IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIRGINIA MAE GINTER ANDREW FRANCIS GINTER, h/w	:	CIVIL ACTION
v.	:	
TROOPER MICHAEL P. SKAHILL; THE OFFICE OF THE DISTRICT ATTORNEY OF DELAWARE COUNTY; THE PENNSYLVANIA STATE POLICE DEPT.	:	NO. 04-2444

MEMORANDUM AND ORDER

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE

October 17, 2006

On August 18, 2005, the parties filed a notice of consent to have me conduct all further proceedings in this action, and, on October 4, 2005, the Honorable Clifford Scott Green ordered that the case be referred to me for all further proceedings and the entry of judgment. *See* Docket Entries Nos. 20 and 21.

Presently before this Court are the Motions for Summary Judgment of Defendants Trooper Michael P. Skahill and the Office of the District Attorney of Delaware County.[1] In his motion for summary judgment Trooper Skahill argues that Plaintiffs Virginia Mae Ginter and Andrew Francis Ginter cannot establish their various claims. The Delaware County District Attorney's office, in its motion, agrees with Skahill and asserts that it is entitled to judgment as a matter of law. Upon consideration of these motions, Plaintiffs' responses, the record, and the applicable caselaw, and as

[1]Judge Green granted the motion to dismiss Defendant the Pennsylvania State Police Department on August 4, 2004. *See* Docket Entry No. 7.

discussed more fully below, Defendants' motions will be granted.

I. FACTUAL BACKGROUND[2]

I begin by presenting the facts, drawing all reasonable inferences in favor of Plaintiffs, the non-moving parties. *See e.g., Hamilton v. Leavy, et al.*, 322 F.3d 776, 782, n. 4 (3d Cir. 2003).

On August 17, 2001, Trooper Skahill was flying in a Pennsylvania State Police helicopter over Delaware County when he noticed marihuana growing in a briar patch located adjacent to the home of Virginia and Andrew Ginter. *See* Skahill Exhibits in Support of his Motion for Summary Judgment[3], Exhibit 5, Police Criminal Complaint against Andrew Ginter. Upon landing the helicopter, Skahill and another State Trooper entered the briar patch and saw several marijuana plants. *Id.*

The Troopers proceeded to the backyard of the Ginters' house, at 535 Smithbridge Road, Concord, Pennsylvania, where Andrew was on the back porch. At the Troopers' request, Andrew identified himself as the owner of the house, and he indicated that he had firearms in his residence and in his truck. *See* Skahill Exhibit 1 at 18-21. The Troopers entered the home and, while retrieving the guns, noticed a small clear vial containing what was suspected to be marijuana residue and a pipe. *See* Skahill Exhibit 5, Criminal Complaint against Andrew Ginter; Plaintiffs' Memorandum of Law in Support of the Plaintiffs' Responses to Skahill's Motion for Summary

[2]The factual history is compiled from a review of Plaintiffs' Complaint and First Amended Complaint; Defendants' Answers to Plaintiffs' Complaints; the Ginters' response to Defendants' affirmative defenses; Defendants' motions for summary judgment, their memoranda in support of their motions, inclusive of all exhibits thereto; Plaintiffs' responses, their memoranda in support of their responses, with exhibits; Defendants' replies to the responses to the motions for summary judgment, and exhibits, and the record of this Court. All facts, and reasonable inferences therefrom, are considered in the light most favorable to the non-moving party.

[3]Hereinafter Skahill's Exhibits.

Judgment[4] at 2. Another gun was found in Andrew's truck. Also in the truck was a tool box which contained brown aluminum facia and gravity drip rodent poison. *See* Skahill Exhibit 5, Criminal Complaint against Andrew Ginter; Plaintiffs' Memo in Response to Skahill at 3.

A path was observed which led from the Ginters' side yard to the briar patch. *See* Skahill Exhibit 5, Criminal Complaint against Andrew Ginter; Plaintiffs' Memo in Response to Skahill at 3. The marijuana plants were removed from the briar patch, and it was noticed that they were enclosed in brown aluminum facia. The aluminum was secured with black electrical tape. Also found at the briar patch site was a bag from Lowe's which contained gravity feed bait rat/mouse poison. Rat/mouse poison was also around the marijuana plants. *See* Skahill Exhibit 5, Criminal Complaint against Andrew Ginter.

