicle. On demand of ... a police officer... a licensee shall display the license."

A.R.S. § 28-622(A) provides: "A person shall not willfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control, or regulate traffic."

Officer Traviolia learned later in January 2003, after the initial citation hearing date of January 3, 2003, that the charges had been dismissed because the citation had not arrived at the Justice Court on time. The Pima County Justice Court minute entry of January 8, 2003, dismissing the charges specified that the case was dismissed without prejudice and provided that "The officer may re-file this charge." (CR 116, USMSJ/SOF, Exhibit D, Minute Entry, January 8, 2003, Justice Court Precinct No. Three, Pima County, Case No. J-1003-TR-200300083; SER/USA 139.)

Officer Traviola resolved to re-file the charges at that time, but, due to other caseload duties, forgot about it until he received Plaintiff's administrative claim letter on June 16, 2003. Four days later, he re-filed the charges. He did not refile the charges in retaliation for receiving the administrative claim letter. (CR 66, Complaint, p. 3, ¶¶ 10 - 11; SER/USA 52; CR 116, USMSJ/SOF, Exhibit B, Traviolia Dep., pp. 83-85; SER/USA 106-108.)

The refiled charges were dismissed by the justice of the peace on the day of trial after a pre-trial hearing where the Deputy County Attorney prosecuting the citations informed the court that the officers could not produce subpoenaed records pertaining to the checkpoint. (CR 126, Defendant United States Reply to Plaintiff's Opposition to Motion for Summary Judgment, Exhibit A, Deposition of Lt. Michael Ford, p. 72; SER/USA 174; CR 116, USMSJ/SOF Exhibit B, Traviolia Dep. Exhibit

3 to deposition, pp. 1-2, 5; SER/USA 116-17, 120.; Deposition of Lt. Ford, pp. 62-66; ER 95-96.)

The district court found that the decision to proceed was based on the independent decision of a prosecutor. (CR 131, p. 5; SER/USA 197.)

Defendant-Appellee United States in this brief addresses the issues pertaining to the Federal Tort Claim Act malicious prosecution allegation. The individual officer defendants-appellees will address the Constitutional claims pertaining to the claims brought under Title 42 U.S.C. Section 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

VI. SUMMARY OF ARGUMENT

Plaintiff was cited by Tohono O'odham police officers at a sobriety checkpoint for failure to present his driver's license and for failure to obey an officer's direction to move his vehicle out of the traffic lane. Those citations were subsequently dismissed after a pre-trial hearing wherein the officers failed to produce documents pertaining to the checkpoint. Plaintiff sought damages under the FTCA for malicious prosecution. However, he has waived his claim that the district court improperly granted summary judgment on his malicious prosecution claim by his failure in this appeal to present any argument or authority in his brief in support of that claim.

Even assuming that he sufficiently raised the issue here, the record establishes that the district court correctly entered summary judgment for the United States. There was no genuine issue of fact below that Plaintiff refused to present his driver's license when directed by the officers and that he failed to obey their direction to move his vehicle out of the traffic lane. Since these actions constituted probable cause to issue the citations, they are an absolute defense to malicious prosecution under Arizona law. Furthermore, there was an independent prosecutorial decision to proceed with the case which also precludes the malicious prosecution claim.

VII. ARGUMENT

A. PLAINTIFF HAS WAIVED HIS MALICIOUS PROSECUTION CLAIM ON APPEAL BECAUSE HE FAILED TO PROVIDE ARGUMENT OR SUPPORT FOR THAT CLAIM.

In this appeal, Plaintiff sets forth six issues. (Op. Br. at 1-2.) The last two issues pertain to his malicious prosecution claim against the United States. However, his brief does not discuss these issues. He asks this Court "to find that he has alleged sufficient facts to defeat the motion for summary judgment on the malicious prosecution claim" and to reverse the district court's grant of summary judgment for the United States. (Op. Br. at 17.) He provides no reference to the record to justify that request. He makes no other arguments in which he cites to the record or to legal authority on the issue of malicious prosecution.

