

STANDARD OF REVIEW

Plaintiff incorporates by reference the Standard of Review discussion set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss (DE 19).

ARGUMENT

I. PLAINTIFF HAS PROPERLY STATED A CLAIM FOR RELIEF UNDER 42 U.S.C. § 1983.

A. The Supreme Court's *Osborne* Decision Makes Clear There Is A Due Process Right To Access Evidence Post-Conviction.

Defendants misstate the scope of the Supreme Court's decision in District Attorney's Office for Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009). Defendants would limit Osborne's holding to post-conviction efforts to access DNA evidence through state procedures that were shown to be deficient. Defendants posit that Osborne imposes a "jurisdictional prerequisite" of showing a failed attempt to access DNA evidence through a state procedure before a due process claim can be raised. Osborne cannot be so narrowly cabined. The Osborne Court recognized a due process right to the proper application of a state-created post-conviction procedures, not simply a due process right to proper application of DNA access statutes.

North Carolina had in place means for a convicted defendant to obtain access to evidence before the State enacted a statute allowing for access to DNA evidence. As discussed in detail in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss at pp. 9-16, during the entire period of Dail's imprisonment, North Carolina provided procedures by which an individual convicted of a crime could access evidence and pursue a claim of actual innocence. Defendants erroneously focus solely upon North Carolina's DNA evidence statute, N.C. Gen. Stat. § 15A-269, not enacted until 2001, and the portion of Osborne addressing attempts to obtain

DNA evidence. Dail's right to seek post-conviction evidence and to pursue an actual innocence claim, however, predated enactment of the DNA statute.

In this case, Dail had a protected liberty interest in accessing evidence to prove innocence based on North Carolina's post-conviction relief statute. That right existed before North Carolina enacted a statute specifically providing for access to DNA evidence. At all relevant times, North Carolina allowed convicted defendants to challenge their conviction and incarceration with new evidence. N.C. Gen. Stat. § 15A-1415(c).² Based on the post-conviction statute, Dail has "a liberty interest in demonstrating his innocence with new evidence under state law." Osborne, 129 S. Ct. at 2319.

Here, procedures to access exculpatory DNA material were essential to Dail's right to demonstrate his innocence with new evidence. The City of Goldsboro provided procedures to realize this right by giving Dail and his representatives a method for requesting DNA evidence. Over the years between his conviction and exoneration, the Goldsboro Police Department entertained the requests of Dail's representatives to access retained evidence, and presumably denied the requests only because they believed the evidence no longer existed. Responding to another similar request in 2007, the Police Department produced the crime scene evidence for testing when it was found in June 2007. Goldsboro thus had an established practice of producing DNA evidence upon request. Moreover, if Defendants had opposed Dail's requests for access to the evidence, Dail could have obtained the material through North Carolina's post-conviction relief procedures. See N.C. Gen. Stat. §§ 15A-1415(c), 15A-1420(c); State v. Taylor, 327 N.C.

² This subsection was inserted into the post-conviction statute in 1996. The prior version of the statute was substantially similar, providing that post-conviction relief was available upon a showing that "Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant." N.C. Gen. Stat. § 15A-1415(b)(6) (1995).

147, 154, 393 S.E.2d 801, 806 (1990) (courts have the “inherent power to compel disclosure of relevant facts regarding a post-trial motion”).

Dail’s liberty interest in proving his innocence and accessing exculpatory evidence, however, was thwarted by Defendants’ unreasonable failure to properly maintain the evidence. Because Defendants had a deficient policy and practice with respect to inventorying and safe-keeping evidence, Defendants falsely informed Dail that the evidence was unavailable for at least 12 years. As a result, Dail was unable to obtain evidence that at all times was under the exclusive control of Defendants, the testing of which would have led to his release pursuant to North Carolina’s procedures for post-conviction relief. Defendants’ evidence-retention practices were manifestly deficient, and unconstitutionally deprived Dail of his liberty interest in proving his innocence, violating his right to procedural due process. See Osborne, 129 S. Ct. at 2319. Because the Amended Complaint alleges – and the evidence to be developed through discovery will demonstrate – that the Goldsboro Police Department had a policy or custom of not properly storing and inventorying evidence, depriving Dail of due process, Dail has stated a valid § 1983 claim for municipal liability under Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S. Ct. 2018 (1978).

