

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 12-5951

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 22, 2013
DEBORAH S. HUNT, Clerk

SHEM MALMQUIST; MEREDITH)
MALMQUIST,)
)
Plaintiffs-Appellants)
)
v.)
)
METROPOLITAN GOVERNMENT OF)
NASHVILLE & DAVIDSON COUNTY,)
TENNESSEE; GERMANTOWN,)
TENNESSEE,)
)
Defendants-Appellees.)

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF
TENNESSEE

ORDER

Before: COOK and GRIFFIN, Circuit Judges; ECONOMUS, District Judge.*

Shem and Meredith Malmquist, Tennessee residents, appeal two district court orders granting separate motions filed by the defendants to dismiss their complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Malmquists filed this civil rights suit under 42 U.S.C. § 1983 against the Metropolitan Government of Nashville and Davidson County (“Metro”) and the City of Germantown, Tennessee (“Germantown”) for allegedly violating their Eighth Amendment right to be free from excessive bail, and their due process rights when they were arrested, temporarily detained, and released after posting bond in October 2009. The parties have

*The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

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expressly waived oral argument, and we unanimously agree that oral argument is not needed. Fed. R. App. P. 34(a).

According to the complaint, the ex-wife of Shem Malmquist, Nicolosi, swore out a warrant against the plaintiffs in Davidson County, stating that she had received a letter, written by the Malmquists, threatening her life. Based on this information, Davidson County officials issued arrest warrants for the Malmquists, and they were arrested at their home in Germantown on October 28, 2009. They were then held at the Germantown Police Department while they awaited transportation to Davidson County. Davidson County sheriffs arrived in the early morning hours of October 29 and, at that time, the Malmquists were presented by video conference to a Davidson County Judicial Commissioner to set their bail.

Both Shem and Meredith were given the choice of using a bail bondsman to post bond for \$1,000, or to post bond in cash for \$500. Eventually, Shem opted for the \$1,000 bail with a bondsman and Meredith opted for the cash bond. The Malmquists admitted that this procedure was normal in that jurisdiction. The Malmquists then returned home to Germantown. The charges against them were ultimately dropped because Nicolosi had fabricated her allegations.

In their complaint, the Malmquists relied on the Eighth Amendment prohibition against excessive bail, as applied through the Fourteenth Amendment, and stated that their bail was set without regard to their individual circumstances and their particular risk of failure to return for a trial. The Malmquists further argued that Tennessee law created a protected right under the Constitution to be offered bail in the county where they were arrested, to be examined by a magistrate judge in regard to the need or the amount of bail before bail is set, to have the magistrate judge's findings relating to any bail decision reduced to writing, to be released on their own recognizance absent a conclusion by a magistrate judge that a risk of flight exists, and to have bail set only on an individual basis without a pre-set schedule. The Malmquists also stated that, without complying with the above process, the defendants denied their right to substantive and procedural due process. The parties consented to jurisdiction by a magistrate judge.

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Metro moved to dismiss the complaint for failure to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court granted the motion. Germantown then filed a Rule 12(b)(6) motion to dismiss, and the district court granted this motion as well. On appeal, the Malmquists challenge the district court's determination, arguing that Metro and Germantown violated their rights under the Excessive Bail Clause of the Eighth Amendment, specifically denying them the right to: 1) a reasonable calculation, prior to setting bail, whether the set amount would assure their appearance in court; 2) a bail amount set without a preset bail schedule; and 3) a bail schedule without amounts that are increased for the "sole purpose of enticing a commercial bail bonding company to post a bond for bail." The Malmquists also argue that the defendants failed to comply with procedural due process when Germantown failed to admit the Malmquists to bail at the time of their arrest, and when a bail schedule was used rather than a more individualized process. Lastly, the Malmquists argue that they were denied substantive due process.

We review de novo a district court's decision to grant a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 607 (6th Cir. 2012). When considering a Rule 12(b)(6) motion, we must accept as true any well-pleaded allegations, but we "need not accept any legal conclusions or unwarranted factual inferences." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The Eighth Amendment does not require bail, but if bail is granted, "it may not be unreasonably high in light of the government's purpose for imposing bail." *Fields v. Henry Cnty., Tenn.*, 701 F.3d 180, 184 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 2036 (2013). The Eighth Amendment's Excessive Bail Clause has consistently been applied to state action in this regard. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). "Excessive bail" is "grossly disproportional to the gravity of a defendant's offense." *See United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *Fields*, 701 F.3d at 184.

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Before Metro or Germantown, as local governments, may be held liable under § 1983, the Malmquists must show that these entities had a policy, custom, or practice regarding the bail process that deprived them of their federal rights. *See Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 777 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 866 (2013). The mere use of a master bond schedule “does not itself pose a constitutional problem under the Eighth Amendment.” *Fields*, 701 F.3d at 184. Moreover, the Malmquists present no argument that the bond amounts, \$500 and \$1,000, were unreasonably high or grossly disproportionate to their offenses. As in *Fields*, the Malmquists failed to show any “inherent problem” with the amounts that were set in their two cases or argue that the amounts were excessive relative to the crimes for which they were arrested. *Id.*

The Malmquists failed to state a substantive due process claim against Metro because the plaintiffs’ claim was covered by a specific constitutional provision and, therefore, must be analyzed under that specific provision rather than under a general substantive due process analysis. *See United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). Similarly, Germantown did not violate the Malmquists’ substantive due process rights when they failed to offer bail because the plaintiffs’ brief detention in Germantown violated no federal or constitutional right. *See Baker*, 443 U.S. at 145; *see also Flemister v. City of Detroit*, 358 F. App’x 616, 620-21 (6th Cir. 2009).

A liberty interest may be created by state law only when the state places “substantive limitations on official conduct” that requires “specific substantive predicates” and requires a specific outcome if those predicates are met. *Fields*, 701 F.3d at 186 (quoting *Gibson v. McMurray*, 159 F.3d 230, 233 (6th Cir. 1998)). If the procedural rights outlined in the state law do not require a “particular substantive outcome,” then no liberty interest is created. *Id.*

Similar to the plaintiff’s arguments in *Fields*, the Malmquists believe that they had a protected liberty interest in a more individualized examination of their circumstances prior to bond being set, as well as a written explanation. They also argue that they had a protected right to be admitted to bail in the county where they were arrested rather than where the warrants were issued. *See Tenn. Code Ann. §§ 40-11-105–107, 40-11-114, 40-11-117–18, 40-11-147.* However, these

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procedures under Tennessee law do not require a specific outcome, so Tennessee law creates no liberty interest in any particular bail process, including the examination process prior to setting the amount of bond. *Fields*, 701 F.3d at 186. Likewise, the decision by the defendants not to release the Malmquists on their own recognizance was purely discretionary under state law, creating no liberty interest in this result. *See* Tenn. Code Ann. §§ 40-11-104, 40-11-115. Therefore, the Malmquists have failed to state a procedural due process claim. *Fields*, 701 F.3d at 187.

Contrary to the Malmquists' contention, the holdings in *Fields* apply to the Malmquists' claims, notwithstanding some differences in the facts. Therefore, these holdings preclude the Malmquists' Eighth Amendment and procedural due process claims as set forth above. Moreover, the petition for certiorari filed in the *Fields* case has since been denied, leaving no doubt about the precedential value of our decision. Based on the above, the Malmquists failed to state a claim against either of the defendants that is "plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Accordingly, the district court's orders are affirmed.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah L. Smith", is written in a cursive style.

Clerk