HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1985

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 83-1919 Oklahoma City v. Tuttle

Three cases were held for Oklahoma City v. Tuttle:

(1) In Bennett v. City of Slidell, no. 84-797, a city building inspector refused to issue an occupancy permit to a cocktail lounge owner because the lounge parking lot was paved with oyster shells, rather than with concrete as required by city ordinance. The building inspector testified that he allowed establishments to operate with oyster shell parking lots unless someone complained about the oyster shells, as had happened in this case. Petitioner did not appeal the inspector's decision to the city council, although the record apparently indicates that the council never questioned the inspector's decisions. After a few more scrapes with the city petitioner finally had his lot paved, after which he received an occupancy permit.

Petitioner brought suit under §1983, seeking damages from the city and various individuals. Apparently, his theory was that the building inspector's unequal application of the parking lot ordinance had violated his rights under the Equal Protection Clause. The DC instructed the jury that the city could be liable if the building inspector had acted pursuant to his city authority, and the jury returned a $20,000 verdict against the city. The DC denied the city's j.n.o.v. motion, reasoning that since the city council never questioned the inspector's decisions his denial in this case was an act representing the city's "policy."

On appeal a panel of the CA5 affirmed, and the case then went en banc. The en banc court reversed, with 8 judges taking the position that the "policy" at issue here could not be attributed to the city council, and that it also could not be said that the building inspector had been delegated authority to set city policy in this area, given that his decisions were appealable to the board of zoning

adjustment and the city council. Here there was no evidence that the policy of discriminatory enforcement could be attributed to the city council. Five judges dissented, reasoning that since the inspector acted within the scope of his delegated authority and the council never questioned those decisions, the decisions constituted city policy. On rehearing the CA5 judges unanimously agreed on the following definition of official city policy:

> 1. A policy statement, ordinance, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official [to] whom the lawmakers have delegated policy-making authority; or
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> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by the officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body or to an official to whom that body delegated policy-making authority.

This case does not really raise the mainstream issues involved in Tuttle, which centered on how and when a city might be held liable for unconstitutional acts allegedly arising from "inadequate training" of its police force. This case instead raises the question of when a decision of a city official, which directly results in a constitutional violation, can be said to constitute municipal policy. Tuttle did not address that question except to the extent that it indicates that a police officer generally does not make such policy. Here the CA5's legal standard makes sense to me, and it seems that the disagreement within the CA5 is only over the standard's application to this case. I am satisfied with the court's reasoning and will vote to deny.

(2) City of Prarie View v. Thomas, no. 84-954, involves several actions taken by a town mayor bent on assuring that a sewer system would be connected across a University's property. When the University took actions to disconnect the sewer because the requisite approval had not been given, the mayor swore out a complaint against the University President, and then acting as magistrate issued an arrest warrant. After arrest, the mayor set bond and then refused a check in payment, thereby forcing the President to be held for over two hours.

The President sued the mayor and the city under §1983, alleging various constitutional violations arising out of his arrest and detention. The DC found the mayor liable, but refused to hold the city liable because there was no official policy of arresting people to further non-law enforcement purposes, and because there was no showing that the city council was aware of or supported the mayor's actions. The CA5 reversed on the municipal liability issue. Citing Bennett, the court noted that an official's acts could be considered city policy only where the individual had been given authority to make city policy in a certain sphere, and had acted within that sphere. The CA5 held that the DC's finding that the city had not authorized the mayor's policymaking here was clearly erroneous; the record indicated that the council had entrusted all decisionmaking concerning the sewer controversy to the mayor, and in addition there was evidence that the council knew that the mayor planned to go ahead with the project without the University's approval.

Again, this case does not involve the central issues of Tuttle, but instead involves an application of the standard articulated in Bennett for identifying a city policymaker. I am satisfied with the legal standard, and given the CA5's view of the facts I cannot quarrel with the standard's application. I will vote to deny in this case also.

(3) Pembaur v. City of Cincinnati, et al, no. 84-1160. Petitioner, a doctor operating a medical clinic, was under investigation by respondent county for alleged welfare fraud. Two deputy sheriffs arrived at the clinic, without warrants, to execute capiases to bring two of petitioner's employees before a grand jury. When petitioner refused to allow the deputies to enter, the deputies called the county prosecutor, who, through a subordinate, told the deputies to "go in and get them." This they did, with the aid of a fire axe.

Petitioner sued various individuals and the county under §1983, alleging a violation of his Fourth Amendment rights. The DC ruled in favor of the county on the ground that the deprivation was not pursuant to official policy. The CA6 affirmed. The court noted that the sheriff and the prosecutor, who authorized the entry, were public officials who could establish county policy under certain circumstances. However, the CA6 noted that in this case petitioner "has failed to establish ... anything more than that, on this one occasion, the Prosecutor and the Sheriff decided to force entry into his office. ... That single, discrete decision is insufficient, by itself, to establish

that the Prosecutor, the Sheriff, or both were implementing a governmental policy." (Emphasis in original.)

Once again, the principal issues in this case do not involve the "inadequate training" scenario of Tuttle, but instead center on identifying when a particular official can be said to have set municipal policy. I think the CA6's decision is consistent with Bennett on that score; Bennett requires proof that the county governing body delegated authority to establish a certain course of action before the political subdivision can be held liable for the official's acts. To the extent that this is a "single incident" case, I think the CA6's analysis is consistent with the plurality opinion in Tuttle. That opinion establishes that a single incident can be enough to justify municipal liability if there is also proof of an "existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." The CA6 merely held that a single action by someone who might be a municipal policymaker does not establish that he was guided by a "policy" intended to apply in a certain class of situations. There was no indication that the county governing body had decided to break doors down to execute capiases under these or any other circumstances, nor was there any indication that the prosecutor or sheriff were authorized to adopt such a policy. Because I find the CA6 opinion consistent with Tuttle, and because I regard it as consistent with Bennett and the evolving law on identifying a muncipal policy, I will vote to deny.

Sincerely,

June 12, 1985

Mr. Justice:

Re: Holds for Oklahoma City v. Tuttle, No. 83-1919

I agree with Justice Rehnquist's recommendation that the Court should deny Bennett v. City of Slidell, No. 84-797, and City of Prairie View v. Thomas, No. 84-594. I disagree with his recommendation regarding Pembaur v. City of Cincinnati, et al., No. 84-1160, however. In that case, deputy sheriffs sought the advice of the county prosecutor regarding how to execute a capias to bring two of petitioner's employees before a grand jury in the face of petitioner's refusal to allow the sheriffs into the building. The prosecutor directed that the sheriffs "go in and get them," so the sheriffs took an axe to the door. The CA6 stated that the prosecutor was an elected official who could establish county policy in certain circumstances, but held that because the evidence showed only that the prosecutor had done so on a single occasion, petitioner had not established that the prosecutor was implementing municipal policy.

The CA6's holding can only be justified under two theories. First, the ct seems to be holding that a single decision, even by a person of policy-making rank, can never be a policy. The opinion which you joined in Tuttle specifically rejected that one free violation theory. The CA6's holding is inconsistent with that view.

The second ground upon which the CA6's holding might be justified is a theory that the prosecutor is not high enough in the ranks that his decisions can establish policy. I don't see how that theory can be correct. Had the evidence in Tuttle shown that the Chief of Police authorized the police officer to shoot the victim, I don't think you would have had any doubt that the officer was acting according to a municipal policy. That is essentially what happened here -- the deputy sheriffs were told by the prosecutor, who apparently is the highest law enforcement officer, to act in a particular fashion. The sheriffs knew to call the prosecutor for a final decision, and the prosecutor believed he had the authority to make the decision. Decisions regarding how to execute capiases are normally within the "job description" of a prosecutor, and there is no evidence that the City Council had ever instructed the prosecutor that he did not have the authority to make such decisions.

If the prosecutor here is not high enough to make policy, then Monell will rarely apply unless the city council itself actually makes the decision. That result would seriously undermine Monell, because few City Councils will ever formally adopt unconstitutional policies. Because the CA6's reasoning is so threatening to Monell, and because the lower courts are having

difficulty figuring out what a "policy" is under Monell, I recommend that you vote to grant.

Thanks, Vicki