Andrew stated the presence of the above items in the briar patch was a coincidence, and he told the Troopers to retrieve a sales receipt from Lowes which was in his home. *Id.* The sales receipt revealed the purchase of gravity feed bait (rat/mouse poison) which was identical to that found in the marihuana field, black electrical tape similar to that used to secure the facia around the marihuana plants, and brown aluminum facia similar to the facia found around the base of the plants and the facia located in the back of Andrew's truck. *Id.*.

On October 1, 2001, Skahill obtained a warrant for the arrest of Andrew Ginter. Andrew was charged with possession of a controlled substance, manufacture or delivery of a controlled substance, and possession of drug paraphernalia. *Id.* On October 10, 2001, Andrew turned himself in to the authorities. *See* Skahill Exhibit 1 at 26. He had a preliminary hearing and was held for trial. *Id.* at 27-28.

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[4]Hereinafter Plaintiffs' Memo in Response to Skahill.

On November 29, 2001, after verifying that Virginia Ginter resided at and was co-owner of the 535 Smithbridge Road house, Skahill obtained a warrant for Virginia's arrest on charges of possession of a controlled substance, manufacture or delivery of a controlled substance, and possession of drug paraphernalia. *See* Skahill Exhibit 5, Criminal Complaint against Virginia Ginter. Virginia turned herself in to the authorities on December 12, 2001, and was released on bail. *See* Skahill Exhibit 2 at 16, 24.

Andrew pled guilty to possession with intent to deliver a controlled substance on June 10, 2002. *See* Skahill Exhibit 3. The charges against Virginia were subsequently withdrawn. *See* Skahill Exhibit 2, Memo in Support of DA's Motion for Summary Judgment[5], Exhibits D and E. On November 12, 2002, Andrew was sentenced to 11 ½ to 23 months and one year of consecutive probation. *See* Skahill Exhibit 4. Andrew did not challenge his guilty plea through direct appeal or through Pennsylvania's Post Conviction Relief Act. *See* DA's Memo, Exhibit B at 115-117.

II. MOTION FOR SUMMARY JUDGMENT

In his motion for summary judgment, Skahill makes the following argument concerning the Ginters' claims:

1. To the extent that the Ginters are contending that their due process rights under the Fifth Amendment of the United States Constitution were violated, such claims are not viable since the due process clause does not apply to the actions of state officials. *See* Skahill's Memo in Support of his Motion for Summary Judgment[6] at 6.

2. To the extent that Virginia is asserting an Eighth Amendment claim, it fails as a matter

[5]Hereinafter DA's Memo.

[6]Hereinafter Skahill's Memo.

of law because the Amendment's prohibition of cruel and unusual punishment applies only to individuals who have been convicted of a crime. In regard to Andrew's claim, nothing in the record shows that Skahill had anything to do with him during his incarceration or that he knew that Andrew had a serious medical condition. *Id.* at 7.

3. Andrew's claim that his constitutional rights were violated when he pled guilty is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). *Id.* at 8.

4. Skahill had probable cause to have the arrest warrants issued for the Ginters. *Id.* at 9.

5. Virginia's claim that her rights were violated when she was arrested is barred by the statute of limitations. *Id.* at 12.

6. Skahill is entitled to summary judgment on Virginia's § 1983 malicious prosecution claim because Skahill had probable cause to have the warrant issued for her arrest. *Id.* at 14.

7. The Ginters cannot maintain claims under 42 U.S.C. § 1985 as they have not established that Skahill's actions were motivated by racial or otherwise class-based invidiously discriminatory animus. *Id.* at 17-18.

8. Skahill is entitled to judgment on the Ginters' § 1981 claims in that nothing in the record suggests that the Ginters are members of a racial minority or that Skahill's actions were motivated by racial animus towards them. *Id.* at 18-19.

9. Skahill is entitled to qualified immunity on the Ginters' constitutional claims, and sovereign immunity bars their state law claims for false imprisonment, false arrest and malicious prosecution. *Id.* at 20-25.

In its motion for summary judgment Delaware County District Attorney's Office makes the following arguments:

1. The Ginters' allegations of violations pursuant to 42 U.S.C. §§ 1981 and 1983 must be dismissed because the Ginters failed to state a claim under which relief may be granted for municipal liability. *See* DA's Memo at 11.

