AELE Seminars:
Jail & Prisoner Legal Issues
January 25-28, 2021

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Jail and Prisoner Law Bulletin

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MONTHLY CASE DIGEST

- Some of the case digests do not have a link to the full opinion.
- Most Federal District Court opinions can be accessed via PACER. Registration required. Opinions are usually free; other documents are 10¢ per page.
- Access to cases linked to www.findlaw.com may require registration, which is free.

Medical Care

A Wisconsin prisoner who suffered an ankle injury while playing basketball in the prison yard underwent surgery to remove damaged bone, tissue, and cartilage. Following surgery, the surgeon provided him with oxycodine and cautioned that he would be in "extreme pain" when the drug wore off. His discharge instructions recommended narcotic-strength painkillers every six hours. A prison doctor prescribed Tylenol #3, as needed every six hours for three days. Because of a nurse's scheduling of the doses, the prisoner woke up at 3:30 a.m. in "excruciating pain." He kept having difficulty accessing the medication that had been ordered because the prison's medication distribution schedule did not match his prescription. His medication order ran out completely and he began experiencing agonizing pain around the clock. The nurse allegedly refused to contact a doctor. Five days later, the doctor prescribed Tramadol, another painkiller. The prisoner didn't receive the medication for two more days, and his medical records showed that the pain required management for several more weeks. A federal appeals court upheld summary judgment for the other defendants, but found that a factual issue remained as to the possible deliberate indifference of the prison nurse. *Machicote v. Roethlisberger*, #19-3009, 969 F.3d 822 (7th Cir. 2020).

Medical Care: Vision

A Pennsylvania prisoner had long struggled with glaucoma, which can lead to blindness if left uncontrolled. His condition worsened while he was imprisoned at a state prison. Doctors recommended a quick surgical procedure to save his eyesight, but nothing happened for almost a year, during which he repeatedly contacted prison staff members. The surgery then occurred, but was too late, resulting in his blindness. A federal appeals court overturned summary judgment on the basis of failure to exhaust available administrative remedies, as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e(a). The court found that his claims for monetary relief are not procedurally defaulted. Under the prison's procedures, a prisoner dealing with an emergency or an urgent situation is not bound by the ordinary procedures specified in the grievance policy, but only needs to alert the closest staff person. The court rejected the prison's "efforts to downplay the urgency" of his situation and found that the prisoner complied with the policy under the circumstances. The appeals court affirmed, however, the dismissal of claims against the state Department of Corrections and its officials on state sovereign immunity grounds, although that defense was not raised before the district court. *Downey v. Pennsylvania Department of Corrections*, #19-2248, 968 F.3d 299 (3rd Cir. 2020).

Prisoner Assault: By Inmate

A prisoner allegedly told a prison official, a female correctional lieutenant, that another prisoner made a threat to kill him. A federal appeals court upheld summary judgment for the defendant in a failure to protect lawsuit. The other prisoner did in fact carry out an assault. The reasonableness of a prison official's response to a substantial risk of serious harm depends on the facts the official knew when she learned about the threat. The court stated that sometimes, the facts are so serious and clear that anything less than immediate protective custody for the threatened prisoner would be unreasonable. More often, as in this case, the court explained that the prison official responds reasonably by taking the time to investigate the threat and look into different options all while making sure the prisoners are being supervised. The court agreed with the trial court that, viewing the summary judgment evidence in the light most favorable to the plaintiff, the defendant reasonably responded to the other prisoner's reported threat (even if the harm was ultimately not averted). In this case, the defendant was available to talk to the plaintiff about the threat and told him she "had his back," would investigate the threat, and look into moving the other prisoner. Furthermore, her response was

reasonable in light of what she knew about the plaintiff and the other inmate, the history of their dispute, and the fact that both the plaintiff and the other prisoner were in the "good behavior dorm" at the time. *Mosley v. Zachery*, #17-14631, 966 F.3d 1265 (11th Cir. 2020).

