IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY

Plaintiff-Appellant,

v.

CITY OF CHICAGO, and
BRODERICK JONES,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

BRIEF AND SHORT APPENDIX OF PLAINTIFF-APPELLANT

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OPENING BRIEF AND SHORT APPENDIX OF PLAINTIFF-APPELLANT

I. JURISDICTIONAL STATEMENT

Plaintiff invoked the jurisdiction of the district court under 28 U.S.C. §1343 to assert claims arising under 42 U.S.C. §1983.[1] (Record Item No. 1.)

Judgment was entered on January 27, 2003. (Short Appendix 7.) Plaintiff filed a Rule 59 motion to alter or amend on January 31, 2003. (Record Item No. 18.) The district court denied this motion on February 18, 2003. (Short Appendix 8-9.) Plaintiff filed his notice of appeal on February 25, 2003. (Record Item No. 20.)

This is an appeal from a final decision resolving all claims against all parties. Plaintiff invokes the jurisdiction of the Court of Appeals under 28 U.S.C. §1291.

II. ISSUES PRESENTED FOR REVIEW

1. Does a Section 1983 claim seeking money damages because a police officer framed an arrestee accrue before the criminal prosecution has been resolved in favor of the arrestee?

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1. Plaintiff also invoked the district court's supplemental jurisdiction under 28 U.S.C. §1367 to assert a state law claim of malicious prosecution. The district court declined to exercise jurisdiction over this claim when it dismissed plaintiff's federal claim. (Short Appendix 6.)

2. Should a wrongful prosecution claim resulting from a police frame-up be analyzed as a Fourth Amendment violation?

3. In the alternative, should the Court explicitly overrule *Christman v. Hanrahan,* 500 F.2d 65 (7th Cir. 1974) and hold that a prosecution resulting from a police framework is actionable as a Fourteenth Amendment violation when, as here, the prosecution results in the dismissal of all charges?

III. STATEMENT OF THE CASE

Plaintiff commenced this action on August 26, 2002 (Record Item 1), asserting claims under 42 U.S.C. §1983 against Chicago police officer Broderick Jones and the City of Chicago. On consideration of a Rule 12(b)(6) motion filed by defendant City of Chicago (Record Item No. 10), the district court concluded that all of plaintiff's claims against the City and against Officer Jones accrued at the time of his arrest and were barred by the two year statute of limitations. (Short Appendix 5-6.) The district court reaffirmed this conclusion in its order denying plaintiff's timely Rule 59 motion to reconsider. (Short Appendix 8-9.)

IV. STATEMENT OF FACTS

For several years, Chicago police officer defendant Broderick Jones has fabricated evidence to charge citizens with drug offenses.[2] Each bogus arrest

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2. These facts are set out in accordance with the rule applied in *Stevens v. Umsted,* 131 F.3d 697, 705 (7th Cir. 1997) and *Chavez v. Illinois State Police,* 251 F.3d 612, 648 (7th Cir. 2001) permitting a plaintiff to "hypothesize" facts in an appeal from an order granting a Rule 12(b)(6) motion to dismiss.

follows a similar pattern: Jones and his partner arrest a suspected drug dealer; if a search fails to turn up any contraband, the officers plant drugs on or about the arrestee and claim that they had observed the arrestee make several drug sales. The City is aware of Jones' misconduct because he has been the subject of numerous citizen complaints about planting drugs. Plaintiff's claim of municipal liability is that officer Jones was able to engage in this wrongdoing because of the deliberate indifference of defendant City of Chicago to the fabrication of evidence by its police officers.

On January 9, 2000, Jones planted drugs on plaintiff and then arrested plaintiff on bogus drug charges. Accepting as bona fide the evidence that Jones had fabricated, a state court judge made a finding of probable cause at a *Gerstein* hearing and plaintiff was formally charged with possession of narcotics. After a judge made a finding of no probable cause at a preliminary hearing, Jones convinced the prosecutor to present the case to a grand jury; the grand jury accepted Jones' false evidence and formally charged plaintiff with felony drug charges. Plaintiff repeatedly appeared in court to answer the criminal charges for more than two years until July of 2002 when all charges were dismissed.

Plaintiff filed this lawsuit on August 26, 2002, more than two years after his arrest, but well within two years of the dismissal of criminal charges.

V. SUMMARY OF ARGUMENT

Plaintiff claims that he was framed by defendant Jones, a Chicago police officer. Jones planted drugs on plaintiff and arrested him on January 9, 2000. Over the next two years, plaintiff repeatedly appeared in court to answer the criminal charges until July of 2002 when all charges were dismissed.

