

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002994-MR

RAYMOND DAVID WATSON

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 95-CI-00257

CLIFF GILL

APPELLEE

OPINION  
AFFIRMING, IN PART, REVERSING, IN PART  
AND REMANDING

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BEFORE: BARBER, DYCHE AND JOHNSON, JUDGES.

BARBER, JUDGE. This is an appeal by Raymond David Watson from an order of the McCracken Circuit Court granting summary judgment to Appellee, Cliff Gill, the McCracken County Jailer. In his lawsuit against Gill, Watson alleges that Gill refused to provide him with his prescription medication and refused to place him on a renal failure diet as prescribed by his physician. Because there are genuine issues of material fact and it would not be impossible for Watson to prevail at trial, Gill is not entitled to judgment as a matter of law. We accordingly reverse and remand.

On November 30, 1993, Watson was arrested, charged with murder and incarcerated in the McCracken County Jail where he remained until transferred to the Eastern Kentucky Correctional Complex on October 14, 1994. On March 20, 1995, Watson filed a lawsuit against Gill, alleging that during his incarceration in the McCracken County Jail, he was not given his prescribed medication and was not placed on a renal failure diet as ordered by his physician. It is undisputed that Watson suffered from kidney disease during the time of his incarceration at the McCracken County jail and required prescription medication and the special diet.

On July 11, 1996, Gill filed a motion for summary judgment. Without notice of the motion to Watson, on July 19, 1996, the trial court granted Gill's motion for summary judgment. Watson subsequently appealed to this Court. On December 4, 1998, this Court rendered an opinion reversing summary judgment on the basis that CR 56.03 had not been complied with (Watson v. Gill, 1996-CA-002717-MR).

Following remand, on July 9, 1999, Watson filed a motion requesting that the trial judge recuse himself from the case, which was denied by order dated July 22, 1999. On October 12, 1999, Gill renewed his motion for summary judgment; on November 8, 1999, the trial court entered an order granting summary judgment. This appeal followed.

Watson contends that the trial court erred in granting summary judgment because there are genuine issues of material fact regarding his claims against Gill.

In order to qualify for summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that no genuine issue existed as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment, and all doubts are to be resolved in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). A party opposing a properly supported motion for summary judgment cannot defeat the motion without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, 807 S.W.2d at 482.

Throughout this case, Watson has prosecuted his case pro se. From his pleadings, Watson's legal theory is not entirely clear. However, based upon the fact that a jail inmate, Watson, is alleging that a jailer, Gill, deliberately denied him access to prescribed medication and refused to provide him with a

renal failure diet, we construe Watson's cause of action as a lawsuit pursuant to 42 U.S.C. § 1983.<sup>1</sup>

Section 42 U.S.C. § 1983 provides, in relevant part, that a person who, under color of any statute, ordinance, regulation or custom of any state, subjects or causes to be subjected, any person to the deprivation of any federally protected right, privilege or immunity is civilly liable to the injured party. Watson, in substance, alleges that Gill was responsible for denying him adequate medical care and, while acting under color of state law, violated his federally protected right to humane treatment and reasonable medical care while he was in Gill's care and custody.

Pursuant to the Eighth Amendment of the United States Constitution, the government has an obligation to provide medical care for those whom it is punishing by incarceration. Estelle v. Gamble, 429 U.S. 97, 103; 97 S.Ct. 285, 290; 50 L.Ed.2d 251, 259 (1976). Government officials violate the Eighth Amendment and the due process clause if they exhibit deliberate indifference to the serious medical needs of a prisoner and inflict unnecessary suffering on a prisoner by failing to treat his medical needs. Gaudreault v. Municipality of Salem, Massachusetts, 923 F.2d 203, 208 (1st Cir. 1990). At trial, to prevail on his § 1983 claim, Watson would have to show by a preponderance of the evidence that Gill violated a constitutionally protected liberty interest of Watson's and that he did so in a manner which evidenced

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<sup>1</sup> The panel in Case 1996-CA-002717-MR likewise construed Watson's lawsuit as a 42 USC § 1983 lawsuit.

deliberate indifference to his constitutional rights. Watson could not prevail simply by proving that Gill merely committed negligent acts which resulted in injury. Rivas v. Freeman, 940 F.2d 1491, 1496 (11th Cir. 1991).

