IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MICHAEL J. FLYNN, JR.,	)	
	)	
Plaintiff,	)	Civil No. 3-02-CV-10091
	)	
vs.	)	
	)	
DETECTIVE MICHAEL BROWN; DETECTIVE BRETT MORGAN; CITY OF DAVENPORT, IOWA; and JOHN DOES 1 THROUGH 10,	)	ORDER
	)	
Defendants.	)	

THE COURT HAS BEFORE IT defendants Michael Brown, Brett Morgan and the City of Davenport, Iowa's (collectively, "defendants") motion for summary judgment, filed November 14, 2003. Plaintiff Michael Flynn ("Flynn" or "plaintiff") resisted the motion December 5, 2003, and defendants filed a reply on December 11, 2003. The motion is fully submitted.

I. BACKGROUND

The following *relevant* facts are either undisputed or viewed in a light most favorable to plaintiff.

A. Facts Leading up to Michael Flynn's Arrest and Trial

On May 23, 2000, the Davenport, Iowa police department received a report of a burglary early that morning or late the previous evening at Flynn Beverage Company in Davenport. Officer B.A. Biggs responded to the report, and spoke with Flynn Beverage employee Linda Kline. Linda Kline

told the officer that 214 cartons of cigarettes valued at $5,537.38 were missing,[1] and that she was the last employee to leave on May 22 and the first to arrive on May 23.

Linda Kline also told Officer Biggs that a surveillance camera covered the area of the crime scene, but that: "Someone tilted the camera away from the cigarette area, so that no video had been taped during the incident." Defendants' App. at 19. Officer Biggs did not independently view the videotape, but instead allowed Linda Kline to take possession of the tape "to review the camera footage over the past day for possible evidence." *Id.*

Officer Biggs indicated in his investigative report that he had observed a small hole in the chain link fence surrounding the business, but did not see signs of heavy traffic.

Defendant Detective Michael Brown subsequently was assigned as lead investigator of the burglary.[2] On Friday, May 26, 2000, Flynn Beverage Company sent a facsimile to the Davenport Police Department indicating that 4,462 cartons of cigarettes valued at $115,345.66 had been stolen. This information was based on inventory lists taken by Flynn Beverage employee Nancy Sampson before the burglary. Flynn, the company vice-president, reviewed the list, and based on Linda Kline's inventory after the burglary, identified which cigarettes were stolen.

On May 30, 2000, Mark Hughes, a warehouse supervisor for Flynn Beverage, reported to Brown that: 1) Flynn Beverage normally had on hand a "couple of thousand" cartons of cigarettes; 2) it was "quite possible" that $115,000 worth of cigarettes had been stolen over time; and 3) Misty Kline,

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[1] Linda Kline later revised this figure to a "maximum of only 720 cartons." Plaintiff's App., Exh. 1 at 2.

[2] Defendants do not dispute that defendant Detective Brett Morgan (now Sargeant Morgan) took over the investigation after Brown left the employ of the City of Davenport.

Linda Kline and Carolyn Flynn, plaintiff's mother, were the individuals who normally handled the cigarettes. Defendants' App. at 24-25.

On July 7, 2000, Linda Kline reported to Brown as follows: 1) only cigarettes from the May 22, 2000 shipment from MJ's Discount Smokes ("MJ East") had been stolen; 2) approximately 32 cases were in the MJ East shipment; 3) Kline believed eight cases remained after the burglary; 4) she took a physical count of the inventory during the week prior to the burglary; 5) she also took a physical count of the inventory after the burglary; 6) Michael Flynn provided her with the list of stolen cigarettes that had been submitted to the Davenport Police Department on May 26, 2000; 7) Kline informed Flynn that the list was overstated and he replied: "It's right, just fax it to the cops"; 8) Flynn's list contained a large number of off-brands that were not carried in stock; 9) Flynn's list contained Planet and Dunhill cigarettes that could not have been stolen as they were stored in an area not accessed during the burglary; 10) Flynn Beverage orders exclusively from MJ's East and Merchant's Wholesale of Iowa; 11) Flynn Beverage had financial problems; 12) Flynn frequented gambling establishments; 13) Flynn had a gambling debt of $1,000; and 14) someone had moved the company's surveillance camera so that the camera did not face the cigarette area, allowing people to move freely in and out of the cigarette area without being seen.[3] Defendants' App. at 27-30. Although plaintiff disputes the veracity of Linda Kline's statements, he does not dispute the fact she made these statements to Detective Brown.

