

1993 WL 22818

Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Akil AL-JUNDI, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased; Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased; Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased; Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased; Maria Santos, Mother and Legal Representative of Santiago Santos, deceased; Laverne Barkley, Mother and Legal Representative of L.D. Barkley, deceased; Jomo Joka Omowale, a/k/a Eric Thompson; Vernon Lafranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George "Che" Nieves; James B. "Red" Murphy; Thomas Louk; Peter Butler; Charles "Flip" Crowley; William Maynard, Jr.; Calvin Hudson; Kimanthi Mpingo, a/k/a Edward Dingle; Kendu Haiku, a/k/a Willie Stokes; Ooji Kwesi Sekou, a/k/a Chris Reed; Phillip "Wald" Shields; Jerome Rosenberg; Alphonso Ross; Frank Lott; Gary Richard Haynes; Raymond Sumpter; Omar Sekou Toure a/k/a Otis McGaughey; Dacajeweiah, a/k/a John Hill; and Johnnie Barnes, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

Kurt G. OSWALD, as Administrator of the Estate of Russell G. Oswald; John S. Keller, as the Administrator of the Estate of John Monahan; Vincent Mancusi; and Karl Pfeil, Defendants.

No. 75-CV-0132E(M).

|
Jan. 19, 1993.

Attorneys and Law Firms

Elizabeth M. Fink, Brooklyn, NY, Michael E. Deutschy, Chicago, IL, Joseph Heath, Jamesville, NY, Dennis Cunningham, San Francisco, CA, Daniel Meyers, New York City, for plaintiffs.

John H. Stenger, Buffalo, NY, for Oswald.

Joshua J. Effron, Delmar, NY, for Keller.

Richard E. Moot, Buffalo, NY, for Mancusi.

Irving C. Maghran, Buffalo, NY, for Pfeil.

MEMORANDUM and ORDER

ELFVIN, District Judge.

*1 Although the jury in this action found that, after the retaking of Attica Correctional Facility from rioting prisoners in 1971, there had been reprisals upon inmates both before and after they had been secured in their cells, it was unable to reach unanimity with regard to the liability *vel non* of Mancusi or Oswald therefor. The jury did find that defendant Pfeil was liable for such reprisals.

Presently Mancusi and Oswald move for judgments as a matter of law arguing that the evidence presented by the plaintiffs in support of their reprisal claim was insufficient for a jury to find that they were liable. In the alternative they move for a new trial on the jury's findings that reprisals had occurred, arguing that the charge was improper, that the verdict sheets were not properly drafted and submitted to the jury, that the occurrence of reprisals and the liability therefor are inextricably intertwined and that jury and counsel misconduct produced verdicts that were based on outside influences and not on the evidence adduced at trial. In addition Mancusi's contention, in which Oswald joins, is that qualified immunity should be afforded because at the time of the retaking there was no clearly established constitutional right that had been violated and that an earlier action brought before Judge John T. Curtin of this Court in *Inmates of Attica Correctional Facility v. Rockefeller*, 71-CV-410 (1971), bars the present action.

Mancusi's and Oswald's first claim is that under the standard set forth in *Whitley v. Albers*, 475 U.S. 312 (1986), the plaintiffs failed to adduce sufficient evidence for a reasonable jury to find in their favor. Oswald also claims that this Court improperly used the "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97 (1976), and that, because the jury was unable to reach

unanimity under the *Estelle* standard, it could not do so under *Whitley*. This Court properly charged the jury under *Whitley* and there was sufficient evidence adduced for the jury to find that reprisals had occurred. See Memorandum and Order dated January 16, 1993. There was also sufficient evidence presented for the jury to find, although it did not, in favor of the plaintiffs with regard to Oswald's and Mancusi's liability for such reprisals and, therefore, Mancusi and Oswald are not entitled to judgments as a matter of law.

The alternative relief sought by Oswald and Mancusi is a new trial on the jury's findings that reprisals had occurred. Their challenge to such is based on essentially two grounds. Firstly, they dispute the evidence considered by the jury, arguing that this Court failed to exclude evidence from trial that was not connected specifically to them, that this Court failed to properly frame the jury questions in order to limit the evidence which the jury considered against each defendant and that this Court's procedure in submitting the questions to the jury was defective in that they did not have the chance to address such questions in their closing statements.

*2 This Court continuously admonished the jury that it was to consider only the applicable evidence in its consideration of a defendant's liability *vel non* and charged the jury that it was only from evidence applicable to the individual defendant under consideration that it was to decide whether the plaintiffs had shown that such defendant was liable. The questions submitted to the jury likewise stated that the jury was to consider only the evidence pertinent to the defendant under consideration in reaching its verdict as to such defendant. In addition, this Court finds no prejudice resulted to either side in drafting the jury questions after summations. Lastly, while there is

some connection between the finding that reprisals had taken place and the liability of an individual defendant for such reprisals, such issues are not so inextricably intertwined as to require that both be retried together.

Secondly Mancusi and Oswald argue that the jury was influenced by the media in reaching its verdicts as indicated by the hearsay evidence presented in the Affirmation of Mary Lou Roshia, Esq., that certain jurors had read and watched media reports of the trial and that such had influenced their decisions. This Court finds that there is not sufficient evidence to raise a reasonable suspicion that the jury's verdicts were based upon evidence outside of the record and that there was sufficient evidence in the record to support such verdicts.

Mancusi and Oswald also point to misconduct on the part of plaintiffs' counsel in speaking to the media and in their courtroom behavior. Suffice to say that all counsel in this case have shown strong emotions at various times and that such behavior, while not condoned, did not have a material affect on the jury's verdicts.

This Court has considered the remaining arguments made by Mancusi and Oswald and finds them without merit.

Accordingly, it is hereby ORDERED that Oswald's and Mancusi's motions are denied in their entirety.

All Citations

Not Reported in F.Supp., 1993 WL 22818