IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1308

AURORA SANCHEZ SILVA, Individually and
as Legal Representative of the Estate of Juan Silva,

Plaintiff-Appellee,

v.

DONLEY COUNTY TEXAS, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(2:92-CV-282)

(July 28, 1994)

Before GOLDBERG, KING and WIENER, Circuit Judges.

PER CURIAM:[*]

Joe N. Shadle, Lisa Jill Elliott, and William J. Thompson appeal the district court's denial of their motion for summary judgment on qualified immunity grounds. We dismiss Thompson's appeal and Shadle's appeal, and we reverse the district court's denial of Elliott's motion for summary 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

On November 8, 1990, Juan "Johnny" Silva was arrested by Deputy Sheriff Joe N. Shadle of the Donley County, Texas, Sheriff's Department on a charge of sexual assault. Shadle transported Silva to the Donley County Jail located in Clarendon, Texas, for incarceration. Silva was known to Shadle because Silva had been arrested by Shadle and incarcerated in the Donley County Jail twice before.

During the booking process, Shadle and Deputy Sheriff Connie McKinney completed a screening form in which it was reflected that Silva's behavior did not suggest the risk of suicide. After Silva had been booked, he was placed in a cell by himself.

Silva then asked Shadle for a razor with which to shave himself. Shadle complied with the request. Soon thereafter, however, Shadle determined that he ought to get the razor back and asked Silva for the razor. Silva said he had flushed the razor down the toilet, and when Shadle went into Silva's cell, he did not see the razor.

At 2:40 p.m. that same day, Silva was arraigned before County Judge Billy Cristal on charges of aggravated sexual assault. He was then taken to the day room area of the jail, where he visited with other inmates, including Ronald Maxwell.

At approximately 4:00 p.m., Silva and other prisoners were observed by Jill Elliott, the dispatcher/jailer who had just arrived on duty. They were standing near cell number two, the cell which belonged to inmate Bobby Bouyea. At approximately

4:40 p.m., Elliott noticed that Silva was sitting on his bed with his feet hanging over the edge. Shortly thereafter, Elliott observed Silva come out of his cell and walk around a little before returning to his cell.

At approximately 5:40 p.m., when Elliott went into the jail area and yelled for Silva because someone had left clothes for him, she received no response. It was then discovered that Silva, having used his bed linens to construct a noose, was hanging in his jail cell. He was pronounced dead at 6:10 p.m. The coroner indicated that Silva had been hanging for approximately 30 minutes before he was found.

Aurora Silva, Silva's mother, then filed suitsQindividually and as legal representative of Silva's estatesQin the United States District Court for the Northern District of Texas, pursuant to 42 U.S.C. § 1983, the Texas Wrongful Death Act, the Texas Survival Act, the Texas Tort Claims Act, and Texas common law. Named as defendants were Shadle, Elliott, Donley County Sheriff William J. ThompsonsQeach of whom had been sued in his individual and official capacitiessQand Donley County. In her complaint, Silva's mother alleged that Shadle and Elliott had been deliberately indifferent to Silva's medical needs resulting in Silva's suicide. She also alleged that Thompson had been deliberately indifferent to training his deputies in the detection and care of suicidal detainees and to adopting a policy concerning the handling of suicide matters. Further, she alleged

that Donley County maintained actionable policies or customs of inadequate detection and care of suicidal detainees.

On November 18, 1992, the defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), with the individual defendants asserting the defense of qualified immunity. On December 21, 1992, the defendants moved for a protective order, requesting that the district court stay discovery while their motion to dismiss was pending. The district court then granted the defendants' motion for a protective order and required that Aurora Silva amend her complaint by repleading "with particularity." She filed her amended complaint on January 27, 1993. Shortly thereafter, the defendants filed a motion for summary judgment, with the individual defendants again asserting the defense of qualified immunity, and another motion for a protective order. On March 16, 1993, the district court denied the defendants' motions for summary judgment, to dismiss, and for a protective order without opinion. Shadle, Elliott, and Thompson (collectively "the appellants") then filed a timely notice of appeal.

