RENDERED: JULY 27, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000446-MR

BOBBY PRIVETTE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 06-CI-03324

KENTON COUNTY, KENTUCKY;
TERRY CARL, IN HIS INDIVIDUAL
AND OFFICIAL CAPACITIES;
SCOTT COLVIN, IN HIS INDIVIDUAL
AND OFFICIAL CAPACITIES;
WARNER STILT, IN HIS INDIVIDUAL
AND OFFICIAL CAPACITIES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: Bobby Privette appeals from a summary judgment by the Kenton Circuit Court dismissing his federal and state-law claims against Kenton County, Kentucky, Kenton County Jailer Terry Carl, and Deputy Jailers Scott Colvin and Wernher[2] Stilt. He argues that the trial court erred by dismissing his claims arising out of a use of excessive force by former Deputy Jailer Michael Stokes. We agree with the trial court that Privette failed to establish a cause of action for violation of his rights under 42 U.S.C. § 1983, and that the individual defendants were entitled to qualified official immunity from Privette's state-law claims. Hence, we affirm.

On October 28, 2006, Privette was an inmate at the Kenton County Detention Center. Michael Stokes was working at the Detention Center as a deputy jailer. Privette alleges that Stokes assaulted him, used excessive force and verbally taunted him repeatedly. Privette states that he filled out a grievance form regarding the incident on October 29 and placed it in the door jam of the cell, in accordance with the Detention Center's practice. However, there is no record that the October 29 grievance was collected or received by the Detention Center officials. He also states that he verbally reported the incident to Lt. Wernher Stilt. Lt. Stilt does not recall the conversation.

[2] In the Notice of Appeal, Privette spells Stilt's first name as "Warner". However, the trial court's judgment spells his first name as "Werner", and Stilt's answer and subsequent pleadings spell the name as "Wernher". We have used the spelling from the Notice of Appeal in the caption, but in the text of this opinion we will use the spelling provided by Stilt.

Privette filed a second grievance regarding the October 28 incident on November 15, 2006. Shortly thereafter, on December 8, he also filed a *pro se* complaint against Stokes alleging violation of his civil rights under 42 U.S.C. § 1983. Detention Center officials acknowledge receipt of Privette's second grievance letter and his *pro se* complaint.

At the time, Stokes was also being investigated for unrelated misconduct involving other inmates. Jailer Terry Carl directed Chief Deputy Colonel Scott Colvin to begin an investigation of both matters in late November or early December of 2006. The other allegations, being of a more serious and criminal nature, took precedence over Privette's complaint and Col. Colvin did not begin interviewing witnesses on Privette's grievance until January of 2007. After substantiating the other complaint, Jailer Carl terminated Stokes's employment on January 18, 2007. He was arrested and criminally charged on that matter the following week. Shortly thereafter, Col. Colvin ended his investigation on Privette's grievance without filing a formal report.

On October 24, 2007, Privette filed an amended complaint with counsel. In addition to his § 1983 claim, Privette asserted claims against Kenton County, Jailer Carl, Col. Colvin, Lt. Stilt and Stokes for assault and battery, and negligent hiring and supervision. All of the defendants moved to dismiss, arguing that Privette had failed to exhaust his administrative remedies as required by the Federal Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), and the Kentucky

Prison Litigation Reform Act, KRS 454.415(1). Kenton County, Jailer Carl, Col. Colvin and Lt. Stilt filed separate motions for summary judgment.

The trial court denied the motions to dismiss, concluding that the Federal Prison Litigation Act does not apply to actions filed in state court, and the Kentucky Prison Litigation Act does not apply to claims from excessive force, assault or negligent hiring and supervision.[3] However, the trial court found that Kenton County, Jailer Carl, Col. Colvin and Lt. Stilt were entitled to summary judgment on the federal and state-law claims. Privette now appeals from this order.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was "no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. In

[3] After entry of this order, Stokes filed a "Motion for Reconsideration", presumably pursuant to CR 56.05, asking the trial court to dismiss Privette's claims against him. On July 9, 2010, the trial court denied Stokes's motion, but amended its prior order to specify that its order denying the motion to dismiss is a final and appealable order. Stokes filed a timely notice of appeal. 2010-CA-001373-MR. However, this Court dismissed his appeal on December 8, 2010, concluding that it was not taken from a final and appealable order. The other defendants did not file a cross-appeal from the trial court's ruling on this matter. Consequently, Privette's claims against Stokes still remain pending in the trial court.

Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, "the movant shows that the adverse party could not prevail under any circumstances."

The Kentucky Supreme Court also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). However, "the word 'impossible' is used in a practical sense, not an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest*, 807 S.W.2d at 481 (internal quotations and citations omitted). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

We first turn to the trial court's summary judgment dismissing Privette's federal claim under 42 U.S.C. § 1983 for violation of his constitutional rights under color of state law. The trial court stated that Privette could not establish that Kenton County had a custom or policy which was a moving force behind the alleged deprivation of his constitutional rights. For tortious conduct to

provide a basis for a government body's § 1983 liability, the deprivation of the plaintiff's right must have been committed pursuant to the government body's official policy. Without such a showing, government bodies are not subject to vicarious liability for the torts of their agents. *Monell v. N.Y. City Dept. of Social Services*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). An act performed pursuant to a "custom" that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. *Id.* at 690-691, 98 S. Ct. at 2035-2036.

Under certain circumstances, a local government can be liable under § 1983 for negligent hiring or its failure to train or supervise its employees. *City of Canton v. Harris*, 489 U.S. 378, 380, 109 S. Ct. 1197, 1199, 103 L. Ed. 2d 412 (1989). But to establish liability, a plaintiff must demonstrate that the governmental action was taken with "deliberate indifference" as to its known or obvious consequences. *Id.* at 388, 109 S. Ct., at 1204. Privette argues that Kenton County, through Jailer Carl, acted with such deliberate indifference by hiring and retaining Stokes despite his prior criminal history.

Stokes applied for employment with the Detention Center in May 2005. Jailer Carl forwarded the application to then-Chief Deputy Rodney Ballard for review. Ballard was acquainted with Stokes and invited him for an interview. Following the interview, Ballard conducted a background check on Stokes. The check revealed that Stokes had been convicted of several misdemeanors, including

non-payment of child-support (1994), public intoxication (2001), fourth-degree assault (2002), and not having his license in possession while operating a motor vehicle (2002).[4] However, Stokes submitted a number of strong letters of recommendation indicating that his conduct had changed during the period after these convictions. In fact, one of the letters was written by the victim of the assault charge. Thus, despite his prior criminal convictions, Jailer Carl made the decision to hire Stokes.

Until the events leading to his termination, Stokes's only disciplinary problems concerned his attendance. He developed a pattern of unexcused tardiness that led his supervisor to recommend that he be terminated in August 2006. After conferring with Stokes and his supervisors, Jailer Carl decided not to terminate his employment. Rather, Jailer Carl placed Stokes on probation for a period of six months.

"Deliberate indifference" is a stringent standard of fault, requiring proof that a governmental actor disregarded a known or obvious consequence of his action. *Board of County Commissioners of Bryan County*, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391, 137 L. Ed. 2d 626 (1997). The fact that inadequate scrutiny of an applicant's background would make a violation of rights more likely cannot alone give rise to an inference that a policymaker's failure to scrutinize the record

[4] Privette also introduced records showing that two Emergency Protective Orders had been previously issued against Stokes for acts of domestic violence in 1995 and 2000. In both cases, the matters were dropped without issuance of a Domestic Violence Order. Furthermore, there is no indication that these orders were revealed as part of the Detention Center's background check on Stokes.

of a particular applicant produced a specific constitutional violation. *Id.* at 410-11, 117 S. Ct. at 1391. "Deliberate indifference" will be found only where an adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that a violation of a third-party's constitutional rights will be a "plainly obvious consequence" of the decision to hire. *Id.* at 411, 117 S. Ct. at 391.

While Stokes's prior criminal background was a cause for concern, those convictions do not make it "plainly obvious" that he was likely to engage in excessive force against an inmate. Similarly, Stokes's disciplinary problems after he was hired did not involve his conduct with inmates and do not suggest that he was likely to use excessive force in his dealings with inmates. Therefore, we agree with the trial court that Kenton County and Jailer Carl are not subject to liability under §1983.

Similarly, Privette has not shown that Jailer Carl, Col. Colvin and Lt. Stilt are liable under § 1983 as Stokes's supervising officers. A supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999), *quoting Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982). In this case, there is no evidence that

any of Stokes's supervisors knew of any incidents of misconduct with inmates prior to October 28.

Privette notes that a failure to make a good-faith investigation of a complaint of abuse may constitute a ratification of that misconduct by supervisory officials. *Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir. 1985). In this case, there is evidence that the Detention Center's practice for collecting grievance forms was inadequate, but there is no evidence that the Detention Center officials deliberately ignored Privette's first complaint. Furthermore, the Detention Center began an investigation as soon as they received Privette's second grievance letter and a copy of his complaint. The investigation was interrupted by the other complaints against Stokes and it was not formally completed because the matter became moot upon Stokes's termination. But under the circumstances, we cannot find that the officials' actions amount to an approval or a ratification of Stokes's conduct.

Privette also alleges that the Detention Center officials encouraged Stokes's actions by failing to adequately discipline other deputy jailers found guilty of use of excessive force. He points to records showing that three other deputy jailers were found guilty of using excessive force on inmates.[5] In two of those cases, the deputies were recommended for a 3-day suspension, and the third was recommended for termination due to multiple violations of use-of-force policy. The records also show that the investigations of these matters were carried

[5] Two of the cases involve investigation of use of excessive force occurring in September and October of 2006 -- before the incident between Stokes and Privette. The third occurred in January of 2008, well after the matters at issue in the current case.

out promptly. While Privette suggests there is no evidence showing that the recommended discipline was actually imposed, any issue of fact on that question is not material. The other incidents do not demonstrate a pattern of encouraging or ratifying the use of excessive force by deputy jailers.

We next turn to the trial court's dismissal of Privette's state-law claims against Kenton County, Jailer Carl, Col. Colvin and Lt. Stilt. It is well-established that counties are cloaked with sovereign immunity unless the legislature has waived such immunity. *See, e.g., Lexington–Fayette Urban County. Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004). When sued in their individual capacities, Jailer Carl, Col. Colvin and Lt. Stilt may be entitled to qualified official immunity. Qualified official immunity protects public employees in the negligent performance of "(1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001).

Privette argues that the decisions to hire and retain Stokes were not made in good faith considering his prior criminal history and his disciplinary record. Recently, the Kentucky Supreme Court discussed the application of the good faith requirement in *Bryant v. Pulaski County Detention Center*, 330 S.W.3d 461 (Ky. 2011), stating as follows:

> The "good faith" qualification has both an objective and a subjective component. [*Yanero*, 65 S.W.3d] at 523 (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.

> Ct. 2727, 73 L. Ed. 2d 396 (1982)). Objectively, a court must ask whether the behavior demonstrates "a presumptive knowledge of and respect for basic, unquestioned constitutional rights." *Id.* (*quoting Harlow*, 457 U.S. at 815). Subjectively, the court's inquiry is whether the official has behaved with "permissible intentions." *Id.* (*quoting Harlow*, 457 U.S. at 815). However, as Justice Cooper pointed out, most case law addresses these elements by stating when the qualified immunity is not available, or when the public official is acting in bad faith. Thus, bad faith "can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded a person in the plaintiff's position, i.e., objective unreasonableness." *Id.* Acting in the face of such knowledge makes the action objectively unreasonable. Or, bad faith can be predicated on whether the public employee "willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive," *id.*, which requires a subjective analysis.

Bryant, 330 S.W.3d at 466.

Under the circumstances, we cannot find that the decisions by Detention Center officials and supervisors were objectively unreasonable or demonstrated a clear intent to violate the constitutional rights of inmates such as Privette. As noted above, most of Stokes's prior criminal history did not involve allegations of violence. Although his single misdemeanor assault conviction was a cause for concern, that concern was mitigated by a strong letter of recommendation by the victim of the assault.

Similarly, Stokes's disciplinary record at the Detention Center involved problems with attendance and not with his interactions with inmates. Privette points out that another deputy jailer testified that Stokes had a history of

verbally taunting inmates. However, the deputy jailer also testified that he never reported these incidents before October 28, 2006. In retrospect, the decisions to hire and retain Stokes were unwise. However, they do not demonstrate bad faith sufficient to negate qualified official immunity. Consequently, the trial court properly dismissed Privette's state-law claims against Jailer Carl, Col. Colvin and Lt. Stilt.

Accordingly, the summary judgment of the Kenton Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARTE OPINION.

COMBS, JUDGE, DISSENTING. After scrutinizing the questionable background of Stokes as well as three other incidents of violence perpetrated by deputies against inmates, I am persuaded that dismissal of this case by entry of summary judgment was highly inappropriate.

Numerous issues of material fact, lurking at surface level and below, are in desperate need of being developed at a trial on the merits. Therefore, I dissent.

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