UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-8707

CARLOS O. MARTINEZ,

Plaintiff-Appellee,

VERSUS

JOHNNY KLEVENHAGEN, ET AL.,

Defendants,

JOHNNY KLEVENHAGEN,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(No. DR-91-CA-26)

April 14, 1995

Before REYNALDO G. GARZA, DEMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Johnny Klevenhagen ("Sheriff Klevenhagen"), Sheriff of Harris County, Texas, appeals from the district court's denial of his motion to dismiss on the basis of qualified immunity in a civil rights action filed by Carlos Martinez ("Martinez") under 42 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 1983. We dismiss the appeal on jurisdictional grounds.

FACTS

On August 4, 1987, Jose Sanchez ("Sanchez") was arrested in Houston and charged with carrying a prohibited weapon. The Texas driver's license in Sanchez's possession identified him as "Carlos Martinez." When Sanchez failed to appear at a probable cause hearing, a warrant was issued for the arrest of "Martinez."

As a result of these events, members of the Harris County Sheriff's Office entered certain information into the Texas Crime Information Center ("TCIC") and the National Crime Information Center ("NCIC"), two databases operated and maintained cooperatively by local, state, and federal law enforcement agencies. Those entries stated that "Carlos Martinez" was wanted in Harris County, Texas, for the prohibited weapon offense, for a car theft offense, and for possession of a firearm on school premises. The driver's license number from the license in Sanchez's possession, which is, in fact, Martinez's actual driver's license number, was included as a "descriptor" of the fugitive.

Martinez, a resident of Martin County, alleges, through his own affidavit and those of Deputies Wellington and Castro of Martin County, that after he and the deputies became aware of the erroneous information in the databases, they made numerous phone calls to the Harris County Sheriff's Office to try to get the information removed. He alleges that his fingerprints were sent to Harris County for verification, but that even when the Harris County Sheriff's Office knew he was not the individual sought in

the warrant, the information was not deleted from the databases. Sheriff Klevenhagen, however, maintains that his office has no record of any communication with the Martin County Sheriff's Office.

In the following years, Martinez was subject to arrest and detention on two different occasions. In June 1989, he was detained and then arrested and strip-searched by United States Immigration Service officers as he returned from a day trip to Mexico with a friend. The officers handed Martinez over to the Del Rio police, who held him for four or five hours until they were able to determine that he was not the fugitive Sanchez. They then released him, according to the incident report, "on the authority of the Sheriff's office in Harris County."

In March 1990, while visiting Big Spring, Texas, Martinez was arrested for public intoxication and trespass. TCIC and NCIC records related to this incident show that, in a phone call to the Big Spring police department, the Harris County Sheriff's Office confirmed the fact that the Martinez held in custody by Big Spring police was not the one wanted in Harris County. Then, less than a week later, the Harris County Sheriff's Office placed a new entry in the databases listing "Carlos Martinez" as an alias of Jose Sanchez and included Martinez's driver's license number as a descriptor of the fugitive. Sometime between July 1990 and January 1991, Martinez's name and driver's license number were removed from the databases.

In June 1991, Carlos Martinez filed a civil rights action

under 42 U.S.C. § 1983 against Johnny Klevenhagen, Sheriff of Harris County, Texas, in both his individual and official capacities. Martinez also sued Harris County and unknown deputy sheriffs. Martinez alleged that by causing his false arrest and imprisonment on two separate occasions, these parties violated his Fourth, Fifth, and Fourteenth Amendment rights. He also asserted pendent state-law claims of false arrest and false imprisonment. Martinez also sought an unspecified amount of damages for physical pain and mental distress, punitive damages against Sheriff Klevenhagen and his deputies, and costs and attorneys' fees.

Sheriff Klevenhagen and Harris County filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Among other things, the motion asserted that Sheriff Klevenhagen was shielded from liability by the doctrine of qualified immunity. Martinez filed a response to the motion to dismiss arguing that "he was wrongfully arrested and detained because of the 'regular and repeated [non-]response' of the Harris County Sheriff's Office to requests that his driver's license number be removed from the TCIC and NCIC data banks so that he would not be a target for groundless arrests." The defendants replied to this pleading and attached exhibits to support their arguments. Martinez then filed a supplemental response.

Because both parties submitted evidence outside the pleadings, the district court treated the motion as a motion for summary judgment. The district court denied the motion for summary judgment with respect to Harris County and Sheriff Klevenhagen in

his official capacity. The district court also denied the motion with respect to Klevenhagen's claim of qualified immunity in his individual capacity. The district court granted summary judgment to the defendants with respect to the state-law claims against them. Klevenhagen filed a timely notice of appeal from the denial of the motion for summary judgment on the basis of qualified immunity.

I

We review Sheriff Klevenhagen's claim that the district court erred in denying his motion to dismiss on qualified immunity grounds under summary judgment standards. Young v. Biggers, 938 F.2d 766, 768 (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 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). We review 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); Doe v. Taylor Independent School District, 15 F.3d 443, 446 (5th Cir. 1994) (en banc), petition for cert. filed, 62 U.S.L.W. 3827 (U.S. June 1, 1994) (No. 93-1918).

II

An order denying a motion for summary judgment based on a claim for qualified immunity in a § 1983 action, to the extent that it turns on an issue of law, is immediately appealable. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). If disputed factual issues material to immunity are present, however, the district court's denial of summary judgment is not appealable. Lampkin, 7 F.3d at 431.