II. STANDARD OF REVIEW

The appellants attached affidavits and documents to their motion for summary judgment; Silva did likewise to her response to that motion. These documents and affidavits were before the district court when the court denied the appellants' motions. We thus review the appellants' claim that the district court erred

in denying these motions on qualified immunity grounds under summary judgment standards. Young v. Biggers, 938 F.2d 566, 568 (5th Cir. 1991) (finding that the district court properly considered the defendants' motion to dismiss and for summary judgment as motions for summary judgment because matters outside of the pleadings had been presented to the court); see Morales v. Department of the Army, 947 F.2d 766, 768 (5th Cir. 1991); Thomas v. Smith, 897 F.2d 154, 155 (5th Cir. 1989). This court reviews the denial of summary judgment on qualified immunity grounds de novo, examining the evidence in the light most favorable to the non-movant. Lampkin v. City of Nacogdoches, 7 F.3d 430, 434 (5th Cir. 1993), cert. denied, 114 S. Ct. 1440 (1994); Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990).

III. DISCUSSION

Shadle, Elliott, and Thompson contend that the district court erred in not granting them summary judgment on qualified immunity grounds. The determination of whether a defendant is entitled to qualified immunity is a threshold question which must be resolved inasmuch as it determines a defendant's immunity from suit rather than merely immunity from damages. Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994); see Siegert v. Gilley, 111 S. Ct. 1789, 1793-94 (1991); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). We must first ascertain whether the plaintiff has sufficiently asserted the violation of

a constitutional right which had been clearly established at the time of the alleged injury such that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Siegert, 111 S. Ct. at 1793; see Hare v. City of Corinth, 1994 WL 202546 (5th Cir. 1994) (to be reported at 22 F.3d 612); Brewer, 3 F.3d at 820. We must then determine whether the defendants are entitled to summary judgment on qualified immunity grounds. Hare, 1994 WL 202546.

A. Clearly Established Constitutional Injury

The Supreme Court has made it clear that deliberate indifference to the serious medical needs of a convicted prisoner violates the Eighth Amendment's proscription against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The Court has also made it clear that a pretrial detainee has a right under the Due Process Clause of the Fourteenth Amendment to be free from punishment altogether. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). In applying Wolfish to an action in which the plaintiff sought to recover against jail officials for the alleged wrongful death of a pretrial detainee who had committed suicide in the jail, we stated that

> [p]retrial detainees are often entitled to greater protection than convicted persons. Although the standard by which to measure the medical attention that must be afforded pretrial detainees has never been spelled out, both this Circuit and other circuits have held that pretrial detainees are entitled to at least the level of medical care set forth in Estelle.

Partridge v. Two Unknown Police Officers of Houston, 791 F.2d 1182, 1186 (5th Cir. 1986).

When Silva committed suicide in 1990, it was thus clearly established that the defendant officials had a constitutional duty to respond at a minimum without deliberate indifference to Silva's serious medical needs, including suicidal tendencies. See Hare, 1994 WL 202546; Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987). Silva's mother has alleged (1) that Shadle knew that Silva had threatened to commit suicide if he were returned to prison but that Shadle ignored this warning, (2) that Elliott had observed Silva's manifestations of a suicidal disposition but that Elliott failed to monitor Silva accordingly, and (3) that Thompson knew of the risk of suicides in the jail but that he had provided no training or supervision of his officers with respect to detecting detainees at risk of suicide and that he had failed to adopt a policy of detection and care of suicidal detainees. If these alleged facts are proven, a jury could find that the defendants were deliberately indifferent to Silva's serious medical needs and thus violated Silva's due process rights.

B. SUMMARY JUDGMENT

Summary judgment is appropriate if "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). However, if disputed factual issues material to qualified immunity are present, the district court's denial of summary judgment on the basis of qualified immunity is not appealable. Lampkin, 7 F.3d at 431; Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989); see Mitchell, 472 U.S. at 530 (holding that a

district court's interlocutory denial of a claim of qualified immunity is appealable "to the extent that it turns on an issue of law"). We discuss separately each defendant's entitlement to summary judgment on the basis of qualified immunity.

Deputy Sheriff Shadle

In Shadle's affidavit, Shadle indicates that he did not know that Silva was vulnerable to suicide. He states:

> I visited with Johnny going to and coming back from the Courthouse. There was nothing at all about Johnny's actions that alarmed me or made me think Johnny was a danger to himself.
>
> Before Johnny Silva hung himself, he never indicated to me that he had ever thought about suicide, had ever attempted suicide, or ever planned to kill himself. No one else did so either. Johnny Silva never told me he would not go back to the state penitentiary. He did not appear to be despondent and depressed when I arrested him, when he was jailed, when he was arraigned, or when I brought him back to jail after the arraignment.

