IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KEVIN JONES **PLAINTIFF**

VS. **NO. 4:11CV00889**

MARK FROST, GARY DUNN, JAMES BACON and CITY OF RUSSELLVILLE, ARKANSAS **DEFENDANTS**

ORDER

Pending are Plaintiff's amended motion for partial summary judgment, docket # 125; Separate Defendant, Gary Dunn's motion for summary judgment, docket # 131; and the motions of Separate Defendants, James Bacon, Mark Frost and the City of Russellville, Arkansas to strike, docket # 100, and for summary judgment, docket # 132. For the reasons set forth herein, the Defendants' motions for summary judgment, docket #'s 131 and 132, are GRANTED. The remaining motions are DENIED as moot.

Facts

Plaintiff, Kevin Jones, filed his Complaint on December 15, 2011 against Defendants Mark Frost, Gary Dunn and James Bacon. The facts as alleged in Plaintiff's complaint are as follows: On December 15, 2005, Nona Dirksmeyer, a nineteen year old Arkansas Tech University student, was attacked and murdered in her apartment in Russellville, Arkansas. In 2006, Plaintiff, who had been dating Ms. Dirksmeyer at the time of her death, was charged with her murder. Plaintiff went to trial and was acquitted.

Defendant Mark Frost was the Russellville Police Department's lead criminal investigator on the Dirksmeyer murder and Defendant James Bacon was the Chief of the Russellville Police Department. Plaintiff alleges that Defendant Gary Dunn was the person who

murdered Dirksmeyer and the Defendants violated his constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by conspiring to withhold evidence and falsifying information in an effort to have Plaintiff prosecuted for the murder of Ms. Dirksmeyer.

On June 25, 2012, the Court entered an Order dismissing Plaintiff's Fifth and Sixth Amendment claims. Finding no Eighth Circuit case directly on point, the Court was not persuaded that the Eighth Circuit would refuse to recognize a § 1983 action based upon a *Brady* violation in the absence of a conviction. Accordingly, the Court refused to dismiss Plaintiff's claim based upon a violation of his Fourteenth Amendment rights.[1] In the same order, construing Plaintiff's allegations as truthful, the Court found that Plaintiff had alleged sufficient facts to support an argument that the statute of limitations should be tolled. Additionally, the Court held that upon the facts alleged, Defendants were not entitled to qualified immunity. Although the Court stated, "Defendants' Motion to Dismiss based upon qualified immunity is denied and Plaintiff's Motion for Partial Summary Judgment on the basis of qualified immunity is granted" the record is clear that the Court applied the standard applicable to motions to dismiss and did not rule on the qualified immunity issue based upon the summary judgment standard.

On July 30, 2012, Plaintiff filed an amended complaint adding the City of Russellville, Arkansas as a Defendant. Plaintiff affirmatively states that he seeks recovery for two causes of action pursuant to 42 U.S.C. § 1983: (1) the defendants engaged in a conspiracy to deprive him

[1] This issue has now been resolved by the Eighth Circuit Court of Appeals. On November 8, 2012, the Court held that even "assuming [a defendant] failed to disclose exculpatory evidence, there was no Brady violation" where the accused was not convicted. *Livers v. Schenck*, 700 F. 3d 340, 359 (8th Cir. 2012).

of his Fourteenth Amendment right to a fair trial effected through *Brady* violations and, (2) the defendants' conspiracy caused him to be maliciously prosecuted. (ECF No.126, p.1). In a later pleading, Plaintiff states that he also seeks relief based upon a state law claim for malicious prosecution. (ECF No. 150, p. 15). Defendants claim that summary judgment is proper at this time.

Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided solely on legal grounds. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56. The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979). The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in *Counts v. M.K. Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988):

> [T]he burden on the moving party for summary judgment is only to demonstrate, *i.e.*, '[to] point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is

> discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339 (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted)(brackets in original)). Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248.

Discussion

Plaintiff's *Brady* claim fails. In *Livers v. Schenck* the Eighth Circuit Court of Appeals held that no cause of action exists under §1983 based upon a *Brady* violation absent a conviction. *Livers,* 700 F.3d at 359, *citing*, *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (holding *Brady* is violated only when "there is a reasonable probability that the suppressed evidence would have produced a different verdict "); *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999) (explaining that where "all criminal charges were dismissed prior to trial[,] ... courts have held universally that the right to a fair trial is not implicated and, therefore, no cause of action exists under § 1983"), and *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998) (refusing to find a *Brady* violation where the criminal defendant "was never convicted and, therefore, did not suffer the effects of an unfair trial"). Because Jones was acquitted of the charges against him, he has no *Brady* violation claim.

