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42 U.S.C. §1983 Civil Liability Update

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RACIAL PROFILING

Gregory v. Dillard's, Inc., 565 F.3d 464 (8th Cir. 2009)

Three of seventeen plaintiffs appealed a decision of the district court claiming discrimination against Dillard's Department Store alleging unequal treatment in the area of surveillance and hostile shopping environment, returns and exchanges and check-writing. The district court found no evidence of any discriminatory actions as a result of a company policy on the returns and exchanges claim and the one plaintiff's asserted check-writing claim bordered on being frivolous.

In the context of these claims, the statute's focus is on protecting a contractual relationship, therefore, a shopper must attempt to purchase an item and the merchant must have thwarted the shopper's attempt to make the purchase. The court agreed with the first and tenth circuit which found that discriminatory surveillance by a retailer is insufficient to establish interference with the aforementioned protected activity.

Cooley v. DiVecchio, 307 Fed.Appx.611 (3rd Cir. 2009)

The Appellate Court affirmed the district court's grant of summary judgment for the defendant on the plaintiff's 8th Amendment claim that he was denied excessive bail based on racial profiling. In Richardson v. Porras, 325 Fed.Appx. 462 (8th Cir. 2009), the court granted summary judgment in a claim that the plaintiff had been the victim of racial profiling when police officers pursued and arrested him as the plaintiff failed to proffer evidence that the officers acted with a discriminatory purpose. The appellate court affirmed summary judgment on behalf of the officers in White v. City of Menlo Park, 320 Fed.Appx. 633 (9th Cir. 2009) because probable cause existed justifying the officer's actions.

Lopez-Rodriguez v. Holder, 560 F.3d 1098 (9th Cir. 2009)

The court adopted the dicta of the Supreme Court in Mendoza and the holdings in Kandamar v. Gonzales, 464 F.3d 65 (1st Cir. 2006) and Almeida-Amaral v. Gonzales, 461 F.3d 231 (2d Cir. 2006) that only egregious civil rights violations will result in the application of the exclusionary rule in civil deportation hearings. In Kandamar the court rejected the plaintiff's racial profiling claim that the entrapment of nationals of certain countries was fundamentally unfair and violated the equal protection clause by treating legal and illegal entrants differently.

Monroe v. City of Charlottesville, VA, __ F.3d __ (4th Cir. 2009)

Charlottesville police, attempting to identify a serial rapist who was described by victims as a youthful-looking black male, approached 190 youthful-looking black males over several years to obtain samples of DNA. Monroe alleged an equal protection violation on the grounds that he was stopped because he was black and because officers do not perform such dragnet stops on alleged white assailants. He claimed he was subjected to an unreasonable seizure when the defendant officer came to his home and he was "forced" to give bodily fluids for DNA analysis.

The appellate court first affirmed the district's denial of Monroe's motion for class certification because he failed to show he would adequately represent the class based on his little interest or knowledge of the core understanding of the case.

The plaintiff claimed his Fourth Amendment rights were violated because he was visited at his home and coerced to give a DNA sample. His subjective belief that he was not free to decline was objectively reasonable as the officer was in uniform, did not tell him he could terminate the encounter, he was at his home and concerned that his neighbors would view him as a snitch. Based on his and other's interactions he believed he had to comply with the officer and given the state of relations between law enforcement and members of the minority community he believed he could not terminate the encounter. The Court explained that a seizure does not occur and the Fourth Amendment is not implicated when an officer merely approaches an individual and asks a few questions. The plaintiff's subjective beliefs are irrelevant and the officer's failure to inform Monroe that he would terminate the encounter does not establish a seizure (INS v. Delgado). Monroe's allegations that he was coerced are legal conclusions, not facts, and the mere fact that the officer was in uniform and approached his home did not go beyond describing a consensual encounter and are insufficient to survive a Rule 12(b)6 motion. In Twombly, the Supreme Court upheld a Rule 12(b)6 dismissal because the complaint did not allege sufficient facts showing a claim was plausible rather than merely conceivable. Bellatl Corp. v. Twombly, 550 U.S. 544 (2007).

