o/a 9-5-84

FILED
SID J. WHITE
APR 24 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT

CASE NO. 64,268

DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

IVIA JEAN NEWSOME,

Respondent.

/

INITIAL BRIEF OF PETITIONER DEPARTMENT OF CORRECTIONS

JIM SMITH
ATTORNEY GENERAL

PAMELA LUTTON-SHIELDS
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1502
Tallahassee, Florida 32301
(904) 488-6730

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND LAWS

STATUTES AND LAWS Continued

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This is an action by Respondent, Ivia Jean Newsome, against the Department of Transportation [hereinafter DOT] and the Department of Corrections [hereinafter DC] for the negligent supervision of Eddie Dixon, an inmate who left a DOT work crew and sexually assaulted her. The trial court entered a summary judgment in DC's favor, ruling that the decision by DC to assign Dixon to a DOT work detail was a planning level function protected by sovereign immunity (R. 27-28, 324). On appeal, the First District Court of Appeal reversed, holding that any negligence of DOT employees in the supervision of Dixon would be imputed to DC. Newsome v. DOT, 435 So.2d 887 (Fla. 1st DCA 1983). The opinion did not address the sovereign immunity issue on the merits. Id. After rehearing was denied, Petitioner, DC, sought and was granted review in this Court.

In September, 1980, Dixon was serving concurrent sentences for convictions of armed robbery and grand theft (R. 120, 125). He had been convicted in 1979, at age sixteen, and was sentenced under the Youthful Offender Act, Ch. 958, Fla. Stat. (1979), to two years imprisonment followed by three years on the Community Control Program,[1] a form of parole (R. 80). Upon commitment to DC, Dixon was classified medium custody and housed at

---

[1]The Community Control Program is established by §§ 958.03 and 958.10, Fla. Stat. (1983).

Hillsborough Correctional Institution [hereinafter HCI] (R. 113), a level I youthful offender institution (R. 225). DC maintains three levels of youthful offender institutions, with level I being for the inmates that are the youngest and with the least serious crimes (R. 225).

Dixon's first progress report after five months at HCI revealed behavior problems (R. 55-56). During this time he was formally disciplined twice, once for fighting and once for refusing to work; and he received 34 Corrective Consultation Slips[2] (R. 113). The following reporting period HCI personnel noticed a marked improvement in Dixon's attitude, behavior, work habits, relationships with others, and participation in counseling and educational programs (R. 110-111). During this time he worked for several weeks on a DOT crew and caused no problems on the job (R. 174-175). On June 30, 1980, Dixon's three-member classification team determined that he was not an escape risk and his custody level was reduced from medium to minimum (R. 41, 42).

On September 11, 1980, Dixon was assigned to DOT work detail, consisting of four DOT employees and three inmates, removing applicances from vacant houses on the block where Ms. Newsome lived, in preparation for road construction (R. 175-

---

[2]A Corrective Consultation Slip is a report of a minor institutional rule violation. Fla.Admin.Code Rule 33-3.08(2)(e).

176). Sometime during the lunch break, Dixon left the crew and assaulted Ms. Newsome in her residence (R. 181-187).

I. WHETHER DC IS VICARIOUSLY LIABLE FOR ANOTHER ENTITY'S NEGLIGENCE IN SUPERVISING INMATES UTLIZED ON A PUBLIC WORKS PROJECT

The appellate court erred in concluding that DC had a non-delegable responsibility for the direct supervision of Dixon while he was working for DOT. DOT had agreed, in a contract authorized by statute, to assume custody and control of the inmates on that work detail, thereby relieving DC of liability for any failure to properly supervise the inmates.

Section 945.11(1), Florida Statutes (1979)[3] provided:

> The department [of corrections] is authorized to enter into agreements with such political subdivisions of the state, as defined by s. 1.01(9), and with such agencies and institutions of the state as might, under supervision of employees of the department [of corrections], use the services on inmates of correctional institutions and camps when it is determined by the department [of corrections] that such services will not be detrimental to the welfare of such inmates or the interests of the state in a program of rehabilitation.