A party waives a claim if the party fails to present any argument or pertinent authority in support of the claim. *See Milne v. Hillblom*, 165 F.3d 733, 736 n.6 (9th Cir. 1999). This is based on the failure to comply with Fed. R. App. P. 28(a)(9) (brief must contain "appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies"). *See National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1049 n.3 (9th Cir. 2000) (party waives issue if presentation of it does not comply with Fed. R. App. P. 28(a)(9)); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir.

1996) ("summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal"); *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 47 n.6 (1st Cir. 2002) (party waived argument raised by reference to district court filing because "[f]iling a brief that merely adopts by reference a memorandum previously filed in the district court does not comply with the Federal Rules of Appellate Procedure" and "it is a practice 'that has been consistently and roundly condemned by the Courts of Appeals") (quoting *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 396 n.6 (4th Cir. 1994)) (citation omitted); *Perillo v. Johnson*, 79 F.3d 441, 443 n.1 (5th Cir. 1996) (habeas petitioner waived issues she attempted to incorporate on appeal by reference to her district court petition).

Thus, by failing to provide argument that supports his bald malicious prosecution claim, the Plaintiff has waived that claim.

B. THE DISTRICT COURT CORRECTLY GRANTED DEFENDANT UNITED STATES SUMMARY JUDGMENT ON PLAINTIFF'S MALICIOUS PROSECUTION CLAIM UNDER THE FEDERAL TORT CLAIMS ACT.

The malicious prosecution argument is waived as stated earlier. If addressed, it is without merit.

1. Standard of Review

Review of a grant of summary judgment is governed by the same standards applied by the district court under Fed. R. Civ. P. 56(c). *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997). Under those standards, this Court, viewing the evidence in the light most favorable to the non-moving party, must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998). This Court may not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Covey v. Hollydale Mobilehome Estates,* 116 F.3d 830, 834, *amended,* 125 F.3d 1281 (9th Cir. 1997). This Court may affirm an order granting summary judgment on any ground finding support in the record. *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002).

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, the district court correctly applied the relevant substantive law and there are no genuine issues of material fact. *Henderson,* 305 F.3d at 1055-56. A motion for summary judgment will be granted in favor of the moving party if the opposing party fails: (1) to produce evidence to support the existence of all essential elements on which the opposing party bears the burden of proof; and (2) to show that "there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Celotex Corp. v. Catrett,* 477 U. S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The essential inquiry is "whether [the evidence] is so one-sided that one party must prevail as a matter of law." *Id.*

2. Argument

a. The District Court's Probable Cause Finding is Supported by the Absence of Any Genuine Factual Dispute in the Record.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson,* 477 U.S. at 247-48 (emphasis added). A fact is only "material" if it is critical to, or might affect, the outcome of the suit under the governing law. *Id.* at 248. A dispute about a

material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* Furthermore, conclusory self-serving affidavits lacking detailed facts and any supporting evidence cannot defeat a motion for summary judgment. *Federal Trade Commission v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1996). In short, as observed by this Court, "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Building Products, Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987).

There are no genuine issues of material fact here with respect to the issue of probable cause to cite Plaintiff for the traffic violations. It is abundantly clear from the record that Plaintiff refused to present his driver's license when directed by the officers. His refusal to do so was his *raison d'etre* for his actions that evening. In his brief he acknowledges that Officer Ford asked to see his driver's license and that "[i]n lieu of providing the driver's license," he gave the officer the name and address of his employer. (Op. Br. at 7.) It is also clear that he did not comply with the officers' directions to move his vehicle to the side of the road and had to be physically pulled from the vehicle so that an officer could then move it out of the traffic lane. Thus the district court correctly found that Plaintiff clearly failed to either produce his driver's license or to move or exit his vehicle as directed.

b. The District Court Correctly Concluded that Probable Cause and Independent Prosecutorial Decision Were Complete Defenses.

Plaintiff's malicious prosecution claim under Arizona tort law may be defeated by the affirmative defenses of probable cause to issue the charges and by independent prosecutorial to proceed with the charges. Both apply here to Plaintiff's claim.