B. Deficient Policies And Procedures for Maintaining and Inventorying Evidence Are of Constitutional Significance and Do Not Constitute Simple Negligence.

In their Reply, Defendants failed to discuss Monell and its progeny, instead preferring to recast Plaintiff’s allegations as sounding in negligence. The Amended Complaint, however, contains detailed allegations of deficiencies in Defendants’ practices and policies for storing and inventorying evidence. See Amended Complaint, ¶¶ 39-42. As demonstrated by the district court’s decision in Newton v. City of New York, 681 F.Supp.2d 473 (S.D.N.Y. 2010), such

deficiencies do not simply evidence negligence, but instead are of constitutional significance. Plaintiff should be permitted an opportunity to develop a factual record which will support liability on a § 1983 claim under Monell.

In this case, as in Newton, Defendants wrongfully interfered with Dail's "liberty interest in demonstrating his innocence with new evidence under state law," Osborne, 129 S. Ct. at 2319, because they did not properly inventory and safeguard the evidence from Dail's criminal case. Defendants' unconstitutional acts are properly redressable under § 1983, as stated in the Amended Complaint. As both Osborne and Newton demonstrate, Dail's § 1983 claim is not foreclosed by the decision in Osborne. For the reasons set forth herein and in Plaintiff's previous Memorandum in Opposition to Defendants' Motion to Dismiss, Defendants' motion to dismiss Plaintiff's § 1983 claim should be denied.

II. PLAINTIFF'S STATE LAW CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

In their Reply, Defendants contend that the statute of limitations for Dail's state law claims began to run when the requested crime scene evidence was located and provided to Dail in June 2007. (DE 22, pp. 7-9.) The mere discovery of the evidence, however, did not demonstrate that Dail was injured by Defendants' negligent and unconstitutional actions. If the evidence had not exonerated Dail, then Dail's inability to obtain the evidence would not have injured him in any way. Dail was only injured because the crime scene evidence exonerated him, and thus Dail did not discover that he was injured until he learned of the DNA test results. Because the statute of limitations "does not begin to run until plaintiff discovers, or in the exercise of reasonable care, should have discovered, that he was injured as a result of defendant's wrongdoing," Dail's state law claims were timely filed. See Black v. Littlejohn, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985); N.C. Gen. Stat. § 1-52 (16).

Defendants also err in arguing that Heck v. Humphrey, 512 U.S. 477 (1994), is inapplicable because Dail's claims are not related to the "invalidity of his conviction." To the contrary, the entire thrust of Dail's claims are that Defendants' negligent and unconstitutional actions prevented him from obtaining exculpatory evidence that ultimately invalidated his conviction and sentence. If the crime scene evidence had not demonstrated the invalidity of his conviction, Dail would not have any valid causes of action. Claims involving access to exculpatory evidence are squarely covered by Heck, as Heck itself involved a prisoner's claims that the defendants had destroyed exculpatory evidence. See Heck, 512 U.S. at 479, 490; Amaker v. Weiner, 179 F.3d 48, 51 (2nd Cir. 1999) (applying Heck to claim based on the withholding of exculpatory evidence).

For these reasons and those set forth in Section II of Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, Defendants' motion to dismiss Plaintiff's state law claims should be denied.

III. PLAINTIFF'S CLAIM UNDER THE NORTH CAROLINA CONSTITUTION SHOULD NOT BE DISMISSED.

Plaintiff incorporates by reference the argument pertaining to his claims under the North Carolina Constitution set forth at Section III of Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss (DE 19), Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied except with regard to the state law claims for false arrest/false imprisonment (Third Cause of Action) and federal claims against individual defendants in their individual capacities (Seventh and Eighth Causes of Action).

This the 1st day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, I electronically filed the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS FILED BY THE ESTATE OF CHESTER HILL AND THE ESTATE OF RONALD MELVIN** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Scott C. Hart, Esq.

/s/ G. Christopher Olson

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