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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 85-462

BOB EUGENE BLEVINS, ET AL.,                      PLAINTIFFS,

VS:                      REPORT AND RECOMMENDATION

W. THOMAS WARD, ET AL.,                      DEFENDANTS.

INTRODUCTION

The above-styled action was brought under 42 U.S.C. Section 1983 for events arising in connection with the alleged wrongful arrest and detention of two Letcher County residents in September, 1984. It is currently pending upon the defendant Wallace Marcum's motion for summary judgment.

FACTS

The criminal trial in The State of West Virginia v. Elijah Sartin, Jr. was scheduled to commence July 9, 1984 before Mingo County Circuit Court, West Virginia. The plaintiff--one of whom had been the victim of the robbery for which the trial was to take place--failed to appear and the case had to be continued. The presiding judge in the case directed the Circuit Court Clerk to issue the attachment against the plaintiffs.<sup>1</sup>

On July 10, 1984, the attachment for the plaintiffs was issued by the court clerk. The defendant Marcum, a deputy sheriff with the Mingo County Sheriff's Department, physically delivered the attachment from the office of the clerk to Rush Wyatt, Chief of Police of Jenkins, Kentucky. Upon receipt of the

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<sup>1</sup>There is some indication of record that the prosecutor may have opposed the notion.

attachment, Wyatt executed and signed a criminal complaint charging that the plaintiffs were fugitives from the State of West Virginia for contempt of Court, causing a warrant of arrest to be issued in Letcher County.

On September 14, 1984, the plaintiffs were arrested in Letcher County, Kentucky. The plaintiffs were released from jail some eleven days thereafter, when the plaintiffs' attorney filed a motion for an order of release for failure to comply with Kentucky's version of the Uniform Act to Secure Attendance of Witnesses from Without the State in a Criminal Proceeding, KRS 421.230, et seq.

During the time they were incarcerated, the county sheriff had advised the West Virginia Prosecuting Attorney that the Blevinses would not waive extradition on their attachment. The prosecutor having been further advised in December of that year by the office of the Attorney General of the State of West Virginia that extradition papers could not be processed, a request was made under KRS 421.230 et seq., for the presence of the witnesses at the trial then assigned for March 19, 1985. On February 28, 1985, an order was issued by the Judge of Letcher County Kentucky, ordering the Blevinses to appear in Mingo County Circuit Court. They did, in fact appear, although they did not have to testify.

#### DISCUSSION

Even from the evidence and allegations of the plaintiffs, it is clear that the defendant police officer's only connection to the controversy herein was to physically deliver the attachment from the West Virginia state court clerk's office to the chief of police in Kentucky. (E.g., Deposition of Lorene Blevins at 80-81). There was no claim that the defendant was actually present at the plaintiff's arrest or detention nor that he had any discretion in the initiation of the proceedings. The most evidence brought forth against Marcum, in a deposition by the plaintiff Bob Blevins, was that because Marcum hung around the courthouse and was the sheriff's "number one" man, he should have known that the papers he took to Kentucky were

improper; Blevins also referred to the fact that when he appeared in the courtroom, Marcum grinned "like the proverbial wolf that was getting ready to eat the sheep" and when the "charges were dismissed" his "smile went off his face, and he never smiled anymore the rest of the day. . .(and) that it quite a bit to look at in my book."

In an affidavit, the defendant himself stated that he had nothing whatsoever to do with the issuance of the attachment in question or the arrest or incarceration of the plaintiffs. He further avered that he did not initiate or encourage the prosecution of the plaintiffs in any way, knew nothing about the case beyond the fact that the plaintiffs were supposed to be witnesses in a criminal trial and had not appeared, and merely had been instructed as part of his duties as Deputy Sheriff of Mingo County, West Virginia to physically deliver the attachments to the Chief of Police of Jenkins, Kentucky. The warrant itself, he further states, appeared regular in form, and was to the best of his knowledge at the time, appropriate.

Due to the limited course of the defendant's involvement in the affair, considering the plaintiffs' testimony to its fullest, it must be said that the facts fully justify the application of qualified immunity from damages applicable as per Ghandi v. Police Department of the City of Detroit, 747 F.2d 338 (6th Cir. 1984). There is no concrete evidence from which it can be surmised that the defendant was aware he was violating some clearly defined constitutional right of the plaintiffs by merely delivering the aforementioned papers. Further, the plaintiff has failed to file a written memorandum in support of his position, despite being given ample opportunity to do so.

Accordingly, IT IS HEREBY RECOMMENDED that the motion for

summary judgment be GRANTED, on the basis that the defendant police officer was entitled to qualified immunity.