The plaintiff detainee claimed that he was assaulted by other inmates while he was confined at a county jail in Tennessee. He sued the sheriff for a civil rights violation in failing to prevent the assault. The sheriff had no direct involvement in the plaintiff's detention. 42 U.S.C. Section 1983 does not impose vicarious liability on supervisors for their subordinates' actions. The prisoner argued that the overcrowded jail had repeatedly failed minimum standards, that the sheriff had long known of its failures, and that he had been deliberately indifferent to inmate safety. The Tennessee Corrections Institute had identified the jail's failures in inspection reports that are sent to the sheriff each year. The trial court denied the sheriff qualified immunity on the plaintiff's Fourteenth Amendment claim, reasoning that pretrial detainees have a clearly established right to be free from a government official's deliberate indifference to inmate assaults.

The federal appeals court reversed. It stated that existing precedent would not have clearly signaled to the sheriff that his responses to the overcrowding problem were so unreasonable as to violate the Fourteenth Amendment. The plaintiff had no evidence suggesting that the sheriff had any personal knowledge of his specific situation. Further, the sheriff had made efforts "to abate" the general risk of inmate-on-inmate violence but did not have the power to allocate more taxpayer dollars to the safety problems. The lawsuit against the county, however, remained viable. *Beck v. Hamblen County*, #19-5428, 969 F.3d 592 (6th Cir. 2020).

Prisoner Death/Injury

Less than an hour after a county jail officer was captured on video yelling in a detainee's ear that "I'd like to break your fucking neck right now," several correctional officers discovered him hanging by his neck from a bed sheet tied to the sprinkler escutcheon in his cell, in what the officers now characterize as a suicide. The detainee's sister claimed that the hanging was staged. The trial court found that there was a genuine dispute of fact as to whether the decedent was capable of hanging himself, mainly due to the physical layout of the cell and the detainee's physical characteristics but still granted the defendants summary

judgment, reasoning that the plaintiff had not presented sufficient evidence as to a specific theory of how the detainee died. A federal appeals court reversed in part, reinstating claims against two correctional officers relating to the death. The court affirmed with respect to other defendants and claims. The trial court improperly discounted the testimony of the county coroner, who officially concluded that the inmate did not hang himself and that a suicide was implausible, which also raised a triable issue of fact as to the cause of death. *Bard v. Brown County*, #19-3468, 2020 U.S. App. Lexis 26160, 2020 Fed. App. 0266P (6th Cir.).

Prisoner Suicide

****Editor's Case Alert****

After serving almost 20 years as a police detective, a man was charged with a federal drug trafficking offense. While incarcerated in a county jail awaiting a preliminary hearing, he committed suicide in his cell. In a lawsuit for deliberate indifference to the detainee's serious medical need, with state-law claims for wrongful death and survival, the trial court denied summary judgment to two officers, finding that neither was entitled to federal qualified immunity or immunity under Ohio law. A federal appeals court reversed, finding that the facts and inferences as found by the trial court did not, as a matter of law, show that either officer was aware that the decedent posed a "strong likelihood" of attempting suicide. During the intake process, he had denied any thoughts of suicide, feelings of hopelessness, or history of psychiatric issues. The intake officer reported no visible signs of distress, noting only that the detainee was a "peace officer." He was later seen by a nurse, who ministered her own physical and mental health assessments, and again denied any thoughts of suicide, feelings of hopelessness, or history of psychiatric issues. He subsequently also met with a mental health clinician, who reported only "normal findings" with respect to demeanor, mood, thought process, behavior, affect, and cognition. Nothing would put officers on notice of a probable suicide. *Downard v. Martin*, #20-3046, 968 F.3d 594 (6th Cir. 2020).

A pretrial detainee at a Wisconsin county jail tried to commit suicide by hanging himself with a blanket, putting him in a vegetative state. In a suicide note, he said that the guards were "f***ing" with him and would not give him access to "crisis counseling." Another inmate housed near his cell, substantiated the claim that was made in his suicide note. In a recorded interview with a county detective, that inmate stated that in the days leading up to the suicide attempt, the detainee

had asked two officers to refer him to crisis counseling but neither of them followed through with their promises.

On remand, a jury ruled in favor of the defendant officers. A federal appeals court held that the trial court's exclusion of the video interview was a reversible error. After a second trial, the jury again returned a verdict for the defendants. The appeals court again remanded. One of the jury instructions erroneously directed the jury to evaluate the plaintiff's Fourteenth Amendment claim according to a subjective rather than objective standard. The jury was improperly told to consider whether the defendants "consciously failed to take reasonable measures to prevent [the detainee] from harming himself." The word "consciously" introduced a subjective element, and the defendants were liable only if their actions or inactions were objectively unreasonable. *Pittman v. Madison County*, #19-2956, 2020 U.S. App. Lexis 25845 (7th Cir.).