This Court's recent decision in *Okoro v. Bohman,* ___ F.3d ___ (7th Cir., No. 02-2033, March 25, 2003) leaves no doubt that plaintiff's Section 1983 claim did not accrue until the criminal charges were dismissed. The district court's conclusion that this action is timebarred because it was not filed within two years of the date that defendant Jones arrested plaintiff must therefore be reversed and the case remanded for further proceedings.

On remand, the district court should analyze plaintiff's claim under the Fourth Amendment analysis offered by Justice Ginsburg in her concurring opinion in *Albright v. Oliver,* 510 U.S. 266, 279 (1994). Although this Court refused to adopt Justice Ginsburg's theory in footnotes in two cases that applied the now rejected "federal malicious prosecution" theory,[3] each of these footnotes consists of an unadorned citation to the Court's pre-*Albright* decision in *Wilkins v. May,* 872 F.2d 190 (7th Cir. 1989). *Wilkins* cannot be fairly read as rejecting the continuing seizure theory discussed five years later by Justice Ginsburg in her concurring opinion in *Albright v. Oliver.*

In the alternative, if the Court concludes that plaintiff's wrongful prosecution claim should be viewed as the denial of a fair trial claim, it should explicitly overrule the holding of *Christman v. Hanrahan,* 500 F.2d 65, 67 (7th Cir. 1974) that there cannot be a denial of a fair trial when, as in this case, the

3. *Reed v. City of Chicago,* 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Washington v. Summerville,* 127 F.3d 552, 560 n.3 (majority opinion), Id. at 560 (Rovner, J., dissenting) (7th Cir. 1997).

plaintiff had not been found guilty.

VI. ARGUMENT

A. Standard of Review

The Court reviews de novo a district court's decision to grant a Rule 12(b)(6) motion to dismiss.

B. A Brief History of Wrongful Prosecution Claims

Wrongful prosecution claims have been litigated in this circuit for more than 30 years. One of the first reported decisions is *Kerr v. City of Chicago,* 424 F.2d 1134 (7th Cir. 1970), where a civil rights plaintiff claimed "that his rights were violated by the obtaining of an involuntary confession and the use of this confession to illegally detain the plaintiff for a period of 18 months." Id. at 1138. The Court held that this claim was actionable under Section 1983, and that the plaintiff could recover as damages the attorney's fees his family had incurred in defending the criminal case. Id. at 1141.

In *Whitley v. Seibel,* 613 F.2d 682 (7th Cir. 1980), *opinion following remand,* 676 F.2d 245 (7th Cir. 1982), a civil rights plaintiff, who had been held in custody for 113 days before the prosecutors dismissed the case, obtained damages for his wrongful prosecution. The claim in *Whitley* was that the defendant police officer had "intentionally misled and misrepresented the facts and circumstances of the case to the assistant state's attorneys involved." 613 F.2d at 686. In rejecting the officer's argument that this conduct was not actionable under Section 1983, this Court articulated the following rule:

> If the officer undertakes to make decisions which are not his to make and then intentionally misleads those who do have the ultimate authority to authorize the arrest, that officer may be found to have deprived the arrestee of his liberty without due process of law.

613 F.2d at 686.

The Court refined this rule in *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988). There, the civil rights plaintiff had been arrested, jailed for a month, and charged with murder and other crimes; as in *Whitley,* all charges were dropped before trial. The Court in *Jones* upheld a large award in favor of the civil rights plaintiff, stating the legal principle applicable here that "[i]f police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of the prosecutors or grand jurors or magistrates to continue to prosecute him. They cannot hide behind the officials whom they have defrauded." Id. at 994.

Allegations of police misconduct — failing to investigate an alibi, misleading a prosecutor, fabricating evidence — are at the core of *Whiteley and Jones,* and this case.

C. Under Heck v. Humphrey, Plaintiff's Claims Accrued when Criminal Charges Were Dismissed

In *Heck v. Humphrey,* 512 U.S. 477 (1994), the Supreme Court held, *inter alia,* that "in order to recover damages . . . for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486-87. (footnote omitted) Under *Heck,* a §1983 action which, if successful, would render a conviction invalid, does not accrue "until the conviction or sentence has been invalidated." Id. at 490.

The accrual rule of *Heck* is applicable while criminal charges are pending, before there has been any conviction or sentence. *Anderson v. Montgomery County,* 111 F.3d 494, 499 (7th Cir. 1997); *Washington v. Summerville,* 127 F.3d 552, 556 (7th Cir. 1997); *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892, 898 n.8 (2001). Thus, a criminal defendant may not file a Section 1983 action during the pendency of the criminal prosecution when the civil action, if successful, would impair the government's ability to prosecute the criminal case.

