

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1069

Filed: 3 September 2019

Durham County, No. 11 CVS 5051

FRANKIE DELANO WASHINGTON and FRANKIE DELANO WASHINGTON, JR.,  
Plaintiffs,

v.

TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL, JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING, ANTHONY T. MARSH, EDWARD SARVIS, BEVERLY COUNCIL, STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC, and THE STATE OF NORTH CAROLINA, Defendants.

Appeal by Plaintiff from order entered 11 May 2018 by Judge C. Winston Gilchrist in Durham County Superior Court. Heard in the Court of Appeals 24 April 2019.

*Ekstrand & Ekstrand LLP, by Robert Ekstrand and Stefanie Smith, for Plaintiff-Appellant.*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn H. Shields, for Defendants-Appellees.*

COLLINS, Judge.

Plaintiff Frankie Delano Washington (“Plaintiff”) appeals from an order granting Defendants Tracey Cline and the State of North Carolina’s (“Defendants”) motion for summary judgment pursuant to North Carolina Rule of Civil Procedure 56, denying Plaintiff’s motion for partial summary judgment, and dismissing Plaintiff’s claims. Plaintiff contends that the trial court erred by granting Defendants

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and denying Plaintiff summary judgment on his cause of action seeking injunctive relief and money damages directly under Article I, section 18, of the North Carolina Constitution for harms he allegedly suffered as a result of the deprivation of his right to a speedy trial thereunder. We affirm.

### **I. Background**

Plaintiff was arrested in 2002 as a suspect in a Durham home invasion that involved an armed robbery and an attempted sexual assault. Plaintiff was held in custody for over a year following his arrest pending investigation by the State Bureau of Investigation (“SBI”) of various articles of evidence. Plaintiff was eventually released from jail on bond, and moved the trial court twice to compel SBI analysis of the State’s evidence. The trial court ordered the SBI to conduct the analysis in 2004, but the SBI was never notified of the trial court’s order. Plaintiff moved to dismiss the charges in 2005 for violation of his right to a speedy trial, but the trial court denied Plaintiff’s motion. In February 2007, approximately four years and nine months following his arrest, Plaintiff was tried and convicted of various offenses in connection with the home invasion.

Plaintiff appealed the convictions to this Court, and on 2 September 2006, in *State v. Washington*, 192 N.C. App. 277, 665 S.E.2d 799 (2008), this Court concluded that Plaintiff had been deprived of his right to a speedy trial as guaranteed by the

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United States and North Carolina Constitutions, vacated the convictions, and dismissed the underlying indictments with prejudice.

On 21 September 2011, Plaintiff<sup>1</sup> sued the State of North Carolina, the City of Durham, and various individuals who worked for the SBI, the Durham Police Department, and the Durham County District Attorney's Office (including Defendant Cline, the principal prosecutor of Plaintiff's criminal case) for a permanent injunction and money damages to redress harms allegedly suffered in connection with Plaintiff's pre-trial detention, investigation, and prosecution. In his complaint, Plaintiff brought 23 causes of action, including a direct cause of action under the North Carolina Constitution against Defendant Cline in her official capacity as District Attorney and Assistant District Attorney for North Carolina's Fourteenth Prosecutorial District, seeking redress for harms allegedly caused by, *inter alia*, the denial of Plaintiff's right to a speedy trial as guaranteed by North Carolina Constitution Article I, section 18 (the "direct constitutional claim").

On 11 January 2012, Defendants moved to strike and dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 8, 10, and 12. On 9 February 2012, Plaintiff moved for partial summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, including on his direct constitutional claim. On 5 August 2016, the trial court entered an order that, in relevant part, denied Defendants' motion to dismiss Plaintiff's direct

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<sup>1</sup> Plaintiff's son was also a plaintiff in the underlying proceedings in this case, but is not a party to this appeal.

constitutional claim, and reserved ruling on Plaintiff's motion for summary judgment on the same. On 13 September 2017, Defendants moved for summary judgment pursuant to Rule 56 on the remaining claims, including on Plaintiff's direct constitutional claim.

On 11 May 2018, the trial court entered an order granting Defendants' motion for summary judgment on all remaining claims (including the direct constitutional claim), denying Plaintiff's motion for partial summary judgment on the same, and dismissing all remaining claims as to all defendants.

Plaintiff timely appealed.

## **II. Discussion**

On appeal, Plaintiff contends that the trial court erred by granting Defendants' and denying Plaintiff's respective motions for summary judgment on Plaintiff's direct claim under North Carolina Constitution Article I, section 18, for the deprivation of his right to a speedy trial.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2018). We review a trial court's order granting or denying summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d

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744, 747 (2012). “If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.” *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

North Carolina Constitution Article I, section 18, sets forth that “[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. Const. art. I, § 18. Our Supreme Court has said that “[e]very person formally accused of crime is guaranteed a speedy and impartial trial by Article I, section 18 of the Constitution of this State and the Sixth and Fourteenth Amendments of the Federal Constitution.” *State v. Tindall*, 294 N.C. 689, 693, 242 S.E.2d 806, 809 (1978). If a criminal defendant establishes that he has been deprived of his right to a speedy trial, any convictions secured in connection therewith must be vacated, and the underlying indictments dismissed. *State v. Washington*, 192 N.C. App. 277, 298, 665 S.E.2d 799, 812 (2008) (concluding right to speedy trial violated; “As such, we must vacate defendant’s convictions and dismiss all charges with prejudice.”); *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (“The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived.”).

As mentioned above, this Court already concluded in Plaintiff’s criminal case that Plaintiff was deprived of his right to a speedy trial, and vacated his convictions

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and dismissed the underlying indictments accordingly. *Washington*, 192 N.C. App. at 298, 665 S.E.2d at 812. Defendants argue that, as a result, Plaintiff has received the “only possible remedy” available for the violation of his constitutional right to a speedy trial, and Defendants support their argument by citing to a number of criminal cases.

