

Arrington v. City of Phila.

United States District Court for the Eastern District of Pennsylvania
February 13, 1989, Decided ; February 13, 1989, Filed
CIVIL ACTION NO. 88-2264

Reporter: 1989 U.S. Dist. LEXIS 19117

JAMIE ARRINGTON, et al. v. THE CITY OF PHILADELPHIA, et al.

Disposition: [*1] Plaintiffs' motion for class certification granted.

Counsel: For ARRINGTON, JAMIE and WATTS, DEL, PLAINTIFFS: Stefan Presser, Legal Director, American Civil Liberties Union of Pennsylvania, David Rudovsky, Esq., David Kairys, Esq., Adam Thurschwell, Esq., KAIRYS & RUDOVSKY, More-R.-Gordon,-Esq., Popper, Gordon & Breen, P.C., Philadelphia PA.

For ARRINGTON, JAMIE and WATTS, DEL, PLAINTIFFS: Terry McCallum, Esq.

For THE CITY OF PHILADELPHIA, POLICE COMMISSIONER KEVIN TUCKER, POLICE OFFICERS BOOTHMAN, GEORGE, CONNERTON, EDWARD, BALSAMA, CARMEN, KOBER, LOU and UNKNOWN POLICE OFFICERS, DEFENDANTS: Ralph J. Toti, City Solicitor Office, Maria L. Petrillo, Esq., Chief Asst. City Solicitor, John Straub, Esq., Phila., PA.

Judges: Edward N. Cahn, J.

Opinion by: Edward N. Cahn

Opinion

MEMORANDUM

CAHN, J.

February 13, 1989

Before this court is the plaintiffs' motion for class certification. For the reasons that follow, I will grant the plaintiffs' motion.

Background

According to the defendants, between January 22, 1988 and March 7, 1988, eight women were accosted, robbed, and in some instances, sexually assaulted by a black male. These attacks occurred in Center City Philadelphia, and the [*2] assailant used a gun in the commission of each crime. The *modus operandi* and descriptions of the attacker led members of the police department to conclude

that one individual, dubbed the "Center City Stalker," was responsible.

The police department conducted a major investigation of these crimes. It distributed composite drawings of the assailant and broadcast radio messages describing him. The plaintiffs contend that the department authorized its officers to stop, question, frisk, and detain black men "who bore a minimal resemblance" to the composite drawings. The plaintiffs claim that as a result of this authorization, the police took 108 black men off the streets of Center City and stopped 267 others on the streets.

The plaintiffs, Jamie Arrington and Dell Watts, were among the black men detained or stopped. The plaintiffs commenced this action pursuant to 42 U.S.C. § 1983 alleging that the police violated their *fourth amendment* rights. After the suit was filed, the defendants agreed to a consent decree that stated that "no person shall be taken into custody into a police district or other police facility based solely on that person's race, sex, and/or [*3] age resemblance to the police composite or physical description of the Center City Stalker." The plaintiffs now seek both compensatory and punitive damages for themselves and all others subjected to the police department's investigation.

Discussion

Courts may approve class actions only after a "rigorous analysis" ensuring compliance with Rule 23 of the Federal Rules of Civil Procedure. General Tel. Co. v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). The plaintiffs bear the burden of proving that the action satisfies all four threshold requirements set forth in Rule 23(a) and also falls within one of the three categories of Rule 23(b). Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974); Weiss v. York Hosp., 745 F.2d 786, 807 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985).

Rule 23(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class,

(3) the claims [*4] or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. In addition to satisfying the four requirements of *Rule 23(a)*, the plaintiffs must also fall within one of the categories of *Rule 23(b)*. The plaintiffs here claim that their action falls within *Rule 23(b)(3)*. In order to rely on *Rule 23(b)(3)*, the plaintiffs must satisfy two criteria. First, questions of law or fact must predominate over any questions affecting individual members. *Fed. R. Civ. P. 23(b)(3)*. Second, a class action must be superior to any other method of adjudication. *Id.*¹

[*5] *A. Rule 23(a)*

1. Numerosity (Rule 23(a)(1)).

Rule 23(a)(1) permits a class action only if "the class is so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. "No hard and fast number rule can or should be stated since 'numerosity' is tied to 'impracticability' of joinder under specific circumstances. Nevertheless, . . . numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the requirement." 3B *Moore's Federal Practice* P 23.051 (2d Ed. 1987) (citations omitted).

