IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MICHAEL POWERS,	::	Case No. C-1-02-605
Plaintiff,	::	(Judge Spiegel)
-vs-	::	PLAINTIFF'S REPLY MEMORANDUM IN SUP-
HAMILTON COUNTY PUBLIC DEFENDER COMMISSION, *et al*.	::	PORT OF MOTION FOR SUMMARY JUDGMENT
	::	(Liability Only; Doc. 36)
Defendants.		

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INTRODUCTION

In his motion for individual and class summary judgment on liability (doc. 36), Mr. Powers argued that most of the issues had already been decided by the Court, including the policy which is the heart of this case, and that no trial was necessary concerning the causal connection between the County's conduct and Mr. Powers' night in jail. He went on to argue in a separate motion (doc. 39) that the proper measure of damages both for him and for the class was that contained in Ohio Rev. Code § 2743.48(E)(2)(b).[1]

In its argument against liability the County makes the following points:

> A. Mr. Powers is questioning "the validity of his sentence," which cannot be done under in federal court under the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994). (Doc. 42, County Memo. in Opp. at 5-6)
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> B. "Public defender offices and individual attorneys appointed to defend indigent criminal defendants do not act under color of state law under 42 U.S.C. 1983 for providing legal representation to such defendants," citing *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445 (1981). (*Id*. at 6)

[1] His reply to the County's opposition to that position will be filed separately.

C. Rule 56, Fed. R. Civ. P., requires the Court to draw all inferences in a light most favorable to the Commission and the Public Defender because they are now opposing summary judgment rather than asserting it as they did earlier. Those inferences will cause the Court to reject a summary disposition of this case. (*Id*. at 7)

D. Since the Public Defender does not control the actions of the attorneys in his office, he cannot be liable for the policy of causing the incarceration of indigents on fines. Thus, a trial is necessary to discover the "specific reasons the attorneys did what they did," whether the criminal defendants wanted to be incarcerated for fines, and whether a hearing would have produced a finding of indigency. (*Id*. at 7-8)

E. The Public Defender Commission consists of volunteers with no budget and limited duties. This status "precludes liability." (*Id*. at 8)

F. Mr. Powers had no liberty interest in merely having a hearing, and the statute requiring a hearing does not guarantee what the outcome of the hearing will be – "the statute is entirely discretionary." Moreover, "the implementation of the statute is duty [*sic*] of the court. No duties are imposed upon any entity or upon any person except the court holding the hearing." (*Id*. at 8-9)

G. The Public Defender has no money to pay a judgment, so the County will have to pay it. This creates *respondeat superior* liability, prohibited by *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978). (*Id*. at 9)

H. The *Younger* abstention principle and the *Rooker-Feldman* doctrine prohibit the Court from holding in favor of Plaintiff and the class. (*Id*. at 10)

Mr. Powers and the Class will respond in the above order.

COUNTERSTATEMENT OF RECORD FACT

The County claims that "the indigency status of Powers was likewise reported to the sentencing court by attorney Shafer, " citing only "doc. 30." (Doc. 42, County Memo. at 5) In reality, the transcript attached to document number 30, which is a motion for leave to file the transcript, demonstrates (at 2-3) the following exchange:

The Court: Does he want me to sentence him today?

> Public Defender Attorney Shafer: He does, yes. Mr. Powers is homeless and can't come up with any bond, so he would like to get this over with.
>
> * * *
>
> The Prosecutor: Michael Powers violated his probation by failing . . . to pay fines, court costs and probation fees.
>
> The Court: Anything on those facts, sir?
>
> Public Defender Attorney Shafer: Nothing, Judge.
>
> The Court: Guilty finding. [and the court imposed the original 30-day sentence with credit for time served]

The transcript speaks for itself.

ARGUMENT

A. AS THE COURT HAS ALREADY DECIDED, *HECK V. HUMPHREY* IS INAPPLICABLE TO THE FACTS OF THIS CASE.

The County makes the same argument regarding *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), as it did in support of its earlier motion for summary judgment. In denying that motion the Court explicitly rejected the County's position. (Doc. 34, Order at 8-10). Since the County has not presented any new arguments, the Court should reaffirm its earlier holding.