The Court also affirmed the dismissal of Monroe's equal protection claim as the government didn't explicitly classify people based on race and there was no showing that a facially neutral law was enforced disproportionately with discriminatory intent. Monroe was approached because he matched the description of the suspect given by several victims. The district court relied on Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000) holding that the equal protection clause "is not implicated when officers limit their investigation to only those persons matching a victim's description of an assailant."

Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)

The court considered whether government officials' arrest and detention of thousands of Arab-Muslim men as part of the investigation of September 11th, plausibly suggested an entitlement to relief for invidious discrimination. The court determined it did not, noting that, "Arab-Muslim men were responsible for the September 11 attacks and it should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspect link to the attacks would produce a disparate, incidental affect on Arab-Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." Id., at 1951.

Jones v. East Haven, 2009 WL 1505147 (C.A. 2 (Conn.))

On April 14, 1997 an East Haven Police Department officer shot and killed the plaintiff following a motor vehicle pursuit. It appears that at sometime around July 10, 2003, the jury returned a verdict against the Town on the Monell claims awarding 2.5 million dollars in punitive damages. The Court ruled on the post-trial motions on July 6, 2007 vacating the punitive damage award and ordering a new trial on the compensatory damages. On May 29, 2009 the Second Circuit determined that it did not have jurisdiction on the defendant's motion to reverse the district court's denial of its motion for judgment as a matter of law, its granting a new trial on the issue of compensatory damages, or, in the alternative, finding the district court should have granted a new trial on both liability and damages. The jury concluded that the plaintiff had proven that the officer violated Jones' constitutional rights by using excessive force, but that the officer was shielded by the doctrine of qualified immunity. The jury also concluded that the plaintiff's constitutional rights were violated as a

result of an official practice or custom of the Town. The district court ruled that the jury could have reasonably concluded that the chief had actual or constructive knowledge of a custom or practice within the police department of deliberate indifference to the constitutional rights of African Americans and other people of color. The chief had served at every level of the police department over the course of 35 years. At the time of the incident the 52 member department was all white and the Town had a minority population of approximately 1.4%. The court described three specific comments or incidents which had been presented to the jury sufficient to support their decision.

On January 8, 1996, a white man made a series of telephone calls to the police department and was subsequently arrested at approximately 1 or 2 a.m. After a violent struggle during which the man was found to have a gun and bit one of the officers, he alleged that he was beaten about the face and had teeth knocked out and needed stitches in his head. At the end of the struggle he claimed he was face down on his bed when one of the officers had a weapon to his head and said, "You're lucky you're not a nigger because you'd be fucking dead." and "[i]n three days you will be in Whalley being butt fucked by the niggers." The officers who were present testified that no such comments were made.

Sometime in 1997 an unofficial department softball team wore t-shirts depicting police officers holding suspects on the hood of a police car which contained the words, "Boyz n the Hood". The Chief testified that although he did not conduct an investigation when he found out about this he distributed a memorandum informing officers that before displaying any item representing the police department they must first obtain permission from the chief of police.

The shooting occurred on April 14, 1997 and a woman testified that during the following year she had two interactions with the East Haven Police Department demonstrative of their feelings against African-Americans. Snowden, a 50 year-old African-American woman, claimed that she was stopped and charged with misuse of a license plate and operating an unregistered motor vehicle with a suspended license, none of which would have been known by the following officer leading her to believe that she was stopped because she was an African-American. When she failed to appear in court, a warrant for her arrest for failure to appear was issued. She further testified on January 7, 2000, she was visiting her son who was incarcerated in a state correctional facility. During her visit the outstanding warrant for failure to appear was discovered, resulting in her being taken into custody by the state police and transported to a hospital as she claimed she had heart disease and was a diabetic which caused her to pass out during transport. An East Haven officer came to pick her up at the hospital but told her that he was going to warm up the prisoner van as it was cold outside and that he was not going to handcuff her. Upon arrival at the police department she fell to the ground after stepping out of the prisoner van and passed out. She heard voices while being dragged into the police department and put on a bench. She claims she was repeatedly called a "nigger" and a "bitch", and if she did not get up "her ass would be dragged all the way to the cell."

The Court found the above evidence to be sufficient to support the jury verdict.

