

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CLARENCE EUGENE WOODFORK, JR.;)
 CAROL YVONNE WOODFORK; AVCO)
 FINANCIAL SERVICES OF)
 OKLAHOMA, INC.;)
 COUNTY TREASURER, Tulsa)
 County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

DEC 08 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 94-C 890K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7 day
 of Dec., 1994. The Plaintiff appears by Stephen C.
 Lewis, United States Attorney for the Northern District of
 Oklahoma, through Neal B. Kirkpatrick, Assistant United States
 Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by Dick A. Blakeley, Assistant District
 Attorney, Tulsa County, Oklahoma; and the Defendants, **Clarence**
Eugene Woodfork, Jr., Carol Yvonne Woodfork, and Avco Financial
Services of Oklahoma, Inc., appear not, but make default.

The Court being fully advised and having examined the
 court file finds that the Defendant, **Clarence Eugene Woodfork,**
Jr., waived service of Summons on October 20, 1994, which was
 filed on November 1, 1994; that the Defendant, **Carol Yvonne**
Woodfork, waived service of Summons, which was dated November 9,
 1994 by scrivener's error, and was filed on October 11, 1994; and

NOTE: THIS JUDGMENT IS TO BE FILED WITH THE
 CLERK OF COURT AND TO ALL COUNSEL AND
 PRO SE LITIGANTS IMMEDIATELY
 UPON RECEIPT.

that the Defendant, **Avco Financial Services of Oklahoma, Inc.**, acknowledged receipt of Summons and Complaint via certified mail on September 22, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on September 28, 1994; and that the Defendants, **Clarence Eugene Woodfork, Jr., Carol Yvonne Woodfork**, and **Avco Financial Services of Oklahoma, Inc.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork, were granted a divorce in Tulsa District Court, case number FD 93-8477, dated June 23, 1994, and filed with the Court Clerk on July 21, 1994, in Tulsa County, Oklahoma.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Six (6), Block Four (4), NORTHLAND PLAZA to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on March 1, 1978, Bettie Tyes Lewis, executed and delivered to Mercury Mortgage Co., Inc. her mortgage note in the amount of \$29,000.00, payable in monthly

installments, with interest thereon at the rate of eight and three-quarters percent (8.75%) per annum.

The Court further finds that as security for the payment of the above-described note, Bettie Tyes Lewis, executed and delivered to Mercury Mortgage Co., Inc. a mortgage dated March 1, 1978, covering the above-described property. Said mortgage was recorded on March 10, 1978, in Book 4315, Page 384, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 17, 1978, Mercury Mortgage Co., Inc. assigned the above-described mortgage note and mortgage to Pulaski Bank and Trust Company. This Assignment of Mortgage was recorded on March 21, 1978, in Book 4316, Page 1992, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 1, 1984, Pulaski Bank and Trust Company assigned the above-described mortgage note and mortgage to Simmons First National Bank of Pine Bluff. This Assignment of Mortgage was recorded on June 3, 1985, in Book 4866, Page 2325, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 30, 1989, Simmons First National Bank of Pine Bluff assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 6, 1989, in Book 5187, Page 1411, in the records of Tulsa County, Oklahoma. A corrected assignment was recorded on August 9, 1989, in Book 5200, Page 213, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork, then husband and wife, became the current title owners of the property by virtue of a General Warranty Deed dated July 25, 1978, and recorded on August 1, 1978 in Book 4344, Page 629, in the records of Tulsa County, Oklahoma. The Defendants, Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork, are the current assumptors of the subject indebtedness.

The Court further finds that on May 20, 1989, the Defendants, Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork, then husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on May 16, 1990.

The Court further finds that the Defendants, Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork, filed their voluntary petition in bankruptcy on September 3, 1991, in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 91-03092, which was discharged on November 17, 1992, and was closed August 25, 1993.

The Court further finds that the Defendants, Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the

Defendants, **Clarence Eugene woodfork, Jr. and Carol Yvonne Woodfork**, are indebted to the Plaintiff in the principal sum of \$36,333.62, plus interest at the rate of 8.75 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$29.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$29.00 which became a lien on June 25, 1993; and a lien in the amount of \$27.13 which became a lien on June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Clarence Eugene Woodfork, Jr., Carol Yvonne Woodfork, and Avco Financial Services of Oklahoma, Inc.**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork**, in the principal sum of \$36,333.62, plus interest at the rate of 8.75 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$85.13 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Clarence Eugene Woodfork, Jr., Carol Yvonne Woodfork, and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Clarence Eugene Woodfork, Jr. and Carol Yvonne Woodfork**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with

or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$85.13, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 890E

NBK:LG

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FARMERS ALLIANCE MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

C. G. DELOZIER, MARY JANE
DELOZIER, C. J. DELOZIER, and
MARK DELOZIER,

Defendants.

Case No. 93-C-648-E

FILED

DEC 08 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

The above-captioned matter is dismissed without prejudice to
refiling with each party to bear their own costs.

s/ TERRY C. KERN

DISTRICT JUDGE

ENTERED ON DOCKET

DATE 12-9-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 09 1994

UNITED STATES OF AMERICA,)
)
Plaintiff,)

vs.)

JOE WILLIS JOHNSON aka)
JOE JOHNSON aka JOE W.)
JOHNSON aka J.W. JOHNSON;)
DONNA M. JOHNSON aka DONNA)
JOHNSON; STATE OF OKLAHOMA)
ex rel. OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma; and)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

FILED

DEC 08 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C-663-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day
of Dec., 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendant, State of Oklahoma ex rel. Oklahoma Tax
Commission, appears by Kim D. Ashley, Assistant General Counsel;
the Defendant, County Treasurer, Tulsa County, Oklahoma, appears
by Dick A. Blakeley, Assistant District Attorney, Tulsa County,
Oklahoma; the Defendant, Board of County Commissioners, Tulsa
County, Oklahoma, appears not, having previously claimed no
right, title or interest in the subject property; and the
Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson
aka J.W. Johnson and Donna M. Johnson aka Donna Johnson, appear
not, but make default.

NOTE: THIS ORDER IS TO BE MAILED
BY MOVING TO ALL CLERKS
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

The Court, being fully advised and having examined the court file, finds that the Defendant, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson, executed a Waiver of Service of Summons on July 8, 1994 which was filed with the Court on July 13, 1994; and that the Defendant, Donna M. Johnson aka Donna Johnson, was served with Summons and Complaint on August 30, 1994.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on July 26, 1994; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on July 26, 1994, claiming no right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on August 1, 1994; and that the Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson and Donna M. Johnson aka Donna Johnson, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Thirty-nine (39), Block Two (2), INDIAN SPRINGS PLAZA, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 18, 1989, the Defendants, Joe Willis Johnson and Donna M. Johnson, executed and

delivered to First Security Mortgage Company, their mortgage note in the amount of \$67,500.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Joe Willis Johnson and Donna M. Johnson, executed and delivered to First Security Mortgage Company, a mortgage dated May 18, 1989, covering the above-described property. Said mortgage was recorded on June 12, 1989, in Book 5188, Page 965, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 18, 1989, First Security Mortgage Company executed and delivered an Assignment of Mortgage to Mortgage Clearing Corporation regarding the subject property. This assignment was recorded on June 28, 1989 in Book 5191, Page 1275, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1991, Mortgage Clearing Corporation executed and delivered an Assignment of Mortgage to Triad Bank N.A. regarding the subject property. This assignment was recorded on December 31, 1991 in Book 5371, Page 947, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1992, Triad Bank, N.A. executed and delivered an Assignment of Mortgage to Liberty Mortgage Company regarding the subject property. This assignment was recorded on October 29, 1992 in Book 5448, Page 1254 in the records of Tulsa County, Oklahoma.

The Court further finds that on February 22, 1993, Liberty Mortgage Company executed and delivered an Assignment of

Mortgage to the Secretary of Veterans Affairs regarding the subject property. This assignment was recorded on March 9, 1993 in Book 5482, Page 1724, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1993, the United States of America, through the Secretary of Veterans Affairs, and the Defendants, Joe Willis Johnson and Donna M. Johnson, entered into a Corrected Modification and Reamortization Agreement which lowered the interest rate to 8% per annum.

The Court further finds that the Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson and Donna M. Johnson aka Donna Johnson, made default under the terms of the aforesaid note, mortgage, and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson and Donna M. Johnson aka Donna Johnson, are indebted to the Plaintiff in the principal sum of \$69,178.77, plus interest at the rate of 8 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$12.60 for service of Summons and Complaint.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$29.00 which became a lien on the

property as of June 25, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson and Donna M. Johnson aka Donna Johnson, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of tax warrant #ITI9100683100, dated May 9, 1991 and recorded on May 14, 1991 in the records of Tulsa County, Oklahoma, in the amount of \$599.43 plus penalties and interest; and tax warrant #ITI9202264000, dated November 24, 1992 and recorded on December 11, 1992 in the records of Tulsa County, Oklahoma, in the amount of \$782.68 plus penalties and interest. Said liens are inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson and Donna M. Johnson aka Donna Johnson, in the principal sum of \$69,178.77, plus interest at the rate of 8 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum

until paid, plus the costs of this action in the amount of \$12.60 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$29.00 for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson; Donna M. Johnson aka Donna Johnson; and the Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in the amount of \$1,382.11 plus penalties and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Joe Willis Johnson aka Joe Johnson aka Joe W. Johnson aka J.W. Johnson and Donna M. Johnson aka Donna Johnson, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of \$1,382.11 plus penalties and interest.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$29.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

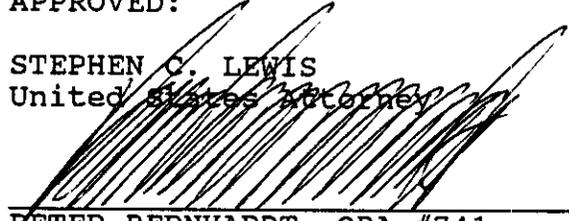
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

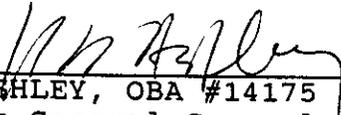
Judgment of Foreclosure
USA v. Joe Willis Johnson, et al.
Civil Action No. 94-C-663-K

Additional Signature Pages


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure
USA v. Joe Willis Johnson, et al.
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Additional Signature Page


KIM D. ASHLEY, OBA #14175
Assistant General Counsel
Attorney for Defendant,
State of Oklahoma ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
USA v. Joe Willis Johnson, et al.
Civil Action No. 94-C-663-K

ENTERED ON DOCKET
DEC 09 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROGER L. DOWELL,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES,)
)
 Defendant.)

93-C-0951-K ✓

FILED

DEC 08 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 28, 1994 in which the Magistrate Judge recommended that the Secretary must (1) Have claimant undergo another consultative psychiatric examination -- one that includes diagnostic testing; (2) Have a mental health expert testify at a supplemental hearing; (3) Have claimant testify in detail about his mental impairment and (4) Have a vocational expert testify at the supplemental hearing. The Magistrate Judge recommends the case be **REMANDED** consistent with these instructions.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are

15

hereby adopted as set forth above.

SO ORDERED THIS 8 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DATE DEC 08 1994

MICHAEL L. EBEL)
)
 Plaintiff,)
)
 vs.)
)
 DEWEY JOHNSON, Sheriff of Rogers)
 County, Oklahoma, in his official)
 and individual capacities, JIMMIE)
 L. HICKS, Undersheriff of Rogers)
 County, Oklahoma, in his official)
 and individual capacities,)
 DEPUTY/JAILER A for Rogers County,)
 Oklahoma, in his/her official)
 capacity, and DEPUTY JAILER B for)
 Rogers County, Oklahoma, in)
 his/her official capacity,)
)
 Defendant.)

No. 93-C-1036-K

FILED
 DEC 08 1994
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before this Court is Defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Also before this Court is the Motion to Dismiss filed by Defendants based on Rule 17 of the Federal Rules of Civil Procedure. This civil rights action arose from severe leg burns sustained by Plaintiff, Michael L. Ebel, while being held at the Rogers County Jail on a charge of driving while intoxicated.

I. FACTS

In the early morning hours of March 27, 1993, the Plaintiff, Michael L. Ebel, was arrested and detained in the Rogers County Jail ("Jail") on a charge of driving while intoxicated. Plaintiff had been drinking from 10:00 p.m. until 2:00 a.m. at a bar and had earlier consumed beer before going to the bar. He was processed at

the Rogers County Jail and given a jail uniform, a mattress, and placed in the south cell block. Plaintiff slept in the hallway of the south cell block.

On the night of Plaintiff's arrest, Gene Alberty ("Alberty") and Chad Chaney ("Chaney") were also being held in the Jail. Both were convicted felons awaiting transfer to the State of Oklahoma's correctional institution.

Plaintiff later woke up in a daze and noticed burns on his legs and felt pain, but he did not know when the burns occurred. He subsequently determined and alleged in his Complaint that Alberty and Chaney had placed toilet paper up the legs of his pants and set it on fire. The cause of the fire, however, remains in dispute.

Plaintiff first called the burns to the attention of jail staff when jail personnel began to prepare to serve breakfast. In response, Plaintiff was told, "Eat your oatmeal. We'll get to you as soon as we can." App. to Pl.'s Resp. to Defs.' Mot. for Summ. J., Dep. of Ebel, p. 39. Subsequently, Plaintiff was taken to the front area of the Jail where he estimates he waited for an hour. Plaintiff was then transported to the office of Dr. Stauffer at approximately 9:20 a.m., received treatment, and thereafter returned to the Jail.

From midnight to 4:00 p.m. on March 27, 1993, the number of persons in the Jail exceeded the maximum number of persons for and which the Jail was certified. While the Plaintiff was in the Jail, the cell doors were open, and incarcerated persons freely mingled

with and had access to each other. The drunk tank was filled not with drunks but with two child molesters and a murderer who were put there, according to the Defendants, for their own safety.