In examining an official's claim of qualified immunity, we follow a two-step process. The first step is to ascertain whether the plaintiff alleges "the violation of a clearly established constitutional right." Sieger v. Gilley, 500 U.S. 226, 231 (1991). We use "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). The second step is to decide whether the defendant's conduct was objectively reasonable in light of the legal rules clearly established at the time of the incident. Rankin, 5 F.3d at 108.

In Sanders v. English, 950 F.2d 1152, 1159 (5th Cir. 1992), we stated that causes of action under § 1983 for false arrest and false imprisonment "implicate the constitutional 'guarantees of the fourth and fourteenth amendments when the individual complains of an arrest [and] detention....without probable cause.'" Id. We further stated that "a plaintiff seeking recovery from a police officer for one of these constitutional torts must tender evidence establishing misconduct that exceeds mere negligence." Id.

In the present case, Martinez alleges that he was wrongfully

arrested, detained and strip-searched in one instance and wrongfully detained in another based on the incorrect information contained in the TCIC and NCIC databases linking his name and driver's license number with the fugitive Sanchez for whom there was an outstanding arrest warrant. Martinez alleges that he and two deputy sheriffs from Martin County, Texas, attempted to have the erroneous information removed from the system on numerous occasions, but that the Harris County Sheriffs's Office would not remove it.[1] Martinez argues that the information was knowingly and intentionally, not negligently, allowed to remain in the system. The facts of this case, as alleged by the plaintiff, certainly state a violation of the well-established constitutional rights against false arrest and false imprisonment.

This court has stated that "[e]ven if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable." Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992). In further definition of the reasonableness of an official's conduct, we have held that an official can not be held liable under a § 1983 claim for the actions of this subordinates unless it is shown that the official, "by action or inaction, demonstrate[d] a deliberate indifference to [the plaintiff's] constitutional rights." Doe, 15 F.3d at 454. To demonstrate deliberate indifference on the part of an official, a plaintiff must show the following: "(1) an unusually serious risk

[1]These allegations are supported by Martinez's affidavit, as well as the affidavits of the two deputies from the Martin County Sheriff's Office. Sheriff Klevenhagen, however, maintains that his office has no record of any communications with the Martin County Sheriff's Office.

of harm..., (2) defendant's actual knowledge of (or at least willful blindness to) that elevated risk, and (3) defendant's failure to take obvious steps to address that known, serious risk." Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir.), cert. denied, 113 S. Ct. 113 (1992).

Martinez alleges that Sheriff Klevenhagen was personally informed of the risk in which Martinez was placed by having his name and driver's license number entered in the databases, and that, despite this knowledge, Sheriff Klevenhagen did not direct that the erroneous information be removed. Deputy Castro stated by affidavit that on the occassions he talked to Harris County Sheriff's Office officials about correcting the computer information and removing Carlos Martinez's driver's license number from the computer, he could not locate anyone who would agree to do it and was advised that he would need to talk to the Sheriff. Deputy Castro twice attempted to talk to Sheriff Klevenhagen, but was told he was unavailable on one occasion, and on another occasion he "left word" with a person he believed to be the Sheriff's secretary, but his call was not returned. Taken along with Martinez's allegation, the affidavit of Deputy Castro presents a question of material fact as to whether Sheriff Klevenhagen acted in an objectively reasonable manner by not correcting the erroneous information if the error had been brought to his attention, or whether his conduct rises to the level of deliberate indifference.

Martinez alleges in the alternative that the constitutional violations he suffered are "the direct result of a rigid and

stubbornly enforced policy and practice of the Harris County Sheriff's Office, a policy and practice which has, now, been acknowledged and ratified by the Sheriff, Johnny Klevenhagen." We have held that a sheriff can not be held liable under 42 U.S.C. § 1983 for the actions of his deputies solely on the basis of vicarious liability. Baskin v. Parker, 602 F.2d 1205, 1207-08 (5th Cir. 1979). A sheriff, as a state official, can be held liable, however, if a casual connection is established between an act of the sheriff and the alleged constitutional violation. See Doe, 15 F.3d at 453 (finding that an official can be held liable if the plaintiff shows that there is a "'deliberately indifferent' policy" established or approved by that official that is the "'closely related' cause of the violation of the plaintiff's federally protected rights"). In Henzel v. Gerstein, 608 F.2d 654, 658 (5th Cir. 1980), we concluded that a plaintiff can meet this burden of establishing a casual connection if he can present evidence from which the jury could reasonably conclude that the deputies acted pursuant to policies implemented by the sheriff.

Martinez contends that the Sheriff, as "the county's final policy maker in the area of law enforcement," Turner v. Upton County, 915 F.2d 133, 136 (5th Cir. 1990), is responsible for a policy requiring that information once entered into the databases not be removed until the "right" person has been arrested. In his affidavit, Deputy Welling states that after mailing Martinez's fingerprints to the Harris County Sheriff's Office, he called to confirm that Martinez's driver's license number has been cleared

from the databases. A deputy sheriff told him that although Martinez was not the person for whom the warrant had been issued, his driver's license number would not be removed from the databases until the "right" Carlos Martinez was apprehended. Further, in response to a request for admission, Sheriff Klevenhagen admitted that "[t]he timing of, and manner in which, agents of the Harris County Sheriff's Office participated in the process of entering and removing information into and from the TCIC database concerning Carlos Martinez's driver's license number was consistent with the policy which governed that matter." This affidavit and admission present a question of material fact as to whether the Sheriff established or condoned a policy of the type the plaintiff alleges and whether such action rises to the level of deliberate indifference towards an individual's constitutional rights. Accordingly, the district court's order denying the motion for summary judgment based on qualified immunity is not appealable.

CONCLUSION

For the foregoing reasons, the appeal from the judgment of the district court is **DISMISSED**.