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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000404-MR

EARL LEE JONES APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 03-CI-02945

KATHY WITT, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS FAYETTE COUNTY SHERIFF; BRIAN FIELDS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY FAYETTE COUNTY SHERIFF; AND JOHN REYNOLDS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY FAYETTE COUNTY SHERIFF APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

HENRY, SENIOR JUDGE: Earl Lee Jones appeals from a summary judgment of the Fayette Circuit Court. Jones filed suit against his neighbor, the Fayette County Sheriff, and two deputy sheriffs for unreasonable seizure and unlawful arrest following an incident in which he was handcuffed by the two deputies who were attempting to serve a warrant. They later learned that the person named in the warrant was a different Earl Jones. We affirm.

The incident that led to this lawsuit occurred in the summer of 2002, when Jones's neighbor, John Gerardi, objected to the placement of a trailer on Jones's property. Gerardi made a series of complaints to the Lexington-Fayette Urban County Government Code Enforcement officials about the trailer and eventually a criminal summons was issued for Jones for violating the applicable zoning ordinance. The summons was not immediately served. Gerardi grew impatient with the delay, making repeated calls to his Lexington-Fayette Urban County Council member's office to find out why the summons had not been served. On Tuesday, July 30, 2002, the summons was finally served on Jones at his place of employment. Gerardi was not aware of this, however, and on the following Sunday, August 4, 2002, he telephoned the Sheriff's office to report that Jones, who Gerardi believed was avoiding service, was at home. Gerardi identified himself by name and gave the dispatcher the address where "Earl Jones" could be found. The dispatcher examined the computer records and found that there was an outstanding warrant for an "Earl Jones." The "Earl Jones" named on the warrant was actually Earl W. Jones, however, a white male residing in Georgetown, whereas the appellant is black and resides in Lexington. The warrant for "Earl W. Jones" had been issued for his failure

to appear on charges of violating an EPO. A criminal summons had also been issued for "Earl W. Jones" for a probation violation.

Gerardi called back later to find out why officers had not yet arrived to serve process for Jones's alleged zoning violation. He spoke with dispatcher Sherry Bailey:

> Gerardi: Hi Sherry, my name is John Gerardi.
>
> Bailey: Um-hum.
>
> Gerardi: Calling from 1208 Cleveland Road.
>
> Bailey: Okay.
>
> Gerardi: [Unintelligible] I talked to an officer, I think his name may have been Weaver, Officer Weaver, about an hour ago.
>
> * * *
>
> Gerardi: . . . What I called in reference to was, uh, the Urban County Government is trying to serve papers on an Earl Jones.
>
> Bailey: Earl Jones.
>
> Gerardi: Right, . . . to appear in court, I think.
>
> Bailey: Okay.
>
> Gerardi: And, uh, the sheriff-deputy that I talked to said he was going to send somebody out because this Earl Jones is out here right now.
>
> Bailey: Okay.
>
> Gerardi: And like I said it's, it's been an hour and I'm wondering if you guys are going to come out or not.
>
> Bailey: Okay, um, well, that's, she didn't say anything to me about it so I'm not sure which one it would be. Let me see if I can find it . . .

> Gerardi: It was right at 7.
>
> Bailey: Earl W. Jones?
>
> Gerardi: Correct.
>
> Bailey: Hold on and let me have one of the deputies call in and see if I can find out, okay . . .
>
> . . .
>
> Bailey: Okay, the deputies said they are going to try that. . . .

Bailey then had the following conversation with the deputies, appellees Brian Fields and John Reynolds:

> Bailey: Hey, did you or Brian take a call about a Earl Jones? Off Centerville Lane?
>
> . . .
>
> Deputy: Brian did.
>
> Bailey: Were you all going to attempt it? Cause he does have a code 2 if it is the same one.
>
> . . .
>
> Deputy: We can.
>
> Bailey: Okay, 'cause I've got the neighbor on the phone saying that he is 97 right now.
>
> Deputy: All right. We might be a little while.

Deputies Reynolds and Fields did not possess copies of the warrant or the summons when they arrived at Jones's residence at dusk. Gerardi met them and led them to the trailer. He knocked on the door and then left. Jones answered the door. According to Deputy Fields' account in his deposition,

> Either myself or the other deputy asked if he was Earl Jones. He acknowledged that he was, and we asked him to come out.