Plaintiff's claim that he had been framed by defendant Jones goes to the heart of the criminal prosecution. The prosecution's charge that plaintiff had knowingly possessed narcotics with the intent to distribute is flatly inconsistent with a finding that Jones had planted the narcotics on plaintiff. Thus, under *Heck* plaintiff could not have filed a damage action arising from the frame-up until the criminal prosecution had been resolved in his favor.

The Court's recent decisions in *Okoro v. Bohman,* 164 F.3d 1059 (7th Cir. 1999), *opinion following remand sub. nom. Okoro v. Callaghan,* ___ F.3d ___ (7th Cir., No. 02-2033, March 25, 2003) are directly on point. There, as the Court summarized in *Robinson v. Doe,* 272 F.3d 921, 923 (7th Cir. 2001):

> The plaintiff [in *Okoro*] claimed that he'd been framed; that the police who arrested him for supposedly selling heroin to them had really come to purchase not heroin but gems, which they subsequently stole from him and then fabricated the tale of his selling them heroin. The testimony of the police that they had bought heroin from the plaintiff was essential to this conviction, yet had he proved his false-arrest case the testimony would have been completely discredited. The rule of *Heck* is that unless and until a criminal defendant gets his conviction overturned, he can't base a civil case on evidence that if true shows he was wrongly convicted; that is an impermissible end run around the conviction.

On remand, "Okoro adhered steadfastly to his position that there were no drugs, that he was framed." *Okoro v. Callaghan,* ___ F.3d at ___ (7th Cir., No. 02-2033, March 25, 2003, slip op. 3). Because these allegations "are inconsistent with the conviction's having been valid," Okoro's claim was barred by *Heck.* Id.

Plaintiff's claim in this case is the same — that he had been framed by defendant Jones, who acted as the result of a municipal policy or practice. Under *Heck,* plaintiff's claim did not accrue until July of 2002, when the criminal case was dismissed. Plaintiff filed this lawsuit on August 26, 2002, well within the two year statute of limitations applicable to §1983 actions in Illinois.

D. The "Categorical Approach" of Snodderly v. R.U.F.F. Drug Enforcement Task Force Does Not Apply to a Claim of "Frame-Up"

In *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001), the Court wrote that "damages for false arrest are free-standing and completely independent from any damages caused by a subsequent prosecution or conviction." Id. at 899. On this basis, the Court applied a "categorical approach," id. at 897, to hold that all claims that a warrantless arrest had been made without probable cause are not barred by *Heck* and accrue at the time of arrest.

Snodderly did not consider the fact situation of this case, where the plaintiff alleges that a police officer planted drugs and framed the plaintiff with false criminal charges — the plaintiff in *Snodderly* claimed that "the arresting officers had information in their possession pointing towards his innocence before they arrested him." 239 F.3d at 898.

Similarly, none of the cases that the Court cited in *Snodderly* for its "categorical approach" considered a claim of "police frame-up." These cases uniformly applied the rule "that a claim of unlawful arrest, *standing alone,* does not necessarily implicate the validity of a criminal prosecution following the arrest." *Mackey v. Dickson,* 47 F.3d 744, 746 (5th Cir. 1995) (emphasis supplied). See, e.g., *Booker v. Ward,* 94 F3d 1052 (7th Cir. 1996) (claim that confession was fruit of unlawful arrest would not mean that conviction was invalid); *Gonzalez v. Entress,* 133 F.3d 551, 553 (7th Cir. 1998) ("Wrongful invasions of property are actionable in trespass, and wrongful detentions actionable under state law and the fourth amendment, no matter what happens to the criminal prosecution"); *Copus v. City of Edgerton,* 151 F.3d 646, 649 (7th Cir. 1998) ("we cannot say with certainty that success on Copus' §1983 claim 'necessarily' would impugn the validity of his conviction").

Success on a claim of police frame-up would, as the Court recognized in its opinions in *Oloro v. Bohman,* discussed *ante,* "necessarily" impugn the validity of a conviction. The Court should therefore reject any request by defendants to apply the "categorical approach" of *Snodderly* to plaintiff's claims in this case.

