

STATE OF MICHIGAN  
COURT OF APPEALS

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ROBERT PHILLIP MITCHELL,

Plaintiff-Appellant,

v

CITY OF PONTIAC,

Defendant-Appellee.

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UNPUBLISHED

June 27, 1997

No. 191654

Oakland Circuit Court

LC No. 94-487977-NZ

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's decision granting summary disposition for defendant pursuant to MCR 2.116(C)(8). We affirm.

Plaintiff was employed by defendant as a police officer. He was charged with larceny after allegedly stealing \$250 from the pocket of a suspect during a traffic stop. Following a preliminary examination, the charge was dropped. Thereafter, plaintiff filed a complaint alleging that defendant practiced a custom or policy that resulted in a violation of his right to due process under Const 1963, art I, § 17. According to the complaint, defendant failed to "adequately and fairly investigate the allegations" set forth against plaintiff.

Our Supreme Court has recognized that a claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in "appropriate cases." *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). On appeal, defendant contends that the trial court erred in dismissing his due process claim. We disagree.

"The first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself." *Marlin v City of Detroit (After Remand)*, 205 Mich App 335, 338; 517 NW2d 305 (1994), quoting *Smith, supra* at 648 (Boyle, J., joined by Cavanagh, J., concurring in part and dissenting in part). Plaintiff's complaint does not specify whether a procedural due process or substantive due process claim is at issue. To the

extent that plaintiff asserts a procedural due process claim, the trial court's decision granting summary disposition in favor of defendant was proper.

In criminal cases, due process generally requires notice of the charge and an opportunity to be heard. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). Here, plaintiff concedes that a preliminary examination was held regarding the larceny charge. There is no allegation that the hearing was procedurally deficient. In fact, plaintiff was successful in getting the charge dismissed. Accordingly, plaintiff has failed to state a claim based on a violation of procedural due process.

The complaint was also deficient to the extent that plaintiff alleges a violation of substantive due process. In essence, plaintiff is attempting to assert a malicious prosecution claim as a constitutional tort. The United States Constitution's Fourteenth Amendment's guarantee of substantive due process will not support a claim based on pretrial deprivations of liberty. *Albright v Oliver*, 510 US 266; 114 S Ct 807; 127 L Ed 2d 114 (1994); *Payton v City of Detroit*, 211 Mich App 375, 403-404; 536 NW2d 233 (1995). Michigan's due process clause is construed no more broadly than the federal guarantee. *Saxon v Dep't of Social Services*, 191 Mich App 689, 698; 479 NW2d 361 (1991). Accordingly, we find that plaintiff has failed to state a claim based on a violation of the right to substantive due process.

We affirm.

/s/ Jane E. Markey  
/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra