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,	)	14-cv-8347
-vs-	)	*(Judge Lee)*
City of Evanston, Illinois,	)	
Defendant.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Court should reject defendant's arguments and grant plaintiffs' motion for summary judgment.

I. The Takings Claim

Defendant does not dispute that on March 9, 2020, the Court vacated its original order dismissing plaintiffs' Fifth Amendment takings claim. (ECF No. 140.) Nevertheless, defendant asserts that plaintiffs may not proceed on that claim without amending their complaint. (ECF No. 161 at 2-4.) The Court of Appeals recently rejected this argument in *Koger v. Dart*, 950 F.3d 971 (7th Cir. 2020):

> Complaints plead *grievances*, not legal theories, and Koger's complaint spelled out his grievance: the Jail confiscated his books and did not return them when he was released. What rule of law, if any, those acts violated, was a subject to be explored in other papers, such as motions, memoranda, and briefs. Koger

> initially relied only on the First Amendment but at later stages of the suit invoked the Due Process Clause too; he did not need to amend the complaint to do so.

Id. at 974–75. As in *Koger*, plaintiffs were not required to amend their complaint after the Court vacated its order dismissing the Takings Claim.

Defendant also asks the Court to follow *Conyers v. City of Chicago*, 12-CV-06144, 2020 WL 2528534 (N.D. Ill. May 18, 2020), *appeal pending* 7th Cir., No. 20-1934, and conclude that plaintiffs must plead and prove that the taking was for a public purpose.[1] (ECF No. 161 at 3-5.) Defendant, however, offers a public purpose for destroying or otherwise disposing of arrestee property.

Defendant explains that it is burdened by retaining arrestee property because it "only has a limited amount of storage space for arrestee property." (ECF No. 159 at 10.) Thus, defendant argues that it must destroy arrestee property to free up valuable storage space in its police department. Although defendant has not adopted this claimed public purpose in an ordinance or regulation, and it might well be the creation of inventive defense counsel, the Court should hold defendant to its word and conclude that

[1] The correctness of this ruling in *Conyers* is before the Seventh Circuit and is also before this Court in a pending motion to dismiss in *Kelley-Lomax v. Chicago*, 20-cv-4638. As the plaintiff argues in *Kelley-Lomax*, this Court is not bound by and should not follow *Conyers*. *Kelly-Lomax v. Chicago*, ECF No. 24 at 5.

defendant's policy for arrestee property results in a taking without compensation, in violation of the Fifth and Fourteenth Amendments.

Defendant also misunderstands plaintiffs' discussion of the Illinois Law Enforcement Disposition of Property Act, 765 ILCS 1030. (ECF No. 161 at 5-6.) Plaintiffs cite that statute, as well as the Evanston Code of Ordinances, Chapter 7, Section 9-7-1 (ECF No. 151 at 6-7) to show that neither the Illinois legislature nor the Evanston City Council has authorized the destruction of arrestee property. Defendant misread this argument as asserting a procedural due process claim. (ECF No. 161 at 5-8.) It does not.

Defendant also relies on *Conyers* and "common sense" (ECF No. 161 at 10) to urge that the legislative judgment set out in 20 Illinois Administrative Code 720.25(h) is different than the plain, ordinary meaning of that provision:

> The Chief of Police shall determine what personal property, if any, a detainee may retain. Receipts must be issued for all personal property taken from a detainee. Personal property, except for items confiscated as evidence, shall be returned to the detainee or his or her designee upon release and such return shall be documented.

Id. This provision sets out regulations that apply to the Chief of Police. The phrase "upon release," refers to release from custody of the Chief of Police, who transfers arrestees to the custody of the Sheriff of Cook County.

Defendant argues for a different reading of "upon release" by citing Section 535 of Title 20 of the Illinois Administrative Code. (ECF No. 161 at 10.) This provision, however, "applies to the Adult, Juvenile and Community Services Divisions of the Department of Corrections." 20 Administrative Code Section 535.10. The Evanston Police Department is not part of the Department of Corrections and this section of the Administrative Code is irrelevant to this case.

II. Substantive Due Process

Defendant appears to agree that the Evanston Ordinance, Section 9-7-1, creates a property right, but argues that the Ordinance does not apply to arrestee property. (ECF No. 161 at 10-12.) While the Court should reject defendant's strained textual argument, as discussed in part (B) below, it need not reach this question because defendant concedes that plaintiffs have a constitutionally protected interest in their personal property.

A. Defendant Concedes a Property Right

Defendant acknowledges in its cross motion for summary judgment that plaintiffs have "a constitutionally protected interest in their personal property." (ECF No. 159 at 7.)

Defendant may only infringe on plaintiffs' "constitutionally protected interest in their personal property" if it has at least a "rational reason" for destroying arrestee property. *Euclid v. Ambler Realty Co.*, 272 U.S. 365,

395 (1926); *Pro-Eco, Inc. v. Bd. of Comm'rs of Jay Cty., Ind.*, 57 F.3d 505, 514 (7th Cir. 1995). The only justification offered by defendant for its policy to destroy arrestee property before the conclusion of criminal cases is its "limited amount of storage space," discussed above at 2. The Court should reject this explanation for "arbitrary, wrongful government actions." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 369 (7th Cir. 2018) (citation omitted).

B. The Strained Textual Argument

The first sentence of the Evanston Ordinance provides as follows:

> It is hereby made the duty of all officers and members of the Police Department, into whose possession *any property seized* or taken shall come, to deliver the same at once to the custodian of lost and stolen property unless it is wanted for immediate use as evidence in any case, and in that event a report and inventory of the same shall be forwarded at once to the custodian.

Evanston Ordinance, Section 9-7-1 (emphasis added.) Defendant does not disagree that its police officers "seize" arrestee property. Defendant argues, however, that the Ordinance only applies to property seized pursuant to the Ordinance (ECF No. 161 at 11) and seeks to support this argument with the first sentence of Section 9-7-3(A), which begins as follows:

> If property *seized or taken possession of under the provisions of this Chapter* shall not be claimed by the rightful owner thereof and possession surrendered to such owner within sixty (60) days from the date of the final disposition of the court proceedings in connection with which such property was seized or otherwise taken possession of … (emphasis supplied)

Defendant argues that this language means that the Ordinance only applies to property seized "under the provisions of this Chapter." (ECF No. 161 at 11.) Defendant states: "Plaintiffs' property was not 'seized or taken possession of' under the provisions of Evanston Ordinance Chapter 7 Lost, Stolen Property." (*Id.*) The Ordinance, however, does not address seizure of property, but focuses on the custody and disposition of property.

III. Procedural Due Process

Plaintiffs rely on the third factor of *Mathews v. Eldridge*, 424 U.S. 319 (1976) ("additional or substitute procedural safeguard") to support their procedural due process claim. Specifically, plaintiffs propose that defendant postpone the sale or destruction of property for persons who are unable to secure pretrial release. (ECF No. 151 at 13-14.)

Defendant challenges this proposed additional procedural safeguard by asserting that plaintiffs "never address what happens if the arrestee is never released." (ECF No. 161 at 12.) But arrestees who are convicted and sentenced to terms of imprisonment are not "persons who are unable to secure pretrial release"—a sentenced prisoner is no longer eligible for pretrial release. The additional procedural safeguard proposed by plaintiffs is that Evanston retain arrestee property until the conclusion of criminal proceedings (as already set out in defendant's ordinance).

Defendant is also mistaken in asserting that no other police department retains arrestee property until the conclusion of criminal proceedings. For example, the New York City Police Department will retain arrestee property for at least "120 days after the termination of criminal proceedings." *Rivera v. Goulart*, No. 15-CV-2197 (VSB), 2018 WL 4609106, at *5 (S.D.N.Y. Sept. 25, 2018).

IV. Conclusion

For the reasons above stated and those previously advanced, the Court should grant summary judgment on liability in favor of the plaintiff class.

Respectfully submitted,

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