E. A Wrongful Prosecution Resulting from a Police Frame-Up Is Best Analyzed as a Fourth Amendment Violation

Before *Newsome v. McCabe,* 256 F.3d 747 (7th Cir. 2001), *opinion on denial of rehearing,* 260 F.3d 824 (7th Cir. 2001), *opinion following remand,* 319 F.3d 301 (7th Cir. 2002), wrongful prosecution claims in this circuit were analyzed as Fourth Amendment "malicious prosecution" claims. As the Court stated in *Smith v. Board of Trustees of University of Illinois,* 34 F.3d 432, 434 (7th Cir. 1994):

> If malicious prosecution or abuse of process is committed by state actors and results in the arrest or other seizure of the defendant, there is an infringement of liberty, but we now know that the defendant's only constitutional remedy is under the Fourth Amendment (as made applicable to the states by the Fourteenth), and not under the due process clause directly. [citing] *Albright v. Oliver,* 510 U.S. 266 (1994).

The Court reaffirmed this view in *Simpson v. Rowan,* 73 F.3d 134, 136 n.4 (7th Cir. 1995) ("claims for malicious prosecution implicate rights protected under the Fourth Amendment").

Newsome rejected "malicious prosecution" as a basis for relief under Section 1983, and held that a wrongful conviction claim should be analyzed as a denial of the Fourteenth Amendment right to a fair trial. 256 F.3d at 751. This Court summarized the *Newsome* rule in *Ineco v. City of Chicago,* 286 F.3d 994 (7th Cir. 2002) and *Bontkowski v. Smith,* 305 F.3d 757 (7th Cir. 2002), that a wrongful prosecution claim requires evidence "that the officers withheld information or evidence necessary for the fair and impartial trial guaranteed by the United States Constitution." *Ineco, supra,* 286 F.3d at 999; *Bontkowski, supra,* 305 F.3d at 760.

Defendants argued in the district court that there can never be a *Newsome* claim for wrongful prosecution unless, as in *Newsome,* there is a conviction that is subsequently set aside. The argument is inconsistent with *Whitley v. Seibel* and *Jones v. Chicago* — both cases where the criminal prosecution had been dismissed by the prosecutor and a wrongful prosecution claim was allowed to proceed.

Defendant's theory that there cannot be a denial of a fair trial unless there is a wrongful conviction is, however, consistent with the Court's decision in

Christman v. Hanrahan, 500 F.2d 65, 67 (7th Cir. 1974). There, the Court held that there could not have been a denial of a fair trial because "plaintiff was not found guilty and the relevant evidence was brought out during the course of the trial." Decisions in other circuits have rejected this reasoning. See, e.g., *Ricciuti v. N.Y.C. Transit Auth.* 124 F.3d 123, 130 (2d Cir. 1997) ("[w]hen a police officer creates false information likely to influence [a factfinder's] decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial"); *Stemler v. City of Florence,* 126 F.3d 856, 872 (6th Cir. 1997), (a police officer violates a Section 1983 plaintiff's "right to due process if he knowingly fabricated evidence against her, and if there is a reasonable likelihood that the false evidence could have affected the judgment of the jury"); *Riley v. City of Montgomery,* 104 F.3d 1247, 1253 (11th Cir. 1997) (officer's actions in fabricating incriminating evidence violated the civil rights plaintiff's due process right to a free trial, even though criminal charges had been dismissed before trial).

Under *Christman v. Hanrahan, supra,* a criminal defendant who is found not guilty would be hard pressed to complain that he (or she) had been denied a fair trial — it was precisely because the trial was fair that the defendant was acquitted. Similarly, it would be anomalous for a criminal defendant who secured dismissal of all charges without a trial to complain of the denial of a fair trial, because no trial had been held.

If wrongful prosecution claims are to be viewed as Fourteenth Amendment denial of a fair trial claims, *Christman v. Hanrahan* should be explicitly overruled because it cannot be reconciled with *Whitley v. Seibel,* 613 F.2d 682 (7th Cir. 1980), *opinion following remand,* 676 F.2d 245 (7th Cir. 1982) and

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988). In our view, however, wrongful prosecution claims of the sort presented in this case should be viewed as Fourth Amendment violations.

After a police officer has made a warrantless arrest, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). In a "police frame-up" case, the judicial determination of probable cause has been corrupted by the officer's wrongdoing — in plaintiff's case, the judge makes a determination of probable cause by accepting as true the false statements that defendant Jones had included in the arrest report.

This Court has held that, under *Heck,* a challenge to the validity of an arrest made pursuant to a warrant cannot proceed during the pendency of a criminal prosecution. *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892, 900 (2001). Instead, such a claim accrues only after "the prosecution has ended in acquittal or dismissal of the charges." Id. The same result should apply when, as here, the gist of the plaintiff's claim is focused on the judge's post-arrest determination of probable cause.

Analyzing wrongful prosecution claims under the Fourth Amendment is consistent with the analysis offered by Justice Ginsburg in her concurring opinion in *Albright v. Oliver,* 510 U.S. 266, 279 (1994) — a defendant remains "seized" for trial so long as he is obligated to appear in court and answer the State's charges. As the Court held in *Gerstein v. Pugh, supra,* "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty." 420 U.S. at 114.

We acknowledge that this Court refused to adopt Justice Ginsburg's theory in footnotes in two cases that applied the now rejected "federal malicious prosecution" theory. *Reed v. City of Chicago,* 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Washington v. Summerville,* 127 F.3d 552, 560 n.3 (majority opinion), Id. at 560 (Rovner, J., dissenting) (7th Cir. 1997). In each of these footnotes, the Court cited to its pre-*Albright* decision in *Wilkins v. May,* 872 F.2d 190 (7th Cir. 1989).

At issue in *Wilkins v. May* was the claim of a convicted felon that FBI agents had held a gun to his head while interrogating him. 872 F.2d at 191. The question examined by the Court was whether "substantive due process remains a possible ground of liability in cases of police brutality not governed by the Fourth or Eighth Amendments." Id. at 195. The Court decided the appeal and expressly noted that it was not resolving this "jurisprudential debate." Id.

Wilkins cannot be fairly read as rejecting the continuing seizure theory discussed five years later by Justice Ginsburg in her concurring opinion in *Albright v. Oliver.*

> A person facing serious criminal charges is hardly freed from the state's control upon his relase from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right ot travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense. A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at

> liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employees the less strong-arm means of a summons in lieu of arrest to secure his present in court.

Albright v. Oliver, 510 U.S. at 279 (Ginsburg, J. concurring)

In this case, the judge's finding at the *Gerstein* hearing that there was probable cause for the filing of charges was based on the evidence that defendant Jones had fabricated to frame plaintiff. This fabricated evidence "served to maintain and reinforce the unlawful haling of [plaintiff] into court, and so perpetuated the Fourth Amendment violation." *Albright v. Oliver,* 510 U.S. at 279 (Ginsburg, J. concurring) Id.

VII. CONCLUSION

For the reasons above stated, the Court should reverse the order dismissing plaintiff's complaint and remand for further proceedings.

Respectfully submitted,

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Circuit Rule 30 Statement

The undersigned hereby certifies that all of the materials required by parts (a) and (b) of Circuit Rule 30 are contained in the following short appendix.

____

Kenneth N. Flaxman
attorney for appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED

REGINALD WILEY,	)	
Plaintiff,	)	
v.	)	No. **02** ***C 6076***
		Paul E. Plunkett, Senior Judge
CITY OF CHICAGO and	)	
BRODERICK JONES,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Reginald Wiley has sued the City of Chicago and Broderick Jones under both state and federal law for having wrongfully prosecuted him. The City of Chicago has filed a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss the 42 U. S.C. § ("section") 1983 claim asserted against it. For the reasons set forth below, the motion is granted.

Facts

On January 9, 2000, defendant Jones, who is a Chicago police officer, arrested plaintiff and caused him to be charged with a crime. (Compl. ¶ 5.) Jones fabricated the evidence on which the arrest was based, but concealed that fact from the prosecutors. (Id. ¶¶ 5-6.) On July 8, 2002, all charges against plaintiff were dismissed. (Id. 17.)

Jones was able to engage in this wrongful conduct because of the City's deliberate indifference to the fabrication of evidence by its police officers. (Id. ¶ 8.) Plaintiff says that the City's conduct violated his Fourteenth Amendment due process rights and seeks damages in excess of $100,000.00.

The Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000). No claim will be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Discussion

Federal Claims

Section 1983 provides redress for constitutional deprivations that occur at the hands of certain government actors. 42 U.S.C. § 1983. To state a viable section 1983 claim against the City, plaintiff must allege that he was deprived of a constitutional right pursuant to one of the City's customs or policies. Id.; Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

The City does not contest plaintiff's "policy" allegations, but says that he has not adequately alleged that he was deprived of a constitutional right. At base, the City says, plaintiff alleges that he was prosecuted without probable cause, conduct that the Seventh Circuit has said is not actionable under section 1983. See Newsome v. McCabe, 256 F.3d 747, 750-51 (7" Cir. 2001) (stating that the

"effective holding" of Albright v. Oliver, 510 U.S. 266 (1994) is that prosecution without probable cause violates due process if it deprives the plaintiff of "an adequate opportunity to defend himself in [a] criminal prosecution," but is actionable under section 1983 only if state post-deprivation remedies are inadequate); see also Penn v. Harris, 296 F.3d 573, 576 (7'h Cir. 2002) (quoting Newsome for the proposition that "there is no constitutional right not to be prosecuted without probable cause.") (internal quotation marks and citation omitted).