In this case, plaintiffs claim that at least 375 men have suffered from police misconduct, and the plaintiffs argue that this number "suffices to prove that joinder in this case is impracticable." The defendants do not challenge the class on the basis of numerosity. I find that joinder would be impracticable in this case. Thus, the plaintiffs have satisfied the numerosity requirement.

2. Commonality (Rule 23(a)(2)).

Rule 23 requires that "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. The

defendants assert that "the location of the crimes, the *modus operandi* of the assailant, and uniformly [*6] consistent description of the assailant constitute the *only* 'common issues of fact.'" I disagree. The plaintiffs allege that the police department authorized its officers "to stop, question, frisk, and detain hundreds of black men without reasonable suspicion or probable cause" in its investigation of the Center City Stalker. Common questions of law or fact arise from the constitutionality of this investigation.

3. Typicality (Rule 23(a)(3)).

"The claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. The typicality requirement overlaps with *Rule 23(a)(4)*'s requirement that "the interest of the representative party must be coextensive with the interest of the other members of the class." 3B *Moore's Federal Practice* P 23.06-2, at 23-169 (2d Ed. 1987). "Typicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.'" *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.), *cert. denied*, [*7] 474 U.S. 946 (1985) (quoting *Weiss v. York Hospital*, 745 F.2d 786, 809 n.36 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)). "Typical" does not mean "identical." *Id.*

The plaintiffs allege that while driving through Center City, "Mr. Watts was stopped, searched, and questioned . . . solely because he was a black man passing through an area targeted by the investigation who supposedly bore some resemblance to the Department's composite." Mr. Arrington, they assert, was taken into custody at a YMCA because he was a black man who physically resembled the police department's composite.² These allegations by the plaintiffs show that their claims are typical of the claims of the class.

[*8] *4. Adequacy of Representation (Rule 23(a)(4)).*

¹ As a preliminary matter, the defendants assert that the plaintiffs have not defined the proposed class with sufficient specificity. The plaintiffs request class certification for "all persons stopped, frisked, questioned, and/or detained as a result of the Philadelphia Police Department's 'Center City Stalker' investigation." I find that this proposed class is defined with sufficient specificity. See *Alliance to End Repression v. Rochford*, 565 F.2d 975, 978 (7th Cir. 1977) ("a class that satisfies all of the other requirements of *Rule 23* will not be rejected as indefinite when its contours are defined by the defendant's own conduct"). If at a later stage of the proceedings it becomes necessary to narrow the class or to divide it into subclasses, this court will do so. See *Fed. R. Civ. P. 23(c)(1)* and (4).

² Contrary to plaintiffs' position, defendants claim that:

neither Mr. Watts nor Mr. Arrington were stopped because of a "minimal resemblance" to the "stalker" and/or mere presence in Center City. In fact, neither plaintiff represents the class of individuals (a) who may have been stopped on the street *merely* because of their resemblance to the composite or (b) who were actually detained without probable cause.

Rule 23 requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." Lewis v. Curtis, 671 F.2d 779, 788 (3d Cir.), cert. denied, 459 U.S. 880, 74 L. Ed. 2d 144, 103 S. Ct. 176 (1982) (quoting Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3d Cir.), cert. denied, 421 U.S. 1011, 44 L. Ed. 2d 679, 95 S. Ct. 2415 (1975)). The defendant has the burden to demonstrate that representation will be inadequate. See Lewis, 671 F.2d at 788 (burden is on defendant in Rule 23.1 context).

In this case, the defendants do not question the competence of plaintiffs' counsel to litigate this case. I find that the plaintiffs have met this prong of the adequate representation requirement.

The defendants argue that the plaintiffs do not [*9] meet the other prong of the requirement. The defendants claim that the plaintiffs' interests are antagonistic to those of the class because the police investigated the plaintiffs for reasons other than a "minimal resemblance to the Center City Stalker."

