

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION

MICHAEL POWERS	:	Case no. C-1-02-605
	:	
Plaintiff	:	(Hon. S. Arthur Spiegel)
	:	
v.	:	CONSOLIDATED RESPONSE TO
	:	PLAINTIFF'S MOTIONS FOR
HAMILTON COUNTY PUBLIC	:	SUMMARY JUDGMENT
DEFENDER COMMISSION, <i>et al.</i>	:	
	:	
Defendants	:	

The remaining defendants, the Hamilton County Public Defender Commission and the Office of the Hamilton County Public Defender, offer the following consolidated response to Plaintiff's Motions for Summary Judgment on liability and damages. (Doc.s 36 and 39).

Respectfully submitted,

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HAMILTON COUNTY PUBLIC DEFENDER*

RESPONSE

I. INCORPORATION BY REFERENCE

As part of their consolidated response to Plaintiff's Motions for Summary Judgment, the Hamilton County Public Defender Commission (Commission) and the Office of the Hamilton County Public Defender (Public Defender) incorporate by reference as if re-written in their entirety, the following documents: (1) Defendants Motion for Summary Judgment, together with all exhibits thereto (Doc.s 23, 24); (2) Defendants Reply to Plaintiff's Response to Motion for Summary Judgment (Doc. 19); and (3) Response by Defendants to Notice filed by Plaintiff regarding clarification of Class (Doc. 33). The Commission and Public Defender further state that they intend to rely upon the entire record now before the court and by this limited incorporation they do not intend to waive any rights, privileges or defenses previously asserted.

II. PROCEDURAL BACKGROUND

Following this Court's order of August 23, 2005 (*Order, doc. 34*), plaintiff Powers filed dual untimely motions for summary judgment on August 30, 2005 (*Plaintiff's Motion [liability only], doc. 36*), followed on September 16, 2005 (*Plaintiff's Motion [damages only], doc. 39*). In the interim defendants filed a petition for permission to appeal the class certification with the Sixth Circuit Court of Appeals and a request for a stay with this Court. (*Motion for Stay, doc. 38*).

III. FACTS

a. The Organization and Duties of the Hamilton County Public Defender Commission

The Hamilton County Public Defender Commission consists of five persons, three who are appointed by the Board of County Commissioners and two appointed by the Court of Common Pleas. (*Sullivan Affidavit*). The members of the Commission are volunteers serving

without pay. *Id.* The duties of the Commission are prescribed by Ohio Revised Code Section 120.14. The Commission appoints the county public defender and determines the qualifications and size of the supporting staff and facilities necessary for the operation of his office. *Id.* The Commission recommends the annual operating budget for the office of the county public defender to the board of county commissioners. *Id.* The budget is subject to approval by the board of county commissioners. *Id.* The Commission has no budget, receives no source of operating revenue, and incurs no expenses. *Id.* The Commission must prepare and send monthly and annual reports to the board of county commissioners and the state public defender for the purpose of receiving funds under *O.R.C. 120.35*. The Commission does not participate in the day-to-day operations of the office of the county public defender. (*Sullivan, Strigari affidavits*) Managerial decisions within the office are made by the county public defender. *Id.* Finally, the Commission plays no role in employment decisions regarding the attorneys working for the Public Defender. (*Strigari affidavit*)

b. The County Public Defender

Louis F. Strigari is the Public Defender of Hamilton County. (*Strigari affidavit*). He has served in that position since 1994 and was appointed to a term of two years in December, 2004. *Id.* Strigari began working as an attorney for the Public Defender in 1984. *Id.* County Public Defenders serve a term (not to exceed four years) and may be removed only for good cause. *O.R.C. 120.14.*

Strigari is responsible for managerial decisions within the office of the Public Defender. *Id.* The attorney staff of the office is divided by practice areas, with the largest contingent of being in the municipal division who represent misdemeanor offenders in municipal court. *Id.* Attorneys are assigned to the municipal division based upon their experience in handling

criminal cases. *Id.* There are 31 attorneys currently assigned to the division. *Id.* The attorneys in the municipal division have extensive experience. None of the attorneys within the division was admitted to practice in Ohio later than 2001. *Id.*

The office also contracts with attorneys to handle misdemeanor cases on an on-call basis. *Id.* The attorney assigned to the case involving the Plaintiff Michael Powers, Jeffrey A. Shafer, was a contract attorney. *Id.*