Though malicious prosecution itself is not actionable under section 1983, the conduct underlying that label suppression of exculpatory evidence, subornation of perjury and the like - is actionable if it violates a substantive constitutional right, like the due process right to a fair trial. Penn, 296 F.3d at 576; Newsome, 256 F.3d at 752. Plaintiff contends that his allegations state a claim for violation of his fair trial rights, even though he was never actually tried.

The Court disagrees. Nearly thirty years ago, the Seventh Circuit said that the due process clause does not "provide broad generalized protection against misdeeds by police or prosecution." Christman v. Hanrahan, 500 F.2d 65, 67 (7'h Cir. 1974). Rather, the court said, "the mission of the clause [is] avoidance of an unfair trial to the accused, and no violation ... result[s] unless the misconduct [has] some prejudicial impact on the defense." Id. Thus, the court held that the due process clause was not violated by the prosecution's unsuccessful attempt to conceal exculpatory evidence because the delay in disclosure, though reprehensible, "did not prejudice the defense." Id. at 68.

Our court of appeals reaffirmed this view of due process in Hensley v. Carey, 818 F.2d 646 (7`h Cir. 1987). The plaintiff in that case had been arrested on a variety of criminal charges, largely on the strength of the victim's line-up identification. The charges were later dropped when the

victim recanted the identification. Plaintiff filed a section 1983 action against the police officers who ran the line-up, claiming that it was unduly suggestive and, as a result, violated his due process rights.

The Seventh Circuit rejected plaintiff's argument that an improper line-up, by itself, violates due process:

> [The Supreme Court cases] establish a rule which bars the admission of unreliable evidence at trial. The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under § 1983.

Id. at 649. Even if the line-up were suggestive, the court said, the identification evidence did not deprive him of his right to a fair trial because he was never tried. Id. at 649. Thus, the court concluded, plaintiff did not have a viable section 1983 claim. Id.

Plaintiff does not allege that he was tried for the charges on which he was arrested. In fact, in his response to the City's motion, he admits that the "charges were dismissed before trial." (Pl.'s Mem. Opp'n Mot. Dismiss at 3.) That admission dooms his section 1983 fair trial due process claims against both the City and, though he did not file a motion to dismiss, defendant Jones.

The Seventh Circuit's opinion in Whitley v. Siebel, 613 F.2d 682 (7'h Cir. 1980) does not dictate a different result. Whitley is a section 1983 false arrest case that was analyzed under the rubric of due process. Id. at 684. In the Whitley court's view, a police officer who procured arrest authority through deliberate misrepresentations violated the plaintiff's right not to be seized without due process of law. Id. at 686. The case says nothing, however, about whether such conduct violated his due process right to a fair trial.

Plaintiffs reliance on Jones v. City of Chicago, 856 F.2d 985 (7`ʰ Cir. 1988) is similarly misplaced. In that case, a young man who had been wrongfully arrested and jailed, but was never tried, sued the City and various police officers under section 1983 for false arrest, false imprisonment and malicious prosecution. In the course of its opinion, the court said:

> [A]t some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause.... But the causal inquiry is unchanged. If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors . . . to confine or prosecute him.

Id. at 994. That statement suggests that police misconduct that occurs after an arrest and results in continued wrongful confinement, i.e., malicious prosecution, can form the basis of a section 1983 due process claim, even if the victim's fair trial rights are not impaired.

But that reading of Jones cannot survive Newsome, which holds that malicious prosecution, to the extent it violates due process at all, is not actionable under section 1983. Newsome, 256 F.3d at 750-52. After Newsome, a person who is wrongfully arrested can file a section 1983 Fourth Amendment claim contesting his arrest and the resulting confinement, and one whose fair trial rights are violated by police misconduct after the arrest can file a section 1983 Fourteenth Amendment claim. Id. at 751-52. But someone who is unlawfully arrested, does not file a timely Fourth Amendment claim and is never tried, cannot contest his pre-trial detention on the theory that the police officers' failure to tell the prosecutor about their misconduct deprived him of liberty without due process of law. Id. at 750-51. That is precisely what plaintiff is attempting to do here, an effort

that cannot succeed in this circuit.' Plaintiff's section 1983 due process claims, therefore, must be dismissed.

