AO

Ohio also seems to provide these cases far better than others

6X 4/3

Resp rec'd

CA6 applied Whitley's "obduracy and wantoness" standard, not a "malicious cruelty" standard. The sentence in the opinion stating that the Whitley standard requires behavior marked by persistent malicious cruelty merely interprets the meaning of the obduracy and wantoness standard.

Comments

I continue to think that this confusing CA6 opinion may not be the best vehicle in which to address this question. If others show interest, however, you may wish to J3.

CFR
AO
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7/3/90

PRELIMINARY MEMORANDUM

~~May~~ Sept. 24 31, 1990 Conference
List ~~2~~ 4, Sheet ~~5~~ 1 (p.~~11~~ 12)

No. 89-7376-CFX

Reply rec'd, 7/19/90
Please see attached sheet.
AA
7/25/90

WILSON (Ohio prisoner challenging conditions)

v.

SEITER, et al. (Ohio prison officials)

Cert to CA6 (Krupansky, Wellford, Harvey [sdj])

Federal/Civil

Timely

1. SUMMARY: Petr urges that to challenge prison conditions as violative of the 8th Amend, he need not prove that prison officials acted with "persistent malicious cruelty." He also challenges application of the summary judgment rule. Because the petn appears to raise an important issue on which there is a conflict among the CA's, I recommend CFR with a view to GRANT.

2. FACTS AND DECISION BELOW: Petr is incarcerated in an Ohio medium security prison. He filed a §1983 complaint in SD Ohio (Graham, J.) claiming that the following conditions of his confinement violated the 8th Amend: unsanitary eating conditions; inadequate heating and cooling; housing with mentally ill inmates; housing with physically ill inmates; inadequate ventilation; excessive noise; insect infestation; and overcrowding. On cross-motions for s.j., both sides submitted affidavits. Petr swore in particular that he (and another pltff) had contacted resps to correct the conditions but that nothing had been done. The dct granted s.j. for resps.

CA6 affirmed: Petr argues that genuine issues of material fact remain regarding conditions of confinement. Confinement conditions are material, and several circuits have found 8th Amend violations on facts similar to those alleged by petr. To the extent the dct adopted findings in resps' affidavits that were controverted by petr, it erred. Nonetheless petr's affidavit may be insufficient to support an 8th Amend violation. Rhodes v. Champan, 452 U.S. 337, sets up a flexible standard for ascertaining whether prison conditions amount to cruel and unusual punishment; all the conditions and circumstances, rather than isolated conditions, must be evaluated. Applying this standard, we conclude that the allegations of high temperatures, housing with mentally ill inmates, and overcrowding are insufficient to state a claim of cruel and unusual punishment. In particular, although inmates are crowded, they also have access during the day to a TV lounge, gymnasium, yard, and library.

We turn to the remaining claims, some of which do suggest the type of seriously inadequate and indecent surroundings necessary to establish an 8th Amend violation. However, in Whitley v. Albers, 475 U.S. 312, 319, the S.Ct. emphasized that "it is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited" by the 8th Amend. Although Whitley involved the suppression of a prison riot, we have applied this standard to challenges to confinement conditions. Birrell v. Brown, 867 F.2d 956 (CA6 1989). As a showing of obduracy and wantonness is critical, the question is whether there is a genuine issue of material fact on these factors. Usually state of mind is not a proper issue for resolution on s.j., but petr does not contend that resps took no efforts to provide them minimally decent confinement conditions; rather they complain of the results of those efforts. Nothing in the affidavits implies that resps used confinement conditions to punish petrs, and the evidence shows action to maintain decent conditions. Additionally, the Whitley standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty, and the record fails to suggest such behavior.

3. CONTENTIONS: (1) CA6 erred in applying Whitley v. Albers to prison condition challenges. Every other CA that has considered the issue has rejected application of the "persistent malicious cruelty" standard and has insistent that, at most, a plaintiff must show deliberate indifference, the standard rejected in Whitley in the special context of emergency efforts under-

taken to restore prison order. Foulds v. Corley, 833 F.2d 52 (CA5 1987); Gillespie v. Crawford, 833 F.2d 47 (CA5 1987), affd in banc, 858 F.2d 1101 (CA5 1988); LaFaut v. Smith, 834 F.2d 389, 392-393 (CA4 1987) (per Ret. Justice Powell); Morgan v. District of Columbia, 824 F.2d 1049 (CADC 1987).

