alternative endings

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 86-340

SARAH ANN HORN, PLAINTIFF,

VS: REPORT AND RECOMMENDATION

RUSSELL STEPP, ET AL., DEFENDANTS.

INTRODUCTION

By the above-styled action, filed pursuant to 28 U.S.C. Section 1983, the plaintiff seeks damages for her arrest and treatment during incarceration on the night of October 18, 1986 by members of the Martin County Sheriff's Department. Currently pending is the motion of the defendant Ray Fields to dismiss for failure to state a claim.

FACTS

Sarah Horn contends that at the time in question she was renting a trailer from one Andy Kirk, who himself lived about a half mile from the rented premises. Although she alone paid the rent from money her mother gave her, she shared the trailer with her boyfriend Ernie Howell. She admitted that she had been arrested on several juvenile charges (none of which were drug-related) previously, but as of the night in question, no charges were outstanding.

According to her version, several people unexpectedly dropped by the trailer to help her celebrate her upcoming twenty-first birthday. The visitors included two men named Scott and Moore, who arrived separately and had had trouble with each other in the past. One of them had brought some vodka, and the group had a few drinks. Approximately an hour into the "party" Scott and Moore began to fight, and their fight continued into the outside, with the others gathering around to watch in the road. The fight went on for about ten minutes or so, and

had degenerated into mere argument by the time a patrol car with the deputy Andy Lowe showed up. Although noone but Scott and Moore had actually participated in the fight, the rest dispersed. Sarah indicated that although she was not actually involved and would not have described herself as "drunk", she wanted to avoid contact with the police and was trying to make her way back to the trailer but could not manage to make it because of the high weeds and the creek by the road. She stated that she was arrested when she was eventually forced to walk back on the road, by persons coming from a patrol car which had then just pulled up. She did not actually specifically fight the police, although deputy Endicott blackened her eye. She admitted that the arrested group argued with each other on the way to jail about who had been responsible for getting the other arrested.

James Endicott testified that he had been riding with James Castle as a "volunteer deputy"[1] that night and that they arrived on the scene sometime after deputy Lowe did, in response to a telephone complaint. He stated that Lowe had already arrested two men, and that others had run away. While chasing some of the people who had run, Castle located Sarah who was hiding under the porch of a nearby house. She reportedly stated "Don't beat me" and had to be pulled out from under the porch. She resisted and was immediately placed under arrest and handcuffed. After Castle momentarily departed, she attempted to run away. She was caught and Castle forceably placed her in the patrol car. He stated that the group was "mouthing off" all the way to jail, but that at no time during the whole affair did he lay a hand on the young lady.

After they arrived back in the jail, Castle took the males upstairs to be booked. Sarah was left in the patrol car, with Endicott left to guard her. Endicott and Russell Stepp, another deputy who first saw Sarah at this

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[1]Endicott stated that he had never been given any specific instruction or training by the sheriff, but had been allowed to go with the other deputies. According to the sheriff's statements, no specific instructions or training was provided to any of the deputies about the use of MACE or any other part of the job.

time, stated in their depositions that she was laying in the backseat of the patrol car violently kicking the glass and the doors. After repeated warnings and when Stepp opened the door to get her, she allegedly kicked him in the stomach at which point Stepp immediately sprayed "one squirt" of MACE at her head, which subdued her.

Sarah, on the other hand, contends that she was not kicking the patrol car, but that when Stepp was ready to take her upstairs, he just "soaked" her side with a large portion of MACE, and shut the patrol car door again. After a few minutes, he opened it up, and grabbed her and took her inside.

Further, after she was in jail, Sarah stated that she repeatedly told Mrs. Horn, the matron, that her side was "burning" due to the MACE and that she needed something to put on it as well as to change her sweater which was wet. Nothing was done and after she was placed in her cell, she could get no one's attention. Since the cell was cold, and she had no change of clothing, there was nothing she could do but sleep in the sweater. She stated that she made no complaints directly to the sheriff.