Under the FTCA, common law torts are defined by the law of the state where the act occurred. 28 U.S.C. § 1346(b)(1). In Arizona, "[t]he essential elements of malicious prosecution are (1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with defendants as prosecutors, (4) actuated by malice, (5) without probable cause, and (6) causing damages." *Slade v. City of Phoenix*, 112 Ariz. 298, 542 P.2d 550, 552 (1975), citing *Overson v. Lynch*, 83 Ariz. 189, 317 P.2d 948 (1957). *See also, Wood v. Kesler*, 323 F.3d 872, 881-82 (11th Cir. 2003). Plaintiff cannot prevail on a malicious prosecution theory since the existence of probable cause is an absolute defense. *Slade*, 541 P.2d at 553; *Hockett v. City of Tucson*, 139 Ariz. 317, 678 P.2d 502, 505 (Ariz. App. 1983); *Whitlock v. Boyer*, 77 Ariz. 334, 271 P.2d 484, 487 (1954).

The existence of probable cause is a question of law to be determined by the court. *Hockett*, 678 F.2d at 505; *Slade*, 541 P. 2d. at 553. Probable cause may exist despite the fact that the charges are subsequently dismissed or the defendant is found

not guilty. *Id.* Because the Tohono O'odham officers cited Plaintiff for a state offense, probable cause is determined by Arizona law. Probable cause to believe that a traffic offense had been committed arises out of an Arizona statute:

> [Arizona Revised Statute] subsection 13-3883(A)(4) [3/] ... plainly grants authority to arrest a person for a misdemeanor offense if the officer has probable cause to believe both that the offense has been committed and that the person to be arrested has committed the offense.

State v. Keener, 73 P.3d 119, 121 (Ariz. App. 2003). Probable cause to arrest for a violation of A.R.S. §28-1595(B) is based on the simple failure of a vehicle operator to produce his driver's license to an officer upon demand. *State v. Bonillas*, 3 P.3d 1016 (Ariz. App. 1999). "The thrust of Part B of this statute is to penalize motorists who refuse to display their driver's licenses . . ." *Bonillas* at 1017, *quoting State v. Boudette*, 791 P.2d 1063, 1065 (Ariz. App. 1990) (upholding similar language in A.R.S. § 28-1075(B), the predecessor statute of § 1595(B)). Here, the existence of probable cause was established by the clear failure of Plaintiff: 1) to present his

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[3/] A.R.S. § 13-3883(A)(4) permits an officer to make a warrantless arrest if he has probable cause to believe: "A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense . . .."

driver's license on demand of the officer, and 2) to move or exit his vehicle as directed by the officer. [4/]

The case went to a hearing on December 9, 2003, at which time the case was dismissed based on a discovery dispute over production by the prosecution of the TOPD's operational plan for the checkpoint. The case was handled for the county by a Deputy County Attorney from the Pima County Attorney's Office. (CR 116, USMSJ/SOF, Exhibit B, Traviolia Dep., Exhibit 3; SER/USA 114-117.) Thus there was an independent prosecutorial decision to proceed with the case. *Walsh v. Eberlein*, 114 Ariz. 342, 560 P.2d 1249, 1252 (Ariz. App. 1977) (malicious prosecution action will not lie where the criminal prosecutor judges the propriety of proceeding with the case and acts upon his own initiative in doing so); cf. *Gowin v.*

[4/] Although he does not make this argument on appeal, Plaintiff claimed below that he could not have violated A.R.S. § 1595(B) because the officers eventually found his driver's license. He cited A.R.S. § 1595(E), which provides that there shall be no conviction if the cited person produces other identification in conformance with § 1595(B)(1) to (5) *and* later produces a driver's license to the court which was valid at the time. This argument was, of course, without merit. The defense provided in § 1595(E) is designed for one who inadvertently forgot to bring his driver's license, not for individuals like Plaintiff who in fact had his driver's license and refused to display it on demand. In fact, he never produced an alternative identification at the scene, and, for obvious reasons, did not later produce a valid driver's license to a court. The officers found it on the scene despite Bressi's best efforts to withhold it. As the *Bonillas* court noted, the thrust of the statute is to penalize those who *refuse* to produce their driver's licenses. *State v. Bonillas*, 3 P.3d at 1017.