B. SINCE THE COURT HAS ALREADY DECIDED THE STATE ACTOR ISSUE, THE COUNTY'S REPEATED ARGUMENT SHOULD BE REJECTED.

Again, this Court rejected the County's second argument in its Order of August 23, 2005. (Doc. 34 at 19-21) It should do the same here.

C. RULE 56 INFERENCES CANNOT CHANGE THE REQUIRED RESULT IN THIS CASE.

The County criticizes Mr. Powers' Memorandum on the ground that he has merely made a *prima facie* case (doc. 42, Memo. at 7), although it does not quite explain

how it would benefit from being correct in its analysis. In any event, this criticism is unfounded.

In the first place, while obvious to the point that there are few citations for it, Rule 56 requires a party moving for summary judgment to demonstrate the lack of a material factual dispute and that he or she is correct as a matter of law *on each and every element of the claim*. *E.g.*, *Rosado v. Taylor*, 324 F.Supp.2d 917, 919 (N.D. Ind. 2004); *Herndon v. Massachusetts Gen. Life. Ins. Co.*, 28 F.Supp.2d 379, 382 (W.D. W.Va. 1998). Thus, Mr. Powers was *required* to state the elements of his 1983 claim and to demonstrate, as he did, that he had been deprived of a federal right and that the County caused that deprivation.

Moreover, while the County correctly states that inferences must be drawn in its favor now that it is the non-moving party, it does not go on to tell the Court what these inferences are. Specifically, in the one area where the County might have done so, that of the causal connection requirement, its memorandum is silent. Mr. Powers' argument (doc. 36, Memo. at 3-4), that the causal connection should be recognized as a matter of law, therefore remains uncontested and the Court should adopt it.

D. THE PUBLIC DEFENDER CANNOT ESCAPE LIABILITY BY CLAIMING HE HAS NO CONTROL OVER HIS EMPLOYEES OR OVER THE LITIGATION POLICY THEY PURSUE.

This Court has already decided that the "Public Defender Commission and the Hamilton County Public Defender had a well-settled custom or policy of not asking for an indigency hearing before a probationer is incarcerated for failure to pay a fine." (Doc.34, Order at 13-14) The County wants this holding changed to state that "the tactical decisions [including the failure to request an indigency hearing] made by individual [public defender] attorneys during representation are made only following discussions

with their individual clients and depend on factors outside the control of the Public Defender." (*Id*. at 7, citing the "Affidavits of Staff Attorneys") What is missing from this extremely abstract analysis is what everyone on the Defendants' side in this case – individual public defenders, the Public Defender himself, the Public Defender Commission, and the attorneys representing the County – knows but will not admit: *That the United States Constitution and the Ohio Legislature forbid the incarceration of a citizen for debt unless he or she has been afforded a hearing to establish whether he or she could pay or was in fact indigent*. *See Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064 (1983); U.S. Constitution, Amendment XII; Ohio Rev. Code § 2947.14. The County could have attached an affidavit from the Public Defender stating that his policy is to follow the Constitution but that individual attorneys refuse to do so. There is no such affidavit. Defendants could have presented sworn testimony, including judges' sheets and transcripts of court proceedings, demonstrating that they *do* request indigency hearings but are routinely turned down by judges. They have presented nothing of the sort.[2] Instead of offering sworn factual evidence on the issue before the Court, the County has provided an affidavit from a representative of the Public Defender Commission which disclaims any responsibility for the office of the Public Defender; an affidavit from the Public Defender which disclaims any responsibility for the "tactical" decisions of the individual public defenders employed by him which apparently includes the tactical decision to ask or not ask for an indigency hearing; and affidavits of public defender attorneys who advise the Court of the routine of their representation and the fact that they are members in

[2] If this were the practice of the Public Defender one would think he would have appealed at least one of these sentences in order to ask an appellate court to put a stop to this unconstitutional practice.

good standing of the Ohio Bar. *In all of these materials the Court will not find one whisper about the issue in this case: Unconstitutional incarceration for debt and why public defender attorneys do nothing about it.*

This is the same attitude the Public Defender and his employees take in the courtroom – the phrase "indigency hearing" is never mentioned. Even as a non-moving party, there is only one inference which can be made from these sworn materials, as well as from the materials presented by Mr. Powers in his memorandum in opposition to the County's motion for summary judgment. (Doc. 20, Reply Memo., attachments to Weber Affidavit) That inference is that the remaining County Defendants systematically and at every level permit indigent defendants to be incarcerated for debt without the least attempt to obtain a hearing as required by law. The County's sworn materials merely accentuate the weakness of its position.[3] Summary judgment is highly appropriate in these circumstances.

