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December 28, 1984

OKLA GINA-POW

83-1919 City of Oklahoma v. Tuttle

MEMO TO FILE

The question presented in the petition for cert is:

"Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under Section 1983."?

An Oklahoma City police officer named Rotramel, responding to a telephone call where a robbery had been committed in a restaurant entered the restaurant and undertook to question Tuttle who - it is conceded - fit the description of the "robber" given the police by telephone. Tuttle declined to stop, left the restaurant, was followed by the officer, and was shot in the back by the officer on the sidewalk. The evidence was conflicting as to the exact circumstances of the shooting, the officer having testified that Tuttle had leaned over as if to pull a gun out of his boot and a toy pistol was found in the boot. But on the basis of the jury's verdict we must accept as a fact that the officer without just cause shot and killed Tuttle.

Monell held that a city is not liable for wrongful conduct of its agents unless they have acted pursuant to a "custom" or "policy" of the city. It may well be that we made a mistake in taking this case. It was tried by a jury, and there was conflicting evidence as to some of the facts and particularly as to whether the officer had been properly trained. On the basis of what is said in the briefs of the parties, I would have thought it proper for the DC to have decided for the city notwithstanding the jury's verdict. The Oklahoma City Police Academy, for a number of years, had been rated one of the top three police academies in the nation. Rotramel had graduated with high marks from the Academy, after completing 18 weeks training. Then Rotramel "rode for several months" with a senior patrolmen before being allowed ride "solo". Moreover, the city's "Operation Manual" for the Police Department provided:

"A police officer is justified in using his firearm only in defense of life and instances where the suspect is armed and/or making an attempt to kill or do great bodily harm."

Apparently the evidence on behalf of Tuttle's widow was opinion evidence to the affect that the city's training was grossly inadequate, even though apparently no

specific examples of the city tolerating the shooting of a civilian in the back without provocation - as presumably the jury found in this case despite substantial evidence to the contrary. instructions given by the DC, they told the But the case comes to us after a jury had decided critical factual issues against the city - apparently including an instruction that required the jury to decide whether or not inadequate training constituted "gross negligence". supervisory city officials and if that policy was In view of the importance of a decision construing the "policy" or "custom" language of Monell, I will need a memorandum from my clerk that focuses primarily on the instructions given, and whether critical instructions were objected to by the city. I find the briefs unclear and contradictory. The Court of Appeals, at p. 7a of the petition for cert sets forth the critical instruction. It may be that this is erroneous in terms of how "custom" and "policy" were defined. Apparently the jury was allowed to "infer" from rather general opinion testimony that the mere fact of one officer shooting a civilian permitted an "inference" of grossly negligent training, and that negligent training alone - without more - is sufficient to meet the Monell standard.

The \_\_\_\_\_ held that the instructions "were not erroneous". I am not sure of this. Apart from the fact

Note to myself: think the case should have gone to the jury

In rereading instructions given by the DC, they told the jury that the city "can be found to have authorized, sanctioned, or acquiesces in any denial of the decedent's rights only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent."

The DC then noted that the plaintiff contended the city was "grossly negligent" in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers." And the court went on to instruct the jury that "the policy, if it existed, may not be expressed in writing; it may be implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of an offensive act."

The \_\_\_ held that the instructions "were not erroneous". I am not sure of this. Apart from the fact that I do not think the case should have gone to the jury on the basis of the evidence as I understand it, I doubt that "gross negligence" may be inferred in the absence of any direct evidence of indifference or negligence. Of course, it can be said that the jury found negligence in training the police despite the undisputed facts that the officer in question was a graduate from one of the three best police schools in the country, had been trained also by an experienced officer before permitted to function alone, and this particular officer had no other blemish on his record.

LPP, JR,