

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANDREW BIGBEE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

05-C-66-C

This civil action for monetary relief under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 – 2680, arises out of an incident in which a prison official at the Oxford Correctional Institution in Oxford, Wisconsin, confiscated several purses that had been made by plaintiff Andrew Bigbee, an inmate at the institution. The institution destroyed the purses; plaintiff has filed suit under the FTCA seeking monetary compensation. The case is before the court on defendant United States of America’s motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). For the reasons stated below, defendant’s motion will be denied.

The Federal Tort Claims Act grants federal courts jurisdiction over claims arising from certain tortious conduct by government employees. 28 U.S.C. § 1346(b)(1). It represents

a waiver of the sovereign immunity of the United States with respect to these claims. However, the statute contains a number of exceptions in which sovereign immunity is not waived. 28 U.S.C. § 2680(a) – (n). Of importance to this case is the exception that provides that sovereign immunity is not waived with respect to

Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on jury of loss of goods, merchandise or other property, while in the possession of any officer of customs or excise or any other law enforcement officer if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law provision for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

28 U.S.C. § 2680(c). Defendant contends that this exception is applicable in this case because a Bureau of Prisons official qualifies as a “law enforcement officer” and an inmate’s handmade purses qualify as “other property.”

The current version of § 2680(c) came into being after Congress amended an earlier version of the statute by passing the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).

Prior to the passage of CAFRA, § 2680(c) provided that sovereign immunity was not waived with respect to claims “arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officers.” In Ortloff v. United States, 335 F.3d 652, 658 (7th Cir. 2003), the Court of Appeals for the Seventh Circuit held that the pre-CAFRA version of § 2680(c) applied “only to law enforcement officers performing functions related to customs and excise duties.”

Defendant argues that this court is not bound by Ortloff’s interpretation of the pre-CAFRA version of § 2680(c) and suggests that the amendments to the statute indicate that an interpretation of the phrase “law enforcement officer” broad enough to include Bureau of Prisons officials is appropriate. It notes also that every federal court of appeals to consider the current version of § 2680(c) has concluded that it is not limited to detentions made by law enforcement officers performing customs or excise duties and that three courts have concluded specifically that Bureau of Prison employees qualify as “law enforcement officers” for the purpose of § 2680(c). Bramwell v. United States Bureau of Prisons, 348 F.3d 804 (9th Cir. 2003); Chapa v. United States Dept. of Justice, 339 F.3d 388 (5th Cir. 2003); Hatten v. White, 275 F.3d 1208 (10th Cir. 2002). Indeed, one district court in this circuit has chosen to follow Bramwell and Chapa instead of Ortloff. French v. United States, No. 3:04-CV-049-RLY-WGH, 2005 WL 1398828 (S.D. Ind. June 10, 2005).

Although defendant's arguments are somewhat persuasive, I conclude that Ortloff remains binding precedent. In the current version of § 2680(c), the phrase "any other law enforcement officer" still follows (and therefore must be read in light of) a specific reference to claims arising out of "the assessment or collection of any tax or customs duty" and the class of officers of "custom or excise." Ortloff, 335 F.3d at 658-59. Moreover, it remains true that one of Congress's purposes in creating the exceptions was to avoid "extending coverage of the Act to suits for which adequate remedies were already available." Kosak v. United States, 465 U.S. 848, 857 (1984). In this case, plaintiff has no other adequate remedy available to him. Because the current version of § 2680(c) does not indicate clearly that Ortloff's interpretation of the phrase "any other law enforcement officer" was erroneous, I will adhere to Ortloff and deny defendant's motion to dismiss.

ORDER

IT IS ORDERED that defendant's motion to dismiss is DENIED.

Entered this 28th day of June, 2005.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

