

15-3525-cv

Spak v. Phillips

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2016

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9 ARGUED: SEPTEMBER 27, 2016

10 DECIDED: MAY 22, 2017

11
12 No. 15-3525-cv

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14 PAUL SPAK,
15 *Plaintiff-Appellant,*

16
17 *v.*

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19 SHANE PHILLIPS,
20 *Defendant-Appellee.*

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23 Appeal from the United States District Court
24 for the District of Connecticut.

25 No. 13 Civ. 1724 – Jeffrey A. Meyer, *Judge.*
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28 Before: WALKER and CABRANES, *Circuit Judges*, and BERMAN, *District*
29 *Judge.* *
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*Judge Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

1 Plaintiff-appellant Paul Spak appeals a decision of the United
2 States District Court for the District of Connecticut (Jeffrey A. Meyer,
3 J.) granting summary judgment in favor of the defendant-appellee
4 Shane Phillips, an officer with the Plainville Police Department in
5 Plainville, Connecticut. In 2010, Spak was arrested by Phillips and
6 charged under Conn. Gen. Stat. § 53a-155 with destroying evidence
7 related to the alleged discharge of illegal fireworks. The prosecuting
8 attorney subsequently dismissed those charges by entering a *nolle*
9 *prosequi*. More than three years after the entry of the *nolle*, Spak
10 brought suit against Phillips for malicious prosecution in violation
11 of the Fourth Amendment, under 42 U.S.C. § 1983. The district court
12 held that Spak's malicious prosecution claim accrued when the *nolle*
13 *prosequi* was entered, and that as a result his suit was time-barred.
14 On appeal, Spak contends that his claim did not accrue when the
15 prosecuting attorney *nolled* his case, but thirteen months later when
16 all public records of his prosecution were erased pursuant to a
17 Connecticut recordkeeping statute. We conclude that Spak's claim
18 accrued when the charges against him were *nolled*. We therefore
19 AFFIRM the judgment of the district court.

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Associates, LLC, New Haven, CT, *for Plaintiff-*
Appellant.

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JOHN M. WALKER, JR., *Circuit Judge*:

Plaintiff-appellant Paul Spak appeals a decision of the United States District Court for the District of Connecticut (Jeffrey A. Meyer, J.) granting summary judgment in favor of the defendant-appellee Shane Phillips, an officer with the Plainville Police Department in Plainville, Connecticut. In 2010, Spak was arrested by Phillips and charged under Conn. Gen. Stat. § 53a-155 with destroying evidence related to the alleged discharge of illegal fireworks. The prosecuting attorney subsequently dismissed those charges by entering a *nolle prosequi*. More than three years after the entry of the *nolle*, Spak brought suit against Phillips for malicious prosecution in violation of the Fourth Amendment, under 42 U.S.C. § 1983. The district court held that Spak's malicious prosecution claim accrued when the *nolle prosequi* was entered, and that as a result his suit was time-barred. On appeal, Spak contends that his claim did not accrue when the prosecuting attorney *nolled* his case, but thirteen months later when all public records of his prosecution were erased pursuant to a Connecticut recordkeeping statute. We conclude that Spak's claim

1 accrued when the charges against him were *nolled*. We therefore
2 AFFIRM the judgment of the district court.

