IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

MICHAEL DWAYNE DURHAM,	)	
Plaintiff,	)	
	)	Civil Action No.: 2:09cv00012
v.	)	
	)	**REPORT AND**
RONALD K. ELKINS, et al.,	)	**RECOMMENDATION**
Defendants.	)	
	)	By: PAMELA MEADE SARGENT
	)	United States Magistrate Judge

In this case, the plaintiff, Michael Dwayne Durham, seeks a judgment against the defendants based on his arrest and detention for more than 90 days on drug charges which were ultimately dismissed against him. This case is currently before the court on the defendants, Ronald D. Oakes's and David L. Horner's, motion to dismiss, (Docket Item No. 38), ("Motion"), and the defendants' Motion for Summary Judgment, (Docket Item No. 45), collectively, ("Motions"). Jurisdiction is conferred upon this court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The Motions are before the undersigned magistrate judge by referral, pursuant to 28 U.S.C. § 636(b)(1)(B). None of the parties have requested oral argument on the Motions. As directed by the order of referral, the undersigned now submits the following Report And Recommendation.

I. Facts

The facts as alleged by Durham in his Second Amended Complaint[1] are presumed true for consideration of the Motions. Durham, who resides in Memphis,

1Durham filed an Amended Complaint before he served his original Complaint and then filed a Second Amended Complaint when motions to dismiss the Amended Complaint were granted.

Tennessee, was notified by the Social Security Administration in November 2006 that his Disability Insurance Benefits were being terminated because he had an outstanding warrant for his arrest in Wise County, Virginia. In December 2006, Durham contacted the Wise County Sheriff's Office to inform the office that there must be a mistake because he had not lived in Virginia in more than 10 years. Durham was told that there was nothing he could do to clear the warrant other than turn himself in to authorities. On December 7, 2006, Durham surrendered to the Memphis, Tennessee, police. He was charged with three counts of distributing a controlled substance in violation of Virginia Code Annotated § 18.2-248, and he was transported to the Southwest Virginia Regional Jail in Duffield, Virginia, where he remained in custody until the charges were dismissed against him on March 23, 2007.

The warrant on which the plaintiff was arrested was prepared by Defendant Horner and had the plaintiff's name and social security number instead of those of the actual perpetrator of these crimes. The Michael Durham who allegedly sold the drugs at issue lives in Wise County and is much younger than the plaintiff. After Durham's court-appointed lawyer presented cellular telephone records showing that Durham was not in Wise County on the dates at issue, the charges against him were dismissed, and he was released from custody on March 23, 2007.

Durham now sues Ronald K. Elkins, the Commonwealth's Attorney for Wise County, Ronald D. Oakes, Wise County Sheriff, and David L. Horner, a Big Stone Gap police officer and a member of the Regional Drug Task Force. In the Motion Horner and Oakes have moved to dismiss Durham's claims against them for failing to state a claim upon which relief can be granted, various claims of

immunity, lapse of the applicable statute of limitations and because a state remedy is available.

II. Analysis

As stated above, this matter is before the court on the Defendants' Motions - one motion to dismiss and one motion for summary judgment. Because documents outside of the pleadings have been considered by the court in considering the motion to dismiss, it shall be construed as a motion for summary judgment as well. *See* FED. R. CIV. P. 12(d).

Pursuant to Federal Rule of Civil Procedure 56(c), the court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that "there is no genuine issue as to any material fact and ... the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (en banc), *cert denied*, 498 U.S. 1109 (1991); *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255;

Matsushita Elec. Indus. Co., Ltd., 475 U.S. at 587; *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995); *Miltier v. Beorn*, 896 F.2d 848, 852 (4th Cir. 1990); *Ross*, 759 F.2d at 364. In other words, the nonmoving party is entitled "to have the credibility of his evidence as forecast assumed." *Miller*, 913 F.2d at 1087 (quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)). Therefore, in reviewing the Defendants' Motions, the court must view the facts and inferences in the light most favorable to Durham.

Durham has filed suit under 42 U.S.C. § 1983. The courts have recognized two distinct causes of action under § 1983 for violations of a person's Fourth Amendment right against unreasonable seizure. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 181-82 (4th Cir. 1996) (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)). With respect to Durham's claims based on false or unlawful arrest or arrest without legal process, the court refers the parties to the court's Order dated August 14, 2009, (Docket Item No. 35), which accepted the undersigned's Report and Recommendation, (Docket Item No. 29), dismissing such cause of action.

The other cause of action recognized for violation of a person's Fourth Amendment right against unreasonable seizure is a claim for malicious prosecution[2] or abuse of judicial process. *See Lambert*, 223 F.3d at 260-62. To pursue such a claim, Durham must show an unreasonable seizure in violation of the

2 The claim will be referred to as a "malicious prosecution" claim, despite the court's recognition that the Fourth Circuit stated that "there is no such thing as a '§ 1983 malicious prosecution claim.' What we termed a 'malicious prosecution' claim in *Brooks* is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution – specifically, the requirement that the prior proceeding terminate favorable to the plaintiff." *Snider v. Lee*, 584 F.3d 193, 199, (4th Cir. 2009) (quoting *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000)).

