1990 WL 97729
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United States District Court, W.D. New York.

Akil AL–JUNDI, a/k/a Herbert Scott Deane, Big Black, a/k/a Frank Smith, Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased, Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased, Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased, Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased, Maria Santos, Mother and Legal Representative of Santiago Santos, deceased, Laverne Barkley, Mother and Legal Representative of L.D. Barkley, deceased, Jomo Joka Omowale, a/k/a Eric Thompson, Vernon Lafranque, Alfred Plummer, Herbert X. Blyden, Joseph Little, Robin Palmer, George "Che" Nieves, James B. "Red" Murphy, Thomas Louk, Peter Butler, Charles "Flip" Crowley, William Maynard, Jr., Calvin Hudson, Kimanthi Mpingo, a/k/a Edward Dingle, Kendu Haiku, a/k/a Willie Stokes, Ooji Kwesi Sekou, a/k/a Chris Reed, Phillip "Wald" Shields, Jerome Rosenberg, Alphonso Ross, Frank Lott, Gary Richard Haynes, Raymond Sumpter, Omar Sekou Toure a/k/a Otis McGaughey, Dacajeweiah, a/k/a John Hill, and Johnnie Barnes, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,
Plaintiffs,
v.
The ESTATE OF Nelson A. ROCKEFELLER, Russell G. Oswald, T. Norman Hurd, Walter Dunbar, Wim Van Eekeren, John C. Miller, John Monahan, John C. Baker, A.C. O'Hara, Vincent Mancusi, Leon Vincent, Karl Pfeil, Robert F. Fischer, Dalton Carney, Henry Williams, J.C. Moochler, A.T. Malovich, Robert P. Quick, W.L. Shurter, K.E. Gellert, G.K. Elbet, T.N. Kruk, W.K. Dillon, M.K. Halloran, K.S. Crouse, R.J. Dwyer, P.P. Zelinski, G.R. Toray, J.B. Connell, B. Muthig, D.O. Parr, J.J. Patterson, J.W. McCarthy, D.O. Ellis, E.M. Byre, and John Does Nos. 1–100,
Defendants.[1]
No. CIV–75–132E.
|
June 26, 1990.

Attorneys and Law Firms

Michael McCarthy, Buffalo N.Y., Elizabeth Fink, Brooklyn N.Y., Michael Deutsch, Chicago Ill. for plaintiff.

John Stenger, Buffalo N.Y., Joshua Effron, Delmar N.Y., Richard Moot, Irving Maghran, Buffalo N.Y., Donald Berens, Dept. Asst Atty Gen., Albany N.Y. for defendant.

MEMORANDUM and ORDER

ELFVIN, Senior District Judge.

***1** This is a civil rights class action suit arising out of an inmate uprising at the Attica (N.Y.) Correctional Facility ("Attica") in September 1971. Each of defendants Russell A. Oswald (the former Commissioner of New York's Department of Correctional Services), Vincent Mancusi (the former Attica Superintendent) and Karl Pfeil (Mancusi's Assistant Deputy) has presently moved for summary judgment.

The undisputed background facts of the uprising are recounted in a prior decision in this matter and need be only briefly summarized for purpose of the present motions. *See Al–Jundi v. Estate of Rockefeller,* CIV–75–132E (W.D.N.Y. September 24, 1988), *aff'd,* 885 F.2d 1060, 1062–1065 (2d Cir.1989).[2] More than 1200 Attica inmates rioted and occupied certain areas of the prison September 9, 1971. These inmates, or certain of them, also took as hostages numerous corrections officers. Several areas of the prison were re-captured that same day by corrections officers assisted by State Police officers,[3] and the inmate take-over was consolidated to certain limited areas, including a prison space known as "D–Yard." Commissioner Oswald arrived on the scene in the afternoon of September 9th and negotiations between him and the inmates were commenced and continued for several days until the morning of September 13th. It was then that Oswald delivered a final plea to the inmates to release their hostages and restore order. This plea was rejected. Oswald then obtained authorization from the now-deceased Governor Nelson A. Rockefeller to order the State Police to retake the prison, with force if

necessary.

The now-deceased Major John Monahan of the State Police devised the plan for re-capturing Attica. The plan proved successful in the sense that the prison was re-captured and order was restored, but in the process ten hostages and twenty-nine inmates lost their lives. Afterward, brutal reprisals allegedly were inflicted on the prisoners.