For his part, the defendant sheriff, Ray Fields, indicated that he had not seen Sarah until she was brought to jail that evening. He indicated that she looked very drunk and wet, as if she had rolled around in some mud. He stated that she never indicated that she was injured or that she needed medical assistance in his presence, and that he in no way suspected that she might have been injured. As he had other duties to attend to, he merely asked his deputies, or was told by them, what had happened and found out that she had been squirted with MACE; he made no further comments, positive or negative, about the situation. He stated that he regularly purchased MACE for the use of his deputies and that he knew they occasionally used it, although he provided no specific instructions or guidelines for its use. He also indicated that, even though they arrested few women and fewer

still who put up some type of resistance, he "would rather" that his deputies MACE rather than "manhandle" female prisoners. His own expressed opinion, based on the times he had occasionally had to use it on a rowdy prisoner, was that MACE could not have caused the type of injuries complained of.

DISCUSSION

Fields now alleges that the action should be dismissed, on the grounds that the plaintiff has failed to state a cause of action under Section 1983. He notes that there has been absolutely no evidence that the sheriff was personally involved in the arrest in question, or that any complaints were made to him directly and there is no dispute concerning this. Further, he states that his responsibility, as a supervisory authority, had to be based on more than some general responsibility to control his employees.

The complaint itself pins the sheriff's responsibility arising from his act of regularly equipping the deputies with MACE, but failing to adequately supervise and train them concerning its use or other parts of the job. To the undersigned, it appears that this action would be no different from a general allegation that a supervisory authority was generally negligence in failing to train or supervise police routinely provided with instrumentalities of death, such as guns. City of Oklahoma v. Tuttle, 471 U.S. 808 (1985).

Thus, IT IS RECOMMENDED that the motion to dismiss be granted.

Particularized objections to this Report and Recommendation must be filed within ten days of the date of service of ths same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd 474 U.S. _____, 38 Cr. L. 3031 (December 4, 1985); Wright v. Holbrook, 794 F.2d 1152, 1154-1155 (6th Cir. 1986). A party may file a response to another party's objections within ten days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

This the _____ day of October, 1987.

_____
JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

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If, however, the motion to dismiss is considered to be one for summary judgment and the information contained in the depositions is scrutinized, the result is different. The sheriff indicated in his deposition that he "would rather" his deputies MACE rowdy female prisoners, rather than "manhandle" them. It is unclear from this statement whether the injuries allegedly received were caused by a "policy or custom" that could "fairly be said to represent official policy", as per Brandon v. Holt, 469 U.S. 464 (1985), or whether the sheriff was merely making a

statement that, in hindsight, he did not consider the deputies to have acted impermissably. Thus, there would remain a question of fact for later determination and the motion to dismiss, treated as a motion for summary judgment, should be denied.

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This the _____ day of October, 1987.

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JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 85-276

MILLARD C. THORNHILL, PLAINTIFF,

VS: MEMORANDUM OPINION

DETECTIVE ED SHEMELYA, ET AL., DEFENDANTS.

* * * * * * * * *

The above-styled action is a pro se action brought pursuant to 42 U.S.C. Section 1983 for alleged deprivation of civil rights. Currently before the Court is the motion for summary judgment filed by the defendants Betty Prater Justice, Clerk of the Pike County Circuit Court, and Jean Prater, Deputy Clerk of the same court.

FACTS

The allegations contained in the original petition filed in June of this year are the sole source of information concerning the plaintiff's complaint. Therein, the two aforementioned parties were listed as "additional defendants"; there was no statement that suit was brought against the defendants in their individual capacities. The statement of claim against all of the defendants was merely, in a severely edited form:

> False charges. Count 1, persistent felony offender in the first degree. Count 2, persistent felony offender in the second degree. False arrest. False imprisonment. Defamation of character. Mental distress and damage. Loss of business. Loss of family and home.

Petition, at 4.

