

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION  
September 28, 2012

---

IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

DERRICK FILS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 07 L 12355
	)	
CITY OF CHICAGO, a Municipal Corporation;	)	
RICHARD E. DORONIUK; and MAHMOUD SHAMAH,	)	The Honorable
	)	Daniel J. Lynch,
Defendants-Appellees.	)	Judge Presiding.

---

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.  
Justice Hall concurred in the judgment.  
Justice Robert E. Gordon dissented.

**ORDER**

¶ 1 *HELD:* The circuit court did not abuse its discretion in refusing to admit the challenged evidence. Moreover, the circuit court properly granted summary judgment in favor of defendants on plaintiff's section 1983 false arrest and *Brady* claims. The exclusionary rule does not apply to this case.

1-11-0157

¶ 2 Plaintiff, Derrick Fils, appeals the circuit court's order granting summary judgment in favor of defendants, City of Chicago (City), Richard Droniuk, and Mahmoud Shamah. On appeal, plaintiff contends the circuit court erroneously refused to admit evidence offered prior to its summary judgment order. Plaintiff further contends there are genuine issues of material fact that prevent summary judgment relating to his section 1983 (42 U.S.C. §1983) false arrest and *Brady* claims. Based on the following, we affirm.

¶ 3 **FACTS**

¶ 4 On October 31, 2005, a warrant was issued to search plaintiff's residence located at 1144 W. 104th Place in Chicago, Illinois, based on information purportedly provided by an informant. At the time, plaintiff was on parole and electronic home monitoring after having been released from prison for armed robbery and kidnapping. The warrant authorized the seizure of cocaine, drug paraphernalia, money, and records of illegal drug transactions.

¶ 5 The warrant was executed on November 1, 2005. According to plaintiff's deposition testimony, he encountered acquaintances Joshua Lovett and Ricardo Townsend outside of his home upon his return from purchasing dinner. At the time, plaintiff lived with his son, aged 14 or 15, who was outside the house. Plaintiff's wife did not live in the home. Plaintiff invited Lovett and Townsend inside to watch television. Approximately 30 minutes later, plaintiff heard banging on his front door. Before plaintiff could open the door, a group of officers burst in. Plaintiff was immediately thrown to the ground and handcuffed.

¶ 6 Plaintiff did not observe what happened to Lovett or Townsend. Plaintiff was then dragged from the living room to his son's bedroom. Lovett was subsequently brought into the

1-11-0157

bedroom as well. Plaintiff testified at his deposition that he was kicked, beaten, and choked, and repeatedly asked, "where is it at?" Plaintiff remained in his son's bedroom for approximately 30 minutes, after which time he was taken to his backyard. Plaintiff then remained in his backyard for another 30 minutes before being transferred to the police station. Plaintiff stated that he did not observe any police officer "do anything" in his bedroom or kitchen. Plaintiff did, however, testify to observing a police officer take \$8,000 from a hidden location in his son's bedroom. Plaintiff could not provide a description of that officer or of any of the officers that participated in the search of his residence. When shown a gun seized in the raid of his home, plaintiff claimed he had never viewed the gun before, had not observed Lovett or Townsend with the gun, and had never observed his son or wife with the gun.

¶ 7 At his deposition, Detective Robert Costello testified that he was involved in the execution of the warrant on November 1, 2005. Costello entered plaintiff's residence through the back door and immediately observed Townsend "d[i]ve out the window." As a result, Costello left the residence and pursued Townsend. Approximately five to seven minutes later, Costello learned that Townsend had been apprehended by another officer. Costello then returned to plaintiff's residence. Costello specifically recalled searching plaintiff's bedroom, but added that he likely assisted in searching other areas of the home. Costello assumed he searched the bedroom after learning that the other areas of the residence had already been searched. During his search of plaintiff's bedroom, Costello discovered a loaded revolver underneath the bed. The handgun was found near the wall. Costello further testified that he was aware that narcotics were recovered in the residence, but he did not observe the narcotics himself.

1-11-0157

¶ 8 At his deposition, Officer John Kurnat testified that he was part of a group of three or four officers that initially entered plaintiff's residence to execute the warrant. Kurnat testified that, within seconds of entering the back door of the residence, he entered the kitchen and observed plaintiff and two other individuals sitting at the kitchen table. According to Kurnat, there was "something" on the table when they entered. Kurnat added that he observed a "white substance" that he believed was narcotics. Kurnat approximated that the amount of powder was somewhere between the size of a golf ball and a watermelon, but he did not have a specific recollection. Once they noticed the officers' presence, plaintiff and the two other men ran into a bedroom where one of the men jumped out of the window while plaintiff and the other man attempted to hide under a bed. The officers pulled the two men from under the bed, handcuffed them, and moved them to the front room.

