

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

KEVIN JONES

PLAINTIFF

V.

4:11CV00889 JMM

**MARK FROST, GARY DUNN,
and JAMES BACON**

DEFENDANTS

ORDER

Pending are two motion for partial summary judgment filed by the Plaintiff and two motions to dismiss filed by James Bacon and Mark Frost. For the reasons set forth below, Plaintiff's motions for partial summary judgment are granted and the Defendants' motions to dismiss are denied in part and granted in part.

I. Facts as alleged in the Complaint

On December 15, 2005, Nona Dirksmeyer, a nineteen year old Arkansas Tech University student, was attacked and murdered in her apartment in Russellville, Arkansas. In 2006, Plaintiff, who had been dating Ms. Dirksmeyer at the time of her death, was charged with her murder. Plaintiff went to trial and was acquitted. Plaintiff alleges that the Defendants violated his Fifth, Sixth, and Fourteenth Amendment rights by conspiring to withhold evidence and falsify information in an effort to have Plaintiff prosecuted for the murder of Ms. Dirksmeyer.

Defendant Mark Frost was the Russellville Police Department's lead criminal investigator on the Dirksmeyer murder and Defendant James Bacon was the Chief of the Russellville Police Department. Plaintiff alleges that Defendant Gary Dunn¹ was the person who

¹ Dunn has not yet been served by the Plaintiff as required under Rule 4 of the Federal Rules of Civil Procedure. The Court granted Plaintiff's motion for an additional 120 days, or until August 11, 2012, to serve Defendant Dunn.

actually attacked and murdered Dirksmeyer. Plaintiff has sued Defendants Frost and Bacon (herein referred to as the “Defendants”) in their official and individual capacities.

II. Motions to Dismiss

Defendants contend that Plaintiff’s Complaint should be dismissed because his claims for failure to disclose *Brady* material are not actionable absent a conviction and because his §1983 claims are barred by the statute of limitations.

To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a “sheer possibility.” *Id.* It is not, however, a “probability requirement.” *Id.* Thus, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’” *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

A. Fourteenth Amendment Claims

Plaintiff alleges that during the Dirksmeyer murder investigation, Defendant Frost investigated the alibi of suspect Gary Dunn and conclusively determined that it was false. However, Frost lied to Prosecutor David Gibbons telling Gibbons that he had confirmed Dunn’s alibi. Frost further convinced Dunn’s polygrapher to slant his finding in Dunn’s favor in order to deflect prosecutorial focus from Dunn. Frost falsely informed the prosecutor that an FBI

Behavioral Science team report supported Frost's conclusion that Plaintiff staged the Dirksmeyer crime scene. Frost purposely failed to obtain DNA testing of the condom wrapper found at the crime scene that excluded Plaintiff and was later found to have Dunn's DNA on it. Frost did not cooperate with a subsequent Arkansas State Police investigation by refusing to produce his investigative notes that contained proof of Dunn's false alibi. Plaintiff also alleges that Chief Bacon knew Dunn's alibi was false but did not advise the prosecutor. Chief Bacon purposely failed to secure a Lowe's video surveillance tape that would have confirmed that Dunn's alibi was false and Bacon pressured the prosecutor to file a murder charge against Plaintiff.

In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194 (1963). The Supreme Court extended the *Brady* duty to law enforcement officials providing them, however, with a good faith defense. See *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337 (1988) ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). The Eighth Circuit explained in *Villasana*:

We conclude this bad faith standard should likewise apply to due process claims that law enforcement officers preserved evidence favorable to the defense but failed to disclose it. In other words, *Brady* ensures that the defendant will obtain relief from a conviction tainted by the State's nondisclosure of materially favorable evidence, regardless of fault, but the recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial.

Villasana v. Wilhoit, 368 F.3d 976, 980 (8th Cir. 2004).

Defendant argue that Plaintiff's *Brady* claims against them as law enforcement officers is

not cognizable because Plaintiff was not convicted and therefore cannot “obtain relief from a conviction tainted by the State’s nondisclosure of materially favorable evidence.” *Villasana*, 368 F.3d at 980. However, in this case, Plaintiff seeks recovery of § 1983 damages, not relief from a conviction. The *Villasana* court appears to allow damages under these circumstances. In fact, the Court has not found an Eighth Circuit case that expressly disallows recovery of damages from a law enforcement official for a *Brady* violation where the plaintiff was not convicted of the crime. Defendants cite the Court to cases from other circuits which stand for the proposition that absent a conviction, a claim based upon alleged withholding of evidence does not exist. After review of the Eighth Circuit’s rulings in this area, the Court is not persuaded that the Eighth Circuit would adopt this bright line rule of law, particularly to the alleged circumstances of this case.