> He said, no, and was going back and forth to his wife or – I know now it's his wife. It was a woman inside who was coming in and out of the doorway. He was standing in the doorway and didn't really know if he was coming in or out.

Reynolds testified in his deposition that Jones was "nervous, non-responsive and uncooperative." He continued to refuse to leave the trailer. The deputies testified that they became concerned because they could not consistently see his hands because he was moving about. Jones's wife, meanwhile, was growing agitated. After several minutes, however, Jones stepped from the trailer. The deputies handcuffed him. They explained that they took this precaution because they feared that Jones might be armed, and because radio contact was sometimes weak in that area. Both Jones and his wife emphatically denied that he was the subject of any outstanding warrants or summonses. The deputies waited while Mrs. Jones retrieved her husband's social security card. They then called the dispatcher to check the number against that of the individual named on the warrant and summons. When they discovered the error, the deputies immediately released Jones and expressed regret for the mistake.

Jones filed suit against the two deputies, and Kathy Witt, the Fayette County Sheriff, individually and in their official capacities, and Gerardi. The trial court granted summary judgment to the deputies and the sheriff. Gerardi's motion for summary judgment was denied. This appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the

respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Jones's first claim is that the police violated his rights under § 10 of the Kentucky Constitution. There is no judicially or legislatively created private cause of action (analogous to a federal 42 U.S.C. § 1983 action) which enables an individual to seek damages for violations of this section of our Constitution. Jones has attempted to draw parallels with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in which the United States Supreme Court inferred a private cause of action for damages to enforce the Fourth Amendment guarantee against unreasonable searches and seizures by federal officials. Although some state courts have inferred such a cause of action from their state constitutions (*see e.g. Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688 (Conn. 1998)) no such cause of action has ever been created or inferred by the Kentucky courts. *See Tallman v. Elizabeth Police Dept.*, 344 F.Supp.2d 992, 997 (W.D.Ky. 2004). Jones is therefore without a way to hold the appellees civilly liable for his alleged damages under § 10 of the Kentucky Constitution.

Jones's other claim was for unlawful arrest. He argues that the knowledge of the dispatcher, who had access to the information regarding the race and address of the individual named in the warrant, should be imputed to the deputies, and that therefore the deputies had constructive knowledge that the outstanding warrant was for a white male named Earl W. Jones of Georgetown, Kentucky. As support for this argument, he relies on *Feathers v. Aey,* 319 F.3d 843 (6th Cir. 2003). In *Feathers*, the Court of Appeals for the Sixth Circuit reviewed a 42 U.S.C. § 1983 action in which police officers Aey and

Donohue made a *Terry* (*see Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) stop of Feathers acting on information from a dispatcher who in turn had relied on an anonymous tip which was without sufficient indicia of reliability to support reasonable suspicion. The Court concluded, based on *United States v. Hensley,* 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985), that the dispatcher's knowledge that the tip was anonymous (and hence unreliable) had to be imputed to the officers.

> Thus, if the dispatcher had sufficient information to find reasonable suspicion for a *Terry* stop, the stop was permissible. But if the dispatcher lacked sufficient information to satisfy the reasonable suspicion requirement, and the officers' subsequent observations did not produce reasonable suspicion, then the stop violated Feathers's Fourth Amendment rights.

Feathers, 319 F.3d at 849.

But the Court then proceeded to make the following critical distinction between criminal and civil proceedings, explaining that the doctrine of qualified immunity was available to protect the police officers from liability in civil suits:

> Nonetheless Feathers cannot overcome the officers' qualified immunity. Aey's and Donohue's behavior was not objectively unreasonable, even in light of the clearly established rights, as *Williams v. Mehra*, 186 F.3d at 691 [(6th Cir. 1999), requires before a plaintiff can overcome qualified immunity. Based on the information that Aey and Donohue had themselves, the *Terry* stop was reasonable. The dispatcher informed the officers of a suspicious person who was possibly intoxicated and supposed to be carrying a weapon. Although this information was from an anonymous tipster, whose information was not sufficient to create reasonable suspicion under *J.L.*[*Florida v. J.L.,* 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000)], the officers knew only what had been reported from the dispatch, and **efficient law enforcement requires - at least for the purposes of determining the civil liability of individual officers - that police be permitted to rely on information provided by the dispatcher.** If the dispatcher's information were accurate and reliable, as the