¶ 9 According to plaintiff's arrest report, the residential search resulted in seizure of a large plastic bag containing "a powdery substance suspect cocaine," two plastic bags containing "a white rock like substance, suspect crack cocaine," a number of plastic bags, an electronic scale "used to weigh drugs," and a .38 revolver and ammunition. Subsequent laboratory testing revealed that the white powder was not cocaine, but the two bags containing a white rock-like substance tested positive for cocaine. Plaintiff was indicted and pled guilty to one count of unlawful use of a weapon by a felon and one count of possession of cocaine.

¶ 10 On October 26, 2006, defendants Droniuk and Shamah were arrested pursuant to a federal indictment charging them with purchasing and planting controlled substances as justification for illegal searches and arrests during which they robbed the subjects of the searches.

1-11-0157

Doroniuk pled guilty and admitted to stealing money from plaintiff during the November 1, 2005, search. Shamah was tried and convicted. Both men are currently incarcerated in federal prison.

¶ 11 Plaintiff filed a postconviction petition (725 ILCS 5/122-2.1 (West 2004)) claiming he would not have pled guilty in his case "had he known of their [Doroniuk and Shamah] corrupt activities." On November 8, 2007, plaintiff's convictions were vacated and the charges against him were dismissed. Plaintiff was released from prison on November 28, 2007. Plaintiff filed the underlying lawsuit prior to his release.

¶ 12 At his deposition, Doroniuk admitted to having planted drugs on two occasions when the execution of search warrants failed to uncover drugs on the subject premises. On both of those occasions, Doroniuk had received information from an informant named Larry Cross. Doroniuk, however, denied planting any drugs in plaintiff's residence. Doroniuk testified that he received information from Lynette "Archie" Clough that she purchased drugs from plaintiff's residence several times over the course of three months. According to Doroniuk, Clough provided him with a layout of plaintiff's residence and details, such as when plaintiff picked up drugs and how many people purchased drugs on a given day. Clough further told Doroniuk that plaintiff had a prior kidnapping arrest and was on electronic home monitoring. Clough added that plaintiff had a gun in the house. Doroniuk testified that Clough had provided accurate information in the past and that plaintiff's residence was a "known drug house." As a result, Doroniuk obtained the warrant to search plaintiff's residence.

1-11-0157

¶ 13 Doroniuk further testified that he and his fellow officers entered the back of plaintiff's residence to execute the warrant, while another officer was stationed at the front door of the building. Two individuals were detained in the front of the building after having purchased drugs from plaintiff's residence. When Doroniuk, Shamah, and two other officers entered plaintiff's residence, Doroniuk observed "a lot" of drugs on the kitchen table and three individuals running toward a bedroom. Doroniuk approximated that he observed at least 200 grams of what he believed to be powder cocaine, as well as spoons for use in making the cocaine into crack. Doroniuk recalled that the powder was sitting in a pile on the table, but admitted his recollection could have been faulty and that the cocaine could have been in plastic bags. Plaintiff and another individual were found underneath a bed, while the third individual jumped out of a closed window. Doroniuk testified that he retrieved plaintiff and placed him in handcuffs before transferring him outside. Doroniuk found a few hundred dollars on plaintiff's person, which Doroniuk took and placed in his police vest. Doroniuk further stated that an officer recovered a gun in one of the bedrooms. Doroniuk could not recall the name of the officer, but recalled that the gun was recovered in a dresser drawer.

¶ 14 Angela Collins and Emile Williams were deposed and testified that they were arrested near plaintiff's residence on the date in question. Collins and Williams admitted that they purchased cocaine from a house located near 104th Place and S. Morgan Street. When shown a photograph of plaintiff's residence, Collins indicated that it looked like the residence where she had purchased drugs on the date in question. On that date, shortly after purchasing the drugs, a group of officers ordered Collins and Williams out of a car. Following a search that revealed the

1-11-0157

drugs, Collins and Williams were arrested. Neither Collins nor Williams knew or recognized plaintiff from a photograph.

¶ 15 On October 31, 2007, plaintiff filed the underlying nine-count complaint. On August 12, 2009, plaintiff filed his second amended complaint, the subject of which underlies this appeal. On October 7, 2010, defendant City filed its motion for summary judgment. Defendants Droniuk and Shamah filed their joint motion for summary judgment on October 15, 2010. On November 9, 2010, plaintiff filed his response to the motions for summary judgment and also filed an amended Supreme Court Rule 213(f)(1) (eff. Jan. 1, 2007) disclosure, naming Lovett and Townsend as trial witnesses. On November 12, 2010, the City filed a motion to strike plaintiff's supplemental 213(f)(1) disclosures. On December 1, 2010, in a written order, the circuit court granted the City's motion to strike, finding "their disclosure as witnesses less than 30 days before trial is a surprise and prejudicial to defendants."

