

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8025  
Summary Calendar

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KEVIN SORRELLS,

Plaintiff-Appellant,

versus

HOWARD S. WARNER, II, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Western District of Texas  
(A 91 CA 688 SS)

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(April 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:\*

This is a civil rights action challenging various actions taken by Hayes County, Texas, and its officials in connection with the prosecution of Kevin Sorrells for a speeding violation. The district court dismissed the action and we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Kevin Sorrells<sup>1</sup> filed this civil rights action against County Judge Howard Warner, Constable Billy Reeves, and Hays County, Texas, alleging that he was illegally arrested and detained for his failure to pay outstanding fines resulting from his conviction of the offenses of speeding and failure to appear for which he was fined \$150 plus costs of \$80 for each offense. Sorrells's convictions were affirmed on appeal, and he filed a petition for discretionary review, which was denied. The appellate mandate was sent to the Hays County Clerk on October 20, 1989.

The trial judge in the speeding and failure to appear cases issued two capiases for Sorrells's arrest in January 1990, stating that Sorrells had failed to pay the fines and costs due and directing any peace officer to place Sorrells in jail until the fines and costs were paid or legally discharged. According to Sorrells, however, these documents were not in the form required by Texas law.

On July 23, 1991, Sorrells was advised of the outstanding warrants for his arrest on the two 1987 convictions. He wrote

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<sup>1</sup>After the notice of appeal was filed, Dan Sorrells, appellant's counsel and father, filed a motion for substitution of party because of the death of Kevin Sorrells on October 5, 1993. Counsel states that he and his wife, Gladys Sorrells, are the only heirs of Kevin Sorrells who has never been married and has no children. Sorrells states that there is no necessity for an administration of the decedent's estate and that none is contemplated. Pursuant to Rule 43(a) of the Federal Rules of Appellate Procedure, the requested substitution is proper and this motion is granted.

Judge Howard Warner, the presiding Judge of the Hays County Court, and inquired about the amount of fines due and a payment plan. Sorrells contends that he was indigent at the time but he did not mention this in his letter to Judge Warner.

Constable Billy Reeves went to the law office of Dan Sorrells (Kevin's father) on July 26, 1991, and advised the elder Sorrells of his intent to arrest Kevin under the two outstanding warrants. Reeves indicated to Dan Sorrells that he was aware that an indigent cannot be arrested for a "fine only" offense but that he was going to arrest Kevin anyway because that was what Judge Warner had ordered him to do. Kevin was out of town, however, and the arrest was not effectuated at that time.

Kevin Sorrells wrote Judge Warner a second letter inquiring about the amount of money due under each capias and enclosed a \$50 money order to be applied to the fines. Judge Warner responded that it was necessary to pay the full amount due for each offense. Sorrells filed a motion to quash the capias on July 31, 1991, and also sent a letter to Constable Reeves, advising him that it would be illegal to arrest him under the capiases and that Sorrells had filed a motion to quash the documents.

Reeves arrested Sorrells on August 5, 1991, pursuant to the instructions of Judge Warner and subsequently filed charges of avoiding and resisting arrest against Sorrells.<sup>2</sup> The court

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<sup>2</sup>According to Reeves's affidavit and report, when he arrested Sorrells, Sorrells's mother threatened him with a shovel and

determined that Sorrells was entitled to credit of \$50 for each day served, which satisfied the fines due for the speeding and failure to appear offenses. Sorrells made bond on the charges of avoiding and resisting arrest and was released from custody.

The defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Warner and Reeves were entitled to judicial and qualified immunity, and that Sorrells failed to allege grounds to impose municipal liability. Sorrells then filed an amended complaint adding as defendants the district attorney and another county judge, who was to preside over his case involving the charge of resisting arrest.<sup>3</sup> The defendants then filed a second motion to dismiss, which the district court granted, except as to Sorrells's claim seeking to enjoin his prosecution for the resisting-arrest charge.

Following a bench trial on the remaining claim, the district court denied Sorrells's request for injunctive relief and entered a final judgment, decreeing that Sorrells was entitled to take nothing. Sorrells timely appealed.<sup>4</sup>

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Sorrells escaped. Sorrells was later captured with assistance from the county canine unit.