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[3] The Court notes the surveillance videotape of the May 2000 burglary was submitted to the police, and has been made part of the record in the present action. The legal significance surrounding the videotape is addressed below.

On July 19, 2000, Brown noted that Flynn Beverage had been paid $114,585 by its insurance company as a result of the May 22-23 burglary. On this same date, he acquired the surveillance tape from the May burglary. Rather than reviewing the videotape immediately, however, he placed it in his desk drawer, and did not remove it until his last day of work nearly five months later, in December 2000.

On July 20, 2000, Detective Brown and another officer interviewed Carolyn Flynn, the president of Flynn Beverage and plaintiff's mother. According to Detective Brown's interview summary, Carolyn Flynn told the detectives that an employee does a complete count of the physical inventory once per week, and that Linda Kline performed the count after the May 22-23 burglary. She also indicated that the amount of the insurance claim, more than $114,000, sounded correct to her.

On July 25, 2000, a second cigarette theft was reported by Flynn Beverage. The burglary apparently occurred on July 8, or 9, 2000.

On August 4, 2000, Detective Brown received a report from Merchant's Wholesale of Iowa detailing its sales to Flynn Beverage for the time period from January 1, 2000 to July 31, 2000. On August 7, 2000, Detective Brown received paperwork from MJ's East detailing its sales to Flynn Beverage for the time period from January 1, 2000 to July 31, 2000. The Davenport Police Department also had in its possession an invoice from MJ's East dated May 14, 2000 that Detective Brown failed to list in his report.

Detective Brown calculated that from January 1, 2000 to July 31, 2000, Flynn Beverage had purchased 13, 856 cartons from MJ's East and Merchant's Wholesale of Iowa, and had reported 11,362 of them stolen during the two reported burglaries. Plaintiff disputes the validity of Detective

Brown's calculations to the extent they did not include purchases from other suppliers, including Molo Oil, during the relevant time period.

On August 8, 2000, while executing a search warrant at Flynn Beverage, Detective Brown spoke with Mia Valentine, Flynn's administrative assistant. Valentine indicated the following: 1) she enters purchasing data into Flynn Beverage's computerized inventory system as part of her normal duties; 2) Flynn directed her to type up a list of items supposedly taken during the July burglary for the insurance company, and that Valentine believed the list contained too many items; 3) two weeks earlier Flynn had asked her to inflate the numbers she entered into the computerized inventory system; 4) Flynn had given her a handwritten list to enter under the name of Merchant's Wholesale with a date of June 19, 2000; 5) Valentine believed the list of items closely resembled those reported stolen in the July burglary; 6) Flynn Beverage had only two suppliers: Merchant's Wholesale and MJ's East; and 7) Linda Kline had performed the physical count for both burglaries.

Plaintiff denies the validity of most of the statements made by Valentine, noting that the criminal trial court found Valentine's testimony "somewhat questionable." Plaintiff's App. Exh. 18 at 107. Plaintiff also notes that Valentine's statements to Detective Brown did not address the May burglary.

On August 9, 2000, Detective Brown spoke with Diane Szkil, a Flynn Beverage employee, who stated that after the May 2000 burglary, Flynn provided her with handwritten notes, from which she was to type a list of items stolen in the burglary. This list ultimately was forwarded both to the insurance company and to the Davenport Police Department.

Detective Brown then spoke with Misty Kline, a Flynn Beverage employee and Linda Kline's daughter. Misty Kline told Detective Brown the following: 1) twenty-four cases of cigarettes were

missing on the morning of May 23, 2000, but that everything else appeared as normal; and 2) several brands of cigarettes listed as stolen in the May burglary were not stocked by Flynn Beverage. Again, plaintiff disputes the validity of Misty Kline's statements.

On August 10, 2000, Detective Brown applied for and received an arrest warrant for Flynn on the charges of Theft 1st, in violation of Iowa Code § 714.2(1), and False Reports to Law Enforcement Authorities , in violation of Iowa Code § 718.6. These charges stemmed from the May 22-23, 2000 burglary.

On September 21, 2000, the Scott County Attorney's Office filed a Trial Information charging Flynn with the above two crimes, as well as insurance fraud in violation of Iowa Code § 507E.3(2)(9). Flynn was never charged with any crime arising out of the July 2000 burglary.