The Amended Complaint, filed September 11, 1975,[4] denominates eleven separate causes of action. The divisions among these counts are not readily comprehensible, whether by defendants, by causes of action or by sequence of events,[5] and hence this Court, in its prior orders, has endeavored to establish a more natural division of the claims therein. The Amended Complaint has been broken down sequentially into "three sections."

"The first deals with the plan to retake and the actual retaking of the prison, the second complains of the alleged 'reprisals' that occurred after the retaking and the third is concerned with the criminal prosecution of inmates for their participation and involvement in the events preceding and leading to the armed retaking." *Al–Jundi v. Estate of Rockefeller, supra,* at p. 2.

Moreover, it has been understood throughout this lengthy litigation that each of the various constitutional claims (brought under the due process and equal protection clauses of the Fourteenth Amendment, the cruel and unusual punishment proscription of the Eighth Amendment, and the due process clause of the Fifth Amendment), as well as the claims asserting a conspiracy to deprive the plaintiffs of their civil rights under 42 U.S.C. § 1985(3), relates to each sequential section. *See Al–Jundi v. Estate of Rockefeller, supra,* at p. 2.

***2** Pertinently, for purposes of the instant motions, the allegations of the first section of the Amended Complaint have already been dismissed as against Mancusi and Pfeil. *See* Memorandum and Order, dated October 30, 1979, at p. 40. Pfeil has also been dismissed with relation to the allegations of the third section. *Id.,* at pp. 33–36, 40. Each of the three sections remains operative as to Oswald.[6]

In support of their motions for summary judgment, each of Oswald, Mancusi and Pfeil has asserted that he enjoys qualified immunity from suit.[7] They also argue that the undisputed material facts do not support the plaintiffs' constitutional claims against them.

Because qualified immunity provides immunity from suit and not merely a shield to liability—*Al–Jundi v. Rockefeller, supra,* 869 F.2d at 664; *see Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985) ("even such pretrial matters as discovery are to be avoided if possible")—, this Court will first address this defense before considering the adequacy of the facts to support the plaintiffs' claims. The qualified immunity doctrine seeks to strike a balance between protecting the rights of individuals, on the one hand, and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority," on the other. *Butz v. Economou,* 488 U.S. 478, 506 (1978). Thus, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action in question has previously been held unlawful, * * * but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

The *current* state of the law is set forth in a 1986 decision, *Whitley v. Albers,* 475 U.S. 312, wherein the Court enunciated the "standard govern[ing] a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot." *See id.,* at 314. It was first noted that "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny * * *." *Id.,* at 319. " 'After incarceration, only the " 'unnecessary and wanton infliction of pain' "... constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " *Ibid.* (*quoting from Ingraham v. Wright,* 430 U.S. 651, 670 (1977)). In applying this standard to a "prison security measure * * * undertaken to resolve a disturbance," the Court determined that

***3** "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Id.,* at 320–321 (*quoting from Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom.* Employee Officer John *v.* Johnson, 414 U.S. 1033 (1973)).

Courts must determine on a summary judgment motion, however, "whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain * * *, the case should not go to [trial]." *See id.,* at 322 (discussing the approach on a motion for directed verdict); *see also Anderson v. Liberty Lobby,* 317 U.S. 242 (1986) (equating the standards for directed verdict and summary judgment motions.) The factors to be considered in applying this approach include (1) the need for the application of force, (2) the relationship between such need and the amount of force employed and (3) the extent of injury inflicted thereby. *Whitley v. Albers, supra,* at 321. "From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Ibid.* But other factors, such as the threat to the safety of prison staff and inmates and any efforts to avoid or temper a forceful response, are "equally relevant." *Ibid.*

Although *Whitley v. Albers, supra,* was not enunciated until 1986, its application of the cruel and unusual punishment clause to prison officials' efforts to quell an inmate uprising displays nothing more esoteric than a common-sense approach to the problem and, moreover, derives its inspiration from the accumulated wisdom of Eighth Amendment decisional law dating well prior to September 1971. *See Ingraham v. Wright,* 430 U.S. 651, 670 (1977) (cited in *Whitley v. Albers* as authority for the wantonness standard); *Estelle v. Gamble,* 429 U.S. 97, 103 (1976) (relied upon in *Ingraham v. Wright*); *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) (relied upon in *Estelle v. Gamble*); *Furman v. Georgia,* 409 U.S. 238, 392–393 (1972) (Burger C.J., dissenting) (cited in *Gregg v. Georgia*); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463–464 (1947) ("abundantly clear" to Chief Justice Burger therefrom "that the Court was disapproving the wanton infliction of physical pain"); *see also Wilkerson v. Utah,* 99 U.S. 130, 135–136 (1878) (the "apparent seed," in Burger's evaluation, of the Eighth Amendment ban against "unnecessary cruelty"); *cf., Rochin v. California,* 342 U.S. 165, 172–173 (1952) (law enforcement conduct that "shocks the conscience" is violative of due process). The defendants here, while not having had the benefit of the instruction of *Whitley v. Albers* at the time of the riot, should intuitively have been aware of the rule to be gleaned therefrom. The law was not express in 1971, but it certainly was "apparent" within the meaning of qualified immunity jurisprudence. *See Anderson v. Creighton, supra,* at 640.

