UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5444
Summary Calendar

DANNY N. MACON,

Plaintiff-Appellant,

VERSUS

CITY OF BOSSIER CITY, ET AL.,

Defendants-Appellees.

****

No. 93-5445
Summary Calendar

DANNY N. MACON,

Plaintiff-Appellant,

VERSUS

CITY OF BOSSIER CITY,

Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Louisiana
(92-CV-152 & 89-2596)

(July 13, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

---

[1] Local Rule 47.5.1 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

Danny N. Macon, *pro se*, appeals the summary judgments awarded the City of Bossier City, Louisiana for his two civil rights actions under 42 U.S.C. § 1983. We **AFFIRM**.

I.

Macon sued the City in November 1989, alleging that he was denied counsel during his 1989 conviction and sentence for simple theft.[2] The district court construed the complaint as a mixed § 1983 action and habeas corpus petition. In March 1990, it dismissed the habeas portion, without prejudice, for failure to exhaust state remedies; it stayed the § 1983 portion pending exhaustion.

Almost two years later, Macon filed another civil rights action against the City, Faraday Hardware, and its co-owner, Rick Avery.[3] This second action arose from the same facts as the first; both involved Macon's conviction for theft of a drill chuck from the store, for which City police arrested Macon in June 1989. At his July 1989 arraignment and August 1989 trial, Macon unsuccessfully requested appointed counsel. He was found guilty, fined $100 plus costs,[4] and sentenced to participate in a work-

---

that this opinion should not be published.

[2] The complaint listed the State of Louisiana as a co-defendant. The record does not indicate that the State was served. Nor does Macon assert on appeal that the State is liable.

[3] The claims against Avery and the store were dismissed, without prejudice, for failure to prosecute.

[4] On appeal, Macon claims that he was fined $100 plus costs, and told that failure to pay the fine would result in 30 days in jail.

release program which required him to pay a $50 fee and remain under house arrest. Macon violated house arrest; he was re-arrested and jailed for the balance of his sentence -- approximately ten days. In both complaints, Macon claimed that, because he received jail time, his constitutional right to counsel was violated by the denial of appointed counsel.

After Macon filed the second action, the City moved to lift the stay in the first, and to dismiss both for failure to state a claim against the City; or, in the alternative, for summary judgment. *See* Fed. R. Civ. P. 12(b)(6) (dismissal for failure to state claim); 56 (summary judgment). The motions for dismissal or summary judgment cited Macon's failure to identify any City policy or practice under which the municipality could be held liable under § 1983.[5] The City attached affidavits explaining the policies, training, and procedures employed by the City police to safeguard certain constitutional rights.

The magistrate judge recommended dismissing with prejudice. He construed the complaints to contain two general allegations: false arrest, and the City court judge's failure to appoint counsel. The magistrate judge concluded that Macon failed to identify a policy pursuant to which the City could be held liable for the arrest; and that the judge was not a city official for §

[5] In response, Macon agreed that the stay should be lifted, but opposed the motions to dismiss. He claimed that the convicting court denied him his constitutional right to counsel, thus denying him a fair trial. He also claimed that the City was liable for his rearrest, contending that it would not have happened if he had been sentenced to community service, instead of to work release.

1983 purposes. In sum, Macon failed to rebut the City's summary judgment evidence.[6] After de novo review, the district court in August 1983 concurred in the magistrate judge's findings, granted the City's motions, and dismissed both cases with prejudice.

II.

The magistrate judge's report noted that Macon did not submit evidence to rebut the City's (including the affidavits, which the magistrate judge considered). When a district court dismisses for failure to state a claim, but considers matters outside of the pleadings which were presented to the court, the dismissal is treated as a summary judgment. Fed. R. Civ. P. 12(b); 56; *e.g.*, ***Washington v. Allstate Ins. Co.***, 901 F.2d 1281, 1284 (5th Cir. 1990).

Summary judgment, which we review freely, is proper if the pleadings and summary judgment evidence show the lack of a "genuine issue as to any material fact". Fed. R. Civ. P. 56(c); *see* ***Fraire v. City of Arlington***, 957 F.2d 1268, 1273 (5th Cir.), *cert. denied*, 113 S.Ct. 462 (1992). To defeat summary judgment, the non-movant must "go beyond the pleadings and by her own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing ... a genuine issue for trial'." ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)).

---

[6] Macon objected to the magistrate judge's report and recommendations, but did not address or identify the required official policy. Instead, he listed five alleged violations of his rights, from the initial wrongful arrest on the theft charge to the house-arrest aspect of work release.

Although a municipality is not vicariously liable under § 1983 for its employees' actions, it may be liable if its official policy is the cause of an unconstitutional action. *E.g.*, ***Johnson v. Moore***, 958 F.2d 92, 93 (5th Cir. 1992). "In order to state a claim, therefore, [Macon] must set forth facts which, if true, show that his constitutional rights were violated as a result of the city's official policy." ***Id.***

In district court, Macon failed to identify any specific City policy responsible for his allegedly unconstitutional arrest or for the denial of his request for counsel.[7] Macon asserts that it has been the City's practice to jail defendants unable to pay their fines. He attempts to discount the City's affidavits by asserting that the City's efforts to ensure constitutional protections do not prevent violations. Nothing in the record, however, supports Macon's allegation that persons are jailed for inability to pay fines. Moreover, it was Macon's burden "to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial."[8] ***Celotex***, 477 U.S. at 322.

---

[7] In any event, it is doubtful that Macon was entitled to counsel. *See* ***United States v. Haymer***, 995 F.2d 550, 552-53 (5th Cir. 1993) (for Sentencing Guidelines purposes, no constitutional violation where uncounseled misdemeanant is not sentenced to incarceration, but was jailed on contempt charges).

[8] Also, Macon contends that he was given a city permit or license to serve alcohol in 1985 and, in a 1987 hearing before the city council challenging revocation of that permit, the council and city attorney denied his request for counsel. He maintains that this, combined with the denial of his 1989 request for counsel, amounts to a policy. Macon raised this for the first time in his reply brief; we do not consider issues so

Macon also asserts that the City should be liable for the actions of the judges involved in his 1989 conviction and sentence. This Court "ha[s] repeatedly held, however, that a municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker." ***Johnson***, 958 F.2d at 94.

In sum, because Macon failed to show an official policy to hold the City liable for the alleged constitutional violations, the district court did not err.[9] *See* ***Fraire***, 957 F.2d at 1281.

III.

For the foregoing reasons, the judgments are

AFFIRMED.

---

raised. *E.g.*, ***Varnado v. Lynaugh***, 920 F.2d 320, 321 (5th Cir. 1991).

[9] In both his appeals, Macon moves for the City court to provide free copies of his 1989 trial transcript and execution of sentence. Because summary judgment was proper, the motions are **DENIED** as moot.