IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60833
Summary Calendar

JOHN HENRY MCKENZIE,

Plaintiff-Appellant,

v.

CITY OF COLUMBIA, MS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(H 94 CV 329)

August 15, 1995

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

John Henry McKenzie brought suit under 42 U.S.C. § 1983 against the City of Columbia, Mississippi, Marion County, Mississippi, Columbia Police Chief Joe Sanders, Columbia police officers John Wayne Tolar, Chuck Pierpont, James Carney, and Marion County Sheriff Webbie McKenzie. McKenzie alleged that: (1) Tolar used excessive force when arresting him; (2) the City and County denied him medical care while he was in jail; and (3) he was unlawfully detained for an excessive time without being taken

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

before a magistrate for a probable cause hearing. The district court granted summary judgment with regard to each of the defendants, and McKenzie now appeals. We affirm the district court's summary judgment.

I. BACKGROUND

On February 2, 1991, McKenzie and Jason Johnson went to retrieve McKenzie's belongings from the apartment of a friend with whom McKenzie had been staying. Because McKenzie did not have a key to the apartment, he forced the door open. A witness observed McKenzie entering the apartment and reported the incident to the police. Officer Tolar responded to the report and obtained descriptions of McKenzie and the automobile in which he was riding.

Tolar searched for the automobile and within a short time pulled over Johnson and McKenzie. Johnson, who was driving, got out of the car and told Tolar that McKenzie had a shotgun in the back seat. Tolar then ordered McKenzie out of the car. As Tolar handcuffed McKenzie, McKenzie claims Tolar delivered a sharp blow to his right foot, causing injury to McKenzie's knee and hip. Tolar, however, contends that he only applied reasonable pressure to McKenzie's foot in order to force his feet apart.

Other police officers soon arrived on the scene. One of these officers, Wayne Miller, who is not a named defendant, testified he searched the automobile at the scene and found a sawed-off shotgun and marihuana. According to McKenzie, however, Tolar planted the marihuana on his person as he was interrogating him in jail.

Although McKenzie was arrested by Columbia city police officers, he was taken to the Marion County Jail, which has an agreement with the City to house City prisoners. After McKenzie was detained, the police went before a municipal judge and obtained criminal warrants for McKenzie's arrest, charging him with carrying an illegally altered, concealed shotgun and with possessing a controlled substance. The warrants provided that McKenzie was to appear before the municipal court on February 14, 1992. On February 6, McKenzie posted bond and was released. McKenzie contends that he was not told he could post bail at any time before February 6.

During the time he was incarcerated, McKenzie complained to jail personnel that his leg was swollen, and, as a result, he needed immediate medical attention. It is not disputed that the jailer, a County employee, informed the Columbia police department of McKenzie's complaint. Nor is it disputed that soon after his complaint, two City police officers visited McKenzie to investigate his alleged injury. The two officers who investigated McKenzie's complaint determined that McKenzie's alleged injury did not warrant immediate medical care.

When McKenzie was released, he visited three physicians for the alleged injury to his leg. The first two physicians told McKenzie that he had, in effect, only strained his muscles. The third physician, however, told McKenzie that the ligaments in his leg were damaged. McKenzie claims that the first two physicians refused to diagnose his leg correctly because he told them it was an injury sustained in an encounter with a police officer.

McKenzie admits that he lied to the third physician, telling him he had injured his leg in a soccer game. Over a year after his arrest, McKenzie underwent an operation on his knee, which he claims was a result of the injury sustained in his initial detention and his subsequent inability to receive medical attention for four days.

After McKenzie filed his complaint and discovery began, the County and the sheriff together moved for summary judgment, as did the City and its police officers. In its order granting judgment for the County and the sheriff, the district court first stated that the sheriff was not personally involved in the alleged denial of medical care and that the County had properly followed its procedure for providing medical care to City detainees by informing the City of McKenzie's complaint. The district court then reasoned that neither the sheriff nor the County could be liable for excessive use of force or unlawful detention because no County official was involved in McKenzie's apprehension since the duty to bring McKenzie before a magistrate rested with the City, not the County.

In its order granting summary judgment for the City and its officials, the district court noted that it considered the claims against officers Tolar, Pierpont, and Carney to be brought only in their official capacities since McKenzie's complaint did not specifically name the defendants in their individual capacities. Because a suit against an official in his official capacity is considered a suit against the governmental entity, the district court then addressed whether McKenzie had identified a particular

policy of the City which resulted in his injury. The district court concluded that McKenzie had identified no such policy and, therefore both the City and the three officers were entitled to summary judgment on the issue of excessive force. Furthermore, the court dismissed the claim against the City for denial of medical services because McKenzie did not allege that the City's procedure for addressing prisoners' medical complaints was unconstitutional.

Unlike the other City police officers, McKenzie specifically named Columbia Police Chief Sanders in both his individual and official capacities. Citing the doctrine of qualified immunity, the district court dismissed the claim against Sanders in his individual capacity for alleged denial of medical care.[1] The district court also dismissed the claim for denial of medical services against Sanders in his official capacity because the City properly followed its procedure for investigating a prisoner's medical complaint.

With regard to McKenzie's claim of unlawful detention against all defendants, the district court highlighted the City's policy in January 1991 of detaining an arrestee for no more than seventy-two hours without a judicial determination of probable cause. Although soon after McKenzie's arrest, the Supreme Court ruled that an

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[1] Although the district court wrote that qualified immunity protects Sanders in his "official" capacity, as opposed to his individual capacity, it is apparent to this court that this was an inadvertent error in word choice. Other than this misstatement, the district court used the correct standards and analysis in evaluating a qualified immunity claim.

arrestee cannot be detained for more than forty-eight hours without a probable cause hearing, see County of Riverside v. McLaughlin, 111 S.Ct. 1661, 1671 (1991), this standard had not been announced at the time McKenzie was arrested. The district court noted that while McKenzie was, in fact, detained for more than seventy-two hours, McKenzie had not identified an unconstitutional policy adopted by the City. The district court also found that McKenzie had not shown that his injury was incurred by the execution of an unconstitutional policy. Accordingly, the district court dismissed McKenzie's claim for unlawful detention. The district court also held that since McKenzie's alleged offense had occurred in the presence of police officers, there was no need for a probable cause hearing. Lastly, the district court dismissed McKenzie's pendent state claims and his request for punitive damages against Sheriff McKenzie and Police Chief Sanders.

McKenzie appeals the district court's decision, arguing that: (1) the district court erred in ruling that Tolar, Pierpont, and Carney were not sued in their individual capacities; (2) the district court wrongfully dismissed McKenzie's claims against Police Chief Sanders, the City of Columbia and Marion County for unlawful detention and denial of medical treatment; (3) the district court erred in dismissing McKenzie's complaint against Sheriff McKenzie in his individual capacity; and (4) the district court wrongfully dismissed McKenzie's claims for punitive damages against Police Chief Sanders and Sheriff McKenzie.

II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the same criteria used by the district court in the first instance. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). First, we consult the applicable law to ascertain the material factual issues. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence bearing on those issues, viewing the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); FDIC v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), cert. denied, 114 S. Ct. 2673 (1994). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

Under Rule 56(c), the party moving for summary judgment bears the initial burden of informing the district court of the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Norman v. Apache Corp., 19 F.3d 1017, 1023 (5th Cir. 1994). If the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-87 (1986); Norman, 19 F.3d at 1023. The burden on the non-moving party is to do more than simply show that there is some

metaphysical doubt as to the material facts. Matsushita, 475 U.S. at 586.

III. ANALYSIS

Relying on an unpublished district court opinion, see Fairman v. Stokes, No. DC 91-40-D-O (N.D. Miss. Sept. 28, 1992), the district court in the case at bar found that because McKenzie's original complaint contained no express statement that Tolar, Pierpont, and Carney were being sued in their individual capacities, McKenzie's allegation that defendants were acting under the color of law indicated to the court that the three defendants were being sued solely in their official capacities. Additionally, the district court wrote that the fact Police Chief Sanders was named in both his individual and official capacity indicated that "there was no individual capacity intended against the other defendants."

The Supreme Court has held that when the capacity in which a defendant is sued is not clear, the course of proceedings should indicate the nature of the liability for which the plaintiff prays. Kentucky v. Graham, 105 S.Ct. 3099, 3106 n.14 (1985). We have also held that "the determination whether the judgment will be paid by the individual or by the state is often difficult to make. When the distinction is unclear, the essential nature and effect of the proceeding must be examined." Karpovs v. Mississippi, 663 F.2d 640, 644 (5th Cir. 1981). In light of these holdings, the district court misstated the applicable rule in its reliance solely on the

wording of McKenzie's complaint. McKenzie's failure to specify the capacity in which Tolar, Pierpont, and Carney were sued does not mean that they were only sued in their official capacity. Nor does naming Police Chief Sanders in his individual capacity mean that, by implication, the other defendants were sued only in their official capacities. While that may have been a relevant consideration, the district court should have resolved the uncertainty in McKenzie's complaint by examining the whole of the proceedings in its order.