Objections to this Report and Recommendation must be filed within ten days of the date of same or further appeal is waived. Fed. R. Civ. P. 72; Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd \_\_\_\_\_ U.S. \_\_\_\_\_ (1984).

This the \_\_\_\_\_ day of November, 1986.

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JOSEPH M. HOOD,  
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 85-462

BOB EUGENE BLEVINS, ET AL.,                      PLAINTIFFS,

VS:    ORDER

W. THOMAS WARD, ET AL.,                      DEFENDANTS.

\* \* \* \* \*

Examination of the record reveals that the plaintiff has failed to submit a response to the motion for summary judgment filed by the defendant Wallace Marcum, despite being given an extension of time granted by the undersigned's previous order. Close examination of the record reveals, on the other hand, that said defendant has failed to attach copies of the attachment to his affidavit submitted in connection with the aforementioned motion, despite a clear intention in that affidavit and motion to do so. Accordingly,

IT IS HEREBY ORDERED that:

(1) within fifteen days of the date of service/distribution of this order, the plaintiff shall submit a response to the motion of the defendant Wallace Marcum for summary judgment; and

(2) within fifteen days of the date of service/distribution of this order, the aforesaid defendant shall file a copy of the attachment issued by the Circuit Court of Mingo County, West Virginia, which is at the heart of the present controversy.

This the \_\_\_\_\_ day of November, 1986.

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JOSEPH M. HOOD,  
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 85-462

BOB EUGENE BLEVINS, ET AL.,                      PLAINTIFFS,

VS:                                      ORDER

W. THOMAS WARD, ET AL.,                      DEFENDANTS.

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Examination of the record reveals that the plaintiff has failed to submit a response to the motion for summary judgment filed by the defendant Wallace Marcum, despite being given an extension of time granted by the undersigned's previous order. Close examination of the record reveals, on the other hand, that the issue of qualified immunity has never been addressed. Accordingly,

IT IS HEREBY ORDERED that:

- (1) the defendant Wallace Marcum shall file a memorandum on the issue of qualified immunity within thirty days of the date of service/distribution of this order; and
- (2) within twenty days thereafter, the plaintiff shall a response thereto.

This the \_\_\_\_\_ day of November, 1986.

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JOSEPH M. HOOD,  
UNITED STATES MAGISTRATE

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 85-462

BOB EUGENE BLEVINS, ET AL., PLAINTIFFS,

VS: MEMORANDUM OPINION

W. THOMAS WARD, ET AL., DEFENDANTS.

INTRODUCTION

The above-styled action was brought under 42 U.S.C. Section 1983 to recover damages for the alleged wrongful arrest and detention of two Letcher County residents in September, 1984. It is currently pending upon the defendant Wallace Marcum's motion for summary judgment.

FACTS

A criminal trial was scheduled to commence July 9, 1984 before Mingo County Circuit Court, West Virginia. The plaintiffs--one of whom had been the victim of the robbery for which the trial was to take place--failed to appear and the case had to be continued. The presiding judge in the case directed the Circuit Court Clerk to issue the attachment against the plaintiffs.<sup>1</sup>

On July 10, 1984, the attachment for the plaintiffs was issued by the Court Clerk. The defendant Marcum, a deputy sheriff with the Mingo County Sheriff's Department, physically delivered the attachment from the office of the clerk to Rush Wyatt, Chief of Police of Jenkins, Kentucky. Upon receipt of the

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<sup>1</sup>There is some indication of record that the prosecutor may have opposed the motion.

attachment, Wyatt executed a criminal complaint charging that the plaintiffs were fugitives from justice in the State of West Virginia, causing a warrant of arrest to be issued in Letcher County.

On September 14, 1984, the plaintiffs were arrested in the same county. The plaintiffs were released from jail some eleven days thereafter, when the plaintiffs' attorney filed a motion for an order of release for failure to comply with Kentucky's version of the Uniform Act to Secure Attendance of Witnesses from Without the State in a Criminal Proceeding, KRS 421.230, et seq.

During the time they were incarcerated, the county sheriff had advised the West Virginia Prosecuting Attorney that the Blevinses would not waive extradition on their attachment. The prosecutor having been further advised in December of that year by the office of the Attorney General of the State of West Virginia that extradition papers could not be processed, a request was made under KRS 421.230 et seq. for the presence of the witnesses at the trial then assigned for March 19, 1985.

On February 28, 1985, an order was issued by the Judge of Letcher County Kentucky, ordering the Blevinses to appear in Mingo County Circuit Court. They did, in fact appear, although they did not have to testify.