State Claims

Having dismissed the only federal claims in this lawsuit, the Court declines to exercise its supplemental jurisdiction over plaintiff's state-law claims. See 28 U.S.C. § 1367(c)(3) (stating that court may decline to exercise supplemental jurisdiction over state claims if it has "dismissed all claims over which it [had] original jurisdiction").

Conclusion

For the reasons set forth above, the City's Rule 12(b)(6) motion to dismiss is granted and the section 1983 fair trial due process claims plaintiff asserts against both defendants are dismissed with prejudice. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state-law claims, which are dismissed without prejudice to refiling in state court. This is a final and appealable order.

ENTER:

UNITED STATES DISTRICT JUDGE

DATED: 1-2-3 o3

'The out-of-circuit cases cited by plaintiff suggest that his claim might succeed elsewhere, but that does not change the result of this case.

Minus, Odder *Form* (O6:.i7)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Paul E. Plunkett	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 6076	DATE	1/23/2003
CASE TITLE	REGINALD WILEY vs. CITY OF CHICAGO,et al		

MOTION: [In the following box (a) indicate (he party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.)

DOCKET ENTRY:

(1) Li Filed motion of [use listing in "Motion" box above.]

(2) O Brief in support of motion due

(3) O Answer brief to motion due Reply to answer brief due

(4) El Ruling/Hearing on set for - at

(5) O Status hearing[held/continued to] [set for/re-set for] on _ set for at

(6) O Pretrial conference[held/continued to] [set forlre-set for] on set for at

(7) O Trial[set for/re-set for] on _ _ at

(8) O [Bench/Jury trial] [Hearing] held/continued to at

(9) O This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
0 FRCP4(m) 0 Local Rule 41.1 0 FRCP41(a)(]) 0 FRCP4 1 (a)(2).

(10) ~ [Other docket entry] ENTER MEMORANDUM OPINION AND ORDER: the City's Rule 12(b)96) motion to dismiss is granted and the section 1983 fair trial due process claims plaintiff asserts against both defendants are dismissed with prejudice. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state-law claims, which are dismissed without prejudice to refiling in state court. This is a final and appealable order.

(11) ⁄ [For further detail see order attached to the original minute order.]

No notices required, advised in open court.

No notices required.

Notices mailed by judge's staff.

Notified counsel by telephone.

Docketing to mail notices.

✓ Mail AO 450 form.

✓ Copy to judge/magistrate judge.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

REGINALD WILEY,	) ~	
Plaintiff,	)	
v.	)	No. **02** ***C 6076***
		Paul E. Plunkett, Senior Judge
CITY OF CHICAGO and BRODERICK JONES,	))	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Reginald Wiley has sued the City of Chicago and Broderick Jones under both state and federal law for having wrongfully prosecuted him. The City of Chicago has filed a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss the 42 U. S.C. § ("section") 1983 claim asserted against it. For the reasons set forth below, the motion is granted.

Facts

On January 9, 2000, defendant Jones, who is a Chicago police officer, arrested plaintiff and caused him to be charged with a crime. (Compl. ¶ 5.) Jones fabricated the evidence on which the arrest was based, but concealed that fact from the prosecutors. (Id. ¶¶ 5-6.) On July 8, 2002, all charges against plaintiff were dismissed. (Id. 17.)

Jones was able to engage in this wrongful conduct because of the City's deliberate indifference to the fabrication of evidence by its police officers. (Id. ¶ 8.) Plaintiff says that the City's conduct violated his Fourteenth Amendment due process rights and seeks damages in excess of $100,000.00.

The Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000). No claim will be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Discussion

Federal Claims

Section 1983 provides redress for constitutional deprivations that occur at the hands of certain government actors. 42 U.S.C. § 1983. To state a viable section 1983 claim against the City, plaintiff must allege that he was deprived of a constitutional right pursuant to one of the City's customs or policies. Id.; Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

The City does not contest plaintiff's "policy" allegations, but says that he has not adequately alleged that he was deprived of a constitutional right. At base, the City says, plaintiff alleges that he was prosecuted without probable cause, conduct that the Seventh Circuit has said is not actionable under section 1983. See Newsome v. McCabe, 256 F.3d 747, 750-51 (7" Cir. 2001) (stating that the

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The Court disagrees. Nearly thirty years ago, the Seventh Circuit said that the due process clause does not "provide broad generalized protection against misdeeds by police or prosecution." Christman v. Hanrahan, 500 F.2d 65, 67 (7'h Cir. 1974). Rather, the court said, "the mission of the clause [is] avoidance of an unfair trial to the accused, and no violation ... result[s] unless the misconduct [has] some prejudicial impact on the defense." Id. Thus, the court held that the due process clause was not violated by the prosecution's unsuccessful attempt to conceal exculpatory evidence because the delay in disclosure, though reprehensible, "did not prejudice the defense." Id. at 68.