---

[3]This statute was amended in 1983; the language "under supervision of employees of the department [of corrections]," was eliminated and an express authorization of supervision by the contracting agency under certain circumstances was added. Ch. 83-175, Laws of Fla. The statute was also renumbered and is now § 946.40, Fla. Stat. (1983).

Pursuant to this statute, DC entered into a contract with DOT (R. 30-38), whereby HCI made available 28 inmates each workday as laborers on DOT projects (R. 217). The inmates on these crews were not accompanied by a correctional officer and were under DOT's direct supervision, under the terms of the agreement (R. 31-32, 37).

It is a fundamental principle that

> the negligence of another will not be imputed to a party if he neither authorized such conduct nor participated therein nor had the power to control it.

2 Fla. Jur.2d Agency and Employment § 109 at 276 (1977). However, this general rule does not apply where the conduct which caused the injury was in the performance of an activity which was a duty specifically imposed by law upon that party for the protection of others. Mastrandea v. J. Mann, 128 So.2d 146, 148 (Fla. 3rd DCA 1961), cert. denied, 133 So.2d 320 (Fla. 1961).

> In order that the employer may be charged with liability, however, the terms of the statute or ordinance in question must be of such a tenor as to subject him to a definite obligation.

Id., quoting 27 Am. Jur. Independent Contractors § 49 at 526-527 (1940) (emphasis added).

The record does not indicate that DC in any way authorized, participated in, or had the power to control the DOT personnel who were supervising Dixon. Consequently, for DC to be held legally responsible for DOT's allegedly tortious supervision of

Dixon, Section 945.11(1) would have to be construed to have imposed on DC a "definite obligation" to directly supervise the inmates working for DOT. No such unequivocal requirement flowed from tha statutory provision.

The statute was interpreted in HRS v. O'Neal, 400 So.2d 28 (Fla. 1st DCA 1981). The court below conceded, based on O'Neal, that

> [Section] 945.11 was not a legislative mandate that DOC employees "directly supervise" the inmates while at the work detail.

435 So.2d at 888 n.2. In O'Neal, an inmate of a minimum custody institution worked on the grounds of an HRS facility, directly supervised only by HRS personnel, in accordance with a contract between DC and HRS. The court held that despite the fact that "no [DC] employee directly supervised [the inmate's] work at [the HRS facility]," "[t]he record establishes that the correctional center employees maintained overall administrative supervision over its inmates . . . . [and that] such supervision meets the requirements of Section 945.11." 400 So.2d at 29 (Emphasis in original). Applying O'Neal to the instant case, DC met its obligation under Section 945.11 by choosing the inmates for the DOT crews (R. 233-234) and by administering the program (R. 33-35).

The O'Neal court's construction of the supervision requirement of Section 945.11 is consistent with the legislative

intent as evidenced by related laws. In the 1979 Appropriations Act the Legislature appropriated funds to DOT to be used the following two years for contractual services with DC. Ch. 79-212, § 1, Item 1213A, Laws of Fla.* A proviso to that funding reads in part:

> Provided, however, [DOT] will continue to contract with [DC] for inmate labor, supervision of which shall be gradually phased over to [DC] in accordance with the approved plan.

Id. This proviso language is an express recognition and condonation that inmate labor had been, and would continue for some time in the future to be, supervised by DOT personnel.

Similiarly, a proviso to DOT's appropriation in 1978 referred to the contract between DC and DOT for inmate road labor. Ch. 78-401, § 1, Item 1209A, Laws of Fla.* In that year, there was also a special appropriation for DOT to contract with DC that contained an express requirement that the funds be used on projects "solely supervised" by DC. Id., Item 1209B. Since that appropriation explicitly mandated that inmate labor on particular projects be under the sole supervision of DC, the Law implicitly authorized the use of inmate labor on other DOT projects without such on-sight supervision by correctional employees. Additionally, a much larger sum was given DOT for purposes of contracting for inmate labor, without any express

---

*See appendix for text.

restriction on the method of supervision ($4,256,000), than was tied to projects required to have sole DC supervision ($243,473). Such a differential in funding indicates an awareness and approval of the fact that supervision of inmates on road crews by DOT was the rule, rather than exception.

Additional evidence that it was not the intent of the framers of Section 945.11 that DC be obligated to directly superintend inmates engaged in DOT public works projects is found in the statutory history of the relationship between DOT and DC. From 1917 through 1961, able-bodied inmates worked on the convict road force "directly under the supervision and control of the state road department." §§ 952.16, et seq. Fla. Stat. (1955),* repealed, Ch. 57-121, § 43, Laws of Fla. In 1957, the same year that Section 945.11 was enacted,[4] the road camps and road force were directed to be transferred to the newly created corrections department, §§ 944.51, 945.02 and 945.07, Fla. Stat. (1957)* upon that department being "so organized and properly financed as to assume the responsibility for their operation." § 945.07, Fla. Stat. (1957). Thus, when providing in Section 945.11 that inmates may be used in public works under supervision of DC, the Legislature knew that, in fact, the inmate road force had been, and would continue for a period of time to be, worked by the road department without any supervision by corrections' personnel.

---

[4]Ch. 57-213, § 11, Laws of Fla.

*See appendix for text.

The actual transfer of the road prisons and the inmate road force over to DC did not take place until 1961. Ch. 61-179, Laws of Fla;* see § 944.51, Fla. Stat. (1957). After the transfer, DOT continued to use inmate labor. See § 944.511, Fla. Stat. (1963).* Sections 344.171(3) and 337.11(3), Fla. Stat. (1983), enacted in 1955, provide that DOT may use "convict labor" in performing its construction and maintenance responsibilities. No mention is made in these statutes of any requirement that DC personnel be present while inmates are working for DOT. This continued close relationship between DOT and DC was also further sanctioned in 1967 by a statutory enactment which provides for the establishment of road prisons to serve the interests of both DOT and DC. § 944.063, Fla. Stat. (1983). With this extensive historical background of inmates working on the roads and being immediately supervised by road department personnel, the conclusion is ineluctable that Section 945.11 was not intended to limit DOT's use of inmates to only those situations where DC could provide the direct supervision.

Furthermore, in inmate Dixon's situation it was not even necessary for DC to look to Section 945.11 for the authority to

---

*See appendix for text.

assign him to a DOT supervised crew. Section 958.09(4), Florida Statutes (1983) provides that DC

> may contract with other public and private agencies for the confinement or community supervision of youthful offenders when consistent with the youthful offender's welfare and the interest of society.

Since Dixon was a youthful offender, his supervision by DOT, in accordance with the contract between the two agencies, was clearly authorized by this statute.

From the foregoing it is clear that DC did not have a statutorily imposed "definite obligation" to have one of its employees physically present watching over the inmates at the DOT work site. Therefore, under the rationale of Mastrandea v. J. Mann, Inc., supra, DC can not be charged with liability for DOT's alleged negligence in the control of Dixon.

II. WHETHER THE DECISION TO ASSIGN INMATE DIXON TO A DOT CREW WAS AN IMMUNE PLANNING LEVEL FUNCTION

Respondent condeded before the First District Court of Appeal that a decision to assign Dixon to a DOT crew could be an immune planning-level function. Newsome v. DOT, Brief of Appellant 14. In view of this concession, this brief will not argue in detail the application of the four criteria from Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1019 (Fla. 1979), for distinguishing between "planning" and "operational" level decisions.

