[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14396
Non-Argument Calendar

D.C. Docket No. 8:17-cv-00554-JDW-TGW

ARNOLD MAURICE MATHIS,

Plaintiff-Appellant,

versus

ZULAIKA ZOE VIZCARRONDO,

Defendant-Appellee,

JAMES MICHAEL EVANS,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

(December 2, 2019)

Before MARCUS, ROSENBAUM and BLACK, Circuit Judges.

PER CURIAM:

Appendix A

Arnold Mathis, a prisoner proceeding *pro se*, appeals the dismissal of his 42 U.S.C. § 1983 action for violations of the Fourth, Fifth, and Fourteenth Amendments. First, Mathis asserts the district court erred in dismissing his unlawful arrest claims as barred by the statute of limitations. Second, he contends the district court erred in dismissing his illegal search claim on the basis of qualified immunity. After review, we affirm the district court.

I. DISCUSSION

A. Unlawful Arrest Claims

A § 1983 claim is governed by the forum state's residual personal injury statute of limitations. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999). In Florida, "a plaintiff must commence a § 1983 claim . . . within four years of the allegedly unconstitutional or otherwise illegal act." *Id.*; *see also* Fla. Stat. § 95.11(3)(p). The statute of limitations "does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Rozar v. Mullis*, 85 F.3d 556, 561–62 (11th Cir. 1996). When an allegedly false arrest is followed by criminal proceedings, the statute of limitations for the false arrest begins to run once the claimant becomes detained pursuant to legal process. *Wallace v. Kato*, 549 U.S. 384, 397 (2007).

The district court did not err in dismissing Mathis's unlawful arrest claims as barred by the statute of limitations. *See Hughes v. Lott*, 350 F.3d 1157, 1159-60 (11th Cir. 2003) (reviewing *de novo* a district court's dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B) and viewing the allegations in the complaint as true). Accepting Mathis's version of the facts as true, he learned there was no probable cause supporting his December 2011 arrest on February 4, 2013. Thus, the facts supporting his unlawful arrest action were apparent on February 4, 2013, making that date the latest possible accrual date for the statute of limitations. Even using this date, the four-year statute of limitations would have run out on February 4, 2017, almost one month before Mathis filed his complaint on March 1, 2017.

Mathis also contends the statute of limitations was equitably tolled because he was prevented from asserting his rights because he was in Polk County jail until February 2015. However, equitable tolling does not apply. Mathis was not prevented in any way from asserting his rights as he would have been able to file this suit from jail. *See Williams v. Albertson's, Inc.*, 879 So. 2d 657, 659 (Fla. 5th DCA 2004) (explaining Florida law allows for equitable tolling where "the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights

mistakenly in the wrong forum"). Therefore, the district court did not err in dismissing his unlawful arrest claims as barred by the statute of limitations.

B. Unlawful Search Claim

The doctrine of "[q]ualified immunity shields public officials from suits against them in their individual capacities for torts committed while performing discretionary duties unless the tortious act violates a clearly established statutory or constitutional right." *Zivojinovich v. Barner*, 525 F.3d 1059, 1071 (11th Cir. 2008). If the official was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity. *Skop v. City of Atlanta*, 485 F.3d 1130, 1136–37 (11th Cir. 2007). Overcoming the official's qualified immunity defense ordinarily involves a two-part inquiry considering (1) whether facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) whether the right violated was clearly established at the time of the official's alleged misconduct. *Roberts v. Spielman*, 643 F.3d 899, 904 (11th Cir. 2011). Both elements must be satisfied to overcome qualified immunity. *Id.*