As we must view the record in the light most favorable to Watson, we must accept his claims, which are supported by numerous affidavits from fellow jail inmates, that while incarcerated in the McCracken County Jail Watson was denied prescription medication and was not provided with a renal failure diet. Gill denies these allegations; therefore, there is a factual dispute in the case. Gill contends that the jail records conclusively establish that Watson signed for his medication and that Watson's allegations are false. However, Watson contends that he was required to sign for the medication prior to being issued the medication, and though he did sign the sheets, he did not, in fact, receive the proper prescription medications. Similarly, while Gill filed an affidavit stating that following his receipt of the proper medical directive Watson was placed on a renal failure diet, Watson disputes this. Again, Watson produced numerous witness affidavits disputing that Watson had been placed on a renal failure diet. In summary, there are genuine issues of material fact regarding whether Gill withheld prescription medications and refused to place Watson on a renal failure diet, and the trial court erred in determining that there were not.

Gill contends that alleged violations occurring prior to March 20, 1994, are barred by the statute of limitations.

However, we addressed this issue in the prior appeal in this case. In our December 4, 1998 opinion, we addressed the statute of limitations issue as follows:

Because Watson's claim is barred by the applicable statute of limitations, Gill argues, regardless of the factual accuracy of his claim, summary judgment was appropriate. Gill maintains that an action based on 42 USC §1983, which Watson's claim appears to be, must be brought within one year of the date of the injury. Collard v. Board of Nursing, 896 F.2d 179, 189 (6th Cir. 1990). Watson's complaint alleges specific instances when he was deprived medical attention, the most recent being on March 7, 1994. With deference to the lack of artistry of its drafter, the complaint also alleges that he was deprived medical attention until the date of his transfer to the Eastern Correctional Complex in October 1994. We are not persuaded, that given the opportunity, it would be impossible for Watson to present evidence that the failure to provide medical care was in the nature of a continuing wrong which continued until his transfer to the Eastern Correctional Complex. Neel v. Rehberg, 577 F.2d 262 (5th Cir. 1978).

In summary, Gill is not entitled to summary judgment upon the theory that Watson's claim is time barred by the statute of limitations. Blackburn v. Murphy, 244 Ky. 370; 50 S.W.2d 957, 959-960 (1932).

Gill contends, however, that if summary judgment was not proper under the foregoing theories, he nevertheless is entitled to summary judgment on the basis that he is entitled to qualified immunity.

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate the clearly established statutory or constitutional rights of which a reasonable person

should have known. Harlow v. Fitzgerald, 457 U.S. 800, 815; 102 S.Ct. 2727, 2736; 73 L.Ed. 396 (1982). In Siegert v. Gilley, 500 U.S. 226, 231-33; 111 S.Ct. 1789; 114 L.Ed.2d 277 (1991), the Supreme Court clarified the appropriate framework for reviewing claims of qualified immunity. Under this framework, a court must first determine whether the plaintiff "has asserted a violation of a constitutional right at all." Id. at 232. If the court determines that the plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right was clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Martinez v. Mafchir, 35 F.3d 1486, 1489, 1490 (10th Cir. 1994).