3 BACKGROUND

4 The relevant facts in this appeal are not in dispute. On June 12,
5 2010, Phillips responded to a complaint of fireworks being
6 discharged in Spak's neighborhood. When he arrived to investigate,
7 he observed Spak burning the remnants of fireworks in a backyard
8 fire pit, in what Phillips perceived as an attempt to destroy evidence.
9 The following day, Phillips submitted a sworn affidavit to the
10 Connecticut Superior Court seeking a warrant to arrest Spak on,
11 *inter alia*, charges of tampering with or fabricating evidence. Based
12 on Phillips' sworn statement, the Connecticut Superior Court issued
13 a warrant for Spak's arrest on June 15, 2010, and based on that
14 warrant Spak was arrested on June 24, 2010. On September 10, 2010,
15 the prosecuting attorney unilaterally dismissed the charges against
16 Spak by entering a *nolle prosequi*. A *nolle prosequi* is "a declaration of
17 the prosecuting officer that he will not prosecute further at that time
18 . . . Upon the entering of a *nolle prosequi* by the state's attorney,
19 there is no case." *State v. Winer*, 286 Conn. 666, 685 (quoting *State v.*
20 *Ackerman*, 27 Conn. Supp. 209, 211 (1967)). The state never instituted
21 further charges against Spak subsequent to the *nolle* stemming from
22 the June 12, 2010 incident.

On October 29, 2013, Spak sued Phillips in Connecticut state court for malicious prosecution under Section 1983 and the Fourth Amendment. Phillips removed the action to the District of Connecticut on November 18, 2013. On January 30, 2015, Phillips moved for summary judgment on several grounds, including that Spak's action was untimely because he filed his complaint more than three years after the accrual of his claim. On October 14, 2015, the district court granted Phillips' motion for summary judgment on that ground. Specifically, the district court held that Spak's malicious prosecution claim accrued on September 10, 2010, when the charges against him were *nolled*, and therefore dismissed the suit as time-barred. Spak now appeals.

A district court's grant of summary judgment is reviewed *de novo*. *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). All legal conclusions by a district court are reviewed *de novo*. *United States v. Livecchi*, 711 F.3d 345, 351 (2d Cir. 2013) (per curiam).

1 argues that his claim did not accrue on the date that the charges
2 against him were *nolled*, but thirteen months later when Connecticut
3 law mandated that the records of his *nolled* prosecution be erased.

4

5 I. Accrual of Section 1983 Claims

6 In the absence of federal common law, the merits of a claim
7 for malicious prosecution under Section 1983 are governed by state
8 law. *Janetka v. Dabe*, 892 F.2d 187, 189 (2d Cir. 1989).¹ Likewise, the
9 applicable statute of limitations for a malicious prosecution claim is
10 borrowed from the statute of limitations for the analogous claim
11 under the law of the state where the cause of action accrued, *see*

¹ Under Connecticut law, a plaintiff asserting malicious prosecution must prove that: “(1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice.” *Brooks v. Sweeney*, 299 Conn. 196, 210-11 (2010). The United States Supreme Court has never squarely held that a plaintiff may bring a suit under Section 1983 for malicious prosecution based on an alleged violation of his Fourth Amendment rights. In *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), the Supreme Court confirmed that plaintiffs can sustain Section 1983 suits under the Fourth Amendment for deprivations of liberty suffered as a result of improper or maliciously instituted legal process. *Id.* at 918 (“[T]hose objecting to a pretrial deprivation of liberty may invoke the Fourth Amendment when . . . that deprivation occurs after legal process commences.”). However, the Court’s opinion in *Manuel* did not directly address the other “elements of, and rules associated with, an action seeking damages for” an unlawful pretrial detention. *Id.* at 920. The rule in the Second Circuit is that plaintiffs may bring what is in effect a state law suit for malicious prosecution in federal court under Section 1983, so long as they are able to demonstrate a deprivation of liberty amounting to a seizure under the Fourth Amendment. *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995). Under our precedent, such a suit is proper where: (1) the defendant is a state actor, and (2) the plaintiff who was subject to malicious prosecution was also subject to arrest or seizure within the meaning of the Fourth Amendment. *See Manganiello v. City of New York*, 612 F.3d 149, 160-61 (2d Cir. 2010).

1 *Lounsbury v. Jeffries*, 25 F.3d 131, 133 (2d Cir. 1994); *see also Wallace v.*
2 *Kato*, 549 U.S. 384, 387 (2007), which in Connecticut is three years, *see*
3 *Walker v. Jastremski*, 430 F.3d 560, 562 (2d Cir. 2005).

