IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 9 1989
CLERK, SUPREME COURT
By________ Deputy Clerk

CASE NO. 73,344

4TH DCA CASE NO. 85-1818

STATE OF FLORIDA DEPARTMENT OF
HEALTH & REHABILITATIVE SERVICES,

Petitioner,

v.

DAVID WHALEY, individually, and as
guardian of his son, MICHAEL WHALEY,
a minor,

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF ON MERITS

LAW OFFICES
DAVIS HOY & DIAMOND, P.A.
SUITE 1010 FORUM III
1655 PALM BEACH LAKES BOULEVARD
P. O. BOX 3797
WEST PALM BEACH, FLORIDA 33402

INDEX

	PAGE
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND STATEMENT OF THE FACTS	1
ARGUMENT I - Certified Question Issue	5
ARGUMENT II - Additional Issues	
Issue A	9
Issue B	9
Issue C	10
CONCLUSION	11
CERTIFICATE OF SERVICE	12

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TABLE OF CITATIONS

CASES:	PAGE
City of North Bay Village v. Braelow, 469 So.2d 869 (Fla. 3d DCA 1985)	5
Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979)	7
Davis v. State, Department of Corrections, 460 So.2d 452 (Fla. 1st DCA 1984)	5
Dep't. of HRS v. Yamuni, 529 So.2d 258 (Fla. 1988)	7
Dupes v. State of Florida, Dep't. of HRS, 13 FLW 2761 (1st DCA, Dec. 19, 1988)	8
Dunagan v. Seeley, 13 F.L.W. 2413 (Fla. 1st DCA, Oct. 28, 1988)	5
In Interest of D.B., 385 So.2d 83 (Fla. 1980)	8
In the Interest of K.P. v. State, 327 So.2d 820 (Fla. 1st DA 1976)	6
Miller v. State of Fla., Dep't. of HRS, 474 So.2d 1228 (Fla. 1st DCA 1985)	9
Nova University, Inc. v. Wagner, 491 So.2d 1116 (Fla. 1986)	6
Sanders v. City of Belle Glade, 510 So.2d 962 (Fla. 4th DCA 1987)	5
Snow v. Nelson, 475 So.2d 225 (Fla. 1985)	7
Wagner v. Nova University, Inc., 473 So.2d 731 (Fla. 4th DCA 1985)	6
STATUTES:	
Section 39.01 (45), Florida Statutes	8
Section 784.011, Florida Statutes	2
Section 945.025, Florida Statutes	8

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Plaintiff's Statements of the Case and of the Facts contain a number of clear factual mistatements. A response to these points is therefore required.

The Plaintiff states (Plaintiff's Answer Brief, p. 3) that HRS admitted in its answer to request for admissions that its employee, Mallett, knew that Jones "had a prior history of having engaged in prior criminal acts." In fact, HRS admitted that Mallett knew that Jones had a history of having allegedly committed criminal acts which might have involved a degree of violence (R: 1053). The distinction is critical for the knowledge available to the intake counsellors of Jones' past indicated that virtually all prior charges against him had been dropped (Pl.'s Ex. 5).

The Plaintiff also states that it alleged that one of the black youths placed in a cell with WHALEY had a known propensity for racist behavior (Plaintiff's Answer Brief, p. 3). In fact, no evidence was ever presented on this point and it remained an empty allegation. The Plaintiff further states that he alleged that the HRS workers failed to regularly check the cell in which WHALEY was placed (Plaintiff's Answer Brief, p. 3); he neglects to mention that the jury found against him on this point and found no negligence in supervision (R: 1179).

The Plaintiff contends that WHALEY was not charged with prior burglaries (Plaintiff's Answer Brief, p. 4). Actually, the Interim Placement Report, prepared when WHALEY was brought to the Center, noted that, in addition to the four residential burglaries with which he was presently charged, more charges were forthcoming (Pl.'s Ex. 4). Testimony revealed that he had a history of having committed an additional 6 prior burglaries ranging over a period of weeks (R: 647). Although March 15 was Michael WHALEY's first arrest, it was far from his first involvement in criminal misconduct.