All attorneys employed by the Public Defender, whether working as a member of the staff or on a contract basis, are professionals licensed by the State of Ohio and admitted to practice in Ohio by the Supreme Court of Ohio. *Id.* The Public Defender expects that all attorneys will remain in good standing with Supreme Court of Ohio, and comply with the Court's directives regarding continuing legal education. *Id.* The Public Defender further expects that attorneys in his employ will be familiar with provisions of the Ohio Revised Code relating to crime and punishment, the Ohio Rules of Criminal Procedure, the Ohio Rules of Evidence, the Ohio Rules of Appellate Procedure, rules related to superintendence, and local rules governing practice before the courts of Hamilton County. *Id.*

The Public Defender does not direct or control the actions of either its staff attorneys or the attorneys operating on a contract basis in the municipal division with respect to tactical decisions made in the representation of individual clients. *Id.* Strigari expects that each attorney working for his office will represent their clients in a professional manner and exercise independent judgment in the best interest of the represented clients consistent with standards established by the Supreme Court of Ohio in its Code of Professional Responsibility. *Id.*

c. Representation by Staff Attorneys Employed by the Public Defender

During the course of representation of indigent criminal defendants attorneys assigned by the Public Defender will, among other things: (1) meet and consult with the client; (2) discuss the charges faced by the client; (3) discuss and explain possible outcomes; (3) answer questions that the client may have; (4) determine the wishes of the client regarding disposition of his matter; (4) assess the mental capacity of the client and filing not guilty by reason of insanity pleas and motions related to the client's competency to stand trial when indicated; (5) request reductions in bond or release from incarceration when appropriate; (6) make court appearances on behalf of the client; (7) engage in plea negotiations with the prosecutor; (8) enter pleas of not guilty, no contest, or guilty, as requested by the client; (9) interview witnesses and issue subpoenas for witnesses and documents; (10) move to suppress evidence and object to its admission at trial; (11) cross-examine state witnesses at trial; (12) when available and appropriate, offer evidence in defense of the client; (13) make closing arguments on behalf of the client; (14) upon conviction, offer evidence in support of mitigation of the sentence; (15) prosecute appeals when warranted and requested by the client. (*Staff Attorney Affidavits*).

If a client is incarcerated on pending charges, representation will typically begin at the initial appearance. *Id.* Tactical decisions on how to proceed in a given case are made in consultation with the client. *Id.* Any examination of the decisions made by the trial attorney regarding the representation of the individual clients will necessarily involve an examination of the discussions between the client and the attorney. *Id.*

When a monetary fine is a component of a sentence considerations can include: (1) the ability of the client or someone else to pay the fine and reasons for prior non-payment;

(2) whether the client is being held on other charges; (3) whether the jail is at capacity; (4) whether a resolution of the fine will result in early termination of probation; (5) whether the client has already served the sentence that will result if incarceration for a fine is imposed; and, (6) whether a commitment will be served concurrent to some other sentence. *Id.*

d. Additional Portions of the Record

Powers offers in support of his motions several transcripts which previously filed in support of his motion to certify a class. (*Doc. 36, citing doc. 22*). Two of these defendants were not represented by the Public Defender. (*Doc. 22, Hicks, Stroud transcripts*). One was credited with jail time already served sufficient to cover the fine imposed. (*Doc. 22, Pearson transcript*). In three others the defendant's indigence was reported to the court by the attorney assigned to represent the defendant. (*Doc. 22, Balled, Nevling, Scruggs transcripts*). The indigency status of Powers was likewise reported to the sentencing court by attorney Shafer. (*Doc. 30*).

IV. ARGUMENT

Introduction

Without pretense or apology, Powers has identified the specifics of his claim and the damages he seeks. His claim is that he was unlawfully sentenced to jail and he seeks damages on behalf of himself and others on a *per diem* basis for the duration of the unlawful sentence. (*See, Plaintiff's Motions for Summary Judgment, doc.s 36 and 29*). The question of the validity of his sentence is very clearly in play. Despite controlling precedent from the United States Supreme Court that no claim may be brought under 42 U.S.C. 1983 which impugns the validity of a state court criminal sentence unless such sentence has been set aside, vacated, or called into

question through an action in habeas corpus, *Heck v. Humphrey*, 512 U.S. 477, 486, 487 (1994),

¹ Powers now moves this Court for judgment as a matter of law on precisely that basis.