Altmiller, 663 F.2d 820, 823 (9th Cir. 1981) (independent decision of prosecutor to proceed with criminal charge pretermits malicious prosecution liability).

c. The District Court Properly Rejected Plaintiff's Constitutional Challenges to the Issuance of the Citations.

As noted in Argument A above, Plaintiff has waived this argument.

Much of Plaintiff's brief is directed at the constitutionality of the sobriety checkpoint conducted by the TOPD officers. Assuming that he does so in the civil tort law context, Plaintiff conflates the Fourth Amendment reasonable suspicion vehicle stop issue with the civil tort law affirmative defense of probable cause to cite for the traffic violations. To the extent that he claims that the checkpoint was constitutionally deficient and, therefore, there could not have been probable cause to detain and question Plaintiff, he is essentially arguing that the district court should have applied the exclusionary rule to preclude an affirmative defense by the government that there was probable cause to cite him for his subsequent traffic citations. The Plaintiff is wrong.

First, Plaintiff's challenge to the constitutionality of the checkpoint was foreclosed by the district court's orders in this matter of September 27, 2005, and March 28, 2007. (CR 64 and 124; SER/USA 33-47; 140-154), granting summary judgment to the TOPD officers on Plaintiff's complaint against the officers for

alleged Fourth Amendment violations arising out of their conduct of the checkpoint. The district court found that the officers had tribal immunity from liability for the roadblock, and thus were not liable for making an illegal stop. (CR 124, Order, March 28, 2007, pp. 7 - 8; SER/USA 146-47.)

Second, the Fourth Amendment exclusionary rule generally does not apply to civil proceedings. *Townes v. City of New York*, 176 F.3d 138, 149 (2d Cir.1999) ("the fruit of the poisonous tree doctrine is not available to assist a § 1983 claimant"); *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir.1997) (exclusionary rule does not apply in a § 1983 action; "such an application would be inappropriate. The Supreme Court has never applied the exclusionary rule to civil cases, state or federal"), *citing City of Waco v. Bridges*, 710 F.2d 220, 225 (5th Cir.1983). This is true even where the evidence is used against the person aggrieved by the violation. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule does not apply to deportation proceeding; evidence of alien's admission of illegal entry admissible despite unlawful arrest). But *see, Gonzalez-Rivera v. I.N.S*, 22 F.3d 1441 (9th Cir. 2005) (exclusionary rule may apply to civil deportation proceedings where there is egregious conduct on the part of the officers).

The Second Circuit explained the rationale for not applying the exclusionary rule to civil constitutional or common law tort actions:

> Civil actions brought under § 1983 are analogous to state common law tort actions, serving primarily the tort objective of compensation. *See Carey v. Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1978); *see also Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986) ("Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are compensatory-damages grounded in determinations of plaintiffs' actual losses."). A § 1983 action, like its state tort analogs, employs the principle of proximate causation. *See Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir.1998). The fruit of the poisonous tree doctrine, however, disregards traditional causation analysis to serve different objectives. *See Wong Sun v. United States*, 371 U.S. [471] at 487-88, 83 S.Ct. at 417; *United States v. Walker*, 535 F.2d 896, 898 (5th Cir.1976) ("The Court [in Wong Sun] specifically rejected a 'but for' or proximate cause test."). To extend the doctrine to § 1983 actions would impermissibly recast the relevant proximate cause inquiry to one of taint and attenuation. See *Reich [v. Minnicus]*, 886 F.Supp. [674] at 685 [S.D. Ind. 1993] ("In this [§ 1983] analysis, ... the operative standard is the tort principle of proximate cause, not the exclusionary rule's principle of taint and attenuation. The two are not identical.").
>
> In a § 1983 suit, constitutionally invalid police conduct that by itself causes little or no harm is assessed on ordinary principles of tort causation and entails little or nominal damages. The fruit of the poisonous tree doctrine is not available to elongate the chain of causation.