The Minimum Inspection Standards for Oklahoma Jails promulgated by the Oklahoma Department of Health, provide that intoxicated prisoners shall be housed separately until they return to normal. Defs.' Mot. for Summ. J., Ex. E; OAC:670-5-5 at (4). The Rogers County Jail Operations Manual states that intoxicated prisoners shall be housed separately from other prisoners if space is available until the prisoner returns to normal. Defs.' Mot. for Summ. J., Ex. F. On March 27, 1993, the Jail was overcrowded, and Defendants state that no space was available to segregate any of three intoxicated prisoners, including the Plaintiff.

Although Defendants could have placed Plaintiff in the booking area, they did not, citing concerns of escape and/or disruption. Similarly, Defendants chose not to place Plaintiff with the prison trustees because it would have been disruptive to that cell at such an early hour of the morning.

II. MOTION TO DISMISS

The Defendants have moved for dismissal of Plaintiff's claims for medical bills in the amount of \$23,762.20 from the Claremore Regional Hospital. Plaintiff received medical services from the Claremore Regional Hospital in the wake of the injuries he suffered while incarcerated. Claremore Regional Hospital has filed a separate suit, (No. CJ-94-152) in the District Court for Rogers

County, Oklahoma in which Claremore Regional Hospital claims that the Rogers County Board of Commissioners is indebted to the hospital for the same medical bills.

Defendants now seeks dismissal based on the principle in Fed.R.Civ.P. 17 that requires every action to be prosecuted by the real party in interest. Under Oklahoma law, the real party in interest "is the party legally entitled to the proceeds of a claim or the party that has the right to receive and control the fruits and benefits of the litigation." Mainord v. Sharp, 569 P.2d 546, 547 (Okla. App. 1977) (quotations omitted). The Mainord court went on to say that the real party in interest is "he who by substantive law has the right of action." Id. at 548.

In interpreting the above language, Defendant argues that Claremore Regional Hospital is the real party in interest, since it has the right to receive and control the fruit and benefits of the litigation on this aspect of Plaintiff's claim for damages. Defendants argue that they will not be protected from further action from the hospital even if the Plaintiff is successful in this Court. For these reasons, Defendants urge this Court to dismiss the action with regard to this element of damages.

Defendants' arguments for dismissal are unavailing. Plaintiff is the real party in interest in this case. He is the party who by substantive law, § 1983, has the right of action. Claremore Regional Hospital possesses no substantive rights under § 1983 against Defendants. This case involves allegations of unconstitutional treatment to Plaintiff and the damages suffered

thereby. Hospital bills from Claremore Regional Hospital are an element of Plaintiff's § 1983 damages. For the foregoing reasons, Defendants' Motion to Dismiss is Denied.

III. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert den. 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. In Anderson v. Liberty Lobby, Inc., the Court stated:

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

IV. MOTION FOR SUMMARY JUDGMENT

Plaintiff has filed suit against Rogers County Sheriff Dewey Johnson and Undersheriff Jimmie Hicks in their official and individual capacities and against two unnamed Rogers County Deputies/Jailers in their official capacities. While Plaintiff did not name Rogers County, its governing board, or the Sheriff's Department as Defendants in the Complaint, a claim against a public official acting in an official capacity is equivalent to a claim against the public entity for which the official works. Watson v. City of Kansas City, 857 F.2d 690, 695 (10th Cir. 1988).

A. The Fourth and Eighth Amendment Claims.

Plaintiff makes a § 1983 claim for denial of medical care and failure to keep him safe under the Fourth, Eighth, and Fourteenth Amendments. With regard to the Eighth Amendment claim, it is important that Plaintiff was a pretrial detainee, not a convicted prisoner. The Eighth Amendment protects convicted prisoners from cruel and unusual punishment, making it relevant in this case only in an indirect way. Pretrial detainees such as Plaintiff may be confined, but they may not be punished. Bell v. Wolfish, 441 U.S. 520 (1979). Because cruel and unusual treatment is

unconstitutional punishment under the Eighth Amendment, the courts have said that any treatment that would violate the Eighth Amendment is similarly unconstitutional under the Fourteenth Amendment for a pre-trial detainee. Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984). In a formal sense, however, the Court can dispense with the Eighth Amendment claim since Plaintiff was not a convicted criminal.

Similarly, Plaintiff's Fourth Amendment claim should be disregarded for this case along with the objective reasonableness test used in traditional Fourth Amendment analysis. The Fourth Amendment's seizure provision governs the use of excessive force during arrest. Graham v. Connor, 490 U.S. 386, 394-95. In Austin v. Hamilton, 945 F.2d 1155 (10th Cir. 1991), the Tenth Circuit adopted the objective reasonableness test for claims of excessive force, not only during arrest, but also incident to arrest. Under the Fourth Amendment, the question is whether the Defendants' actions were "objectively reasonable" in light of the facts and circumstances confronting them, without regard to underlying intent or motivation. Graham, 490 U.S. at 397.

Plaintiff seeks to use seizure provisions of the Fourth Amendment to apply in the instant case, arguing that because Plaintiff had not been arraigned, the seizure, in effect, was still in process. However, the arrest of Plaintiff is not in issue. There was clearly probable cause for the arrest. Moreover, this case does not involve the extent of force used during arrest or incident to it. While a seizure for Fourth Amendment purposes may

extend beyond the initial arrest, the incidents at issue in this case do not implicate arrest-related or force-related questions contemplated by the Fourth Amendment. Since the Tenth Circuit has only used this standard when assessing claims of excessive force during or incident to arrest, this Court declines to extend this test to the completely different context of this dispute. See Frohmader v. Wayne, 958 F.2d 1024, 1026 (10th Cir. 1992) ("claims of post arrest excessive force. . . are governed by the 'objective reasonableness standard' of the Fourth Amendment. . . .").¹

B. The Fourteenth Amendment Claim.

This case concerns the duty of Jail officials to make the Jail safe for pretrial detainees such as Plaintiff and the duty to provide medical care to prisoners. Both of these issues implicate the due process clause of the Fourteenth Amendment. However, the analysis of the two issues are different under that clause.

1. Jail Safety and Placement in the South Cell Block

Plaintiff claims that officials at the Jail violated his rights by failing to protect him from other inmates. In Bell v. Wolfish, 441 U.S. at 536 n. 16, the Supreme Court set out the standard of constitutional review applicable to procedures,

¹In the Tenth Circuit case of Gonzales v. City of Espanola, No. CIV-90-33-M, 1991 WL 202784, at *2 (10th Cir, Oct. 8, 1991) the court specifically held that while the Fourth Amendment could be used to assess pre-indictment excessive force claims, it was not appropriate where Plaintiff was alleging that officials failed to protect him from self-inflicted injuries.

policies, or practices affecting pretrial detainees. The Due Process clause of the Fourteenth Amendment prohibits "punishment" of persons unless they have been convicted of a crime. This right attaches not only to the length of the detention but also includes the right not to be subjected to conditions imposed for the purposes of punishment. Id at 535-42. Courts must decide whether a condition imposed during pretrial detention is imposed for the purpose of punishment or whether it is an incident of some other legitimate governmental purpose. Matzker 748 F.2d at 1146.

In this case, there is no evidence of a specific intent to punish Plaintiff by placing him in the south cell block in the early morning hours. In fact, no such allegation has even been made. Nevertheless, Plaintiff may establish that Defendants violated his constitutional right to be free from punishment if there were no alternative, legitimate, reasons for the decision not to separate him from dangerous prisoners. The Court stated in Bell:

Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which the [restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Conversely, if a restriction or condition is not reasonably related to a legitimate governmental goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. Bell, 441 U.S. at 538-539 (citations omitted).

Plaintiff is required to show that the decision made concerning his

incarceration in the south cell block was not reasonably related to any legitimate purpose or was arbitrary or purposeless.

When Plaintiff was booked at approximately 3:00 a.m., there was no space available in the drunk tank, since that space was used to segregate other prisoners deemed to require protective treatment. Defs.' Mot. for Summ. J., Ex. B, p.14. The Supreme Court has repeatedly said that prison officials have broad administrative and discretionary authority over the institutions they manage, and that lawfully incarcerated individuals have only a narrow range of protected liberty interests. Hewitt v. Helms, 459 U.S. 460 (1983). While this discretion is not unlimited under the Wolfish v. Bell standard, the decision to use the drunk tank for other prisoners cannot be said to be a *per se* violation of the constitutional standard.

Defendants also chose not to place Plaintiff in the booking area. The reason provided by Defendants is that a prisoner may pose a threat to the jailer as well as an escape risk if housed in that area. Plaintiff's blood alcohol level was .25 percent. While this level of intoxication appeared to incapacitate Plaintiff, Defendants expressed concern about the potentially unpredictable behavior an intoxicated person may demonstrate. The jailer therefore made the decision not to place Plaintiff in the booking area. Given such a concern, this decision was not arbitrary or purposeless.

While the explanations concerning the drunk tank and the booking area appear reasonable, it is difficult to discern a

rational reason why Plaintiff was not placed in the trustees' cell. The reasons given by Defendant are contradictory. On the one hand, Defendants say they did not want to disrupt the trustees' closed-off cell area because at 3:10 a.m., such movement would have disturbed the whole cell block. Defs.' Mot. for Summ. J. at p. 8. On the other hand, Defendants assert that the trustees would be in and out all night performing their duties. As a result of this movement, Defendants say that placement of Plaintiff in this area would have created security problems. Furthermore, there is a dispute in the record over whether there was room for Plaintiff's mattress on the floor of the trustees' cell. Defendants cite the deposition of Sheriff Johnson to argue that there was no room on the floor for Plaintiff's mattress. Defs.' Mot. for Summ. J., at p.9. In contrast, Plaintiff attaches a deposition from Louis Bullock that the middle of the trustee area could have been used to place a mattress on the floor. Pl.'s App., Dep. of Bullock, at 46-47. Alternatively, Bullock says the bunks could have been rearranged to make room in an orderly fashion for placement of the mattress. Id.

Although Plaintiff has claimed he was so intoxicated he did not awake to the burning of his legs, jail officials placed him in an area of the Jail where convicted felons were free to mingle. In discussing the constitutional standard for protection of pretrial detainees, the Fifth Circuit has held:

The confinement of pre-trial detainees indiscriminately with convicted prisoners is unconstitutional unless such a practice is "reasonably related to the institution's interest in maintaining jail security," or physical

facilities do not permit their separation. . . .
Nonetheless, pretrial detainees have a due process right
to be considered individually to the extent space and
security requirements permit.

Jones-v. Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981). There are material facts in dispute concerning space limitations in the trustees' cell and the risk to prison security posed by placement of the Plaintiff in other parts of the Jail. These disputes are relevant to the analysis of whether Plaintiff's confinement was reasonably related to jail security or limitations of the physical facility.² In light of these factual disputes, summary judgment would not be appropriate unless it is determined that the Defendants are immune from suit.

In a §1983 action against government officials, it is also necessary to evaluate the immunity defenses raised by Defendants. This court must assess the qualified immunity both of the officials involved and the entity for which the officials worked--the Rogers County Sheriff's Department. If Defendants can establish that they are immune from suit, the case need not proceed any further. Plaintiff is suing the sheriff in his individual and official

²In the recent case of Farmer v. Brennan, 114 S. Ct. 1970 (1994), the Supreme Court faced a claim brought by a convicted prisoner who had been assaulted by other inmates. The Court adopted a "subjective standard" in determining whether the prisoner's Eighth Amendment rights were violated, asking whether officials *knew of and disregarded* an excessive risk to the inmate's health and safety. Since treatment found unconstitutional under the Eighth Amendment would also violate the punishment prohibition set forth by the Fourteenth Amendment for pretrial detainees, it is instructive that the same factual question would remain if this Court used the Farmer analysis. A central question would remain as to whether Defendants adequately considered incarceration alternatives they knew would have afforded Plaintiff enhanced protection from assault.

capacities, the undersheriff in his individual and official capacities, and two unknown jail employees in their official capacities for the damages that ensued from the fire in the Jail. The identity and number of the deputies/jailers involved in the incarceration of Plaintiff on March 27, 1993 are not yet known or disclosed.

Defendants argue that qualified immunity protects them from liability. The defense of qualified immunity shields public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The officials' state of mind is generally not a factor in determining whether immunity is available. Id. 457 U.S. at 815-187. Summary judgment should be granted if the Defendants can establish as a matter of law that a reasonable official in his position would have believed that his conduct did not violate clearly established law. By the time of the actions at issue in this case, it was clear that Bell v. Wolfish prohibited punishment of pretrial detainees. Moreover, the Tenth Circuit had recognized that inmates have a right to be reasonably protected from threats of assaults from other inmates. Ramos v. Lynn, 639 F.2d 559 (10th Cir. 1980). Lower courts have almost uniformly held that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. See Farmer, 114 S.Ct. at 1976-77, n. 2. See also Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988) (asserting

duty of prison officials to protect prisoners from assault by other prisoners), cert. denied, 488 U.S. 823 (1988); Stokes v. Delcambre, 710 F.2d 1120, 1124 (1983) (holding that since 1979 it has been clear that "all jailers owe a constitutionally rooted duty to their prisoners to provide them reasonable protection from injury at the hands of their fellow prisoners"). Given the fact that Plaintiff had a blood alcohol level of almost .25 percent, jail officials could reasonably have known that their decision to place a pre-trial detainee--practically unconscious due to drunkenness--in the same area as dangerous convicts could amount to a constitutional violation.

An action against public officials in their official capacities is equivalent to a claim against the entity for which the official works. Watson v. City of Kansas City, Kansas, 857 F.2d 690, 695 (10th Cir. 1988) (citing Monnell v. Department of Social Services, 436 U.S. 658, 690 n.55 (1978)). For that reason, this Court must also address the issue of municipal liability. All the officials sued here are employees of the Rogers County Sheriff's Department. Local government entities, in turn, are only subject to § 1983 liability if it shown that actions taken pursuant to official municipal policy violated the constitution. There must be a "direct causal link between a municipal policy or custom and the alleged constitutional violation." City of Canton v. Harris, 489 U.S. 378, 385 (1989). A public entity may not be held liable pursuant to § 1983 simply under a respondeat superior theory.