2. The Ginters cannot establish a constitutional violation by the District Attorney's Office because any constitutional cause of action raised by Andrew is precluded by *Heck v. Humphrey*. This includes the Ginters' First, Fourth, Fifth, Eighth, and Fourteenth Amendment claims. *Id.* at 14-21.

3. The DA's office is entitled to judgment as a matter of law on the Ginters' § 1985 claims as there are no allegations in their Complaint that suggests any Defendant conspired to prevent a federal officer from performing his duties. *Id.* at 22.

4. The Ginters' § 1981 claims fail as a matter of law since they have not produced any evidence that they are members of a protected class. *Id.* at 23-24.

III. DISCUSSION

A. Legal Standard

Summary judgment is appropriate only where there exists no genuine issue as to any material fact, such that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56©).

"When the non-moving party bears the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 329 (3d Cir. 1995); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). A non-moving party creates a genuine issue of material fact when it provides evidence "such that a reasonable jury could return a verdict for the non-moving

party". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1996); *see also Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 65 (3d Cir. 1996).

B. Analysis

1) Heck v. Humphrey

Both Defendants assert that any claims brought by Andrew are barred by the doctrine set forth by the Supreme Court of the United States in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 62 USLW 4594, 129 L.Ed.2d 383 (1994). The Supreme Court held that:

> I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 486-487.

In the case at hand, Andrew pled guilty to possession with intent to deliver a controlled substance. He did not challenge that conviction through direct appeal or via Pennsylvania's Post Conviction Relief Act. As a result, his constitutional claims are barred, and Defendants are entitled to judgment as a matter of law. In the interest of a thorough discussion, however, I will analyze each of the claims addressed by Defendants in their motions.

2) 1st Amendment Claim

The Ginters allege that their First Amendment [7] rights were violated by the District Attorney's

[7]The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a

Office of Delaware County. Mr. and Mrs. Ginter claim that they both were involved in a protected activity in that Andrew was exercising his constitutionally protected right to his presumed innocence; his right to freedom from unlawful searches, and his right to trial in which a jury must be satisfied beyond a reasonable doubt that he was guilty of the accusations. They further state that Virginia was not involved in the investigation and should never have been arrested. *See* Plaintiffs' Answer to DA at 26.

Though the Complaint contains no specific allegation to support a cause of action for a First Amendment violation, I will give Plaintiffs the benefit of the doubt and surmise they are alleging retaliation.

In order for Andrew to prevail on a First Amendment claim, he must show that his plea was not voluntary, thereby invalidating his conviction. Andrew has not presented evidence that his underlying conviction was reversed upon appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by the grant of a federal writ of habeas corpus. His conviction remains valid, and his claim of a First Amendment violation is precluded by *Heck* and its progeny.

In order for Virginia to prevail on her retaliation claim, she would have to prove three things: 1) that she engaged in protected activity; 2) that the District Attorney's Office responded with retaliation, and 3) that her protected activity was the cause of its retaliation. *See Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997); *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004). The Complaint alleges that Virginia was arrested because of Andrew's refusal to plead guilty, not because of any protected activity in which she engaged.

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redress of grievances.

The District Attorney's Office is entitled to judgment as a matter of law on this claim.

3) 4th Amendment/Probable Cause Claims

Plaintiffs also assert that their Fourth Amendment[8] rights were violated when they were allegedly arrested without sufficient probable cause. It goes without saying that the Fourth Amendment prohibits someone's arrest without probable cause. *See Orsatti v. New Jersey State Police*, 71 F.3d 480, 482 (3d Cir. 1995); *Cherry v. Garner*, 2004 WL 3019241 *8 (E.D.Pa. December 30, 2004). The issue of probable cause, or lack thereof, is addressed by the Ginters in a variety of ways.

