BENCH MEMORANDUM

Monday, December 2, 1985

Pembaur v. Cincinnati, No. 84-1160

Cert to CA6 (Kennedy, Jones, Cohn (DJ))

Initial Votes

Grant: WJB, TM, HAB, JPS

Deny: WEB, BRW, LFP, WHR

Recommendation: REVERSE

QUESTION PRESENTED

Can a single decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. §1983?

BACKGROUND

On May 19, 1977, two deputy sheriffs of Hamilton County, Ohio, assisted by the Cincinnati police, forcibly entered the medical offices of the petitioner. The county law enforcement officials, who had not obtained search warrants authorizing them to enter the premises, had gone to the offices to serve writs of capias upon two of petitioner's employees. The capiases are

writs directing the person served to appear before a grand jury; it is not an arrest warrant. It can be issued by a notary, and does not require probable cause or statements under oath. The petitioner declined to allow the police to enter to search his office for the named individuals.

Upon the petitioner's refusal to grant the police access, one of the county deputies telephoned the Hamilton County Prosecutor's office. The county prosecutor advised an assistant prosecutor to instruct the sheriff's deputies to "go in and get them." Pursuant to this instruction, the county police, along with the Cincinnati city police, chopped in the door of the office with an axe.

The petitioner filed suit in United States District Court pursuant to 42 U.S.C. § 1983, charging the City of Cincinnati, Hamilton county, and various city and county officials with deprivation of the rights guaranteed him by the Fourth and Fourteenth Amendments. After a bench trial, the district court dismissed the action. The petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which held that although the city of Cincinnati would be liable if petitioner could, on remand, prove the existence of an established policy of using excessive force to serve writs, the county could not be liable under § 1983 because a single decision, even one by a policymaking official, could not constitute or demonstrate a municipal policy. The petitioner now asks this Court to find that the Hamilton County prosecutor is empowered to establish county policy and that, in certain cases, a single decision or

action suffices to prove the existence of a municipal policy for purposes of establishing liability under 42 U.S.C. § 1983.

DISCUSSION

As the court of appeals recognized, petitioner's Fourth and Fourteenth Amendment rights were clearly violated. The police invasion of petitioner's office without a search warrant constituted an illegal search under Steagald v. United States, (1981). The only question, therefore, is the liability of the County for the actions of the county prosecutor.

In Monell v. Department of Social Services (1978) this Court recognized that a city or other municipal corporation is a "person" within the meaning of § 1983 and, consequently, can be sued directly for monetary, declaratory, and injunctive relief. Monell also concluded, however, that such liability cannot rest on a theory of respondeat superior. Rather, official policy must be the cause of the deprivation. The Court stressed that no municipality will be held liable "solely because it employs a tortfeasor."

Last Term, in Oklahoma City v. Tuttle the Court declined to hold that a jury could impose liability upon a municipality on the basis of a single excessive use of force by a non-policymaking official. Tuttle rested on two premises: first, that there was an insufficient causal link between the putative policy and the constitutional violation and, second, that the single incident provided insufficient evidence of the existence

of the policy. This case is different on both scores.

The Court in Tuttle noted that even if plaintiff's contention that there existed a policy of inadequate training which might result in "police misconduct" were true, the plaintiff had neglected to "satisfy Monell's requirement that the particular policy be the 'moving force' behind a constitutional violation." In contrast, the prosecutor's decision here was the "moving force" behind the injury to petitioner's Fourth Amendment rights. Unlike the officials responsible for overseeing police conduct in Tuttle, Hamilton County's prosecutor is not alleged to have practiced a policy of omission which, through an attenuated chain of events, indirectly led to violations of rights. In this case, county police, unsure of what action to take when petitioner refused to allow his office to be searched without a warrant, contacted the prosecutor's office. There can be no doubt that the prosecutor's instructions to serve the arrest warrants, even though to do so police would have to disregard the rights of third parties, are "affirmatively linked" to the subsequent infringements of rights guaranteed by the Fourth Amendment.

The real issue, then, is the second issue identified in Tuttle--the existence vel non of a policy. Petitioner claims that a decision of a policymaker, when that policymaker has been given the authority to make a final decision, constitutes municipal policy. The Court has carefully distinguished municipal officers empowered to establish policy from employees who simply follow orders. Section 1983 does not impose liability

on a municipality for any violation of constitutional or federal statutory rights any employee might commit in the course of his employment. Such a rule of liability would punish governments for having the misfortune to employ a tortfeasor. Monell, 436 U.S. at 694. Municipalities are, however, subject to liability for their own official policies. Obviously, a municipality can set policy only through its officers; the question, then, becomes whether the prosecutor was "making policy" when he told the police to break down the doors of petr's office.

That the prosecutor is a policymaker is not open to question; "it is clear the prosecutor ... establishes County policy." (CA6 opinion). Moreover, the prosecutor is given the express statutory authority to advise all municipal officials of what the law is. In the present case, he exercized that authority in advising the Sheriff to serve the capiases. Petr and resp differ only on whether that single act of advising constitutes "policy."

In deciding when an official's actions may be held to constitute governmental policy, courts examine whether the decisionmaker exercises final authority. An official's actions enjoy final authority if, "at the time they are made, for practical and legal reasons," they express the ultimate decision of the municipality in the matter. Rookard v. Health & Hospitals Corp., 710 F.2d 41, 45 (2d Cir. 1983). The final authority standard is widely employed to ascertain whether there exists a cognizable § 1983 claim against a municipality. Indeed, most of the cases decided by the CA's involving §1983 claims against a

municipality based on the acts of a policymaking official have considered whether the decision that led to the constitutional harm was a decision that the policymaker had the final authority to make.

In the present case, the prosecutor is the county's highest-ranking legal officer, and one whose opinions on legal matters are to be sought and followed by other county officials. Moreover, the entire exchange between the prosecutor and the sheriff strongly supports the notion that the prosecutor was making policy. The sheriff, unsure what action to take, did what any non-policymaker should do--he called the policymaker and asked, in effect, "what is the policy?" He got an answer--to go in and serve the writs by any means necessary. It seems obvious to me that this was an exercise of the prosecutor's policymaking authority, and one which led directly to a violation of constitutional rights.

The CA6 found that petr had established only that "on this one occasion" the prosecutor and sheriff had decided to break into petr's office. If indeed that decision was one which the prosecutor made in his policymaking capacity, I don't think that it makes any difference whether this conduct has occurred more than once. However, the CA6's conclusion does open up the question whether this was just an isolated tortious act, like the shooting in Tuttle. I think it was not. As I just mentioned, the sheriff went to the prosecutor specifically because the prosecutor is the person who establishes legal policy. All the parties involved followed precisely the pattern that the

municipality had established--the lower-level officer, unsure how to proceed, went to the policymaker, and the policymaker made a decision. If that decision, made through established channels, cannot be imputed to the municipality, then I don't see what decisions can be. It would always be possible for a municipality to repudiate, after the fact, any decisions by its policymakers that turned out to violate constitutional rights. If that is all the municipality need do to escape liability, however, then Monell has no bite at all.

CONCLUSION

The decision to violate petr's constitutional rights in this case was made by a municipal officer with the final authority to make the decision, and was made in the manner established by the municipality for such decisions. The decision therefore should be imputed to the municipality for §1983 purposes.

REVERSE

pm

November 26, 1985

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