

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JAMES HARRIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 82-0889-AM
	)	
JAMES T. HENDRICK,	)	
	)	
Defendant,	)	

ORDER

This matter comes before the court on defendant's motion for summary judgment under Rule 56 (b) of the Federal Rules of Civil Procedure. For reasons stated in the accompanying memorandum opinion, defendant's motion is GRANTED. Accordingly, plaintiff's case is DISMISSED.

Let the Clerk send a copy of this order and accompanying memorandum opinion to the plaintiff and to counsel for the defendant.

DATE: March 9, 1983

Richard L. Williams  
UNITED STATES DISTRICT JUDGE

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 Plaintiff, )  
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 JAMES T. HENDRICK, )  
 )  
 Defendant, )

MEMORANDUM OPINION

Plaintiff is a prisoner in the Virginia Correctional System. Plaintiff brings this action under 42 U.S.C. § 1983, claiming that defendant's conduct in preparing or handling the transcript of defendant's state court criminal trial prevented plaintiff from preparing an adequate state appeal, and consequently deprived plaintiff of his rights to due process of law. This matter comes before the court on defendant's motion for summary judgment under Rule 56 (b) of the Federal Rules of Civil Procedure. For reasons stated below, defendant's motion is granted.

I. FACTUAL BACKGROUND

Plaintiff was tried and convicted in the Circuit Court of the City of Petersburg, Virginia, on September 21, 1981. Defendant was not present at the trial. The trial was recorded on five cassette tapes, which the Court Clerk's office mailed to defendant on October 7, 1981. The clerk's office had previously arranged that defendant should transcribe the tapes and file the original transcript in the Clerk's office. Defendant completed the trial transcription and sent the original transcript to the Clerk's office on November 17, 1981. Defendant also supplied copies to the Commonwealth's Attorney and the plaintiff's criminal defense attorney. The defendant supplied an addendum (pages 271-284 of the transcript) on December 22, 1981. The defendant certified the official transcript to be accurate and complete.

On January 14, 1982, the Clerk's office forwarded the official transcript as part of plaintiff's trial record to the Clerk's office of the Supreme Court of Virginia. On June 17, 1982, the Clerk's office received a letter from the plaintiff alleging that 8 pages of his copy of the trial transcript were duplicated, and eight others were missing. The Clerk's office replied to plaintiff that since the official transcript had already been filed with the Supreme Court of Virginia, there was no way to check the transcript or to supply him with the missing pages.

On September 27, 1982, the Supreme Court of Virginia denied plaintiff's writ of appeal. The Supreme Court of Virginia returned the record, including the official transcript, to the

Clerk's Office of the Circuit Court of the City of Petersburg on October 5, 1982.

On September 28, 1982, plaintiff filed this action against defendant, alleging that defendant "was negligent in preparing the transcript because there is [sic] important pages missing out of the transcript which is [sic] substituted with the same page." Specifically, plaintiff claims that in his own copy of the transcript there are two copies of page 42, but no copy of page 43; two copies of page 44, but no copy of page 45; two copies of page 48, but no copy of page 49; two copies of page 50, but no copy of page 51; two copies of page 52, but no copy of page 53; two copies of page 99, but no copy of page 100; two copies of page 101, but no copy of page 102.

Plaintiff asserts that the court reporter is "legally obligated to protect plaintiff against any unreasonable risks and failed to the [sic] standard." Plaintiff contends that the alleged defects in his copy of the transcript prevented him from making an effective appeal of his criminal conviction to the Virginia Supreme Court.

In moving for summary judgment, defendant presents an affidavit stating that he has inspected the official transcript of plaintiff's criminal trial, and has found the transcript to be accurate and complete. Defendant also presents an affidavit from the Clerk of the Court of the City of Petersburg which states that the Clerk has inspected the official transcript and found that there are no missing pages. The Clerk attached to his affidavit xerox copies of the pages of the official transcript which plaintiff alleges to be missing from his copy.

In his reply to defendant's motion for summary judgment, plaintiff states that "[a]lthough the Courts [sic] transcript may in fact be complete and in order; this does not mean of alter the fact that the Plaintiff and Plaintiffs [sic] attorney were served proper or complete transcripts, which evidently they were not." Plaintiff apparently concedes that the official transcript is correct, thereby changing his claim from one of negligent transcript preparation to one of negligent transcript handling. Also, plaintiff alleges for the first time in his response to defendant's motion for summary judgment that his attorney did not receive a complete copy. Plaintiff contends that not only did he rely on the defective copy in preparing his appeal, but "so did plaintiff's attorney if the statement by the defense counsel is correct that the copy of the Plaintiff received was probably the copy of his attorney." Thus, plaintiff does not deny (though neither does he concede) that he received his defective copy from his attorney. Nor does he anywhere indicate how he would have first-hand knowledge that his attorney's copy was incomplete, or whether his attorney ever made any attempt to correct the alleged defects in his copy. Plaintiff contends that these defects were the result of defendant's negligence, and that the defects prevented plaintiff and plaintiff's attorney from mounting an effective defense.

## II. LEGAL ANALYSIS

An action under Section 1983 has two essential elements: (i) the defendant must have been "acting under color of state law"; and (ii) the defendant's conduct must have "deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, 451 U.S. 527, 535 (1981). Defendant does not contest that he was acting under color of state law. See Slavin v. Curry, 574 F.2d 1256, 1261 (5th Cir. 1978) (court reporter acts under color of state law in preparing trial transcript), modified on other grounds 583 F.2d 779, overruled on other grounds sub. nom. Sparks v. DuVal County Ranch Company, 604 F.2d 976 (5th Cir. 1979).

The court must next determine whether the actions alleged constitute a deprivation of a right secured under the Constitution such that plaintiff may maintain an action under Section 1983. A number of difficulties unnecessarily complicate the court's task in evaluating plaintiff's rather novel claims. For example, plaintiff never even specifies in what ways defendant's supposed negligence prevented him from receiving an adequate appeal, given that the Virginia Supreme Court had an accurate copy of the transcript. Plaintiff never even actually claims that defendant gave him the defective copy. It is just as likely that plaintiff's attorney received an accurate copy and gave plaintiff an inaccurate copy.

But in considering defendant's motion for summary judgment, plaintiff's allegations must be taken as true. Adickes v. Kress, 398 U.S. 144 (1970); Cole v. Cole, 632 F.2d 1083, 1090 (4th Cir.

1980). The strongest statement of plaintiff's claim is that defendant's alleged negligence in handling (not preparing) the transcript caused the alleged defects in plaintiff's and possibly plaintiff's attorney's copies (but not the official copy), and that these alleged defects prevented plaintiff from presenting an adequate appeal of his criminal conviction. Thus, plaintiff contends that defendant's actions deprived him of due process of law.

Other courts have held that allegations of a court reporter's improper preparation or mishandling of a trial transcript states a cause of action under Section 1983. See, e.g., Rheurark v. Shaw, 547 F.2d 1257, 1259 (5th Cir 1977), reh'g 477 F.Supp. 897 (N.D. Tex. 1979); Qualls v. Shaw, 535 F.2d 318 (5th Cir. 1976); Washington v. Official Court Stenographer, 251 F. Supp. 945 (E.D. Pa. 1966); Simmons v. Maslynsky, 45 F.R.D. 127 (E.D. Pa. 1968). But the court cannot find any cases which support the proposition that a court reporter's negligent provision of a defective transcript to a party's defense lawyer states a constitutional claim.

Fortunately, this court does not need to reach the question whether plaintiff's allegations state a constitutional violation, because even if plaintiff has stated a valid claim, defendant is immune from any liability. While court reporters are not entitled to absolute immunity, they are entitled to "qualified immunity." See Slavin v. Curry, supra; McLallen v. Henderson, 492 F.2d 1298, 1300 (8th Cir. 1974). Under such qualified immunity, a court reporter cannot be held liable if he can show that he was acting

pursuant to lawful authority, following his instructions in good faith, and was not in derogation of those instructions or rules. Id.

Defendant was acting pursuant to the instructions of the Clerk of the Circuit Court of the City of Petersburg. The defendant presents an affidavit that he followed these instructions, and supplied an accurate transcript, which the plaintiff does not dispute. Further, defendant contends that his actions were at all times made in good faith compliance with his instructions. Indeed, plaintiff makes no contention that defendant's allegedly negligent conduct was in any way reckless or malicious, or the result of anything other than good faith obedience to the Clerk of the Court's instructions.

While there seems to be no factual dispute about the defendant's good faith, previous courts have held if there is such a dispute, a hearing is necessary to determine if defendant's motivation entitles him to a defense of good faith. See, e.g., Slavin v. Curry, supra, at 1262. But the Supreme Court has recently held that such a hearing is unnecessary where there is no contention that defendant's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See Harlow v. Fitzgerald, \_\_\_ U.S. \_\_\_, 50 U.S.L.W. 4815, 4820 (June 24, 1982). Given this court's own difficulty in affirming that the conduct alleged in plaintiff's complaint states a constitutional violation, there would seem to be no way a reasonable person could have known that such conduct would state a constitutional claim. Thus, even if



plaintiff's complaint states a valid constitutional claim ( a proposition which this court finds highly dubious), and even if plaintiff's complaint is read to question defendant's good faith, this court finds that he has nonetheless failed to raise factual issues sufficient to avert defendant's motion from summary judgment. Even if everything in plaintiff's complaint is true, defendant is immune from liability. Therefore, defendant's motion for summary judgment is granted and plaintiff's case is dismissed.

DATE: March 9, 1983

Richard L. Williams  
UNITED STATES DISTRICT JUDGE