However, Alton L. Gaines, at whose home Shadle arrested Silva, attested to the fact that when Shadle arrived to arrest Silva, Gaines told Shadle "that Silva had said that he would rather kill himself than go back to jail." Moreover, Maxwell, one of the inmates with whom Silva had talked in the day room, attested to the fact that on the day of Silva's suicide, Shadle told him that "Silva had threatened to kill himself should he have to go back to the state penitentiary." He also stated that Silva appeared very despondent, preoccupied and distracted, making him consider trying to prevent Silva from having any sharp implements with which Silva could hurt himself. Further, in the offense report he himself prepared, Shadle admitted to having given Silva a

razor with which to shave after Silva had been taken to his cell. In this same report, Shadle also wrote:

> After giving Johnny the razor, I thought that I had better get it back from him after he had shaved. I told Johnny I needed the razor back. Johnny said he had flushed the razor down the toilet. When I went into Johnny's room, I did not see the razor.

The summary judgment evidence thus indicates that whether Shadle knew or had reason to know of Silva's vulnerability to suicide is a genuine issue of material fact. Hence, if ShadlesQas a reasonable jail officialsQhad reason to know of Silva's vulnerability, it would be up to the trier of fact to determine whether Shadle's conduct in this particular situation constituted deliberate indifference to Silva's serious medical needs. The district court's denial of Shadle's motion for summary judgment thus does not turn on an issue of law and is not appealable.

Jailer/Dispatcher Elliott

Silva's mother asserts that Shadle informed Elliott of Shadle's belief that Silva was contemplating suicide and that Elliott herself witnessed that Silva was despondent and withdrawn after he was incarcerated, putting her on notice of Silva's suicidal tendencies. However, nothing in the summary judgment record supports these assertions. Elliott herself attested to the fact that she had observed Silva both standing outside of another prisoner's room and sitting on his bed with his feet hanging over the edge. She also attested to the fact that between the time she checked on the prisoners at 4:40 p.m. and

when Silva was found hanging, at approximately 5:49 p.m., she noticed Silva come out of his cell one time and walk around a little before returning to his cell. These observations, without more, do not indicate that Elliott herself, as a reasonable jail official, had knowledge or reason to know of Silva's vulnerability to suicide. Because the record indicates no genuine issue of material fact with respect to the claim against Elliott, the district court erred in not granting Elliott's motion for summary judgment on qualified immunity grounds.

Sheriff Thompson

Silva's mother contends that Thompson failed to implement policies which would have led to the detection of Silva's suicidal tendencies and the prevention of Silva's suicide. She particularly asserts that Thompson failed to train his employees as to the proper techniques in suicide prevention despite knowledge of the risk of suicide inherent in the detention setting. Further, she asserts that various policies actually implemented by ThompsonsQe.g., having only one officer staffing the jail, having no regular cell-check policy, allowing detainees in single cells, and having no provisions for observing at-risk inmatessQamounted to deliberate indifference to possible jail suicides, including Silva's.

In Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453-54 (5th Cir. 1994) (en banc), petition for cert. filed, 62 U.S.L.W. 3827 (U.S. June 6, 1994) (No. 93-1918), this court determined that the same standard employed to determine a municipality's liability

under § 1983 should be employed to determine the liability of an individual to whom a municipality has delegated responsibility for the direct supervision of employees. Hence, we concluded that a policymaking or supervisory official's individual liability under § 1983 arises only at the point at which a plaintiff shows "that the official, by action or inaction, demonstrates a deliberate indifference to [the plaintiff's] constitutional rights." Id. at 454; see City of Canton v. Harris, 489 U.S. 378, 390 (1989) (concluding that § 1983 liability arises for policymakers where "the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"); cf. Evans v. City of Marlin, Tex., 986 F.2d 104, 108 (5th Cir. 1993) ("A failure to adopt a policy rises to the level of deliberate indifference 'when it is obvious that the likely consequences of not adopting a policy will be a deprivation of civil rights.'") (quoting Rhyne v. Henderson County, 973 F.2d 386, 392 (5th Cir. 1992)).