Townes v. City of New York, 176 F.3d at 146 (footnote omitted).

Finally, the checkpoint complied with Fourth Amendment principles. The Supreme Court has upheld the concept of suspicionless checkpoint stops at a fixed Border Patrol checkpoint. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In *Martinez-Fuerte*, the Supreme Court held that the government's legitimate interests

advanced by the temporary seizure outweighed the minimal intrusion on a motorist's privacy. *Martinez-Fuerte*, 428 U.S. at 561-62.

In balancing these interests during a checkpoint stop, the Court specifically considered: (1) whether the procedure was routinely and evenly applied to all vehicles; (2) whether the checkpoint involved little officer discretion and was not likely to result in abuse; and, (3) whether the appearance of authority of the officers at the checkpoint would allay the concerns of lawful travelers. *Id.* at 556-60. As the district court noted in its March 28 order (CR 124, p. 3; SER/USA 142), the officers stopped vehicles at the roadblock and asked all drivers the same questions pertaining to intoxication and identification. If evidence of violations were found, the offenders were cited into the appropriate court or, in the case of federal drug or immigration violations, turned over to federal officers on the scene. It is uncontested that the officers were uniformed and in marked law enforcement vehicles. Thus the basic criteria of *Martinez-Fuerte* were satisfied.

Sobriety checkpoints of the type conducted by TOPD were upheld in *Michigan Department of State Police v. Sitz*, 496 U. S. 444 (1990). Moreover, the Supreme Court previously suggested that a similar checkpoint solely for checking for driver's licences and vehicle registrations would not offend the Fourth Amendment:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. [Footnote omitted.] Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

Delaware v. Prouse, 440 U.S. 648, 663 (1979). This Court has upheld temporary checkpoints on a U.S. Marine base where the purpose was to check vehicles for aliens. *United States v. Hernandez,* 739 F.2d 484 (9th Cir. 1984). In *United States v. Prichard,* 645 F.2d 854 (10th Cir. 1981), the Tenth Circuit upheld a roadblock set up on Interstate 40 to conduct a routine driver's license and car registration check. Furthermore, the fact that the officers made arrests for non-DUI offenses, or that it may have been one of their purposes, does not invalidate the legality of the checkpoint as long as there was an independent administrative justification for the checkpoint. *United States v. Soto-Camacho,* 58 F.3d 408, 411-12 (9th Cir. 1995). Accordingly, the officers were well within constitutional parameters in requesting that Plaintiff display his driver's license at the checkpoint, and the district court correctly so found.

Accordingly, because there was clearly probable cause to proceed on the two charges and because a decision was independently made by a prosecutor to proceed

with the case, there was no liability for malicious prosecution. The district court properly granted summary judgment for the United States on Plaintiff's FTCA claim. (CR 131, pp. 4-5; SER/USA 196-97.)

VIII. CONCLUSION

For the foregoing reasons, this Court should affirm the judgment entered by the district court.

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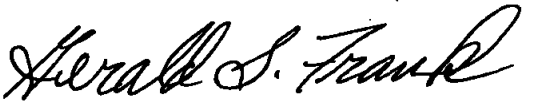

GERALD S. FRANK
Assistant U.S. Attorney

IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 07-15931

I certify that: (check appropriate option(s))

___ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

- ☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

- ☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

__X__ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

- ☒ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

- ☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

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October 18, 2007
Date

Gerald S. Trant
Signature of Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2007, I caused the Brief of Appellees and Supplemental Excerpts of Record to be served by causing two copies of the brief and one copy of the supplemental excerpts to be mailed, postage prepaid, to: David J. Euchner, Esq., 32 N. Stone Avenue, 4th Floor, Tucson, AZ 85701; and James Palmore Harrison, 1736 Franklin Street, 9th Floor, Oakland, CA 94612, counsel for defendant-appellant.

Gerald S. Frank

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