<sup>3</sup>Sorrells also sought to enjoin the prosecution of the outstanding charges against him, which was denied by the district court. Although the record is not clear as to the status of that charge at the time the appeal was filed, it is clear that the request to enjoin those proceedings was mooted by Sorrells's death.

<sup>4</sup>Before the trial, Sorrells filed a motion for reconsideration. Although the district court did not directly address this motion, Sorrells reurged his arguments that he was

## II

This court reviews de novo a trial court's dismissal of a complaint for failure to state a claim upon which relief can be granted.<sup>5</sup> Giddings v. Chandler, 979 F.2d 1104, 1106 (5th Cir. 1992). The dismissal may be upheld "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." Id. (internal quotation and citation omitted). "In making this determination, [the Court] accept[s] the well-pleaded allegations in a complaint as true." Id. (citation omitted).

### A

On appeal, Sorrells argues that Judge Warner is not entitled to immunity because he was performing a ministerial function in issuing the *capias* and acted outside the scope of his jurisdiction.

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illegally arrested at the conclusion of the trial. Although the district court did not directly address Sorrells's motion for reconsideration, the court's remarks at the hearing and the entry of the final judgment dismissing the action by implication reflected the court's decision to deny Sorrells's motion. See Lapeyrouse v. Texaco, Inc., 670 F.2d 503, 504-05 (5th Cir. 1982)(although practice is not favored, in some instances entry of final judgment has effect of overruling motions pending at time that judgment is entered).

<sup>5</sup>One of Sorrells's issues on appeal is whether the district court erred in declining to consider his response to the defendants' motion. Sorrells's response to the motion was filed in the record, and it is not clear whether the district court disregarded or was unaware of the pleadings. The defendants suggest that the responses were not timely filed under the local rules and, therefore, that it was within the court's discretion to disregard the pleadings. Because review of the ruling on the motion to dismiss is de novo, Sorrells will not be prejudiced on appeal by the district court's failure to consider his responses.

"Judicial officers are absolutely immune from liability for damages unless they act without jurisdiction." Dayse v. Schuldt, 894 F.2d 170, 172 (5th Cir. 1990).

The Hays County Court has jurisdiction in criminal cases involving misdemeanors. See Tex. Govt. Code Ann. § 25.0003, § 25.1072, (West 1988) and § 26.045(a) (West 1989). A county judge has the authority to issue all writs necessary for the enforcement of the jurisdiction of the county court. Id. at § 25.0004. Based on Sorrells's allegations, Warner possessed subject-matter jurisdiction over his case.<sup>6</sup>

Accepting Sorrells allegations against Warner as true, the actions taken by the judge were subject to judicial immunity. Therefore, the district court did not err in dismissing the complaint against Warner.

B

Sorrells next argues that Hays County is not immune from suit because it pays the constable, who has no supervisor, and who, according to Sorrells, illegally arrested him.

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<sup>6</sup>Sorrells's reliance on Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), to support his argument that Warner's actions were ministerial in nature and, therefore, not subject to immunity, is misplaced. In Forrester, the court held that a judge was acting in an administrative capacity in demoting and discharging an employee. 484 U.S. at 229. Warner's actions in directing the constable to arrest Sorrells for the failure to pay the fines are clearly different from the judge's actions in Forrester and were not administrative in nature. Instead, Warner was exercising a judicial function necessary to conclude the criminal proceeding.

A county can be held liable for injuries under 42 U.S.C. § 1983 only if an official policy or governmental custom caused the deprivation of constitutional rights. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690-94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). "The power to make and enforce policy . . . is marked by authority to define objectives and choose the means of achieving them." Rhode v. Denson, 776 F.2d 107, 109 (5th Cir. 1985), cert. denied, 476 U.S. 1170 (1986).

A Texas constable is not "given the discretion, or range of choice, that is at the core of the power to impose one's own chosen policy." Id. The fact that a constable has the discretion to make arrests under certain circumstances does not constitute policymaking authority. Id.; see also Merritt v. Harris County, 775 S.W.2d 17, 24-25 (Tex. Ct. App. 1989) (county constables are not policymaking officials of county government when performing their narrowly circumscribed duty of executing a writ of execution).

