IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERMAINE WILSON and DAMEON SANDERS, individually and for a class,	)	
Plaintiffs,	)	
v.	)	No. 14-cv-08347
CITY OF EVANSTON, ILLINOIS,	)	Honorable John Z. Lee
Defendant.	)	

DEFENDANT, CITY OF EVANSTON'S, MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant, City of Evanston ("Evanston"), by and through its attorneys, Tribler, Orpett & Meyer, P.C., states the following for its Memorandum in Support of its Motion for Summary Judgment:

INTRODUCTION

Plaintiffs Jermaine Wilson ("Wilson") and Dameon Sanders ("Sanders") were arrested by the Evanston Police Department ("EPD") in July 2013. Their personal property was identified and inventoried by the EPD pursuant to the terms of the Prisoner Property Receipts in which both Plaintiffs acknowledge receiving. Plaintiffs were transferred to the Cook County Department of Corrections ("CCDOC"), but certain property remained in EPD's inventory because CCDOC would not accept it. Plaintiffs failed to retrieve their property that remained in EPD's inventory before it was destroyed almost a year later, despite knowing the City would dispose of it within 30 days of their arrest.

Plaintiffs blame the City for the destruction of their property. On August 31, 2016, Plaintiffs filed a Second Amended Complaint under 42 U.S.C. § 1983 claiming the EPD's policy

for handling arrestees' property violates their Fourteenth Amendment substantive and procedural due process rights. (Dkt. #75, p. 1.) On August 30, 2017, Plaintiffs' motion for class certification was granted and they were allowed to proceed with their claims on behalf of the following classes: Class I-Substantive Due Process and Class II-Procedural Due Process. *Id*. at p. 30.

For the reasons explained below, and those set forth in the City's response to Plaintiffs' Motion for Summary Judgment, the City is entitled to judgment on Plaintiffs' Fourteenth Amendment substantive and procedural due process claims which are the only to two claims/classes certified by this Court. *Id*. at 30.

UNCONTESTED FACTS

Upon arrest, the EPD provides arrestees with a "Prisoner Property Receipt" which identifies all items of personal property to be inventoried and contains the terms in which the arrestee's property will be inventoried. (SoF ¶ 29). The "NOTIFICATION REGARDING YOUR PROPERTY" section contained within the Prisoner Property Receipt informs the arrestee that the property will be inventoried with the Property Bureau, that the arrestee or his/her designee will have 30 days from the date of arrest to retrieve their property, and informs the arrestee that if they do not retrieve their property within 30 days, it will be disposed of. (SoF ¶29). There form allows an arrestee to write-in the name of an authorized representative to retrieve their property. (SoF ¶30). A phone number is provided for the arrestee to contact the Property Bureau regarding their property and they are also referred to the EPD's website. (SoF ¶32). The arrestee is given a copy of the completed form to keep. (SoF ¶27).

The City also posts information about arrestee property on its website. (SoF ¶35). The information on the website identifies the difference between Lost/Recovered Property and Arrestee Property and the disposal policies for various types of property. (SoF ¶35, ¶36). The website

information notifies individuals that they may make a written request for an extension of the holding period and also provides a phone number to contact the Property Bureau. (SoF ¶36).

Michael Wasowicz oversaw the Property Bureau and was involved in changing the arrestee property policy contained within the Prisoner Property Receipt form to the version utilized at the time of Plaintiffs' arrests. (SoF ¶40, ¶41). Wasowicz previously worked at the Skokie Police Department and recalled Skokie's arrestee property procedure allowed an arrestee to designate a representative to retrieve their property at the time of their arrest. (SoF ¶42). Wasowicz decided to revise the procedure contained in the EPD's Prisoner Property Receipt form to prove an arrestee the ability to designate a representative to retrieve their property at the time of their arrest to make it easier to facilitate the return of arrestee property and eliminate some of the previous requirements he believed could be burdensome. (SoF ¶42). Wasowicz also changed the time period for arrestees to reclaim their property from 90 days to 30 days so individuals would take action sooner than later to pick up their property and avoid overcrowding of the storage facility. (SoF ¶43). The EPD has approximately 40 arrestees per month, which translates into approximately 480 items per year. (SoF ¶51). Most arrestee property is retrieved. (SoF ¶49).

The City provides several ways for arrestees to retrieve their property. (SoF ¶¶44-48). These options are discussed in the City's Response to Plaintiff's Motion for Summary Judgment.

ARGUMENT

I. Plaintiffs' substantive due process claim fails because (1) the Evanston ordinance, being a procedural ordinance, does not create a constitutionally protected property interest; and (2) the ordinance only sets forth procedures for handling lost or stolen property, which is inapplicable to Plaintiff's arrestee property which was neither lost nor stolen.

"To establish a claim for a due process violation under 42 U.S.C. § 1983 against the City, Plaintiffs must show that they '(1) suffered a deprivation of a federal right; (2) as a result of either

an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority…which (3) was the proximate cause of [their] injury.' *Elizarri v. Sheriff of Cook County*, 07 CV 2427, 2015 WL 1538150, at *2 (N.D. Ill. Mar. 31, 2015)." Doc. 64 p. 6.

Under their substantive due process-based theory, Plaintiffs argue Section 9-7-3(A) contained within Chapter 7 of Evanston's Code of Ordinances entitled, "Lost, Stolen Property" creates a protected property interest requiring the EPD to store arrestee property for sixty days after the final disposition of court proceedings in connection with which the property was taken. (Dkt. #56, p. 2. ¶2). Plaintiffs contend that EPD's property disposal policy contained within the Prisoner Property Receipts violates this alleged protected property interest. (Dkt. 75, p. 5). The substantive due process claims "arise from EPD's purported policy of contravening the City's ordinance by destroying or disposing of arrestees' property before the conclusion of the underlying criminal proceedings." (Dkt. #75, p. 20).

A. The Subject Ordinance Does Not Create Protected Right

"The threshold question in any due process challenge is whether a protected property or liberty interest actually exists." *Citizens Health Corp. v. Sebelius*, 725 F.3d 687, 694 (7th Cir. 2013). "It is by now well-established that in order to demonstrate a property interest worthy of protection under the fourteenth amendment's due process clause, a party may not simply rely upon the procedural guarantees of state law or local ordinance." *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989).

"In order to give rise to a constitutionally protected property interest, a statute or ordinance must go beyond mere procedural guarantees to provide some substantive criteria limiting the state's discretion—as can be found, for example, in a requirement that employees be fired only 'for cause.' If a statute or regulation merely delimits what procedures must be followed before an

employee is fired, then it does not contain the requisite substantive predicate." *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989) (collecting cases).

"In order to create a property interest, a statute or ordinance must provide 'some substantive criteria limiting the state's discretion,' as for instance in a requirement that employees can only be fired 'for cause.' A statute which merely provides procedures to be followed does not include a substantive right." *Miyler v. Village of East Galesburg*, 512 F.3d 896, 898 (7th Cir. 2008).

"One *cannot* have a "property interest" (or a life or liberty interest, for that matter) in mere procedures because "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a claim of entitlement…The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right." *Doe by Nelson v. Milwaukee County*, 903 F.2d 499, 503 (7th Cir. 1990) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983)). In this case, Section 9-7-3 is, in essence, a set of procedures that guides the custodian of lost and stolen property in instances where the owner fails to claim his or her lost or stolen property. Additionally, Evanston's Lost, Stolen Property Ordinance does not apply to Plaintiffs' arrestee property, for reasons set forth in the City's response**.** Accordingly, the City is entitled to judgment on Plaintiffs' Fourteenth Amendment substantive due process claim.

II. Plaintiffs fail to satisfy the elements of their due process claim under §1983.

To establish a claim for a due process violation under 42 U.S.C. § 1983 against the City, Plaintiff must prove they "(1) suffered a deprivation of a federal right; (2) as a result of either an express municipal policy … which (3) was the proximate cause of [their] injury." King v. Kramer, No. 13-cv-2379, 2014 WL 3954028, at *10 (7th Cir. July 10, 2014); see also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). The facts in this case are similar to those in *Elizarri et al.*

v. Sheriff of Cook County, another class action lawsuit wherein Plaintiffs alleged *Monell* liability to the Sheriff of Cook County alleging that their constitutional rights had been violated by the Sheriff's failure to prevent the loss of their personal property while they were in Cook County jail. *See Elizarri,* 901 F. 3d 787, 788 (7th Cir. 2018).. The jury returned a verdict in favor of the Sheriff, finding that Sheriff had implemented changes in an effort to improve the property loss rates. *See id.* at 789-790. The plaintiffs appealed, and the Seventh Circuit affirmed the verdict. *See id.* at 792. The Seventh Circuit held that the trial judge had correctly instructed the jury on the question of the Sheriff's liability under § 1983. In *Elizarri,* the judge told the jury that the Sheriff could be found liable for violating the Fourteenth Amendment if: (1) There was a widespread custom or practice which allowed plaintiffs' property to be lost or stolen before it could be returned to plaintiffs when they left the jail; (2) The custom or practice was the moving force behind plaintiffs' losses. A custom or practice is a moving force behind a constitutional violation if the custom or practice was the direct cause of the loss. (3) The Defendant was deliberately indifferent to Plaintiffs' losses. To show deliberate indifference, the Plaintiffs must prove by a preponderance of the evidence these two things: (a) That the Defendant actually knew of the substantial risk that the property storage practices in effect would cause a loss of Plaintiffs' property; and (b) The Defendant consciously disregarded this risk by failing to take reasonable measures to prevent such losses. *Elizarri* at 790.

In this case, like in *Elizarri,* there is no evidence that (1) Evanston's property disposal policy contained within the Prisoner Property Receipt prevented Plaintiffs from retrieving their property within 30 days of their arrest; (2) that Evanston's policy and procedure was the 'moving force' behind Plaintiffs' inability to retrieve their property; or (3) that the City was deliberately indifferent to Plaintiffs in the implementation of the procedures afforded to retrieve their property.

The federal right in dispute in this case is procedural due process. "A procedural due process claim requires the plaintiff to show (1) that he was deprived of a protected liberty or property interest, and (2) that he did not receive the process that was due to justify the deprivation of that interest." *Armato v. Grounds*, 766 F.3d 713, 721-22 (7th Cir. 2014). Here, Defendants do not challenge Plaintiffs' assertion of a constitutionally protected interest in their personal property.

The only issue here is whether Plaintiffs can show that they "did not receive the process that was due to justify the deprivation of (their property) interest." *Armato*, 766 F.3d at 722. "Due process requires the government to follow reasonable procedures for minimizing mistaken deprivations of liberty." *Atkins v. City of Chi.*, 631 F. 3d 823, 827 (7th Cir. 2011). "In determining what process is due in a particular situation, a court considers: (1) the private interest affected by the government action; (2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value of any alternative procedural safeguards; and (3) the government's interest, including the function involved and additional administrative or fiscal burdens that alternate procedural requirements would require." *Saiger v. City of Chicago*, No. 13-cv-5590, 2014 U.S. Dist. LEXIS 83206, at *8 (N.D. Ill. June 19, 2014) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

A. Evanston's property disposal policy did not prevent Plaintiffs from retrieving their property.

Plaintiffs argue that the City's procedure requiring arrestees to retrieve their property within 30 days of arrest made it nearly impossible for arrestees, who are detained pending trial, to reclaim their inventoried property. This argument is refuted by the evidence and testimony in the record, all of which overwhelmingly demonstrate that arrestees can retrieve their property in a multitude of different ways. This Court has already concluded that Wilson did not state a claim based on his theory that the notice contained in the Prisoner Property Receipt was insufficient.

Wilson v. City of Evanston, No. 14 C 8347, 2016 WL 344533, at *4 (N.D. Ill. Jan. 28, 2016). Doc. 75, p. 4. Therefore, it is undisputed that the City gave Plaintiffs' sufficient notice as to what the process was for them to retrieve their property from the City.

As explained in the City's response, there are several ways that arrestees could retrieve their personal property. The is no evidence the City's procedure prevented Plaintiffs from retrieving their property within 30 days of their arrest. Plaintiffs simply failed to timely pursue the procedures afforded to them by failing to retrieve their property before it was destroyed almost 10 months after their arrest. In fact, that evidence shows that Dameon Sanders' was able to retrieve his personal property from the EPD on four prior occasions arising out of his previous arrests in 2010, 2011, 2014 and 2015. (SoF ¶88-91). This fact alone refutes the argument that the City's policy showed "systemic and gross deficiencies." *Daniel v. Cook Cty.*, 833 F. 3d 728, 734 (7th Cir. 2016). Where, as here "the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the [omission in the policy] and the constitutional deprivation." *Calhoun v. Ramsey,* 408 F.3d 375, 380 (7th Cir. 2005).

According to Wasowicz, the EPD arrested approximately 480 individuals per year. (SoF ¶49). That indicates that less than 10% of arrestees had property that was destroyed or otherwise disposed of, hardly indicative of "systemic and gross deficiencies" and is not sufficient to rise to a true constitutional injury for the purposes of §1983. *Daniel*, 833 F. 3d at 734.

B. Evanston's arrestee property policy and procedure was not the 'moving force' behind Plaintiffs' inability to retrieve their property.

To establish liability under § 1983, Plaintiffs must show that the City's policy, custom or practice was the "moving force" behind their constitutional injuries. *Dixon v. Cook Cty.*, 819 F. 3d 343, 348 (7th Cir. 2016). "A custom or practice is a moving force behind a constitutional violation

if the custom or practice was the direct cause of the loss." *Elizarri,* 901 F.3d at 790. Evanston's policy and procedure did not prevent Plaintiffs' from retrieving their property. Plaintiffs' failure to timely implement the procedures available resulted in their loss. The procedures were constitutionally adequate, it was Plaintiffs' efforts to implement those procedures that were inadequate.

C. The City was not deliberately indifferent to Plaintiffs in the implementation of the procedures afforded to retrieve their property.

Plaintiffs' 1983 claim fails because there is no evidence that policy-making officials at the City were aware of "systemic and gross deficiencies" with the procedures for arrestees to retrieve their property, yet took no corrective action (also referred to as "deliberate indifference"). *Dixon,* 819 F. 3d at 348 (citing *Wellman v. Faulkner*, 715 F. 2d 269, 272 (7th Cir. 1983). To prove "deliberate indifference" Plaintiffs must present evidence establishing that: (1) the City actually knew its arrestee property procedures would prevent Plaintiffs from retrieving their property thereby resulting in their loss; and (2) the City consciously disregarded this risk by failing to take reasonable measures to prevent such losses. As the Seventh Circuit has explained, deliberate indifference "is more than negligence". *Arnett v. Webster,* 658 F. 3d 742, 751 (7th Cir. 2011). See also, *Daniel,* 833 F. 3d at 734 (noting distinction between systemic problems showing deliberate indifference and occasional lapses that are inevitable in institutions). Plaintiffs cannot meet either prong of the deliberate indifference test where the evidence in the record demonstrates that the City had a 90% return-rate for arrestee property (EPD lost/destroyed property of only 39 out of approximately 480 yearly arrestees). (SoF ¶¶ 49-51). *See Bd. Of Cty. Comm'rs of Bryan Cty, Ok v. Brown*, 520 U.S. 397, 410 (1997)(noting that deliberate indifference is a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence."). In addition, the City's decision to eliminate the need for a notarized form to be submitted by arrestees

when appointing designees is further evidence that the City was trying to make it easier for arrestees to designate others to retrieve their personal property within the thirty-day time period. (SoF ¶ 42). There is further no evidence to refute Wasowicz testimony that most property is retrieved nor is there evidence that Evanston's procedures prevented any arrestee from retrieving their property.

D. The burden imposed by requiring the City to hold arrestees' property until their release outweighs any possible value of Plaintiffs' proposed procedure.

Plaintiffs contend the City "should hold [arrestees' property] until [they] get out." (Dkt. #75, p. 6). Defendant must only show its procedure is constitutionally adequate, not that it is infallible. *Krecioch v. U.S.*, 221 F. 3d 976, 979-980 (7th Cir. 2000). It is Plaintiff who must prove the City's procedures are constitutionally inadequate.

The burden on the City to maintain every piece of property from every arrestee indefinitely outweighs any probable value of Plaintiffs' proposed alternative procedure and is further contrary to Plaintiffs contention for why the procedures are inadequate. Plaintiffs' proposal to hold property indefinitely until the arrestee is release would place no incentive on any arrestee to implement the procedures afforded to retrieve their property. There is no evidence allowing a greater time period would encourage arrestees to act sooner and utilize the procedures afforded to them in order to retrieve their property. Additionally, Plaintiffs proposal would create an exponential increase in the arrestees' personal property that the City would have to store. As a matter of common sense, the City only has a limited amount of storage space for arrestee property.

CONCLUSION

The City of Evanston is entitled to summary judgment for the reasons stated herein and the arguments asserted in response to Plaintiffs' motion for summary judgment which are incorporated herein.

Respectfully submitted,

s/ William B. Oberts
One of the Attorneys for City of Evanston

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendant, City of Evanston's Memorandum in Support of Its Motion for Summary Judgment, was served upon:

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service was accomplished pursuant to ECF as to Filing Users and complies with LR 5.5 as to any party who is not a Filing User or represented by a Filing User by mailing a copy to the above-named attorney or party of record at the address listed above, from 225 W. Washington Street, Suite 2550, Chicago, IL 60606, on the 30th day of November, 2020, with proper postage prepaid.

s/ William B. Oberts
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