4 However, the time at which a claim for malicious prosecution
5 under Section 1983 accrues is “a question of federal law that is *not*
6 resolved by reference to state law.” *Wallace*, 549 U.S. at 388. Federal
7 courts apply “general . . . common-law tort principles” to determine
8 the accrual date of a Section 1983 claim. *Id.*; *see also Manuel*, 137 S. Ct.
9 at 920 (“In defining the contours and prerequisites of a § 1983 claim,
10 including its rule of accrual, courts are to look first to the common
11 law of torts.”). In malicious prosecution suits under Section 1983, the
12 statute of limitations begins to run when the prosecution
13 “terminate[s] in the plaintiff’s favor.” *Poventud v. City of N.Y.*, 750
14 F.3d 121, 130 (2d Cir. 2014) (en banc) (quoting *Heck v. Humphrey*, 512
15 U.S. 477, 489-90 (1994)). A “favorable termination” does not occur
16 until the prosecution against the plaintiff has “conclusively” ended.
17 *Murphy v. Lynn*, 53 F.3d 547, 548 (2d Cir. 1995).

18 One point of clarification regarding this accrual rule is in
19 order. The fact that the accrual of Section 1983 claims is analyzed
20 under federal common law, while the merits of those claims are
21 analyzed under the law of the state where the tort occurred, has led
22 to some confusion concerning the standards used to define a
23 “favorable termination” in the malicious prosecution context. This is

1 because a malicious prosecution claim accrues when the underlying
2 prosecution terminates in favor of the accused, *id.*, but “favorable
3 termination” is also a substantive element of a state law tort claim,
4 *see, e.g., Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980).
5 While the same phrase—“favorable termination”—is used in both
6 the accrual analysis and the merits analysis of a Section 1983 suit, it
7 is analyzed under a different legal standard in each context.

8 When the question before a federal court is at what point a
9 malicious prosecution claim accrued, “favorable termination” is
10 analyzed under federal common law, because the timing of accrual
11 is a question of federal law. *See, e.g., Wallace*, 549 U.S. at 388. When,
12 by contrast, a federal court is analyzing the substantive merits of a
13 plaintiff’s claim, the definition of “favorable termination” is
14 analyzed under state law. *See, e.g., Singleton*, 632 F.2d at 193. What
15 constitutes a “favorable termination” may turn out to be the same in
16 each context, but not necessarily so. However, even if “favorable
17 termination” in a particular case is unclear as a matter of state law, it
18 can still be conclusively resolved as a matter of claim accrual under
19 federal law. Thus, the fact that a *nolle prosequi* constitutes a favorable
20 termination under Connecticut state law may be relevant to our
21 accrual inquiry, but it is not dispositive. Unless a *nolle* also
22 constitutes a “favorable termination” under federal common law,

1 then Spak's claim did not accrue for Section 1983 purposes upon
2 entry of the *nolle*.

3

4 II. Effect of a *Nolle Prosequi*

5 Under Connecticut law, a prosecutor may decline to prosecute
6 a case by entering a *nolle prosequi*. Conn. Practice Book § 39-31 (2017).
7 The effect of a *nolle* is to terminate a particular prosecution against
8 the defendant. However, a *nolle prosequi* is not the equivalent of a
9 dismissal of a criminal prosecution with prejudice, because jeopardy
10 does not attach. *Roberts v. Babkiewicz*, 582 F.3d 418, 420 (2d Cir. 2009)
11 (per curiam) ("A *nolle prosequi* is 'a unilateral act by a prosecutor,
12 which ends the pending proceedings without an acquittal and
13 without placing the defendant in jeopardy.'" (quoting *Cislo v. City of*
14 *Shelton*, 240 Conn. 590, 599 n.9 (1997))).

15 The statute of limitations on the *nolled* charge continues to run,
16 and the prosecutor may choose to initiate a second prosecution at
17 any time before the limitations period expires. *Winer*, 286 Conn. at
18 684-85. A prosecution can only be reinstituted following a *nolle*,
19 however, by the filing of a new charging document and a new
20 arrest. *Id.* at 685. If a new prosecution is not commenced,
21 Connecticut law requires that within thirteen months of the *nolle* "all
22 police and court records and records of the state's or prosecuting
23 attorney" related to the prosecution be erased. Conn. Gen. Stat. § 54-

1 142a(c)(1); *see also* *Martin v. Hearst Corp.*, 777 F.3d 546, 549 (2d Cir.
 2 2015).

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4 **III. The *Nolle Prosequi* Constituted a Favorable Termination**
 5 **for Claim Accrual Purposes**

6 We agree with the district court that as a general matter a *nolle*
 7 *prosequi* constitutes a “favorable termination” for the purpose of
 8 determining when a Section 1983 claim accrues.² The weight of
 9 authority on the common law of malicious prosecution supports this
 10 conclusion. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 659 cmt. (c)
 11 (AM. LAW INST. 1977) (“If the public prosecutor has power to make
 12 such an entry [of *nolle prosequi*] without the consent of the court, the
 13 entry constitutes a termination of the proceedings in favor of the
 14 accused.”). Other federal courts have held that the entry of a *nolle*
 15 *prosequi* is sufficient to constitute a favorable termination. *See, e.g.*,
 16 *Owens v. Balt. City State’s Attorneys Office*, 767 F.3d 379, 390 (4th Cir.

² Our opinion in *Roberts v. Babkiewicz*, 582 F.3d 418 (2d Cir. 2009), did not settle this issue. In *Roberts*, the district court granted judgment on the pleadings to the defendants on the plaintiff’s Section 1983 malicious prosecution claim. *Id.* at 419-20. The district court held that the plaintiff had not demonstrated that the dismissal of criminal charges against him by *nolle prosequi* constituted a “favorable termination” as a matter of state substantive law, because the charges had been *nolled* as part of a plea agreement. *Id.* at 420. We remanded the case to the district court for further proceedings, on the basis that the facts in the complaint, construed in the light most favorable to the plaintiff, did not necessarily demonstrate that the *nolle* was entered in exchange for a plea to a lesser charge. *Id.* at 421-22. However, our opinion in *Roberts* only dealt with the merits of the plaintiff’s underlying state law claim. It did not address the question of whether a *nolle* constitutes a favorable termination under federal common law.

1 2014), *cert. denied sub nom. Balt. City Police Dep't v. Owens*, 135 S. Ct.
2 1893 (2015) (citing common law authorities to conclude that a *nolle*
3 *prosequi* constitutes a favorable termination); *Donahue v. Gavin*, 280
4 F.3d 371, 383 (3d Cir. 2002); *White v. Rockafellow*, 181 F.3d 106, 106
5 (6th Cir. 1999); *Washington v. Summerville*, 127 F.3d 552, 557 (7th Cir.
6 1997).

7 To be sure, courts and common law authorities state that a
8 *nolle* does not constitute a favorable termination when it is entered
9 for reasons that are “not indicative of the defendant’s innocence.”
10 *Washington*, 127 F.3d at 557. However, this qualifier is defined
11 narrowly. It generally only includes *nolles* that are caused by the
12 defendant—either by his fleeing the jurisdiction to make himself
13 unavailable for trial or delaying a trial by means of fraud. It also
14 includes any *nolle* entered in exchange for consideration offered by
15 the defendant (*e.g.*, cooperation). *See generally* RESTATEMENT
16 (SECOND) OF TORTS § 660 (AM. LAW INST. 1977).

17 Spak disputes this conclusion, and cites our decision in
18 *Murphy v. Lynn* which states that the termination of a prosecution
19 must be “conclusive[]” in order to satisfy the favorable termination
20 requirement of a Section 1983 claim. 53 F.3d at 548. *Murphy* involved
21 a malicious prosecution claim originating in New York, while Spak’s
22 claim accrued in Connecticut, but it is nonetheless relevant because
23 favorable termination for accrual purposes is a matter of federal law

1 which does not vary from state to state. Spak contends that a *nolle*
2 *prosequi* is not a “conclusive” termination of a prosecution because
3 jeopardy does not attach when a *nolle* is entered and the prosecuting
4 attorney may file new charges against the same defendant for the
5 same criminal act at any time before the statute of limitations on the
6 underlying crime has run.

7 This argument misreads our holding in *Murphy*. It is true that,
8 strictly speaking, a *nolle prosequi* only terminates a specific
9 prosecution by vacating a charging instrument; it does not prevent a
10 prosecutor from re-charging the same defendant for the same
11 criminal conduct at some point in the future. *Winer*, 286 Conn. at
12 685. Under the common law, however, a termination of the existing
13 prosecution is sufficient for a malicious prosecution claim to accrue.
14 See W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS § 119 (5th
15 ed. 1984) (noting that the entry of a *nolle prosequi* constitutes
16 favorable termination for malicious prosecution charges when it
17 “h[as] the effect of ending the particular proceeding and requiring
18 new process or other official action to commence a new
19 prosecution”). So long as a particular prosecution has been
20 “conclusively” terminated in favor of the accused, such that the
21 underlying indictment or criminal information has been vacated and
22 cannot be revived, then the plaintiff has a justiciable claim for
23 malicious prosecution. At that point, all of the issues relevant to the

1 claim—such as malice and lack of probable cause, *see*, 299 Conn. at
2 210-11—are ripe for adjudication. Nothing in our opinion in *Murphy*
3 can be read to contravene this longstanding common law rule.

4 We are mindful that both our court, *see DiBlasio v. City of New*
5 *York*, 102 F.3d 654, 658 (2d Cir. 1996), and the Supreme Court have
6 warned against the possibility of parallel civil and criminal litigation
7 arising from the state’s prosecution of the same defendant for the
8 same criminal offense, *Heck*, 512 U.S. at 484–86 (noting that favorable
9 termination requirement “avoids parallel litigation over the issues of
10 probable cause and guilt . . . and [] precludes the possibility of the
11 claimant [*sic*] succeeding in the tort action after having been
12 convicted in the underlying criminal prosecution, in contravention
13 of a strong judicial policy against the creation of two conflicting
14 resolutions arising out of the same or identical transaction”)
15 (quoting 8 S. SPEISER, C. KRAUSE, & A. GANS, *AMERICAN LAW OF*
16 *TORTS* § 28:5, p. 24 (1991)); *accord Poventud*, 750 F.3d at 130.

17 However, we read our precedent and the Supreme Court’s
18 dicta in *Heck v. Humphrey* to counsel only against duplicative
19 litigation on issues of guilt and probable cause arising out of the
20 same accusatory instrument.³ *Heck* and its progeny generally deal

³ We are aware that the District of Connecticut has held in several instances that a *nolle* is not sufficient to constitute favorable termination, and that a plaintiff must obtain either an unqualified dismissal or an acquittal of charges in order to pursue a malicious prosecution claim under Section 1983. *See Simpson v. Denardo*, No. 3:02CV1471(MRK),

1 with Section 1983 suits that are filed by plaintiffs asserting that a
2 prior criminal conviction is invalid, and seeking to recover damages
3 for the state's abuse of legal process. Those decisions thus require
4 that the plaintiff demonstrate that the outstanding conviction has
5 been conclusively invalidated in a manner that demonstrates his
6 innocence before he can pursue his civil claim. *See, e.g., Heck*, 512
7 U.S. at 484-81; *Pontevud*, 750 F.3d at 131-33; *DiBlasio*, 102 F.3d at 658-
8 59. They do not address the type of termination at issue here, in
9 which a plaintiff was never convicted of a criminal offense, but the
10 charges against him were dismissed in a manner that did not
11 preclude future prosecution under a different charging instrument.