The affidavits filed by these defendants in connection with their summary judgment motion indicate that their sole connection with the state court case which was at the center of Thornhill's complaint was to note motions and orders on the docket sheet, which was maintained as a part of the business of their office. These statements were not in contradiction with the plaintiff's original allegations; further, the plaintiff has provided no counter-affidavits.

APPLICABLE LAW

When a person is named only in his official capacity, it is the sovereign alone who is before the Court. Brandon v. Holt, _____ U.S.____ (1985). Although the Eleventh Amendment protection to sovereigns may not ward off injunctive relief, the situation is changed when an award of retrospective monetary damages is sought. Hutto v. Finney, 437 U.S. 678 (1978).

In this particular case, even if there were no such protection, state statutory authority provides that every clerk shall maintain such records, files, dockets and indexes as are prescribed by statute or rule. K.R.S. 30A.080(1). Court rules also provide for the clerk to keep a docket for each action filed with the court, which are to include notations of all papers filed with the clerk, process issued, returns made, appearances, orders, verdicts and judgments. Ky. R. Civ. P. 79.01. Thus, the actions alleged were within the scope of the defendant's official capacity.

The Sixth Circuit Court of Appeals has long held that where the allegations in a 1983 action against a court clerk pertained to an act performed within the scope of her or her official quasi-judicial duties, that clerk is entitled to immunity. Denman v. Leedy, 479 F.2d 1097, 1098 (6th Cir. 1973). This absolute immunity principle is still applicable. Johnson v. Granholm, 662 F.2d 449, 450 (6th

Cir. 1981).

This the ___ day of October, 1985.

G. WIX UNTHANK, JUDGE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 85-276

MILLARD C. THORNHILL, PLAINTIFF,

VS: ORDER

DETECTIVE ED SHEMELYA, ET AL., DEFENDANTS.

* * * * * * * * * *

In accordance with the memorandum opinion entered this same date,

IT IS HEREBY ORDERED that:

(1) the motion for summary judgment filed by the defendants Betty Prater Justice and Jean Prater be DENIED; and

(2) the aforementioned defendants be DISMISSED as parties to the above-styled action.

This the ___ day of October, 1985.

G. WIX UNTHANK, JUDGE.

PAGE(S)
MISSING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 85-356

BILLY LEE MARCUM, PLAINTIFF,

VS: MEMORANDUM OPINION

RAY FIELDS, ET AL., DEFENDANT.

INTRODUCTION

The above-styled action is a civil rights action brought by the plaintiff pursuant to the Constitution of the United States and 42 U.S.C. Sections 1983 and 1985. It is currently before the Court on a motion to dismiss.

FACTS

On July 30, 1985, the plaintiff filed a complaint with the Clerk of this Court, which contained the following allegations:

> At all times mentioned herein, the defendant, Ray Fields, was and is Sheriff of Martin County, Kentucky; the defendant, Robert Maynard, was and is a Deputy Sheriff in Martin County, Kentucky; the defendant, Andy Lowe, was and is a Deputy Sheriff in Martin County, Kentucky. Further, at all times material to this complaint, the defendants were properly elected, employed or appointed to their respective job titles and duties and were acting under color of Statutes and Ordinances of the Commonwealth of Kentucky.
>
> During all times mentioned herein, the defendants acted under color and pretense of Statutes, Ordinances, Regulations, Customs and Usages of the Commonwealth of Kentucky, in Martin County, Kentucky. The defendants did further engage in illegal conduct to the injury and detriment of the plaintiff and deprived the plaintiff of the rights, privileges and immunity secured to the plaintiff by the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the laws of the United States and the Commonwealth of Kentucky.
>
> On or about the 7th day of August, 1983, the defendants did overtly and covertly act outside of the scope of their jurisdiction without authority of law and did act willfully, knowingly, and purposely with the specific intent to deprive the plaintiff of:
> (a) His right to be free from illegal seizure of His person;

(b) His right to be free from unlawful arrest and conviction without evidence of support thereof;
(c) HIs right to be free from illegal detention and imprisonment;
(d) His right to be free from physical abuse, coercion and intimidation;
(e) His right to be free from the use of excessive, unreasonable and unnecessary force in the exercise of any legitimate act by a police officer;
(f) His right to medical treatment.

