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1985 WL 3181

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United States District Court; E.D. Pennsylvania.

SIDNEY CLIETT, JR., et al.

v.

THE CITY OF PHILADELPHIA, et al.

Civil Action No. 85-1846. | October 17, 1985.

#### Attorneys and Law Firms

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CITY OF PHILADELPHIA POLICE COMMISSIONER  
GREGORE SAMBOR.

#### Opinion

### MEMORANDUM OPINION AND ORDER

VanARTSDALEN, Judge.

\*1 This action was brought as the result of a police action known as ‘Operation Cold Turkey’ which was carried out by the Philadelphia Police Department beginning on March 27, 1985. The operation, which was carried out in an attempt to reduce drug-related activity in certain areas of the city, allegedly led to the stopping, frisking and/or questioning of over 1,400 persons, of whom close to 200 were taken to a police station and formally charged or arrested. Plaintiffs, those people stopped by the police during the operation, claim that the operation was unconstitutional because it caused them to be stopped based solely on their presence in the targeted high-crime areas. On April 10, 1985, I approved a consent decree which ordered the police to observe all constitutional requirements in carrying out Operation Cold Turkey and to refrain from stopping individuals based solely on their presence in the target areas. Plaintiffs, now seeking monetary damages for the alleged violation of their constitutional rights, have moved to be allowed to proceed as a class pursuant to Federal Rule of Civil Procedure 23(b)(3).

In order to be certified as a class, plaintiffs must meet the requirements of Rule 23(a) and 23(b)(3). Rule 23(a) requires that:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law on fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) requires a finding that ‘the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.’ Defendants oppose the plaintiffs’ motion for class certification on the grounds that plaintiffs’ claims fail to present common questions of law or fact and that the representatives’ claims are thus not typical as required under 23(a)(2) or (a)(3). As a result of these failures, defendants argue that plaintiffs have similarly failed to show that common questions of law or fact predominate in the case as required by Rule 23(b)(3). Defendants have not argued that the class of 1,400 plaintiffs fails to meet the numerosity requirement of 23(a)(1) or that the plaintiffs could not be adequately represented by plaintiffs’ counsel.

Plaintiffs in this case have been brought together by the fact that they were all stopped by the police as the result of Operation Cold Turkey. All the plaintiffs’ claims arise from alleged constitutional violations which were carried out as a result of the operation. The alleged violations appear to be grouped into two categories: illegal stops and illegal arrests. Those plaintiffs who were stopped claim to have been unconstitutionally detained, frisked and/or questioned solely because they were present in a targeted high-crime area. Those plaintiffs who were arrested claim to have been unconstitutionally arrested and taken to a police station without probable cause. Within each of these groups there exist common questions of fact and law as to how the police operation was carried out and whether the operation was unconstitutional.<sup>1</sup> Plaintiffs have alleged that their claims arise out of a common course of conduct by the police. These allegations suffice to satisfy the commonality and typicality requirements of 23(a)(2) and (a)(3). See Paskel v. Heckler, 99 F.R.D. 80, 84 (E.D. Pa. 1983) and Green v. Wolf Corp., 406 F.2d 291, 300 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

**Cliett v. City of Phila., Not Reported in F.Supp. (1985)**

\*2 The more important question in a 23(b)(3) class certification, however, is whether the common issue, in this case the constitutionality of Operation Cold Turkey, predominates over the individual issues which may arise in determining the defendants' liability and damages as to each class member. The meaning of 'predominate' has not been subject to any uniform, or indeed clear, interpretation. See Simer v. Ries, 661 F.2d 655, 672 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982). The existence of some individual issues does not, however, preclude the certification of a class under 23(b)(3). Id. at 674; Umbriac v. American Snacks, Inc., 388 F. Supp. 265, 273 (E.D. Pa. 1975).

Defendants argue that the issue of liability will depend on a factual determination as to the circumstances surrounding each individual stop by the police and that these individual issues predominate over any common issues. However, as set out by the court in Abramovitz v. Ahern, 96 F.R.D. 208, 217 (D. Conn. 1982), where the plaintiffs have alleged that the police have engaged in a presumptively invalid procedure, as in the case of Operation Cold Turkey (based on the allegations of the complaint), a 23(b)(3) class is appropriate since the liability which the plaintiffs seek to establish is based on the operation itself rather than on the circumstances surrounding each individual stop or arrest. Thus, the common issue as to the validity of the operation predominates over the individual circumstances surrounding each encounter carried out during the operation. If at a later stage of the proceedings it is found that the operation itself was not unconstitutional, then the class could be decertified pursuant to Federal Rule of Civil Procedure 23(c)(1) and the plaintiffs could proceed by individual suits to seek redress for any individual constitutional violations which may have occurred. Abramovitz, 96 F.R.D. at 217.

A 23(b)(3) class action is also superior to other methods for adjudicating this case. Since the majority of claims for illegal stops involve minimal damages, there is little likelihood that the plaintiffs would prefer to prosecute

their claims individually and to date the record does not disclose any other actions arising out of Operation Cold Turkey having been filed. See Plaintiffs' Memorandum of Law in Support of Class Certification, p. 15. Furthermore, the fact that the plaintiffs may be unwilling or unable individually to pursue the possibly small amount of damages to which they may be entitled, weighs in favor of a class action to vindicate their rights. Werfel v. Kramarsky, 61 F.R.D. 674, 682 (S.D.N.Y. 1974). Thus, I find that the requirements of Rule 23(a) and 23(b)(3) have been met and certification of the class of plaintiffs, with a subclass of those who were arrested as well as stopped, is proper.

**ORDER**

Upon consideration of plaintiffs' motion for class certification and supporting and opposing memoranda of law, for the reasons stated in the accompanying memorandum, it is

\*3 Ordered that plaintiffs' motion for class certification is granted and this action shall proceed as a class action in accordance with Federal Rule of Civil Procedure 23(b)(3). The class shall consist of those individuals who were stopped, frisked and/or questioned by police as a result of or in carrying out the Philadelphia Police Department's Operation Cold Turkey. Further, a subclass is certified consisting of those individuals who were either charged with summary offenses or arrested as a result of Operation Cold Turkey.

It is further ordered that plaintiffs shall file by motion a proposed form of notice to the class as specified in Federal Rule of Civil Procedure 23(c)(2), within twenty (20) days of this order, together with any proposed order for further ?? pretrial proceedings and scheduling.

Footnotes

<sup>1</sup> Since the issue of whether Operation Cold Turkey permitted the unconstitutional arrest of plaintiffs differs from the issue of whether the operation permitted the unconstitutional stopping of plaintiffs, it is appropriate to create a subclass of those plaintiffs who were charged or arrested as well as stopped. Federal Rule of Civil Procedure 23(c)(4)(B); Fox v. Prudent Resources Trust, 69 F.R.D. 74, 77 (E.D. Pa. 1975) (court has discretion to create subclasses).