While testimony revealed that the time required to process a child through the screening process was normally 30-45 minutes (R: 136), it was also established that

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screening could not be completed without contacting the parents and, in the case of a detainment, the States Attorney's office (R: 168). In this case, the States Attorney was not available until 7:30 p.m. and WHALEY's parents were not available until 7:50 p.m. (R: 167-9; Pl.'s Ex. 4). The youths brought in with WHALEY at 6:00 p.m. were not processed immediately as the Plaintiff contends [Answer Brief p. 5 -- where he cites as reference the final argument of counsel (R: 938)]. The testimony indicated that processing of Ahrens in intake was completed at 7:30 p.m. and that of Parker at 8:15 p.m. (R: 170-71, Pl.'s Ex. 4).

The record available on Glen Moore showed that he had been charged a year earlier with a simple assault (i.e. a threat to do violence coupled with an ability to do so - Section 784.011, *Florida Statutes*) which was concluded with non-judicial procedure (Pl.'s Ex. 19). He was currently brought to the center for failing to appear at a hearing on a charge involving two burglaries (Pl.'s Ex. 3).

Willie Jones was indeed arrested for an alleged armed robbery a few days previously. The actual charges against him did not include resisting arrest as claimed by the Plaintiff; the Juvenile Referral Report (Pl.'s Ex. 8) lists the four charges as: 1. Armed Robbery, 2. Grand Theft, 3. Aggravated Assault, 4. Person engaged in criminal offenses having weapon. The report indicates that the violence attributed to Jones was that he pointed a gun at a store clerk, asked for money and said "I don't want to hurt you." (Pl.'s Ex. 8).

The list of charges against Jones contained in Plaintiff's Exhibit 17 indicates that virtually all of the prior charges were either non-filed or nolle-prossed, usually by determination of the State Attorney (S.A.). It is, at most, an ambiguous indication of Jones' background and gives no clue to his conduct in the supervised custody of a detention center. Even if all of the charges had been sustained, Jones' background would not have been unusually violent in comparison with many of the juvenile criminals processed at the center (R: 183).

Plaintiff suggests that Mallett knew Jones and knew the information about him contained in "the reports". (Plaintiff's Answer Brief p. 7). In fact, Mallett (who did not assign Jones to a cell; that was done before his shift by McCray) testified that he *thought* he had seen Jones in the Detention Center on one other occasion (R: 235), but that he had never previously screened him (R: 237). In respect to the "reports", he stated that while he did not read Jones' Interim Placement Report (Pl.'s Ex. 5) which came with him on March 15, he was advised of its contents orally by Lloyd McCray when he came on duty that night (R: 283). There was no indication that he had knowledge of any other reports such as Plaintiff's Ex. 18.

Both McCray and Mallett indicated that the potential of a youth for violence was a consideration which they took into account in cell placement; however, it was their opinion that the critical issue for this purpose was a youth's potential for violence in the detention setting rather than his potential for committing violent crimes in society where he would not be subject to supervision (R: 198-199; 285-288). This opinion was concurred in by the author of the intake manual cited by the Plaintiff (R: 553-554).

Finally, the Plaintiff's contention of a "cover-up" is patently absurd; the uncontradicted evidence demonstrated that the day after the incident, Mallett prepared and filed an affidavit in support of probable cause in which he charged Jones and Moore with a sexual assault and prepared a report of the incident to his supervisor (Pl.'s Ex. 1, 8). It can hardly be contended that the immediate preparation of criminal charges against Moore and Jones constituted a cover-up. In respect to the comments to Mr. WHALEY by HRS personnel the following day (Answer Brief p. 9), these comments were made by the Detention Center supervising staff who had not yet received a report of the incident: Mallett was criticized by the Inspector General's office for failing to file the proper multi-copy incident report form which would have alerted the Detention Center supervisor of the incident (instead he submitted a handwritten report to his intake

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supervisor). This failure to use the proper form produced no injury to the Plaintiff (Pl.'s Ex. 1, 7, 12, 14; R: 404-405).