Complaint at 2-3.

APPLICABLE LAW

In reviewing a motion to dismiss on the plaintiff's pleadings, a court is reuired to treat as true the material facts alleged in the complaint. Duncan v. Leeds, 742 F.2d 989 (6th Cir. 1984). Since the plaintiff essentially admits that the complaint was filed more than a year after the overt conduct which was complained of occurred, the issue now is which of the Kentucky limitations statutes apply to the fact situation. The defendant contends that a dismissal under the terms of the an applicable one-year limitations statute, K.R.S. 413.254, is in order. The plaintiff, in the alternative, suggests that K.R.S. 413.120, providing a five-year period for the bringing of certain actions, applies.

When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so; this approach has also been specifically adopted in 42 U.S.C. Section 1988 for claims enforceable under the Reconstruction Civil Rights Acts. Wilson v. Garcia, No. 83-2146 (S. Ct. April 17, 1985). The courts must then determine which is the most appropriate or analogous state limitations period to apply to the claim; the problems of characterization of the claim in order to find that analogous state limitation period is one of federal law. Id. Section 1983 claims, however, are best characterized uniformly as personal injury actions, so that that type of limitations period would apply; it is unlikely that Congress intended to apply the catchall period of limitations for statutory claims that were later enacted by many states. Id.

In the present case, two separate statutes have been put forward by the parties. The statute urged to be applicable by the defendant provides:

> Actions for professional service malpractice--Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or ommission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. Time shall not commence against a party under legal disability until removal of the disability.

KRS 413.245. The term "professional services" is defined by a preceding statute to mean "any service rendered in a profession required to be licensed, admnistered and regulated as professions in the Commonwealth of Kentucky, except those professions governed by KRS 413.140[1]. KRS 413.243. The only cases construing the statute have applied it in situations involving malpractice by an attorney and one of these indicates that the statute was merely a codification of the rule announced in Louisville Trust Co. v. Johns-Mansville Products, 580 S.W.2d 497 (1979), a medical malpractice case. Graham v. Harlin, Parker and Rudloff, 664 S.W.2d 945, 947 (Ky. App. 1983).

On the other hand, the plaintiff alleges that the five year term in KRS 413.120(7) is applicable. This provision pertains to actions for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated. KRS 312.120(7).

Yet another statutory provision, providing for a one year limitation period, applies to personal injury actions as well as actions for malicious prosecution and arrest. KRS 413.140.

DISCUSSION

The Court is of the opinion that the limitations period provided by the last-cited statute should apply in view of the provisions of Wilson, supra.

The issue of the propriety of retroactive application of Wilson has not been briefed by the parties. Accordingly, a separate order will be entered, requiring the parties to submit memoranda on the specific issue and be prepared to argue said issue at the time of the preliminary conference set in a virtually identical case, involving the same defendant and the same counsel for both parties.

This the _____ day of November, 1985.

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G. WIX UNTHANK, JUDGE

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[1]Presumably, this refers to KRS 413.140(e), which applies to actions against a physician, surgeon, or dentist for malpractice or negligence.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 85-356

BILLY LEE MARCUM, PLAINTIFF,

VS: ORDER

RAY FIELDS, ET AL., DEFENDANT.

* * * * * * * *

In accordance with the memorandum opinion entered this same date,

IT IS HEREBY ORDERED that:

(1) arguments on the matter will be heard at the time of the preliminary conference in Parsons v. Fields, Pikeville Civil Action No. 85-355, set for November 7, 1985 at the hour of 9 a.m., involving the same issue and attorneys, and

(2) by the time of the preliminary conference, the parties shall file memoranda on the issue of "retroactive application" of the Wilson v. Garcia, No. 83-2146 (S. Ct. April 17, 1985) to the present case, and

This the _____ day of November, 1985.

_____

G. WIX UNTHANK, JUDGE