¶ 16 In a written order dated December 9, 2010, following a multi-day hearing on defendants' motions for summary judgment, the circuit court granted summary judgment in favor of defendants on count II (section 1983 false arrest), count III (common law battery), count IV (common law battery *respondeat superior*), count V (common law false arrest and imprisonment), count VI (common law false imprisonment *respondeat superior*), count VII (common law conversion), count VIII (common law conversion *respondeat superior*), and count IX (section 1983 *Brady* claim). The court denied summary judgment on count I (section 1983 excessive force) where the parties agreed to stay proceedings on that claim. The order included agreed upon language pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010) such that there

1-11-0157

was no just reason for delaying the enforcement or appeal of the order.

¶ 17 In granting summary judgment on the false arrest claim, the circuit court stated that it considered the case one of constructive possession, in that “with respect to the narcotics and the gun and where they come from looking at the evidence in a light most favorable to the plaintiff, they’re in the house at the time the execution of the warrant takes place.” In its analysis, the circuit court considered whether there was probable cause to arrest plaintiff in light of the evidence presented, especially Droniuk and Shamah’s “prior bad acts.” The circuit court determined there was probable cause to arrest plaintiff and, therefore, his false arrest claim could not be substantiated. In relevant part, the court stated:

“This was a case in which a search warrant was executed and they eventually recovered 62 grams, not small possessory amounts, multiple baggies that were there ostensibly to be used to package the narcotics. The two co-arrestees who were in the house with him, Townsend and Lovett, were evidently arrested with narcotics on them. I’m not quite certain the amounts, but narcotics on them. I don’t know if they were in baggies, if they were similar to the baggies on the table or if the record’s been established as to whether or not they’re similar.

But, nonetheless, narcotics on them and money was on them, as was narcotics found on at least one or two of the persons arrested outside, \*\*\* Ms. Collins and Mr. Williams. \*\*\*. They may or may not have been at that residence, but they were arrested contemporaneous with the execution of that warrant at or near that residence.

1-11-0157

I believe that might have been the residence, although in the light most favorable to the plaintiff, it could have been another location. So the secondary goal of these officers was drugs with respect to the money, in essence to barter that with confidential informants to keep them, if necessary from time to time when they requested it, in their continuing services or perhaps to be used as insurance to drop the drugs, if you will, to make a positive finding in a subsequent search.

In terms of the similarities here or the signature-like qualities that might render this the handiwork of the officers, they sometimes used the same CI [confidential informant] and engaged in the same practices with the CI, namely, giving them some money, a little bit of money or giving them some narcotics. Sometimes the same judge was used when the search warrant was signed. I think I've heard there were multiple judges. This involved search warrant cases. That makes it a signature-like—or I should say that's the evidence that would support a finding that it has some sort of signature-like quality, and narcotics were involved here and money was involved here. But none of that rises to the level of this sort of signature, if you will, that would distinguish that from anything else that a tactical officer does in their normal duties.

And even though we're dealing with officers here who have admitted and been found to have engaged in criminal conspiracies, if you will to commit certain felonies, federal crimes and state crimes for that matter, during their performance

1-11-0157

of their duties, I do not find that the record here allows me to go beyond what it is that's there; namely, that the narcotics and the gun were present at the house that day. So the probable cause analysis starts there. Would a reasonable officer given those circumstances be in a position, absent some other evidence to the contrary or even with some contrary evidence that perhaps someone was saying, well, that's mine, either Lovett or Townsend or that matter, if that was the evidence, would they be wrong in arresting the owner of this house[?]

For all practical purposes [plaintiff] is the owner of the house. He's the one that lived there. There was proof of residency required during the search. Would they be wrong in arresting that person strictly from a probable cause standpoint, not from a reasonable doubt analysis[?] And I think the conclusion must be that they would not be, given that in the light most favorable to the plaintiff, those drugs are in the house and there's no testimony that they were absent from the house to his knowledge. He never says I wasn't selling drugs at that time, I wasn't engaged in the sale of drugs at that time, I did not see any drugs in the kitchen the last time I was in there, which may have been moments before the arrest. I would have known if someone brought drugs in or Lovett or Townsend were the ones that brought it in.

And then, again, I would have to hear from Lovett and Townsend who would have to say the same thing, and arguably the son, just to be thorough and accurate here. Again, beyond that, though, even if we were to get to the modus

1-11-0157

operandi [MO] and to the prior bad acts, I do not believe that these officers ever were engaged in what took place here, certainly to the extent that it took place here, and that's the only evidence in the record. I don't want the jury to engage in conjecture or speculation.

