

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-20385

Summary Calendar

WISTING FIERRO RUIZ and
OLGA MARTINEZ,

Plaintiffs-Appellants,

versus

SUSIE M. WONG; JOSE A. GARCIA;
RICK ASHWOOD; MICHAEL BALAS;
JOHNNY KLEVENHAGEN, Sheriff,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(CA-H-93-3350)
(January 24, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Wisting Fierro Ruiz and Olga Martinez appeal the district court's order granting defendants' motion to dismiss or for summary judgment. We affirm.

Appellants' action arises out of a search warrant prepared by IRS agent Susie Wong on November 16, 1991. The search warrant for

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appellants' residence called for the seizure of United States currency, controlled substances, photographs, and "other tangible items evidencing the obtaining, secreting, transfer and/or concealment of assets and/or currency." Defendant Michael Balas, the IRS agent who helped execute the warrant, seized gold watches and a gold bracelet and necklace, among other things, from Ruiz's and Martinez's residence. Appellants claim constitutional violations regarding the execution of the search warrant, the seizure of certain items during that search, the loss of some jewelry seized in that search, and the custodial detention of other personal items taken from them at their booking in the Harris County Jail.

After Ruiz and Martinez were convicted of possession with intent to distribute cocaine and conspiring to launder money, Ruiz wrote to Wong requesting the return of property seized in the search or surrendered at booking. Wong replied that some jewelry, cash, and photographs were available for return, and she requested the value of a seized necklace and bracelet. Although she did not state so in the letter, the necklace and bracelet had been lost. In a later letter, she explained that the property would be returned to Ruiz's power-of-attorney representative. In response, Ruiz signed a power of attorney authorizing a Ms. Tiffany Matthews to acquire his property for him. Wong gave Matthews all of the property she had described in her letter, but refused to turn over property belonging to Martinez until she received a power of attorney from Martinez herself.

On October 22, 1993, Ruiz and Martinez filed this action. They sued Wong and Balas, as well as Jose Garcia, a Houston Police Department officer who participated in the arrest; Johnny Klevenhagen, the sheriff of Harris County who has supervisory authority over the Harris County Jail; and Rick Ashwood, a Houston police officer who transported Ruiz from the Harris County Jail to the Montgomery County Jail. The district court granted all defendants' motions to dismiss or for summary judgment, and Ruiz and Martinez here appeal.

I.

Although it is hard to discern appellants' argument from their pro se brief, it is harder to imagine grounds for reversing the district court's order. The district court rightly rejected appellants' claims against the federal defendants. Appellants sued all the defendants except Wong in their official capacity -- no statement regarding capacity is made as to Wong -- and to the extent that appellants have sued Wong and Balas, the federal defendants, in their official capacities, their suit is barred by sovereign immunity. The United States, as sovereign, cannot be sued without its consent. Agents and officers of the United States enjoy sovereign immunity when they are sued in their official capacities. See Bank One, Texas v. Taylor, 970 F.2d 16, 33 (5th Cir. 1992), cert. denied, 113 S. Ct. 2331 (1993); Alabama Rural Fire Insurance Company v. Naylor, 530 F.2d 1221, 1225 (5th Cir. 1976). Because suits against Wong and Balas in their official capacities seek a remedy against the United States, appellants have

the burden of showing that the government has waived sovereign immunity. See Harvey Construction Company v. Robertson-CECO Corp., 10 F.3d 300, 303 (5th Cir. 1994). Appellants made no such showing.

Although the government has made a limited waiver of its sovereign immunity for claims like appellants' in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-2680, that waiver is unavailable here because appellants did not take the necessary administrative steps to claim compensation under the FTCA. 28 U.S.C. § 2675(a); Transco Leasing Corp. v. United States, 896 F.2d 1435, 1441 (5th Cir. 1990). (Having said that, we note that appellants might still be able to recover the value of the jewelry lost while in custody of the IRS by bringing a suit against the United States for breach of an implied-in-fact contract of bailment in the Court of Federal Claims under the Tucker Act (28 U.S.C. § 1491(a)(1)), or in district court for a claim not exceeding \$10,000 under 28 U.S.C. § 1346(a)(2), as the federal defendants suggest in their appellate brief.)