#### DISCUSSION

Even from the evidence and allegations of the plaintiffs, it is clear that the defendant police officer's only connection to the controversy herein was to physically deliver the attachment from the West Virginia state court clerk's office to the chief of police in Kentucky. (E.g., Deposition of Lorene Blevins at 80-81). There was no claim that the defendant was actually present at the plaintiff's arrest or detention nor that he had any discretion in the initiation of the proceedings. The most "evidence" brought forth against Marcum, in a deposition by the plaintiff Bob Blevins, was that because Marcum hung around the courthouse and was the sheriff's



number one" man, he "should have known" that the papers he took to Kentucky were improper; Blevins also referred to the fact that when he appeared in the courtroom, Marcum grinned "like the proverbial wolf that was getting ready to eat the sheep" and when the "charges were dismissed" his "smile went off his face, and he never smiled anymore the rest of the day. . . (and) that it quite a bit to look at in my book."

In an affidavit, the defendant himself stated that he had nothing whatsoever to do with the issuance of the attachment in question or the arrest or incarceration of the plaintiffs. He further avered that he did not initiate or encourage the prosecution of the plaintiffs in any way, knew nothing about the case beyond the fact that the plaintiffs were supposed to be witnesses in a criminal trial and had not appeared, and merely had been instructed as part of his duties as Deputy Sheriff of Mingo County, West Virginia to physically deliver the attachments to the Chief of Police of Jenkins, Kentucky. The warrant itself, he further states, appeared regular in form, and was to the best of his knowledge at the time, appropriate.

Due to the limited course of the defendant's involvement in the affair, considering the plaintiffs' testimony to its fullest, it must be said that the facts fully justify the application of qualified immunity from damages applicable as per Ghandi v. Police Department of the City of Detroit, 747 F.2d 338 (6th Cir. 1984). There is no evidence from which it can be surmised that the defendant was aware he was violating some clearly defined constitutional right of the plaintiffs by what action he took. Mitchell v. Forsyth, \_\_\_\_\_ U.S. \_\_\_\_\_ (1985). Further, the plaintiff has failed to file a written memorandum in support of his position, despite being given ample opportunity to do so.

Although the defendant has not specifically raised this issue in his motion for summary judgment, he has called attention to the fact that his involvement was

extremely limited and that he only acted under instructions in performing the sole task allotted him. Accordingly, it is clear that judgment should be granted for him, on the basis that he was entitled to qualified immunity. A separate order will be entered consistent with this opinion.

This the \_\_\_\_\_ day of November, 1986.

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HENRY R. WILHOIT  
JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 85-462

BOB EUGENE BLEVINS, ET AL.,

PLAINTIFFS,

VS:

ORDER

W. THOMAS WARD, ET AL.,

DEFENDANTS.

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Examination of the record reveals that the plaintiff has failed to submit a response to the motion for summary judgment filed by the defendant Wallace Marcum, despite being given an extension of time granted by the undersigned's previous order. Close examination of the record reveals also that the defendant himself has failed to attach copies of the West Virginia attachment to his affidavit submitted in connection with the aforementioned motion, despite the clear intention evidenced by the language of the affidavit and motion for that to be done. Accordingly,

IT IS HEREBY ORDERED that:

(1) within fifteen days of the date of service/distribution of this order, the plaintiff shall submit a response to the motion of the defendant Wallace Marcum for summary judgment; and

(2) within that same period of time, the aforesaid defendant shall file a copy of the attachment issued by the Circuit Court of Mingo County, West

Virginia, which is at the heart of the present controversy.

This the \_\_\_\_\_ day of November, 1986.

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HENRY R. WILHOIT,  
JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
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CIVIL ACTION NO. 85-462

BOB EUGENE BLEVINS, ET AL.,                                 PLAINTIFFS,

VS:   ORDER

W. THOMAS WARD, ET AL.,                                 DEFENDANTS.

\* \* \* \* \*

Examination of the record reveals that the plaintiff has failed to submit a response to the motion for summary judgment filed by the defendant Wallace Marcum, despite being given an extension of time granted by the undersigned's previous order. Close examination of the record reveals, on the other hand, that the issue of qualified immunity has never been addressed. Accordingly,

IT IS HEREBY ORDERED that:

(1) the defendant Wallace Marcum shall file a memorandum on the issue of qualified immunity within thirty days of the date of service/distribution of this order; and

(2) within twenty days thereafter, the plaintiff shall a response thereto.

This the \_\_\_\_\_ day of November, 1986.

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HENRY R. WILHOIT,  
JUDGE