Moreover, in *Wilson v. Lawrence County, MO*, the Eighth Circuit recognized a substantive due process claim for reckless investigation. The Court explained that

law enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly as illustrated by the *Brady* line of cases requiring the state to disclose exculpatory evidence to the defense. . . . They are the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. There is no countervailing equally important governmental interest that would excuse the appellants from fulfilling their responsibility to investigate these leads. . . .

Wilson v. Lawrence County, MO, 260 F.3d 946, 957 (8th Cir. 2001).

Viewing the facts as alleged in the Complaint as true as the Court must at this stage of the litigation, the Court cannot say that Plaintiff has failed to allege a constitutional violation of his Fourteenth Amendment rights. Therefore, Defendants’ Motion to Dismiss Plaintiff’s Fourteenth Amendment claims is denied.

B. Fifth and Sixth Amendment Claims

Defendants argue that Plaintiff has failed to set forth a Fifth or Sixth Amendment claim in his Complaint. Plaintiff has not responded to this argument. The Court agrees that there are no facts alleged in the Complaint which implicate the Fifth or Sixth Amendment. Therefore, Plaintiff's Fifth and Sixth Amendment claims are dismissed.

Defendants also seek to have Plaintiff's state law claims dismissed. However, Plaintiff has not included a state law claim in his Complaint.

C. Statute of Limitations

Defendants argue in their supplemental motion to dismiss that Plaintiff's claims which are brought pursuant to §1983 are barred by the three-year statute of limitations. Defendants contend that Plaintiff's cause of action accrued upon his acquittal on July 19, 2007. Plaintiff's Complaint was not filed in this Court until December 15, 2011, more than three years from the date of his acquittal.

Plaintiff contends that because the acquittal date does not appear on the face of his Complaint this argument cannot be considered by the Court on a motion to dismiss. Plaintiff's contention is without merit. When reviewing a motion to dismiss, the Court "may consider some materials that are of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (internal citations omitted). The verdict form memorializing Plaintiff's acquittal falls into each of these categories.

However, Plaintiff also argues that he has sufficiently pled facts which constitute concealment of the evidence by the Defendants and which outline Plaintiff's inability to discover the Defendants' actions. Therefore, Plaintiff argues the three year statute of limitations should

be tolled. In fact, Plaintiff has alleged in his Complaint that the “gag order” prohibiting communication about the Dunn case thwarted diligent attempts by Plaintiff’s attorney to investigate the facts of this case. At this time, the Court must construe Plaintiff’s allegations as truthful. Therefore, the Court finds that Plaintiff has set forth sufficient facts to withstand the Defendants’ motion to dismiss based upon the statute of limitations.

D. Qualified Immunity

“Under the qualified immunity doctrine, government 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. Officials are not liable for incorrect decisions made in gray areas of the law. To defeat a defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation.” *Burke v. Sullivan*, (8th Cir. 2012) (internal citations omitted).

Defendants claim they are entitled to qualified immunity because Plaintiff has failed to establish a *Brady* violation. As stated above, the Court finds that Plaintiff has set forth sufficient facts to state a *Brady* violation claim against the Defendants and has also stated sufficient facts to set forth a Fourteenth Amendment due process claim for reckless investigation.

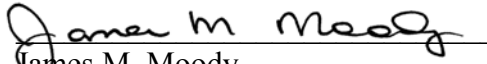
The Court finds that the rights set forth by *Brady* and its progeny were clearly established in 2006 when Plaintiff was charged with the Dirksmeyer murder. Moreover, Plaintiff has alleged that the Defendants knew that a suspect’s alibi could not be confirmed, but intentionally told the prosecutor that the alibi had been substantiated. Defendant Frost refused to turn over his

field notes on the issue, purposefully influenced a polygrapher, falsely informed the prosecutor that an FBI Behavioral Science team report supported Frost's conclusion that Plaintiff staged the Dirksmeyer crime scene, and purposely failed to obtain DNA testing of the condom wrapper. Bacon knew Dunn's alibi was false but did not advise the prosecutor. Defendant Bacon purposely failed to secure evidence that would have confirmed that Dunn's alibi was false and pressured the prosecutor to file a murder charge against Plaintiff. If true, there can be no argument as to whether a reasonable law enforcement officer would have know that these actions violated Plaintiff's rights under the Fourteenth Amendment. For these reasons, Defendants' Motion to Dismiss based upon qualified immunity is DENIED and Plaintiff's Motion for Partial Summary Judgment on the basis of qualified immunity is GRANTED.

III. Conclusion

The motions for partial summary judgment filed by the Plaintiff (ECF No. 11, 15) are GRANTED as to qualified immunity. The motions to dismiss filed by James Bacon and Mark Frost (ECF No. 4, 21) are DENIED as to Plaintiff's Fourteenth Amendment claims and GRANTED as to Plaintiff's Fifth and Sixth Amendment claims.

IT IS SO ORDERED this 25th day of June, 2012.


James M. Moody
United States District Judge