\* \* \*

Setting all those [unfavorable facts in evidence] aside and looking at the evidence in the light most favorable to the plaintiff, what I'm left here with is to expand this MO pattern to include the planting of a gun, the testimony that's unrefuted in this case—and that's from Officer Doroniuk no less—but witness nonetheless, regardless of the taint that may be inherent in his credibility as a convicted, shamed police officer. The testimony is that he never planted a gun. He's not aware of anyone planting a gun or carrying what's known as a dropped gun or a throwaway gun, that he's heard of that in the past, as perhaps many officers or laypeople have, that perhaps an officer would carry around an unmarked gun, unregistered gun in the event that it was needed to justify some use of his own weapon or to plant it during the course of a search in order to generate positive results in a crime to lodge against someone falsely. So I have to set that aside.

The MO<sup>1</sup> doesn't include that. It doesn't include bringing in possession with intent to deliver size amounts, baggies, scales and powder, cutting powder as well. It sounds like from what I hear, and you can correct me if I'm wrong, these were small possessory amounts—I'm not sure if they were ever asked about the amounts—but possessory amounts that were used just to make a negative warrant a positive one to carry just above the threshold where it's positive, which would mean small or whatever classification type amounts that would be necessary.

So that's the pattern that I have here, and I don't think we even get to the pattern analysis for 1983 purposes because of the reasons I've set forth here that the record is lacking. But even if it was, I do not believe that this pattern to that extent would apply. \*\*\*.

\* \* \*

So the 1983 count for false arrest that's predicated on probable cause, I believe if a reasonable police officer objectively looked at what it is that's confronted with them when they go into that house; namely, the actual existence of narcotics there, whether the defendant actually was aware of it or not—he's apparently aware of it given the fact that it's his home and it's open and notorious location on the kitchen table with baggies, cutting powder and a scale and he's in

---

<sup>1</sup> The circuit court clarified, in denying plaintiff's motion to reconsider, that the evidence was indicative of the prior bad acts of Doroniuk and Shamah, not merely modus operandi, which was not relevant because identity was not at issue

1-11-0157

and around persons who have this in their possession—that’s not disputed in this record. I think it means the \*\* motion with respect to the 1983 count is to be granted on false arrest.”

¶ 18 In granting the motion for summary judgment as to the Brady claim, the circuit court concluded:

“Likewise, the same logic applies to the Brady count or the count pertaining to false or misleading information that was provided by officers—these officers to the prosecutors and the fact that they were quote/unquote prosecuting them without probable cause, for those reasons the 1983 count fails. The fact that this has been characterized as exculpatory evidence, I would note that the exculpatory evidence that Officer Droniuk provides in this case or could provide in this case in this record is strictly that he stole \$180 from this particular plaintiff, \$800 from a co-arrestee and evidently some money from one of the other co-arrestees, plus there was some money that fell on the floor according I think to his testimony. He would provide that exculpatory evidence, and that does not go to establish actual innocence. It may go to establish that he, like Mr. Fils, had committed a crime on that day or more probably than not had committed a crime on that day, but it doesn’t go to provide actual innocence to the narcotics charges and to the gun charge and, like I said, there’s no currency violation charges here.”

¶ 19 The circuit court subsequently denied plaintiff’s motion to reconsider the summary judgment ruling. This appeal followed.

¶ 20

DECISION

¶ 21

I. Evidentiary Rulings

¶ 22 We first consider plaintiff's contention that the circuit court erred in refusing to admit Lovett and Townsend as witnesses; failed to consider the prior bad acts of defendants Doroniuk and Shamah; and failed to consider his counsel's offer of proof at the summary judgment hearing and his affidavit that was attached to his motion to reconsider.

¶ 23 A circuit court's determination regarding the admission of evidence is within its discretion. *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 377, 805 N.E.2d 222 (2003). Absent an abuse of discretion, we will not disturb that determination on review. *Id.* An abuse of discretion will be found "only where no reasonable man would take the view adopted by the circuit court." *Id.* We address each of plaintiff's arguments in turn.

¶ 24 Supreme Court Rule 218(c) (eff. Oct. 4, 2002) provides:

"[a]ll dates set for the disclosure of witnesses \*\*\* and the completion of discovery shall be chosen to ensure that discovery will be completed not later than 60 days before the date on which the trial court reasonably anticipates that trial will commence, unless otherwise agreed by the parties. This rule is to be liberally construed to do substantial justice between and among the parties."

¶ 25 It is undisputed that plaintiff violated Rule 218(c) where his supplemental Rule 213(f)(1) request to add Lovett and Townsend as lay witnesses was filed on November 9, 2010, which was less than 30 days before the scheduled trial date.