As previously noted, the government has a constitutional obligation to provide medical care to jail inmates. Estelle v. Gamble, supra. Watson's pleadings assert a violation of this constitutional right. Moreover, the constitutional right at the time of Watson's incarceration was a clearly established right (Estelle v. Gamble was rendered in 1976). Further, a reasonable official in Gill's situation, a county jailer, should have understood that withholding prescription medications from an inmate and refusing to place an inmate on a diet as prescribed by a physician were constitutional violations of the inmate's rights under Estelle. In light of the

allegations in this lawsuit, Gill is not entitled to qualified immunity.<sup>2</sup>

Finally, Watson contends that the trial judge abused his discretion when he failed to recuse himself from the case. Specifically, Watson contends that the trial judge should recuse himself because Watson has a sincere belief that the trial judge, due to his prior rulings, harbors personal bias and prejudice towards him; because the trial judge presided over his bond hearing on the murder charge for which he is incarcerated; because the trial judge has expressed opinions concerning the merits of the proceedings; because Watson's murder victim, his father-in-law, had bragged about attending dogfights and chicken fights with McCracken County judges; because the trial judge improperly dismissed the case in 1996; because a close relationship exists between the trial judge and Gill; and because the murder victim's son works for McCracken County and Watson's ex-wife has told him that the son has "clout within the system" because he "know[s] all of the judges personally."

KRS<sup>3</sup> 26A.015(2) (e) requires a judge to disqualify himself "[w]here he has a personal bias or prejudice concerning a party, . . . or has expressed an opinion concerning the merits of

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<sup>2</sup>Gill also attempts to argue that he is entitled to qualified immunity because the dispute here involves a ministerial function; however, by definition, the deliberate withholding of medical care is not a "ministerial act." For qualified immunity purposes, a duty is "ministerial" only where the statute or regulation leaves no room for discretion. Sellers v. Baer, 28 F.3d 895, 902 (8<sup>th</sup> Cir. 1994). If, as alleged, Gill withheld medical care, clearly he was not doing so pursuant to a statute or regulation.

<sup>3</sup>Kentucky Revised Statutes.



the proceeding." Canon 3C(1) of the Code of Judicial Conduct, SCR<sup>4</sup> 4.300, contains a similar provision. The burden of proof required to demonstrate that recusal of a trial judge is mandated is an onerous one. The moving party must be able to show that the trial judge is prejudiced to such a degree that the judge cannot be impartial. Johnson v. Ducobu, Ky., 258 S.W.2d 509, 511 (1953); Brand v. Commonwealth, Ky. App. 939 S.W.2d 358, 359 (1997). In order to successfully seek recusal of a judge, a showing of facts must be made "of a character calculated seriously to impair the judge's impartiality and sway his judgment." Foster v. Commonwealth, Ky., 348 S.W.2d 759, 760 (1961); Miller v. Commonwealth, Ky., 925 S.W.2d 449, 452 (1995). The mere fact that the trial judge has indicated or stated his belief in the guilt of the defendant is not enough to disqualify the judge. Nelson v. Commonwealth, Ky., 202 Ky. 1, 258 S.W. 674 (1924). There must be a showing of bias, prejudice against, or hostility towards the defendant. Stamp v. Commonwealth, 195 Ky., 904, 243 S.W. 27 (1922); White v. Commonwealth, Ky., 310 S.W.2d 277, 278 (1958).

Watson has failed to meet his burden of demonstrating that the trial judge was prejudiced to such a degree that he was incapable of being impartial. Watson's complaints consist largely, if not entirely, of speculation, conjecture, and hearsay. A mere belief that the trial judge will not afford a fair and impartial trial on the merits or that the judge will not rule fairly and impartially is not sufficient grounds to require

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<sup>4</sup>Supreme Court Rule.

recusal. Webb v. Commonwealth, Ky., 904 S.W.2d 226-230 (1995). The trial judge was in the best position to determine whether questions raised regarding his impartiality were reasonable. We see no reason to second-guess his decision. Jacobs v. Commonwealth, Ky. App., 947 S.W.2d 416-417 (1997). Therefore, we affirm the trial judge's decision to not recuse himself from this case.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed, in part, reversed, in part and remanded for additional proceedings consistent with this opinion.

JOHNSON, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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