

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5790

MARCO PEREZ,

Plaintiff-Appellant,

versus

BEXAR COUNTY, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(SA 90 CA 1333)

(March 10, 1993)

Before POLITZ, Chief Judge, WISDOM and WIENER, Circuit Judges.

POLITZ, Chief Judge:*

Marco Perez appeals the dismissal of his claim under 42 U.S.C. § 1983 against Bexar County, Texas. Finding no error we affirm.

Background

Perez, along with a codefendant, Simon Orta, was charged with

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

first degree robbery in St. Louis, Missouri. He appeared at an extradition hearing in Bexar County, Texas. Upon determining that Perez spoke no English, the judge ordered Orta to serve as interpreter. Perez waived extradition to Missouri and later was sentenced to a substantial prison term in that state. He filed a section 1983 claim alleging that the county failed to provide an independent interpreter and that Orta misled him into waiving his extradition rights.¹

Bexar County initially filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The magistrate judge ordered Perez to file an amended complaint stating facts sufficient to support his claim that the alleged deprivation of rights was pursuant to county custom or policy. In his amended complaint, Perez alleges that the judge, referred to only as "Judge John Doe," was a county official capable of binding the county. He further alleges that the judge's decision to allow the codefendant to serve as interpreter violated his due process rights. Bexar County filed a second motion to dismiss or, alternatively, for summary judgment.

The magistrate judge recommended that Perez's action be dismissed for failure to state a claim for which relief could be granted, noting that Perez pointed only to a single instance of alleged unconstitutional conduct on the part of the county. Prior

¹ Perez contends that Orta, whose confession implicated Perez and created a conflict of interest, caused him to waive his right to contest extradition by telling him that "if he signed the extradition he would not get any time in Missouri."

to preparing his report the magistrate judge telephoned the Bexar County courthouse and ascertained that the extradition hearing was presided over by a state judge, not a county judge, leading to his conclusion that any constitutional violation could not be connected to a county official. Over Perez's objections the district court accepted the magistrate judge's recommendations and dismissed Perez's complaint. Perez timely appealed.

Analysis

We review a Rule 12(b)(6) dismissal *de novo*.² Dismissal under Rule 12(b)(6) is only proper if, after construing the allegations in the complaint in the light most favorable to the plaintiff, "it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations."³ Our review does not consider matters outside the pleadings.⁴

² **Barrientos v. Reliance Standard Life Ins. Co.**, 911 F.2d 1115 (5th Cir. 1990), cert. denied, 111 S.Ct. 795 (1991).

³ **Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.**, 804 F.2d 879, 881 (5th Cir. 1986).

⁴ **Rankin v. City of Wichita Falls**, 762 F.2d 444 (5th Cir. 1985). The magistrate judge improperly considered matters outside the pleadings, i.e. the phone call to the Bexar County courthouse. Consideration of matters outside the pleadings converts a motion to dismiss into a motion for summary judgment and the court must afford the plaintiff notice and a reasonable opportunity to respond. **Young v. Biggers**, 938 F.2d 565 (5th Cir. 1991); Fed.R.Civ.P. 56. Because Perez was not afforded such an opportunity, summary judgment would have been inappropriate. Thus, we consider only whether the matter was properly dismissed under Rule 12(b)(6).

County Liability

Municipal liability under section 1983 may not be based upon *respondeat superior*, but it may arise when an official acts pursuant to municipal policy or custom.⁵ Municipal liability under section 1983 also may be predicated upon an isolated decision made by a person with power to make policy for the municipality.⁶ A section 1983 complaint against a municipality must identify the policy, connect the policy to the municipality, and show that the particular injury occurred because of the execution of the policy.⁷

Perez relies heavily on **Pembaur**. He argues that a county judge is a county policymaking official and that the county is liable for the judge's isolated decision to appoint the codefendant as interpreter. Bexar County, on the other hand, contends that Perez's complaint fails to specify any county-wide policy which violated his rights or identify any county policymaker responsible for the alleged violation.

Because of the nature of Texas county governments, county judges are deemed policymakers in certain respects. The state constitution and statutes give a county judge, in addition to judicial duties, "numerous executive, legislative and

⁵ **Monell v. Dept. of Social Services**, 436 U.S. 658 (1978).

⁶ **Pembaur v. City of Cincinnati**, 475 U.S. 469 (1986).

⁷ **Bennett v. City of Slidell**, 728 F.2d 762 (5th Cir. 1984) (*en banc*), cert. denied, 472 U.S. 1016 (1985).

administrative chores in the day-to-day governance of the county."⁸ In those areas in which the judge is the final county authority, "his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983."⁹ We have also held, however, "that a municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal officer or lawmaker."¹⁰ We distinguish between the judge's administrative actions, which may constitute official county policy under **Monell**, and the judge's judicial actions, wherein the judge effectuates state policy by applying state law.¹¹

Assuming, *arguendo*, that a county judge presided over Perez's extradition hearing,¹² the appointment of an interpreter was a

⁸ **Familias Unidas v. Briscoe**, 619 F.2d 391, 404 (5th Cir. 1980). These chores include presiding over the county's legislative body, preparing the county budget, and conducting elections. **Id.**

⁹ **Id.** (quoting **Monell**, 436 U.S. at 694).

¹⁰ **Johnson v. Moore**, 958 F.2d 92, 94 (5th Cir. 1992).

¹¹ **Familias Unidas**, 619 F.2d at 404.

¹² A county judge has some authority to conduct extradition proceedings. "[A] fugitive may be advised of his rights concerning extradition and he may waive extradition in a county court, since it is a court of record, but . . . the county court does not have jurisdiction to hold a habeas corpus hearing on extradition in a felony case." **Ex parte Sullivan**, 534 S.W.2d 140, 141 (Tex.Crim.App. 1976) (citations omitted).

matter governed by state law.¹³ Conducting an extradition hearing also is an exclusively judicial function. The authority to appoint an interpreter in such a proceeding "bears no relation to [the judge's] traditional role in the administration of county government or to the discretionary powers delegated to him by state statute in aid of that role."¹⁴ Once the hearing convened, the county judge presiding over the hearing was a judicial officer, not a county policymaker. Thus, Perez has failed to allege that any Bexar County official policy or policymaker occasioned the violation of his constitutional rights.

AFFIRMED.

¹³ Tex. Code Crim. P. art. 38.30.

¹⁴ **Familias Unidas**, 619 F.2d at 404.