Powers' claim and those of the class relate entirely to the representation provided in court. It involves solely the traditional functions of lawyers providing counsel for clients in criminal proceedings. Despite controlling precedent from the United States Supreme Court that public defender offices and individual attorneys appointed to defend indigent criminal defendants do not act under color of state law under 42 U.S.C. 1983 for providing legal representation to such defendants, *Polk County v. Dodson*, 454 U.S. 312 (1981), *see also Dodson v. Polk County*, 483 F. Supp. 347, (S.D. Iowa 1979) (dismissing as frivolous Dodson's claims against the county public defender).² Powers seeks judgment on the basis of the representation he received.

This case boils down to a very simple proposition: either *Heck* and *Polk* are still controlling law in this circuit or they are not.

¹ See additional briefing on *Heck* in defendants' prior filings. (Doc.s 23, 29)

² The district court's specific holding regarding the office of the public defender follows:

Establishing a public defender office is merely a means of administering the state's obligation to provide counsel to indigent defendants in criminal cases. Another means is appointment of privately practicing lawyers. The nature of the representation of an indigent defendant by a public defender is identical to the nature of the representation of an indigent defendant by a court-appointed privately practicing lawyer. In neither case is the power allegedly misused "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," which is the Classic case definition of action taken "under color of" state law.

The actions of defendants Shepard and the Polk County Offender Advocate were not "under color of" state law, and therefore plaintiff has failed to state a claim against those defendants cognizable under 42 U.S.C. §§ 1983.

Dodson v. Polk County, 483 F. Supp. 347, 350 (D. Iowa 1979)

a. Powers Applies the Wrong Legal Standard

Powers claims that he has “satisfied all the elements of a 1983 claim. (*Motion on Liability, doc. 36 at 2*). Whether he has or not is wholly irrelevant to the question this Court must now decide. The question is not whether a movant has made a *prima facie* case, but rather whether there remains a dispute as to any genuine issues of material fact. *Fed.R.Civ.P. 56, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Likewise Powers claims that the existence of a policy or custom necessary to impose liability under Section 1983 “is no longer in issue.” (*Motion on Liability, doc. 36 at 3*). Unfortunately for Powers, the shoe is now on his foot. In deciding his twin motions, this Court must view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the Commission and the Public Defender. *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962).

b. As the Public Defender Does Not Control the Decisions Made by Assigned Counsel in the Representation of Their Clients, There Is No Policy and No Liability Attaches to the Public Defender.

The attorneys employed by the Public Defender and assigned by contract are all professionals licensed to practice in the State of Ohio. This license carries with it the responsibility to provide zealous representation, independent of the influence of other persons or entities. *Ohio CPR, Canons 5, 7*. The office of the Public Defender and the attorneys it employs do not deviate from these standards. (*See affidavits of Staff Attorneys and Strigari.*)

The tactical decisions made by individual attorneys during representation are made only following discussions with their individual clients and depend on factors outside the control of the Public Defender. (*Affidavits of Staff Attorneys*). These are not, as alleged by Powers, administrative or ministerial matters. They are rather part of the core function of lawyers representing criminal clients.

In any event, absent evidence of the specific reason the attorneys did what they did, one may only speculate as to why a hearing was not held. It is certainly possible that the result comported with the wishes of the client. It is also certainly possible that no harm resulted from the absence of a hearing. (*See eg. Doc. 22, Pearson transcript*). These are reasonable inferences that are sufficient to require a trial on this matter.

c. The Limited Role of the Public Defender Commission Precludes Liability for the Actions of Attorneys Assigned to Represent Indigent Clients.

The Hamilton County Public Defender Commission is a group of volunteers which has no budget. (*Affidavit of Sullivan*). Its responsibility is limited to providing reports to obtain money for the operation of the office from the State of Ohio, appointing the Public Defender, determining the Public Defender's facility and staffing needs, and recommending a budget for the Public Defender's office. *Id.* The Commission does not participate in the managerial decisions of the Public Defender. (*Affidavit of Strigari*). The Commission can only remove the Public Defender for good cause during his term. *O.R.C. 120.14*.

d. There Is No Liberty Interest in Process Itself.

