UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

KEITH L. FERRELL PLAINTIFF

v. CIVIL ACTION NO. 3:00CV-287-S

CITY OF RADCLIFF, KENTUCKY, et al. DEFENDANTS

MEMORANDUM OPINION

This matter is before the court on the motion of the plaintiff, Keith L. Ferrell ("Ferrell"), to reconsider the order entered on December 21st, 2000 which dismissed Ferrell's Complaint as to Ken Howard, Keith Bond, and John Simcoe. *See* DNs 20, 21. For the reasons set forth below, Ferrell's motion will be denied.[1]

BACKGROUND

In his Complaint, Ferrell claims that he was arrested and charged with Assault in the Fourth Degree pursuant to Ky. Rev. Stat. Ann. § 508.030. This arrest allegedly arose out of a reported domestic disturbance to which police responded. According to Ferrell, these defendants, as prosecuting attorneys for Hardin County, offered to dismiss the assault charges pending against the plaintiff if he would stipulate that the officers had sufficient probable cause to arrest the plaintiff. Believing that the police officers responsible for his arrest deprived him of his constitutionally protected rights under color of law in violation of 42 U.S.C. §1983, Ferrell refused the offer. Ferrell's Complaint alleged that by conditioning the dismissal of the assault charges against him

[1]While the Federal Rules of Civil Procedure do not technically provide for a motion to reconsider an order, motions that are so styled are generally construed by courts as motions to alter or amend judgment filed pursuant to Fed. R. Civ. P. 59 (e). *See Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). Therefore, we will analyze Ferrell's motion according to Rule 59 (e). We also note that Ferrell's motion was timely filed. *See* Fed. R. Civ. P. 6 (a).

upon a stipulation as to probable cause for his arrest, these defendants violated 42 U.S.C. §1983 ("§ 1983").

At the time he filed his Complaint, Ferrell's assault charge was still pending in Hardin County District Court. According to Ferrell's brief, *see* DN 22, he was acquitted of the assault charge on the basis that "the Commonwealth failed to provide discovery to the Defendant . . .." *Id.* at 2. Ferrell states that an appeal by the Commonwealth of Kentucky is currently pending in Hardin Circuit Court. *See id.*

On December 21st, 2000, we granted these defendants' motion for summary judgment based on their absolute immunity from § 1983 liability for actions taken within the scope of their prosecutorial duties. *See* DNs 20, 21. In our memorandum opinion, we held that:

> the defendants were clearly acting as advocates on behalf of Hardin County and the Commonwealth of Kentucky when they attempted to negotiate the dismissal of the assault charges against the plaintiff. The affidavits of each of the defendants also support our conclusion that none were involved in the administrative or investigative aspects of the plaintiff's prosecution. These facts appear to be undisputed as the plaintiff has failed to rebut them with factual allegations of his own. *See U.S. v. Dusenbery*, 223 F.3d 422, 424 (6th Cir. 2000) (noting that "the party opposing a motion for summary judgment may not rest upon the mere allegations or denial of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial") (citations omitted). Therefore, based on both the legal doctrine of absolute immunity as it has been developed by both the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit, and the failure of the plaintiff to allege that the defendants acted as anything but advocates for the Commonwealth of Kentucky, the defendants' Motion for Summary Judgment will be granted.

Id. at 4.

Ferrell now asks that we reconsider our determination that these defendants are absolutely immune from § 1983 liability. Ferrell's motion is based on the fact that "no discovery has been taken in this case at the direction of the Magistrate, and therefore, Summary Judgment is inappropriate at this juncture of the proceeding." Pl.'s Mot. Recons. at 1.

STANDARD OF REVIEW

Motions to alter or amend judgment are "extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged." *In Re August, 1993 Regular Grand Jury*, 854 F.Supp. 1403, 1406 (S.D. Ind. 1994). As such, motions for reconsideration are granted "very sparingly." *Bakari v. Beyer*, 870 F.Supp. 85, 88 (D.N.J. 1994). "Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted).

DISCUSSION

Ferrell's motion will be denied for two reasons. First, the fact that no discovery has been taken in this matter is irrelevant to our determination that these defendants, as a matter of law, are entitled to summary judgment on Ferrell's § 1983 claim. Ferrell states that "the Plaintiff was prohibited from doing any positive discovery until the conclusion of the criminal case." *See* Pl.'s Mot. Recons. at 1-2. In fact, the August 30th, 2000 scheduling order stated that "[a]ll *deposition* discovery is stayed pending completion of the related criminal case." DN 11. Therefore, Ferrell was free to engage in other types of discovery to bolster his claims in the face of these defendants' motion. That he chose not to do so may not now serve as grounds for a motion to alter or amend judgment. *See FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) ("Rule 59(e) motions are aimed at *re* consideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued.") (emphasis in original), *quoted in Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998).

Second, even if the parties had engaged in discovery, the only factual allegation made in Ferrell's Complaint which concerns these defendants is that "the Hardin County Attorney's Office, Radcliff Division, has agreed to dismiss the action which is currently set for trial on June ___, 2000, which is more than one year from the date of the incident, only on the condition that Plaintiff agree

he would not file any civil action against the police officers." Compl. at ¶ 15 (DN 1). Even assuming this allegation was supported by discoverable information, it is clear that these defendants clearly acted in their prosecutorial capacity. Indeed, Ferrell's Complaint does not allege otherwise.

CONCLUSION

For the foregoing reasons, Ferrell's motion to alter or amend the order entered by this court on December 21st, 2000 will be denied. Ferrell has failed to demonstrate that the order was based on a clear error of law, that newly discovered evidence supports his position, that there has been an intervening change in controlling law regarding the doctrine of absolute immunity, or that reconsideration is necessary to prevent manifest injustice. A separate order will be entered this date in accordance with this opinion.

This _____ day of _____, 2001.

_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

Motion having been made by the plaintiff, Keith Ferrell, for reconsideration of the court's order entered December 21st, 2000, and the court being otherwise sufficiently advised, and for the reasons set forth in the accompanying memorandum opinion, **IT IS HEREBY ORDERED AND ADJUDGED** that the plaintiff's motion is **DENIED**.

This _____ day of _____, 2001.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record