The defendants' argument is essentially a factual one. This is not the proper time to resolve this dispute. See Eisen, 417 U.S. at 178. The interests of the plaintiffs do not appear antagonistic to those of the class for the same reason that the plaintiffs' claims are typical of the claims of the class. Both plaintiffs assert that the police targeted them because of their minimal resemblance to the police department's composite. This is the same claim that they assert for the entire class. Therefore, the plaintiffs have satisfied the adequacy of representation requirement of Rule 23(a).

B. Rule 23(b)(3)

In addition to meeting the requirements of Rule 23(a), the plaintiffs must also satisfy Rule 23(b)(3)'s requirements. Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior [*10] to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The plaintiffs' claims meet these requirements.

1. Predominance.

In determining whether common questions predominate, the key inquiry is the issue of liability. See Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977), cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978). Normally, a court must examine the circumstances surrounding a stop or detention to determine whether the fourth amendment has been violated. See United States v. Cortez, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 101 S. Ct. 690 (1981); Brown v. Texas, 443 U.S. 47, 51-52, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979). Defendants argue that a class action is inappropriate in this case because the circumstances surrounding every individual stop or detention will have to be examined to determine if the police violated the fourth amendment. Thus, the defendants assert, individual issues will predominate over common issues.

This same argument was rejected by Judge VanArtsdalen in Cliett v. City of Philadelphia, [*11] 1985 U.S. Dist. LEXIS 14832, No. 85-1846 (E.D. Pa. October 17, 1985) (available on LEXIS). In Cliett the plaintiffs sought damages as a result of the Philadelphia Police Department's "Operation Cold Turkey." During Operation Cold Turkey, the police arrested nearly 1400 individuals merely because they were located in areas for drug sweeps. The City of Philadelphia opposed class certification in Cliett. It argued that "the issue of liability depended on a factual determination as to the circumstances surrounding each individual stopped by the police and that these individual issues predominate over any common issues." Cliett, slip op. at 4. Judge VanArtsdalen rejected this argument:

However, as set out by the court in Abramovitz v. Ahern, 96 F.R.D. 208, 217 (D. Conn. 1982), where the plaintiffs have alleged that the police have engaged in a presumptively invalid procedure, as in the case of Operation Cold Turkey (based on the allegations of the complaint), a 23(b)(3) class is appropriate since the liability which the plaintiffs seek to establish is based on the operation itself rather than on the circumstances surrounding each individual stop or arrest. Thus, the common issue [*12] as to the validity of the operation predominates over the individual circumstances surrounding each encounter carried out during the operation.

This is not the proper time to resolve factual disputes. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). Therefore, I will accept the plaintiffs' allegations at this time.

This reasoning also applies to the case at bar, even though the facts of *Cliett* may be distinguishable. The plaintiffs here assert that "it is the existence of the investigation resting on the Department's authorization to stop and/or detain individuals on nothing more than their resemblance to a composite drawing which plaintiffs claim suspended fourth amendment safeguards that provides a common course of conduct sufficient for class certification." The validity of the police operation predominates over the individual circumstances surrounding each stop or detention. However, if at a later stage of the proceedings I find that individual questions of law or fact predominate over common questions, then the class could be decertified. *See Fed. R. Civ. P. 23(c)(1)*.

2. Superiority of Class Action.

"[A] class action is superior to other available methods for the fair and efficient adjudication" of this controversy. *Fed. R. Civ. P. 23(b)(3)*. Joinder of all class members would be impracticable, and individual trials would cause [*13] unwarranted duplication. Moreover, any difficulties encountered in the management of this case should be minimal. A class action is especially appropriate where, as in this case, a large number of citizens might not otherwise bring suit to protect their constitutional liberties.

Conclusion

Because the plaintiffs have met the requirements of *Rule 23* and because a class action represents the most efficient and fairest method of adjudicating this controversy, I will grant the plaintiffs' motion for class certification. However, if at a later stage of the proceedings I find that class certification is no longer warranted, then the class could be decertified. *See Fed. R. Civ. P. 23(c)(1)*.

An appropriate order follows.

BY THE COURT:

Edward N. Cahn, J.

ORDER

AND NOW, this 13 day of Feb, 1989, IT IS ORDERED that plaintiffs' motion for class certification is GRANTED. Plaintiffs' complaint shall be maintained as a class action pursuant to *Rules 23(a)* and *23(b)(3) of the Federal Rules of Civil Procedure*.

BY THE COURT:

Edward N. Cahn, J.