If, as Powers claims, this matter is solely about procedure and not his underlying sentence, his claim is frivolous and ought to be dismissed. Process is not an end in itself. *Levin v. Childers*, 101 F.3d 44, 46 (6th Cir. 1996), *quoting Olim v. Wakinekona*, 461 U.S. 238, 350 (1983). Its purpose is to protect a substantive interest. *Id.* An expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause. *Id.* State created procedural rights that do not guarantee a particular substantive outcome are not protected by the Fourteenth Amendment, even where such procedural rights are mandatory. *Id.*

Under any reading, O.R.C. 2947.14 only requires a hearing. It guarantees no substantive outcome. The statute is entirely discretionary. No person is required to be incarcerated for

failing to pay fine. More importantly, there are no standards whatsoever as to when an offender will be presumed to be unable to pay a fine. The implementation of the statute is duty of the court. No duties are imposed upon any entity or upon any person except the court holding the hearing. Neither the Public Defender Commission nor the office of the Public Defender are mentioned within the four corners of the statute.

The requirements of *O.R.C. 2947.14* are nothing more than a codification of *Bearden v. Georgia*, 461 U.S. 660 (1983). *Bearden* impose the duty of inquiry upon the court – not the attorneys representing an offender.

e. As Respondeat Superior Does Not Apply in Section 1983 Claims, There Is No Entity Available to Pay Damages Which Might Be Awarded.

As pointed out by this Court in granting summary judgment to Hamilton County, the County is too far removed from the process to impose liability on it for a judgment in this matter. (Order, doc. 34 at 15-16). *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978). The Commission has no budget or monetary authority. The Public Defender is funded entirely by the State of Ohio (implicating the Eleventh Amendment to the United States Constitution) and by Hamilton County. Even assuming that the Commission and the Public Defender incur some liability to the plaintiff class, and therefore must pay damages, it will be *Hamilton County* and through it the State that must pay any judgment. This is prohibited by *Monell*.

f. Principles of Federalism and Comity Preclude the Wholesale Re-examination of Final State Court Judgments.

Powers' claim and those of the class call into question every criminal sentence in which a fine was imposed. It will require a wholesale examination of every state court final judgment which imposes a fine as part of a criminal conviction. Powers seeks no relief other than damages

for wrongful incarceration on behalf of himself and the class. Regardless of whether he now seeks to vacate the state court sentence, Powers is claiming that it was wrong from its inception. He is making the same claim on behalf of the putative class he represents.

Two lines of cases have dealt with the proper relationship between the federal courts and the court systems of the several states. Both deal with concepts of federalism and comity that being: a proper respect for the role of state governments and their functions, a recognition that the nation is composed of separate state governments, and an expectation that the national government "will fare if the States and their institutions are left free to perform their separate functions in their separate ways. *Younger v. Harris*, 401 U.S. 37, 44 (1971). *Younger* and its progeny require abstention in certain circumstances when there are parallel state proceedings. The *Rooker-Feldman* doctrine bars district courts from hearing both challenges to state court judgments and claims that are "inextricably intertwined" with state court judgments. *See Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998).

In Powers' case, one cannot separate the claimed actions of the remaining defendants from his claimed wrongful incarceration. The latter directly flows from the former. The same is certainly true as well for the class that Powers purports to represent. They are "inextricably intertwined."

Even assuming that Powers' claim does not fit neatly into either the *Younger* or *Rooker-Feldman* scenarios, the underlying considerations of federalism and comity clearly do apply. Conducting a class-wide systemic examination of the Hamilton County Justice System is precisely the type of interference with the ongoing operations of a state court system that was rightly disfavored by *Younger* and *Rooker-Feldman*.

g. Damages.

Ohio's waiver of its immunity for damages for wrongful imprisonment does not apply to misdemeanor offenders. *O.R.C. 2743.48(A)*. In addition, pursuant to this waiver of immunity, Ohio's Court of Claims has exclusive original jurisdiction over such claims. *O.R.C. 2743.48(D)*. The use of the provisions of this section to provide a yard stick for damage awards to Powers and the class he represents is inappropriate.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motions for Summary Judgment (doc.s 36 and 39) are not well taken and must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically through the court's ECF system upon:

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