

ORIGINAL

In the
Supreme Court of the United States

T. L. BAKER,

PETITIONER,

V.

LINNIE CARL McCOLLAN,

RESPONDENT.

No. 78-752

Washington, D. C.
April 23, 1979

Pages 1 thru 51

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

Hoover Reporting Co., Inc.

*Official Reporters
Washington, D. C.*

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----:
T. L. BAKER,

Petitioner,

v.

No. 78-752

LINNIE CARL McCOLLAN,

Respondent.
-----:

Washington, D. C.

Monday, April 23, 1979

The above-entitled matter came on for argument at
1:25 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

A. W. SORELLE III, ESQ., Underwood, Wilson, Sutton,
Berry, Stein & Johnson, P. O. Box 9158, Amarillo,
Texas 79105; on behalf of the Petitioner

DOUGLAS R. LARSON, ESQ., Johnston & Larson, 1002
Texas Building, 810 Main Street, Dallas, Texas
75202; on behalf of the Respondent

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
A. W. SORELLE III, ESQ., on behalf of the Petitioner	3
DOUGLAS R. LARSON, ESQ., on behalf of the Respondent	20
A. W. SORELLE III, ESQ., on behalf of the Petitioner - Rebuttal	45

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-752, Baker v. McCollan.

Mr. SoRelle, I think you can proceed now.

ORAL ARGUMENT OF A. W. SORELLE, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SORELLE: Mr. Chief Justice, and may it please the Court:

The respondent brought this section 1983 action alleging a violation of due process under the Fourteenth Amendment of the Constitution. The facts are basically uncontroverted. The respondent was born on December 8, 1949, and originally given the name "Linny," spelled L-i-n-n-y, "Carroll," C-a-r-r-o-l-l, "McCollon," o-n. He informally adopted the name which he uses today in this proceeding, with a diff erent spelling of Linnie, the middle name "Carl" and "McCollan," a-n.

The date of birth is significant only because later, by 1972, the respondent had a Texas driver's license identifying him as "Linnie Carl McCollan" and through an error the birth date of "December 8, 1948" was inserted and even though he knew of it did not correct it and therefore it became part of his assumed identity.

QUESTION: And whose date of birth was that?

MR. SORELLE: No one that we know of, Your Honor.

These facts would not be particularly significant except for the remarkable coincidence -- and I say a coincidence because that is all the record will support -- that the respondent's older brother, whose true name was "Leonard," decided in 1972 to adopt the identical assumed name and went so far as to seek a duplicate driver's license in the name of "Linnie Carl McCollan." Unfortunately through some area of the Department of Public Safety, the same was issued and the older brother Leonard had a driver's license that identified him as Linnie Carl McCollan, date of birth December 8, 1948, all information the same including the driver's license number being identical, the only difference in the two driver's licenses being the photographs on the license themselves.

Then, unfortunately, Leonard, posing as --

QUESTION: Didn't one of them say "duplicate"?

MR. SORELLE: Yes, sir, probably -- I think you are absolutely correct, it would have said "duplicate" on the one that Leonard had. In any case, you are right, it would have said "duplicate." But other than the word "duplicate" and the photograph, the identifying information was identical.

Leonard, acting as Linnie, was then arrested in October of '72 on a drug violation, was booked as Linnie Carl McCollan, was released on bail as Linnie Carl McCollan,

signed all the papers that he signed as Linnie McCollan, and then left town presumably because his bondsman later surrendered the bond and sought to have a warrant issued for the missing Linnie Carl McCollan. The justice of the peace dutifully issued a warrant for the arrest of Linnie Carl McCollan, a copy of which is in the appendix.

One significant item on this point. The warrant was issued on November 3, 1972. This suit is against petitioner Baker who was sheriff of Potter County, but he was not sheriff of Potter County up until this time. In fact, certain events in this case, one being the death of Sheriff Gather, his predecessor. Sheriff Baker was then appointed on November 20, 1972, to the office. Then the respondent becomes involved when on December 26, 1972, a Dallas police officer stopped the respondent for a traffic violation, reported the name and identification and identifying information through their central office and was informed that there was a Potter County warrant outstanding for Linnie Carl McCollan. He dutifully arrested him, took him to the station, the respondent protested that he wasn't the man wanted and there is no evidence of whether this was a unique statement, but in any case the police officer did ask his superior to contact Potter County, they compared the identifying information and, as you might expect, said, no, this is the man, that is the

man we want with the warrant.

On December 30th, a Potter County deputy with a warrant went to Dallas, picked up the respondent, returned him to the Potter County jail on the evening of December 30th. Sheriff Baker, against whom this action is brought, was not present at the jail at that time and had left for the evening and was going to be gone over the New Year's holiday. And even though he had contact with his office, he received no notice of any protest by the respondent, that he was not the right man wanted.

QUESTION: This duplicate driver's license, at what stage did that get into the hands of the person to whom it was not lawfully issued?

MR. SORELLE: This was earlier, in 1972. I am sorry, I do not recall the precise date, but I believe it was issued sometime in 1972.

QUESTION: Did Linnie Carl McCollan give it to his brother?

MR. SORELLE: Mr. McCollan said in the trial that he didn't know how his older brother came by the information. It was demonstrated that the applicant for the duplicate license himself, the applicant, which would have been Leonard, gave the specific identifying information. The respondent admitted that his brother would have no way of knowing that he had an erroneous birth date on his

driver's license, that he had not told him, and he didn't know how he knew this. In any case, there is no evidence in the record to support precisely how brother Leonard obtained the information.

QUESTION: Another point, was he fingerprinted?

MR. SORELLE: Yes, Your Honor, the --

QUESTION: Well, did they agree with the other fingerprints?

MR. SORELLE: No, sir, Your Honor, and this is the point that is being raised by respondents in this case. When Leonard was arrested as Linnie Carl McCollan, he was fingerprinted and photographed. He was arrested and booked through the city police department, then transferred to Potter County, but Potter County also photographed and fingerprinted Leonard.