Fourth Amendment based on (1) the initiation or maintenance of a proceeding against him by the defendants, (2) termination of that proceeding favorable to him, and (3) lack of probable cause to support that proceeding. *See Lambert,* 223 F.3d at 260, 262 n.2; *Brook*s, 85 F.3d at 183-84, n.5.

Durham's Second Amended Complaint sets forth the necessary factual allegations to sustain an action for violation of Durham's right to be free from unreasonable seizure based on malicious prosecution. Durham claims that he was charged with three counts of distributing a controlled substance in violation of Virginia Code § 18.2-248, (Attachment to Docket Item No. 30, ("Second Amended Complaint"), at 4), and he was incarcerated from December 7, 2006, to March 23, 2007, (Second Amended Complaint at 4), thereby initiating and maintaining the proceedings against him. The charges were nolle prossed on March 23, 2007, thereby terminating the proceedings in his favor. (Second Amended Complaint at 5.) Finally, Durham alleges that the defendants did not have the necessary probable cause to maintain the proceedings against him. (Second Amended Complaint at 5.) Thus, Durham has alleged the necessary facts to support a claim for malicious prosecution. It is noted that the defendants argue that summary judgment should be granted in their favor on this claim for failure to allege malice as an element. (Docket Item No. 45 at 4.) Since this is a § 1983 action based on malicious prosecution and not a malicious prosecution case, a showing of malice is not required.

The defendants also assert that the statute of limitations has expired on the claim. As explained in the undersigned's previous Report and Recommendation, (Docket Item No. 29), the statute of limitations did not begin to run on the

malicious prosecution claim until March 23, 2007, the date on which the charges against Durham were dropped. *See Heck*, 512 U.S. at 484 (one element of §1983 malicious prosecution claim is termination of criminal proceedings in favor of the accused); *Morrison v. Jones*, 551 F.2d 939, 940-41 (4th Cir. 1977) (cause of action for §1983 malicious prosecution does not accrue until criminal proceedings are terminated). Contrary to the defendants' assertion, the facts supporting Durham's claim for malicious prosecution "arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading," thus, invoking the relation back doctrine of Rule 15(c) of the Federal Rules of Civil Procedure. As such, Durham's malicious prosecution claim is not barred by the applicable statute of limitations.

Next, the court will address the defendants' contention that the malicious prosecution suit is not available in this court because Virginia provides such an action. (Docket Item No. 38 at 5.) In support of their argument, the defendants cite *Albright v. Oliver*, 510 U.S. 266, 283-86 (1994), a plurality opinion, in which only two Justices concurred in the defendants' cited proposition. However, the fact that a state law remedy is available does not preclude the federal cause of action; the state remedy is supplemental to the federal action. *See Monroe v. Pape,* 365 U.S. 167, 183 (1961) (overruled in part, not relevant here, by *Monell v. New York City Dep't. of Soc. Servs.*, 436 U.S. 658, 664-89 (1978)). *See also Heck*, 512 U.S. at 480-81(exhaustion of state law remedies not a prerequisite to § 1983 actions); *Hall v. Tawney*, 621 F.2d 607, 612 (4th Cir. 1980) (fact that state provided adequate remedies did not preclude action under § 1983). Consequently, the fact that Virginia could provide redress from Durham's claim does not prevent him from asserting the claim in this court.

Defendant Oakes argues that the claims against him should be dismissed because "there is no allegation in the Complaint against the Sheriff himself," and vicarious liability is not available. (Docket Item No. 38 at 7-8.) Durham asserts that he is not pursuing a claim under a theory of vicarious liability and should be permitted to show Oakes's involvement at trial. (Docket Item No.40 at 11.) The law is well-settled that vicarious liability is not available under § 1983. *See Revene v. Charles County Comm'rs*, 882 F.2d 870 (4th Cir. 1989). Durham does not make a claim that Oakes is liable under a theory of vicarious liability; however, he also does not assert any facts that would make Oakes personally, or officially, liable. Durham's allegations are limited to claims against the "Sheriff's Department," and he does not claim that the actions were a result of a custom and usage known by Oakes. *See generally Randall v. Prince George's County, Md.*, 302 F.3d 188, 210-11 (4th Cir. 2002). As such, I find that summary judgment should be granted in Oakes's favor, and the claims against Defendant Oakes should be dismissed.

Finally, the court will deal with Defendant Horner's claims of immunity.[3] Defendant Horner claims immunity under the Eleventh Amendment of the United States Constitution. (Docket Item No. 38 at 7.) He asserts that since the action was filed against him in his official capacity, he falls under the Eleventh Amendment's protection. It is true that state officers sued in their official capacities, "assume the identity of the government that employs them," and are thus not "persons" under the meaning of § 1983. *Hafer v. Melo*, 502 U.S. 21, 27 (1991). However, when a state officer is sued in his or her individual capacity , he or she "fits comfortably within the statutory term 'person.'" *Hafer*, 502 U.S. at 27.