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DATED: 1-2-3 03

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United States District Court

Northern District of Illinois

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REGINALD WILEY

v.

CITY OF CHICAGO and
BRODERICK JONES

JUDGMENT IN A CIVIL, CASE

Case Number: 02 C 6076

EJ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

~ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the City's Rule 12(b)96) motion to dismiss is granted and the section 1983 fair trial due process claims plaintiff asserts against both defendants are dismissed with prejudice. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state-law claims, which are dismissed without prejudice to refiling in state court. This is a final and appealable order.

Michael W. Dobbins, Clerk of Court

Date: 1/23/2003

Theresa B. Kinney, Deputy Clerk

[title omitted in printing]

Order on Motion to Reconsider

On January 27, 2003, the Court entered judgment in favor of defendants on plaintiff's complaint. Plaintiff has filed a timely Federal Rule of Civil Procedure 59(e) motion to alter or amend seeking reinstatement of the section 1983 false arrest claim he asserted against defendant Jones.

Plaintiff alleges that Jones arrested him on January 9, 2000. (Compl. par. 5.) But he did not file his complaint until August 26, 2002, well after the two-year limitations period applicable to his false arrest claim had expired. *Kalimari v. Illinois Dept of Corr.,* 879 F.2d 276, 277 (7th Cir. 1989) (stating that statute of limitations for section 1983 actions filed in Illinois is two years).

Plaintiff acknowledges that he was arrested more than two years before he filed suit, but contends that his claim is still timely. Because the premise of his false arrest claim is that Jones fabricated evidence against him, plaintiff says that success on that claim would necessarily have undermined the criminal case against him. As such, he says, *Heck v. Humphrey,* 512 U.S. 477 (1994) precluded him from filing suit until the criminal case was resolved i11 his favor. The criminal charges against him were dismissed on July 8, 2002 (See Compl. par. 7), about a month before he filed his complaint. Thus, plaintiff says, his false arrest claim is timely.

Plaintiff's argument was squarely rejected by the Seventh Circuit in *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001). Snodderly, like the plaintiff in this case, filed a false arrest claim more than two years after he was arrested, but within two years after the criminal charges against him were dismissed. The district court dismissed the claim as untimely and Snodderly appealed. On appeal, Snodderly argued that *Heck* precluded him from bringing his false arrest claim until the charges against him were dropped because success on that claim would necessarily have impugned the pending prosecution.

The Seventh Circuit disagreed:

> [A] claim for false arrest, insofar as it seeks damages for the arrest only, would not necessarily imply the invalidity of any future conviction or sentence. A plaintiff could succeed on a false arrest claim by demonstrating that he was arrested without probable cause (for example, by showing that the arresting officers ignored exculpatory information and arrested him with little or no basis for suspecting that he committed the crime); however, this would not demonstrate the invalidity of a future conviction for the same

> offense. A person can be validly convicted regardless of the quantum of evidence possessed by the police at the time of arrest.

Id. at 899. On the strength of that distinction, the court rejected the notion that the accrual date for a section 1983 false arrest claim depends on the facts of each case and the parameters of *Heck.* Instead, the court reaffirmed its position that a claim for false arrest accrues at the time of the arrest. Id.

The court's opinion in *Okoro v. Bohman,* 164 F.3d 1059 (7th Cir. 1999) does not dictate a different result. First, *Okoro,* was not a section 1983 false arrest case, but a case pursuant to federal Rule of Criminal Procedure 41(c) seeking the return of property allegedly stolen during a. search. Id. at 1061. Moreover, even if it were a false arrest case, the court's statement about the application of *Heck* would be dictum because, as the court said, the issue was not even raised by the parties. Id. Finally, *Okoro* was decided two years before the court reaffirmed its "categorical approach" to applying Heck to false arrest cases in *Snodderly.* Thus, *Okoro* would not control this suit even if it were a false arrest case decided on the basis of Heck.

For all of these reasons, plaintiff's motion to alter or amend the Court's January 27, 2003 judgment order is denied.

CIRCUIT RULE 31(e) CERTIFICATE

The undersigned, attorney of record for plaintiff-appellant, certifies that he filed a digital version of the foregoing brief and short appendix via the Internet this 17th day of April, 2003.

____

Kenneth N. Flaxman