A sheriff, under Texas law, is the chief county policymaker for law enforcement, and his edicts thus establish county policy. Turner v. Upton, 915 F.2d 133, 136 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991). He also has final policymaking authority over the actual training of custodial officers under his supervision. See Colle v. Brazos County, Tex., 981 F.2d 237, 245-46 (5th Cir. 1993). Such a policymaker can be held liable

under § 1983 if he fails to provide his officers with minimal training to detect "obvious medical needs of detainees with known, demonstrable, and serious mental disorders." Burns v. City of Galveston, Tex., 905 F.2d 100, 104 (5th Cir. 1990); see Partridge, 791 F.2d at 1188. The question in the instant case is thus whether Thompson, as sheriff of Donley County, exhibited deliberate indifference in failing to provide training for jail officials in the detection of inmates' suicidal tendencies and in the management of those inmates who manifested such tendencies or in failing to promulgate a suicide detection/management policy.

Thompson's motion for summary judgment points out that he had no personal knowledge of any suicide threat made by Silva and that the policies and customs of Donley County were "not to be consciously indifferent toward actual or potential illnesses and injuries." He attests to the fact that he had "never heard of any attempt or threat by Juan (Johnny) Silva to hurt or kill himself," and there is no summary judgment evidence in the record to show otherwise. However, Silva's mother asserted that at the time of Silva's suicide, the custodial officers at the jail under Thompson's supervision had received no training to enable them to detect a detainee's risk of suicide or to protect a detainee found to be at risk. She also asserted that Thompson failed to have in force a policy concerning the detection, classification, and handling of suicidal matters and that the "policy" in place which Thompson apparently condoned included the lack of regular

cell checks of the prisoners and the monitoring of the prisoners by a single deputy, who also acted as the dispatcher.

We first note that the record in this case is relatively sparse with respect to this issue because no discovery has been conducted. This court has made it clear that "qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad." Lion Boulos v. Wilson, 834 F.2d 504, 507 (5th Cir. 1987); see Gaines v. Davis, 928 F.2d 705, 706-07 (5th Cir. 1991); cf. Partridge, 791 F.2d at 1189-90 (reversing the district court's grant of summary judgment because the central issue and many material facts in the § 1983 case were disputed and because the record was inadequate). Despite the sparseness of the record, we believe that genuine issues of material fact exist as to Thompson's entitlement to summary judgment on qualified immunity grounds.

Thompson's motion for summary judgment does not specifically address the lack-of-training issue, save to mention that "there is no evidence of record in this case that there was any inadequate training . . . toward which the City of Waco or any of its officials could have been consciously indifferent."[1] Although Thompson attests to the fact that the jail followed certain intake procedures to evaluate each detainee on admission to the jail, which included the written assessment of the booking

[1] We note that Thompson must have mistakenly named the city of Waco and its officials, neither of whom is a party to this lawsuit. Defendant's counsel is urged to exercise greater caution when editing the pleadings.

officer's visual observation of a detainee, he does not deny, or even address, the assertion that the jail personnel under his supervision had received no suicide detection training.

Joseph R. Rowan, an expert in correctional administration, having reviewed various documents describing the staffing and procedures involved at the Donley County Jail at the time of Silva's incarceration,[2] attested that he had concluded (1) that the monitoring of all the prisoners in their cells was generally conducted by one person: the jailer/dispatcher on duty; (2) that some of the inmates themselves indicated that Elliott was the only dispatcher/jailer who made regular cell checks; (3) that jail officials were not given in-service training in the recognition and management of suicidal prisoners; and (4) that no suicide prevention plan, policies, or defined procedures had been developed and issued by Thompson. Further, Alton Gaines, at whose home Silva had been arrested, attested to the fact that his brother had attempted suicide in the jail in 1989, thereby suggesting that Thompson, as sheriff, had been put on notice of the need for suicide detection/protection training amongst jail personnel.

The summary judgment record before us reflects a dispute about whether Thompson was deliberately indifferent in failing to establish suicide detection/prevention training for the jail

[2] Rowan stated that the documents which he reviewed contained information of the "type reasonably relied upon by experts in my field in forming opinions or inferences as I have done herein."

personnel or in establishing de facto a policy or custom which included such things as irregular cell checks of inmates, even those who may have exhibited suicidal tendencies. Because Thompson's appeal presents more than a pure question of law, the district court's denial of his motion for summary judgment is not appealable.

IV. CONCLUSION

For the foregoing reasons, we DISMISS the appeal as to Shadle and Thompson, and we REVERSE the district court's denial of summary judgment as to Elliott and REMAND with instructions to dismiss Elliott as a defendant.