UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1176

JOHN D. MCALLISTER,

Plaintiff - Appellant,

v.

TIMOTHY MALFITANO, Detective, J.P.D.; DETECTIVE SELOGY, J.P.D.; POLICE CHIEF MICHAEL YANIERO, J.P.D.; NICCOYA DOBSON, A.D.A; ERNIE R. LEE, District Attorney,

Defendants - Appellees,

and,

INTERLOCAL RISK FINANCING FUND OF NORTH CAROLINA,

Defendant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. James C. Dever III, District Judge. (7:17-cv-00066-D)

Submitted: July 31, 2019 Decided: September 3, 2019

Before WYNN and FLOYD, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

John D. McAllister, Appellant Pro Se. Brian Edes, CROSSLEY MCINTOSH COLLIER HANLEY & EDES PLLC, Wilmington, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

John D. McAllister appeals the district court's order denying his motion for summary judgment and granting the motion for summary judgment filed by Defendants Timothy Malfitano and Steven A. Selogy. We review de novo the district court's disposition of cross-motions for summary judgment. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). "When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 354 (4th Cir. 2011). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Lawson v. Union Cty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)).

We have reviewed the record and find no reversible error in the district court's decision to grant summary judgment in favor of Malfitano and Selogy. Accordingly, we grant leave to proceed in forma pauperis and affirm for the reasons stated by the district court. *McAllister v. Malfitano*, No. 7:17-cv-00066-D (E.D.N.C. Feb. 8, 2019). We grant McAllister's motion to dismiss the appeal as to the remaining Appellees. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix (A)

FILED: November 5, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1176
(7:17-cv-00066-D)

JOHN D. MCALLISTER

Plaintiff - Appellant

v.

TIMOTHY MALFITANO, Detective, J.P.D.; DETECTIVE SELOGY, J.P.D.; POLICE CHIEF MICHAEL YANIERO, J.P.D.; NICCOYA DOBSON, A.D.A; ERNIE R. LEE, District Attorney

Defendants - Appellees

and

INTERLOCAL RISK FINANCING FUND OF NORTH CAROLINA

Defendant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Floyd, Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix (C)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:17-CV-66-D

JOHN D. MCALLISTER, Plaintiff, v. DETECTIVE TIM MALFITANO, et al., Defendants.	)	ORDER

On April 3, 2017, John D. McAllister ("plaintiff" or "McAllister"), proceeding pro se, filed a complaint pursuant to 42 U.S.C. § 1983 [D.E. 1]. McAllister names as defendants two detectives and the chief of the Jacksonville Police Department ("the JPD defendants") and two members of the Onslow County District Attorney's Office. McAllister alleges Fourth, Sixth, and Fourteenth Amendment violations arising out of his arrest on January 5, 2016. See 2d Am. Compl. [D.E. 53] 2–7. McAllister seeks declaratory relief, injunctive relief, compensatory damages, and punitive damages. Id.

On July 12, 2018, McAllister moved for summary judgment [D.E. 60] and focused on whether defendants complied with the scheduling order and whether the two defendants from the Onslow County District Attorney's Office are in default. See Pl.'s Mot. Summ. J. [D.E. 60] 3–4. On July 20, 2018, the two defendants from the Onslow County District Attorney's Office moved to dismiss the second amended complaint pursuant to Rule 12(b) of the Federal Rule of Civil Procedure [D.E. 62]. On July 27, 2018, the JPD defendants moved for summary judgment [D.E. 65]. See Fed. R. Civ. P. 56. Pursuant to Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam), the

court notified McAllister about defendants' motions, the consequences of failing to respond, and the response deadlines [D.E. 64, 68]. McAllister responded in opposition to defendants' motions [D.E. 67, 69]. Defendants did not respond in opposition to McAllister's motion for summary judgment, and the time within which to do so has expired. As explained below, the court grants defendants' motions and denies McAllister's motion.

I.