E. LACK OF A BUDGET DOES NOT IMMUNIZE COUNTY OFFICIALS.

The County provides no authority for the proposition that the duties and budget of a county entity may preclude it from being held liable for unconstitutional county policy. Perhaps it is trying to say that as between the two remaining Defendants the Office of the Public Defender is the more culpable. This is a matter between these entities and certainly need not be decided now. Since a defendant cannot benefit from immunity from suit without submitting some reasoning or authority, the Court should reject this defense.

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[3] *E.g.*, "it is also certainly possible that no harm resulted from the absence of a hearing." (Doc. 42, County Memo. at 8) Of course, the result of the hearing has no bearing on the constitutionality of the denial of a hearing. *See Fuentes v. Shevin*, 407 U.S. 67, 87, 92 S.Ct. 1983 (1972) (miscited in Mr. Powers' main memorandum, doc. 36 at 3).

F. MR. POWERS' AND THE CLASS'S RIGHT NOT TO BE INCARCERATED FOR DEBT IS, BEYOND ANY QUESTION, A FEDERAL RIGHT WHICH CAN BE REDRESSED IN A 1983 ACTION.

In this section of its memorandum the County does not appear to contest the proposition that every citizen has a federal liberty interest in not being incarcerated for debt without an indigency hearing, as held in *Bearden v. Georgia*, *supra*, and *Alkire v. Irving*, 330 F.3d 802, 816 (6th Cir. 2003). Instead it cites *Levin v. Childers*, 101 F.3d 44 (6th Cir. 1996), for the proposition that "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." (Doc. 42, County Memo. at 8) Levin involved a state statutory right to a hearing after a physician had his Medicaid payments suspended during a fraud investigation. The only right contained in the state statute was that of a hearing. The Sixth Circuit therefore held that it would be ridiculous, in a Fourteenth Amendment context, to hold that one cannot be deprived of a hearing without a hearing. *Id*. at 46.

The same would be true in the instant case if Mr. Powers had not been incarcerated, just as the physician in *Levin* had not yet been punished. In such a case Mr. Powers could hardly have a cause of action based merely upon the failure to conduct an indigency hearing when neither Bearden, the Thirteenth Amendment nor the Ohio statute had been violated by incarceration or other punishment. But in fact Mr. Powers was incarcerated. The County's argument therefore has no force.

G. NO *RESPONDEAT SUPERIOR* LIABILITY IS CREATED BY THE FACT THAT ONE ENTITY WILL PAY A JUDGMENT AGAINST ANOTHER.

The County cites no authority or reasoning for the proposition that a state actor may escape liability for violating an individual's federal constitutional rights by demonstrating that another state entity will have to pay the judgment. The absurdity of

such a rule is apparent – a state statute or labor contract which required a police department to pay a civil rights judgment against an officer would thereby liberate that officer from liability. This theory should be rejected out of hand.

As to the only authority the County does cite in this section (memo. at 9), *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), the Court has already decided that that case eliminates liability for Hamilton County and its Commissioners but not for the actual policymakers, *i.e.*, the remaining Defendants. (Doc. 34, Order at 12-17) That decision should apply here.

H. AS THE COURT HAS ALREADY HELD, NEITHER *YOUNGER V. HARRIS* NOR THE *ROOKER-FELDMAN* DOCTRINE HAS ANY APPLICATION HERE.

The Court has already considered and rejected these theories (*id*. at 21-22) and Mr. Powers sees no reason to go over them again.

CONCLUSION

For the foregoing reasons the Court should grant summary judgment on liability in favor of Plaintiff and the Class.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on October 17, 2005, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: **David T. Stevenson**, 230 E. Ninth St., Suite 4000, Cincinnati, Ohio, 45202.

/s/ Stephen R. Felson