1-11-0157

¶ 26 Contrary to plaintiff's argument, we find the circuit court did liberally construe the rule in order to provide justice between and among the parties. Specifically, the court considered the most basic fact that Lovett and Townsend were present during the execution of the warrant and, therefore, their identity was known to all parties since November 1, 2005.

¶ 27 Additionally, the court applied the following factors, which are to be used in determining whether striking witness testimony and barring further testimony from the witness is an appropriate sanction: "(1) surprise to the adverse party; (2) the prejudicial effect of the witness' testimony; (3) the nature of the witness' testimony; (4) the diligence of the adverse party; (5) whether objection to the witness' testimony was timely; and (6) the good faith of the party calling the witness." Clayton, 346 Ill. App. 3d at 381 (quoting Boatmen's National Bank of Belleville v. Martin, 155 Ill. 2d 305, 314, 614 N.E.2d 1194 (1993)). The City filed a timely motion to strike plaintiff's Rule 213(f)(1) request. In that motion, the City informed the circuit court that the parties exchanged correspondence in February 2010 when the City sought assistance in locating Lovett and Townsend. Plaintiff's attorney responded in the correspondence by informing the City that he did not intend to call Lovett or Townsend as witnesses. Plaintiff's original Rule 213(f)(1) disclosures confirm this fact. Not until after the depositions of other witnesses were completed and defendants' filed their motions for summary judgment did plaintiff file his supplemental Rule 213(f)(1) request to add Lovett and Townsend as lay witnesses. The City, however, had ceased its efforts in locating Doroniuk and Shamah based on the February 2010 correspondence. We cannot say the circuit court abused its discretion in finding the disclosure was not in good faith and was both a surprise and unfairly prejudicial. Plaintiff argues that defendants participated in

1-11-0157

gamesmanship that should have forgiven his belated disclosure request. Based on our review of the record, we disagree.

¶ 28 Moreover, plaintiff has waived his contention on more than one basis. First, we note that plaintiff did not file a motion to reconsider the circuit court's ruling denying his supplemental Rule 213(f)(1) request. See *Haudrich v. Howmedia*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248 (1996) ("[i]t is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal"). Additionally, plaintiff failed to provide the circuit court with an offer of proof regarding the testimony of Lovett and Townsend. The relevant law provides:

"A party claiming he has not been given the opportunity to prove his case must provide a reviewing court with an adequate offer of proof as to what the excluded evidence would have been. [Citation.] The purpose of an offer of proof is to disclose the nature of the offered evidence for the information of the trial judge and opposing counsel, and to allow the reviewing court to determine whether exclusion was erroneous and harmful. [Citation.] 'To be adequate, an offer of proof must apprise the trial court of what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose.' [Citation.] In absence of an offer of proof, the issue of whether evidence was improperly excluded will be deemed waived." *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773, 771 N.E.2d 966 (2002).

1-11-0157

Plaintiff did not provide the trial court with an offer of proof. We, therefore, conclude the issue is waived.

¶ 29 Turning to plaintiff's argument that the circuit court failed to consider the "prior bad acts" of Doroniuk and Shamah, we find no abuse of discretion. Our review of the record demonstrates that the circuit court found it unnecessary to determine whether defendants' prior bad acts were admissible because the court concluded plaintiff failed to establish evidence to support his allegations. In its oral pronouncement granting defendants' motions for summary judgment, the circuit court thoroughly reviewed the evidence on file. In so doing, the court discussed the evidence related to the prior bad acts of Doroniuk and Shamah. In that review, the court mainly focused on the similarities and differences between the pattern of prior criminal activity, i.e., in using the same informant to obtain warrants, purchasing and planting a small quantity of narcotics on the subjects of the warrants, stealing the subjects' money, and sometimes paying or providing narcotics to the informant, versus the circumstances of the execution of plaintiff's warrant, i.e., using a different informant, finding a large quantity of narcotics, an electronic scale, baggies, recovering a handgun, and stealing plaintiff's money. Notwithstanding, the court repeatedly stated that the admissibility of the prior bad act evidence need not be considered because plaintiff did not establish a claim for false arrest or under Brady where he failed to establish that the narcotics and handgun were not at least within his constructive possession.