At the time they did not take -- and this was one of the points that respondent makes -- they did not take fingerprints and photographs with them to Dallas when they picked him up. They returned him and apparently did not compare the photographs at that time. Immediately, on January 2nd, when Sheriff Baker arrived back at the jail and was informed that the man was contending that he was not the correct Linnie Carl McCollan, he immediately investigated, compared the photographs and the arresting officer had kept the duplicate driver's license that had

been issued to Leonard, for some reason knowing that there was some problem with it, and they brought respondent down from the jail, the sheriff discussed it with him, asked him whose picture was on there, he said it was his brother Leonard, the sheriff acted on his own to release him, arrange transportation back to Dallas.

QUESTION: If they had sent that to Dallas, all of that would have been avoided, wouldn't it?

MR. SORELLE: This is the assumption that is made. We don't know whether the photographs, had they been sent to Dallas, certainly someone would have known sooner that the contention was real, that he possibly wasn't the person. I question personally whether -- I don't know whether a police officer in general has the authority to make this determination, but in fact they were not sent so there was no comparison made until the second --

QUESTION: Well, don't the police officers send fingerprints over the wire on the hour? Isn't that a common procedure?

MR. SORELLE: I assume it is, Your Honor. I don't know. There is no particular record in this case about this, but there was some statement, they could have been mailed, they could have been sent to Dallas, yes, sir.

QUESTION: Does this particular sheriff's office have facilities for transmitting fingerprints by mail?

MR. SORELLE: Well, by mail.

QUESTION: I mean by wire.

MR. SORELLE: I don't know if they have any tele-graphic method. It is not in the record and I personally don't know, Your Honor, whether they do or not.

QUESTION: Did this particular place have the fingerprints of both of them?

MR. SORELLE: The place where he was ultimately held and released?

QUESTION: Yes.

MR. SORELLE: Yes, Your Honor.

QUESTION: And couldn't they have given to the officers that went to Dallas?

MR. SORELLE: Yes, sir.

QUESTION: There was nothing to stop them from doing that, was there?

MR. SORELLE: No, sir, and we are certainly not contending that there was. Our initial position in this case is simply that we have not stated any violation of due process where there is arrest pursuant to a warrant that describes the individual in the warrant, that the respondents on this would be tantamount to suggesting that due process not only requires identification to a warrant but that the most efficient means of identification must be used or one cannot rely upon the warrant. And it is

our position that in this case the police officer has traditionally been held to the standard that he must have either a valid warrant, and there is no contention this warrant is not valid, or rely upon probable cause. Here the arrest was supported, the arrest and confinement by the valid warrant in the name of respondent. The respondent, as in the case of anyone who is arrested and later acquitted, was determined not to be the one who should have been arrested, and he was released in due course through the investigation.

So the threshold question we believe the Fifth Circuit overlooked was whether there was in fact a violation of due process, because there was in fact a warrant for the arrest. The Fifth Circuit reasoned from the reverse side of the case by concluding that it being demonstrated after the fact that he should not have been arrested, therefore it was a false imprisonment, that false imprisonment is an intentional tort and under their own case of *Bryan v. Jones* it can be read to suggest that the only thing necessary for this tort is that someone was in fact confined, he was aware of his confinement, and suffered injury by it.

However, even under *Bryan v. Jones*, there was a preliminary finding and that is that there was a confinement without any process, and it may be that under *Monroe v. Pape* we can presume intent to confine without process when

there is in fact no process. But it seems a little far-fetched to presume intent to confine without process when there was in fact process naming the person to be arrested.

The second difficulty with the Fifth Circuit's initial approach to the case is that they concluded that Sheriff Baker could be held responsible for the acts of his duties because it was necessary in this case to attribute the acts of the deputies to Sheriff Baker if he was to have liability. They did so by simply suggesting that he is responsible for the acts of his deputies, he authorized them to go so then in fact he committed the confinement.

Again, we find it rather difficult to conclude that Sheriff Baker intended to confine the man when his first action upon learning that this particular man was confined was to investigate and release him. And the only way we can get to Sheriff Baker on the confinement is to apply the doctrine of respondeat superior which we believe this Court should -- as well as in the city cases in *Monell* -- should extend your conclusion there to local government respondeat superior should not apply to sheriffs either.

Respondents would take one further step and say that the sheriff in Texas is responsible for the actions of his duties, and he is statutorily responsible for supervising the deputies and can be held as a surety for them.

But it would not be reasonable to use this as a basis for extending respondeat superior to the sheriff because then it would tend to make 1983 a variable statute depending on what state statutes happen to apply in any given jurisdiction.

The Fifth Circuit acknowledged that there might be some question here on respondeat superior, so they then shifted their analysis to the sheriff and suggested that it should be the sheriff's own acts or conduct. The sheriff did not act affirmatively in any way to confine or restrain the respondent, therefore they suggested that it was a failure to act, a failure to have implemented a policy of transmitting photographs and fingerprints which he himself said after the fact as a result of this, he investigated and determined that this would be a good policy.

QUESTION: Well, when you talk about respondeat superiore, Mr. Sorelle, aren't you ordinarily talking about the liability of the supervisor for the negligence of his employees? And here as I understand it, the deputies were simply carrying out the instructions of the sheriff. That wouldn't be respondeat superior, to say that the sheriff is liable if he directs one of his deputies to go and arrest somebody, would it?

MR. SORELLE: No, Your Honor, if in fact he direct him to go arrest this particular person. What he

authorized them to do was to execute the warrant, and I think it would be a little far-fetched to suggest that he intended that they arrest the wrong man and that in authorizing a deputy to execute a warrant that he has then authorized them to misapply the process.

I understand your question, and it is probably so, but we are dealing here with a question of whether someone has committed intentional conduct. It appears to me that we are thinking of questions of whether intentional conduct has been committed and presuming that the conduct has been.

I understand fully the position -- or I think I do -- that specific intent to violate a statute may not be required, but it has always seemed in the past that this Court has required that at least there be some intentional conduct.

QUESTION: That is the point I am worried about. If the sheriff said it is my policy, don't check behind these warrants, go and pick up whoever it is -- but that is not this case, is it?

MR. SORELLE: No, sir. The sheriff certainly didn't suggest that, and all the evidence in this case indicates that the sheriff, number one, was displeased with it. He acted -- the only affirmative conduct shown in this case by the sheriff has all been in ultimate good

faith. The moment he had notice, he acted to release him. The moment he investigated and determined what caused it, he acted to change the policy.

We raised also in our brief the evidentiary question that this in effect should not in any circumstance be evidence of negligence because of the federal rule of procedure that states that you don't use corrective action to prove the negligence of the initial action. But our feeling is there is no intentional conduct directed toward depriving the respondent of a federally protected right.

QUESTION: Suppose -- I take it your position is though that even, no matter how negligent the sheriff might have been -- and you say he wasn't negligent at all -- no matter how negligent he might have been, 1983 just doesn't reach you in that kind of conduct.

MR. SORELLE: Not any level of negligence, no, sir, I don't think --

QUESTION: Well, maybe not wrecklessness, but --

MR. SORELLE: We are talking here about simple negligence because there was --

QUESTION: Suppose there was a failure to exercise reasonable care here to ascertain whether they had the right man.

MR. SORELLE: Yes, sir, and under those circumstances we would hold that 1983 does not reach that conduct,

a simple inadvertent failure to take some precaution, unless it reaches the level where there is a known duty and the failure to act could come within the intentional disregard or deliberate indifference standards that have been set out in some of the --

QUESTION: Well, known duty is the duty not to hold somebody without probable cause to believe he has committed a crime.

MR. SORELLE: Yes, sir, but that --

QUESTION: And would you say you should take reasonable care to do that duty?

MR. SORELLE: Yes, sir, and I think in that case where you are relying on a warrant, it is probably -- you should take reasonable steps to identify the man as being the man named in the warrant. But the respondent --

QUESTION: Suppose there wasn't those reasonable steps taken in this case?

MR. SORELLE: Well, there is no evidence concerning the reasonableness of the steps taken.

QUESTION: Just suppose they weren't, suppose it was conceded that there were not reasonable steps taken to identify the person.

MR. SORELLE: And if there was a known duty to take these steps, then I think we may have that --

QUESTION: I don't know, that is part of the

question. You know you are not supposed to arrest the wrong man.

MR. SORELLE: Certainly.

QUESTION: Suppose there was a failure to take reasonable steps to identify the person you are arresting. Now, let's just suppose there was a failure to take those kinds of steps.

MR. SORELLE: Yes, sir.

QUESTION: Would you think 1983 would reach it or not?

MR. SORELLE: I think this starts getting closer I think and that should be part of the plaintiff's burden to show that there were not reasonable steps, and under those circumstances I think if it reaches the level that you could suggest deliberate indifference, intentional disregard for your attempts to arrest the man, yes, sir. If it is a simple negligence, failure to -- without any knowledge of a pre-existing problem there, it would be my position that that would be an extension of the 1983 beyond any holding of this Court in the past.

QUESTION: Mr. Sorelle, can I test what you are saying for a minute. This standard, whether it is deliberate indifference or negligence or intention, and so forth, where do we look to see what that standard is? Do we look to the constitutional violation that says he shouldn't put

a man in jail without a trial, and so forth, or do we look to 1983 which says in effect if there is a constitutional violation you may recover, or do we look to the defense of good faith immunity? There are sort of three different places that standards could be found. Where do you say we look to find out whether it is negligence or deliberate indifference or what?

MR. SORELLE: Well, I believe that you first look to the statute 1983 to determine, since that is the statute under which you are recovering, to try to determine whether this requires intentional conduct.

QUESTION: Well, is there anything in 1983 on this subject at all? It simply says, doesn't it, that if there is a constitutional violation, a person then has a remedy?

MR. SORELLE: It says that one who subjects or causes one to be subjected, this leaves open the question I believe of whether they were talking about whether you need active conduct. It implies subjects or causes one to be subjects in my mind implies that someone must have done something and therefore I would feel that it would require some intent, some intentional act, and then going beyond it, behind that, I think when we look at the Congressional Record of the debates, it is inconceivable to me that the drafters of this statute were in any way thinking of unintentional conduct. The complete review, they were talking

about crimes of deliberate failures to enforce the law, deliberate violations of persons' rights. And so I believe that the statute itself, some initial threshold determination must be made.

QUESTION: Isn't it true that the "sheriff's office" was the cause of this man being arrested, the cause of him being transported back to Potter, and the cause for him being held until the sheriff turned him loose?

MR. SORELLE: Well, the --

QUESTION: The "sheriff's office."

MR. SORELLE: -- the sheriff had nothing to do with issuing the warrant.

QUESTION: I said the "sheriff's office."

MR. SORELLE: No, sir, the sheriff's office had nothing to do with the issuance of the warrant in the name of Linnie Carl McCollan. That was issued by a justice of the peace.

QUESTION: Well, who told Dallas to hold him?

MR. SORELLE: Well, they -- when a warrant is issued, apparently this is communicated --

QUESTION: Well, who told the Dallas people to hold him? Who went to get him?

MR. SORELLE: The Potter County Sheriff's Office went to get him.

QUESTION: All right. When they --

MR. SORELLE: Certainly, unquestionably they intentionally confined him, but they did not intentionally confine him without a warrant or without process in any fashion.

QUESTION: But they are the ones that did deny him his right to freedom.

MR. SORELLE: If you have a right to freedom that is unfettered without any ability to rely upon process, yes, sir. It is my belief though that the police officer must be able in some fashion to rely upon process in the name of the person to be arrested and in fact they did, and in fact there were procedures used to determine that he was the wrong man and he was in fact released by the --

QUESTION: That was on January 2nd, and he got back to Potter County about December 30th?

MR. SORELLE: December 30th, in the evening, and --

QUESTION: Didn't he then protest that he was the wrong man and didn't they then have fingerprints available right there?

MR. SORELLE: Yes, sir, and they did not -- the officers that were there did not prepare them. Of course, Sheriff Baker, as I say, was not there --

QUESTION: At that point it was under the jurisdiction of the sheriff's office at least?

MR. SORELLE: It was in the sheriff's office, unquestionably, yes, sir.

QUESTION: In Texas, is it true, as in most places I have observed, that public offices aren't really beehives of activity over New Year's weekend?

MR. SORELLE: Yes, sir, and unfortunately this was the case in this office at that time, and certainly that should not necessarily be a reason, but the evidence indicated that the normal I.D. people weren't there and it takes certain people to compare fingerprints and photographs and the sheriff was not notified of the man's contentions, because immediately being so notified they did act to release him.

Your Honor, if I might, I would reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Larson.

ORAL ARGUMENT OF DOUGLAS R. LARSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LARSON: Mr. Chief Justice, and may it please the Court --

QUESTION: I am not clear on the facts here yet, either from the reading of the appendix and records or the argument. How did this unauthorized license get in the hands of -- the driver's license get in the hands of the

unauthorized person?

MR. LARSON: Your Honor, I don't know and I don't believe my client knows. It is quite possible -- the record has several situations under which my client obtained driver's licenses. It is quite possible that his brother may have stolen a copy of one of his several driver's licenses. In fact, if you read the cross-examination by them, you will find that the plaintiff in this case in the trial court had several driver's licenses and, prone as he was to lose them, he applied for more, and it is quite possible, I would think, that brother Leonard stole one of them but we don't know and we have no way of knowing, and my client has insisted from the very beginning that he doesn't know how Leonard got his driver's license.

I want to say one other thing. This isn't in the record, but my client's parents were functionally illiterate and the mistakes on his birth certificate were due to their illiteracy and nothing else. He was told all during his life that his birthday was the date that is on the driver's license, at least that is my understanding of it. In addition to that, his name was misspelled because his mother and dad didn't know how to spell very well.

Now, I believe this case is --

QUESTION: Is his name Linnie?

MR. LARSON: Yes, sir.

QUESTION: And his brother's name is Leonard?

MR. LARSON: Yes, sir.

QUESTION: And how was Linnie misspelled, as Leonard or what?

MR. LARSON: Well, he says that his birth certificate has L-i-n-n-e-y on it and not L-i-n-n-i-e.

QUESTION: I see.

MR. LARSON: That is what his contention is.

I don't think when Congress passed 1983 they passed the statute in a vacuum. I think that when they passed the statute, they recognized that there were certain tort principles that were going to be engrafted on this statute.

QUESTION: That was a long time ago.

MR. LARSON: Yes, it was.

QUESTION: Do you think they had this kind of suit in mind at the time?

MR. LARSON: Well, I believe that there was some question before Congress as to whether or not Negroes were being properly treated by the law enforcement --

QUESTION: Well, wouldn't you be here whether or not your client was a Negro?

MR. LARSON: Yes, sir, but that doesn't change the fact that the statute, when it was originally passed, I believe, was directed against the southern states for

their actions against Negroes.

QUESTION: Do you have a cause of action in the state courts of Texas?

MR. LARSON: Yes, sir, I believe we do.

QUESTION: Why didn't you go there?

MR. LARSON: Well, because I don't like to try these kinds of cases in the state courts of Texas, Your Honor. The judges are not very favorable to these kinds of cases there. I have attempted to exercise the constitutional rights of several people in the state courts and I have found some of the judges to be somewhat less than receptive or as receptive as they ought to be.

QUESTION: Is Amarillo the county seat of Potter County?

MR. LARSON: Yes, sir.

When Congress passed the statute, this was not done in a vacuum, it was done with the idea that there were some causes of action that were automatically going to be engrafted, because of the development of the common law were going to be automatically engrafted in 1983. Now, this Court has already recognized in a couple of cases, in Pierson v. Ray and Monroe v. Paper, a false arrest case, but I don't think this Court has ever had before it a false imprisonment case. And the issues are a little different in that in a false arrest case you can use the defense of

good faith, but I don't think that applies in a false imprisonment case.

QUESTION: You are talking about ordinary tort law?

QUESTION: You are talking about tort law.

MR. LARSON: That's correct.

QUESTION: Aren't you?

MR. LARSON: That's correct.

QUESTION: I thought your theory was that this man had been deprived of his liberty without due process of law in violation of the Fourteenth Amendment.

MR. LARSON: That's correct. I also believe that the Constitution requires that the sheriff in this case arrest only the persons who are actually wanted pursuant to warrant. Just because he has a warrant that says arrest Linnie McCollan, that doesn't get him off the hook because he had the information which would have corrected the situation. He had the fingerprints and the photographs at the ---

QUESTION: But those materials didn't do him any good when he sent his deputy over to Dallas to pick the man up, did it?

MR. LARSON: That's right. He was under a duty, a constitutional duty to imprison only those that are to be lawfully imprisoned. Now ---

QUESTION: Mr. Larson, are you saying that every case of false imprisonment or false arrest at common law tort is necessarily a constitutional violation?

MR. LARSON: No, sir.

QUESTION: Well, what is the line?

MR. LARSON: Well, there are a lot of false arrest cases that occur between private parties.

QUESTION: Well, suppose a false arrest or false imprisonment by a person acting under a color of state law.

MR. LARSON: Well, if there is an underlying constitutional requirement to effectuate liberty, yes.

QUESTION: But that is what I am trying to ask you. Is every single official false arrest or false imprisonment a violation of the person's Fourth and Fourteenth Amendment rights?

MR. LARSON: Yes. I think it is helpful that if we -- when we study this case, if we look at the law of torts because the law of torts gives us some guidance on how to establish these cases. Pierson v. Ray and Monroe both teach us that the background of tort liability is to be used in helping to decide 1983 cases.

Now, as I understand it, he is saying that there is no intent here. Well, under the common law of false imprisonment, the only intent that was required is the intent to imprison. Well, there certainly is the intent to

imprison here because the plaintiff was imprisoned. In addition to that, the common law in the restatement of torts says that a warrant can be relied on to a certain point, but the sheriff or the jailer has to use due diligence to determine whether or not the person he has arrested is the person he actually wants.

In this case, the sheriff had the fingerprints and photographs of the right person, but he made no effort until several days later to compare them, and this is not clear in the record as to how the sheriff finally came around to it, but in the plaintiff's deposition --

QUESTION: Don't you have to have in the record -- don't you have to have in the record the fact that the sheriff had this before he arrested him?

MR. LARSON: But he did have them, yes, sir.

QUESTION: Is that in the record?

MR. LARSON: Yes. He had the fingerprints --

QUESTION: That is in the record?

MR. LARSON: Yes, sir -- and he had the photographs.

QUESTION: In the record.

MR. LARSON: That's right, it is in the record.

In fact --

QUESTION: Of brother Leonard.

MR. LARSON: That's correct. And it would have

been easy for the deputies to take the pictures when they came from Potter County down to Dallas, it would have been easy to compare them because they don't even look alike. Leonard and Linnie don't look anything alike. In fact, I would --

QUESTION: That may be true in fact, but you would have a difficult time persuading me that that is true on the basis of this appendix.

MR. LARSON: I understand that, but --

QUESTION: It is clearly different -- these two are clearly different. One has glasses, the other doesn't, but sometimes all of us do that.

MR. LARSON: Well, the Fifth Circuit concluded in its opinion that there weren't alike, that you could easily tell it. But in addition to that, we had the plaintiff in the trial court telling them that he wasn't the right one.

QUESTION: Now, you have described this in your brief -- and I am still not clear on the relevance of it -- but you have described it as a forged fictitious driver's license. Now, since you have gone to that trouble to describe it that way, what is the significance of that fact to this case?

MR. LARSON: Well, Sheriff Baker's predecessor in office took the driver's license away from Leonard

when he arrested him, his office did, and they knew it was a phony driver's license because they took it up, they checked with the Department of Public Safety and they realized that it was a phony driver's license, but they made no effort to change anything. They knew he was operating under some wrong name and they knew that wasn't his driver's license so they took it up and they had Leonard's picture on the driver's license, but it was Linnie's driver's license, not Leonard's.

QUESTION: But it wasn't Sheriff Baker either, was it? That was his predecessor.

MR. LARSON: Yes, sir, but I am not --

QUESTION: And Sheriff Baker is not responsible for what his predecessor did, is he?

MR. LARSON: No, and I haven't maintained that in the trial of this case, Your Honor. I did not maintain that. I said that the duty -- Sheriff Baker's duty arose at the time that the fingerprints and the mug shots would have been mailed to Dallas. I have conceded that the arrest was justified under the circumstances, but the sheriff had to use due diligence to determine he had the right man.

The burden that someone is in jail and wants to get out shouldn't be placed upon the person who is in the jail, it should be placed upon the person who is causing him to be there, and that person is the one who should be

the person who has the duty to determine whether or not he is the one that he is supposed to have, and in this case Sheriff Baker had the fingerprints. .

QUESTION: Do you really think that is where the burden is?

MR. LARSON: Yes, sir.

QUESTION: Every time a person is in jail or prison?

MR. LARSON: If the person who is imprisoning the plaintiff has the fingerprints and mug shots, he is under an obligation to check.

QUESTION: Well, I misunderstood you. I thought you were stating that as a general proposition, that the burden is on the custodian always as a general rule to show the validity of the custody.

MR. LARSON: That's correct, he is under a duty to constantly check his authority for the holding of --

QUESTION: Is this true of every warden of every penitentiary?

MR. LARSON: Yes, sir.

QUESTION: That the presumption is against the custody of the people in his charge?

MR. LARSON: The presumption is on him because the Constitution says you can't deprive somebody without --

QUESTION: Let's assume that most people in the

prisons of our country are there because they have been convicted in criminal courts on criminal charges and sentenced to prison, and yet you say the presumption is against the validity of their imprisonment?

MR. LARSON: No, sir, I am not saying that presumption is against the validity of their imprisonment, but I am saying that the duty is upon the jailer to constantly--

QUESTION: To justify the imprisonment always, the burden is on him?

MR. LARSON: That's right, because the person incarcerated doesn't have any way to get access to the records. He has to rely on the jailer. The jailer is the one who has control.

QUESTION: Well, what if the warden of a prison having 5,000 inmates takes a stroll through the athletic field and a prisoner yells, "I'm wrongfully confined, I don't belong here." Does the warden have a duty thereupon to immediately suspend whatever else he planned for the day and go back and check the records on that particular man?

MR. LARSON: Not immediately, because he has the lesion by which he can go back and check on a daily basis. He is not under immediate duty to do it --

QUESTION: The same day he would have to check that?

MR. LARSON: Quite frankly, Your Honor, I suspect that almost everybody in jails think they ought not to be there.

QUESTION: I think so, too.

MR. LARSON: But, yes, I think the Constitution requires a jailer to know the authority for who he holds and to be constantly checking and verifying it so that he can determine when his person is supposed to be released. To place the duty on the person incarcerated would not make any sense because he has no access to the records and he has no access to the keys to let him out.

QUESTION: All you are saying, as I understand it, is that if somebody files a petition for writ of habeas corpus, says I am being detained without lawful authority, unless the warden can show his authority he is entitled to get out.

MR. LARSON: That's correct.

QUESTION: I thought the applicant, the plaintiff had the burden of proof.

MR. LARSON: He does, but all he has to show --

QUESTION: But he doesn't, you say.

MR. LARSON: Yes, I did. I agree, he has the burden. He only has to show that he is incarcerated and that the reason for holding him is unjust, and that is what he did in this case. But then the burden switches.

QUESTION: Mr. Larson, he doesn't even have the burden of showing it was unjust. He says I am incarcerated, nobody has a right to incarcerate me, period. If he says that, he gets out unless the warden comes in and shows him why he is there.

MR. LARSON: The plaintiff in this case established that it wasn't justified to hold him because the sheriff failed in his duty to determine that he only had the right people.

QUESTION: I understand, but the sheriff here met his burden initially by saying, well, I arrest pursuant to a warrant, but then the burden shifted back to you and you said, yes, but you got the wrong man.

MR. LARSON: Right, but the common law says that you can't rely wholly on a warrant, you've got to use all the information at your hands and use due diligence to be sure you've got the same one. For example, let's suppose we have two gentlemen named Warren Burger who were wanted for arrest ---

QUESTION: Now don't arrest my Chief Justice.
We need him.

MR. LARSON: No offense intended.

QUESTION: That is a losing argument.

(Laughter)

MR. LARSON: All right, I will change the example

to John Smith. Let's suppose we have two people named John Smith, one who had not committed a crime and one had. The person who is executing the warrant would be under a duty to ascertain which John Smith he is supposed to arrest. Now, he may not be able to ascertain that until he gets him to the penitentiary or to jail and checks out his records, or he may not have any way to check at all, but he has got to use all the information at his hands to be sure he has got the right one. You just can't arrest somebody, anybody because their name happens to be the same. I imagine there is somewhere a warrant for Douglas Larson somewhere, but I haven't done anything that I know of, and I don't think the sheriff ought to be able to arrest me. He has got to be sure he has got the right one.

I suspect that almost everyone has a name somewhere there is a warrant for it, whether or not he is the one who is wanted or not.

QUESTION: What I don't understand is you filed a writ of habeas corpus and you say I am not the right man and the warden shows the papers and says here is the instructions I got to put this man in jail. I say at that stage, if you don't do something else, you stay in jail.

MR. LARSON: Yes, but the plaintiff --

QUESTION: So there is some burden on you.

MR. LARSON: That's right, the plaintiff did

that in this case.

QUESTION: That is all the petitioner is trying to say, you do have --

MR. LARSON: I understand. The plaintiff did that in this case.

QUESTION: It is automatic.

MR. LARSON: The plaintiff did that in this case. He showed -- the sheriff had the fingerprints and the photographs of the right person.

QUESTION: It was afterwards he showed that.

MR. LARSON: I'm sorry?

QUESTION: He showed that in the lawsuit, didn't he?

MR. LARSON: That's right.

QUESTION: But he didn't show it while he was being held, did he?

MR. LARSON: No, he couldn't. He didn't have access to the records.

QUESTION: Well, what did he say?

MR. LARSON: He said I am not the one, there is a mistake.

QUESTION: And that is all he said?

MR. LARSON: Well, it is inadmissible because --

QUESTION: Isn't it very seldom that when you pick up a guy that he says, yeah, I'm the man you are

looking for? Isn't that very seldom?

MR. LARSON: I would suspect that is true, but that doesn't relieve the person who places him in jail the burden of determining that he has the right person.

QUESTION: Mr. Larson, is it now **your** claim or was it in your complaint that this arrest was not made on probable cause?

MR. LARSON: I am not complaining about the arrest. I am complaining about the false imprisonment.

ESTION: Well, the arrest is what led to the custody. Was the arrest made on probable cause or not, in your submission?

MR. LARSON: The arrest was made pursuant to a warrant. The sheriff testified that the standard was, that he would --

QUESTION: Well, I think my question can be answered yes or no, and then say what you wish. Is it part of your case that the arrest was not made on probable cause?

MR. LARSON: No.

QUESTION: You concede that it was made on probable cause?

MR. LARSON: Yes. If the Court would look at the record, you will see that when I asked the jury, when I submitted my motions to the jury, my question for the jury was did the sheriff make a reasonable -- did he reasonably

make a determination as to whether or not he had lawful authority to hold the plaintiff. Now, there was another issue as to when that might have taken place. I submit that the United States mail would take perhaps 24 hours for the photographs and the fingerprints to be mailed from Potter County down to Dallas. I am conceding up to that point of time that we have no case. It is only after the sheriff has exercised --

QUESTION: Well, all of this talk of two people both being named Linnie McCollan, one guilty of an offense and the other not, after all that talk, it really has nothing to do with probable cause, does it?

MR. LARSON: No. I am not complaining about the fact that the plaintiff was arrested.

QUESTION: You are not saying this was an invalid arrest?

MR. LARSON: No.

QUESTION: Nor therefore that the ensuing custody at least for a short time was not valid?

MR. LARSON: That's correct.

QUESTION: At what point after the arrest did this become unlawful?

MR. LARSON: The sheriff testified that the standard is --

QUESTION: Never mind what the sheriff said. In

your case here, when did the arrest which you have just conceded was made on probable cause under the warrant, when after that arrest did the custody become unlawful?

MR. LARSON: That was a jury question and we never got it answered, Your Honor. The question in my mind is it is probably 24 hours or enough time to allow the sheriff of Potter County to mail the fingerprints and the warrant to Dallas. Now, I assume that would take 24 hours. It also could occur at a different time. The sheriff said that there was also a duty on the deputies who left Potter County and came to Dallas to take the fingerprints and the mug shots with them. They didn't do it.

Now, the jury can decide which one of those times is more reasonable.

QUESTION: Mr. Larson, isn't there also the third alternative -- you don't seem to ever refer to this -- of when they got him back to Potter County and he was still protesting he was the wrong man, wasn't there then a duty to compare --

MR. LARSON: Yes, sir.

QUESTION: There are three different alternatives, as I understand your case.

MR. LARSON: That's correct.

QUESTION: Well, at least you are saying that at some point in time after repeated assertions that you've got

the wrong man, there was some kind of a duty to look around a little?

MR. LARSON: Well, I think the fact that the plaintiff made some assertions that he wasn't the one is helpful, but I don't think that is determinative of the case. I think the sheriff has a duty to be sure he has got the right one and to exercise due diligence to determine whether or not he has the right one.

QUESTION: At some point he determined that he did not have the right one.

MR. LARSON: That's right. It is probably because the bail bondsman went up and saw the plaintiff in jail and said that is not the man and went down and told the sheriff. However, the record is not clear on that.

QUESTION: Does the record show exactly what was said by the respondent when he arrived at the jail?

MR. LARSON: Yes, sir.

QUESTION: What did he say?

MR. LARSON: He said "I'm not the one, there is a mistake." In fact, he --

QUESTION: Did he offer any explanation?

MR. LARSON: He didn't have any. He didn't know.

QUESTION: At this stage, he didn't know it was his brother that you wanted.

MR. LARSON: He didn't know whether it was his

brother or not. I guess he might have assumed that his brother had done something and he was being arrested for it, but he didn't know. He just throughout the entire course of this litigation maintained that he had no knowledge of what his brother was doing or not doing in Potter County.

To my way of thinking, the more interesting issue or the more sexy issue -- if you will pardon the expression -- in this case is whether or not the sheriff is entitled to the defense of good faith.

Well, in this case we have a sheriff who didn't do anything. In fact, he is saying that I have got a right to be a fool and I've got a right to be a full and I don't have any professional or statutory or constitutional responsibilities to be sure I've got the right man in jail.

QUESTION: Is that issue here, Mr. Larson? I thought the Court of Appeals said that it could be submitted to the jury upon retrial afterwards, and you haven't cross-petitioned.

MR. LARSON: That's true.

QUESTION: Then why, sexy as it may be, **is it** here?

MR. LARSON: I think the issues that the petitioner framed here cover that issue.

QUESTION: Well, you are not obliged to follow him if he is in error.

MR. LARSON: I agree. But be that as it may, I still don't believe that the sheriff is entitled to a defense of good faith here. I think good faith applies to a false arrest case like the one in Pierson v. Ray, where the arresting officer has a right to rely on what he believes the law to be. But in this situation, I think the sheriff's duty is clear. He has a duty to incarcerate only those persons which he has the lawful authority to do so.

QUESTION: Mr. Larson, would it be correct if the issue really is whether there is a constitutional violation, a deprivation of liberty without due process of law, are you in effect arguing that the constitutional requirement of due process requires that when a man is arrested and protests his innocence and all the rest, there is part of the procedure that the police must follow is to check reliable sources to identify him?

MR. LARSON: That's correct.

QUESTION: So the constitutional violation was the failure to accord due process which means a failure to check this man's identity when it was appropriate to do so?

MR. LARSON: That's correct.

QUESTION: So we don't have to look at negligence or good faith or any of this stuff, do we?

MR. LARSON: That is my position.

QUESTION: What do you do with the bench warrant that is authorized to pick up John C. Doe immediately, it commands, I think is the word.

MR. LARSON: All warrants command, I believe that is correct.

QUESTION: Well, what discretion does the sheriff have then?

MR. LARSON: Well, I trust that he would do something to try to narrow down which John Doe --

QUESTION: John Doe that lives at 2268 Apple Way Drive, Amarillo, Texas 17892.

MR. LARSON: I would assume then that the sheriff is under the duty to arrest the John Doe found at that address.

QUESTION: Well, could he get in the same trouble he is here?

MR. LARSON: No, sir.

QUESTION: Why not?

MR. LARSON: Unless there was some other information that --

QUESTION: Well, couldn't they allege in the bench warrant in this case that the man jumped bail? He certainly can issue a bench warrant when the man jumps bail.

MR. LARSON: Yes, sir, but --

QUESTION: In most states.

MR. LARSON: -- I'm not complaining about the arrest, Mr. Justice Marshall. I am complaining about the failure of the sheriff to verify his information against the plaintiff who was there in this jail or there subject to his --

QUESTION: And all the man says is I am not the man, then he has to go to work?

MR. LARSON: I don't think it even matters whether or not he says I'm not the man or not. I think the duty is still on the sheriff --

QUESTION: To make sure that he is the man?

MR. LARSON: -- to make sure that he is the right one.

QUESTION: That is your position?

MR. LARSON: That is my position, yes, sir.

QUESTION: Even if he signs a statement admitting that he is the man described in the warrant?

MR. LARSON: Well, common law solves that problem because that is one of the exceptions to the rule, that if the person who is about to be arrested says that, then the person who effectuates the false imprisonment is let off the hook.

QUESTION: Because that way he makes sure he has

the man.

MR. LARSON: That's correct.

QUESTION: Do you think the sheriff had a qualified privilege under the facts and circumstances of this case?

MR. LARSON: No, sir.

QUESTION: None at all?

MR. LARSON: That's correct.

QUESTION: Why?

MR. LARSON: Because the duty is on him to verify that he has the right person and he didn't do that duty, nor did he issue any regulations in his department. He didn't do anything. He merely just sat by and issued no regulations. I think --

QUESTION: Would the governor of a state have any privilege if he had acted, as you suggest, by doing nothing? I am thinking about Scheuer v. Rhodes.

MR. LARSON: Well, that is a different case.

QUESTION: A governor is different from a sheriff, is he?

MR. LARSON: That's correct. I think the sheriff's duties are clear --

QUESTION: Does the sheriff ever have a qualified privilege?

MR. LARSON: A jailer or a sheriff has a certain

duty and it involves no discretion. A governor has discretion. He can make his decision based on several things and his failure to act or his agreement to act I don't think makes or allows him to use good faith as a defense. But a jailer, his duty is clear, imprison only the right person, check your information on a daily basis and be sure you don't keep anybody longer than you are supposed to.

QUESTION: Well, if you arrest the wrong man on a warrant where there is probable cause like you say there is here, and he arrests him and puts him in his car, he takes him, as soon as he walks through the jail house door he has violated the constitutional rights if he is the wrong man.

MR. LARSON: No, sir. As soon -- I will give a sheriff the latitude in time, enough time to check whatever other information he might have.

QUESTION: Well, his duty isn't to have only the right man, is it?

MR. LARSON: After a reasonable time it is.

QUESTION: All right, I will -- say he sent off the fingerprints and the answer came back, yes, this is the right man and in fact they made a mistake on the other end, then what about the sheriff?

MR. LARSON: Well, that would be out of his realm of responsibility. He is --

QUESTION: Well, he still got the wrong man, so his duty isn't just to have the right man, is it?

MR. LARSON: His duty is to use as much information he has at hand.

QUESTION: It isn't even that, is it, Mr. Larson? His duty is to follow a procedure which will reasonably identify the man as being the right man, isn't it?

MR. LARSON: That's correct.

QUESTION: And you say he didn't follow the right procedure. That is what the due process clause is all about, procedure.

MR. LARSON: That's correct.

QUESTION: At any time did he indicate that there might be some problem about his brother having created this identification problem?

MR. LARSON: There is nothing in the record to indicate that, Your Honor.

Unless there are further questions, I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Sorelle.

ORAL ARGUMENT OF A. W. SORELLE III, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. SORELLE: Mr. Chief Justice, and may it please the Court:

The respondent's position boils down to this, that the due process clause now has a new recognized federal

right and that being that if a man has been previously arrested, no warrant for that man may be exercised without using fingerprints and photographs to identify the subsequent man.

QUESTION: I didn't understand Mr. Larson to be saying that. I thought he conceded the validity of the original arrest.

MR. SORELLE: He conceded the initial arrest, but he suggests that as a matter of due process that reasonableness of identity must include using fingerprints and photographs under these circumstances.

QUESTION: Not for the original arrest, as I understood Mr. Larson.

MR. SORELLE: Your Honor, I submit that due process then should not require that at any stage in these proceedings during this period of time simply because if the respondent in this case is going to demonstrate an unreasonable method of identification, then he should have approached it by showing that the method used was unreasonable and not suggesting that the corrective action instituted by the sheriff should have been used.

QUESTION: Mr. Sorelle, one of the complaints is that if the sheriff hadn't been out celebrating New Year's Eve, the man would have been turned loose right away.

MR. SORELLE: No, sir, I don't think that was suggested.

QUESTION: Well, doesn't the record show that as soon as the sheriff was made aware of the facts, he turned the man loose?

MR. SORELLE: Absolutely. And it is our position that this is one of the reasons why the sheriff in this case should not have been held liable under --

QUESTION: He could have come in during the holiday and taken a look at his job.

MR. SORELLE: Yes, sir, and he had telephone contact with one of his deputies who obviously failed to advise him ---

QUESTION: Well, I would say the more contact you give him with the jail, the more trouble he will get in.

MR. SORELLE: Certainly, but he had no notice that this man was arrested and we are talking here, according to respondent, about intentional tort that he intended to arrest this man and ---

QUESTION: Mr. Sorelle, we are not really talking about the arrest any more.

MR. SORELLE: Well, the confinement.

QUESTION: It seems to me that the complaint is whether the procedures were adequate and you change the

procedures. But if your man, instead of being off for the weekend had been in Mexico for two weeks, presumably the man would have stayed in jail for two weeks until the sheriff got back and you would have precisely the same argument. As soon as he found out, he let him out.

MR. SORELLE: No, sir. The only point I am making --

QUESTION: Well, what is the difference between three days and thirteen days?

MR. SORELLE: The point is that at some place in here, this is a personal action against Sheriff Baker, somewhere in here there should be a showing that the sheriff made --

QUESTION: And he did make adequate procedures for identifying people who had been arrested.

MR. SORELLE: Acted erroneously, yes, sir. But it is my position that the procedures to examine should be the procedures used and not the procedures not used if we are going to treat it as a tort.

QUESTION: That's right, in those procedures if the sheriff had been gone for three weeks, under those procedures this man would have stayed in jail for three weeks.

MR. SORELLE: I don't believe so. I think the evidence also shows that on coming back they would have

also routinely processed the new photographs and I.D. made at the time of the arrest.

QUESTION: Well, why didn't they do it when they picked him up and brought him to --

MR. SORELLE: The only testimony was that the I.D. man was not on duty during that period himself. It was a matter that they were apparently short-handed and didn't have a man on duty during that weekend, and I believe that is the answer. Our position is that there were procedures, they in fact worked in this case, the problem being that there was a short delay.

QUESTION: The Court of Appeals simply said the case had to go back for a jury verdict, didn't it?

MR. SORELLE: The Court of Appeals -- yes, sir, they finally determined that it should go back to determine whether the sheriff was unreasonable in failing to have previously instituted this policy.

QUESTION: And that was to be determined by the jury or judge as a matter of question of fact?

MR. SORELLE: That would be a question of fact, and it was our position, of course, that this is a pure negligence issue, and if this Court affirmed that holding, that it would be extending 1983 to simple negligence acts.

QUESTION: So under the Court of Appeals holding, the procedures used by the sheriff would be a question of

fact to the jury in every case as to whether they conform to the Constitution.

MR. SORELLE: Yes, sir, so that in any allegation if a man was arrested, confined, later determined that he should not have been confined, whether by jury or not, presumably he would have a cause of action against the jailer to determine whether the jailer should have had investigated and determined earlier that he was the wrong man. I submit, Your Honors, that in this case had Sheriff Baker -- he would have been better off had he done nothing, taken this respondent before the magistrate, had him bound over for trial and ignored the changes of his procedure, then it would have been left up to the jury to determine his innocence because Sheriff Baker acted affirmatively to determine that this was the wrong man and released him and then acted affirmatively to investigate and determine a better procedure by his own good-faith acts created the sole evidence on which the Fifth Circuit determined to submit a cause to the jury.

The trial court considered that there was no violation of due process and directed a verdict. The Fifth Circuit I believe erroneously placed it in context with Whirl v. Kern.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:22 o'clock p.m., the case in
the above-entitled matter was submitted.)

- - -

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1979 APR 30 PM 4 41