3Because I already have recommended granting summary judgment in Defendant Oakes's favor and dismissing the claims against him, I will address the remaining immunity arguments as they relate to Defendant Horner.

As such, state officers may be sued personally for actions taken in their official capacities. *See Hafer*, 502 U.S. at 26-27. Accordingly, Defendant Horner is not protected by the Eleventh Amendment with respect to his personal liability.

Lastly, Horner claims to be protected by qualified immunity. (Docket Item No. 45 at 2-3.) Under a theory of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). The focus is on what the official reasonably perceived, and the court is not to look at the actions with the benefit of hindsight. *See Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994). Furthermore, the protection of qualified immunity applies whether the official commits a mistake of fact, mistake of law or mistake based on mixed questions of fact and law. *See Pearson v. Callahan*, __ U.S. __, __,129 S.Ct. 808, 815 (Jan. 21, 2009).

In determining whether the defendant's actions were immunized, the court has to identify the constitutional right claimed to have been violated, decide whether that right was clearly established at the time of the violation, and, if so, determine whether a reasonable person would have known their actions violated the right. *See Smith v. Reddy*, 101 F.3d 351, 355 (4th Cir. 1996) (citing *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992)). The inquiry of whether Horner violated clearly established constitutional rights is to be undertaken in the specific context of this case, not as a general proposition. *See Brosseau v. Haugen*, 543 U.S. 194,

198 (2004) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (overruled on alternate grounds)).

In the Fourth Circuit, there is a strong sentiment questioning whether malicious prosecution claims are entitled to constitutional protection. In *Lambert*, the court indicated that the *Albright* decision expressed a "fairly strong sentiment against constitutionalizing malicious prosecution." 223 F.3d at 261. However, the court went on to state that the *Albright* opinion did not ultimately rule on the applicability of malicious prosecution in Fourth Amendment cases. *See Lambert*, 223 F.3d at 261. In two unpublished opinions, which the court recognizes are not of precedential value,[4] the Fourth Circuit has recognized that, in the wake of *Albright*, the right to be free from malicious prosecution is not grounded in the Constitution, which would not make it a "clearly established" right. *See Osborne v. Rose*, 1998 WL 17044, at *4-5 (4th Cir. Jan. 20, 1998) (unpublished) ("We do not believe, however, that the mere possibility that [malicious prosecution] claims might survive after *Albright* demonstrates that a constitutional right had reached the status of being clearly established."); *Brown v. Daniel*, 2000 WL 1455443, at *3 (4th Cir. Sept. 29, 2000) (unpublished) (because plaintiff "had no clearly established right to be free from 'malicious prosecution' when the alleged misconduct occurred [defendants] are entitled to qualified immunity on the malicious prosecution claim.") Accordingly, there is much skepticism as to whether the right to avoid malicious prosecution is a "clearly established" constitutional right.

4 *See* Fourth Circuit Court of Appeals Local Rule 36(c). *See also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006) (unpublished decisions have no precedential value and are only entitled to the weight generated by the persuasiveness of their reasoning).

Regardless, in the case before the court, the defendant is entitled to the protection of qualified immunity. The defendant is alleged to have violated the plaintiff's Fourth Amendment right to be free from unreasonable seizures of his person and the Fourteenth Amendment's guarantee not to be deprived of liberty without due process. (Second Amended Complaint at 6.) This allegedly occurred as a result of Horner's inadvertent inclusion of Durham's information, rather than the information of the actual suspect. Such actions were not apparently unlawful to Horner, nor are they sufficient to classify him as plainly incompetent. *See Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324, 331 (4th Cir. 2009) (plaintiff's complaint must allege conduct a reasonable official would know is unlawful); *Porterfield v. Lott*, 156 F.3d 563, 567 (4th Cir. 1998) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) ("all but the plainly incompetent or those who knowingly violate the law are protected"). Thus, Horner is entitled to the protection of qualified immunity.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Pursuant to previous court Orders, Durham's claims for false or unlawful arrest or arrest without legal process were dismissed;
2. Durham has alleged sufficient facts to support a § 1983 claim for unreasonable seizure based on malicious prosecution;
3. Durham's claim did not accrue until Durham's release from custody and is not barred by the statute of limitations;

4. Durham's claim for unreasonable seizure based on malicious prosecution may be heard in federal court despite there being an available remedy in Virginia courts;
5. Durham does not allege sufficient facts to hold Oakes liable; thus, summary judgment should be granted in his favor and the claims against him should be dismissed;
6. The Eleventh Amendment does not provide immunity from claims against Defendant Horner in his individual capacity, but it does provide immunity from suit in his official capacity; and
7. Horner's actions are protected by qualified immunity because a reasonable official would not have known his conduct was in violation of clearly established constitutional rights.

RECOMMENDED DISPOSITION

Based upon the above-stated reasons, the undersigned recommends the court grant summary judgment in the defendants' favor.

Notice To Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636 (b)(1)(c):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those

> portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objections to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in the matter to the Honorable Glen M. Williams, Senior United States District Judge.

The clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: This 30th day of November 2009.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE