COURT OF APPEALS
DECISION
DATED AND RELEASED

October 26, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2425

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

BARBARA ELLIS,

Plaintiff-Appellant,

v.

CITY OF REEDSBURG,
OFFICER PEGGY WEAVER,
OFFICER JOHN TRAGO,
OFFICER DARRIN FRYE,
OFFICER WENDY DUERR,
OFFICER DAVID HOGE,
CITY VILLAGE MUTUAL CO.,
CITY OF GREEN BAY,
AND DETECTIVE CAPTAIN JERRY ROGALSKI,

Defendants-Respondents.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

SUNDBY, J. Barbara Ellis was a suspect in the murder of her boyfriend in 1988. According to the trial court she and the investigating officer, defendant Jerry Rogalski of the Green Bay Police Department, "had been involved in a cat and mouse game for some time." On February 2, 1993, City of Reedsburg police officers, at Rogalski's request, took Ellis into custody and caused her to be committed to the Boscobel Area Health Care Center pursuant to § 51.15, STATS., where she was detained for three days.

Rogalski informed the Reedsburg police that during a two-hour telephone conversation that day, Ellis told him that she had a handgun and was going to kill herself at her mother's grave near Wisconsin Dells. Before they caused Ellis to be committed, Reedsburg police allowed Ellis to talk to Rogalski who had called the department. Ellis begged Rogalski to allow her to go home so that she could go to work. Rogalski told her: "You're not going to work tomorrow. You're going to go to the hospital for 3 days and a doctor is going to talk to you and get down to the bottom of this bullshit." He further told her, "You can beg 'til the cows come home. It ain't going to do you any good. I'm dealing the cards now."

NATURE OF ACTION

Ellis brought this action against Rogalski, the City of Green Bay, the City of Reedsburg and Reedsburg police officers. She claims that Rogalski acted maliciously to punish her for failing to cooperate in his investigation. Ellis asks that we listen to the tape recording of her telephone conversation with Rogalski. She claims that the recording shows that the Reedsburg department would not have caused her to be committed if Rogalski had withdrawn his request. She argues that he therefore deprived her of her right to liberty under the Due Process Clause of the Fourteenth Amendment. She seeks damages against Rogalski, the City of Green Bay, the defendant Reedsburg police officers and the City of Reedsburg under 42 U.S.C. § 1983.

Ellis's state claim against the City of Reedsburg and its police officers is that they violated her right to privacy under § 895.50(2)(c), STATS., by revealing that they had caused her to be committed to the Boscobel Area Health Care Center. She seeks damages against the City and the defendant police officers under that statute.

CIVIL RIGHTS CLAIM

The trial court concluded that because "all police actions were reasonable and proper," defendant police officers are entitled to qualified immunity. However, qualified immunity is a defense which does not come into play until it is established that the public officer or employee deprived plaintiff of a constitutional right. *See* ***Barnhill v. Board of Regents***, 166 Wis.2d 395, 409, 479 N.W.2d 917, 922 (1992). If that is established, the trial court must then determine whether the plaintiff's constitutional right was so clearly established that the officer knew or should have known that he or she would violate plaintiff's constitutional rights by the action taken. ***Id***. at 407-08, 479 N.W.2d at 922.

Before that inquiry is necessary, however, an aggrieved person must show that he or she had a constitutional right which was abridged. *See* ***Barnhill***, 166 Wis.2d at 409, 479 N.W.2d at 922. Ellis claims that defendants deprived her of her constitutional right to liberty without due process of law. The Due Process Clause has two components: procedural due process and substantive due process. ***Zinermon v. Burch***, 494 U.S. 113, 125-26 (1990). Ellis does not claim that defendants violated her right to procedural due process: basically, the right to notice and an opportunity to be heard. However, the facts she alleges in her complaint, which we must accept as true to determine whether she states a claim, ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991), support a claim for deprivation of substantive due process. A plaintiff who claims a denial of substantive due process must show that the government could not do to her what it did no matter how much process she was given. ***Zinermon***, 494 U.S. at 125. Ellis alleges that Rogalski maliciously caused her to be committed for three days to punish her for not cooperating with his investigation. She also claims that he lied to the Reedsburg police in order to have them commit her. Such arbitrary and capricious action violates the Due Process Clause.

Rogalski denies that he acted maliciously in asking the Reedsburg police to cause Ellis to be committed or that he lied in doing so. He does not argue, however, that such acts would not be actionable under § 1983, or that the law was not sufficiently developed so that he should have known that if he maliciously or falsely caused her to be committed, he would violate her Fourteenth Amendment right to liberty. Indeed, such an argument would be

frivolous. We must therefor examine the parties' proof to determine whether defendants make a *prima facie* case for summary judgment and, if they do, whether Ellis's proof rebuts that case. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). If we encounter a disputed issue of material fact, we must deny defendant's motion. ***Id***.

The transcript of Rogalski's telephone calls on February 2, 1993, to Ellis and the Reedsburg police shows that Ellis clearly informed Rogalski that she had a gun and intended to kill herself. At various times in her phone conversation with Rogalski, Ellis stated that she had a gun and, "[i]f I take enough painkillers, it shouldn't hurt"; "I'll see you someday beyond." She stated that she was going to her mother's grave to ask her to forgive her for what she was going to do. Rogalski and the City made a *prima facie* case that Ellis told Rogalski that she intended to kill herself. Ellis does not claim that if Rogalski honestly believed that she intended to kill herself, he did not follow proper police procedures when he informed the Reedsburg police of the facts and asked them to detain Ellis and commit her for evaluation. However, Ellis claims that Rogalski should have known she was bluffing. Once before she had threatened suicide, but her sister persuaded her not to kill herself. She points to Rogalski's statement that she had "cried wolf" once too often. As Ellis suggests, we have listened to her taped conversation with Rogalski. Rogalski's frustration is clear, but we cannot conclude from Ellis's statements that she had no intention of carrying out her threats. Unsuccessful suicide attempts are common where a person is seriously suicidal. Rogalski would have been negligent in the extreme if he had brushed aside or ignored her threats. We conclude that there are no disputed facts which preclude summary judgment dismissing Ellis's § 1983 claim.

PRIVACY CLAIM

Section 895.50, STATS., provides in part:

> (1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:
>
> ....

> (b) Compensatory damages based either on loss or defendant's unjust enrichment; and
>
> (c) a reasonable amount for attorney fees.
>
> (2) In this section, "invasion of privacy" means any of the following:
>
> ....
>
> (c) publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed....

Ellis submitted her affidavit in opposition to defendants' motion for summary judgment. She deposes: "That one of your affiant's neighbors ... brought up the incident to your affiant and could only have gained that knowledge from the Reedsburg police." This averment is infirm in two respects: Ellis does not identify her informant and speculates that her informant got his or her knowledge from an unidentified member of the department. This is not an allegation of fact sufficient to rebut defendants' motion. She also avers that she heard her neighbor tell her boss's husband that she had been in the "nut house." She does not depose how her neighbor got that information. Finally, she deposes that her fellow employees and unidentified persons in the community "have become aware" of her hospitalization and could have gotten that information only from members of the police department. An affidavit in support of or in opposition to summary judgment must state facts showing that there is a genuine issue of material fact for trial. Section 802.08(3), STATS.; *see also* ***Driver v. Driver***, 119 Wis.2d 65, 69, 349 N.W.2d 97, 100 (Ct. App. 1984). The trial court correctly concluded that Ellis's affidavit did not aver facts sufficient to rebut defendants' motion for summary judgment on Ellis's right to privacy claim.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.