Plaintiff's allegation of malicious prosecution pursuant to § 1983 also fails as the Eighth Circuit "has uniformly held that malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional injury." *Kurtz v. City of Shrewsbury*, 245 F.3d 753,

758 (8th Cir. 2001). Plaintiff claims that the defendants' conspiracy to violate his Fourteenth Amendment right to a fair trial effected through *Brady* violations caused him to be maliciously prosecuted. Plaintiff contends that this *Brady* violation satisfies the required constitutional injury to support his malicious prosecution claim. However, as set forth above, because Plaintiff was acquitted of the charges against him, he has no *Brady* violation claim. Accordingly, Plaintiff's malicious prosecution claim pursuant to § 1983 also fails.

Plaintiff's causes of action pursuant to 42 U.S.C. §1983, §1985 in addition to his state law claim for malicious prosecution are barred by the statute of limitations. Plaintiff was acquitted of the first degree murder of Ms. Dirksmeyer by jury verdict and judgment entered July 19, 2007 and October 2, 2007. Plaintiff filed this action on December 15, 2011 more than four years later. In Arkansas, the statute of limitations for Section 1983 and Section 1985 claims is three years. *Morton v. City of Little Rock*, 934 F.2d 180 (8th Cir. 1991) and *Housley v. Erwin,* 2008 WL 176388 (W.D.Ark. 2008)*, citing, Bell v Fowler,* 99 F.3d 262, 265-66 (8th Cir. 1996). Plaintiff's state law claim for malicious prosecution is governed by a three year statute of limitations, Ark.Code Ann. § 16-56-105, which applies to all tort actions not otherwise limited by law. *Delaney v. Ashcraft*, 2006 WL 2265228 (W.D.Ark. 2006) *citing, O'Mara v. Dykema*, 328 Ark. 310, 317, 942 S.W.2d 854 (1997). Plaintiff argues that the statute should be tolled based upon fraudulent concealment.

Affirmative acts concealing a cause of action will bar the start of the statute of limitations until the time when the cause of action is discovered or should have been discovered by reasonable diligence. *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997). A plaintiff's ignorance of his rights or the "mere silence of one who is under no obligation to speak will not toll the statute." *Gibson v. Herring*, 63 Ark. App. 155, 158, 975 S.W.2d 860, 862 (Ark. App.

1998) *citing Wilson v. General Electric Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992). "There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." *Id.* "Although the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion a trial court may resolve fact issues as a matter of law." *Varner v. Peterson Farms,* 371 F.3d 1011, 1017 (8th Cir. 2004).

Here, Plaintiff argues that Frost concealed his field note which stated, "No transaction on 12/15" and that he was not able to discover this note until October 17, 2011. Plaintiff contends that this note reveals that Frost knew that Dunn's alibi was false but he fraudulently cleared Dunn in a written "Prosecutors Report." Plaintiff presents the affidavit of James M. Pratt, Jr., Prosecuting Attorney for the 13th Judicial District of Arkansas from January 1, 1999 to December 31, 2006. Pratt opines that assuming a prosecutor had known that Dunn's alibi was false, and:

> Once it was established that Kevin Jones was excluded as a donor of the DNA found on the crime scene condom wrapper, a minimal further investigation would include obtaining Gary Dunn's DNA for comparison to the DNA already found on the condom wrapper. Given the fact that Dunn was subsequently included as a donor, any reasonable prosecutor would then begin the process of examining other pertinent information bearing on probable cause to suspect that someone other than Mr. Jones had killed Nona. The following information was known by law enforcement and documented in their files:
>
> - Dunn and his mother lied about his whereabouts during Nona's time of death range;
> - Dunn's apartment faced Nona's across a parking lot in the same complex;
> - Dunn was on parole at the time having been convicted of assaulting a female jogger;
> - Dunn's modus operandi in the jogger attack was similar to the modus operandi used in Nona's murder; both women appeared to be pointedly struck in the throat and both were hit or bludgeoned with a club of

opportunity, a tree limb for the jogger and Nona's pole lamp in her apartment;
- the female jogger's recollection that Dunn said "I'll f'ing kill you" during his attack on her; and
- Dunn's predatory stalk of Sarah Campbell on February 24, 2007 from the Wal-Mart parking lot for several miles.

(ECF No.121, exhibit 5).