¶ 30 Turning to plaintiff's final evidentiary argument, we, again, find no abuse of discretion. Plaintiff argues the circuit court failed to acknowledge his counsel's offers of proof that plaintiff would testify at trial to being innocent of any connection to drug or gun activity and that no such

1-11-0157

activity occurred in his house. Plaintiff contends that these offers of proof provided the missing evidence to defeat summary judgment. We initially note that an offer of proof is not evidence on file such as that required by section 2-1005(c) of the Code of Civil Procedure. 735 ILCS 5/2-1005(c) (West 2006) (summary judgment may be granted only on the basis of "the pleadings, depositions, and admissions, on file, together with the affidavits, if any"); see *Estate of Romanowski*, 329 Ill. App. 3d at 773 (the purpose of an offer of proof is to give a reviewing court a basis upon which to determine whether evidence was properly excluded, not to act as the evidence itself). Additionally, "where the party moving for summary judgment supplies well-alleged facts in an affidavit that are not contradicted by counteraffidavit, such allegations must be taken as true, notwithstanding the existence of contrary averments in the nonmovant's pleadings which merely purport to establish bona fide issues of fact." *Steiner Electric Co. v. NuLine Technologies Inc.*, 364 Ill. App. 3d 876, 882, 847 N.E.2d 656 (2006) (citing *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587, 272 N.E.2d 497 (1971)). Plaintiff's counsel's offers of proof merely purported to establish bona fide issues of fact.

¶ 31 Moreover, in his brief, plaintiff quotes the following statement made by the circuit court:

"[Plaintiff] never says I wasn't selling drugs at that time, I wasn't engaged in the sale of drugs at that time, I did not see any drugs in the kitchen the last time I was in there, which may have been moments before the arrest. I would have known if someone brought drugs in or Lovett or Townsend were the ones that brought it in."

1-11-0157

Our review of the circuit court's additional rulings on the motion for summary judgment and its rulings on the motion to reconsider demonstrates that even if, and eventually when in his supplemental affidavit attached to the motion to reconsider, plaintiff provided a pleading disavowing participation in any drug activity, the fact remained that plaintiff failed to provide facts establishing that Doroniuk and Shamah planted the drugs and handgun. We, therefore, conclude that the circuit court did not abuse its discretion.

¶ 32 In sum, we consider plaintiff's contentions regarding the circuit court's granting of summary judgment based on the same evidence considered by the court. In that vein, we note that plaintiff has cited to evidence that was not before the circuit court prior to making its summary judgment ruling. "The scope of appellate review of a summary judgment motion is limited to the record as it existed at the time the trial court ruled." *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 947, 627 N.E.2d 202 (1993) (citing *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 509-10, 589 N.E.2d 1034 (1992) ("upon appellate review of a summary judgement ruling the appellant may only refer to the record as it existed at the time the trial court ruled, outline the arguments made at that time, and explain why the trial court erred in granting summary judgment")). We, therefore, refuse to consider Clough's deposition, which does not appear in the record, and Doroniuk's deposition in his federal case, which also does not appear in the record, as well as plaintiff's affidavit, Officer Habiak's deposition testimony, and the vice case report, which did not appear in the record until plaintiff's motion to reconsider despite not being "newly discovered." See *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248, 571 N.E.2d 1107 (1991) (a circuit

court is justified in disregarding the contents of an affidavit attached to a motion to reconsider summary judgment and may deny that motion solely on the basis that the material was available prior to reconsideration but was never presented). "Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. Civil proceedings already suffer from far too many delays, and the interest of finality and efficiency require that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." (Emphasis in original.) *Id.* at 248-89.

¶ 33

## II. Summary Judgment

¶ 34 Plaintiff contends the circuit court erred in granting summary judgment on his false arrest and *Brady* claim where he demonstrated there was no probable cause to support his arrest and the government suppressed exculpatory evidence.

¶ 35 Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). A plaintiff need not prove his case on summary judgment; however, he must present some evidence to support the allegations in his complaint. *Lappin v. Costello*, 232 Ill. App. 3d 1033, 1040, 598 N.E.2d 311 (1992). "If the opponent of a motion for summary judgment fails to controvert the proofs offered in support of the motion, and the movant's showing of uncontradicted facts would entitle him to judgment as a matter of law, then summary judgment is proper." *Id.* We review a circuit court's decision whether to grant summary judgment de novo. *Id.*

¶ 36

A. False Arrest

¶ 37 Plaintiff contends the circuit court erred in granting summary judgment on his false arrest claim where there were genuine issues of material fact as to whether defendants had probable cause to arrest him.

" '[F]alse arrest is the unlawful restraint of an individual's personal liberty.' [Citation.] If probable cause existed for the arrest, an action for false arrest cannot lie. The existence of probable cause is a question of law and only becomes a question of fact if the operative facts are in dispute. [Citation.] Probable cause is defined as a state of facts which, if known, would lead a person of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. [Citation.] Not only is the existence of probable cause an absolute bar to a claim of false arrest [citation], but the existence of probable cause to arrest is also an absolute defense to an arrestee's civil rights action against the police based on fourth and fourteenth amendment violations. [Citation.]" Lappin, 232 Ill. App. 3d at 1041-42.

¶ 38 Simply stated, there was absolutely no evidence advanced by plaintiff to demonstrate that Doroniuk and Shamah planted the narcotics and handgun. Importantly, contrary to plaintiff's suggestion that none of the items inventoried were present in his home, Detective Costello testified at his deposition regarding the recovery of the handgun from under plaintiff's bed and Officer Kurnat testified at his deposition to finding plaintiff, Townsend, and Lovett sitting at the kitchen table with an amount of powder resembling narcotics on the table. Although subsequent

1-11-0157

testing revealed the powder was not positive for narcotics, the police recovered nearly 63 grams of cocaine in rock form. Considering the standard for summary judgment, namely, that the evidence must be considered in a light most favorable to the nonmovant, or in this case, plaintiff, we acknowledge plaintiff's deposition testimony that he was in his living room when the police entered and handcuffed him. Nevertheless, plaintiff failed to present a sufficient "chain of evidence" demonstrating that the narcotics, drug paraphernalia, and handgun were not present in his home when the police entered, thereby creating probable cause for his arrest. See 720 ILCS 570/402 (West 2006) (statute criminalizing possession of cocaine); 720 ILCS 5/24-1.1(a) (West 2006) (statute criminalizing possession of a firearm by felon). Plaintiff's speculative arguments regarding the appearance of the narcotics and handgun cannot defeat summary judgment.

¶ 39

#### B. Exculpatory Evidence

¶ 40 Plaintiff next contends the circuit court erred in granting summary judgment in favor of defendants on his Brady claim. Specifically, plaintiff contends defendants failed to disclose exculpatory evidence demonstrating his innocence, such that Doroniuk and Shamah falsely obtained the search warrant, intended to steal money and/or drugs from plaintiff in execution of that warrant, and either planted the narcotics and handgun or created a false report representing that plaintiff had narcotics and a handgun in his home.

¶ 41 Pursuant to *Brady v. Maryland*, 373 U.S.83, 87 (1963), prosecutors are required to disclose any exculpatory evidence to the defense, including information that could be used to impeach a witness. *People v. Jones*, 2012 IL App (1) 093180, ¶65. "Brady requires that if the State does not disclose evidence, the nontendered evidence must be favorable to the accused and

1-11-0157

material before relief can be allowed. Favorable evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

¶ 42 Plaintiff contends that he would not have pled guilty to the criminal charges stemming from the events on November 1, 2005, had he known the exculpatory evidence detailed above. The main issue with plaintiff's argument is that the evidence in question was not exculpatory in the traditional sense where plaintiff alleged that he knew the officers provided a false account of the events to which he was innocent. Moreover, as we determined, plaintiff failed to demonstrate Droniuk and Shamah lacked probable cause to arrest him; therefore, they could not be responsible for providing evidence that did not exist.

¶ 43 In addition, a criminal defendant's right to exculpatory evidence is part and parcel of receiving a fair trial. *U.S. v. Ruiz*, 536 U.S. 622, 628 (2002). "When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Id.* In *Ruiz*, the U.S. Supreme Court concluded that failure to disclose exculpatory evidence does not render a guilty plea involuntary. *Id.* To the extent plaintiff argues he would not have pled guilty had he been aware of the prior illegal activity of Droniuk and Shamah, we recognize the case cited by plaintiff, *McCann v. Mangialardi*, 337 F.3d 782 (7th Cir. 2003). In *McCann*, the Seventh Circuit Court of Appeals, in *dicta*, concluded that the *Ruiz* court indicated a distinction between impeachment information and exculpatory evidence of actual innocence. *Id.* at 787-88. The *McCann* court proposed that failure to disclose knowledge of a criminal defendant's factual innocence prior to allowing the defendant to enter a guilty plea would be a

1-11-0157

due process violation. *Id.* at 788. However, the *McCann* court was not required to resolve that question because, similar to the case before this court, the plaintiff failed to present evidence demonstrating the officer knew drugs were planted in the plaintiff's car prior to entry of the guilty plea. *Id.* We, therefore, conclude that summary judgment was properly granted on plaintiff's *Brady* claim.

¶ 44 III. Exclusionary Rule

¶ 45 Plaintiff finally contends the exclusionary rule should apply to exclude all of the evidence discovered in his residence.

¶ 46 We quote the relevant law at length:

"Under the exclusionary rule, 'evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.' [Citation.] '[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' [Citation.] The Supreme Court has explained that '[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.' [Citation.] Instead, application of the exclusionary rule has been restricted to those areas where the remedial objectives of deterring unlawful police conduct are 'most efficaciously served.' [Citation.]

Accordingly, the Supreme Court developed a balancing test to measure the appropriate use of the exclusionary rule. [Citation.] Under this test, we must balance the likely benefits of excluding unlawfully seized evidence against the likely costs. [Citation.] On the benefit side of the analysis is the deterrence of possible future unlawful police conduct. [Citation.] 'On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.' [Citation.]" *U.S. Residential Management & Development, L.L.C. v. Head*, 397 Ill. App. 3d 156, 161-62, 922 N.E.2d 1 (2009).

¶ 47 The applicability of the exclusionary rule presumes the existence of unlawfully seized evidence. Viewing the evidence in a light most favorable to plaintiff, we will assume the warrant was unlawfully obtained because, according to Doroniuk's deposition testimony, it was issued by a judge receiving payment and the information upon which the warrant was obtained was not substantiated by the informant.

¶ 48 The improperly obtained warrant notwithstanding, we do not find the evidence was unlawfully seized. Plaintiff concedes that, as a parolee, he had a "significantly diminished" expectation of privacy because a condition of his release from prison was to "consent to a search of his or her person, property, or residence under his or her control." See 730 ILCS 5/3-3-7(a)(10) (West 2004); *People v. Wilson*, 228 Ill. 2d 35, 52, 885 N.E.2d 1033 (2008) (the exclusionary rule was not implicated where a warrantless, nonconsensual search of the parolee defendant's home did not violate the fourth amendment). Plaintiff, however, argues that the

1-11-0157

search of his home was not reasonable. *Wilson*, 228 Ill. 2d at 40 ("the requirement for a warrant has been held unnecessary in cases involving probationers and parolees when the search is deemed reasonable. [Citations] In determining the reasonableness of a warrantless search, a court must examine the totality of the circumstances and assess, on the one hand, the degree to which the search intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. [Citation.]") We disagree.

According to Doroniuk's deposition testimony, plaintiff's home was a known drug house. We find it reasonable to search the home of a parolee alleged to be involved in drug activity. "[T]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 52 (quoting *Samson v. California*, 547 U.S. 843, 857 (2006)).

¶ 49 Moreover, the exclusionary rule has not been extended to civil cases and, in light of the foregoing, we will not do so here. See *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998) (and cases cited therein).

¶ 50 CONCLUSION

¶ 51 We conclude the circuit court did not abuse its discretion in refusing to admit the challenged evidence. We further conclude the circuit court properly granted summary judgment in favor of defendants on plaintiff's section 1983 false arrest and *Brady* claims. Finally, we conclude the exclusionary rule did not prohibit the admission of the evidence discovered in plaintiff's residence. We, therefore, affirm the judgment of the circuit court.

¶ 52 Affirmed.

1-11-0157

¶ 53 JUSTICE ROBERT E. GORDON, dissenting:

¶ 54 The majority writes: "Viewing the evidence in a light most favorable to plaintiff, we will assume the warrant [in the case at bar] was unlawfully obtained because, according to [former police officer] Doroniuk's deposition testimony, it was issued by a judge receiving payment and the information upon which the warrant was obtained was not substantiated by the informant."

*Supra* ¶ 47. I agree with the majority that we must conclude that the warrant used by the officers in this case was unlawful.

¶ 55 However, the majority concludes: "The improperly obtained warrant notwithstanding, we do not find the evidence was unlawfully seized." *Supra* ¶ 48. The majority reaches this conclusion by assuming that, since the officers *could have* conducted the search as a warrantless search of a parolee, we must find the actual search, and the fruits of that search, lawful.

However, the fact remains that the search was actually conducted pursuant to a warrant, and that warrant was unlawful. Thus, I would find that the search, as actually conducted, was unlawful, and so were the fruits of that search.

¶ 56 The fourth amendment specifically provides that "[n]o Warrants shall issue, but upon probable cause." U.S. const. amend. IV. Since this warrant issued not upon probable cause but upon payment, it was a direct violation of the explicit words of the fourth amendment.

¶ 57 The majority finds that, even if there was a fourth amendment violation in defendant's criminal case, the exclusionary rule does not apply here, because this is a civil case. *Supra* ¶ 49. However, this misunderstands the nature of plaintiff's claim. Plaintiff claims that the trial court erred in granting summary judgment on his false arrest and *Brady* claim where he demonstrated

1-11-0157

there was no probable cause *in the criminal case* to support his arrest. If the fruits of the search had been excluded *in the criminal case*, then there was no probable cause to support his subsequent arrest *in the criminal case*.

¶ 58 As a result, I agree with defendant that, in conducting our analysis of his underlying criminal case, we must exclude the fruits of the illegal search. Thus, I would reverse the trial court's grant of summary judgment and I must respectfully dissent here.