12 We do not read those opinions to prevent such a plaintiff from
13 bringing suit on the basis of vacated charges simply because he
14 might be prosecuted again in the future, even successfully. *See, e.g.,*
15 RESTATEMENT (SECOND) OF TORTS § 659, cmt. b (1977) (AM. LAW INST.
16 1977) ("In order that there may be a sufficient termination in favor of
17 the accused it is not necessary that the proceedings should have

2004 WL 1737444, at *10 (D. Conn. July 29, 2004) ("A *nolle prosequi* does not qualify as a favorable termination for purposes of a malicious prosecution claim."); *Bacchiocchi v. Chapman*, No. 03:02CV1403, 2004 WL 202142, at *4-5 (D. Conn. Jan. 26, 2004). These holdings were based on the Second Circuit's decision in *Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992), which stated that "[a] person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim." In *Roesch*, the prosecution against the plaintiff was not terminated by a *nolle prosequi*, but rather by participation in a pre-trial rehabilitation program. *Id.* at 851. To the extent that district courts have read *Roesch* to imply that a *nolle* does not constitute a favorable termination, this reading is mistaken.

1 gone so far as to preclude further prosecution on the ground of
2 double jeopardy.”). Indeed, while it is theoretically possible that a
3 prosecutor could revive a *nolled* case, and obtain a criminal
4 conviction against a defendant who has already received a favorable
5 civil judgment in a malicious prosecution suit, we think that this is
6 highly unlikely to occur in practice. *Cf. Uboh v. Reno*, 141 F.3d 1000,
7 1005–06 (11th Cir. 1998) (holding that a prosecutor’s unilateral
8 dismissal of charges constituted a favorable termination, on the
9 grounds that it was “extraordinarily unlikely” that the prosecutor
10 would “renew[] [the charges] in a subsequent action”).

11 Moreover, preventing plaintiffs from bringing suit for
12 malicious prosecution once a *nolle* is entered would be inconsistent
13 with the purpose of Section 1983. *See Manuel*, 137 S. Ct. at 921 (“In
14 applying, selecting among, or adjusting common-law approaches
15 [for determining when a claim under Section 1983 accrues], courts
16 must closely attend to the values and purposes of the constitutional
17 right at issue.”). When the state institutes criminal charges
18 maliciously and without probable cause and requires a defendant to
19 appear before a court and answer those charges, it violates the
20 Fourth Amendment’s guarantee against unlawful seizure. *See*
21 *Murphy*, 118 F.3d at 944. The accused is entitled to seek recovery for
22 such a wrongful seizure as soon as the charges are vacated. His day

1 in court should not be delayed merely because the state remains free
2 to bring a similar prosecution in the future.

3 Lastly, Spak's contention that his claim accrued not upon
4 entry of the *nolle*, but thirteen months later when records of the
5 charges against him were automatically erased pursuant to
6 Connecticut state law, *see* Conn. Gen. Stat. § 54-142a(c)(1), is
7 meritless. Connecticut courts have made clear that the erasure
8 provision Spak cites is a purely administrative measure, *Winer*, 286
9 Conn. at 679–80 (holding that “the recording of nolle and later, the
10 erasure of criminal records,” are “administrative rather than
11 substantive in intent”). Moreover, the erasure of records pertaining
12 to a prosecution does not preclude the prosecuting attorney from
13 filing new charges against the same defendant at some point in the
14 future. *See id.* at 683 (noting that the erasure provision does not
15 “provide new substantive protections for defendants”). This statute
16 therefore provides no more “conclusive” bar to future criminal
17 proceedings than the *nolle* itself.

18 CONCLUSION

19 We have considered Spak's remaining arguments, and we
20 find them unavailing. We therefore AFFIRM the judgment of the
21 district court.