Although it is unclear whether appellants have sued Wong in her official or individual capacity, even a suit against her in her individual capacity would not succeed because she did not violate any clearly established constitutional rights. Appellants allege that Wong violated their First, Fourth, Eighth, and Fourteenth Amendments rights by drafting a flawed search warrant, by failing to return their religious items, and by requesting evidence of the lost items' value.

By denying Martinez's motion to suppress the evidence at their criminal trial, the district court has already effectively rejected appellants' Fourth Amendment claim. In his motion to suppress, Ruiz argued that the search warrant lacked probable cause and did not sufficiently specify the items to be seized. The district court denied that motion, and this court may take judicial notice of that. See Fed. R. Evid. 201; Moore v. Estelle, 526 F.2d 690, 694 (5th Cir.), cert. denied, 426 U.S. 953 (1976).

Appellants' First and Eighth Amendment claims that they have been separated from their religious medallions while in prison are undermined by defendant Wong's outstanding offer to return the items to appellants upon presentation of powers of attorney. In any event, the district court found no evidence that anyone retained these religious medallions with the intent of preventing appellants from practicing their religion, or that being separated from their religious medallions prevented appellants from practicing their religion.

Appellants' Fifth and Fourteenth Amendment claims that the jewelry loss violates their due process rights were also rightly rejected below. Negligent loss of property by government officials does not give rise to a constitutional claim. See Daniels v. Williams, 474 U.S. 327 (1986). Even if the loss of the jewelry were intentional, appellants would have no due process claim since they have adequate post-deprivation remedies. See Hudson v. Palmer, 468 U.S. 517 (1984).

II.

Nor did the district court err in rejecting appellants' claims against the non-federal defendants: Garcia, Ashwood, and Klevenhagen. Appellants allege that these defendants failed to return their currency and violated their First and Eighth Amendment rights by holding their religious medallions in custodial detention.¹ These allegations, however, are insufficient to sustain appellants' claims against these defendants.

Appellants have sued these defendants in their official capacity as Houston police officers and as the sheriff of Harris County. Suits against government officials in their official capacity are treated as suits against the government. See Hafer v. Melo, 112 S. Ct. 358, 361 (1991). To establish municipal or county liability under § 1983, appellants must show not isolated incidents of unconstitutional behavior, but a "pattern of similar incidents in which citizens were injured or endangered by intentional or negligent policy misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the [municipality or county]." Freire v. City of Arlington, 957 F.2d 1268, 1278 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992) (citation and internal quotation marks omitted); see also Colle v. Brazos County, Tex., 981 F.2d 237, 244 (5th Cir. 1993). Here, however, appellants have

¹ The district court found that by check dated May 20, 1992, the currency, \$771.50, was returned to appellants. The chain and religious medallion belonging to appellant Ruiz has been returned to his attorney-in-fact. A chain (without a medallion) belonging to appellant Martinez was available for return to her attorney-in-fact upon presentation of a power of attorney when the district court issued its order.

failed even to allege that the City of Houston or Harris County had a policy of unconstitutionally withholding the property of arrestees.

Instead, appellants have sued defendant Klevenhagen because he is the supervisor of the Harris County Jail where appellants were booked and where they relinquished some of their property. Liability under § 1983 cannot be imposed on the basis of respondeat superior. See Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). Appellants' claim against defendants Garcia and Ashwood is even more tenuous. The district court found that there is no evidence that either of them participated in the custodial detention of appellants' property. Accordingly, the district court rightly dismissed these claims.

III.

Appellants also argue that the district court improperly denied their motions for discovery. However, because appellants have not stated what information they seek through this discovery or how the information would have changed the outcome of this case, they have not demonstrated that the district court abused its discretion in denying their motions. Cf. Marshall v. Norwood, 741 F.2d 761, 764 (5th Cir. 1984).

IV.

Finally, Ruiz and Martinez have moved this court for leave to file an amended complaint. This appellate court cannot grant their requested relief. Accordingly, the motion is denied.

AFFIRMED.