***4** The plaintiffs urge that Oswald's recommended approval of the Monahan plan to recapture Attica was a wanton act undertaken with callous disregard for its potential infliction of harm upon the rioting inmates and their hostages. Specifically, they allege that such plan failed to account for the "emotionally and racially charged atmosphere prevailing among the members of the assault force," failed to provide an adequate command structure to ensure the application of force would not become excessive or vindictive, failed to warn the inmates of the imminence of the assault or provide them with a means to surrender in the face thereof and, finally, failed to make allowance for adequate medical care for persons injured during the assault. Amended Complaint, ¶ 38. Monahan's plan for re-taking D–Yard, according to his account, was to involve two groups of seventy-five State Police officers converging upon D–Yard armed with .38 caliber handguns and shotguns loaded with "double–O" buckshot. Accompanying them was to be an indeterminately-numbered National Guard tear gas unit. Additionally, there were to be six sharpshooters on the C–Block roof armed with .270 caliber rifles to provide cover fire if needed. Prior to the assault, a National Guard helicopter was to drop tear gas in D–Yard, while behind the initial forces a twenty-five man State Police squad accompanied by two corrections officers was to enter D–Yard for purpose of identifying and rescuing hostages. These men were armed comparably with the assault force. *See* Testimony of Monahan before the New York State Special Commission on Attica ("McKay Commission"), April 25, 1972, at p. 1604 (endorsing the description given by another witness, at pp. 1580–1591, as "very accurate"). Oswald's understanding of the plan to re-take the prison was derived from discussions with Monahan as well as with Colonel John C. Miller and General A.C. O'Hara of the State Police. *See* Testimony of Russell G. Oswald before the Wyoming County (N.Y.) Grand Jury, September 18, 1972, at p. 56. He understood that two groups of approximately thirty State Police officers would converge on D–Yard, that there were to be sharpshooters on rooftops with high-powered rifles to provide cover fire if needed, that prior to the assault there was to be a precision-dropping of tear gas by the National Guard by helicopter into D–Yard, and that approximately twenty State Police officers along with two corrections officers were to follow the assault force for purpose of identifying the hostages. *Ibid.* It appears, also, that Oswald gave some

attention to providing for medical care, such not being part of Monahan's plan. He remembers discussing it with Mancusi and O'Hara, but ultimately medical care was "left for the National Guard to work out." *See* Oswald testimony before the McKay Commission, *supra,* April 28, 1972, at p. 2723.

Neither Monahan's nor Oswald's recollection of the plan alludes to any warnings or ultimatums to be given the inmates respecting the imminency of a forceful retaking of the prison. Likewise neither makes any reference to a prospective chain of command once the State Police were loosed upon the facility. But, perhaps most tellingly, Oswald acknowledges that little attention was given by him to the special medical needs which might arise from such an operation and that, upon approving the assault plan, he did not have any understanding of the specific steps, if any, which had been or would be taken to provide medical care. Oswald's understanding of the plan was likewise vague concerning the size of the assault force which was to descend on D–Yard. Monahan, according to his testimony, devised a pair of 75–man units (150 men in all); Oswald anticipated only sixty men. If Monahan is to be believed concerning the specifications of his own plan, either Oswald has misrecollected events, was woefully misinformed about this aspect of the plan or was recklessly indifferent to its specifics. This is a question of fact which cannot be resolved on Oswald's instant motion. If Oswald was, in fact, recklessly uncertain of the plan's parameters at the time he approved it or if he recklessly failed to consider issues impacting directly on the reasonableness of the plan, and if its going awry was a reasonably foreseeable result, then Oswald would properly share in the legal responsibility for the ensuing carnage. His recklessness, in this setting, would have been " 'so dangerous that [his] knowledge of the risk can be inferred.' " *Whitley v. Albers, supra,* at 321 (*quoting from Duckworth v. Franzen,* 780 F.2d 645, 652 (7th Cir.1985)).