Nevertheless, any error by the district court is harmless. For even if evidence in the proceedings indicates that McKenzie intended to name Tolar, Pierpont, and Carney in their individual capacities, the district court's judgment with regard to the three officers is proper based on their assertions of qualified immunity.[2] State officials performing discretionary duties are shielded from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. Butz v. Economou, 98 S.Ct. 2894, 2909 (1978).

Qualified immunity turns primarily on objective factors, including whether the law at the time the incident took place was clearly established. Harlow v. Fitzgerald, 102 S.Ct. 2727, 2737 (1982). If a defendant can prove that police officers of reasonable competence could disagree on whether the defendant was

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[2] In their reply to McKenzie's complaint, the three police officers asserted the defense of qualified immunity despite their claim that they assumed they were being sued solely in their official capacities.

justified, then qualified immunity should be recognized. Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995).

Regarding his claim against Pierpont and Carney, any constitutional deprivations McKenzie can prove occurred while he was still a pre-trial detainee would necessarily involve a Fourteenth Amendment claim. See Grabowski v. Jackson County Public Defenders Office, 47 F.3d 1386 (5th Cir. 1995), reh'g en banc granted, No. 92-7728, 94-60089 (March 14, 1995); see also Bell v. Wolfish, 441 U.S. 520 (1979). As of March 1995, a Fourteenth Amendment claim for denial of medical care involves an inquiry into whether the failure to supply care is reasonably related to a legitimate government objective. Grabowski, 47 F.3d at 1396. That standard, which is more liberal than its Eighth Amendment counterpart, is currently under review. See Id. Nonetheless, even if the Fifth Circuit were to adopt a standard as strict as that of "deliberate indifference," which is currently required to prove an Eighth Amendment claim for denial of medical care, we find that

Officers Pierpont and Carney have sufficiently demonstrated that their refusal to allow McKenzie immediate medical attention did not violate clearly established constitutional rights of which a reasonable police officer should have known. The officers' decision that McKenzie's alleged injury did not merit immediate medical attention is strongly buttressed by the objective findings of the first two doctors who examined McKenzie upon his release.

Thus, in light of the doctors' examinations and McKenzie's lack of proof as to any causal link between his operation and the officers' alleged denial of medical care, it is clear that an

officer of reasonable competence would have made the same decision that Officers Pierpont and Carney did. Qualified immunity was therefore appropriate with regard to these two defendants.

With regard to Officer Tolar, McKenzie's claims against him do not involve a genuine issue of material fact regarding liability for either use of excessive force or denial of medical care. Because the events in this case took place in 1991, the objective reasonableness of the defendant's use of force must be evaluated under the law at that time. See Fontenot v. Cormier, 56 F.3d 669, 674 (5th Cir. 1995). In 1991, to prevail on a Fourth Amendment claim of excessive force, a plaintiff had to prove that a significant injury resulted from a use of force that was clearly excessive to need, and that that excessiveness of need was objectively reasonable. Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989)(en banc). In light of the findings of the first two doctors who examined his leg, McKenzie does not raise a genuine issue of material fact on the first requirement of an excessive force claim in 1991 -- that the injury be significant.

Regarding McKenzie's additional claim against Tolar for unlawful detention, there is no evidence that Tolar was involved in any manner with McKenzie after McKenzie was initially detained. As a result, there is no genuine issue of material fact regarding Tolar's liability on these issues. Accordingly, we affirm the district court's grant of summary judgment.

Concerning the district court's dismissal of McKenzie's claims against Police Chief Sanders and Sheriff McKenzie, supervisory officials cannot be held liable under 42 U.S.C. § 1983 on any

theory of vicarious liability. Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987). A supervisor may be liable, however, if he is personally involved in a constitutional deprivation or if there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. Id. at 303. Further, a supervisor may be liable under § 1983 even without overt personal participation in the offensive act if he implements a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force behind the constitutional violation. Id. at 303.

It is clear from the record that neither Police Chief Sanders nor Sheriff McKenzie was personally involved in any alleged denial of medical care to McKenzie. Furthermore, McKenzie does not contend that, at the time of the incident, either Chief Sanders or Sheriff McKenzie personally implemented any policy which was constitutionally deficient. Although McKenzie alleges that both Chief Sanders and Sheriff McKenzie were liable as a result of their failure to adequately train and/or supervise their respective officers, McKenzie's allegations do not rise to the level of a policy of neglect, nor do they establish an issue of material fact regarding a causal relation between McKenzie's alleged injury and Chief Sanders' or Sheriff McKenzie's conduct. Since neither Chief Sanders nor Sheriff McKenzie can be held liable for a constitutional deprivation based solely on their respective positions, we find that the district court's grant of summary judgment with regard to the claims against them was proper.