Both Mr. and Mrs. Ginter claim that their constitutional rights were violated by Trooper Skahill when he arrested them because he did not have sufficient probable cause to have the warrants issued for their arrests. *See* Skahill's Memo at 9-10. To succeed in this claim, Plaintiffs must show "by a preponderance of the evidence: (1) that the police officer 'knowingly and deliberately, or with reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant;' and (2) that 'such statements or omissions are material, or necessary to the finding of probable cause.'" *Cummings v. City of Philadelphia*, 2004 WL 906259 *5 (E.D.Pa. April 26, 2004). *See also Sherwood v. Mulvhill*, 113 F.3d 396, 399 (3d Cir. 1997). It must be determined whether a reasonable jury could conclude that Skahill made statements or omissions that he either knew or should have known were false except for his reckless disregard for the truth. *See*

[8]The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Cummings, 2004 WL 906259 at *6. "Omissions are made with reckless disregard 'if an officer withholds a fact in his ken that '[a]ny reasonable person would have known that this was the kind of thing the judge would wish to know'". *Id.* Recklessness of assertions "is measured not by the relevance of the information, but by the demonstration of willingness to affirmatively distort the truth". *Id.* "[T]he affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *Id.*

During his guilty plea, Andrew admitted to the facts as set forth in Skahill's affidavit of probable cause which was used to obtain the warrant for Andrews's arrest. *See* Skahill Exhibit 3. In regard to Virginia, there is no dispute that she and her husband are co-owners of their home at 535 Smithbridge Road, Concord, Pennsylvania, nor is there any dispute that marijuana residue and drug paraphernalia were found in their house.

Under the doctrine of constructive possession, Skahill could charge both owners of the property with the crimes of possession with the intent to deliver a controlled substance, possession of a controlled substance, and possession of paraphernalia. "Proof of actual possession need not be shown; it may be established by circumstantial evidence." *USA v. Davis*, 461 F.2d 1026, 1035 (3d Cir. 1972). "The evidence must be such, however, that a jury may infer that the person charged with possession had dominion and control of the narcotic drug, or that he knowingly had power to exercise dominion and control over the drug (internal citations omitted)." *Id.* The evidence must support an inference that the individual knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. *See USA v. Jenkins*, 90 F.3d 814, 817-818 (3d Cir. 1996). *See also USA v. DiNovo*, 523 F.2d 197 (7th Cur, 1975).

Though Virginia was not discovered in the immediate area of the marijuana in her home, constructive possession is justified on the basis of her possessory interest in the house she owns with Andrew.

Virginia specifically challenges her arrest. "[A]n arrest based upon probable cause is justified, regardless of whether the individual named is found guilty." *Cherry*, 2004 WL 3019241 at *8. If at the moment the arrest was made the facts and circumstances within Skahill's knowledge, and of which he had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that both the Ginters had violated the law, probable cause is present. *See Merkle v. Upper Dublin School District*, 211 F.3d 782, 789 (3d Cir. 2000).

The facts reveal that Trooper Skahill had probable cause to arrest both Andrew and Virginia Ginter, and, because the DA's Office does not make arrests, both Defendants are entitled to judgment as a matter of law on this claim.[9]

4) 5th Amendment Claim

The Ginters claim their arrests constituted a violation of their Fifth Amendment[10] rights by Defendants. Presumably, they refer to their due process rights. However, "[t]he due process clause of the Fifth Amendment applies only to the conduct of federal actors". *Cherry v. City of Philadelphia*, 2004 WL 2600684 *6 (E.D.Pa. November 15, 2004). "The due process clause of the

[9]There is no need to discuss the issue of the statute of limitations raised by Defendants.

[10]The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifth Amendment does not limit actions of state officials." *Huffaker v. Bucks County District Attorney's Office*, 758 F.Supp. 287, 290 (E.D.Pa. 1991). In this case, Defendants are not federal actors, and the Complaint does not allege any connection between them and the federal government. Both defendants are entitled to judgment as a matter of law on the Ginters' Fifth Amendment claim.

5) 6th Amendment Claim

Andrew has asserted a violation of his 6th Amendment[11] right to trial. He claims that he pled guilty to the charges filed against him in order to spare his wife from criminal prosecution. He claims that Defendants' decision to arrest Virginia deprived him of his right to trial in violation of the Sixth Amendment. After his guilty plea, the charges against Virginia were dropped. Andrew further explains his position:

> Mr. Ginter pleaded guilty to the charges which he believes were properly filed against him. Prior to entering his plea of guilty, the Constitution of both the United States as well as the Commonwealth of Pennsylvania provided him the protection of his right to defend against the accusations and be tried before a jury of his peers. He was presumed to be innocent and he was not required to present a defense. He depended upon the Constitutional protections of the law and instructed his attorney to proceed to trial invoking the Constitutional guarantees of due process, presumption of innocence and an instruction that before he could be found guilty, a jury of twelve citizens must be satisfied beyond a reasonable doubt that he was guilty. One person believing there was reasonable doubt would have prevented a conviction.
>
> The facts showed the marijuana growing in the briar patch was not visually apparent from the home owned by Andrew Ginter. There was nothing which linked him to the marijuana other than two

[11]The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

> items which were seized during a search which Andrew believed was illegally performed. In summary, he meant to exercise his right to trial and to mount a legal defense.
>
> He now avers the rights provided to him by the two Constitutions were taken from him due to the illegal arrest and intimidation of his wife, Virginia. Plaintiffs' Memo in Response to the DA's Office at 23.

In order for Andrew to prevail on his claim that he was denied his right to a trial, he would have to show that his plea was not voluntary, thereby invalidating his conviction. As previously noted, *Heck* prevents his maintenance of this claim since his plea remains valid.

However, according to Andrew, "[s]ince he is not seeking to reverse his conviction or invalidate the conviction, he is not foreclosed from filing an action where the damage results from a collateral injury to his wife under the theory of loss of consortium. His complaint is that the improper arrest of his wife caused him to be extorted and to enter his plea of guilty." *Id.* at 24. "He is not attacking the conviction, he is only claiming an injury through his rights as a husband on a loss of consortium claim." Plaintiffs' Answer to the Motion for Summary Judgment filed by Defendants the Office of the District Attorney of Delaware County[12] at 25.

The general rule is that "a litigant may only assert his own constitutional rights or immunities". *O'Malley v. Brierley*, 477 F.2d 785-789 (3d Cir. 1973) (*quoting United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 523, 4 L.Ed.2d 524 (1960)). "There is no authority to permit spousal recovery for loss of consortium on violations of the other spouse's civil rights." *Wakshul v. City of Philadelphia*, 998 F.Supp. 585, 590 (E.D.Pa. 1998) (*quoting Quitmeyer v. SEPTA*, 740 F.Supp. 363, 370 (E.D.Pa. 1990)).

Virginia has made no 6th Amendment claim, nor could she, as the charges against her were

[12]Hereinafter Plaintiffs' Answer to DA's Office.

dismissed. Further, Andrew cannot maintain a derivative loss of consortium claim herein.

Both Defendants are entitled to judgment as a matter of law on Andrew's 6th Amendment Claim.

6) 8th Amendment Claim

Both Ginters also claim a violation of their Eighth Amendment[13] right to be free from cruel and unusual punishment. The Eighth Amendment's prohibition of cruel and unusual punishment applies only to prisoners who have been convicted of a crime. *See Ingraham v. Wright*, 430 U.S. 651, 664 (1977). Virginia was not convicted of a crime or incarcerated; therefore, she cannot pursue an 8th Amendment claim concerning cruel and unusual punishment.

However, Andrew was convicted of a crime and incarcerated. In regard to his 8th Amendment claim, Andrew states:

> Andrew Ginter has asserted he was forced to present himself for incarceration without being given the opportunity to have the urethra tube stint removed. He asserts he was deprived of his rights to trial and defense of his charges due to the conspiracy to arrest Virginia and thereby coerce him into surrendering the enumerated rights. His claim however is for a loss of consortium and not for his incarceration. He recognizes that the entry of the plea of guilty forecloses such an action and has intentionally chosen to limit his claim to the derivative cause of action resulting from his marital relationship and his rights which are derived therefrom. Plaintiffs' Memo in Response to Skahill's Motion at 9.

Andrew's issue seems to be that when he was incarcerated, he had a medical condition which went untreated. There is nothing in the record to indicate that either Trooper Skahill or the DA's Office

[13]The Eighth Amendment reads:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

knew of his alleged condition. Nor is there any indication that Defendants had any contact with him while he was imprisoned. Andrew again mentions that he is claiming loss of consortium due to Virginia's arrest and her alleged deprivation of constitutional rights. This is not applicable herein.

Both Defendants are entitled to judgment as a matter of law on Plaintiffs' Eighth Amendment Claim.