***5** As for the second section of the Amended Complaint, regarding the plaintiffs' claims that they were subjected to torturous reprisals following the recapture of Attica, which barbarities the movants allegedly witnessed but took no action within their authority to halt—*see* Amended Complaint, ¶¶ 60–61—, Oswald asserts his lack of personal involvement and has been joined in this argument by Mancusi and Pfeil.

It is undisputed that a great many, if not the vast majority or all, of the Attica inmates were tortured by corrections officers after the prison was re-taken and, further, it cannot reasonably be contended that such conduct was permissable under constitutional norms which were clearly-established even in 1971. A "gauntlet" was erected in one of the prison passageways whereby officials were positioned with clubs and prisoners were made to run the length of the passageway, receiving blows and racial epithets along the way. *See Inmates of Attica Correctional Facility v. Rockefeller,* 453 F.2d 12, 16 (2d Cir.1971). In other separate instances of abuse, continuing from September 13th until at least September 16th, "[i]njured prisoners, some on stretchers, were struck, prodded or beaten with sticks, belts, bats or other weapons." *Id.,* at 18–19. Some inmates were "burned with matches, and others poked in the genitals or arms with sticks." *Id.,* at 19. The United States Court of Appeals for the Second Circuit, in considering the question of preliminary injunctive relief against reprisals back in December 1971, characterized the corrections officers' conduct as "an orgy of brutality." *Ibid.* (accepting as true for its purposes the testimony with respect to physical abuse of prisoners). What is disputed respecting the instant movants is their participation in such conduct.

Oswald has given conflicting accounts whether he had been aware of the brutality and hence whether he could have reasonably been expected to employ his authority as the Commissioner of the State Department of Corrections to put a halt to it. Under oath in April 1972, Oswald stated that he had been informed about the gauntlet while still physically present at Attica, but inasmuch as such exercise was "practically" completed by such time and inasmuch as he believed "it was much like a fraternity hazing," he did nothing to stop it. *See* Oswald testimony before the McKay Commission, *supra,* April 28, 1972, at pp. 2720–2721. Eighteen years Oswald attested that he "neither participated in, ordered nor knowingly permitted" any of the alleged brutalities. Affidavit of Russell G. Oswald (sworn to April 5, 1990), ¶ 20. The inconsistency in these accounts is itself sufficient to establish a genuine issue of fact for trial as to Oswald's personal involvement in the reprisals. A supervising official's failure to remedy a constitutional infringement upon learning of it personally involves the official in the wrong. *Williams v. Smith,* 781 F.2d 319, 323 (2d Cir.1986).

***6** Mancusi also denies having participated in or having had personal knowledge of the reprisals. Affidavit of Vincent R. Mancusi (sworn to February 9, 1990), ¶¶ 9–10. The plaintiffs, however, have pointed to evidence placing Mancusi in the Attica "command center" at relevant times, which should have made him privy to

reports of activities occurring in various areas of the prison. *See* McKay Report, *supra,* at p. 432 & fn. 4. Two of the plaintiffs have supplied affidavits, as well, attesting to having seen the Attica Superintendent personally witness his underlings commit brutalities. *See* Affidavit of Jerome Rosenberg (sworn to May 3, 1990), ¶¶ 7–8; Affidavit of Albert Bictory (sworn to May 3, 1990), ¶¶ 3, 5. As with Oswald, triable issues of fact remain respecting Mancusi's involvement in the reprisals.

Assistant Deputy Superintendent Pfeil denies having observed the torture of inmates as well, claiming not to have been in the locations where such activities are said to have occurred. Affidavit of Karl Pfeil (sworn to March 11, 1990), ¶ 3. Earlier inquiries into events, however, contradict this assertion—*see* McKay Report, *supra,* at p. 447 (placing Pfeil in A–Yard September 13, 1971, the place and date of alleged brutalities)—and, again, two of the plaintiffs attest to having seen him witness reprisals. *See* Rosenberg affidavit, *supra,* ¶¶ 7–8; *Bictory* affidavit, *supra,* ¶¶ 3, 5. Judgment respecting Pfeil's liability for these reprisals must also await trial.

