IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4292

Summary Calendar

JAMES BYRD,

Plaintiff-Appellant,

v.

CITY OF LUFKIN POLICE DEPARTMENT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(9:90-CV-49)

(February 24, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[*]

James Byrd, Jr. appeals the district court's dismissal with prejudice of his 42 U.S.C. § 1983 civil rights suit. We affirm in part, and vacate and remand in part.

I.

On the evening of May 22, 1988, the Nuway Oil Co. convenience store in Lufkin, Texas was robbed. The store clerk

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

told the police that two black males had committed the crime. The police subsequently found two black males in the area, one of them being Byrd. Byrd voluntarily agreed to go to the police station to speak with Detective Harrison. During questioning, Byrd admitted he had been at the store, but denied any involvement in the robbery. Harrison concluded there was probable cause to arrest Byrd for the robbery. The District Attorney, however, declined to prosecute Byrd, and Byrd was released two days later.

On April 18, 1990, Byrd filed an original complaint pursuant to 42 U.S.C. § 1983, claiming false arrest and imprisonment. He named as defendants the "City of Lufkin Police Dept.," "City Patrolman on call, records will reflect name," and "R. Harrison, Detective, employed by the City of Lufkin." Harrison and the police department answered the suit.[1]

On April 10, 1991, Byrd submitted a second amended complaint for the first time naming Officers Foster and Bivens, the arresting officers, as defendants. The amended complaint was filed on April 24, 1991. Officers Foster and Bivens were actually served with this complaint on October 24, 1991, and October 23, 1991, respectively.

On July 31, 1991, Byrd was given a check in the amount of $3,000 to settle his claims against various defendants. The check was listed in the name of the "City of Lufkin," and

[1] On May 15, 1991, a partial final judgment was entered dismissing the claims against the City of Lufkin Police Department. An amended order of dismissal was filed on June 12.

included the statement for "any and all claims." For some reason, the insurance adjuster gave the check to Byrd directly without requiring that he sign a settlement agreement. Byrd cashed the check upon receipt. After spending all the money, Byrd refused to sign the proffered settlement papers, claiming that he had accepted the money in partial payment of a future settlement or judgment.[2]

On October 10, 1991, the parties consented to a trial before a United States magistrate pursuant to 28 U.S.C. § 636(c).[3] On the same day, the magistrate conducted an evidentiary hearing on the issue of whether a settlement agreement was entered into between Byrd and Detective Harrison. Detective Harrison filed a motion to dismiss on the basis of the settlement agreement on October 25, 1991. Officers Foster and Bivens filed their motion to dismiss on November 4, 1991, based on Texas' two year personal injury statute of limitations. See Owens v. Okure. 488 U.S. 235, 249-50 (1989); Elzy v. Roberson, 868 F.2d 793, 794 (5th Cir. 1989).

On November 25, 1991, the magistrate issued a Memorandum Opinion and Order granting all motions to dismiss, and dismissing Byrd's complaint with prejudice. Byrd filed his notice of appeal from the final judgment of November 25 on December 23, 1991. On

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[2] Byrd argues that the $3,000 check is not a settlement as to all defendants because he had previously expressed a desire to settle for a larger amount of money, and because each of the individual defendants' names does not appear on the check.

[3] The Consent specified a direct appeal to this court.

appeal, Byrd complains that the magistrate erred in (1) dismissing his claims against the City of Lufkin Police Department, as he did not settle his claims against them; (2) the dismissal of his claims against Detective Harrison, as he did not settle his claims against Harrison; and (3) the dismissal of his claims against Officers Foster and Bivens as time-barred.

II.

Byrd's first point of error on appeal must necessarily fail, as neither the City of Lufkin nor the City of Lufkin Police Department is a party to this appeal. Byrd's claims against the City of Lufkin Police Department were dismissed with prejudice on May 15, 1991. His claims against the remaining defendants were dismissed on November 25, 1991. Byrd has appealed only the November 25th order. As a result, we cannot consider the liability of the city or the police department. See Fed. R. App. P. 3(c); Pope v. MCI Telecommunications Corp., 937 F.2d 258, 266-67 (5th Cir. 1991), cert. denied, 112 S. Ct. 1956 (1992); C. A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1056 (5th Cir.), cert. denied, 454 U.S. 1125 (1981). We review Byrd's remaining points of error under the clearly erroneous standard. See Fed. R. Civ. P. 52(a); Lockette v. Greyhound Lines, Inc., 817 F.2d 1182, 1185 (5th Cir. 1987).