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I.

CERTIFIED QUESTION ISSUE

IS THE ASSIGNMENT OR PLACEMENT OF ALLEGED JUVENILE DELINQUENTS IN A PARTICULAR ROOM OR LOCATION IN AN HRS DETENTION FACILITY AN INHERENTLY GOVERNMENTAL FUNCTION (ENFORCEMENT OF LAWS AND PUBLIC SAFETY PROTECTION) OR A DISCRETIONARY GOVERNMENTAL FUNCTION, WHICH IS PROTECTED BY SOVEREIGN IMMUNITY?

At the outset, the Plaintiff's argument makes it necessary to note what governmental function the certified question addresses and what functions it does not address. At issue on this point is whether the sovereign immunity of the State has been waived in respect to the function of classifying and assigning juvenile offenders within a juvenile detention center. At issue is not waiver of immunity in respect to the immediate *supervision* of juvenile offenders in detention centers. Hence, the reliance upon *Dunagan v. Seeley*, 13 F.L.W. 2413 (Fla. 1st DCA, Oct. 28, 1988); *Sanders v. City of Belle Glade*, 510 So.2d 962 (Fla. 4th DCA 1987) and *City of North Bay Village v. Braelow*, 469 So.2d 869 (Fla. 3d DCA 1985) is misplaced. In *Dunagan*, the contention was that a jail employee negligently failed to maintain a locked door thus allowing a dangerous prisoner to attack the plaintiff; in *Sanders*, it was alleged that the police negligently permitted an attacker to assault their prisoner while moving him to a patrol car; in *Braelow*, the plaintiff complained of an assault by a police officer. In none of these cases was classification or assignment an issue. Indeed, in *Dunagan* the court acknowledged the controlling law of *Davis v. State, Department of Corrections*, 460 So.2d 452 (Fla. 1st DCA 1984) (a case relied upon by HRS in its Initial Brief) but distinguished the situation:

> Unlike the situation in *Davis*, appellant's complaint does not hinge upon allegations of negligence at the planning level, such as in the classification of prisoners or in the policies adopted for their supervision.
>
> (supra at 2414)

Davis, of course, involved allegations that the employees of the DOC negligently assigned the plaintiff to a dormitory and a bed in near proximity to a more violent prisoner. This

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assignment function was held to be discretionary and the action barred by sovereign immunity.

The Plaintiff suggests that HRS's position is that it has no duty to protect delinquent children from harm perpetrated by third persons while in custody (Answer Brief p. 21). This is not the HRS position. The Department does not contend that the function of supervising -- watching and guarding -- children in custody is discretionary. That, however, is not the issue presented in this case where the jury found the supervision by the Intake Counsellors to have been performed without negligence. At issue here is whether the assignment function, which requires a counsellor to decide the most appropriate cell assignment for youths when there are only two cells available for holding them and a large number of potential assignment factors -- sex; variations in age (from under 12 to 18); variations in size; status - delinquent and dependent; attitude and behavior among them -- is discretionary. As the HRS Intake Security manual noted:

> It is the screener's responsibility to utilize his/her best judgement/discretion in the placement of youth in the holding rooms.
>
> (Pl.'s Ex. 6)

As in those functions analogized in HRS's Initial Brief (p. 12-13), the assignment function, although occurring at a lower or more immediate level of official conduct, does require the application of decision making expertise similar to that of the policeman, fireman or dogcatcher where there are no clearly defined lines of choice established in advance.[1/]

The Plaintiff argues that the situation involving assignment of delinquent youth cannot be analogized to the assignment function involving adult violators since the former are "wards of the state"[2/], and that the statutory authority establishing detention centers

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1/ The Plaintiff argues that the manual does indeed set forth mandatory guidelines (Answer Brief p. 18-19). In fact the manual simply lists those factors which must be considered without providing any rule as to how each factor or any particular combination of them is to control. The calculus of factors is left to the individual counsellor's discretion.

2/ The case cited to support this proposition, In the Interest of K.P. v. State, 327 So.2d 820 (Fla. 1st DA 1976), does not hold that delinquent youths are "wards of the state". No other authority can be found to support this proposition. Similarly, the case of Nova University, Inc. v. Wagner, 491 So.2d 1116 (Fla. 1986) does not hold that liability can be predicated upon the doctrine of in loco parentis. This was the holding of the District Court in Wagner v. Nova University,

provides that they are to be facilities for the *care* of children. Consequently, the Plaintiff contends that those cases which have considered the question of the waiver of immunity in respect to claims involving dependent children are applicable here where the issue involves custody of delinquent children.[3/]

This contention ignores the fact that the question of whether a function is discretionary or governmental does not turn simply upon a question of the status of the plaintiff as a criminal offender or an abused youth. The critical issue revolves around the nature of the function performed. The fact that it involves delinquent youths is important only in respect to the recognition by courts of this state that decisions involving the police power and public safety -- such as whether to arrest or not arrest, whether to assign prisoners to one cell or bed rather than another, or whether to impound or not to impound -- are all ones which can be discretionary even in respect to the application of decisional factors to particular situations. That is, this Court and the various District Courts have all recognized that decisions involving the use of the police power and the maintenance of public safety, particularly in the handling of criminals, may be discretionary in nature -- and, consequently, not to be second guessed by the judicial system -- even though they involve a particular decision in respect to a particular individual or situation. This is not to say that all decisions made in respect to the handling of criminals is protected by sovereign immunity -- see above, in regard to supervision -- but only those which meet the four-part test adopted in *Commercial Carrier v. Indian River County*, 371 So.2d 1010 (Fla. 1979), as discussed in HRS's Initial Brief.

The Plaintiff's contention also ignores the distinction noted by this Court between delinquent and dependent youth and their status in the judicial system:

> To accurately characterize the proceeding involved, it should be recognized that juvenile dependency proceedings and juvenile delinquency proceedings have distinct and separate

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Inc., 473 So.2d 731 (Fla. 4th DCA 1985) in espousing a position rejected by this Court in Snow v. Nelson, 475 So.2d 225 (Fla. 1985).

3/ e.g. Dep't. of HRS v. Yamuni, 529 So.2d 258 (Fla. 1988).

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> purposes. Dependency proceedings exist to protect and care for the child that has been neglected, abused, or abandoned. Delinquency proceedings, on the other hand, exist to remove children from the adult criminal justice system and punish them in a manner more suitable and appropriate for children.
>
> *In Interest of D.B.*, 385 So.2d 83 (Fla. 1980).

In situations involving dependent children, the Department's over-riding duty and concern is for the welfare of the child. In respect to delinquent children, however, the Department's duties are not unidirectional. While its function includes concern for the welfare of the delinquent child, it also serves in an adversarial role vis-a-vis the child. In the case of a delinquent child, much as with an adult offender, the Department must concern itself with multiple duties running to the safety of society as well as to the child in custody.[4/] The resulting need for the agency to balance often conflicting considerations is an important reason for acknowledging the application of the discretionary function exception to the waiver of immunity.[5/]

4/ see Dupes v. State of Florida, Dep't. of HRS, 13 FLW 2761 (1st DCA, Dec. 19, 1988).

5/ While the Plaintiff attempts to distinguish juvenile offenders from adults on the basis that Section 39.01 (45), Florida Statutes, refers to the function of detention facilities as providing for the "care" of children, this attempt fails in view of the provision in Section 945.025, Florida Statutes that the DOC is given "protective care" of adult inmates.

II.