Retaliation

A prisoner filed a lawsuit for damages putting forth equal protection and First Amendment claims arising out of his grievances stemming from his transfer to a prison where he was denied permission to possess an aviation manual he had been allowed to have at his prior correctional facility. The trial court dismissed all but one claim asserting that the plaintiff's First Amendment rights were violated when a federal correctional counselor retaliated against him for filing grievances by denying him prison grievance forms. The trial court interpreted the action as one brought against the counselor under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and granted summary judgment, concluding that a *Bivens* remedy should not be implied for retaliatory denials of administrative remedies. A federal appeals court upheld this result, ruling that the plaintiff failed to prove an essential element of a First Amendment retaliation claim, that the denial of a few grievance forms would chill an inmate of ordinary firmness from filing future grievances. In this case, the record establishes that the federal Bureau of Prisons' (BOP) flexible four-step grievance process allowed the plaintiff to have his initial grievance decided on the merits and then to submit a second grievance that initially bypassed the informal resolution step, which was also decided on the merits. Furthermore, there was no evidence that other inmates would not be granted comparable procedural access to BOP administrative grievance remedies. *Gonzalez v. Bendt*, #18-2360, 2020 U.S. App. Lexis 26281 (8th Cir.).

Search and Seizure: Body Cavity

Other inmates at a Wisconsin county jail reported that a female detainee was concealing methamphetamine inside her body. This prompted a physical search of her vagina and rectum under a written policy authorizing such a search to be conducted by medical personnel when there was reasonable suspicion to believe an inmate was internally hiding contraband. Officers transported her to a hospital, where a doctor and nu4rse first conducted an ultrasound test and then the physical search, doing so in a private room without the officers present. No drugs were found. In a lawsuit asserting Fourth Amendment claims, a federal appeals court upheld summary judgment for the defendants, who had reasonable suspicion that the plaintiff was concealing contraband, which justified the cavity search. *Brown v. Polk County*, #19-698, 965 F.3d 534 (7th Cir. 2020)

Strip Searches: Prisoners

A certified class of prisoners claimed that during 2011 female inmates at an Illinois prison were strip-searched as part of a training exercise for cadet guards. The inmates were required to stand naked, nearly shoulder to shoulder, in a room where they could be seen by others not conducting the searches, including male officers. Menstruating inmates had to remove their sanitary protection in front of others, were not given replacements, and many got blood on their bodies, clothing, and the floor. The naked inmates had to stand barefoot on a floor dirty with menstrual blood and raise their breasts, lift their hair, turn around, bend over, spread their buttocks and vaginas, and cough.

The trial court awarded summary judgment to the defendants on the 42 U.S.C. 1983 Fourth Amendment theory. A jury subsequently returned a defense verdict on the Eighth Amendment claim. A federal appeals court initially affirmed this result but, on rehearing, reversed, holding that the Fourth Amendment protects a right to bodily privacy for convicted prisoners, although in a significantly limited way, including during visual inspections. The court remanded for the trial court to assess whether the plaintiffs had demonstrated that an issue of fact exists as to the reasonableness of the strip and body cavity searches. *Henry v. Hulett*, #16-4234, 969 F.3d 769 (7th Cir. 2020).

Resources

COVID-19: COVID-19, Incarceration, and Reentry, by Carrie Pettus-Davis, Stephanie Kennedy, and Faye Miller, Florida State University, College of Social Work (August 2020).

Private Prisons: Impacts of Private Prison Contracting on Inmate Time Served and Recidivism, by Anita Mukherjee, American Economic Journal: Economic Policy (August 2020).

Youthful Prisoners: Sticker Shock: The Cost of Youth Incarceration, Justice Policy Institute (July 2020).

Reference:

- Abbreviations of Law Reports, laws and agencies used in our publications.
- AELE's list of recently-noted jail and prisoner law resources.

Cross References

First Amendment – See also, Retaliation
Prison Litigation Reform Act: Exhaustion of Remedies – See also, Medical Care: Vision
Prisoner Suicide – See also, Prisoner Death/Injury
Search and Seizure: Body Cavity Searches – See also Strip Searches: Prisoners

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