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 defendant Ronald K. Elkins's motion to dismiss, (Docket Item No. 37), ("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

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.

Memphis, 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 the Defendant David L. 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 Elkins has moved to dismiss Durham's claim against him for failing to

state a claim upon which relief can be granted, based on 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 Defendant's 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 party 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 Defendant's 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)). One of these causes of action is for false or unlawful arrest without legal process. *See Wallace v. Kato*, 549 U.S. 384, 389 (2007). 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

2The 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 favorably to the plaintiff." *Snider v. Lee*, 584 F.3d 193, 199, (4th Cir. 2009) (quoting *Lambert v. Williams*,

pursue such a claim, Durham must show an unreasonable seizure in violation of the Fourth Amendment based on (1) the initiation or maintenance of a proceeding against him by the defendant, (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 1 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 satisfying the requirement of the initiation or maintenance of 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 defendant argues the case should be dismissed for failure to allege malice as an element of malicious prosection. (Motion at 10.) Since this is a § 1983 action based on malicious prosecution and not a malicious prosecution case, a showing of malice is not required.

223 F.3d 257, 262 (4th Cir. 2000).

Elkins asserts that the statute of limitations has expired on the claim. (Motion at 10.) 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 plaintiff's Fourth Amendment 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 defendant's 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.

Defendant further argues that the statute of limitations for suing him individually has passed. (Motion at 5.) In the Complaint, (Docket Item No.1), and the Amended Complaint, (Docket Item No. 7), Elkins was sued only in his official capacity as Commonwealth's Attorney; however, in the Second Amended Complaint, Elkins was named both individually and in his official capacity. The parties disagree over whether *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995), applies in the instant case, but the court need not rule on this issue as Rule 15(c) is dispositive as to the defendant's statute of limitations defense.

Under Rule 15(c), an amendment changing a party or the naming of the party against whom a claim is asserted relates back to the original pleading if the

party to be brought in (1) received notice of the action so as to not be prejudiced if required to defend on the merits and (2) knew or should have known that the action would have been brought, but for a mistake in the proper identity. See FED. R. CIV. P. 15(c)(1)(C). In *Goodman v. PraxAir, Inc.*, 494 F.3d 458 (4th Cir. 2007), the Fourth Circuit provided guidance for handling issues involving the relation-back doctrine of Rule 15(c). The court advised that the focus of Rule 15(c) is not on the type of mistake, but upon notice and the prejudice to the defending party, because such requirements ensure the party the protection of the statute of limitations. *See Goodman,* 494 F.3d at 469-70. The court decided that "[w]hen [the] party has been given fair notice of a claim *within the limitations period* and will suffer no improper prejudice in defending it, the liberal amendment policies of the Federal Rules favor relation-back." *Goodman*, 494 F.3d at 471.

In light of the Fourth Circuit's guidance, Elkins being named individually should relate back to the original pleading. Elkins clearly had notice of the claim, as he was named officially, and he would not be prejudiced by having to defend as he already has been doing so. Furthermore, with consideration given to the "liberal amendment policies of the Federal Rules," Elkins should have known that he would have been named individually but for a mistake. *See Goodman,* 494 F.3d at 470. In explaining the "mistake" language of Rule 15(c) the *Goodman* court stated:

> The "mistake" language is textually limited to describing the notice that the new party had, requiring that the new party have expected or should have expected, within the limitations period, that it was meant to be named a party in the first place, although it also implies that the plaintiff in fact made a mistake. No policy supports permitting

> relation-back for typographical mistakes, but not for oversights or mistakes of inclusion or omission. The policy considerations of Rule 15(c) concern whether the repose granted by statutes of limitations is preserved for parties named in amended pleadings. And that depends on the notice to and effect on the new party. The limitations of Rule 15(c)(3) thus only apply when the policies underlying limitations rules may be trampled.

494 F.3d at 471. Accordingly, Elkins being named in his individual capacity in the Second Amended Complaint relates back to the original pleading and will not be barred by the statute of limitations.

Next, the court will address the defendant's contention that the malicious prosecution suit is not available in this court because Virginia provides such an action. (Motion at 10.) In support of his argument, the defendant cites *Albright v. Oliver*, 510 U.S. 266, 283-86 (1994), a plurality opinion, in which only two Justices concurred with 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 is not a prerequisite to § 1983 actions); *Hall v. Tawney*, 621 F.2d 607, 612 (4th Cir. 1980) (the fact that state provided adequate remedies did not preclude action under § 1983). Consequently, the fact that Virginia could provide redress for Durham's claim does not prevent him from asserting the claim in this court.

Finally, the court will deal with the defendant's claims of immunity. The

defendant first claims immunity under the Eleventh Amendment of the United States Constitution. (Motion at 5.) The defendant 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. As such, state officers may be sued personally for actions taken in their official capacities. *See Hafer*, 502 U.S. at 26-27. Put another way, the Eleventh Amendment provides protection for state officers sued officially, but not in an individual capacity. Accordingly, the defendant is protected by the Eleventh Amendment with respect to suit filed in his official capacity, but not with respect to his individual capacity.

Defendant further claims that, as Commonwealth's Attorney, he is protected by absolute immunity. (Motion at 2-3.) "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)). Prosecutors are entitled to absolute immunity from civil liability for alleged conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). However, prosecutors are not entitled to absolute immunity for administrative duties or investigatory functions that do no relate to his or her initiation or preparation for a prosecution or judicial proceeding. *See Buckley*, 509 U.S. at 273. Here, Elkins is claimed to have continued the detention and prosecution of Durham pending receipt of cellular telephone records proving his innocence. Such actions

are investigatory in nature and not associated with Elkins's preparation for trial or evaluation of trial evidence. Thus, Elkins is not shielded from liability on the basis of absolute immunity.

Lastly, Elkins claims to be protected by qualified immunity. (Motion at 6.) 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 Elkins 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,[3] 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.

3 *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 is alleged to have occurred due to Defendant Elkins continuing the investigation of the plaintiff pending proof of his innocence before releasing him from custody, which the plaintiff characterizes as malicious prosecution. Such actions are not objectively unreasonable for an individual in the defendant's position; thus, the defendant, or a reasonable person in the defendant's position, could not have known such actions to be unlawful. *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"). Rather, it would be unreasonable for the defendant to release an individual, held in custody pursuant to an indictment and a warrant, without establishing that the individual was innocent. Accordingly, the defendant 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 naming Elkins individually in the Second Amended Complaint is not barred by the statute of limitations because it "relates back" to the original filing;
5. 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;
6. The Eleventh Amendment does not provide immunity from claims against a defendant in his individual capacity, but it does provide immunity from suit in his official capacity;
7. Elkins's actions which are the basis of Durham's claims were investigative in nature and, thus, are not entitled to absolute immunity; and
8. Elkins'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 Elkins's 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