A clear policy existed at the Jail to incarcerate intoxicated

individuals and place them in separate cells when available. Defs.' Mot. for Summ. J., Ex. F (emphasis added). In essence, the policy in the Jail allowed for non-segregation of intoxicated persons when there was no room available for such segregation. Pl.'s App., Dep. of Hicks, p.6-8. As a result of following this policy, Plaintiff was placed in an area where convicted felons could freely mingle. Such placement allegedly caused the burning incident that led to the instant litigation. Therefore, the decision to place Plaintiff in the south cell block, where he was highly vulnerable to assault, was pursuant to official policy of the sheriff's department and thereby subjects the department to § 1983 liability.

B. Denial of Medical Care

In Frohman v. Wayne, 958 F.2d 1024, 1028 (10th Cir. 1992), the Tenth Circuit clearly held that a pre-trial detainee under the Fourteenth Amendment's due process clause should be afforded the same degree of medical attention afforded convicted criminals under the Eighth Amendment. Thus, Ebel's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test of Estelle v. Gamble, 429 U.S. 97, 104 (1976).

This Court must determine whether Defendants' response to Plaintiff's complaints about the burns he received constituted a violation of the Estelle standard. The analysis under Estelle is two-pronged. The initial question is whether there is evidence of

"serious medical needs." Second, a constitutional violation only occurs once it is determined that there was "deliberate indifference" to such needs. Frohman, 958 F.2d at 1028.

There is little doubt that Ebel's medical needs were serious. He alleges that his burns resulted from paper that had been placed in his pant legs and then ignited. He awoke in excruciating pain and was taken to a doctor's office to receive treatment. In his deposition, Plaintiff states that his socks were burned into his feet. Pl.'s App., Dep. of Ebel, p.35. Subsequent to his release, he received skin grafts as part of a ten-day hospital stay to treat the second and third degree burns he sustained in prison. Id. at 58-59. He was also hospitalized a second time for additional skin grafts. Id. at 60.

Despite the evidence that Plaintiff sustained serious injury, there is not sufficient evidence to establish deliberate indifference to those needs. Although Plaintiff alleges a delay in treatment, he does not know the exact time of the injury. He reported the burns to the jailers when they came in to serve breakfast. Id. at 38. Although the response was not immediate, the Plaintiff was moved shortly thereafter into a different location to await transfer to the office of Dr. Stauffer. Dr. Stauffer bandaged the wounds and placed Silvadene Cream on them. Id. at 48. Upon his return to jail, Plaintiff gave a statement to Undersheriff Hicks about the incident and was then released soon after giving the statement. It is uncontested that Plaintiff was taken to Dr. Stauffer's office by approximately 9:00 a.m, or by 9:20 a.m. at the

latest. Defs.' Mot. for Summ. J., at p.3. Undersheriff Hicks states that he was first made aware of the incident at approximately 8:30 a.m. Pl.'s App., Dep. of Hicks, at p. 47.

At most, the deliberate indifference at issue subsequent to the injury involves either the delay between Plaintiff's report of the incident and receipt of treatment or, alternatively, the decision to take Plaintiff to Dr. Stauffer's office rather than to the hospital for medical care. Delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference which results in substantial harm. Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993); Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993). There was no significant delay between the time Plaintiff reported the incident and the response by personnel at the Jail. Nor is there any evidence that the lapse in time contributed to the harm suffered by Plaintiff. As to the decision to go to Dr. Stauffer, Plaintiff only alleges in the most general terms that there was some *sub rosa* reason why he was taken to the doctor's office rather than to the hospital. However, there is absolutely no evidence to suggest that this decision harmed Plaintiff or constituted negligence, let alone deliberate indifference. In a § 1983 action, the party moving for summary judgment has no burden to prove unsupported claims, and a plaintiff cannot rely on conclusory allegations. Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988). Plaintiff returned to Dr. Stauffer after his release the next day. He went to the hospital upon the doctor's recommendation a few days

later since the pain had not subsided. Under these facts, Plaintiff has no claim based on deliberate indifference to serious medical needs. With regard to medical treatment subsequent to Plaintiff's injuries, summary judgment should be granted. Having found no factual basis to give rise to a civil rights violation regarding actions taken after the burning incident, there is no need to address related immunity issues.

V. Conclusion.

For the foregoing reasons, the Motion to Dismiss is Denied. Furthermore, the Motion for Summary Judgment is granted in part and denied in part. The Motion for Summary Judgment is granted with respect to claims made by Plaintiff that officials at the Jail violated his civil rights in failing to provide adequate medical treatment after Plaintiff was burned. The Motion for Summary Judgment is denied with respect to claims arising out of the decision by officials at the Jail to place Plaintiff in the south cell block and thereby place him at risk of assault.

ORDERED this 7 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ELIZABETH WARREN BLANKENSHIP TRUST A,)
PATRICIA WARREN SWINDLE TRUST A,)
JEAN WARREN YOUNG TRUST A, MARILYN)
WARREN COWART TRUST A, DOROTHY WARREN)
KING TRUST A, WILLIAM K. WARREN, JR.,)
TRUST A, NATALIE O. WARREN LIVING)
TRUST (JOHN GABRINO TRUSTEE) and)
WARREN AMERICAN OIL COMPANY, a)
Texas Corporation,)

Plaintiffs,)

v.)

UNION PACIFIC RESOURCES COMPANY, a)
Delaware Corporation,)

Defendant.)

FILED

DEC 08 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-911K

ORDER

Based upon the Application of the Plaintiff, Warren American Oil Company and the affidavit of the Defendant, the causes of action of separate Plaintiff Warren American Oil Company against Defendant are dismissed due to a lack of diversity between the Plaintiff Warren American Oil Company and the Defendant. This dismissal is not on the merits. All parties are to bear their own costs.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE ~~DEC - 8 1994~~

SUBMITTED BY:

Frank D. Spiegelberg, OBA #8504
Sheila M. Powers, OBA #013757
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ATTORNEYS FOR PLAINTIFFS
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JEAN WARREN YOUNG TRUST A,
MARILYN WARREN COWART TRUST A,
DOROTHY WARREN KING TRUST A,
WILLIAM K. WARREN, JR., TRUST A,
NATALIE O. WARREN LIVING TRUST
(JOHN GABRINO TRUSTEE) and
WARREN AMERICAN OIL COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 8 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

EVELYN MAXINE DYE,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES FIDELITY &)
GUARANTY COMPANY,)
)
Defendant.)

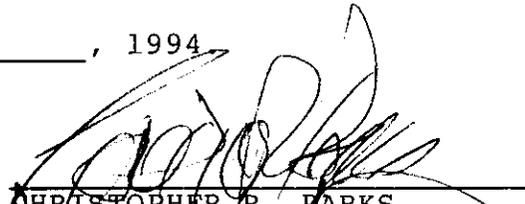
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DATE DEC 08 1994

STIPULATION OF DISMISSAL AS TO
DEFENDANT, U.S. FIDELITY & GUARANTY COMPANY

By reason of settlement between Plaintiff, EVELYN MAXINE DYE, and Defendant, U.S. FIDELITY & GUARANTY COMPANY, said parties do hereby stipulate to dismissal of Plaintiff's action with prejudice as to Defendant, U.S. FIDELITY & GUARANTY COMPANY. Plaintiff otherwise reserves her claims against the additional Defendant, KENTUCKY FRIED CHICKEN, which claim is now the subject of Plaintiff's Notice of Appeal.

Dated this 7 day of Dec, 1994


CHRISTOPHER R. PARKS
Attorney for Plaintiff


JAMES E. POE, OBA #7198
Attorney for Defendant
U.S. Fidelity & Guaranty Co

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 8 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

TERESA RAYNETT HULL,

Plaintiff,

vs.

STATE FARM GENERAL INSURANCE COMPANY,
a corporation, and STATE FARM FIRE
AND CASUALTY COMPANY, a corporation.

Defendants.

Case No. 94-C-885 B ✓

ENTERED ON DOCKET

DATE ~~DEC 0 8 1994~~

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the parties, plaintiff Teresa Raynett Hull and defendants State Farm General Insurance Company and State Farm Fire and Casualty Company, and pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, hereby stipulate to dismiss the above-entitled action and any and all causes of action arising therefrom with prejudice, with each party to bear their own costs and attorney fees.

Respectfully submitted,

FRASIER & FRASIER

by



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Attorneys for Defendants, State Farm
General Insurance Company and State
Farm Fire and Casualty Company

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 8th day of December, 1994, a true and correct copy of the above and foregoing instrument was mailed with postage prepaid thereon, to the following:

James E. Frasier, Esq.
Everett R. Bennett, Jr., Esq.
Frasier & Frasier
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P.O. Box 799
Tulsa, Oklahoma 74101
(918) 584-4724

Kent B. Rainey

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 OLD VILLAGE DRAPERY COMPANY,)
 an Oklahoma corporation;)
 ERLE D. THOMAS aka E. D. Thomas;)
 MARY C. THOMAS;)
 BANK OF OKLAHOMA, N.A.,)
 Successor in Interest to)
 Mercantile Bank,)
 Successor in Interest to)
 Mercantile Bank and Trust Company;)
 T & T WINDOW COVERINGS, INC.)
 dba Old Village Drapery Company;)
 KIRSCH WINDOW TREATMENTS)
 aka Kirsch Company;)
 STATE OF OKLAHOMA ex rel.)
 Oklahoma Tax Commission;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
 FABRICUT, INC.,)
)
 Defendants.)

FILED

DEC - 7 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

RECEIVED
DEC 8 1994
DATE

CIVIL ACTION NO. 94-C-275-B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Small Business Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed with prejudice.

Dated this 7th day of Dec., 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Phil Pinnell".

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PP:css

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

PATRICIA DALE WILSON,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES,)
)
 Defendant.)

DEC - 7 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

93-C-1082-E *FK*

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Patricia Dale Wilson applied for Social Security disability benefits, alleging she could no longer work. The Secretary of Health and Human Services denied that application. Ms. Wilson now appeals that decision to this Court.¹

Two issues are raised in the appeal. First, Ms. Wilson contends that the Administrative Law Judge's ("ALJ") decision fails to provide a sufficient basis for appellate review. Second, Ms. Wilson asserts that substantial evidence does not support the ALJ's decision that she can return to work. For the reasons discussed below, the Magistrate Judge recommends the case be remanded.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir.

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

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1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).² A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

II. Legal Analysis

A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

² One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).

In this case, Ms. Wilson, a 52-year-old woman, alleges an onset date of June 1, 1990 due to problems with her back, arthritis, depression and anxiety. Ms. Wilson has a high school education plus two years of college and she has previously worked as a punch press operator, pipe threader, clerk, waitress, and seamstress.

After reviewing the evidence, which included testimony by Ms. Wilson, a Medical Expert and a Vocational Expert, the ALJ found that Ms. Wilson could not return to her previous work. However, he did conclude that she could return to work as a cashier, parking lot attendant, information clerk and/or mail clerk. *Record at 29.*

Ms. Wilson challenges the ALJ's decision, raising two issues. The first is whether the ALJ's decision provides a sufficient basis for appellate review. Grounds for reversal exist if the Secretary fails to provide the Court with a sufficient basis to determine that appropriate legal principles have been followed.

Upon review, the undersigned finds merit in Ms. Wilson's argument. It is unclear whether the ALJ properly questioned the Vocational Expert and to what extent he followed the "treating physician" rule.

Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). When questioning the Vocational Expert, the ALJ's hypothetical properly included limitations for lifting/carrying, bending/stooping and sitting/standing/walking, but made no mention of Ms. Wilson's "deficit of vision." **This omission took place despite the ALJ's finding that Ms. Wilson could not return to her past job as a seamstress because the vision problems.** *Record at 26.*

Therefore, it appears that the Vocational Expert did not take into account Ms. Wilson's "deficit of vision" when determining what jobs she should could perform. As a result, the hypothetical question did not relate with "precision" Ms. Wilson's impairments.³

It also is unclear as to whether the ALJ properly followed the rule on treating physicians. The rule requires the Secretary and/or the ALJ to give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).

Here, Dr. Benjamin Benner, a treating physician who performed back surgery on Ms. Wilson, wrote a January 23, 1992 letter in which he noted that Ms. Wilson had been unemployable because of her back condition (and July 12, 1991 back surgery) since December of 1991. Dr. Benner also wrote that Ms. Wilson would continue to be unemployable for at least another six months. *Record at 253*.

The ALJ apparently gave little weight (although it is unclear) to Dr. Benner's opinion. Instead, he relied on the opinion of Dr. David R. Hicks, who also treated Ms. Wilson. Dr. Hicks examined Ms. Wilson on April 22, 1992 -- the same day of Dr. Benner's letter -- and found that "she has good relief of her pre-op pain and while she is not symptom free, overall she is doing well." *Id. at 261*. While Dr. Hicks' opinion is more optimistic than Dr. Benner's, the two are not necessarily inconsistent. Dr. Hicks does not specifically dispute Dr. Benner's comments that Wilson can not return to work. In fact, Dr. Hicks makes no finding as to whether Ms. Wilson can work. Consequently, it is unclear

³ It is possible that, as a seamstress, Ms. Wilson would need better vision than in the jobs listed by the vocational expert. However, the record is unclear whether the ALJ even took the vision impairment into account.

as to what (if any) specific and legitimate reasons the ALJ discounted and/or rejected Dr. Benner's opinion.⁴

Furthermore, the undersigned is unsure as to what weight, if any, the ALJ placed on the opinion of Dr. James Allen. Dr. Allen, an M.D. who was hired by the Secretary to do a consultative psychiatric examination of Ms. Wilson, wrote that "because of her physical problems, I do not believe she would be able to work." *Record at 291*. That conclusion, if given sufficient weight, would enhance Ms. Wilson's disability claim. On the other hand, the ALJ may have discounted the statement because Dr. Allen did not perform a physical examination. As the record stands now, it simply is unclear.⁵

In sum, the United States Magistrate Judge recommends the case be **REMANDED** for the reasons discussed above. On remand, the ALJ must hold a supplemental hearing where the Medical and Vocational Experts again testify. The ALJ must then re-examine the evidence and the inquiry of these experts in light of this opinion.