On the night of January 5, 1993, defendants Tim Malfitano ("Malfitano") and Steven Selogy ("Selogy"), who were then detectives with the JPD, arrested a man named Henry Lee Danley ("Danley") following a foot pursuit in "a high crime area known as an open air market for the sale of illicit drugs." 2d Malfitano Decl. [D.E. 65-3] ¶¶ 4–14; see Exs. [D.E. 65-3] 7–9 (1993 JPD incident report); Selogy Decl. [D.E. 65-4] ¶¶ 6–9. Danley had five .22 caliber rounds of ammunition at the time of his arrest, and Malfitano located a .22 caliber revolver on the path that Danley ran on during the chase. See 2d Malfitano Decl. [D.E. 65-3] ¶ 12; Exs. [D.E. 65-3] 8; Selogy Decl. [D.E. 65-4] ¶ 8. The officers transported Danley to JPD for processing. See 2d Malfitano Decl. [D.E. 65-3] ¶ 14. After searching the firearm's serial number, officers determined that it was stolen from Jones County, and Danley informed Malfitano that he received it from a man named "Cockeye." See id. ¶¶ 15–19; Exs. [D.E. 65-3] 8; Selogy Decl. [D.E. 65-4] ¶ 10. Selogy knew that "Cockeye" was McAllister's alias, and Danley identified McAllister as "Cockeye" in a photo lineup. See 2d Malfitano Decl. [D.E. 65-3] ¶¶ 20–21; Exs. [D.E. 65-3] 8; Selogy Decl. [D.E. 65-4] ¶¶ 11–12. McAllister acknowledges that his nickname is "Cockeye." [D.E. 65-5] 14.

On January 7, 1993, Malfitano and Selogy presented arrest warrants for McAllister to an Onslow County magistrate, who issued the warrants on January 7, 1993. See 2d Am. Compl. [D.E. 53] 2–3; Exs. A, B [D.E. 53-1, 53-2] (arrest warrants); Pl.'s Mot. Summ. J., Exs. A, B [D.E. 60-1,

60-2] (same); 2d Malfitano Decl. [D.E. 65-3] ¶¶ 22–24; Exs. [D.E. 65-3] 6; Selogy Decl. [D.E. 65-4] ¶¶ 13–14. The warrants charged McAllister with possession of a firearm by a convicted felon and possession of a stolen firearm. See [D.E. 53-1]; [D.E. 53-2]. Malfitano and Selogy did not have any further interactions with McAllister after the magistrate issued the warrants. See 2d Malfitano Decl. [D.E. 65-3] ¶ 25; Selogy Decl. [D.E. 65-4] ¶ 15; [D.E. 65-5] 22.

McAllister left North Carolina in January 1993 and moved to Kentucky. See [D.E. 65-5] 6. Despite moving to Kentucky, McAllister continued to interact with the North Carolina criminal justice system. In March 1993, McAllister was arrested in Kentucky on a warrant charging McAllister with felonious larceny of a car belonging to Mary Elizabeth Pugh. Pugh had reported the car stolen in North Carolina. See McCallister v. Lee, No. 7:13-CV-154-FL, 2014 WL 3721428, at *1–2 (E.D.N.C. May 8, 2014) (citations omitted) (unpublished), report and recommendation adopted, 2014 WL 3700337 (E.D.N.C. July 24, 2014) (unpublished), aff'd, 585 F. App'x 56 (4th Cir. 2014) (per curiam) (unpublished). North Carolina sought to extradite McAllister concerning the charge. See McCallister, 2014 WL 3721428, at *1–2. In September 1993, a Kentucky court dismissed extradition proceedings against McAllister. See id.

In September 1998, while McAllister was in North Carolina, the Onslow County Sheriff's Department arrested McAllister on the charge underlying the 1993 arrest warrant. See id. at *2. On November 19, 1998, McAllister (who had the assistance of counsel) pleaded guilty in Onslow County District Court to possession of stolen property for conduct underlying the 1993 warrant involving Pugh's car. Id.

In 2004, McAllister was convicted in Onslow County Superior Court of common law robbery and attempted larceny. The court sentenced McAllister as a habitual felon based, in part, on his 1998 conviction of possession of stolen property. See id.; 2d Am. Compl. [D.E. 53] 4–5; Ex. C [D.E. 53-

McAllister failed to properly serve Lee and Dobson. "In North Carolina, service on an agency or officer of the state is governed by North Carolina Rule of Civil Procedure [4(j)(4)]." Cooper v. Stanback, No. 1:13CV571, 2015 WL 1888285, at *2 (M.D.N.C. Apr. 15, 2015) (unpublished), report and recommendation adopted, 2015 WL 2357264 (M.D.N.C. May 15, 2015) (unpublished); see N.C. Gen. Stat. § 1A-1, Rule 4(j)(4). A state agency can be properly served:

> by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the process agent, delivering to the addressee, and obtaining a delivery receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(4)(a). State agencies must appoint a process agent and file the name and address of the agent with the Attorney General. See id. Rule 4(j)(4)(b). If a state agency fails to designate a process agent, service may made upon the agency by serving the Attorney General or a deputy or assistant attorney general. See id. Rule 4(j)(4)(c).

Lee and Dobson are part of the North Carolina Administrative Office of the Courts, which has designated Jonathan R. Harris, General Counsel, as its process agent. See N.C. Dep't of Justice, Process Agent Directory, https://www.ncdoj.gov/getdoc/f85e2106-9532-4a64-9c58-ebb251165639/2-6-4-3-2-Process-Agent-Directory.aspx (last visited Feb. 7, 2019). McAllister did not properly serve Lee or Dobson. Accordingly, the court grants their motion to dismiss for failure to effect service.

Alternatively, McAllister has failed to state a claim against Lee and Dobson. Prosecutors are absolutely immune when carrying out the judicial phase of prosecutorial functions, including initiating a judicial proceeding, appearing in court, or terminating a judicial proceeding. See, e.g., Van de Kamp v. Goldstein, 555 U.S. 335, 342 (2009); Buckley v. Fitzsimmons, 509 U.S. 259,

269–70 (1993); Imbler v. Pachtman, 424 U.S. 409, 427–31 (1976). Thus, the court grants their motion to dismiss.

III.

Summary judgment is appropriate when, after reviewing the record as a whole, the court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party may not rest on the allegations or denials in its pleading, Anderson, 477 U.S. at 248–49, but "must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis and quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. Anderson, 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. Scott v. Harris, 550 U.S. 372, 378 (2007).

"When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." Desmond v. PNGI Charles Town Gaming, LLC, 630 F.3d 351, 354 (4th Cir. 2011). Additionally, "the district court must review the motion, even if unopposed, and determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law." Robinson v. Wix Filtration Corp., 599 F.3d 403, 409 n.8 (4th Cir. 2010) (emphasis and quotation omitted); see Stevenson v. City of Seat Pleasant, 743 F.3d 411, 416 n.3 (4th Cir. 2014).

"Allegations that an arrest made pursuant to a warrant was not supported by probable cause, or claims seeking damages for the period after legal process issued"—e.g., post-indictment or arraignment—are considered a section 1983 malicious prosecution claim. Brooks v. City of Winston-Salem, 85 F.3d 178, 182 (4th Cir. 1996). Such a claim "is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." Evans v. Chalmers, 703 F.3d 636, 647 (4th Cir. 2012) (quoting Lambert v. Williams, 223 F.3d 257, 261 (4th Cir. 2000)). "To succeed, a plaintiff must show that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in the plaintiff's favor." Humbert v. Mayor & City Council of Balt. City, 866 F.3d 546, 555 (4th Cir. 2017) (quotations and alterations omitted), cert. denied, 138 S. Ct. 2602 (2018); see Smith v. Munday, 848 F.3d 248, 252, 257 (4th Cir. 2017); Dorn v. Town of Prosperity, 375 F. App'x 284, 288 (4th Cir. 2010) (unpublished); Porterfield v. Lott, 156 F.3d 563, 568 (4th Cir. 1998).

Where the alleged malicious prosecution arose from an arrest warrant, a plaintiff must show that the person seeking the arrest warrant "knowingly and intentionally or with a reckless disregard for the truth either made false statements in their affidavits [in support of the warrant] or omitted facts from those affidavits, thus rendering the affidavits misleading." Evans, 703 F.3d at 650 (quotation omitted); see Franks v. Delaware, 438 U.S. 154, 155–56 (1978); Miller v. Prince George's Cty., 475 F.3d 621, 627 (4th Cir. 2007); [D.E. 66] 7–8; [D.E. 69-1] 3–4. Specifically, a plaintiff first must make a substantial preliminary showing of intentional or reckless falsehood in the affidavit. "Allegations of negligence or innocent mistake are insufficient" to demonstrate a constitutional violation. Franks, 438 U.S. at 155–56, 171. "Second, [a plaintiff] must demonstrate that those false statements or omissions are material, that is, necessary to a neutral and disinterested magistrate's

authorization of the [warrant]." Evans, 703 F.3d at 650 (quotations and alteration omitted); see Massey v. Ojaniit, 759 F.3d 343, 357 (4th Cir. 2014).

Even viewing the record in the light most favorable to McAllister, McAllister has failed to show intentional or reckless falsehood in the affidavit. See Massey, 759 F.3d at 356–57; Evans, 703 F.3d at 650–52; Simpson v. Town of Warwick Police Dep't, 159 F. Supp. 3d 419, 436 (S.D.N.Y. 2016). Malfitano and Selogy were entitled to rely on information that they obtained from Danley and to seek the warrants. See Simpson, 159 F. Supp. 3d at 436. Moreover, McAllister's focus on the delay in serving him with the 1993 arrest warrants and his perceptions concerning alleged procedural defects in the warrants do not alter this conclusion. See Safar v. Tingle, 859 F.3d 241, 246–47 (4th Cir. 2017); Simpson, 159 F. Supp. 3d at 437–38 & n.19 (collecting cases). Thus, the court grants summary judgment to Malfitano and Selogy and denies McAllister's motion for summary judgment.

As for Chief Yaniero, to avoid summary judgment, McAllister must show a genuine issue of material fact concerning whether (1) a constitutional injury occurred as a result of an employee's conduct; (2) Chief Yaniero had a policy or custom that amounted to a deliberate indifference to the deprivation of plaintiff's constitutional rights; and (3) this policy or custom caused the alleged constitutional injury. See, e.g., City of Canton v. Harris, 489 U.S. 378, 388–92 (1989); Smith v. Atkins, 777 F. Supp. 2d 955, 966–67 (E.D.N.C. 2011). "[T]he inadequacy of police training may serve as a basis for [section] 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Harris, 489 U.S. at 388; see Connick v. Thompson, 563 U.S. 51, 60–62 (2011); Bd. of Comm'rs v. Brown, 520 U.S. 397, 408–10 (1997); Doe v. Broderick, 225 F.3d 440, 456 (4th Cir. 2000); Carter v. Morris, 164 F.3d 215, 220–21 (4th Cir. 1999). Thus, to establish a claim under section 1983 for failure to train law

enforcement officers, a plaintiff must show that "officers are not adequately trained 'in relation to the tasks [that] the particular officers must perform' and this deficiency is 'closely related to the ultimate injury.'" Lytle v. Doyle, 326 F.3d 463, 473 (4th Cir. 2003) (quoting Harris, 489 U.S. at 390–91). Moreover, "[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train. . . . Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." Thompson, 563 U.S. at 62 (quotation omitted); see Doe, 225 F.3d at 456; Smith, 777 F. Supp. 2d at 967. Only in the rarest of circumstances may "the unconstitutional consequences of failing to train . . . be so patently obvious that a city could be liable under [section] 1983 without proof of a pre-existing pattern of violations." Thompson, 563 U.S. at 64; see, e.g., Okla. City v. Tuttle, 471 U.S. 808, 824 (1985) (plurality opinion).

Even viewing the record in the light most favorable to McAllister, McAllister has failed to make the requisite showing. McAllister has "not identified any specific training deficiencies, and there is no pattern of unconstitutional conduct." Smith, 777 F. Supp. 2d at 967–68; see Simpson, 159 F. Supp. 3d at 438–39. Thus, the court grants Chief Yaniero's motion for summary judgment and denies plaintiff's motion for summary judgment.

IV.

In sum, the court GRANTS defendants' motions to dismiss and for summary judgment [D.E. 62, 65], and DENIES plaintiff's motion [D.E. 60]. Defendants may file motions for costs in accordance with the Federal Rules of Civil Procedure and this court's local rules. The clerk shall close the case.

SO ORDERED. This 8 day of February 2019.

I certify the foregoing to be a true and correct
copy of the original.
Peter A. Moore, Jr., Clerk
United States District Court
Eastern District of North Carolina

By: Nicole Sellers
Deputy Clerk

J. Dever
JAMES C. DEVER III
United States District Judge