The district court did not err in dismissing Mathis's unlawful search claim because Vizcarrondo is entitled to qualified immunity. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1199 (11th Cir. 2007) (stating when reviewing a motion to dismiss on qualified immunity grounds, we determine whether a complaint sets

forth a violation of a clearly established constitutional right *de novo*). First, Vizcarrondo was acting within her discretionary authority when she conducted the warrantless search of Mathis's cell phone because she was performing routine investigatory monitoring of Mathis and his jail visits when the search occurred. Second, while Mathis alleged a constitutional violation—the warrantless search of his cell phone—that right was not clearly established in 2011 when the alleged unlawful search took place. It was not until 2013 and 2014, two to three years after the search of Mathis's cell phone, that both the Florida Supreme Court and the United States Supreme Court conclusively determined that warrantless searches of cell phones were unconstitutional. *See Smallwood v. State*, 113 So. 3d 724, 732-33 (Fla. 2013) (holding the search incident to arrest exception to the Fourth Amendment warrant requirement does not permit an officer to search an arrestee's cellphone without a warrant); *Riley v. California*, 573 U.S. 373, 386 (2014) (holding the police may not search digital information on a cellphone seized from an arrested individual without a warrant). In *Smallwood*, the Florida Supreme Court noted that prior to its decision in 2013, "such searches [had] been held both valid and invalid by various state and federal courts." *Smallwood*, 113 So. 3d at 728. Therefore, the constitutional right could not have been clearly established when Vizcarrondo searched Mathis's phone almost two years prior to the

Smallwood decision. Because the right was not clearly established at the time she searched Mathis's cell phone, Vizcarrondo is entitled to qualified immunity.

II. CONCLUSION

The district court did not err in dismissing Mathis's complaint because Mathis's unlawful arrest claims were barred by the statute of limitations and Vizcarrondo's search of Mathis's cell phone was protected by qualified immunity.[1]

AFFIRMED.

[1] As we affirm the district court's holding on these issues, we need not address the district court's alternate holding that Mathis was not entitled to punitive damages under 42 U.S.C. § 1997e(e).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ARNOLD MAURICE MATHIS,

Plaintiff,

v. **Case No. 8:17-cv-554-T-27TGW**

ZULAIKA ZOE VIZCARRONDO,

Defendant.
_____/

ORDER

BEFORE THE COURT is Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Dkt. 23), which Plaintiff opposes (Dkt. 33). The motion to dismiss is **GRANTED**.

I. ALLEGATIONS OF THE SECOND AMENDED COMPLAINT

In his Second Amended Complaint (Dkt. 12), Plaintiff alleges the following pertinent facts: On December 16, 2011, Jarvis Jiles filed a complaint with the Polk County Sheriff's Department alleging that he was sexually abused by Plaintiff in 2004 and 2005. Jiles was interviewed by officers twice that day, then subsequently made a "controlled call" to Plaintiff.

Plaintiff was arrested and taken into custody on December 17, 2011. His cellular phone was seized. Defendant discovered the password for Plaintiff's cellular phone and, without a warrant, searched the phone on December 19, 2011. On December 22, 2011, a warrant was issued to search Plaintiff's cellular phone. On that same day, Defendant prepared an affidavit that was the basis for 28 charges of sexual offenses by Plaintiff against victims other than Jiles.[1]

On April 25, 2014, during a hearing on Plaintiff's motion to suppress, "testimony came to light that

[1] The charges against Plaintiff for his offenses on Jiles were dismissed because the statute of limitations expired.

Appendix B

raised a suspicion that there could have been an unlawful search" of Plaintiff's cellular phone before the search warrant was issued on December 22, 2011. In December 2014, Plaintiff retained an expert who concluded that Plaintiff's cellular phone had been accessed, and the photo gallery therein viewed, on December 19, 2011. After the expert's deposition was taken on February 2, 2015, all 28 charges against Plaintiff were dismissed by the State on February 3, 2015.

Plaintiff contends that Defendant's warrantless search of his cellular phone on December 19, 2011, violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. As relief, he seeks $1,000,000.00 in monetary damages, and an injunction directing the Polk County Sheriff's Department to: 1) "institute a Bill of Rights training program"; 2) "certify that its officers are so trained as to the scope of cell phone searches"; and 3) "revoke the certifications of [Defendant] who wronged [Plaintiff]."