Byrd's second point of error, alleging that the magistrate erred in finding that he had settled his claims with regard to Detective Harrison, also fails. While the parties disagree as to the terms of the settlement, there is evidence in the record to

support the magistrate's finding that Byrd had at least settled his claims against Detective Harrison. In fact, at the conclusion of the hearing on October 10, 1991, Byrd himself consistently testified that he considered the money to be a settlement of his claims with respect to the City of Lufkin and Detective Harrison, but not with respect to Officers Foster and Bivens. We cannot hold that the magistrate's finding that a settlement agreement existed between Byrd and Detective Harrison was clear error. As a result, the enforcement of the settlement agreement was within the inherent power of the district court. Seattle-First Nat'l Bank v. Manges, 900 F.2d 795, 800 (5th Cir. 1990).

Byrd's third point of error comes to us in an interesting procedural setting such that we cannot decide the point on appeal and must remand to the district court. The magistrate found that Byrd's claims against Officers Foster and Bivens were time-barred by Fed. R. Civ. P. 15(c) and Schiavone v. Fortune, 477 U.S. 21, 29 (1986), because the officers did not receive notice of the suit until almost one and one-half years after the expiration of the applicable two year Texas statute of limitations.[4] See Owens

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[4] Under Schiavone, relation back is governed by four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the orignal pleadings; (2) the added party must have received sufficient notice that it would not be prejudiced in maintaining its defense; (3) the added party must or should have known that, but for a mistake concering identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the applicable limitations period. 477 U.S. at 29.

v. Okure, 488 U.S. 235, 249-50 (1989); Elzy v. Roberson, 868 F.2d 793, 794 (5th Cir. 1989); see also Tex. Civ. Prac. & Rem. Code Ann. § 16.03(a) (Vernon 1986); Burrell v. Newsome, 883 F.2d 416, 419 (5th Cir. 1989). During the pendency of this appeal, however, the Federal Rules of Civil Procedure have been amended, fundamentally altering Fed. R. Civ. P. 15(c) which governs the relation back of amendments. This court applies the new rule to pending appeals unless application of the new rule would cause "manifest injustice." Skoczylas v. Federal Bureau of Prisons. 961 F.2d 543, 546 (5th Cir. 1992). Application of the new rule in the case at bar would not work such injustice. See id.

Under Schiavone, the critical issue in this case would have been whether the added party had notice of the suit prior to the expiration of the limitations period. See Schiavone, 477 U.S. at 29; Skoczylas, 961 F.2d at 545. This is no longer the case. The express purpose of the amendment of Rule 15(c), as indicated by the advisory committee, was to change the result in Schiavone. Fed. R. Civ. P. advisory committee note (1991 amendment). The fundamental difference between the Schiavone rule and the amended Rule 15(c) is that, instead of requiring notice within the limitations period, relation back is allowed as long as the added party had notice within 120 days following the filing of the complaint, or longer if good cause is shown. Fed. R. Civ. P. 4(j); Skoczylas, 961 F.2d at 545.

Byrd submitted his amended complaint naming Officers Foster and Bivens for the first time as defendants on April 10, 1991,

approximately 355 days after the original complaint was filed, and almost one and one-half years after the expiration of the applicable limitations period. There is no evidence in the record that either officer had notice of the suit before the amended complaint was filed. Therefore, the amended complaint does not relate back to the date of the original petition and Byrd's claims against the officers are time-barred unless Byrd can demonstrate good cause for his delay in naming them as defendants. Fed. R. Civ. P. 15(c) & 4(j); see Skoczylas, 961 F.2d at 545. Because this new rule did not take effect until December 1, 1991, the magistrate did not have the opportunity to examine Byrd's claim under the amended Rule 15(c). As a result, the district court's dismissal of Byrd's claims against Officers Foster and Bivens as time-barred is vacated, and the issue is remanded for a determination of whether, under the new Rule 15(c), there was good cause for Byrd's delay in naming Foster and Bivens as defendants.

III.

Accordingly, we AFFIRM the dismissal of Byrd's claims against Detective Harrison; we VACATE the dismissal of Byrd's claims against Officers Foster and Bivens as time-barred and REMAND for consideration in light of the amended version of Fed. R. Civ. P. 15(c).