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DJ 144-42-937

MAR 2 1976

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Tyler et al. and United States v. Percich, et al., C. A. No. 74-40 (C)(2) (E.D. Mo.)

I recommend that we appeal the district court's order of December 29, 1975, in the above captioned case denying motions by the United States (a) that defendants be enjoined from transferring inmates (or potential inmates) of the St. Louis City Jail to the Central Police Holdover and to certain jails outside of St. Louis County, and, (b) that defendants be required to furnish jail inmates additional opportunities for recreation and more liberal visiting rights.

MRF 3/2/76
JSP
RB 3/2/76

STATUS

The last day for notice of appeal is February 27, 1976. A protective notice of appeal has been filed.

QUESTIONS PRESENTED

1. Whether the district court erred, as a matter of law, in holding that the issue of transfer, by these defendants, of pretrial detainees who would ordinarily be placed in the city jail, to other institutions at which conditions fail to meet constitutional standards, exceeds the scope of the instant lawsuit;

2. Whether, after the United States presented a prima facie case the members of plaintiff class were being subjected to unconstitutional conditions at the Central Police Holdover, the district court erred in failing to enjoin defendants from transferring city jail inmates to that facility;

cc: Clair Cripe, BOP
George Gilinsky, Crim, Div.
Record
Chrono
Dunbaugh
Landsberg
Barnett
Queen
Donald J. Stohr, USA

Tyler v. Percich

JC-MO-004-012

3. Whether, in considering motions by the United States to require defendants to furnish inmates with more opportunities for visiting and recreation, the district court

(a) committed legal error by failing to apply and implement the doctrine that pretrial detainees can not, consistent with the Fourteenth Amendment, be denied liberty except under the least restrictive conditions necessary to assure their appearance at trial, and as a result,

(b) abused its discretion in ratifying, pro tanto, the limited recreation and visiting now available to jail inmates.

STATEMENT

A. Background

This action was brought on January 18, 1974, by plaintiffs representing present a future inmates of the St. Louis City Jail alleging that the conditions at the jail subjected the prisoners, inter alia, to cruel and unusual punishment, and denied them rights protectedby the due process and equal protection clauses of the Fourteenth Amendment. The defendants are the Commissioner of Adult Services and his employee, the warden, who operate the the jail, and the St. Louis City Sheriff. Shortlybefore trial, the court granted the United States permission to participate as a litigating amicus.

After trial (September 30-October 2, 1974), the district court found that:

> "Those accused of crimes and awaiting trial under a presumption of innocence are incarcerated in the city jail under conditions worse than those afforded to persons convicted of the most heinour crimes in Missouri." (Mem. Opinion, October 15, 197) _1/ p. 3

and ordered the jail to be closed. (Order, October 2, 1974). The court stayed its Order for 30 days to afford defendants an opportunity to bring the jail into full compliance with the requirements of the constitution. Meanwhile, the court ordered that certain interim measures be taken such as reduction of the jail population from about 450 to 228.

Defendants took an appeal to the United States Court of Appeals for the Eighth Circuit. You authorized our participation as an amicus urging affirmance. The court of appeal affirmed, per curiam, on December 10, 1974, and remanded the matter to the district court with discretion to modify or dissolve the Order closing the jail. _2/ On December 30, 1974, after a hearing as to

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__/ Cf. Imates of Suffolk County Jail v. Eisenstaedt, 360 F. Supp. 676, 686 (D. Mass. 1973), aff'd 494 F.2d 1196 (1st Cir. 1974). In fact, the Memorandum Opinion contains no specific comparisons between the jail and neighboring prisons, and the only such evidence before the court was an untranscribe deposition. For further discussion of the legal bases for finding unconstitutional conditions in jails, see pages to of this Memorandum.

__/ Successive stays were granted, by the Court of Appeals and the district court after remand, to March 1, 1975. Thereafter, there were no formal stays, but the jail was also not closed and it does not appear that it will be.

defendants' progress to date, the district court ordered the United States to assume the status of plaintiff-intervenor 3/ to take discovery and make further recommendations as necessary. Accordingly, for the next year, the United States engaged in discovery, negotiated with defendants, and "settled out" most of the remaining issues.4/ Through this period, the defendants were making substantial improvements in the physical conditions at the jail. As to the remaining issues, the United States made four motions for additional relief. 5/ All of these motions were pending until December 29, 1975, at which time they were all denied.

B. Facts

(i) Transfers

In order to comply with the court's interim order to reduce the jail population, defendants began utilizing the Central Police Holdover in November 1974, and jails outside St. Louis County almost a year later. Between 20 and 35 detainees have been housed at the Holdover for short terms (exactly how long is not clear on the record) at all times since November 1974, and approximately 150 were placed in

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3/ The United States did not file a complaint in intervention.

4/ These issues included provision of a dequate medical care and classification of prisoners (March 21, 1975 joint letter to the court) and the jail disciplinary system (unsigned partial consent order, submitted July 25, 1975).

5/ See Attachment A for an outline of the motions filed by the United States and the relevant relief requested during 1975. Prayers for refief are also found in an April 18, memorandum to the court and August 8, 1975 Proposed Relief following the July 25 hearing.

so-called "out-state" jails between September 1 and December 12, 1975. The United States asked on five different occasions that transfers to the Holdover be enjoined (See Appendix A). On December 12, 1975, we asked for a TRO or Preliminary Injunction against transfer to out-state jails based upon information in FBI reports.

The Holdover is a simple lockup intended for pre-arraignment detention. There is no evidence that it has been overcrowded, but all prisoners there live in 4-man squardrooms smaller than the equivalent squadrooms at the jail. While the record is unclear on many points, it is undisputed that Holdover prisoners never leave thier cells except for (non-contact) visits, have no shower facilities, and are not allowed to keep any personal hygiene articles or other minimal belóngings sush as paper and pencils. 6/ Similar conditions in the (pre-Order) jail had been specifically found to violate inmates' constitutional rights. October 15, 1974 Memorandum Opinion, pp. 5, 7-8.

On December 12, 1975, we were prepared to show that as a result of placement in out-state jails, detainees were being denied access to counsel, and were being subjected to congeries of conditions found, in this and other cases to deprive them of due process and equll protection. 7/

6/ By contrast, jail inmates are permitted out of their cells except during sleeping hours, have access to day rooms,or, at least, catwalks. The opportunities for writing and recreation at the jail are discussed in detail later in this Memorandum.

7/ One or more of the following conditions was alleged with respect to each jail: overcrowded conditions, lack of proper classification of prisoners, arbitrary discipline, lack of recreation, poor hygiene and/or medical care, inadequate protection from other inmates, and denial or unwarranted restrictions on visits. Motion of United States for a TRO or Preliminary Injunction, December 12, 1975.

On December 19, however, the district court refused to permit the United States to adduce evidence in support of these allegations.

(ii) Visits

At the time of trial, the jail held two 2 1/2 hour visiting periods per week during which inmates could see members of their immediate families (other than children) in the "booths." Trustees were permitted Saturday visiting hours in addition, and Sundays, on a rotating basis, inmates were permitted contact visits of uncertain duration, each inmate getting one such visit in about eight weeks. Each booth visit was about ten minutes long. As of April 1975, there have been Monday, Wednesday and Friday booth visits, and sufficient contact visiting hours on Saturday and Sunday to afford each inmate contact one every four-five weeks. Inmates are allowed twenty minutes per guest in the booths, and up to three booth guests per visit. Authorized guests are still limited to four immediate relatives (or four friends, if there were no relatives) and children listed on the visiting card can visit if accompanied by an adult. There are 4 booths on each floor, but only one of the five lobby areas is used for contact visits.

(iii) Recreation

Inmates ate the St. Louis Jail are not locked in or out of their cells except for sleeping (or unless placed in a sixth floor cell for safekeeping.) On the second, third and fourth floors they may "use" the catwalk - improperly called a "dayroom" in the record - and on the fifth and sixth floors there are areas which can legitimately be called dayrooms which the inmates may use all day. At the time of trial, and for about a year thereafter, no outdoor recreation was available at all. (See Memorandum Opinion, October 15, 1974, p. 5).

In the ensuing months, defendants created an indoor recreation room on the sixth floor (which did not encroach on the trustees' day room area) which could accommodate such activities as pool and ping-pong - it is not a gymnasium - and hired a few persons from the department of recreation to supervise it. Defendants' present plan calls for each inmate to have use of the recreation room 75 minutes a week.

After much delay, and much prodding by the court, defendants also built and secured an outdoor recreation yeard which opend for use some time in the late summer or early fall of 1975. Plans call for each inmate to have two 45 minute outdoor recreation periods a week. This schedule is predicated on an over-all yard schedule of 6 hours a day, 6 days a week. The record does not reflect whether these plans have been implemented.

In a series of motions during 1975, the United States urged that plaintiffs were entitled to less restricted visiting and recreational opportunities. We asked that inmates be allowed daily booth visits, at least weekly contact visits, and daily opportunities for recreation. Defendants responded, in conclusory terms, that the schedules they had adopted represented the maximum that could be handled in terms of space and available staff, and maintained that the Constitution required no more than they now offered. The district court accepted this defense and denied all motions for further relief.

C. Legal Considerations

(i) Transfers

The district court denied all relief with respect to transfers on the grounds that (1) the issue of transfers exceeded the scope of the lawsuit and (2) would require a full de novo trial to resolve; and, (3) the wrong parties were before the court.

The last of these reasons is clearly wrong, for all that is sought is an injunction against the named defendants who are before the court. As for the need for a "full trial," the record already contained evidence regarding conditions at the Holdover, heard before the court contracted the scope of the suit, and our December 12 motion asked that the sheriff be enjoined from placing detainees in out-state jails unless defendants could show, affirmatively that conditions at each jail met constitutional standards. 8/ The crucial issue is the nature of the class and of the court's original decision.

The court defined plaintiffs' class as all present and future inmates of the City Jail. It is undisputed that all but a negligible proportion of the jail inmates, at the time of trial, were ppretrial detainees, and that with the possible exception of the Medium Security institutions which housed some transferees prior to trial the city jail was the only facility housing pretrial detainees. 9/ It is logical, therefore, to consider the plaintiff class, or subclass, as all present and future detainess, and to regard the suit as having adjudicated the duty of the named defendants not to submit members of this class to unconstitutional conditions. Indeed, comments by the Commissioner and by the court, on the record, strongly suggest that this is how they, twoo, viewed the matter during the early post-

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8/ Or if the detainee and his counsel agreed to the transfer, or if the receiving jurisdiction had a "hold" on the prisoner. In context, it seems that we actually asked the sherriff to be enjoined unless he could rebut the *prima facie* case we offered to make regarding unconstitutional conditions at any given jail.

9/ If the sheriff had been using out-state jails, which he had statutory authority to do, prior to this action, there is no evidence of it in the record.

Order monts. 10/ See also, Rhem v. Malcolm 389 F. Supp. 964, 966-967 (S.D. N.Y. 1974), in which the district court explicitly held that its findings and orders regarding present and future inmates of the "Tombs" applied to the same class moved, en masse, to Rikers Island. Moreover, Missouri statutes place responsibility for pretrial detainees squarely in the ahands of the named defendants. 11/ Thus, all detainees are "jail prisoners" whether they have literally been transferred to from the jail to other facilities or placed there, by the sheriff, ab initio.

The court has said many times, on the record, that it would prefer that we bring separate suits for specific relief gainst every other facility at which donditions fall below constitutional standards. Aside from the undesirability and impracticality of this alternative, there is no legal basis for requiring us to proceed in such a fashion.

10/ Tr. 11/1/74, p. 30: "(Q.) ...if conditions in the institution to which you moved the prisoners were such as to be unconstitutional, this would not be your concern? A. (Tallent) If conditions were found to be unconstitutional then we would have to move the prisoners somewhere else."

Tr. 12/23/74, p. 136: (After defendants' counsel objects to line of questioning about the Workhouse): Court: "...but there are people who are in the same category that are being... pretrial detainees that are being detained else-where, and the thrust of it is that whether or not they are being kept in a situation that is compatible with Constitu-tional requirement."

11/ "If the offense is not bailable, or if the personsdoes not meet the conditions for release as provided in section 544.455, the prisoner shall be committed to the jail of the county in which the same is to be tried, there to remain until he be discharged by due course of law." V.A.M.S. §544.470

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county be insufficient, to commit any person or persons in his custody... to the nearest jail of some other county..." V.A.M.S. §221.030.

The United States Attorney for the Eastern District of Missouri is eager that we appeal Judge Regan's denial of our motions with respect to transfers, as demonstrated by the leter attached hereto as Attachment B.

(ii) Visits, Recreation, and the "Least Restrictive Alternative"

In its initial Order of October 2, 1974, the district court ordered the jail to be closed unless it met constitutional standards, but did not, then or thereafter, set forth what those standards were or by what date they should be met.

The underlying theory, however, of all cases involving jail conditions, is that detainees, presumed innocent, can not, consistent with due process, be subjected to "punishment" whether cruel and unusual or not. Brenneman v. Madigan, 343 F. Supp. 128, 130 (N.D. Cal. 1972); Jones v. Wittenberg, 330 F. Supp. 707, 717 (N.D. Ohio 1971), aff'd subnom Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Conklin v. Hancock, 334 F. Supp. 119, 1121 (D. N.H. 1971); Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971). Any condition of confinement found to be cruel and unusual as applied to convicts a fortiori "punishes" a detainee, prior to trial and sentence, in violation of his Fourteenth Amendment right to due process of law. 12/

Moreover, most pretrial detainees would be free but for their inability to post bail. Inherently, their detention involves unequal treatment vis-a-vis criminal defendants who are able to post bail, but to the extent possible the

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12/ Cmpare, e.g., Gates v. Collier 489 F.2d 889 (5th Cir. 197[illegible] and Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971) which formed the basis for the orders in this case regarding required number of guards. More felicitous practices in post-sentence facilities may be adduced to set minimum standards for jails. See, particularly, Rhem v. Malcolm, 371 F. Supp. 594, 625 (S.D. N.Y.), aff'd 507 F.2d 333 (2d Cir. 1974).

inequality must be minimized, Since the only function of pretrial detention is to assure the detainee's appearance at trial, the conditions of his incarceration must add up to the least restrictive means of achieving that purpose. Theoretically, every freedom must be afforded consistent with institutional security. Miller v. Carson, 401 F. Supp. 835, 836 (M.D. Fla. 1975); Rhem v. Malcolm, supra, 371 F. Supp. at 622-623; Brenneman v. Madigan, supra, 343 F. Supp. at 138; Hamilton v. Love, supra, 328 F. Supp. at 1192.

Implementing the doctrine of "least restrictive alternative," courts have required jail administrators to offer visiting provisions as or more liberal than were requested in this case, and in circumstances at least as difficult, Jones v. Wittenberg, 330 F. Supp. 707, 717; Rhem v. Malcolm, 371 F. Supp. 594, 601-607, and have recognized, in an increasing number of instances the importance and desirability of furnishing contact visits. Dillard v. Pitchess, 399 F. Supp. 1225, 1240 (C.D. Cal. 1972) (requiring introduction of contact visits) Rhem v. Malcolm, supra, 371 F. Supp. at 601-607 (there must be contact visits except high security risks); Brenneman v. Madigan, supra, 343 F. Supp. at 134. Similarly, courts have held daily recreation periods to be a constitutional requirement. Rhem v. Malcolm, 389 F. Supp. 964, 972 (S.D. N.Y. 1974) (Rikers Island stage); Hamilton v. Landrieu, 351 F. Supp. 549, 550 (E.D. La. 1972); Miller v. Carson, 401 F. Supp. 835, 891-893 (M.D. Fla. 1975).

We do not suggest that the "least restrictive alternative" doctrine entitles the detainee to every comfort he would enjoy in his own home, and we must acknowledge that defendants have greatly improved conditions.inHowever, reasonable physical exercise and contact with relatives and friends have been rrecognized as fundamental rights, as basic to humane confinement as minimal living space and decent sanitation. Such rights can not be curtailed because jail administrators lack the flexibility to maximize use of

existing staff, or the imagination to seek out all available additional resources. Cf. Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968). 13/ We maintiin that in the instant case, the district court too readily accepted defendants' representations that they could do no better.

We urge that the Court of Appeals be asked either to set out minimum standards for adequate visiting and recreation, or at least remand, requiring the district court to place a heavy burden upon the defendants to show why they can not offer plaintiffs the "least restrictive" detention to which they are entitled.

CONCLUSION

For the reasons stated in this Memorandum, we urge that appeal be taken from the court's December 29, 1975 Order with respect to the issues outlined above.

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

13/ "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations...."