(2) CA6 also misapplied Whitley. While all 8th Amend violations must involve obduracy and wantonness, Whitley suggested that these terms encompass more than one state of mind; for example, Estelle v. Gamble, 429 U.S. 97, held that only deliberate indifference must be shown in a claim of neglect of medical needs, but in the special context of maintaining prison order, where the responsibility to attend to the prisoners conflicts with other interests, a higher standard must be proven to show a constl violation: essentially, malice. When prisoners are subjected to continuing conditions depriving them of basic necessities, such practices rarely result from malicious intent to inflict pain, but from neglect and failure to remedy obvious conditions. If a bad condition persists over a period of time, prison staff probably know of its existence; this should be sufficient. Cf. City of Canton v. Harris, 109 S.Ct. 1197.

4. DISCUSSION: Petr's assertion of a conflict appears correct. Several courts have specifically rejected application of Whitley in a pure challenge to conditions of confinement, arguing that the special considerations of Whitley are not present in such a case. Moreover, petr is correct that Whitley's discussion of obduracy and wantonness encompasses more than one state

of mind; it refers to both deliberate indifference and malicious intent to inflict pain. Whitley made clear that in the specific context of suppression of a prison riot, only the standard of malicious intent to inflict pain, not deliberate indifference, should apply, but did not overrule application of the lesser standard in other contexts, such as disregard of medical needs.

CA6's opinion is confusing in its discussion of the standard being applied. At times it talks about wantonness, at other times about persistent malicious cruelty. Its invocation of Whitley, however, makes clear that it will require the stringent state of mind required by that case for a very different context, and the overall impression one gets from the opinion is that the Whitley standard, rather than the deliberate indifference standard, is being applied. On the other hand, CA6 also stated that the affidavits tended to show that resps did in fact take action to maintain decent conditions. This, of course, would suggest that resps were not even deliberately indifferent to the conditions of confinement (although CA6 did not phrase the matter that way, talking rather about wantonness -- which it appears to have concluded was identical to malicious intent to inflict harm). However, it is even arguable that a lower state of mind than deliberate indifference should be required for a conditions challenge -- because some conditions can be so barbaric that they are cruel and unusual even if prison officials wish to ameliorate them. Moreover, petr virulently contested below the dct's conclusion that resps had made efforts to correct these conditions. I am not certain that this is the best case to de-

cide the issue presented by the petn, but it does seem important. I therefore recommend a CFR with a view to grant on the standard applicable to a confinement conditions challenge.

In his second question presented, petr argues that CA6 erred in affirming the grant of s.j. in light of factual disputes over resps' state of mind. This issue is not certworthy by itself, and petr does not really argue it in the body of the petn. However, in light of the problems just noted above, if the petn is granted, the Court might want to preserve this issue for review.

5. RECOMMENDATION: CFR with a view to GRANT.

Response has been waived.

IFP status appears proper.

Paul

May 21, 1990 Wolfson Opin in petn

(BRW, Yale, Krawitch)

Given the confused CA6 opinion, I am inclined to recommend that the Ct await a better vehicle. In addition, given the current tenor of the Ct, I would hesitate to recommend that the Ct hear this type of case. Nonetheless, a CFR can do no harm.

CFR

AP

5/23/90

Wilson v. Seiter, No. 89-7376-CFX

Reply rec'd 7/9/90.

Petr asserts in the reply that CA10 has also rejected the "persistent malicious cruelty" standard in favor of the "deliberate indifference" standard in the context of a §1983 action by the widow of a prisoner who had been killed by other prisoners allegedly as a result of wrongful conduct by his jailers. Thus, CAs 10, 5, 4, and DC now conflict with CA6's interpretation of Whitley.

I suspect that CA6 got this one wrong and the issue is an important one. Anne hesitated to recommend that the Court hear this type of case, given what was then the Court's tenor. The situation is now even less favorable for this issue. Furthermore, the CA6 opinion is confused and confusing despite both parties' efforts to make sense of it. I recommend, as did Anne, that you deny or J3.

Still X or J3
AA 7/27/90