However, it should be noted that Evangelical United Brethren Church v. State, 407 P.2d 440 (Wash. 1965), the case which was the source of the four-pronged test adopted in Commercial Carrier, involved issues which are essentially identical to those presented here. In Evangelical, a teenager escaped from a "close security" institution for juvenile delinquents and set fire to two buildings. The owners of the buildings sued the state in negligence for having assigned a juvenile who had a history of behavior problems, including destruction of property, and extreme mental instability, to an "open program". The youngster had been adjudged delinquent two and one-half years before the incident based upon his having set a number of fires and other behavior problems. At that time, state officials diagnosed him as dangerously psychotic and assaultive and committed him to a mental hospital where he was treated for several months. Juvenile authorities assessed him as dangerously psychotic, violent, and an escape risk and placed him in an institution designed for juveniles with the most serious behavior problems. During his tenure at the school he was involved in a serious disciplinary incident where he and a group of other boys broke windows and set fire to some papers. While on parole he continued to display behavior problems so he was sent back to the institution with a recommendation that he be considered a security risk and be closely supervised. Despite this recommendation, the school assigned him to a minimum security

program. Less than a month later, the boy escaped and committed the acts which brought about the lawsuit.

After setting forth and applying the now familiar, four part test, the Evangelical court concluded that the school officials determination of the level of security to be maintained over the juvenile was "clearly and unequivocally" a planning level function:

> The decisions involved were, within the framework of necessary executive and administrative processes of government, purely discretionary, if not in fact quasi-judicial in character. Even though in the eyes of some the decisions involved may seem unwise, such does not render the state subject to orthodox tort liability.

Id. at 447. Evangelical cannot be distinguished from the case at bar. The decision in that case to assign the juvenile to in "open program" was identical in nature to DC's placement of Dixon on a DOT crew. The rationale given in the Evangelical case is equally applicable here:

> . . . [the decisions involved] necessarily require that a proper balance be struck between therapy and security. To this end, it calls into play the excercise of executive expertise, evaluation and judgment in an area involving many variable human, emotional, and psychological factors and about which widely divergent opinions can and do exist. The decisions required are not unlike those called for in the legislative and judicial processes of government. Indeed, [it has been] held that an administrative decision to parole an inmate from a mental hospital embraces the exercise of discretion which is quasi-

> judicial in character. Emery v. Littlejohn, 83 Wash. 334, 145 P. 423 (1915). To now hold, under existing legislation, that the exercise of the executive and administrative discretion involved [here] is subject to regulation and controlled by the media of damage actions would do naught but stifle the basic governmental process and policy.

An exception to the rule of immunity for planning level activity has been suggested in cases analagous to the one at bar. In Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981), the court held that the granting of parole is a discretionary, planning level function but cautioned that immunity may not apply if the decision were made in contravention of specific statutory or administrative provisions. Similiarly, it has been held that while the criteria for the release of mental patients is planning level, the "ministerial" act of following those criteria is operational and not immune. Bellavance v. State, 390 So.2d 422, 424 (Fla. 1st DCA 1980). A ministerial act is one which involves essentially no discretion. See Somlyo v. Schott, 45 So.2d 502, 503 (Fla. 1950); Coral Gables v. State, 44 So.2d 298, 300 (Fla. 1950); 9 Fla. Jur.2d Civil Servants § 100 (1982).

The record in the instant case reveals that the challenged action was not ministerial in nature and, furthermore, that there was no violation of established policy in assigning Dixon to the DOT work detail. As was the accepted practice, the recommendation was made by the classification team and approved by the

superintendent (R. 47-48, 210-11). There was no sort of checklist for the officials to follow in making their decision, DC relied on the staff members to apply their professional judgment (R. 47-48, 209-11, 234-36). No strict policy against sending inmates convicted of violent crimes or those with behavior problems out on DOT crews existed. In response to the question of whether there are particular types of inmates that HCI almost always sends to DOT and types that definitely are not sent, the HCI Superintendent said:

> It is our preference to send inmates that have committed property crimes and not crimes of violence. We refrain from sending, particularly, inmates with sexually related offenses out in the community (R. 217).

Significantly, the superintendent did not indicate it would have been a breach of policy for an inmate convicted of a crime involving a weapon to be put on a DOT crew. Similarly, Dixon's classification supervisor, Joe Butler, stated unequivocally that there was no specific frequency of disciplinary problems that would automatically disqualify an inmate from being considered for DOT work (R. 242-43).

