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ORIGINAL

CASE NO. 89-7376 (3)

Supreme Court, U.S.
FILED
JUN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PEARLY L. WILSON,

Petitioner,

v.

RICHARD P. SEITER, ET AL.,

Respondents.

On petition For Writ of Certiorari To The
United States Curt of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's application of the obduracy and wantonness standard set forth in Whitley v. Albers, 475 U.S. 312 (1986), to a prison conditions suit conflicts with the decisions of other circuits or in any way misapplies Whitley?

2. Whether the Sixth Circuit properly affirmed the grant of summary judgment to the respondents based upon the fact that there were no disputes of material fact in the record?

PARTIES

The petitioner Pearly L. Wilson is a prisoner at the Hocking Correctional Facility (hereafter HCF) in Nelsonville, Ohio. Everett Hunt, Jr., a second plaintiff in the lower courts, is no longer confined at the HCF. Respondent Richard P. Seiter is currently the former Director of the Ohio Department of Rehabilitation and Correction, and respondent Carl Humphreys is the former Superintendent of Hocking Correction Facility (hereinafter HCF)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

STATEMENT OF THE CASE

Petitioner Pearly L. Wilson, an abusive inmate litigator who has been sanctioned under Rule 11, Fed. R. Civ.P., and is currently required to pay a partial filing with original actions and appeals in the Sixth Circuit due to his repeated frivilous appeals, commenced the present suit under 42 U.S.C. §1983 challenging virtually every condition of his confinement at HCF.[1] In his shotgun complaint, petitioner essentially alleged that he had been subjected to cruel and unusual punishment based upon the following conditions at HCF: overcrowding, excessive noise, inadequate storage, inadequate heating and cooling, unclean lavatories, and unsanitary eating conditions. Respondents moved to dismiss this case because neither the petitioner nor his co-plaintiff[2] alleged that they

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1 The imposition of Rule 11 actions was upheld by the Sixth Circuit and a partial filing fee was ordered in Pearly Wilson v. George Denton, et al., Case No. 89-3454 and 89-3978 (6th Cir. March 20, 1990), cert. denied 110 S.Ct. 2217 (May 20, 1990). In its Order, the Court of Appeals noted that petitioner had filed over 70 cases in the court of appeals since 1976 and that he had filed 24 cases in the last two years. The court stated further, "almost all of these filing have been either frivolous or premature". Respondents would note that petitioner has filed at lease four petitions for certiorari in the last year according to the Ohio Attorney General's records. Case Nos. 89-7612, 89-71[illegible]1, 89-7613 and this petition.

2 As noted in the List of Parties, the second plaintiff is no longer confined at HCF and is no longer pursuing this case.

had suffered any injury as a result of the allegedly unconstitutional conditions. (R.E. 9). The Court overruled respondents' motion to dismiss and the parties filed cross-motions for summary judgment. (R.E. 16, 11, 18, 23).

Respondents' version of the facts is contained in affidavits attached to their memorandum contra petitioner's motion for summary judgment and in their own motion for summary judgment. (R.E. 18 and 23). First, respondents rely upon the affidavit of Homer Friend which is attached to defendants' memorandum conta to plaintiff's motion for summary judgment. (R.E. 18). Mr. Friend is the Unit Manager at HCF, and he has been employed at HCF since 1983 when it was initially opened as a prison. In his affidavit, he refutes petitioner's assertions, and shows that there is no basis in fact to support petitioner's allegations. With regard to noise in the dormitories,he points out that several measures have been taken to keep down the noise level; such as not permitting televisions in the dormitories, only permitting radios with earphones, and rules which prohibit excessive noise. He states that each inmate is given two lockers for storage, and that very few complaints have been filed about the amount of storage space.

He reviews the heating and ventilation in the dormitories, and states that the heaters have been recently serviced and are in good working order. He states that inmates are not generally given special clothes in the winter, but they are permitted to buy special clothing such as long underware, and they are given an extra blanket. With regard to ventilation, he points out that two large exhaust fans have been installed in each dormitory to ensure proper ventilation. These fans also reduce the heat in the summer and additionally, most of the windows can be opened to aid with the heat and ventilation in the summer.

With regard to sanitation, he states that the restrooms are completely cleaned twice per day, and additionally, the porters clean the restrooms throughout each day as needed. These cleaning procedures would apply to the urinals, commodes and sinks which petitoner claims to be unsanitary. Mr. Friend next discusses the sanitary practices in the kitchen and dining area, and he notes that both areas are cleaned after every meal. He states further that there are 57 inmates who work in the kitchen and make sure that it is clean and sanitary, and he states that these areas are kept very clean. He states that HCF has contracted with an exterminator to deal with any pests in this institution. With regard to inmate hygiene among food service workers, he notes that a inmates who work around food have to wear hats and plastic gloves.

Concerning the overall health environment at HCF, he states that every inmate is given a medical screening upon reception into the prison system and a second examination upon entering HCF. He notes that there have been no outbreaks of contagious disease at HCF since it became a prison in 1983. He states further that mentally ill inmates are sent to programs outside of HCF, and are not "warehoused" at HCF. Finally, he states that since there is an older population at HCF, some inmates have age-related problems, but that physically ill inmates are not "warehoused" at HCF.

Respondents also submitted the affidavit of Jerry Patton, Health Care Administrator of HCF, in which he confirmed that inmates are medically examined during their reception into the Ohio prison system. He stated further that there had been no outbreak of contagious diseases at HCF, that no inmates have been overcome by heat, and that the number of illnesses in the winter is normal. Finally, he stated that the petitioner had only been treated for routine health problems at HCF. Respondents also submitted an affidavit by the staff counsel for the Ohio Judicial Conference authenticating an article which he wrote for a newsletter in which he described the cleanliness of HCF.

The District Court granted respondents' motion for summary judgment finding that the complained of conditions did not demonstrate obduracy and wantonness on the part of prison officials. (R.E. 26). The District Court rejected the claim regarding improper classification because such matters are within the discretion of prison officials. Id. The District Court further rejected the claims regarding the placement of mentally ill and physically ill inmates within the population at HCF finding no evidence to support a showing that respondents acted wantonly with respect to such conditions.

The District Court discussed and rejected petitioner's sanitation and overcrowding claims as follows:

> Defendants present affidavits tending to show that the restrooms are cleaned at least twice a day and precautions are taken to keep the facilities and food in as sanitary a condition as possible. It must be remembered that HCF houses 327 inmates. Measures are taken to keep noise levels to a minimum; heaters have been recently serviced and are in good working order; exhaust fans have been installed in each dormitory and most windows an be opened; kitchens and dining areas are cleaned after every meal and those who work around food are required to wear hats and gloves; HCF contracts with an exterminator to keep the institution free of vermin. Consequently, it is clear that prison officials take steps to keep HCF as clean and sanitary as possible.
>
> Plaintiffs allege that the dormitories are overcrowded. There are two dormitories ("huge rooms with two rows of bunks about three feet apart") housing 141 and 143 inmates. However, the inmates are not confined to the dormitories during the day. Recreational facilities and a TV room are available to dormitory inmates. Although crowded (plaintiffs allege each inmate has less than 50 square feet of space), plaintiffs have not countered defendants' affidavits with evidence which would support their claim that conditions in the dormitories amount to cruel and unusual punishment.

(Id. at pp. 6-7). Based upon these findings, the District Court concluded,

> In sum, the Court HOLDS that plaintiffs have been provided with at least the minimal civilized measure of life's necessities and have not been deprived of their Eighth Amendment right to be free from cruel and unusual punishment. We HOLD that HCF officials do not demonstrate obdurate or wanton behavior regarding the conditions of HCF.

Id. at p. 7

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment. The Sixth Circuit identified eight potential claims: "(1) unsanitary eating conditions; (2) inadequate heating and cooling; (3) housing with mentally ill inmates; (4) housing with physically ill inmates; (5) inadequate ventilation; (6) excessive noise; (7) insect infestation; and (8) overcrowding". Pearly Wilson v. Richard Seiter, et al., 893 F.2d, 861, 864 (6th Cir. 1990). The Court of Appeals found that three of the claims (inadequate cooling, housing with mentally ill inmates, and overcrowding) fail to allege conditions which violate the constitution. Id. at 865.

With respect to the inadequate cooling claim, the Court found that this claim was based upon petitioner's allegation that he had been occasionally exposed to temperatures of 95 degrees in the summer, and the Court of Appeals concluded that such an allegation could not support a claim of cruel and unusual punishment. Id. Concerning the housing of mentally ill inmates at HCF, the Court of Appeals noted that petitioner's claim was based solely upon subjective feelings.

With no evidence of any actual incidents of violence due to this situation, the Court of Appeals found that petitioner could not show that his fear was reasonable and consequently this claim is not actionable. Id. And with regard to the overcrowding claim, the Court of Appeals considered "all of the circumstances surrounding confinement to ascertain whether prison population density inflicts cruel and unusual punishment. . .", and rejected this claim as follows:

> The record before us, undisputed by appellants, establishes that while the inmates may indeed have only 50 or so square feet of living space within their dorm, the inmates also have access during the day to a television lounge, gymnasium, yard, weight room billards table, and library. This is not, therefore, a situation wherein the inmates allege constant exposure to overcrowding. We therefore reject any eighth amendment claim on this basis.
>
> Id.

Turning to the remaining claims, the Court of Appeals determined that the "obduracy an wantonness " standard of Whitley v. Albers, 475 U.S. 312 (1986), applies to prison conditions suits. Id. 15 866. The Court of Appeals then examined petitioner's affidavits to determine whether those affidavits could create a material issue of fact concerning the issue of whether respondents acted with obduracy and wantonness:

> The question we must address, therefore, is whether the appellants affidavits, while not directly contradicting the appellees affidavits, nevertheless contain facts reasonably implying the appellees acted with obduracy and wantonness.

Id. The Court of Appeals discussed the evidence on the record and concluded that petitioner had put on no evidence to show that respondents acted with obduracy and wantonness in the following passage:

> Importantly, the appellants do not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions. Rather, appellants' complaints are aimed at the results of those efforts. The undisputed record indicates that the HCF unit manager has adopted specific affirmative measures to reduce noise levels, has had heaters serviced, provides inmates with an extra blanket during winter months, has installed exhaust fans for improved ventilation, requires the cleaning of lavatories and kitchen on a daily basis and has contracted with an exterminator to treat HFC for pests on a twice-monthly basis. The appellants' position apparently, is that despite these actions, prison conditions remain unacceptable.
>
> Rhodes and its progeny made clear that confinement conditions may constitute cruel and unusual punishment only if such conditions "compose the punishment at issue". 452 U.S. at 347, 101 S.Ct. at 2399. Nothing in the appellants' affidavits implies that the appellees used confinement conditions to punish the appellants. To the contrary, the evidence shows action on the appellees' behalf to maintain decent conditions at HCF. Additionally, the Whitley standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior. At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim. See Birrell, supra, at 958.

Id. at 866-67. Thus, the Court of Appeals found that respondents' conduct could at most be characterized as negligent.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ANY OTHER CIRCUITS.

Petitioner contends the decision of the Sixth Circuit conflicts with the Fourth, Fifth and District of Columbia Circuits in its application of Whitley v. Albers, supra, to a prison conditions suit. This is simply not correct. Petitioner has mischaracterized the Sixth Circuit's decision in such a manner that it creates a conflict when in fact no conflict exists. Moreover, the Sixth Circuit's application of Whitley is consistent with decisions from the Eighth and Ninth Circuits, and it does not conflict with the various decisions cited in the petition for certiorari.

The most fundamental flaw in petitioner's argument is its mischaracterization of the Sixth Circuit decision. Petitioner argues that the Sixth Circuit applied a "malicious cruelty" test from Whitley to this prison conditions suit in contrast to decisions by other circuits in which a deliberate indifference standard was applied to conditions suits. However, the Sixth Circuit actually applied the obduracy and wantonness standard from Whitley. As stated by the Court of Appeals,

> Initially, it is noteworthy that we have applied Whitley's obduracy and wantonness" standard to eighth amendment challenges to confinement conditions. In Birrell v. Brown, 867 F.2d 956 (6th Cir. 1989), we noted that "[i]n addition to producing evidence of seriously inadequate and indecent surroundings, a plaintiff must also establish that the conditions are

> the result of recklessness by prison officials and not mere negligence or oversight". Id. at 958. The importance of this application of Whitley may be merely semantic, yet it establishes that at least in this circuit, the Whitley standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.
>
> Having concluded that a showing of obduracy and wantonness is material to appellants' claims, the critical, and determinative, question becomes whether appellants' affidavits place this fact in issue.

893 F.2d, at 866. Thus, the Sixth Circuit applied the obduracy an wantonness standard and not a "malicious cruelty" standard as alleged by the petitioner.

Petitioner relies upon one sentence in the opinion to support his argument that the Sixth Circuit applied a "malicious cruelty" standard:

> Additionally, the Whitley standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty.

893 F.2d. at 867. This sentence merely interprets the meaning of the obduracy and wantonness standard. The opinion repeatedly states that the appropriate standard is obduracy and wantonness, and one interpretive sentence does not change the standard applied throughout the decision.

Indeed, this Court's decision in Whitley clearly held that there must be a showing of obduracy and wantonness to support a claim alleging cruel and unusual punishment:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

475 U.S. at 319. And as this statement reflects, the obduracy an wantonness requirement does apply to conditions suits. Moreover, petitioner agrees that "all Eighth Amendment violations must involve 'obduracy and wantonness'. . . ." (Petition for a Writ of Certiorari, at p. 25). As pointed out by the petitioner, Whitley goes on to discuss particular standards within differing contexts: i.e., deliberate indifference in medical care cases and the "malicious and sadistic" standard when a prison security measure is taken in response to a prison disturbance. However, these latter standards do not supplant the requirement that there must be a showing of obduracy and wantonness. The Sixth Circuit opinion turns upon an analysis based upon the obduracy and wantonness requirement, and the cases cited by petitioner applied a more specific intent standard such as deliberate indifference. There is no conflict since under Whitley the conduct must be obdurate and wanton regardless of whatever more specific intent standard also applies. The only way that a conflict could arise would be if the Sixth Circuit had applied the "malicious and sadistic" standard. But as discussed above, that standard was not applied in the instant case.

Furthermore, other circuits have applied Whitley's obduracy and wantonness standard to conditions cases. In Cody v. Hillard, 830 F.2d. 912 (8th Cir. 1987), plaintiffs challenged double-celling at a particular prison, and the court applied Whitley's obduracy and wantonness standard:

> As the District Court recognized, the prison administration is striving within the limits of available resources to restrict the amount of double-celling that must be done to accommodate the rising tide of convicted felons. This hardly reflects obduracy an wantonness 'on the part of those whose job it is to manage SD SP. [the prison at issue] See Whitley, 106 S.Ct. at 1084.

830 F.2d at 915. See Also, Campbell v. Garza, 889 F.2d, 797 (8th Cir. 1989). And in a suit by a prisoner alleging an Eighth Amendment violation based upon a search of his cell, the Ninth Circuit upheld a District Court's application of the obduracy an wantonness requirement. Vigliotto v. Terry, 873 F.2d, 1201, 1203 (9th Cir. 1989). Thus, both the Eighth and Ninth Circuits have applied Whitley in the same manner as the Sixth Circuit.

Moreover, the Sixth Circuit has applied the deliberate indifference standard to a "failure to protect" case in a very similiar manner as that employed in the decisions cited by the petitioner as being in conflict with this decision. McGhee v. Foltz, 852 F.2d. 876, 881 (6th Cir. 1988). McGhee applies essentially the same approach as the following cases cited by petitioner; LaFaut v. Smith, 834 F.2d, 389 (4th

Cir. 1987)); Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987); Howard v. Adkinson, 887 F.2d 134 (8th Cir. 1989); Cartes-Quinones v. Jimenez-Nettleship, 842 F.2d. 556 (1st Cir. 1988), cert. denied, 109 S.Ct. 68 (1988); and in particular, Noll v. Carlson, 809 F.2d, 1446 (9th Cir. 1987). Consequently, should the court find a conflict between the Sixth Circuit decision and the decisions cited by the petitioner, then there is at most, only an intracircuit conflict between this decision and McGhee. A conflict within a circuit does not necessitate review by this court.

In sum, the Sixth Circuit decision herein applying the Whitley obduracy and wantonness standard to a prison conditions suit does not conflict with the decisions cited by the petitioner. Whitley required a showing of obduracy and wantonness in all Eighth Amendment suits and the Sixth Circuit properly applied this requirement. The fact that other circuits have applied a more specific intent standard such as deliberate indifference does not conflict the Sixth Circuit's analysis which is based upon the more general requirement that the conduct be obdurate and wanton. Finally, should this Court find that there is a conflict, the Sixth Circuit's own decision in McGhee v. Foltz, supra, raises the same conflict and such conflict should be resolved within the circuit through an en banc review.

II. THE DECISION OF THE SIXTH CIRCUIT PROPERLY APPLIED THE OBDURACY AND WANTONNESS STANDARD SET FORTH IN WHITLEY V. ALBERS.

In Whitley v. Albers, supra, at 319, this court specifically held that "obduracy and wantonness. . . characterize the conduct prohibited by the Cruel and Unusual Punishments Clause. . . in connection with establishing conditions of confinement. . .." Petitioner now argues that the Sixth Circuit erred in applying this obduracy and wantonness requirement to a conditions suit. Based upon the unequivical language of Whitley, it is clear that the Sixth Circuit did not err in its application of Whitley to the preent case.

In Whitley, this Court did note:

> The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.

475 U.S. at 320. And based upon this approach, this court stated that the deliberate indifference standard was appropriate for medical claims, and that a malicious and sadistic standard applies to prison security measures undertaken to resolve a disturbance. 475 U.S. 320-321. However, Whitley was not a conditions suit and it expressed no opinion regarding a specific intent standard in conditions suits. Under these circumstances, and in the face of Whitley's

unequivical holding that a showing of obduracy and wantonness is required in all Eighth Amendment cases including conditions suits, the Sixth Circuit did not err in applying the obduracy and wantonness standard.

Moreover, as noted above, the Sixth Circuit's application of Whitley is essentially the same as that followed in decisions in the Eighth and Ninth Circuits. Cody v. Hillard, supra; Campbell v. Garza, supra; and Vigliotto v. Terry, supra. These decisions show that the Sixth Circuit's approach is reasonable and certainly not unique. These decisions interpret Whitley to mean what it states, i.e., that there must be a showing of obduracy and wantonness to show cruel and unusual punishment. Petitioner is essentially asking this Court to negate its previous decision because petitioner feels that such a standard is too difficult to meet.

Respondents maintain the Sixth Circuit's approach is also correct as a matter of policy. In Whitley, this Court set forth a specific requirement that prisoners must show that prison officials acted obdurately and wantonly in order to establish a claim of cruel and unusual punishment. This requirement refocuses the inquiry in prison suits back toward the animus of prison officials which is entirely appropriate. Prison officials should not beheld liable for conduct which is held to be cruel and unusual unless there is a showing of obduracy and wantonness on their part. This is an appropriate standard and public policy favors such a requirement.

Finally, respondents would note that regardless of which standard applies, deliberate indifference or malicious cruelty, the result upon remand will be the same since the Sixth Circuit found that respondents' conduct was negligent at best. As stated, at the close of the lower court's opinion,

> At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim.

893 F.2d. at 867. Thus, the Sixth Circuit decision did not even hinge upon which standard applied since it found respondents' conduct to be negligent at best which is far below deliberate indifference.

In sum, the Sixth Circuit correctly applied Whitley's obduracy and wantonness to this suit challenging conditions of confinement. The application of this requirement is mandated by the clear language of Whitley, and it is appropriate as a matter of policy. Petitioner's grandiose prediction that "[f]ailure to reverse the Sixth Circuit decision will once again draw an iron curtain between the Constitution and nation's prisons" (Petition for Certiorari at p. 36, footnote omitted) is patently ridiculous. The Sixth Circuit followed both the language and the intent of Whitley in the present case, and Whitley certainly did not establish any iron curtain around the American prison system. Whitley did establish that prisoners must prove that prison officials acted with obduracy

and wantonness in order to show cruel and unusual punishment, and this requirement was properly applied by the Sixth Circuit. This Court should uphold the Sixth Circuit by denying this petition for certiorari.

CONCLUSION

Respondents request the court to deny the petition for certiorari.

Respectfully submitted,

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June 22, 1990

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RE: Pearly Wilson v. Richard Seiter, et al.
BRIEF IN OPPOSITON TO PETITON FOR CERTIORARI

Dear Mr. Spaniol:

Enclosed is the original and 12 copies of Defendant's Brief in Opposition to Petition for Certiorari, the original and a cover sheet each of the Certificate of Service, the Affidavit of Mailing and the Notice of Appearance, in regard to the above referenced matter.

We would appreciate your filing the above listed documents, and returning the cover sheets and a copy of the brief, each time-stamped, in the enclosed self-addressed, prepaid envelope.

Thank you for your assistance in this matter.

Very truly yours,

ANTHONY J. CELEBREZZE, JR.
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FCS/pac
Enclosures

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NOTICE OF APPEARANCE

Please take notice that Rita S. Eppler will appear as counsel of record for Respondent in the above captioned case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rita S. Eppler, counsel of record for respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of June, 1990, I served a copy of Respondent's Brief in Opposition on the following counsel of record by mailing such copy in a duly addressed envelope, with first-class postage prepaid, to:

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I further certify that all parties required to be served have been served.

RITA S. EPPLER
Counsel of Record