"Concealment of facts, no matter how fraudulent or otherwise wrongful, has no effect on the running of a statute of limitations if the plaintiffs could have discovered the fraud or sufficient other facts upon which to bring their lawsuit, through a reasonable effort on their part." *Varner v. Peterson Farms,* 371 F.3d at 1017. It is undisputed that DNA testing which excluded the Plaintiff as the donor of the DNA substance found on the condom wrapper was reported on January 4, 2007. (ECF No. 144, p.2). Further, Plaintiff admits that DNA testing which identified Dunn as a potential donor of the DNA substance found on the condom wrapper was reported on December 18, 2007. (Id.) Jones defense team was aware of Dunn's name prior to the criminal trial of Jones: they knew that Dunn had possibly been polygraphed by the Russellville Police Department, that he had previously been prosecuted for attacking a woman at Bona Dea trail in Russellville and, that he had been convicted of battery. (ECF No. 153, exhibit 1). Plaintiff concedes that on June 5, 2008, additional DNA testing confirmed that Nona Dirksmeyer's DNA was mixed the DNA of potential donor Dunn on the condom wrapper. (ECF No. 144, p.3). Further, on August 14, 2008, Dunn denied ever being in Dirksmeyer's apartment. (ECF No. 67, exhibit 8). Finally, the contents of the field note were available to Jones team in typed memorandum form in February 2008.[2] (ECF No. 153, exhibit 4 and 5).

[2]The type written form of the notes was provided to Arkansas State Police Investigator Stacie Rhoads in February 2008 and Plaintiff's investigator, Todd Steffy was aware of the memo around the same time.

The Court finds that Plaintiff should have been aware through due diligence and reasonable effort on his part of his potential cause of action well before December 15, 2008, (three years prior to the filing of Plaintiff's complaint). Accordingly, Plaintiff's causes of action are barred by the statute of limitations.

Finally, Plaintiff's claims of malicious prosecution fail as a matter of law. Plaintiff concedes that probable cause existed for his arrest. He claims that the Defendants failed to "maintain probable cause" throughout his trial. Plaintiff argues that the "continuation of a prosecution in the face of facts that undermine probable cause can support a claim of malicious prosecution." *Coombs v. Hot Springs Village Property Owners Ass'n,* 98 Ark. App. 226, 233, 254 S.W.3d 5,11 (Ark. App. 2007). Plaintiff, however, does not claim that the initial probable cause which existed for his arrest was undermined during his trial, yet the prosecution maliciously continued. Instead, relying on *Kuehl v. Burtis*, 173 F.3d 646, 650 (8th Cir. 1999), Plaintiff argues that probable cause should be determined by considering evidence that a further minimal investigation would have revealed. Plaintiff contends that this "minimal investigation" would have included testing Dunn's DNA to the condom wrapper, revealing him has a potential donor.

Plaintiff's reliance on *Kuehl* is misplaced. *Kuehl* establishes that police officers have a duty to conduct a reasonably thorough investigation prior to arrest and cannot disregard plainly exculpatory evidence. The Court explained that probable cause to arrest does not exist when a minimal further investigation would have exonerated the suspect. *Id.* A "minimal investigation" includes interviewing witnesses readily available at the scene, investigating basic evidence and inquiring if a crime has been committed. Plaintiff does not cite to any authority to support his contention that the Defendants continued to have a duty to investigate following an

arrest based on probable cause. *See, Olinger v. Larson*, 134 F.3d 1362, 1367 (8th Cir. 1998) citing with approval, *Brodnicki v. City of Omaha,* 75 F.3d 1261, 1264 (8th Cir. 1996) (recognizing that a police officer need not investigate a suspect's alibi and "conduct a mini-trial before arresting [the suspect]"); *Thompson v. Olson*, 798 F.2d 552, 556 (1st Cir. 1986) (providing that "following a legal warrantless arrest based on probable cause, an affirmative duty to release arises only if the arresting officer ascertains beyond a reasonable doubt that the suspicion (probable cause) which forms the basis for the privilege to arrest is unfounded"). Even if a duty to continue to investigate existed following probable cause to arrest, "minimal investigation" does not include obtaining DNA testing.

Plaintiff also fails to support his claim for conspiracy to deprive him of his civil rights under Section 1985. In order to prevail on his civil rights conspiracy claim, Plaintiff must provide some facts suggesting a mutual understanding between the Defendants to commit unconstitutional acts. *Smith v. Bacon,* 699 F.2d 434, 436 (8th Cir. 1983). Plaintiff offers no evidence to support such a "meeting of the minds." *Barstad v. Murray County*, 420 F.3d 880 (8th Cir. 2005).

For these reasons, Defendants' motions for summary judgment are granted, docket #'s 131 and 132. The remaining motions are denied as moot.

IT IS SO ORDERED this 10th day of September, 2013.

James M. Moody
United States District Judge