When considering an inmate for a DOT assignment, HCI officials weighed a number of factors--criminal record, length of sentence, time served and remaining on the sentence, program involvement and institutional adjustment, to name a few (R. 48, 210, 217, 239-40, 243). The nature of the inmate's crime and his

disciplinary record were not set restrictions but were just two of the many points balanced. Consequently, since the decision to give Dixon a DOT work assignment was neither a ministerial act, nor violative of any statute or rule, the decision remains immune pursuant to the Evangelical rationale.

Nor do the facts of the instant case show that DC created a "known dangerous condition," which under DOT v. Neilson, 419 So.2d 1071 (Fla. 1982), and its progeny, would not be protected by sovereign immunity. In explaining the "known danger" exception, this Court gave the following illustration:

> [I]f a governmental entity plans a road with a sharp curve which cannot be negotiated by an automobile traveling more than twenty-five miles per hour, the entity cannot be liable for building the road because the decision to do so is at the judgmental, planning level. If, however, the entity knows when it builds the road that automobiles cannot negotiate the curve at more than twenty-five miles per hour, than an operational-level duty arises to warn motorists of the hazard.

St. Petersburg v. Collom, 419 So.2d 1086 (Fla. 1982). From this example it is clear that to be subject to liability it is not sufficient that the governmental entity has caused a dangerous situation to exist; it must know that it has created a trap for the unwary.

In this case, there was absolutely no evidence that DC knew that Dixon would escape or that he would sexually assault a woman if he did escape. Rather the evidence in the record affirmatively shows that DC had no knowledge that anyone was in danger of sexual

assault by Dixon. HCI is not for "problem" inmates; as previously argued, the inmates sent there are younger, youthful offenders with less serious crimes (R. 58, 225). When Dixon previously worked on a DOT crew he was a "model inmate" (R. 40, 175). Though Dixon had been a behavior problem when he first arrived at HCI, in that he had numerous violations of "petty" institutional rules (R. 113-114, 207), his behavior improved considerably during the succeeding half a year (R. 110, 216). Furthermore, he was due to be released on parole in just a few months (R. 217), and it was the professional opinion of the three members of Dixon's Classification Team that he was not an escape risk (R. 41-42, 111). Given these facts, there is no basis for a finding that DC knew it was putting persons in jeopardy by having Dixon out on a DOT crew.

The Evangelical opinion is further authority for DC's position on this point. Despite the fact that the juvenile, there, had numerous incidents of setting fires, destruction of property, and running away from authorities, the court held, as a matter of law, that his escape and burning of two buildings was not a foreseeable consequence of his being allowed to work in a nonsecure area near a road. 107 P.2d at 447-48. If the juvenile's actions in Evangelical were not considered likely given his background, DC was certainly not on notice that Dixon's presence on the DOT squad would likely result in an escape and a rape. Consequently, the "known danger" exception does not apply under the circumstances of this case.

CONCLUSION

The decision of the First District Court of Appeal should be reversed as the court erred in holding that DC was legally responsible for DOT's direct supervision of inmates. Additionally, the summary judgment entered by the trial court should be affirmed as the decision to assign an inmate to a DOT work program is protected by sovereign immunity.

Sincerely,

JIM SMITH
ATTORNEY GENERAL

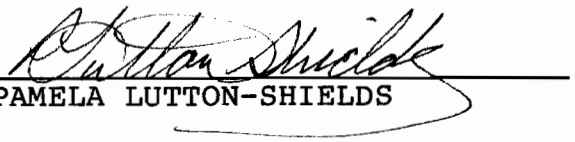
PAMELA LUTTON-SHIELDS
ASSISTANT ATTORNEY

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1502
Tallahassee, Florida 32301
(904) 488-6730

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOEL D. EATON, Podhurst, Orseck, Parks, JOsefsberg, Eaton, Meadow & Olin, P.A., Suite 1201, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130-1780 and WAGNER, CUNNINGHAM, et al., 708 Jackson Street, Tampa, Florida 33602 this 23d day of April, 1984.



PAMELA LUTTON-SHIELDS