7) 14th Amendment Claim

Plaintiffs Amended Complaint alleges a violation of their Fourteenth Amendment rights.[14] To the extent that Andrew is alleging a procedural or substantive due process violation, as already pointed out, this claim is barred by *Heck*. In order for Virginia to state a cause of action for a violation of procedural due process claim, she must show that she was deprived of a protected property interest and that the state procedures for challenging that deprivation did not comport with the due process of law. *See Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1293 (3d Cir. 1993). For her to establish a substantive due process violation, she must show that "the government's actions were not rationally related to a legitimate government interest or were in fact motivated by bias, bad faith or improper motive" (internal quotations omitted). *Sameric Corporation of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998).

It is apparent that Virginia was afforded an opportunity to be heard in that she was scheduled for numerous preliminary hearings to challenge the charges against her. In discussing a joint

[14]The Fourteenth Amendment reads in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

resolution of the Ginters' cases, Virginia agreed to continuances of her hearing pending Andrew's guilty plea. *See* DA's Memo, Exhibits C and D.

Further, our Courts recognize that "the concept of substantive due process is properly reserved for truly egregious and extraordinary cases". *Rich v. Bailey*, 1996 WL 745298 *4 (E.D.Pa. December 23, 1996 (*quoting Myers v. Scott County*, 868 F.2d 1017, 1019 (8th Cir. 1989).

Under the facts herein, Virginia was charged based upon the allegations in a police criminal complaint and affidavit of probable cause. She owned, with Andrew, the residence at 535 Smithbridge Road, Concord, Pennsylvania in which was found marijuana and drug paraphernalia. She consequently was charged under the doctrine of constructive possession, the prevailing law in the Commonwealth of Pennsylvania. She was prosecuted under this theory until Andrew accepted responsibility for the marijuana plants. There is nothing "truly egregious" or "extraordinary" about what occurred herein. The District Attorney's Office is entitled to judgment on this claim.

8) Virginia's § 1983 Malicious Prosecution Claim

Virginia claims that Skahill and the District Attorney's Office had no probable cause to have the warrant issued for her arrest and that the only reason Skahill and the DA's Office requested the warrant for her arrest was because Andrew would not plead guilty at his preliminary hearing.

> To prove malicious prosecution under section 1983, a plaintiff must show that: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003).

See also Tyson v. Damore, 2004 WL 1837033 (E.D.Pa. August 13, 2004)

Virginia's claim is based on the issuance of a warrant for her arrest and the subsequent withdrawal of charges. "The test for an arrest without probable cause is an objective one, based on 'the facts available to the officers at the moment of the arrest.'" *Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994).

Based on the information available to Skahill at the time the warrant was sought, there was probable cause for her arrest. Virginia admitted to living at her home, which she owned with her husband, Andrew, at 535 Smithbridge Road in Concord, Pennsylvania. Skahill found marijuana and drug paraphernalia in that home. The doctrine of constructive possession permitted Skahill to charge Virginia with possession of a controlled substance and possession of drug paraphernalia for the items that were in the house she owned jointly with her husband. As long as Skahill had some reasonable basis to believe that Virginia had committed a crime, the arrest is justified as being based upon probable cause. "Probable cause need only exist as to any offense that could be charged under the circumstances." *Id.* Since initiation of a criminal proceeding without probable cause is necessary to a malicious prosecution claim, summary judgment in favor of Skahill is appropriate on this claim.

Virginia also asserts this claim against the District Attorney's office. In order for her to sustain a cause of action for municipal liability, she must first establish a constitutional violation, and that violation must have been caused by the municipal policy. The Ginters have produced no evidence that the District Attorney's office acted maliciously or for anything other than bringing Virginia to justice. The theory of constructive possession, under which Virginia was charged, is, and was at that time, the prevailing law in Pennsylvania. Summary judgment in favor of the Office of the District Attorney is proper on this claim.