A bench trial was held in the Iowa District Court for Scott County on April 8, 9, 10 and 16, 2002. In an Order issued May 2, 2002, the district judge found Flynn not guilty on all counts.

B. Facts Surrounding Surveillance Videotape and Alternate Suspect

As set forth above, Detective Brown took possession of the May 22-23, 2000 surveillance videotape on July 19, 2000, but did not review the surveillance videotape until December 2000. Apparently, when he did view the videotape, he watched it only in fastforward mode. Detective Brown admitted in deposition that he did not tell anyone else of the existence of the videotape despite the fact several persons had asked about it.[4] Upon Detective Brown's departure from the police department, the videotape apparently was taken from Detective Brown's locker or desk by another department

[4] Brown stated in deposition the videotape was given to him in an unmarked envelope, and that when he placed the envelope in his desk drawer, he did not know its contents.

employee, Pam Schryver, and mislabeled.

Sargeant Morgan interviewed Flynn on September 1, 2000, after Flynn's arrest. Flynn told Sargeant Morgan and several other officers, including Lieutenant Kern, that he believed the police department possessed the videotape. Flynn's criminal attorney, Douglas Scovil, also requested to view the videotape, but was told by Michael Walton, the prosecutor, that "the surveillance tape was not taken by the police nor the insurance company. Linda Kline does not have the tape and believes Mike Flynn was the last person she knows to have been in possession of the tape." Plaintiff's App, Exh. 16 at 100. The videotape was not produced by defendants or Mr. Walton before or during Flynn's criminal trial.

Flynn discovered the videotape after the trial, when he attempted to retrieve the evidence collected during the investigation. The videotape shows the following relevant activity:[5]

> --On May 22, 2000, at 13:34 to :42, and 15:29 to :32, Misty Kline is seen handing cigarettes to unknown individuals.
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> –On May 22, 2000, at 14:12 to :18, MJ's East delivers 17 cases, of cigarettes, not the 32 reflected in the invoice from that date;
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> –On May 22, 2000, at 14:27 to :28, the MJ's East cigarettes are placed on a pallet in the cigarette room;
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> –On May 23, 2000, at 4:48, Linda Kline arrives at Flynn Beverage;
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> –On May 23, 2000, at 5:00 to :03, Linda Kline tells Nancy Sampson of the burglary;
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> –On May 23, 2000, at 5:32 to :36, Linda Kline enters the cigarette room

[5] The times reflected are those from the tape clock, which is one hour slow. The Court emphasizes that these depictions are as viewed in the light most favorable to plaintiff.

and rearranges the MJ's East delivery in a suspicious manner.

See Plaintiff's App., Exh. 27 at 128-29.

Plaintiff showed the videotape to Lieutenant Dennis Kern. After reviewing the tape himself, Lieutenant Kern indicated that at one point, Linda Kline appeared to moving merchandise in a "suspicious" manner that raised some "curiousities." *Id.*, Exh. 8 at 33-35.[6] He then shared his thoughts with Detective Morgan, who agreed that the videotape "lended credence" to his suspicions of Linda Kline. *Id.*, Exh. 13 at 77.

Pam Schryver, the police department employee responsible for mislabeling the surveillance videotape, was removed from her position in the property and evidence division due to her conduct. Upon learning of the problems related to the videotape, a commander and staff meeting was held, which resulted in a mandate to officers that they submit evidence more timely.

Sargeant Morgan, who was involved in the investigation of the May 22-23, 2000 burglary before the investigation was reassigned to Detective Brown, stated in deposition that he had considered Linda Kline a suspect in the burglary due to her access to the cigarette area, as well as some suspicious behavior cited by Michael Flynn. Plaintiff's Exh. 13 at 75. He also knew that the mother/daughter relationship between Linda and Misty Kline could easily give rise to "alibis and motives and opportunities." *Id.* at 79. During Flynn's criminal trial, Detective Morgan testified that he was

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[6] Plaintiff has moved in limine for an affirmative ruling regarding the scope of Lieutenant Kern's and Detective Morgan's testimony. The Court agrees that neither officer need be certified as an expert in order to provide opinion testimony on what they consider to be suspicious behavior. *See, e.g.*, *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997). Plaintiff's motion is therefore granted.

suspicious about the cigarette inventory maintained by Linda Kline, as well as the "build to sheet" inventory list Linda Kline provided to the police after Flynn's arrest. *Id.*

Dorene Mariet, a former Flynn Beverage Company employee, told Detective Morgan in the initial stages of his investigation that immediately prior to the May burglary, she had been physically pushed by Linda Kline upon discovering the large quantity of cigarettes Linda had ordered. Detective Morgan also possessed Per Mar security records showing that Linda Kline entered the Flynn Beverage Company warehouse on May 20, 2000, after the close of business, and that her account to police as to when she arrived at work and discovered the crime on May 23, 2000 was false.

Detective Morgan was surprised to learn he was being removed from the case, but believed it was because "Detective Brown thought he had the case covered . . . ." *Id.* at 74. On October 31, 2003, the date of his deposition, Detective Morgan continued to view Linda Kline as a suspect in the burglaries. Detective Morgan admitted in his deposition that the Davenport Police Department knew prior to Flynn's arrest that the numbers given by Linda Kline regarding the amount of cigarettes stolen were inaccurate.

Plaintiff filed the present complaint on August 9, 2002. Count I of his complaint sets forth a cause of action under 42 U.S.C. § 1983, alleging defendants Brown, Morgan and Does 1 through 10 violated his civil rights by falsely arresting him, engaging in malicious prosecution, and maliciously withholding from plaintiff and his defense attorney exculpatory evidence. Count II alleges defendants Brown, the City of Davenport and Does 1 through 10 committed false arrest. Count III sets forth a cause of action against Brown, Morgan, the City of Davenport and Does 1 through 10 for malicious prosecution. Defendants now move for summary judgment on all counts.

II. APPLICABLE LAW & DISCUSSION

A. Standard of Review

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity that there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he 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 v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Further, "'whether summary judgment on grounds of qualified immunity is appropriate from a particular set of facts is a question of law.'" *Pace v. City of Des Moines*, 201 F.3d 1050, 1056 (8th Cir. 2000) (*quoting Lambert v. City of Dumas*, 187 F.3d 931, 935 (8th Cir. 1999)). "In the event that a genuine dispute exists concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment on that ground."

B. John Doe Defendants

Initially, the Court notes that plaintiff's Amended Complaint lists "John Does 1 through 10" generally as defendants in all four counts of his complaint, but does not attribute specific acts of

wrongdoing to any or all of these unknown individuals. Discovery is now closed, and plaintiff has failed to demonstrate to the Court any steps he has taken to identify and serve any of these individuals, nor has he further amended his complaint to allege specific acts of conduct that would create a reasonable possibility of identification. *See Weiss v. Moore*, 991 F.2d 802, 1993 WL 104697 at *1 (8th Cir. 1993) (appropriate for district court to dismiss John Doe defendant once "no methods of discovery [remained] to ascertain his identity"); *but see Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985) (improper for district court to dismiss John Doe defendant in early stages of litigation, when plaintiff had provided specific allegations regarding John Doe's relevant conduct). Accordingly, John Does 1 through 10 are dismissed from the litigation.

C. 42 U.S.C. § 1983 Claim against Brown and Morgan

With regard to count I of his amended complaint, pled pursuant to 42 U.S.C. § 1983, plaintiff alleges the individual defendants violated plaintiff's constitutional rights by falsely arresting him and maliciously withholding from plaintiff and his defense attorney exculpatory evidence. "To establish a claim under 42 U.S.C. § 1983 [a plaintiff] must show a deprivation of a right, privilege, or immunity secured by the constitution or laws of the United States." *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 1999). A prima facie case under § 1983 requires plaintiffs to show defendants: (1) acted under color of law; and (2) caused constitutional violations that damaged plaintiffs. *Reeve v. Oliver*, 41 F.3d 381, 383 (8th Cir. 1994). For purposes of this motion for summary judgment, there is no dispute the officers were acting under color of State law. The question is whether they violated plaintiff's constitutional rights.

Section 1983 does not provide new rights, rather it provides a remedy for violations of

substantive federal rights. *Braun v. Best*, 1998 WL 887270 (N.D. Iowa 1998) (quoting 42 U.S.C. § 1983) (citations omitted). A plaintiff must identify the rights upon which he alleges the defendants have infringed, with reference to either a federal statute or constitutional provision. *Id.* (citing *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)). In the present case, plaintiff bases his § 1983 claim on the Fourth Amendment--claiming the officers lacked probable cause for an arrest--and on the Fourteenth Amendment, claiming plaintiff was denied procedural due process and the right to a fair trial when the police failed to produce the potentially exculpatory videotape. The Court will address each of these arguments in turn.

1. Fourth Amendment Probable Cause

For an arrest to be valid under the Fourth Amendment, the arrest must be supported by probable cause. "Probable cause exists if the totality of the facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed an offense at the time of the arrest." *Smithson v. Aldrich*, 253 F.3d 1058, 1062 (8th Cir. 2000) (internal quotations omitted). *See also*, *Brinegar v. United States*, 338 U.S. 160, 175-76 (1948) ("Probable cause exists where the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution to the belief that an offense has been or is being committed.") (internal quotation omitted). The Court does not evaluate each piece of information independently, but rather considers "all of the facts for their cumulative meaning." *United States v. Nation*, 243 F.3d 467, 470 (8th Cir. 2001). "[T]he probability, not a prima facie showing, of criminal activities is the standard of probable cause." *United States v. Wallraff*, 705 F.2d 980, 990 (8th Cir. 1983). The difference between probable cause and

reasonable suspicion is based on the quantity, quality, and reliability of the evidence available to the officers at the time of the detention. *United States v. Wheat*, 278 F.3d 722, 731 (8th Cir. 2001).

Viewing the facts in a light most favorable to plaintiff, the Court nevertheless finds probable cause existed to obtain an arrest warrant for Flynn on August 10, 2000. First, there is no dispute that key evidence suggested the burglaries were committed by a Flynn employee. *See* Defendants' App. at 20, 58 (application for search warrant and police interview report indicating door used to gain access had magnetic alarm that had been removed from the inside and taped to the contact on door frame); *Id.* at 19 (police interview report indicating surveillance camera had been tilted away from cigarette area, and that there was no sign of new damage around perimeter of building). Secondly, interviews conducted with four Flynn Beverage employees: Linda Kline, Misty Kline, Mia Valentine and Diane Szkil provided information that tended to implicate Flynn. Specifically, Linda Kline told Detective Brown on July 7, 2000 that Flynn directed her to forward to the police a list of cigarette cartons allegedly stolen even after she informed him the list was "overstated." Defendant's App. at 28. Both Linda and Misty Kline also told Detective Brown that the list contained a number of cigarette brands not carried in-stock, with Linda adding that several brands on the list were kept under lock in the cigar room. *Id.* at 28-29.

Diane Szkil also suggested during her interview that the handwritten list of items allegedly stolen during the May 22-23, 2000 burglary had been prepared, or at least authorized, by Flynn himself. Although Flynn now contends the list was prepared by separate inventories taken before and after the burglary by Nancy Sampson and Linda Kline, respectively, he does not dispute that he authorized that the list be released to the insurance company and the police, nor that he directed Szkil and Valentine to

prepare and enter the list into the company's computer system.

Mia Valentine recalled similar conduct on the part of Flynn following the July burglary. On August 8, 2000, Valentine told Detective Brown that Flynn had asked her to enter a list of items into the company's computer system that Flynn planned to claim were stolen during the burglary. *Id.* at 40. Valentine believed this list would serve as the basis for Flynn's insurance recovery. *Id.* Valentine told Detective Brown that she is aware of all products that come into the business, and that "there was entirely too much product" on the list provided by Flynn. *Id.* The fact the trial court later found Valentine's testimony less than credible does not impact the consideration of Valentine's testimony in the present probable cause analysis.

Admittedly, the detectives had reason to question the accuracy of Linda Kline's testimony prior to August 10, 2000, based on the fact she first told Officer Biggs that 214 cartons of cigarettes were stolen, and later changed that figure to 720. In addition, the Per Mar security logs showed Linda's account of time she arrived at the facility on May 23, 2000 also was inaccurate. Without more, however, these potential inaccuracies were not necessarily sufficient to render Linda the prime suspect, especially when statements made by Misty Kline and Mia Valentine appeared to corroborate Linda's belief that Flynn had overstated the number of cartons stolen.

Furthermore, once Detective Morgan learned Linda Kline had passed a polygraph examination, it was both reasonable and prudent for him to "move on to other subjects." Plaintiff's Exh. 13 at 77. That plaintiff vigorously disputes the *accuracy* of the polygraph results does not nullify the relevance of the examination results in evaluating probable cause. *See, e.g., Johnson v. Schneiderheinz*, 102 F.3d 340, 342 (8th Cir. 1996) (fact defendant and his accomplice were found to be lying in polygraph

examinations relevant in evaluating reasonableness of officer's probable cause determination).

Lastly, evidence available on August 10, 2000 suggested Flynn had a motive for the burglary: Linda Kline indicated he had gambling debts, *see* Defendants' App. at 30, and it is clear he would benefit, at least indirectly, from the large insurance proceeds.

Plaintiff points to the sequence of events on the surveillance videotape as evidence of Linda's and perhaps, Mindy Kline's culpability. The videotape has no relevance to the existence of probable cause on August 10, 2000, however. It is undisputed that no Davenport police officer viewed the videotape prior to Flynn's arrest, and plaintiff has no evidence to suggest Detective Brown purposely and/or maliciously concealed its existence.

Accordingly, as of August 10, 2000, the Court finds "the totality of the facts based on reasonably trustworthy information would justify a prudent person in believing" Michael Flynn had committed the May 22-23, 2000 burglary at Flynn Beverage, and had filed a false report with the police department by overstating the amounts allegedly stolen. *Smithson v. Aldrich*, 253 F.3d 1058, 1062 (8th Cir. 2000). The evidence shows the officers interviewed available witnesses and conducted a reasonably thorough investigation prior to seeking the arrest warrant. *See Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996) (authorities need not conduct a "mini-trial" prior to making an arrest). This is not a situation in which the officers were both aware of, and affirmatively chose to ignore, evidence that "conclusively" established Flynn's innocence. *But see United States v. Easter*, 552 F.2d 230, 233-34 (8th Cir. 1977) (no probable cause where officer knew of DNA evidence and videotape of crime that "conclusively established" defendant's innocence).

At the very least, the fact two other individuals corroborated the Klines' views that Flynn

authorized employees to over-state the items stolen causes the Court to find the detectives had "arguable probable cause" sufficient to entitle them to qualified immunity for any error in judgment they may have made. *See id*. at 1061 ("The qualified immunity standard gives ample room for mistake in judgments by protecting all but the plainly incompetent or those who knowingly violate the law.") (internal quotations omitted). In the Fourth Amendment context, "law enforcement officers are entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so–provided that the mistake is objectively reasonable." *Id.* at 1062.

2. Procedural Due Process

Flynn also contends his procedural due process rights were violated when the officers failed to preserve and ensure the production of the potentially exculpatory videotape. Several courts, including the Eighth Circuit, have held that officers who withold potentially exculpatory information from prosecutors, and the defense, commit a due process violation for which immunity is not available. *See, e.g.*, *Newsome v. McCabe*, 256 F.3d 747, 753 (8th Cir. 2001) (officers failed to "alert" prosecutors that criminal defendant's fingerprints did not match those obtained at the scene, and evidence showed the same two officers encouraged witnesses to select defendant from lineup); *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) (en banc) (police who deliberately withhold potentially exculpatory evidence, preventing prosecutors from complying with *Brady v. Maryland*, violate due process clause); *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988) (authorities must release to criminal defendant prior to trial all "information undermining the credibility of a government witness"). Negligence alone is insufficient to support a due process violation, however. An officer's failure to preserve or ensure production of exculpatory evidence is not violative of due process absent a showing of bad faith.

Viewing the facts in a light most favorable to plaintiff, the evidence in the present case shows that plaintiff informed Detective Morgan in his post-arrest interview on September 1, 2000 that he believed the police had possession of the surveillance tape, and that he felt it was important that the police "see that tape." Plaintiff's App. Exh. 12 at 65. He also indicated he thought it was "unusual" that the video recorder was running on the night of the burglary, due to the fact that "in a year's time, the camera was only on 5 or 6 times." *Id.* Although Detective Morgan was arguably negligent in failing to investigate the actual whereabouts of the videotape, the record is devoid of evidence Detective Morgan acted in bad faith.