> police presumed, the totality of circumstances would justify the *Terry* stop. This is precisely the scenario contemplated in *Hensley*, in which, after reasoning that a stop based on a bulletin that was itself issued in the absence of reasonable suspicion would violate the Fourth Amendment, the Supreme Court stated that, "[i]n such a situation, of course, the officers making the stop may have a good-faith defense to any civil suit." *Hensley*, 469 U.S. at 232, 105 S.Ct. 675. So although the stop violated the Fourth Amendment because the authorities' collective information did not amount to reasonable suspicion, Feathers cannot prevail in a § 1983 suit because the individual defendants had a sufficient factual basis for thinking that they were acting consistently with *Terry*.

Feathers,, 319 F.3d at 851 (emphasis supplied).

In a similar case involving a mistaken probable cause determination, *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), the United States Supreme Court held that law enforcement officials are entitled to qualified immunity for probable cause determinations, even if such determinations are mistaken, if their determinations are based on the facts and circumstances within their knowledge at the time and of which they had reasonably trustworthy information.

In an analogous Kentucky case, in which police officers served a warrant that had been issued under a mistaken name, this Court observed that "[p]olice officers must have some immunity from liability when they are carrying out the duties of their office." It concluded that "[a]n officer is protected and justified in executing process fair on its face that is, process that is issued by a court ... is legal in form, and contains nothing to notify or fairly apprise the officer that it is issued without authority." *Dugger v. Off 2nd, Inc.,* 612 S.W.2d 756, 757 (Ky.App. 1980).

In the case before us, Fields and Reynolds acted in a good faith, objectively reasonable manner in serving the warrant. Jones himself implies this when he attempts to

impute the dispatcher's error to the two deputies. The circuit court correctly granted the motion for summary judgment to these two defendants, because they are entitled to official immunity for their actions.

Jones also contends that Sheriff Witt was liable because she authorized, permitted and ratified the procedure of seizing persons suspected of being sought under a warrant before checking the identifiers in the warrant, and for equipping the deputies with unreliable radio equipment. "KRS 70.040, in effect provides that the sheriff has no personal liability for the acts or omissions of his deputies. It says that the 'office of the sheriff,' not the individual holder of the office, shall be so liable." *Muncy v. Keen*, 619 S.W.2d 712, 714 (Ky.App. 1981). Therefore, the statute precludes any individual liability for Witt.

Jones's argument rests on the deposition testimony of Deputy Field, who explained that they were planning to identify Jones by asking him his social security number and his date of birth, and then checking back with the dispatcher to see if they had found the right individual. Jones argues that this system is flawed because it led to his wrongful arrest. He contends that before attempting to serve a warrant, the deputies should have been provided with a description, including the race, of the individual named in the warrant. He contends that the deputies' failure to use this method was the result of flawed training and therefore attributable to Sheriff Witt.

We disagree. An error could just as easily be made if officers assumed that an individual of a particular race was the sought individual. "Earl W. Jones" could have also been African-American. Case law is replete with instances where police officers mistakenly detain individuals on the basis of a physical description. *See e.g. Hill v.*

California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971) and *United States v. Rosario,* 543 F.2d 6 (2d Cir. 1976). There is no evidence that Sheriff Witt had created or perpetuated a flawed system for serving warrants.

There is also no evidence that Sheriff Witt supplied the officers with unreliable radio equipment. The deputies merely noted that the equipment sometimes did not work well in remote areas. Furthermore, it appears that the decision to handcuff Jones was primarily due to the deputies' fear that he had a weapon, rather than concerns about being able to radio for assistance. Jones has not alluded to any discovery requests on his part seeking evidence regarding the type of radio being used, whether better types of radios are available, and whether Witt was negligent in selecting or not changing the type of radios being used. Our courts have stressed that "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992).

For the foregoing reasons, the summary judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
William C. Jacobs Lexington, Kentucky	Stephen G. Amato Benjamin L. Riddle Lexington, Kentucky