ADDITIONAL ISSUES PRESENTED FOR REVIEW UNDER THIS COURT'S PLENARY REVIEW POWER.

The Plaintiff has chosen not to respond to the additional arguments set forth in the Initial Brief of HRS. Instead he has chosen to attach a copy of his answer brief filed in the District Court of Appeal. That brief does not directly respond to the argument fashioned in the Initial Brief, part II, to this Court. Consequently there are only certain statements in that previously filed answer brief which require a reply.[6/]

A.
The Trial Court Erred In Failing to Direct a Verdict Upon the Plaintiff's Claim of Delay In Processing. (see Plaintiff's Argument IB)

The Plaintiff places principal reliance upon the case of *Miller v. State of Fla., Dep't. of HRS*, 474 So.2d 1228 (Fla. 1st DCA 1985). There, however, the assailant was a person characterized as a paranoid schizophrenic exhibiting uncontrolled violence who had a history of having committed similar prior attacks in the same hospital.

In the present case, there were no prior instances of violence in the intake unit. There was no knowledge by the counsellors of any past history of violence by Moore or Jones committed in a confined, secure environment and there was no evidence that either was a person unable to control his violent tendencies.

B.
The Trial Court Erred in Failing to Direct A Verdict Upon the Failure to Procure Medical and Psychiatric Care. (See Plaintiff's Argument IC)

The Plaintiff contends that the damages awarded were not excessive where WHALEY suffered from a chronic stress syndrome disorder with a disability rating of 10-

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6/ The Plaintiff reiterates his argument that this Court should not address these additional issues. This matter has been addressed in the pleading entitled "Response of Petitioner, HRS To Respondents' Motion to Toll Briefing Schedule and Motion For Leave to File Statement Why Discretionary Jurisdiction Should Be Denied", filed with this Court in this proceeding on December 6, 1988. No additional argument is needed.

15%. The Plaintiff ignores the issue under this argument which addressed the damages awarded for an alleged delay in providing psychiatric and medical services. There was no evidence that the delay produced *any* incremental damage. If, in fact, some incremental damage was due to the delay *and*, if this is the only affirmed basis of liability, the damages would be excessive.

C.
The Trial Court Erred In Admitting Into Evidence Plaintiff's Exhibit 18. This Error Was Prejudicial.
(See Plaintiff's Argument II)

No further argument is needed here as all points raised by the Plaintiff were anticipated in the Initial Brief. It should be noted however that the Plaintiff again attempts to suggest that Willie Jones was a known racist. This is without a scintilla of support and the attempt to intrude reverse racism into this case in the total absence of any evidence thereof is itself suspect.

LAW OFFICES OF DAVIS HOY & DIAMOND, P.A.
SUITE 1010 FORUM III, 1655 PALM BEACH LAKES BOULEVARD, WEST PALM BEACH, FLORIDA 33401 • TEL. (407) 478-2400

CONCLUSION

For the reasons set forth herein and in the Initial Brief of the Petitioner, the State of Florida, Department of Health & Rehabilitative Services respectfully submits that the certified question be answerd in the affirmative, that the other issues be answered also in the affirmative and that the Decision below be quashed with instructions to return the cause for the entry of a judgement in favor of this Department.

LAW OFFICES OF DAVIS HOY & DIAMOND, P.A.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to RICHARD A. KUPFER, ESQUIRE, Post Office Box 3466, West Palm Beach, FL 33402; CAROLE SHAUFFER and JANET HELSON, Youth Law Center, 1663 Mission Street, Fifth Floor, San Francisco, CA 94103 and FRED A. HAZOURI, ESQUIRE, Post Office Box 024426, West Palm Beach, FL 33402, by U. S. Mail, this 30th day of January, 1989.

DAVIS HOY & DIAMOND, P.A.
Attorneys for Petitioner
Post Office Box 3797
West Palm Beach, FL 33402
(407) 478-2400

By
MICHAEL B. DAVIS