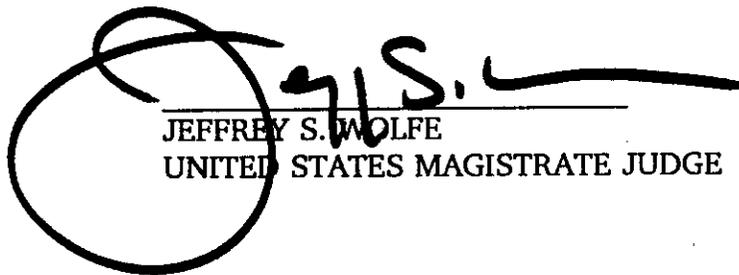
Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁶

⁴ *The issue is not cleared up by the testimony of Dr. Harold Goldman. Dr. Goldman, a medical expert for the Secretary, failed to discuss Dr. Benner's opinion that Ms. Wilson was unable to work. Consequently, the undersigned is unsure whether Dr. Goldman disagreed with such a finding or whether he adequately took Dr. Benner's opinion into consideration.*

⁵ *On page 20, the ALJ mentioned the examination of Dr. Allen. However, he does not address Dr. Allen's statement that Ms. Wilson can no longer work because of physical problems. Dr. Allen examined Ms. Wilson on December 19, 1991.*

⁶ *See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).*

Dated this 7th day of Dec., 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

SC

FILED

DEC - 7 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARMEN BRAY, surviving spouse)
of JOHN BRAY, deceased,)
)
Plaintiff,)
)
vs.)
)
HOMELAND STORES, INC.,)
a corporation,)
)
Defendant.)

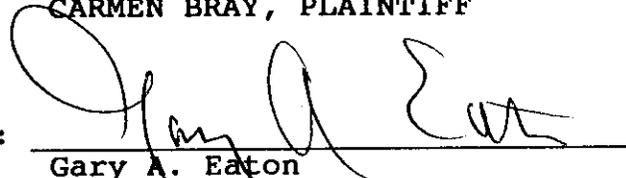
Case No. 93-C-937 E

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties, pursuant to Rule 41 of the Federal Rules of Civil Procedure, through their respective counsel of record, and hereby enter their Stipulation of Dismissal with Prejudice.

CARMEN BRAY, PLAINTIFF

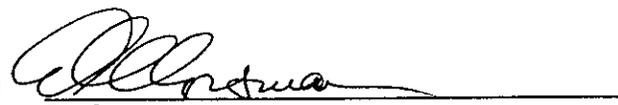
By:



Gary A. Eaton
1717 East 15th
Tulsa, OK 74104

HOMELAND STORES, INC., DEFENDANT

By:



Andrew B. Morsman
7134 S. Yale, Ste. 900
Tulsa, OK 74136

ENTERED ON DOCKET

DATE 12-8-94

habeas claims, exhaust state remedies where necessary, and avoid any Rule 9 problems.¹ See McKlesky v. Zant, 499 U.S. 467 (1991).

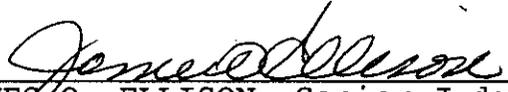
ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's petition for a writ of habeas corpus is **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have;

(2) Petitioner's motion to dismiss without prejudice (doc. #13) is **granted**; and

(3) Petitioner's pro se motions to dismiss and to strike (docs. #7 and #9) are **granted**.

SO ORDERED THIS 7th day of December, 1994.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

¹Rule 9 of the Rules Governing Section 2254 Cases in the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 7 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOEL ALLEN,)	
)	
Petitioner,)	
)	
vs.)	No. 92-C-147-E
)	
RON CHAMPION,)	
)	
Respondent.)	

ORDER

Now before the Court is Petitioner's motion to dismiss his habeas corpus claim based on the issue of appellate delay without prejudice. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and thus mooted the delay issue.

Before the Court are also Petitioner's pro se motions for appointment of counsel, submitted in letter form (docs. #16 and #18). In his motions, Petitioner alleges that he is entitled to the appointment of counsel to litigate in this habeas corpus action the alleged destruction of certain semen samples during the delay in his direct criminal appeal.

After reviewing the record in this case and in particular Petitioner's pro-se motions for the appointment of counsel, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. As to the alleged destruction of certain semen samples, the Court concludes that Petitioner should pursue that claim in a separate action. This procedure will permit Petitioner to have sufficient time to explore fully his potential habeas claims, exhaust state remedies where

ENTERED ON DOCKET

DATE 12-8-94

22

necessary, and avoid any Rule 9 problems.¹ See McKlesky v. Zant, 499 U.S. 467 (1991).

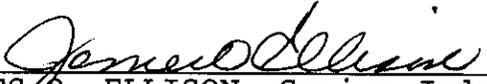
ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's petition for a writ of habeas corpus is **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have;

(2) Petitioner's motion to dismiss without prejudice is **granted**; and

(3) Petitioner's motions for the appointment of counsel (docs. #16 and #18) are **denied without prejudice** at this time.

SO ORDERED THIS 7th day of December, 1994.



JAMES P. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

¹Rule 9 of the Rules Governing Section 2254 Cases in the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 7 - 1994

JENNIFER WILLIAMS,)
)
Plaintiff,)
)
v.)
)
BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF TULSA,)
et al.,)

No. 94-C-96-B

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE DEC - 7 1994

JOURNAL ENTRY OF JUDGMENT
AND SETTLEMENT AGREEMENT

This case comes on for hearing this 6 day of Dec, 1994.
The Plaintiff Jennifer Williams, appearing by Counsel, Melvin C. Hall. Defendants, City of Tulsa and Officer John Doe appearing by their counsel Mark H. Newbold, Assistant City Attorney. The court finds that these parties reached a settlement agreement in the above case and that the above parties have entered and agreed to be bound to the following stipulations:

1. The City and John Doe are not liable for any wrongs incurred or which may be incurred as a result of her arrest that occurred on or about October 1, 1993. Furthermore, the City of Tulsa and Officer John Doe are not liable for any wrongs incurred or which may incur as a result of her incarceration at Tulsa County Jail and the Osage County Jail.

2. The Plaintiff releases in full The City of Tulsa and Officer John Doe from all claims that arose out of or may arise out of her arrest that occurred on or about October 1, 1993. Furthermore, the Plaintiff releases in full the City of Tulsa and Officer John Doe from all past, present, and future claims

concerning her subsequent incarceration in the Tulsa County Jail and the Osage County Jail.

3. The attorneys for the Plaintiff by and through Melvin C. Hall release all claims against the City of Tulsa and Officer John Doe for attorney's fees and all other costs.

4. The City of Tulsa and John Doe without admitting any liability agree to pay Jennifer Williams Two Thousand Dollars (\$2,000)

5.) Plaintiff by her signature below agrees to these stipulations and that these stipulations are a full and final settlement of all past, present, and future claims against the above named defendants.

The Court based upon the above stipulations finds the Plaintiff is entitled to recover Two Thousand Dollars (\$2,000) from the City of Tulsa.

IT IS THEREFORE ORDERED that the Plaintiff recover judgment against the City of Tulsa and Officer John Doe in the amount of Two Thousand Dollars(\$2,000)

s/ MICHAEL BURRAGE

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED TO FORM AND CONTENT

Jennifer Williams
Jennifer Williams, Plaintiff

Melvin C. Hall

Melvin C. Hall
Attorney for Plaintiff

Mark H. Newbold

Mark H. Newbold
Attorney for Defendants
City of Tulsa and Officer
John Doe

ENTERED ON DOCKET
DEC 06 1994

DATE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 06 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Barcelona Partners)
)
 Plaintiff,)
)
 vs.)
)
 Coastal Mart, Inc.)
)
 Defendant.)

No. 94-C-41-K

O R D E R

Now before this Court is Plaintiff's Motion for Voluntary Dismissal Without Prejudice. Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, "an action shall not be dismissed at the plaintiff's request save upon order of the court and upon such terms and conditions as the court deems proper." Plaintiff seeks an Order by this Court allowing it to voluntarily dismiss. This Court, hereby, grants Plaintiff's Motion for Voluntary Dismissal Without Prejudice.

Plaintiff owns Barcelona Apartments, which is located adjacent to Defendant's service station. Plaintiff brought this action on January 14, 1994, seeking damages for trespass, public and private nuisance, negligence, unjust enrichment, decrease in value, lost business opportunity, and clean-up and abatement of the hydrocarbon contamination which allegedly emanated from a leaking underground storage tank system on Defendant's property.

Discovery was scheduled to close after November 14, 1994. Plaintiff filed its motion for voluntary dismissal on November 9, 1994.

Plaintiff requests dismissal in order to address remaining uncertainty concerning the extent of environmental contamination on its property. As discovery progressed, Plaintiff's and Defendant's environmental test results have diverged significantly. Defendant has criticized Plaintiff's expert's testing procedures and protocol although Defendant was present during much of the suspect testing procedures.

According to Plaintiff's expert, the contamination in the soil and water underneath the Barcelona Apartments includes, among other contaminants, benzene, which is a cancer-causing agent. Plaintiff seeks additional time to assess the extent and seriousness of the contamination before going to a jury for final adjudication. Furthermore, Plaintiff states that if it discovers through further investigation that the chemicals did not migrate onto its property, as claimed by Defendant, it will not refile the lawsuit.

It is firmly within the discretion of this Court to permit voluntary dismissal without prejudice in order to allow a plaintiff an opportunity to secure new evidence to prove its present claim. Wright & Miller, Federal Practice and Procedure: Civil § 2364. Such an order of the Court is only reviewable for abuse of discretion. Id. In Cone v. West Virginia Pulp and Paper, 330 U.S. 212, 217 n.5 (1947), the Supreme Court noted that Rule 41(a)(2) allows a plaintiff to dismiss without prejudice if the Court believes that although there may be a technical failure of proof, there is nevertheless a meritorious claim.

At the same time, voluntary dismissal should not be allowed if

the Defendant will suffer legal prejudice. "Accordingly the courts have generally followed the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit." Wright & Miller, Federal Practice and Procedure: Civil § 2364. Defendant has demonstrated no legal prejudice but for the costs associated with participating in the litigation process thus far. However, it is clear from the nature of the case and the course of discovery that much of the expense incurred by Defendant could be utilized by Defendant if Plaintiff decides to renew the litigation. Furthermore, should Plaintiff decide not to refile, the Defendant will not have to incur the costs of an expensive court battle.

The Court's decision to allow voluntary dismissal is not inconsistent with the Court's Order of October 27, 1994. This Court expressed in that Order its belief that the addition of new experts by Plaintiff at that point would have seriously burdened Defendant at a time when the trial date was fast approaching. Voluntary dismissal avoids that risk, since it would give both parties an opportunity to reevaluate the dispute without the immediate deadline of a trial date.

For the foregoing reasons, Plaintiff's Motion for Voluntary Dismissal is granted.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON BOOKS

DATE DEC 6 1994

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RON HACKATHORN;
JOANNA HACKATHORN,
CITY OF BROKEN ARROW, Oklahoma;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-580-B

FILED

DEC - 6 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6th day of Dec., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; and the Defendants, RON HACKATHORN and JOANNA HACKATHORN, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, RON HACKATHORN and JOANNA HACKATHORN, were served with process a copy of Summons and Complaint on July 26, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on June 7, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 13, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 28, 1994.

The Court further finds that on August 19, 1994, RON L. HACKATHORN and JOANNA HACKATHORN, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 94-02408-C. On October 24, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Twenty-six (26), Block Thirteen (13),
VANDEVER WEST, an Addition to the City of
Broken Arrow, Tulsa County, State of
Oklahoma, according to the recorded Plat
thereof.
aka 1826 W. Ithica**

The Court further finds that on July 25, 1986, Charles D. Frank and Brenda L. Frank, executed and delivered to CFS Mortgage Corporation, their mortgage note in the amount of

\$62,200.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles D. Frank and Brenda L. Frank, executed and delivered to CFS Mortgage Corporation, a mortgage dated July 25, 1986, covering the above-described property. Said mortgage was recorded on August 1, 1986, in Book 4959, Page 2255, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 22, 1990, Commercial Federal Mortgage Corporation, formerly CFS Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 15, 1990, in Book 5259, Page 1294, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 19, 1986, Charles D. Frank and Brenda L. Frank, husband and wife, granted a general warranty deed to Ron Hackathorn and Joanna Hackathorn, husband and wife. This deed was recorded with the Tulsa County Clerk on December 22, 1986, in Book 4990, Page 795, and Ron Hackathorn and Joanna Hackathorn, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on June 1, 1990, the Defendants, RON HACKATHORN and JOANNA HACKATHORN, entered into an agreement with the Plaintiff lowering the amount of the monthly

installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, RON HACKATHORN AND JOANNA HACKATHORN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RON HACKATHORN and JOANNA HACKATHORN, are indebted to the Plaintiff in the principal sum of \$89,939.14, plus interest at the rate of Ten percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$45.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$47.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$51.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, RON HACKATHORN and JOANNA HACKATHORN, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, RON HACKATHORN and JOANNA HACKATHORN, in the principal sum of \$89,939.14, plus interest at the rate of Ten percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$143.00 for personal property

taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, RON HACKATHORN and JOANNA HACKATHORN have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, RON HACKATHORN and JOANNA HACKATHORN, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$143.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-580-B

NBK:flv

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 5 - 1994

FORREST TOWRY, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 CASINO CREDIT SERVICES, INC.,)
 a Delaware Corporation, d/b/a)
 CRW FINANCIAL, INC.,)
)
 Defendant.)

FILED
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-CV-438-BU

ENTERED ON DOCKET
DATE 12-6-94

O R D E R

Upon the joint application of plaintiff, Forrest Towry, and defendant Casino Credit Services Inc., d/b/a CRW Financial, Inc., and each of them, to dismiss the Amended Complaint herein and for good cause shown, the court finds that:

1. The plaintiff's Amended Complaint filed herein should be dismissed by stipulation pursuant to the provisions of Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

2. That said dismissal is with prejudice, and further that each party is responsible for its own attorneys fees and costs incurred herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the above styled and captioned cause should be and the same is hereby dismissed with prejudice and that the parties herein are responsible for the payment of their own attorneys fees and costs incurred herein.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

SCW/jch

ENTERED ON DOCKET

DATE _____

FILED

DEC - 5 1994 *[Signature]*

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICIA LESTER,
Plaintiff,

vs.

JIM L. ROBERTS and TERRI ROBERTS,
Defendant

No. 94-C-353-B ✓

ENTERED ON DOCKET

DATE DEC 06 1994

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Patricia Lester, and the Defendants, Jim L. Roberts and Terri Roberts, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein with prejudice for the reason that all matters, causes of action and issues in the case have been settled, compromised and released herein, including post and pre-judgment interest.

PATRICK D. O'CONNOR

Patrick D. O'Connor

Attorney for Plaintiff

STEPHEN C. WILKERSON

Stephen C. Wilkerson

Attorney for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 05 1994
DATE _____

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JOHNNY RAY TEEL; DEBRA JANE)
SMITH; COUNTY TREASURER, Rogers)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Rogers)
County, Oklahoma,)
)
Defendants.)

FILED
DEC -5 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 94-C 870B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5 day of Dec,

1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma**, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, **Johnny Ray Teel and Debra Jane Smith**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Johnny Ray Teel and Debra Jane Smith are both single, unmarried person.

The Court being fully advised and having examined the court file finds that the Defendant, **Johnny Ray Teel**, waived service of Summons on October 12, 1994, which was filed on October 14, 1994; that the Defendant, **Debra Jane Smith**, waived service of Summons on October 12, 1994, which was filed on October 14, 1994; that Defendant, **County Treasurer, Rogers County, Oklahoma**, acknowledged receipt of Summons and

NOTE
BY _____
DEPT. OF _____

Complaint on September 19, 1994; and that Defendant, **Board of County Commissioners, Rogers County, Oklahoma**, acknowledged receipt of Summons and Complaint on September 15, 1994.

It appears that the Defendants, **County Treasurer, Rogers County, Oklahoma**, and **Board of County Commissioners, Rogers County, Oklahoma**, filed their Answer on September 30, 1994; and that the Defendants, **Johnny Ray Teel and Debra Jane Smith**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Three (3), Block Two (2), VILLAGE THIRD ADDITION, a Subdivision in Rogers County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 15, 1987, the Defendants, Johnny Ray Teel and Debra Jane Smith, executed and delivered to Mercury Mortgage Co., Inc., a corporation, their mortgage note in the amount of \$64,563.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Johnny Ray Teel, a single person, and Debra Jane Smith, a single person, executed and delivered to Mercury Mortgage Co., Inc. a mortgage dated May 15, 1987, covering the above-described property. Said mortgage was recorded on May 20, 1987, in Book 760, Page 22, in the records of Rogers County, Oklahoma.

The Court further finds that on July 28, 1988, Mercury Mortgage Co., Inc. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 29, 1988, in Book 789, Page 366, in the records of Rogers County, Oklahoma.

The Court further finds that on September 1, 1988, the Defendants, Johnny Ray Teel and Debra Jane Smith, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1990, July 18, 1990, and July 2, 1991.

The Court further finds that the Defendants, Johnny Ray Teel and Debra Jane Smith, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Johnny Ray Teel and Debra Jane Smith**, are indebted to the Plaintiff in the principal sum of \$111,285.03, plus interest at the rate of 10.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Rogers County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$63.66 which became a lien on the property as of June, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Rogers County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Johnny Ray Teel and Debra Jane Smith**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Johnny Ray Teel and Debra Jane Smith**, in the principal sum of \$111,285.03, plus interest at the rate of 10.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Rogers County, Oklahoma**, have and recover judgment in the amount of \$63.66 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Johnny Ray Teel, Debra Jane Smith, and Board of County Commissioners, Rogers County, Oklahoma,** have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Johnny Ray Teel and Debra Jane Smith,** to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Rogers County, Oklahoma, in the amount of \$63.66, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

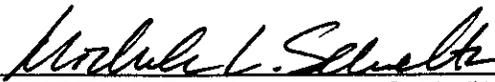
S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


MICHELE L. SCHULTZ, OBA #13771

Assistant District Attorney
219 S. Missouri, Room 1-111
Claremore, OK 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 870B

NBK:lg

ENTERED ON DOCKET

DATE DEC 05 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PENNHURST MEDICAL GROUP, a)
Pennsylvania Corporation,)

Plaintiff,)

vs.)

Case No. 94-C-841-B ✓

OKLAHOMA DEPARTMENT OF HUMAN)
SERVICES, an Oklahoma State)

Agency,)

Defendant.)

FILED

DEC - 5 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Plaintiff Pennhurst Medical Group's unopposed motion to
dismiss its Complaint without prejudice (Docket #9) is hereby
GRANTED. This Order renders moot the motion to dismiss filed by
Defendant Oklahoma Department of Human Services (Docket #5).

IT IS SO ORDERED THIS 5 DAY OF DECEMBER, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE DEC 05 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC -5 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE FIRST NATIONAL BANK OF BOSTON)
AS AGENT FOR ITSELF AND BANK IV)
OF TULSA,)
)
Appellant,)
)
v.)
)
THE SOUTHLAND CORPORATION,)
)
Appellee.)

94-C-0587-B

ORDER

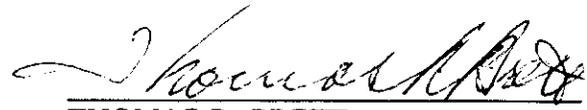
On August 31, 1994, Appellant First National Bank of Boston filed a Motion to Dismiss Appeal (docket #2).¹ First National Bank earlier had appealed a decision by the United States Bankruptcy Court in the Northern District of Oklahoma. That appeal was filed on June 7, 1994 (docket #1).

First national Bank requests the appeal be dismissed because it has executed a Compromise and Settlement with Appellee Southland Corporation. According to First National Bank, the settlement resolves the issues which were being contested in its appeal. *Motion to Dismiss Appeal, page 2.* No objection or response has been filed by Southland. Therefore, since the parties have settled their dispute, the Motion to Dismiss Appeal is **GRANTED.**

¹"Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion or order or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

5

SO ORDERED THIS 5 day of Dec., 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

DEC 2 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RODNEY D. MITCHELL)
SANDRA WILLIAMS MITCHELL)
)
Petitioner,)
)
v.)
)
STEVE LEWIS, U.S. Attorney for)
the Northern District of)
Oklahoma, et al.)
)
Respondents.)

Case No. 94-C-588-E

ORDER DISMISSING WITH PREJUDICE

On this 10th day of November, 1994, Petitioners' oral motion to dismiss the above-captioned matter with prejudice comes on before me, the undersigned Judge of the United States District Court, and I hereby order the same.

IT IS SO ORDERED on the _____ day of _____, 1994.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT COURT JUDGE

Robert L. Briggs, OBA #10215
David D. Smith, OBA #8429
BRIGGS AND SMITH
Oil Capital Building
507 S. Main, Suite 605
Tulsa, OK 74103
(918) 599-7780
ATTORNEYS FOR PETITIONERS

ENTERED ON DOCKET
DATE 12-5-94

FILED

DEC 2 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SANDRA WILLIAMS MITCHELL)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA, et al.)
)
 Defendant.)

Case No. 94-C-528-E

ORDER DISMISSING WITH PREJUDICE AND
DENYING CASE & ASSOCIATES PROPERTIES, INC.'s MOTION FOR SANCTIONS

On this 10th day of November, 1994, Petitioners' oral motion to dismiss the above-captioned matter with prejudice comes on before me, the undersigned Judge of the United States District Court, hereby orders the same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Case & Associates Properties, Inc.'s oral motion for sanctions against Petitioner is hereby denied.

IT IS SO ORDERED on the 2nd day of December, 1994.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT COURT JUDGE

Robert L. Briggs, OBA #10215
David D. Smith, OBA #8429
BRIGGS AND SMITH
Oil Capital Building
507 S. Main, Suite 605
Tulsa, OK 74103
(918) 599-7780
ATTORNEYS FOR PLAINTIFF

ENTERED ON DOCKET
DATE 12-5-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 2 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RODNEY KEITH DICK,)
)
 Petitioner,)
)
 vs.)
)
 R. MICHAEL CODY,)
)
 Respondents.)

No. 94-C-756-B

ENTERED ON DOCKET
DATE DEC 02 1994

ORDER

Respondent has moved to dismiss Petitioner's petition for a writ of habeas corpus for failure to exhaust state court remedies. He asserts that Petitioner has not exhausted his state court remedies because his direct criminal appeal is presently pending before the Oklahoma Court of Criminal Appeals. Petitioner does not dispute that his direct appeal is presently pending, but argues that unless this Court intervenes to stay the direct criminal appeal Petitioner will be denied his Sixth Amendment right to counsel. Petitioner also challenges the state court's denial of his right to a bond pending appeal.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, a petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford,

24

339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the Petitioner has not exhausted his state remedies with regard to his Sixth Amendment right to counsel as he has a pending direct criminal appeal. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (even if the claim petitioner raises in federal court has been fairly presented once to the highest state court, petitioner has not exhausted his state remedies if he has a pending direct appeal in state court); Parkhurst v. State of Wyoming, 641 F.2d 775, 776 (10th Cir. 1981) (court properly denied habeas corpus relief for failure to exhaust state remedies because direct criminal appeal was pending). While the Court understands Petitioner's frustration with his appellate counsel and his alleged refusal to file Petitioner's pro-se brief on direct appeal (which raised newly discovered evidence) this Court cannot review the alleged Sixth Amendment violations of his trial and appellate counsel until Petitioner has "fairly presented" those specific claims to the Oklahoma Court of Criminal Appeals. As petitioner is well aware, ineffective assistance of counsel claims are often not reviewable until the filing of a post-conviction proceeding because they require additional fact finding. See Kimmelman v. Morrison, 477 U.S. 365, 378 (1986); Osborne v. Shillinger, 861 F.2d 612, 623

(10th Cir. 1988).

The Court also notes that Petitioner has not pled any facts demonstrating any delay in the processing of his state appeal which may justify this Court's intervention in a pending state appeal. See Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994). Therefore, the Court concludes that Petitioner's ineffective assistance of counsel claims should be dismissed for failure to exhaust state remedies.

While Petitioner has exhausted his state remedies as to the denial of his motion for a bond pending appeal,¹ the Court concludes that Petitioner is not entitled to habeas corpus relief on that ground. "A state prisoner has no absolute federal constitutional right to bail pending appeal," Hamilton v. State of New Mexico, 479 F.2d 343, 344 (10th Cir. 1973) "[a]nd generally denial of bail is not an available ground for seeking Federal habeas corpus relief." McInnes v. Anderson, 366 F.Supp. 983, 987 (E.D. Okla. 1973). "Where, however, bail is authorized by the state statute [as in the State of Oklahoma] . . . , the arbitrary denial of bail violates due process under the Fourteenth Amendment, and allegations of such arbitrary denial are grounds for review by federal courts." United States ex rel. Rainwater v. Morris, 411 F.Supp. 1252, 1255 (N.D. Ill. 1976).

In the instant petition and motion for bond, Petitioner contends that the trial court abused its discretion in denying his

¹June 23, 1994 order denying application for a writ of habeas corpus by the Oklahoma Court of Criminal Appeals, ex. 14 attached to Petitioner's writ of habeas corpus.

request for an appeal bond and that Okla. Stat. Ann. tit. 22, § 1077 (11) (West Supp. 1994), denying bail on appeal after conviction of "[a]ny other felony after former conviction of a felony," is unconstitutional in that it permits a court to rely on prior felonies which are over ten years old.

Because the denial of bail in Petitioner's case did not rest within the discretion of the trial court, this Court need not review Petitioner's first claim that the trial court abused its discretion in denying Petitioner's request for an appeal bond. Okla. Stat. tit. 22, § 1077 provides that the refusal to grant bail rests within the discretion of the trial court only when the conviction does not fall within any of the eleven enumerated offenses, section 1077(1) through (11).² In Petitioner's case the

²Okla. Stat. tit. 22, § 1077 reads in part as follows:

Bail on appeal shall be allowed on appeal from a judgment of conviction of misdemeanor, or in felony cases where the punishment is a fine only, and when made and approved shall stay the execution of such judgment. Bail on appeal after the effective date of this act shall not be allowed after conviction of any of the following offenses:

1. Murder in any degree;
2. Kidnapping for purpose of extortion;
3. Robbery with a dangerous weapon;
4. Rape in any degree;
5. Arson in the first degree;
6. Shooting with intent to kill;
7. Manslaughter in the first degree;
8. Forcible sodomy;
9. Any felony conviction for which the evidence shows that the defendant used or was in possession of a firearm or other dangerous or deadly weapon during the commission of the offense;
10. Trafficking in illegal drugs; or
11. Any other felony after former conviction of a felony.

trial court denied bail under section 1077(11) because Petitioner had four prior felony convictions. The Court of Criminal Appeals affirmed the denial on the same grounds. See Ex. 14 attached to Petitioner's petition for a writ of habeas corpus, doc. #1. Accordingly, Petitioner is not entitled to habeas relief on his first ground.

With regard to Petitioner's contention that section 1077(11) is unconstitutional in that it relies on prior convictions which are more than ten years old, the Court concludes that question is not cognizable in this habeas corpus action because it raises only an alleged error in the interpretation or application of state law. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986); Davis v. Reynolds, 890 F.2d 1105, 1109 (10th Cir. 1989). At any rate, the Court notes that the Oklahoma Court of Criminal Appeals has previously held that section 1077(11) only requires the State to establish that a prior conviction was incurred by the convicted person. In re Brewer, 779 P.2d 137, 138 (Okla. Crim. App. 1985). Therefore, Petitioner is not entitled to habeas corpus relief on this second ground.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Respondents' motion to dismiss (doc. #16) is **granted** as to Petitioner's Sixth Amendment claim (third ground for relief) and that claim is hereby **dismissed without**

The granting or refusal of bail after judgment of conviction in all other felony cases shall rest in the discretion of the court, however, if bail is allowed, the trial court shall state the reason therefor.

prejudice to it being reasserted when the Petitioner has exhausted all his state remedies;

(3) Petitioner is **not entitled to habeas corpus relief** on the basis that he was denied a bond pending appeal (first and second grounds for relief);

(4) Petitioner's motions to stay proceedings and for an appeal bond (docs. #23 and #24) are **denied**.

SO ORDERED THIS 2nd day of Dec., 1994.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 2 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

KENNETH WILLIAMS,)
)
 Petitioner,)
)
 vs.)
)
 MICHAEL CODY, et al.,)
)
 Respondents)

No. 93-C-892-B

ENTERED ON DOCKET
DEC 02 1994

DATE _____

ORDER

Petitioner's pro-se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for a decision. Respondent has filed a Rule 5 response and Petitioner has filed a reply. Respondent has also supplemented the record as ordered by the Court in its August 25, 1994 order. As set out more fully below, the Court concludes that Petitioner's application for a writ of habeas corpus should be dismissed as procedurally barred.

I. BACKGROUND

In this proceeding, Petitioner challenges his April 13, 1988 conviction by jury for First Degree Manslaughter, in Tulsa County District Court, Case No. CRF-87-3962. Although the Court advised Petitioner of his right to file a direct appeal, Petitioner did not timely appeal his conviction. In August 1989, however, he filed an application for post-conviction relief claiming that his counsel was ineffective for failing to file a direct criminal appeal and for failing to defend him at trial. (Petition attached to Doc. #13.) The District Court denied relief, finding that Petitioner failed to retain another counsel or to request the court to appoint

counsel once he found out that his counsel did not intend to file an appeal. (Doc. #5 ex. A.) Petitioner timely appealed the denial to the Oklahoma Court of Criminal Appeals, but did not comply with Administrative Directive #ADC 89-21, and the record was returned to him by the Tulsa County District Court with a notice of non-compliance. (Docs. #12 and 13 and attachments; Doc. #5 ex. B at 2.)

Thereafter petitioner filed a second application for post-conviction relief, alleging the same issue raised in his original application. The District Court denied relief (doc. #5 ex. B) and the Court of Criminal Appeals affirmed as follows:

The district court noted that in petitioner's first application for relief he claimed he had been denied an appeal through no fault of his own because his attorney disregarded his request for a direct appeal. Petitioner raised this issue again in his second application for an appeal out of time. Thus, the district court denied petitioner's second application finding the issue had been waived for failure to lodge a timely appeal from the order denying relief in his first application. We agree with the district court that this issue is barred from further review. See Maines v. State, 597 P.2d 774 (Okla. Crim. App. 1979); 22 O.S. 1991, § 1086. Accordingly, the order of the district court is hereby AFFIRMED.

(Doc. #5 ex. C.)

In the present application for a writ of habeas corpus, Petitioner again alleges that he was denied the effective assistance of counsel when his retained counsel failed to file a timely notice of appeal although he was advised by Petitioner and his mother that Petitioner wanted to appeal his conviction. Petitioner also alleges that he was denied his right to a direct criminal appeal under Oklahoma Stat. tit. 22, § 1051. (Doc. #1.]

Respondent objects to Petitioner's application on the ground that Petitioner has procedurally defaulted his claims; the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and Petitioner failed to show cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. Respondent argues that Petitioner surrendered his right to reassert the claim raised in the present petition when he failed to appeal the denial of his first application for post-conviction relief. (Doc. #5.)

Petitioner replies that his retained counsel's failure to file a timely appeal provides sufficient cause to excuse his first default--i.e., the failure to file a direct criminal appeal. As to his second default, Petitioner contends that he lost the ability to appeal the first denial of his post-conviction relief through no fault of his own. He states, for the first time in his reply, that he never received a notice that the record had been returned to the lower court due to an administrative error, and more importantly, that the inmate who was helping him on the appeal was transferred to another institution in the middle of the appeal process and Petitioner was forbidden to communicate with him. (Doc. #8 at 5.) Attached to his reply are affidavits from a correctional officer, a cell mate, and an inmate who is presently helping the Petitioner with the instant petition. The affidavits reveal that Petitioner is a little "slow" and would not be able to prosecute this action if it were not for the help of jail house lawyers.

On August 25, 1994, the Court ordered Respondent to address

Petitioner's contention in his reply that he did not receive notice that his appeal from the denial of his first application for post-conviction relief did not comply with Administrative Directive #ADC-89-21. The Court also ordered Respondent to submit a copy of Petitioner's second application for post-conviction relief in Case No. CRF-87-3962, and petition in error and appeal brief in Case No. PC-93-545.

Although Respondent has timely briefed and supplemented the record as set out in the Court's order, Petitioner has failed to respond. On October 31, 1994, in response to Petitioner's motion for judicial assistance, the Court ordered Respondent to mail Petitioner a second copy of Respondent's "Notice of Compliance" filed on September 30, 1994, and granted Petitioner an additional twenty days to file a final reply. As of the day of this order the Court has not received a reply or any other correspondence from the Plaintiff. Accordingly, the Court will proceed to the merits of this case.

II. ANALYSIS

As a preliminary matter, the Court must determine whether the Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review

of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992). Additionally, the Court notes that the Attorney General is not a proper party in this case because Petitioner is presently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases in the District Court.

The Court turns next to Respondent's argument that Petitioner is procedurally barred from asserting his claims in the present petition. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se

prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner does not dispute that he defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule when he failed to appeal properly the denial of his first application for post-conviction relief. See Okla. Stat. Ann. tit. 22, § 1087 (West 1986); Farrell v. Lane, 939 F.2d 409 (7th Cir. 1991) (petitioner defaulted claim of ineffective assistance of counsel for purposes of habeas review, even though he had raised that issue in post-conviction petition, where he had failed to appeal denial of post-conviction petition). He argues, however, that ineffective assistance of counsel in filing a direct criminal appeal and ineffective assistance by an inmate law clerk in pursuing his first application for post conviction relief are

sufficient causes to excuse his procedural default. He also argues that he did not receive notice that his record had been returned to the district court for failure to comply with an administrative rule.

Even if Petitioner could show sufficient cause under the Coleman test for purposes of his direct appeal, the present petition for a writ of habeas corpus must be denied because Petitioner's showing of cause and prejudice concerning his failure to appeal the denial of his first application for post-conviction relief is inadequate. The Court notes that Petitioner has no federal constitutional right to effective assistance of counsel at the post conviction level. See Coleman, 501 U.S. 722, 111 S.Ct. 2546, 2568 (1991) (no constitutional right to counsel in a state post-conviction proceeding); see also Carter v. Montgomery, 769 F.2d 1537, 1543 (11th Cir. 1985); Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990). Therefore, any failure on the part of the inmate who was assisting Petitioner with his first state post-conviction petition does not serve as cause to explain petitioner's default. See Whiddon v. Dugger, 894 F.2d 1266, 1267 (11th Cir. 1990) (because there is no right to legal counsel in collateral proceedings, poor advice about such proceedings from a state provided attorney or inmate law clerk affords no basis for "cause").

Similarly, Petitioner's unsupported claim that he did not receive notice that his record did not comply with Administrative Directive #ADC-89-21 (raised for the first time in his reply) is

insufficient to show cause to excuse his procedural default. The appearance docket, attached to Respondent's September 30, 1994 notice of compliance, reveals that on July 24, 1991, the Clerk of the Tulsa County District Court sent Petitioner a notice that his "designation of record/notice of intent to appeal" did not comply with Administrative Directive #ADC-89-21.

Because Petitioner has not made the requisite showing of cause for his procedural default, the Court need not reach the prejudice prong of the cause-and-prejudice exception.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence. Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence, but contests only his retained counsel's failure to file a direct appeal. While Petitioner contends in his reply that he has always claimed his innocence, the Petitioner does not allege any grounds for the Court to review.

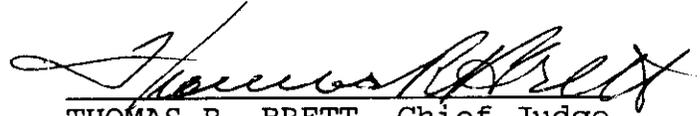
III. CONCLUSION

Therefore, the Court concludes that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his failure to appeal properly the denial of his first application for post-conviction relief. **ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The Attorney General for the State of Oklahoma is **dismissed** as a party in this case; and

(2) This petition for a writ of habeas corpus is **denied** as procedurally barred.

SO ORDERED THIS 2nd day of Dec., 1994.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

With regard to successive claims, the Petitioner bears the burden of showing that "'although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.'" Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert. denied, 112 S.Ct. 1310 (1992). In McClesky v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

After carefully reviewing the record in this case, the Court concludes that the present petition for habeas corpus relief fails to allege new or different grounds for relief and that the prior determination by this Court was on the merits. The fact that Petitioner disagrees with the prior disposition of his claims does not support a finding that the prior decision was not on the merits. Similarly the fact that an evidentiary hearing was not conducted in the prior habeas proceeding does not provide sufficient basis to undermine the finding that the prior decision was not on the merits. See Larson v. United States, 905 F.2d 218, 221 (8th Cir. 1990) (denial of prior habeas petition is on the merits even though the court did not hold an evidentiary hearing).

Having determined that Petitioner's petition is successive,

the Court must examine whether a fundamental miscarriage of justice would result unless the Court reconsiders his claims on the merits. See Parks, 958 F.2d at 994. The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In Herrera v. Collins, 113 S.Ct. 853 (1993), the Court stated "that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." See also McClesky v. Zant, 499 U.S. 467, 495 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks v. Reynolds, 958 F.2d at 995.

In the instant case, Petitioner has made no colorable showing of actual innocence which would justify reaching the merits of the successive claims raised in the present petition. Therefore, the Court finds that Petitioner's application for a writ of habeas corpus should be dismissed as a successive petition under Rule 9(b).

The Court also finds that the Attorney General is not a proper party in this case because the Petitioner is presently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) The Attorney General is **dismissed** as a party in this case;
- (2) Respondent's motion to dismiss (doc. #6) is **granted**; and
- (3) Petitioner's application for a writ of habeas corpus is **dismissed** as a successive petition.

SO ORDERED THIS 7th day of Dec, 1994.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 2 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOHN D. HUDAK,)
)
 Petitioner,)
)
 vs.)
)
 BOBBY BOONE,)
)
 Respondent.)

No. 93-C-1044-B ✓

ENTERED ON DOCKET

DATE DEC 02 1994

ORDER

Petitioner's pro-se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for a decision. Respondent has filed a Rule 5 response and Petitioner has filed a reply. As set out more fully below, the Court concludes that Petitioner's first two grounds for relief should be denied as procedurally barred and that the Respondent should address the merits of Petitioner's ineffective-assistance-of-counsel claims in a supplemental Rule 5 response.

I. BACKGROUND

In this proceeding, Petitioner challenges his June 1, 1992 guilty plea conviction for robbery with a dangerous weapon in Tulsa County District Court, Case No. CF-92-306. Sentencing was passed to obtain a pre-sentence investigation report and on July 10, 1992, Petitioner received a fifteen-year sentence, with ten years to be served and five years suspended. Although the district court advised the Petitioner of his right to a direct appeal and of the procedures for completing the same, the Petitioner failed to appeal

6

his guilty plea within the applicable time periods.

In 1993, Petitioner filed an application for post-conviction relief and request for an appeal out of time in the District Court of Tulsa County. He alleged that he was subjected to an illegal search and seizure; he was stopped without probable cause; and counsel provided ineffective assistance. The District Court denied relief, finding that counsel provided effective assistance; by entering his guilty plea, Petitioner waived any procedural errors which may have occurred with regard to the obtaining of evidence without probable cause; and Petitioner's failure to file a timely direct appeal waived any of his remaining issues. The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief because Petitioner had not established that his failure to file an appeal was through no fault of his own.

In the present application for a writ of habeas corpus, Petitioner attempts to raise the same issues which he raised in his post-conviction application by incorporating his petition on appeal from the denial of post-conviction relief. In that petition (labeled as exhibit "A"), Petitioner alleged that he was subjected to an illegal search and seizure; that he was stopped without probable cause; and that counsel provided ineffective assistance. In support of his ineffective assistance claim, Petitioner alleged (1) that counsel refused to investigate two prior incidents of tire slashing which the prosecutor allegedly relied on to request a fifteen-year sentence; (2) that counsel never requested a plea bargain; and (3) that counsel did not fully advise Petitioner about

his option of going to trial, and always stressed the option of pleading guilty. (Petition appealing the denial of post-conviction relief at 3-7, ex. A attached to doc. #1.)

Respondent has objected to Petitioner's application on the ground that the Petitioner has procedurally defaulted his claims; the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and Petitioner failed to show cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. [Docket #4.] Petitioner replies that he did not default his ineffective assistance of counsel claim because the state court addressed that claim on the merits. Although Petitioner agrees that he defaulted his first and second claim, he argues that ineffective assistance of counsel is sufficient cause to excuse his failure to file a direct appeal. Petitioner states as follows:

Petitioner and his parents asked of the[ir] retained lawyer that an appeal be filed, and he refused stating grounds of his personal findings--were not based upon a professional level. Petitioner was not in a position, nor did he have the knowledge at that time to enact such proceedings himself. He took the decision of a lawyers [,]which he and his parents paid, as to not file an appeal. Petitioner only accepts fault for listening to the person that was hired to look out for his best interest (his lawyer).

[Doc. #5.] In his petition, Petitioner also stated that he did not appeal his guilty plea because his retained counsel told him "that it would be a waste of time and money and that he would advise against." He also alleged that filing an appeal "was beyond my control, my lawyers took hard earned money from me and my parents and gave us bad advice and bad service altogether throughout the

duration of the case." (Doc. #1.)

II. ANALYSIS

As a preliminary matter, the Court must determine whether the Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), and that the Attorney General is not a proper party in this case because Petitioner is presently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases.

The Court turns next to Respondent's argument that Petitioner is procedurally barred from asserting his claims in the present petition. The doctrine of procedural default prohibits a federal

court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

The Court will address first whether Petitioner is procedurally barred from raising his claims that he was subject to an illegal search and seizure and that officers lacked probable

stop, and second whether he is procedurally barred from raising in this petition his claim that his counsel provided ineffective assistance.

A. Search and Seizure and Lack of Probable Cause

Petitioner does not dispute that the decision of the Oklahoma Court of Criminal Appeals with regard to his first and second grounds rested on a state procedural default. He argues, however, that ineffective assistance of counsel--in advising him not to file an appeal--is sufficient cause to excuse his procedural default. In his petition, he alleges that his counsel erroneously advised Petitioner and his family against filing a direct appeal, and that they followed that advice.

To prove ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal habeas court need not consider whether a petitioner established the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to

properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992).

After carefully reviewing the record in this case, the Court concludes that even if counsel had filed a motion to withdraw a guilty plea and then sought a direct appeal, Petitioner would not have had a reasonable probability of obtaining relief. Petitioner waived his claims relating to the alleged unconstitutional search and seizure and the lack of probable cause to stop when he entered his plea of guilty. United States v. LaFoon, 978 F.2d 1183, 1184 (10th Cir. 1992); United States v. Davis, 900 F.2d 1524, 1525-26 (10th Cir.), cert. denied, 498 U.S. 856 (1990); Ledgerwood v. State, 455 P.2d 745 (Okla. Crim. App. 1969). The Tenth Circuit Court of Appeals has specifically stated that a collateral attack on a conviction resulting from a guilty plea is confined to whether the underlying plea was both counseled and voluntary, and therefore a guilty plea bars subsequent challenges based on non-jurisdiction, pre-plea errors. Osborn v. Shillinger, 997 F.2d 1324 (10th Cir. 1993). Accordingly, the Court must conclude that Petitioner is procedurally barred from raising his first and second grounds for relief in this petition for a writ of habeas corpus.

B. Ineffective Assistance of Counsel

Respondent have raised the defense of procedural default as to Petitioner's claim that his counsel provided ineffective

assistance. Respondent argues that because Petitioner failed to file a direct appeal, he is procedurally barred from raising his ineffectiveness claim in this petition unless he shows cause and prejudice, or a fundamental miscarriage of justice. The Court disagrees.

The Fourteenth Amendment requires a state "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)). In some circumstances, a criminal defendant cannot fairly be expected to raise an ineffective assistance claim on direct appeal. See Kimmelman v. Morrison, 477 U.S. 365, 378 (1986). "Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." Id. The Court explained that "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." Id. (citation omitted).

In Osborne v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988), the Tenth Circuit Court of Appeals recognized yet another hurdle in raising ineffective assistance claims on direct appeal. The Court

noted that "[i]neffectiveness claims are ordinarily inappropriate to raise on direct appeal because they require additional fact finding." Id.

In the present case, Petitioner's ineffective-assistance-of-counsel claims are predicated on the failures of the same counsel who, he claims, convinced him that he should plead guilty and that he had no grounds to raise on direct appeal. Petitioner cannot be expected to have raised these claims on direct appeal. Therefore, even if the Oklahoma Court of Criminal Appeals intended to bar collateral review of Petitioner's ineffective-assistance-of-counsel claims that bar would be inadequate to preclude federal habeas review of Petitioner's ineffective-assistance-of-counsel claims. Accordingly, Respondent shall address the merits of Petitioner's claim of ineffective assistance of counsel in a subsequent Rule 5 response.

III. CONCLUSION

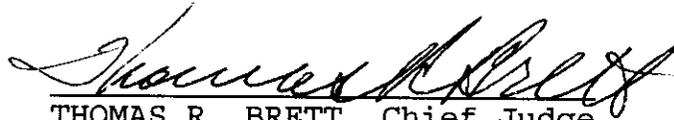
After reviewing the record in this case, the Court concludes that Petitioner is procedurally barred from raising his claims with regard to the alleged illegal search and seizure and failure to suppress, but that he is not barred from raising his ineffective-assistance-of-counsel claims. **ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The Attorney General for the State of Oklahoma is **dismissed** as a party in this case;
- (2) Petitioner's claims with regard to the illegal search and

seizure and failure to suppress are denied as procedurally barred;

- (3) Respondent shall file a supplemental Rule 5 response addressing the merits of Petitioner's ineffective assistance of counsel claims on or before thirty (30) days from the date of filing of this order; and
- (4) Petitioner shall have twenty (20) days thereafter to submit a supplemental reply.

SO ORDERED THIS 2nd day of Dec., 1994.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 02 1994
DATE

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

CHARLES M. TORRES; DIXIE L.)

TORRES; COUNTY TREASURER, Tulsa)

County, Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)

Tulsa County, Oklahoma,)

Defendants.)

FILED

DEC - 2 1994

**Richard M. Lawrence, Clerk
U.S. DISTRICT COURT**

CIVIL ACTION NO. 94-C 548B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2 day of Dec., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **Charles M. Torres and Dixie L. Torres**, appear Pro Se, and an Order Granting Partial Summary Judgment against them has been entered by the court.

The Court being fully advised and having examined the court file finds that the Defendants, **Charles M. Torres and Dixie L. Torres**, each waived service of Summons on June 8, 1994.

The Court being fully advised and having examined the court file finds that the Defendants, **Charles M. Torres and Dixie L. Torres**, are husband and wife.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on July 14, 1994; and that the Defendants, **Charles M. Torres and Dixie L. Torres**, filed their Answer on July 25, 1994.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Five (5), Block Six (6), WOODLAND GLEN FOURTH,
an Addition to the City of Tulsa, Tulsa County, State of
Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on July 30, 1986, the Defendants, Charles M. Torres and Dixie L. Torres, executed and delivered to FIRST SECURITY MORTGAGE COMPANY their mortgage note in the amount of \$78,701.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Charles M. Torres and Dixie L. Torres, executed and delivered to First Security Mortgage Company a mortgage dated July 30, 1986, covering the above-described property. Said mortgage was recorded on August 13, 1986, in Book 4962, Page 2217, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 6, 1986, FIRST SECURITY MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to ASSOCIATES NATIONAL MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on September 3, 1986, in Book 4967, Page 267, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 30, 1989, ASSOCIATES NATIONAL MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON,

D.C., HIS/HER SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on February 7, 1989, in Book 5165, Page 1490, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1990, the Defendants, Charles M. Torres Dixie L. Torres, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on April 1, 1991 and February 1, 1992.

The Court further finds that the Defendants, Charles M. Torres and Dixie L. Torres, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Charles M. Torres and Dixie L. Torres**, are indebted to the Plaintiff in the principal sum of \$122,039.50, plus interest at the rate of 10.5 percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that on October 26, 1994, the Plaintiff, United States of America, filed its Motion for Partial Summary Judgment against the Defendants, Charles M. Torres and Dixie L. Torres. On November 21, 1994, the Honorable Thomas R. Brett granted Plaintiff's Motion for Partial Summary Judgment.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Charles M. Torres and Dixie L. Torres**, have no right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Charles M. Torres and Dixie L. Torres**, in the principal sum of \$122,039.50, plus interest at the rate of 10.5 percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 6.47 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Charles M. Torres, Dixie L. Torres, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Charles M. Torres and Dixie L. Torres**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK

Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 94-C 548B

NBK:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHARON WILSON,

Plaintiff,

vs.

HILLCREST MEDICAL CENTER
and UTICA PARK CLINIC, INC.,

Defendants.

ENTERED ON DOCKET

DATE DEC 02 1994

Case No: 94-C-147-B

FILED

DEC - 2 1994

**Richard M. Lawrence, Clerk
U.S. DISTRICT COURT**

ORDER OF DISMISSAL

Pursuant to the stipulation of the parties, the plaintiff's claim against Hillcrest Medical Center a/k/a Hillcrest Hospital, is hereby dismissed without prejudice.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT COURT JUDGE

residual functional capacity. 20 C.F.R. §416.920(f).
Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d

359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

Here, the ALJ proceeded to step five, and concluded claimant could perform a significant number of jobs existing in the national economy at his current residual functional capacity. (R.O.A. 28). Specifically, the ALJ concluded claimant was unable to perform his past relevant work as a shop worker in an auto shop or as a garage manager, but claimant had the residual functional capacity to perform sedentary work and was therefore not disabled. (R.O.A. 27-29). The ALJ rendered his decision on August 27, 1992. The Appeals Council denied claimant's request for review on March 19, 1993. Plaintiff filed the present action on April 2, 1993.

Sedentary work is that which "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. §§404.1567(a), 416.967(a). Plaintiff contends the ALJ did not properly consider the opinion of plaintiff's treating physician, Dr. Curtis M. Coggins, dated September 20, 1991 (R.O.A. 130). In that brief letter, Dr. Coggins states his recommendation that, because of a back injury and persistent low back pain, claimant "not do any work which requires prolonged sitting or standing, any lifting, bending, stooping, or straining at all."

Substantial weight must be given evidence provided by treating

physicians, unless good cause is shown to the contrary. Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir.1988). However, a treating physician's report may be rejected if it is brief, conclusory and unsupported by medical evidence. Id. "If the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for this action must be set forth." Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir.1984). The ALJ in this case carefully and fully stated his reasons for not giving great weight to Dr. Coggins' opinion. He noted the opinion was brief and conclusory, (R.O.A. 20), which it was. The ALJ further found Dr. Coggins' conclusion of disability was inconsistent with his progress notes on this patient, and lacked supportive objective findings. Id. Finally, the ALJ found Dr. Coggins' conclusion inconsistent with the other physicians who examined claimant, Drs. Fielding, Hallford and Zumwalt. (R.O.A. 21-24). For example, Dr. Fielding reported in September, 1990, that plaintiff had a relatively normal gait and did not walk with a cane. Plaintiff could walk on his heels and toes without evidence of lower extremity weakness. Dr. Fielding concluded plaintiff had a normal neurological examination and further stated he saw no evidence for significant spinal injury. (R.O.A. 203-04). Dr. Zumwalt concluded plaintiff "would seem to be able to do any type of sedentary work. . . ." and referenced no limitation on plaintiff's ability to sit. (R.O.A. 213). Upon review, the Court agrees with the ALJ's discounting of the treating physician's opinion.

It is also clear from the record the ALJ considered and

evaluated claimant's allegations of pain. See Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir.1988) (claimant entitled to consideration of nonmedical objective and subjective testimony of pain). The Code of Federal Regulations states "we will not reject your statements about the intensity and persistence of your pain. . . solely because the available objective medical evidence does not substantiate your statements." 20 C.F.R. §404.1529(c)(2). However, a claimant's statement about pain will not alone establish disability. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir.1992). "By statute, objective medical evidence must establish an impairment that reasonably could be expected to produce the alleged pain, and statements regarding the intensity and persistence of the pain must be consistent with medical findings and signs." Gossett v. Bowen, 862 F.2d 802, 806 (10th Cir.1988); 42 U.S.C. §423(d)(5)(A). See also 20 C.F.R. §404.1529(a) & (b). Subjective pain must be evaluated with due consideration for credibility, motivation, and medical evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir.1984). The ALJ's determination of credibility is a factor to be considered in determining whether his decision is supported by substantial evidence. Id. at 62. See also Gossett v. Brown, 862 F.2d 802, 807 (10th Cir.1988) (generally ALJ's credibility determinations are treated as binding). The ALJ found "claimant's testimony to be credible only to the extent that it is reconciled with his ability to perform sedentary exertional activity." (R.O.A. 28). See also (R.O.A. 25).

The ALJ found objective medical evidence to support a finding

that claimant "suffers from mild to moderate pain but not disabling pain." (R.O.A. 26). This conclusion was based on medical examinations of claimant by Doctors Fielding, Hallford and Zumwalt and the type of pain medication which doctors had prescribed for him. The United States Court of Appeals for the Tenth Circuit has stated "if an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Luna v. Bowen, 834 F.2d 161, 164 (10th Cir.1987)(emphasis in original). It is clear the ALJ did consider all relevant evidence and set forth pertinent elements necessary to fully evaluate claimant's credibility:

After careful consideration of claimant's signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions and the combined impact on the claimant's daily activities, the Administrative Law Judge finds that the claimant is not suffering from a totally disabling pain syndrome. . . .

(R.O.A. 27)

Substantial evidence supports this conclusion and it will not be disturbed.

Next, plaintiff argues "the Administrative Law Judge erred in that he failed to call a vocational expert to assess the erosion of the plaintiff's occupational base." (Plaintiff's Brief at 6). Plaintiff here refers to the principle that "[o]nce it is determined that a claimant cannot perform the full range of work

within a given category, case law suggests the ALJ should consider the erosion of a claimant's occupational base before determining how much reliance to place on the 'grids,' 20 C.F.R. Part 404, Subpt. P, App.2, and whether to obtain vocational evidence." Turner v. Sullivan, 951 F.2d 1260, 1991 WL 268818 (10th Cir.). See, e.g., Talbot v. Heckler, 814 F.2d 1456, 1460-61 (10th Cir.1987); Ortiz v. Secretary of Health & Human Servs., 890 F.2d 520, 524-25 (1st Cir.1989); DeFrancesco v. Bowen, 867 F.2d 1040, 1045 (7th Cir.1989). In the case at bar, the ALJ discounted Dr. Coggins' report and implicitly found the claimant could perform the full range of work within the sedentary category. Use of the grids as a framework for consideration was thus still appropriate. For the same reason, the ALJ did not violate Soc. Sec. Ruling 83-12, which states the adjudicator should consult vocational resources or vocational experts where the erosion of the occupational base is unclear. Also, only Dr. Coggins placed a limitation on plaintiff's ability to sit for extended periods. The ALJ, properly in the Court's view, discounted Dr. Coggins' report. Therefore, the portion of Soc. Sec. Ruling 83-12 which refers to "alternate sitting and standing" is not implicated.

This Court finds there is sufficient evidence in the record to support the ALJ's ruling that the plaintiff is able to perform sedentary work.

After a through review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that plaintiff was not disabled as defined under

the Social Security Act. The Secretary's decision is, therefore,
AFFIRMED.

IT IS SO ORDERED this 1 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 02 1994

MURIEL KAY DAVIS, a single
woman,

Plaintiff,

and

HEINZ BAKERY,

Intervening Plaintiff,

vs.

ADAMATIC, A CORPORATION, a New
Jersey corporation,

Defendant.

FILED

DEC 01 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-149-K ✓

ORDER OF DISMISSAL OF ALL REMAINING CLAIMS

COMES NOW before me, the undersigned Judge, the Joint Application for Order of Dismissal With Prejudice Of Plaintiff's Cross-Claim Against Intervening Plaintiff Heinz Bakery. Upon consideration of the same, it is well taken and is hereby granted.

IT IS ORDERED THAT all claims by and between all parties to this action are declared resolved, and that the above styled and numbered cause in its entirety is hereby dismissed with prejudice.

Done this 1 day of December 1994.


JUDGE OF THE DISTRICT COURT

39

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 21 1994

Richard A. ... Clerk
U.S. DISTRICT COURT

NORMAN POUND,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

93-C-1058-E

ORDER

Plaintiff Norman Pound applied for Social Security disability benefits, alleging he could no longer work because of arthritis, herpes, poor vision and chronic pain. The Secretary of Health and Human Services denied the application. Mr. Pound now appeals that decision to this Court.¹

Two issues are raised in Mr. Pound's appeal. First, does substantial evidence support the Secretary's decision that he can return to his past work as a delivery driver? Second, did the Administrative Law Judge ("ALJ") properly analyze Mr. Pound's complaints of pain? For the reasons discussed below, the case is **remanded**.

I. Legal Analysis

A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

ENTERED ON DOCKET

DATE 12-1-94

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impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In this case, the ALJ found, at step 4, that Mr. Pound could return to his past relevant work as a wrecker driver and/or delivery driver. Mr. Pound questions that finding, arguing that substantial evidence does not support such a decision.² Intertwined with that issue is whether the ALJ properly questioned the Vocational Expert.³

Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). A review of the record indicates the ALJ's questioning of the Vocational Expert was imprecise.

In an April 8, 1992 examination, Dr. Richard Cooper found that the 47-year-old Mr. Pound had restricted ranges of motion in some fingers, chronic pain in the right lower thorax and right upper abdomen and reduced vision (albeit without glasses). Dr. Cooper also found that Mr. Pound's finger dexterity to be "fair" and that his grip strength in his left

² Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992). Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

³ The Secretary appears to argue that since the ALJ was not required to call a vocational expert at Step 4, no error was made. The undersigned disagrees. The expert was called to help determine whether Mr. Pound could return to his past relevant work. As it stands now, the record is unclear to that issue, with or without the expert's testimony.

hand appeared weak. No other evidence contradicted Dr. Cooper's findings and some of Mr. Pound's testimony corroborated it.⁴

The ALJ, in effect, asked only three substantive questions. He asked the vocational expert to evaluate Mr. Pound's past work activity. He asked the Vocational Expert whether Mr. Pound's past driving jobs required "fine dexterity." He asked whether the jobs required "particularly fine dexterity." *Id. at 40-41.* These questions are lacking, in part, because they do not specifically address Dr. Cooper's findings. For example, Dr. Cooper found that Mr. Pound had "chronic pain" in certain areas. Dr. Cooper found problems with Mr. Pound's grip in his left hand. Dr. Cooper found finger dexterity to be "fair". None of these specific findings, however, were incorporated into the hypothetical questioning.

In addition, in response to questions from Mr. Pound's attorney, the Vocational Expert testified that -- if a person had trouble gripping a steering wheel or problems with dexterity -- he may not be able to work as a delivery driver. *Id. at 43.* The Vocational Expert also testified that, if a person was drowsy from medication, his ability as a delivery driver would be limited.

At bottom, given the minimal questioning of the Vocational Expert by the ALJ, it is difficult to determine whether Mr. Pound can return to his past relevant work. The ALJ should have been more precise concerning Mr. Pound's impairments, and the effect his condition has upon his ability to drive. The Vocational Expert's testimony should have been more detailed about the requirements needed to be a wrecker service driver or a

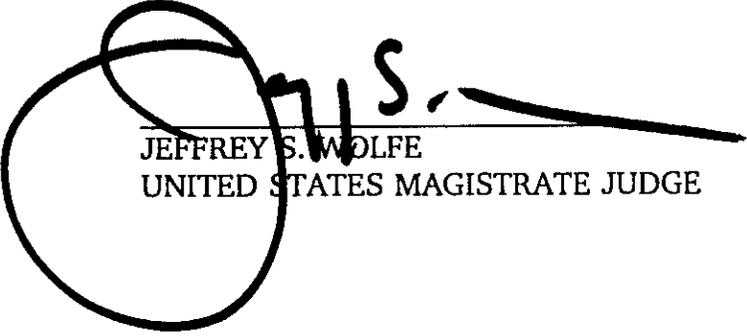
⁴ Mr. Pound testified that he had sharp pain in his right rib, wrist and shoulder. He testified that he had swelling in his wrists and shoulders. He testified that he cannot grip and that his medication makes him drowsy.

delivery driver.⁵ The record suggests that Mr. Pound can work somewhere in the national economy, but it is unclear as to whether he can return to his past relevant work.

Therefore, the undersigned recommends the case be **REMANDED** to the Secretary for a supplemental hearing. At this hearing, a Vocational Expert should again testify. The ALJ should be more detailed and precise in his questioning consistent with the undersigned's findings. After listening to such testimony, the ALJ must re-examine the evidence to determine whether Mr. Pound can return to his past relevant work or whether the analysis must proceed to step 5.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁶

Dated this 30th day of Nov., 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁵ The record also suggests the vocational expert was unsure about some of the requirements of a "wrecker driver" or a "delivery driver." See page 41 of the Record.

⁶ See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHARRON JONES,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

FILED

NOV 30 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

93-C-963-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Sharron Jones applied for Social Security disability benefits, alleging she could no longer work because of a learning disability, and severe pain on the right side of her body. The Secretary of Health and Human Services denied that application. Ms. Jones now appeals that decision to this Court.¹

Ms. Jones raises two issues. First, she asserts that the Administrative Law Judge ("ALJ") improperly "discredited" her disability allegations. Second, Ms. Jones argues that the ALJ erred as a matter of law by concluding that she could return to her past relevant work. For the reasons set forth below, the United States Magistrate Judge recommends the Secretary's decision be **affirmed**.

I. Summary of Evidence

Ms. Jones, 5-foot-3 inches tall and 230 pounds, was born in 1945. She has a 10th

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

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grade education. From March of 1976 until January of 1992, her past relevant work was as a secretary. *Record at 78.*

-Ms. Jones testified that her daily activities are limited. She testified that she only leaves the house to visit the drugstore and the doctor. She also testified that she spends some 18 hours a day in bed. *Record at 42.* She testified that she can no longer work because of chest pains, blurred vision, congestion and dizziness. *Id. at 42-45, 55.* Ms. Jones also testified that she could only stand only two minutes at a time and can lift only two pounds. *Id. at 46.* She also takes medications, which she says upsets her stomach and make her drowsy. *Id.*

The medical evidence consists of reports submitted by Dr. Jose Medina, treatment notes from St. John Medical Center, Dr. A. Munson Fuller, Dr. Gerald Plost and records from the University of Oklahoma College of Medicine.

Dr. Medina, a specialist in cardiovascular disease, examined Ms. Jones from March 16 to April 5 of 1990. He examined her heart and noted that she had "significant angina pectoris" with chronic pulmonary disease. He recommended cardiac catheterization, which was done at St. John Medical Center. Ms. Jones also underwent angiography. Her discharge diagnosis allowed her to resume routine activity levels.

Dr. Fuller, an otolaryngologist, examined Ms. Jones four times between March 3, 1990 to January 18, 1992. Twice she was seen in 1990 for an upper respiratory infection and she was seen two other times for a cough.

Dr. Plost, a specialist in internal medicine and pulmonary disease, examined Ms. Jones several times between March of 1990 and February of 1992. Dr. Plost noted minor

problems with respiratory system, but his February 21, 1992 examination indicated that Ms. Jones suffered from "residual cough from acute bronchitis" and asthma. *Id. at 131*. He recommended she take Prednisone and Tagamet.

Ms. Jones also was examined by doctors at the University of Oklahoma College of Medicine between the time frame of September 18, 1992 to January 21, 1993. *Id. at 141*. On her last visit, she was diagnosed for peptic ulcer disease, asthma and angina.²

II. Legal Analysis

A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ concluded, at step 4, that Ms. Jones could return to her past work as a secretary. The ALJ also found:

-- That Ms. Jones had peptic ulcer disease, allergies, asthma with bronchitis and angina, but that she did not have an impairment or combinations of impairments that met the listings in Appendix 1, Subpart P, Regulations No. 4.

-- That Ms. Jones' allegations of inability to work, to include pain, nausea, depression, nervousness, shortness of breath, dizziness, blurred vision, reduced hearing, drowsiness, and other symptoms are not credible or supported by the medical documents in evidence.

² The ALJ offers a more detailed summary of the medical evidence.

– That Ms. Jones had the residual functional capacity to perform work-related activities, except for work involving lifting more than 10 pounds at a time and lifting and standing/walking more than 2 hours in an 8-hour day and any significant stooping. *Record at 22.*

Two issues are raised by Ms. Jones.³ First, she contends the ALJ erred by discrediting her allegations of disability. Second, Ms. Jones asserts that the ALJ's decision is not supported by substantial evidence. Each issue is discussed below.

Ms. Jones argues that the ALJ discredited her testimony because it was not supported by the medical evidence. In making the argument, Ms. Jones cites *Gatson v. Bowen*, 838 F.2d 442 (10th Cir. 1988) and *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987).

In *Gatson*, the ALJ found that, based on the medical record, the claimant's subjective complaints of pain were not credible. The court, however, noted that "where medical signs and findings establish the existence of a medical impairment that reasonably could be expected to produce disabling pain in some individuals and where statements of the claimant or treating physician regarding the intensity and persistence of pain are reasonably consistent with the medical signs and findings, a conclusion that pain is disabling can be justifiable." *Id. at 449.* The court also wrote:

[The ALJ] seemed to assume that the medical signs and findings must establish the disabling pain rather than merely establish an impairment that could be reasonably capable of producing the alleged pain...Discounting relevant testimony and reducing its credibility cannot be based on a belief that medical evidence which does not establish disabling pain thereby overrides all nonmedical evidence. *Id.*

³The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992). Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

The *Gatson* decision can be distinguished from the case at bar. First, in *Gatson*, the court found that the medical evidence did not support the ALJ's findings.⁴ Second, the court found that the claimant's statements and the findings of the treating physician was "reasonably consistent" with the medical evidence. *Id.* at 449. In the case at bar, the medical evidence does support the ALJ's finding of no disability. In addition, none of the medical findings are "reasonably consistent" with Mr. Jones' testimony. Furthermore, from a procedural standpoint, the ALJ did not err in evaluating Ms. Jones complaints of disabling pain.

Under *Luna v. Bowen*, the ALJ must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. If so, the ALJ must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id.* at 163-164.

The ALJ analyzed the objective evidence and found Ms. Jones to not be disabled. The ALJ also evaluated Ms. Jones' subjective complaints on pages 16-19 of the Record. He discussed Ms. Jones' contact with doctors, her daily activities, her bouts with nervousness and depression and the side effects of her medication.⁵ He then concluded that Ms. Jones'

⁴ The ALJ had found the claimant not to be disabled at step 5. The court, however, found that the medical evidence was not sufficient to meet the Secretary's burden as neither "the findings of the treating physician nor the reports of the Social Security Administration's consulting physicians and occupational therapist establish the claimant's full capacity for light work." *Id.* at 448. In this case, the ALJ found Ms. Jones able to work at step 4.

⁵ In *Luna*, the Tenth Circuit outlined what factors could be evaluated when analyzing a claimant's subjective complaints of pain. Among those factors were: (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, (2) regular use of crutches or a cane, (3) regular contact with a doctor, (4) the possibility that psychological disorders combine with physical problem, (5) the claimant's daily activities, and (6) the dosage, effectiveness and side effects of medication. In this case, the ALJ discussed factors 3, 4, 5 and 6.

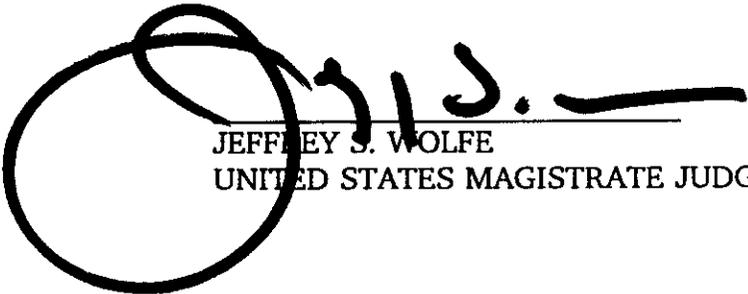
complaints did not affect her concentration to prevent the performance of work activity and that her testimony was not "sufficiently credible" to support a disability finding. *Record at 19.* As a result, the ALJ did not err on this issue. He must be allowed to judge the claimant's credibility and to weigh the evidence accordingly.

The next issue raised by Ms. Jones is that the ALJ erred as a matter of law by finding that she could return to work as a secretary. Ms. Jones argues that the ALJ should not have used the Dictionary of Occupational Titles ("DOT") to find that she could return to work as a secretary. This argument is without merit. The ALJ, at step 4, followed the proper procedure in making his determination.

A review of the record shows that substantial evidence supports the ALJ's decision that Ms. Jones can return to her past relevant work. In addition, the ALJ has not erred as a matter of law in discounting the testimony of Ms. Jones or elsewhere in his analysis. Therefore, for the reasons discussed above, the undersigned recommends the Secretary's decision be **AFFIRMED**.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁶

Dated this 30th day of Nov., 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁶ See *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991).