9) Claim under 42 U.S.C. § 1985

The Ginters also allege that Defendants violated their rights under 42 U.S.C. § 1985. 42 U.S.C. § 1985(3)[15] reads in pertinent part:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In order to maintain a cause of action for violation of 42 U.S.C. § 1985, the following must be established: "(1) a conspiracy by the defendants; (2) designed to deprive plaintiff of the equal protection of the laws or equal privileges and immunities; (3) the commission of an overt act in furtherance of that conspiracy; (4) a resultant injury to person or property or a deprivation of any right or privilege of citizens; and (5) defendants' actions were motivated by a racial or otherwise class-based invidiously discriminatory animus". *Moleski v. Cheltenham Township, 2002 WL 32349132* *7 (E.D.Pa. April 30, 2002) *(quoting Litz v. City of Allentown*, 896 F.Supp. 1401, 1414 (E.D.Pa. 1995)). Racial or other prohibited animus is a necessary element of a § 1985(3) claim. *See Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 430 (3d Cir. 1988).

The Ginters have not established that the actions of Trooper Skahill were motivated by racial or otherwise class-based invidiously discriminatory animus. In regard to Plaintiffs' § 1985 claim

[15]Though the Gintners do not so specify, I presume that they are proceeding under § 1985(3). For a claim under § 1985(1), a plaintiff would have to be a federal officer. Section 1985(2) protects against conspiracies used to obstruct justice or intimidate a party, witness or juror to a legal proceeding. Since neither of these latter two sections are applicable to the facts herein, I deduce that Plaintiffs seek relief under § 1985(3). *See Moleski v. Cheltenham Township*, 2002 WL 32349132 *7 n. 3 (E.D.Pa. April 30, 2002).

against the District Attorney's Office, the Ginters have failed to allege a cause of action for a constitutional violation due to an established policy, practice or custom. Liability exists only when the constitutional injury results from a municipal policy or custom. *See DiBenedetto v. City of Reading*, 1998 WL 474145 *10 (E.D.Pa. July 16, 1998).

Trooper Skahill and the Office of the District Attorney are both entitled to judgment as a matter of law on Plaintiffs' § 1985 claim.

10) 42 U.S.C. § 1981 Claim

The Gintners also claim that both Trooper Skahill and the District Attorney's Office violated 42 U.S.C. § 1981 with their arrest.

42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of contracts and property transactions, and it provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 796 (3d Cir. 2001).

In order to establish a claim under 42 U.S.C. § 1981, a plaintiff must allege facts which support the following elements: "1) plaintiff is a member of a racial minority; 2) intent to discriminate on the basis of race by the defendant; and 3) discrimination concerned one or more of the activities enumerated in the statute which includes the right to make and enforce contracts, to sue, be parties, and give evidence". *Yelverton v. Lehman*, 1996 WL 296551 *7 (E.D.Pa. June 3, 1996), *aff'd. mem.*, 175 F.3d 1012 (3d Cir. 1999).

Nothing in the record reveals that the Ginters are members of a racial minority or that Skahill's actions were in any way motivated by racial animus towards them. Furthermore, Plaintiffs have not alleged any discrimination concerning one or more of the activities enumerated in the statute. This applies, too, to the District Attorney's Office. In addition, the analysis of a § 1981 claim against a municipality is the same as the analysis for a § 1983 claim against a municipality,. *See Hitchens v. County of Montgomery*, 2002 WL 207180 *4 n.6 (E.D.Pa. February 11, 2002). The Ginters have produced no evidence that the alleged violation was due to a policy or custom of the District Attorney's Office. Both defendants are entitled to judgment as a matter of law on this claim.

11) Qualified Immunity

Trooper Skahill asserts that he is entitled to qualified immunity on the Ginters' constitutional claims.

> In determining whether to grant summary judgment on qualified immunity grounds, a court must first consider whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right". *Saucier v. Katz*, 533 U.S. 194, 201 (2001). '[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.'" *Id. Hamlton v. Leavy, et al.* , 2003 WL 559393 at *8 (3d Cir. February 28, 2003).

In analyzing whether the constitutional right was clearly established, the court must consider "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted". This inquiry is an objective one and must be undertaken in light of the specific context of the individual case. The question is whether the officer's conduct was objectively reasonable in light of the facts and circumstances confronting him/her, regardless of underlying intent or motivation. *See Curley v. Klem*, 298 F.3d 271, 277-79 (3d Cir. 2002) (*quoting Saucier*, 121 S.Ct.

at 2156(2001)).

A decision, at the summary judgment level, on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis. The existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue. *Id.* at 278 (3d Cir. 2002).

The Ginters bear the initial burden of showing that Trooper Skahill's conduct violated some clearly established statutory or constitutional right. *See Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997). They have not sustained this burden. The facts reveal that a reasonable officer in Trooper Skahill's position would not believe that he was violating the constitutional rights of Mr. and Mrs. Ginter when he applied for arrest warrants supported by an affidavit of probable cause. Further, a reasonable officer in Trooper Skahill's position, with the facts at hand, would believe that he had probable cause to have the Ginters arrested. As a result, he is entitled to qualified immunity on the constitutional claims of Mr. and Mrs. Ginter.

12) Sovereign Immunity in regard to State Claims

The Ginters allege that their arrests by Trooper Skahill amounted to false arrest, false imprisonment and malicious prosecution. Skahill asserts that these state law claims are barred by sovereign immunity. "Sovereign immunity applies to intentional and negligent torts." *Dill v. Oslick*, 1999 WL 508675 *4 (E.D.Pa. July 19, 1999).

> Generally, officials and employees of the Commonwealth of Pennsylvania acting within the scope of their duties enjoy the same immunity as the Commonwealth itself. Therefore, Commonwealth officials are immune from state law tort claims unless the General Assembly has specifically waived immunity. The sovereign Immunity Act waives the immunity of the Commonwealth and its officials only in nine narrow categories of negligence cases.

. . . . .

> When determining whether conduct of an employee is within the scope of his/her duties, Pennsylvania courts have applied the Restatement (Second) of Agency § 228, which reads in pertinent part, that"[c]onduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master; and
> (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master (internal citations omitted). *Miller v. Hogeland*, 2000 WL 987864 *3 (E.D.Pa. July 18, 2000)

The nine categories of cases for which sovereign immunity is waived are cases involving: "(1) vehicle liability, (2) medical-professional liability, (3) care, custody or control of personal property, (4) a dangerous condition of Commonwealth real estate, highways and sidewalks, (5) a dangerous condition of Commonwealth highways, particularly potholes or sinkholes, (6) care, custody or control of animals, (7) liquor store sales, (8) National Guard activities, and (9) toxoids and vaccines". *Id.*, *3, n. 2. *See also Litzenberger v. Vanim*, 2002 WL 1759370 (E.D.Pa. July 31, 2002); *Perlmutter v. Pettus*, 2001 WL 1169215 E.D.Pa. October 1, 2001).

Here, all of the Ginters' state law claims are intentional torts which are not excluded from the immunity statute. It is also evident that Trooper Skahill was acting within the scope of his duties as a Pennsylvania State Trooper when he investigated and applied for arrest warrants for Plaintiffs. Skahill is immune from the Ginters' claims of false imprisonment, false arrest and malicious prosecution. He is entitled to summary judgment on these claims.

IV. CONCLUSION

Consistent with the above discussion, the motions for summary judgment filed by Trooper Michael P. Skahill and the Office of the District Attorney of Delaware County are granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIRGINIA MAE GINTER ANDREW FRANCIS GINTER, h/w	:	CIVIL ACTION
v.	:	
TROOPER MICHAEL P., SKAHILL THE OFFICE OF THE DISTRICT ATTORNEY OF DELAWARE COUNTY, THE PENNSYLVANIA STATE POLICE DEPT.	:	NO. 04-2444

ORDER

AND NOW, this 17th day of October, 2006, upon consideration of Defendants' motions for summary judgment, Plaintiffs' responses, Defendants' replies, and consistent with the above discussion, it is hereby **ORDERED** that:

1. Defendant Skahill's Motion for Summary Judgment (Docket Entry No. 23) is **GRANTED**.

2. The Motion for Summary Judgment of Defendant, the Office of the District Attorney of Delaware County, Pursuant to F.R.C.P. 56 (Docket Entry No. 27) is **GRANTED**.

3. Judgment is entered in favor of Defendants Trooper Michael P. Skahill and the Office of the District Attorney of Delaware County and against Plaintiffs Virginia Mae Ginter and Andrew Francis Ginter, h/w.

4. This case is closed.[16]

BY THE COURT:

S/M. FAITH ANGELL
M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE

[16]The Honorable Clifford Scott Green granted the motion to dismiss Defendant the Pennsylvania State Police Department on August 4, 2004. *See* Docket Entry No. 7.