Sorrells's complaint alleges that Constable Reeves was acting at the direction of the county judge in arresting Sorrells and does not reflect that Reeves had the authority to establish the county's policy for arresting individuals who failed to pay a fine. Therefore, the county cannot be subjected to liability as a result of Constable Reeves' service of the *capias*.

Sorrells further argues that Hays County can be held liable because it has a policy of failing to attach a copy of the

judgment, sentence, or order to a *capias*, of failing to make a finding of probable cause, and of not following the directions of the mandate of the court of appeal. These allegations also do not operate to open the county to liability because, even if the *capiases* did not technically comply with the state procedural law, the Constitution is not violated simply by a technical violation of state procedural law.<sup>7</sup> See Lynch v. Cannatella, 810 F.2d 1363, 1372 (5th Cir. 1987) (public officials do not forfeit their right to immunity by violating a statute or regulation that does not give rise to a constitutional right).

C

Sorrells further argues that Constable Reeves is not entitled to immunity because he knew that Sorrells was indigent at the time of the arrest and that an indigent should not be jailed for failure to pay a fine and because he knew that the warrants were invalid on their face.

In considering a defendant's claim of qualified immunity, the court must initially determine whether the plaintiff has alleged a violation of a clearly established constitutional right. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). If the plaintiff has alleged a constitutional violation, the court must then determine

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<sup>7</sup>Sorrells's assertion that his arrest was illegal because it was without probable cause could have stated a constitutional violation but, according to his complaint, the judicial official made a determination that there was probable cause for Sorrells's arrest.

the reasonableness of the officer's conduct. Id. at 657. The objective reasonableness of the officer's conduct must be measured with reference to the clearly established law at the time of the incident in question. Id.

The Constitution prohibits a state from imposing a fine as a sentence and then automatically converting the fine to a jail term if an indigent defendant cannot immediately make payment in full. Tate v. Short, 401 U.S. 395, 398, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971). Tate, however, recognized that there is no "constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses to do so or neglects to do so". Id. at 400. Imprisonment is a proper enforcement method if the defendant is unable to make the payment despite reasonable efforts to satisfy the fines by using alternative methods. Id. at 400-01. Further, Tate is based on an assumption that the defendant has appeared before the court and asserted his indigency. See Garcia v. City of Abilene, 890 F.2d 773, 776 (5th Cir. 1989). The exhibits attached to Sorrells's complaint reflect that Sorrells never personally advised the county officials of his indigence, but that he merely contested the legal validity of the capiases issued.<sup>8</sup>

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<sup>8</sup>He even advised Judge Warner that he would pay the total amount due upon the court's notifying him of the total amount due. Upon receipt of notification of the total amount due, Sorrells filed a motion to quash the capias based on defects in the document, and the fact that he was entitled to monetary credit for time served in jail. Even then, he did not assert his indigence in the motion to quash. Nor did Sorrells's letters to Constable Reeves or to the district attorney advise the officials of his

Therefore, Reeves did not unlawfully arrest Sorrells under the clearly established law because Sorrells had failed to assert his indigence in response to the orders to pay the fines.

Further, the argument that Sorrells's arrest was illegal because Reeves knew that he was contesting the legality of the warrants and that the warrants were invalid on their face is also meritless because, as previously discussed, even if the capiases were technically not in compliance with state law, the arrest was not unconstitutional if Reeves reasonably believed that there was probable cause to arrest Sorrells. The capiases, which were issued by a judicial officer, directed the constable to arrest Sorrells because he had failed to pay his fine. Therefore, it was reasonable for Reeves to determine that he had probable cause to effect the arrest.

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indigent status. The only allegation in Sorrells's complaint indicating that Reeves (or any defendant) had any knowledge that Sorrells was contending that he was indigent was Reeves's discussion with Sorrells's father with respect to the impropriety of arresting an indigent in a fine-only case. This representation by Sorrells's father, however, was insufficient in the light of Sorrells's personal failure to assert his indigency to the court or county officials.

III

For the reasons stated above, the judgment is

A F F I R M E D.