II. STANDARD OF REVIEW

Defendant moves to dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P. Rule 12(b)(6) states that any defendant may assert the defense of "failure to state a claim upon which relief can be granted" to a claim for relief. Defendant argues entitlement to qualified immunity, which may be asserted in a motion to dismiss under Rule 12(b)(6). *Skrtich v. Thornton*, 280 F.3d 1295, 1306 (11th Cir. 2002).

In deciding whether to grant a motion to dismiss on this ground, a court must accept "the allegations in the complaint as true and construe them in the light most favorable to the nonmoving party." *Starosta v. MBNA America Bank. N.A.*, 244 Fed. Appx. 939, 941 (11th Cir. 2007) (unpublished) (quoting from *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1139 (11th Cir. 2005)). However, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions. . . ." *Bell*

Atlantic Corp. et al. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (alteration in original) (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

Although the court must afford a *pro se* litigant wide leeway in pleadings, a *pro se* litigant is nonetheless required to satisfy necessary burdens in that he is "not relieved of his obligation to allege sufficient facts to support a cognizable legal claim," and "to survive a motion to dismiss, a Plaintiff must do more than merely label his claims." *Excess Risk Underwriters. Inc. v. Lafayette Ins. Co.*, 208 F. Supp. 2d 1310, 1313 (S.D. Fla. 2002). Dismissal is, therefore, permitted "when on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Glover v. Liggett Group. Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006) (citing *Marshall City Bd. Of Educ. v. Marshall City Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993)).

III. SUMMARY OF THE ARGUMENTS

Defendant contends that the Second Amended Complaint should be dismissed because: 1) Plaintiff's claims are barred by the statute of limitations; 2) she is entitled to qualified immunity; and 3) Plaintiff is not entitled to the monetary damages and injunctive relief he requests. Plaintiff argues that: 1) his claims are not barred by the statute of limitations because he did not discover Defendant's "fraud" until after the statute of limitations expired; 2) Defendant is not entitled to qualified immunity; and 3) he is entitled to nominal and punitive damages.

IV. DISCUSSION

A. Defendant is entitled to qualified immunity

Defendant argues that she is entitled to qualified immunity. "[G]overnment 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). As such, qualified immunity allows officials to "carry out their discretionary duties without fear of personal liability or harassing litigation[.]" *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir.2002) (internal citations omitted). "[O]nly in exceptional circumstances will government actors have no shield against claims made against them in their individual capacities." *Lassiter v. Alabama A & M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir.1994) (en banc) (citations and emphasis omitted). Because qualified immunity is "immunity from suit rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), its purposes would be "thwarted if a case is erroneously permitted to go to trial." *Baltimore v. City of Albany, Georgia*, 183 Fed. App'x 891, 895 (11th Cir.2006) (citations and quotations omitted).

To qualify for qualified immunity, the public official must first establish that she was acting within the scope of her discretionary authority. *Ferraro*, 284 F.3d at 1194. Once that showing is made, the burden shifts to the plaintiff to show that qualified immunity should not apply. *Lewis v. City of W. Palm Beach, Fla.*, 561 F.3d 1288, 1291 (11th Cir.2009). The plaintiff must show that, considered in the light most favorable to the party asserting the injury, the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional right was violated, the defendant is entitled to qualified immunity. If the facts establish a constitutional violation, the plaintiff must show that, at the time the incident occurred, "every reasonable [] officer would have realized the acts violated already clearly established federal law." *Garrett v. Athens-Clarke Co.*, 378 F.3d 1274, 1278-79 (11th Cir.2004) (citing *Saucier*, 544 U.S. at 201-02).

1. Whether Defendant was acting within the scope of her discretionary authority

There is no dispute that Defendant, a law enforcement officer, was acting within the scope of her discretionary authority in searching Plaintiff's cellular phone after he was arrested. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004) (a government employee is acting within the

scope of discretionary authority when the acts in question "are of a type that fell within the employee's job responsibilities.").

2. Whether Defendant violated Plaintiff's constitutional rights

Plaintiff contends that Defendant violated his constitutional rights when she searched his cellular phone without a warrant. He is correct. *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) ("[A] warrant is generally required before a ... search [of a cell phone], even when a cell phone is seized incident to arrest."). Accordingly, taking the allegations in the Second Amended Complaint as true, Defendant's warrantless search of the cell phone on December 19, 2011, constituted an unreasonable search in violation of the Fourth Amendment. *See Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) ("The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.") (internal quotation marks and alteration omitted); *Riley*, 134 S.Ct. at 2485-86 (under search incident to arrest exception, interest in protecting police officers' safety did not justify dispensing with warrant requirement before officers could search digital data on arrestees' cell phones).

c. Whether Defendant violated clearly established law

Even though Defendant's search of the cell phone on violated the Fourth Amendment, Plaintiff has failed to show that the law was clearly established when the search was conducted. "A right is clearly established only if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate. This doctrine provides government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Carroll v. Carman*, ___ U.S. ___, 135 S. Ct. 348, 350 (2014) (internal citations and punctuation omitted).

The inquiry is undertaken "in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). There need not be a case directly "on point" before it may be concluded that the law is clearly established, "but existing precedent must have placed the statutory or constitutional question beyond debate." *Stanton v. Sims*, 521 U.S. 3, 6 (2013) (citation omitted). *See also Mullenix v. Luna*, ___U.S. ___, 136 S. Ct. 305, 308 (2015). "In this circuit, rights are 'clearly established' by decisions of the Supreme Court, [the Eleventh Circuit Court of Appeals], or the highest court of the state in which the case arose." *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 953 (11th Cir. 2003).

Plaintiff cannot establish that the warrantless search of his cell phone was a clearly established constitutional violation in 2011. The issue was not clearly established in the Eleventh Circuit at the time. *See United States v. Allen*, 416 F. App'x 21, 27 (11th Cir. 2011) (unpublished) ("Whether the warrantless search of a cell phone incident to arrest violates a person's Fourth Amendment expectation of privacy is an unanswered question in this Circuit. It is a fairly difficult question, however, it is also a question that we need not answer today."). And it was not until 2013 that the Florida Supreme Court decided that law enforcement officers are generally required to obtain a search warrant before searching the a cell phone that has been seized incident to a lawful arrest. *See Smallwood v. State*, 113 So.3d 724 (Fla.2013). Finally, *Riley* was not decided until 2014. Even though Defendant committed a constitutional violation in searching Plaintiff's cell phone on December 19, 2011, Plaintiff's constitutional right to be protected from a warrantless search of his cell phone was not clearly established at that time. Accordingly, Defendant is entitled to qualified immunity.

B. Plaintiff is not entitled to injunctive relief

Plaintiff requests an injunction directing the Polk County Sheriff's Department to institute a "Bill of Rights" training program, and revoke Defendant's "certifications." Because the Sheriff is not a party to

this case, injunctive relief against him is unavailable. *See in re Infant Formula Antitrust Litigation, MDL 878 v. Abbott Laboratories*, 72 F.3d 842, 842-43 (11th Cir.1995) (the person from whom the injunctive relief is sought must be a party to the underlying action). Accordingly, Plaintiff's request for injunctive relief must be denied.[2]

Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Dkt. 23) is therefore **GRANTED**. The **Clerk** shall enter judgment against Plaintiff, and close this case.

DONE and ORDERED on September 13th, 2018.

/s/ James D. Whittemore

JAMES D. WHITTEMORE
United States District Judge

Copies to: *Pro Se* Plaintiff; Counsel of Record

[2] It is unnecessary to address Defendant's argument that Plaintiff's claims are barred by the statute of limitations in light her entitlement to qualified immunity.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14396-AA

ARNOLD MAURICE MATHIS,

Plaintiff - Appellant,

versus

ZULAIKA ZOE VIZCARRONDO,

Defendant - Appellee,

JAMES MICHAEL EVANS,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM, BLACK, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

Appendix C