Finally as to the third section of the Amended Complaint, concerning the prosecutions brought against certain of the rioting inmates, both Mancusi and Oswald plausibly deny having had anything to do with such legal maneuvers (Pfeil, as noted, has already been dismissed respecting the third section of the Amended Complaint)—*see* Oswald affidavit, *supra,* ¶ 21; Mancusi affidavit, *supra,* ¶ 11,—and the plaintiffs have been mute in response. The third section suffers from a complete failure of proof and as such will be dismissed as to Oswald and Mancusi. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

Accordingly, it is hereby ORDERED that the third section of the Amended Complaint is dismissed as to Oswald and Mancusi but that these defendants' motions for summary judgment, along with that of defendant Pfeil, are otherwise denied.[8]

All Citations

Not Reported in F.Supp., 1990 WL 97729

Footnotes

1 Plaintiffs Durham, Lundy, Hicks, McNeil, Santos and Barkley have been dismissed for lack of standing. Memorandum and Order, dated October 30, 1979, at p. 21. Plaintiff Barnes has recently been added by consolidation of a related suit. *See Barnes v. State of New York,* CIV–73–442E (W.D.N.Y. January 8, 1990). He had sued certain defendants which are not parties to this action—*viz.,* The State of New York, Paul D. McGinnis and The State Corrections Committee. The claims against these defendants are deemed to have been abandoned. Concerning the status of the various captioned defendants herein, *see* fn. 6 hereinbelow.

2 Both this Court's decision and the appellate decision affirming such contain detailed background discussions.

3 Eleven hostages were rescued, one of whom later died of inmate-inflicted wounds.

4 The Amended Complaint is labelled by the plaintiffs simply "COMPLAINT–CLASS ACTION," but was their second pleading herein, filed of right, and has been construed and regarded by this Court as their Amended Complaint. *See* Memorandum and Order, dated October 30, 1979, at p. 2 fn. 2 & p. 4 fn. 3.

5 So far as can be ascertained, all counts relate to all defendants, although certain counts identify certain defendants

by name as being among others. Several counts reference identical constitutional and/or statutory provisions, and the first count, aside from its substantive claim or claims, makes jurisdictional allegations, and identifies the parties and "facts" common to all counts. Finally the lattermost counts are largely one-sentence reallegations-by-reference of earlier paragraphs labelled with different asserted causes of action.

[6] As for the other defendants, the estate of the late Governor Rockefeller had been substituted in his stead upon his death in 1979, and the estate was eventually dismissed on the basis of qualified immunity and the Governor's lack of personal involvement in the events. *Al–Jundi v. Estate of Rockefeller, supra.* Dunbar was dismissed for the plaintiff's failure to substitute his estate following his death in 1975. Memorandum and Order, dated October 30, 1979, at pp. 7–8. Van Eekeren, Miller, Vincent, Hurd, Carney, Williams, Moochler, Malovich, Quick, Shurter, Gellert, Elbet, Kruk, Dillon, Halloran, Crouse, Dwyer, Zelinski, Toray, Connell, Muthig, Parr, Patterson, McCarthy, Ellis and Byre were all dismissed for lack of service upon them of the Amended Complaint. *Id.,* at pp. 7, 14. New York Deputy Attorney General Fischer was dismissed on the basis of prosecutorial immunity. *Id.,* at pp. 28–29 *and* Order, dated April 23, 1980. Baker was dismissed without opposition. Order, dated October 20, 1980. O'Hara was dismissed for lack of allegations of personal involvement. Memorandum and Order, dated October 30, 1979, at p. 40. And the defendants Doe were all dismissed for the plaintiff's failure to substitute named defendants within a reasonable period of time. *Id.,* at p. 15. Aside from the three movants, the only remaining defendant is the late John Monahan, whose estate might or might not be substituted depending on this Court's resolution of a pending motion. *See* Memorandum and Order, dated June 14, 1990.

[7] As an off-shoot of their qualified immunity defenses, each also contends that an action asserting a deprivation of constitutional rights brought under 42 U.S.C. § 1983 cannot lie against them, inasmuch as state officials acting in their official capacities are not "persons" who may be sued within the contemplation of section 1983. *See Will v. Michigan Dept. of State Police ("Will"),* 490 U.S. ——, 109 S.Ct. 2304 (1989). This contention, however, is nothing more than a warmed-over version of an Eleventh Amendment *sovereign* immunity defense under a slightly variant theory. And these defendants have already been dismissed from this suit in their official capacities. Memorandum and Order, dated October 30, 1979, at pp. 15–16. Nothing in *Will* or the Eleventh Amendment precludes a section 1983 suit against state officials in their *individual* capacities, which is precisely the footing upon which this suit against these defendants presently stands.

[8] These defendants have alternatively requested *in limine* respecting whether they had acted in their official or individual capacities in their alleged actions. Such requests are frivolous and rest upon a miscomprehension of immunity law. *See* footnote 7 hereinabove. They are likewise denied.