With regard to Detective Brown, the evidence shows he received the surveillance videotape on August 9, 2000, reviewed the tape only superficially in December 2000, and failed to inform his supervisor or colleagues preparing for the criminal trial of the tape's whereabouts or contents. Plaintiff's App. Exh. 7 at 20-22. Again, however, there is no evidence of a "conscious effort to suppress exculpatory evidence." *California v. Trombetta*, 467 U.S. 479, 488 (1984). During his deposition, Detective Brown testified he did not see "anything but what appeared to be routine business procedures." *Id.* at 20. The fact Lieutenant Kern may have considered the videotape exculpatory does not create bad faith on the part of Detective Brown.

D. Remaining State Law Claims

1. False Arrest

Count II of plaintiff's amended complaint alleges defendants Brown and the City of Davenport committed the common law tort of false arrest. Amended Complaint at 5. "In Iowa, false arrest is indistinguishable from false imprisonment . . . ." *Barrera v. ConAgra, Inc.*, 244 F.3d 663, 666 (8th Cir. 2001). The torts are defined as "an unlawful restraint on freedom of movement or personal

liberty." *Valdadez v. City of Des Moines*, 324 N.W. 2d 475, 477 (Iowa 1982). To make a prima facie case of false imprisonment, plaintiff must show that he was unlawfully restrained against his will. *Children v. Burton*, 331 N.W.2d 673, 678-79 (Iowa 1983). Because this Court found the individual officers had probable cause to obtain the arrest warrant, however, it necessarily follows that plaintiff cannot show he was "unlawfully restrained." Accordingly, defendants' motion for summary judgment is granted with regard to count II of plaintiff's Amended Complaint.

2. Malicious Prosecution

Count III of plaintiff's amended complaint sets forth a cause of action against all defendants for malicious prosecution. Amended Complaint at 6. To establish this claim under Iowa law, a party must prove:

> (1) a previous prosecution; (2) instigation of that prosecution by the defendant; (3) termination of the prosecution by acquittal or discharge of the plaintiff; (4) want of probable cause; (5) malice on the part of the defendant for bringing the prosecution; and (6) damage to the plaintiff.

Winckel v. Von Maur, Inc., No. 00-1272, 2001 WL 1658809 (Iowa Ct. App. Dec. 28, 2001). In the present case, the Court finds as a matter of law plaintiff is unable to establish that probable cause was lacking, or that any of the defendants exhibited malice in proceeding with plaintiff's prosecution. To show this element under Iowa law, a plaintiff must show that "defendant's instigation of criminal proceedings against plaintiff was primarily inspired by ill-will, hatred or other wrongful motives." *Yoch v. City of Cedar Rapids*, 353 N.W.2d 95, 102 (Iowa Ct. App. 1984). No such showing has been made in the present case, and defendants' motion for summary judgment is appropriately granted with regard to this count.

3. Intentional Infliction of Emotional Distress

Lastly, count IV of plaintiff's amended complaint alleges all defendants engaged in intentional infliction of emotional distress. Amended Complaint at 7. To establish this tort under Iowa law, a plaintiff must show the following:

> (1) outrageous conduct by defendants; (2) defendants' intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) plaintiff suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by defendants' outrageous conduct.

Dickerson v. Mertz, 547 N.W.2d 208, 214 (Iowa 1996). Whether a defendant's conduct is sufficiently extreme or severe as to allow recovery is a legal question appropriately determined by the court. *Id.*

In *Dickerson*, the Iowa Supreme Court held that the defendant conservation peace officers' issuance of two citations found to be based on probable cause, along with other actions taken within the scope of the defendants' employment, were not extreme or outrageous under the meaning of the tort. Likewise, in the present case the defendants arrested plaintiff based on probable cause that he had committed the crimes at issue. That plaintiff was acquitted at trial has no impact on this finding. Absent a showing one or more defendants committed other extreme or outrageous conduct outside the scope of his employment with the Davenport Police Department, summary judgment is granted on count IV of plaintiff's amended complaint. *See id.* (fact plaintiff acquitted at trial did not render defendants' conduct in issuing citations "extreme or outrageous").

III. CONCLUSION

For the above stated reasons, plaintiff's first motion in limine, filed January 14, 2004, is granted. Defendants' motion for summary judgment, filed November 14, 2003, is granted in full. The Clerk of Court is directed to enter judgment in favor of defendants and against plaintiff.

IT IS SO ORDERED.

Dated this 5th day of February, 2004.

RONALD E. LONGSTAFF, Chief Judge
United States District Court