UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2756
Summary Calendar

PAUL KOLACEK,

Plaintiff-Appellee,

versus

JOHNNY J. KLEVENHAGEN, ET AL.,

Defendants,

JOHNNY J. KLEVENHAGEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-1196)

(January 6, 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Johnny Klevenhagen, Sheriff of Harris County, Texas, appeals denial of his motion to dismiss this 42 U.S.C. § 1983 prisoner's suit on qualified immunity grounds. We reverse and render judgment

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in favor of the sheriff in his individual capacity.

Background

Paul Kolacek, while serving a four-year sentence in the Texas Department of Corrections, learned in February 1989 that Harris County prosecutors had obtained an indictment against him for forgery. Kolacek allegedly requested adjudication of these pending charges several times during his incarceration in Dallas but Harris County did not immediately pursue that prosecution. In October 1989 he was transferred to Arizona to face charges there.

Kolacek was paroled on his original sentence while he was in Arizona. On January 30, 1990 a detainer was lodged against him and in May the district attorney's office formally requested his delivery for trial in Harris County under Article IV of the Interstate Agreement on Detainers (IAD).[1] On August 22, 1990 the Harris County sheriff's office took custody of Kolacek at the Arizona State Prison. One month later Kolacek pled guilty to the Texas forgery charges and received a four-year prison term. Shortly thereafter the authorities returned him to Arizona to complete his sentence.

Proceeding *pro se* and *in forma pauperis*, Kolacek filed this section 1983 action. The sheriff moved to dismiss for failure to state a claim, advancing qualified immunity. The district court denied that motion, stating that "a more substantive response from

[1] See Tex. Code Crim. Proc. Ann. art. 51.15 (Vernon 1979); 18 U.S.C. App. § 2 (1985).

the defendant would further the court's evaluation of this *pro se* case." The sheriff timely appealed.

Analysis

On appeal we consider immunity for Sheriff Klevenhagen in his individual capacity only.[2] We have jurisdiction to hear this issue on interlocutory appeal provided it turns on a question of law.[3] We review the district court's ruling *de novo*,[4] affirming only if Kolacek has alleged facts demonstrating conduct which a reasonable person would have known to violate federal constitutional or statutory rights clearly established at the time.[5] Additionally, Kolacek must establish that the sheriff personally caused the violation; there is no *respondeat superior* liability in

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[2]Qualified immunity does not apply to suits against officials in their official capacity. **Kentucky v. Graham**, 473 U.S. 159 (1985).

[3]See **Mitchell v. Forsyth**, 472 U.S. 511, 530 (1985) ("a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment"). Kolacek, apparently unaware of this rule, urges us to assess sanctions against the sheriff for filing a "premature appeal." That motion, carried with the case, is accordingly DENIED.

[4]**Jackson v. City of Beaumont Police Dept.**, 958 F.2d 616 (5th Cir. 1992).

[5]**Harlow v. Fitzgerald**, 457 U.S. 800 (1982). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." **Mitchell**, 472 U.S. at 526; see also **Siegert v. Gilley**, 500 U.S. 226 (1991).

section 1983 cases.[6]

The primary basis of Kolacek's complaint is alleged noncompliance with the IAD.[7] First, Kolacek contends that he should have been tried by Harris County during his previous incarceration in Texas. Yet the IAD contains no right to transfer and trial applicable in the absence of an interstate element. Next, Kolacek argues that the January 1990 detainer was filed against him in violation of the IAD. Even if there was some violation, Sheriff Klevenhagen did not lodge the detainer against Kolacek. Kolacek also argues that his transfer was illegal because he did not request that the sheriff's office collect him from Arizona. Under Article IV of the IAD, the authorities of a receiving state are not required to secure a prisoner's consent before making such a transfer.

Kolacek separately alleges that his transfer to the Harris County jail violated eighth amendment proscriptions against substandard jail conditions and overcrowding. This contention lacks merit. We found that by August 13, 1990, the jail was in compliance with a court order which addressed these eighth amendment considerations.[8] Kolacek was not incarcerated in the

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[6]See **Monell v. Department of Social Services**, 436 U.S. 658 (1978). See also Martin A. Schwartz and John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees 317 (2d ed. 1991) ("[E]ach defendant . . . may be held liable only for that defendant's own wrongs.").

[7]The IAD has federal law status for purposes of section 1983 suits. See **Cuyler v. Adams**, 449 U.S. 433 (1981).

[8]See **Alberti v. Sheriff of Harris County, Tex.**, 937 F.2d 984 (5th Cir. 1991), cert. denied sub nom. **Richards v. Lindsay**, 112

Harris County jail until August 23, 1990, several days after that compliance.

Kolacek demonstrates no knowing legal violation committed personally by the sheriff. Thus, Sheriff Klevenhagen should be granted qualified immunity in his individual capacity. The district court's judgment is accordingly REVERSED and judgment is RENDERED in favor of Sheriff Klevenhagen in his individual capacity.[9]

S.Ct. 1994 (1992).

[9]Sheriff Klevenhagen also seeks costs and attorney's fees. While equity obviously militates against charging a *pro se* plaintiff who survived a motion to dismiss in the district court, the matter of attorney's fees in the first instance belongs to the trial court.