McKenzie also contends that the district court erred in dismissing his claims against the City of Columbia and Marion County for unlawful detention and denial of medical care. We have held that municipalities are liable under 42 U.S.C. § 1983 for a deprivation of constitutional rights only if that deprivation is inflicted pursuant to an official, municipal policy. Campbell v. City of San Antonio, 43 F.3d 973, 977 (5th Cir. 1995). Additionally, we have held that an isolated violation is not the persistent, often repeated violations that constitute a policy as required for § 1983 liability. Bennett v. City of Slidell, 728 F.2d 762, 768, (5th Cir. 1984), cert. denied, 472 U.S. 1016 (1985). Although McKenzie's detention exceeded the City's limit of seventy-two hours, it was only an isolated incident. The district court determined that McKenzie had failed to allege any general policy of the City or County that resulted in his alleged injury or his allegedly unlawful detention. We find no error in this conclusion. Accordingly, we find that the district court properly granted summary judgment on these issues.

A short time after the incident at bar occurred, the Supreme Court ruled that a pre-trial detainee arrested without a warrant cannot be held for more than forty-eight hours without a judicial determination of probable cause. County of Riverside v. McLaughlin, 111 S.Ct. 1661, 1671 (1991). McKenzie concedes that this standard should not be applied retroactively to his case. Nonetheless, on appeal McKenzie attacks the City of Columbia's earlier seventy-two hour detention period for a warrantless arrest as unconstitutional under the law established in the Fifth Circuit

at the time of McKenzie's arrest. See Sanders v. City of Houston, 543 F.Supp 694, 702 (S.D. Tex. 1982), aff'd, 741 F.2d 1379 (5th Cir. 1984)(no published opinion); see also United States v. Garza, 754 F.2d 1202, 1211 (1985)(Goldberg, J., concurring). McKenzie, however, did not allege that the seventy-two hour policy was unconstitutional in and of itself in either his initial complaint nor his replies to the defendants' motions for summary judgment. It is well-established that, in order to preserve an argument on appeal, a litigant must raise the argument to such a degree that district court may rule on it. FDIC v. Mijalis, 15 F.3d 1314, 1327 (5th Cir. 1994); Butler Aviation Int'l, Inc. v. Whyte (In re Fairchild Aircraft Corp.), 6 F.3d 1119, 1128 (5th Cir. 1993). Typically, we will not consider on appeal matters not presented to the trial court. Quenzer v. United States (In re Quenzer), 19 F.3d 163, 165 (5th Cir. 1993). Because the district court did not have the opportunity to evaluate the City's seventy-two hour policy independent from the time McKenzie was actually detained, its grant of summary judgment in favor of the City was proper and is hereby affirmed. Moreover, because McKenzie failed to assert at the district court level any general policy of the County that resulted in his unlawful detention, the district court's grant of summary judgment for the County on this issue is also affirmed.

Lastly, McKenzie does not allege that either the City or the County had any general policy regarding prisoner's medical complaints which resulted in an infringement of McKenzie's rights.[3]

[3] McKenzie does allege that the City of Columbia was negligent in training its employees to respond to emergency situations. McKenzie also contends that Marion County was

The only policy that McKenzie brings to light is the County's practice of informing the City when one of its prisoners made a complaint. In the case at bar, that policy was followed exactly. The fact that the two City police officers who responded to McKenzie's complaint did not believe his alleged injury warranted immediate medical treatment cannot serve as an indictment of the City or County policy. At best, the officers' actions would be an isolated violation and therefore not indicative of a general policy. However, because McKenzie's complaint with regard to officers Pierpont and Carney was meritless, there cannot exist even an isolated violation of McKenzie's rights. For the above reasons, there is no genuine issue of material fact regarding any liability for denial of medical care on the part of the City of Columbia or Marion County. The district court's grant of summary judgment with regard to the these two defendants was therefore proper and is hereby affirmed.

IV. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is hereby AFFIRMED.

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negligent in not ensuring that the City of Columbia adequately cared for prisoners in the county's jail. However, McKenzie's allegations do not rise to the level of a policy of neglect, nor do they establish an issue of material fact regarding a causal relation between McKenzie's alleged injury and the City's or County's conduct