Defendants are correct that, in the context of his criminal prosecution, Plaintiff has already received the only acceptable remedy for the violation of the speedy trial right. *Barker*, 407 U.S. at 522. But this is a civil lawsuit, not a criminal prosecution, and Plaintiff here seeks not to overturn his criminal convictions, but to redress harms he allegedly suffered as a result of the denial of his right to a speedy trial. The holdings from the criminal cases cited by Defendants are not applicable in the civil context. *See Hart v. Mannina*, 798 F.3d 578, 595 n.4 (7th Cir. 2015) (noting that in *Barker*, “the Supreme Court said that dismissal of the charges was the ‘only possible remedy,’ but it said this in a direct criminal appeal where the prosecutor had argued that less drastic remedies such as applying the exclusionary rule to certain evidence or granting a new trial would be more appropriate than outright dismissal. The Court had no occasion to consider whether damages are available in a civil case” under federal law (citation omitted)).

In this civil lawsuit, Plaintiff invokes this Court’s conclusion that his constitutional right to a speedy trial was violated in seeking to redress harms

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allegedly caused by his constitutionally-deficient detention, investigation, and prosecution, including a permanent injunction and money damages for “economic loss, physical harm, emotional trauma, loss of liberty, loss of privacy, loss of education and training, loss of earning capacity, and irreparable harm to his reputation,” as well as various costs and expenses he allegedly incurred in connection with his defense. However, Plaintiff cites no legal authority recognizing a private cause of action by which one deprived of his right to a speedy trial under North Carolina Constitution Article I, section 18, can sue for injunctive relief and/or money damages in connection with harms allegedly suffered because of the constitutional violation, and we are aware of no such authority. Accordingly, Plaintiff in essence asks us to recognize a new right to relief, and therefore presents us with a question of first impression.

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the United States Supreme Court held that victims of a violation of the Fourth Amendment to the United States Constitution caused by a federal agent can sue the agent in federal court for damages despite the absence of any statute creating such a cause of action. *Id.* at 389. The *Bivens* Court allowed the petitioner in that case to sue for the violation of the Fourth Amendment right to be free from unreasonable searches and seizures, and thereby recognized the first so-called *Bivens* cause of action. *Id.*

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Since *Bivens* was decided in 1971, the Supreme Court has extended its holding only twice, to alleged violations of the Fifth Amendment, *see Davis v. Passman*, 442 U.S. 228, 248-49 (1979), and the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14, 23-24 (1980). The Supreme Court has expressly declined to recognize a *Bivens* cause of action for alleged violations of the First Amendment. *See Bush v. Lucas*, 462 U.S. 367, 390 (1983).

*Bivens* has never been extended to allow a claim for damages in connection with the deprivation of the right to a speedy trial as guaranteed by the Sixth Amendment. *See Witchard v. Keith*, No. 6:10-cv-474-Orl-31GJK, 2011 U.S. Dist. LEXIS 7620, at \*10 (M.D. Fla. Jan. 26, 2011) (“The Supreme Court has not expressly extended *Bivens* liability to Sixth Amendment claims.”); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (“Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.”). And some federal courts have expressly rejected such a cause of action. *See Patterson v. Hinds Cty., Miss.*, No. 3:13-CV-432-CWR-FKB, 2016 U.S. Dist. LEXIS 172814, at \*12-13 (S.D. Miss. June 10, 2016) (holding that the damages sought by a plaintiff suing in connection with the violation of his speedy trial right are “simply foreclosed by law”); *Bauman v. Hidalgo Cty., Tex.*, No. M-04-145M-04-145, 2005 U.S. Dist. LEXIS 48355, at \*16 n.1 (S.D. Tex. July 6, 2005) (“While the Constitution does afford a person a constitutional right to a speedy trial, the remedy for a violation is dismissal of any



criminal charges, not money damages.”). Consistent with federal case law, we decline to recognize a private cause of action in connection with the deprivation of the right to a speedy trial as guaranteed by Article I, section 18 of our North Carolina Constitution.

As a result of the deprivation of his right to a speedy trial, in his criminal case, Plaintiff successfully petitioned this Court to vacate his convictions and dismiss the underlying indictments with prejudice. Invoking the same right, in this civil case, Plaintiff brought a number of claims seeking injunctive relief and damages, but the trial court dismissed those claims. Following the trial court’s ruling, Plaintiff appealed only the dismissal of his direct claim under the North Carolina Constitution. Regardless of whether Plaintiff could have established a claim for injunctive relief or damages under one of his other legal theories,<sup>2</sup> since he has appealed only the dismissal of his direct constitutional claim, our conclusion that no private cause of action for injunctive relief or damages lies in connection with the deprivation of the right to a speedy trial as guaranteed by Article I, section 18 of the North Carolina Constitution mandates the corresponding conclusion that Plaintiff has placed before us no right to relief which the trial court could have recognized.

### **III. Conclusion**

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<sup>2</sup> Because Plaintiff has not appealed the trial court’s decisions regarding any of his causes of action except his direct constitutional claim, and because we decline to recognize the right to relief that Plaintiff suggests, we have no occasion to analyze the parties’ arguments concerning other causes of action that might have been available to Plaintiff.

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Because we decline to recognize the private cause of action that Plaintiff seeks to bring, we conclude that the trial court did not err by granting Defendants' motion for summary judgment on Plaintiff's direct constitutional claim, or by denying Plaintiff's motion for summary judgment on the same.

AFFIRMED.

Judges BRYANT and STROUD concur.