FALSE ARREST

Tennison v. City and County of San Francisco, 548 F.3d 1293 (9th Cir. 2008)

Tennison and Gough were convicted of murder and received 25 years and 27 years to life respectively. The State's key witness was an eleven year-old girl who claims she saw the beating and shooting of the victim and picked both out of photo arrays. There was significant exculpatory and contradictory evidence including the confession of another individual which led to a successful habeas petition based on the suppression of material exculpatory evidence.

Duty of Police Officers:

The investigators first claim that the duty to disclose exculpatory evidence was the prosecutor's and not theirs. The Supreme Court has held that Brady suppression occurs when the government fails to turn over even evidence that is known only to the police investigators and not the prosecutor. Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it where the investigating agency does.

The defendants then claimed that the plaintiffs must establish bad faith. Bad faith proof is required when officers fail to preserve and gather exculpatory evidence but does not apply when material exculpatory evidence is withheld.

Placement of Information in a File May Not Ensure a Successful Defense to Liability.

Police claimed they placed notes regarding another witness statement indicating they had arrested the wrong person and identifying the people involved including the shooter and other material detailed evidence. Such significant evidence should be brought to the attention of the prosecutor.

A Criminal Defendant's Awareness of the Possible Existence of Claimed Exculpatory Evidence Will Also Not Necessarily Lead to a Successful Defense.

Mere knowledge that another witness may have some information is not the same as extensive statements to the police. "Defense counsel is entitled to plan his trial strategy on the basis of full disclosure by the government."

The investigators also argued that they are entitled to qualified immunity as information with regard to the identity of the real shooter was known to the plaintiffs. Noting that the purpose of *Brady* is to preserve the fairness of criminal trials, the court recognized that a *Brady* violation may be cured by belated disclosure of evidence, so long as disclosure occurs at a time when such disclosure would be of value to the accused. In this case, the plaintiff did not learn about the taped confession of the shooter until the second to the last day of his hearing which was too late to be of value to him. The plaintiff's knowledge that the shooter had bragged about his involvement was not the same as the shooter's Mirandized confession to the police. Although the investigators claimed that the confession was inherently unbelievable, in addition to this confession a reliable witness confirmed the shooter's involvement. Such evidence would certainly undermine the confidence in the outcome of a trial and it would be clear to a reasonable officer that such material should have been disclosed to the defense.

Placing a note regarding a witness reward in the file did not satisfy the officer's obligation to disclose such evidence to the prosecutor. The offer of a reward to a key witness is material to impeachment evidence and should have been disclosed.

Wilkins v. DeReys, 528 F.3d 790 (10th Cir. 2008)

In 1996, Ben Anaya and his girlfriend were murdered and left in a locked cabin with the girlfriend's two and three year-old sons, who starved to death. Anaya was a member of a gang and the defendant investigators focused on his fellow gang members. The officers allegedly pushed hard for a couple of the gang members to implicate the plaintiffs. Plaintiffs contend that the officers fabricated evidence by intentionally extracting matching false statements using these statements as the sole basis for the subsequent arrest and trial. Plaintiffs claim the officers took advantage of one of the gang member's learning disabilities, threatened them and their families with harm and promised leniency and protection if they cooperated. Plaintiffs were tried separately and neither jury could reach a verdict and mistrials were declared. The interviewed gang members refused to testify but their statements were admitted at trial. The district attorney dismissed the criminal cases and reserved the right to retry both men. The Court first found that there was a question of fact to support the malice requirement. If the officers coerced false testimony by taking advantage of the age and lack of education and threatening harm to the families of those interrogated there would be a question of fact as to whether the officers acted recklessly or intentionally coerced the false statements.

The second question was whether or not the warrants were supported by probable cause. Without the coerced statements the officers lacked probable cause to arrest the plaintiffs. The officers claimed there was sufficient evidence to support probable cause, however, the court rejected this argument finding that information outside of the institution of legal process cannot be used to support probable cause. "An otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant, but not disclosed to the issuing magistrate... a contrary rule would, of course, render the legal process requirements of the fourth amendment meaningless."

Finally, the court found that in this case the *nolle* amounted to a favorable termination. Abandonment of prosecution is ordinarily insufficient to constitute favorable termination, if the abandonment is pursuant to an agreement of compromise or out of mercy requested by the accused. To determine whether a *nolle prosequi* constitutes a favorable termination the court must look at the stated reasons for the dismissal as well as circumstances surrounding it to determine whether the dismissal indicates the accused innocence. The dispositive inquiry is whether the failure to proceed implies a lack of reasonable grounds for the prosecution. The State's opinion that there was insufficient evidence upon which to retry the defendants as the case could not be proven beyond a reasonable doubt amounted to a favorable termination of the proceedings.

Deville v. Marcantel, 567 F.3d 156 (5th Cir. 2009)

Deville, a forty-five year-old registered nurse was driving with her two year-old granddaughter when she was stopped for allegedly driving 10 miles over the speed limit. She asked why she was stopped, was told of the speeding violation and responded that she had her cruise control on the speed limit. She stated the stop was bullshit and repeated the comment while retrieving her papers. She

refused the officer's request to step out of the vehicle responding that she hadn't done anything wrong. The officer asked her again to step out of the vehicle and indicated that he was calling child services to pick up her two year-old granddaughter. Deville rolled up her window, called her husband, daughter-in-law and son. The officer walked to his cruiser and called the chief of police, Marcantel. Upon the arrival of the chief who was off-duty, spoke to the officer and then approached the car telling Deville that if she didn't roll down the window, he would break it. Deville did not roll down her window, stating that she was waiting for her husband, at which point Marcantel began hitting the window of the car with his flashlight. When she began to roll down the window, the glass broke, Marcantel grabbed her through the window, opened the door, pulled her out of the vehicle and placed her in handcuffs. After falling to the ground she was lifted up and placed in the back of the cruiser. After being taken to the hospital, she was charged with speeding, aggravated battery and resisting an officer. The toxicology report from the hospital showed some prescription medications in Deville's blood which resulted in Marcantel seeking an arrest warrant for driving under the influence of a controlled substance. The warrant was issued 9 months after the initial arrest. Deville alleged that the subsequent charges were motivated only by her threat of litigation against Marcantel.

The Court found sufficient questions of fact to deny the officer qualified immunity on his false arrest claims involving speeding, resisting an officer and failure to sign a traffic ticket.

The Court also denied the officer summary judgment on the excessive use of force claim. Here, there was a traffic stop for a minor traffic offense, unsupported by probable cause, Deville's passive resistance to being removed from her vehicle, did not justify a threat of calling child services, beating on Deville's driver's window with a heavy flashlight, breaking the window, a rough extraction from the vehicle causing a forceful blow to Deville's abdomen and handcuffs applied so tightly they caused severe nerve damage. These actions were sufficiently egregious to warrant a denial of qualified immunity.

Gonzales v. City of Elgin, ___ F.3d ___ (7th Cir. 2009)

At 4:30 a.m. the six plaintiffs were gathered following a wedding party when they were informed that a couple of their friends were being beaten at a nearby restaurant. By the time the six men and women arrived at the restaurant the fight was over. The first officer to arrive told everybody to leave and when one of the plaintiffs asked why, the officer told him to "...get the fuck out of here". When more police cars arrived, two of the men began to walk away, at which point, one of the defendant officers allegedly grabbed him and officers allegedly punched and kicked the arrestee. Some of the other plaintiffs who protested the arrest were subsequently arrested. The Court describes in some detail each of the incidents and the disputed facts between the plaintiffs' stories and the officers' renditions. The videos on the police cruisers generally support the plaintiffs' version of events.

The defendants' argument supporting probable cause is premised on the factual assumption that when the police arrived at the restaurant the scene was chaotic, however, at least one of the police videos shows officers resting against cars, wandering around the scene, and pausing to talk and laugh with one another. In rejecting the plaintiffs' arrest for resisting or obstructing peace officers, the court cited a number of prior decisions indicating that even if the plaintiffs had approached the officers who were attempting to make an arrest, there is nothing wrong in itself with approaching a police officer. "[T]he First Amendment protects even profanity-laden speech directed at police officers...Merely

arguing with a police officer—even using abusive language—does not constitute resisting a peace officer...disrespect for the law, antagonism, or belligerence is insufficient to constitute resisting or obstructing a peace officer.” Citations omitted. The Court also found that the officers were not entitled to qualified immunity on the excessive use of force or failure to intervene claims. “In the situation the plaintiffs describe, it is clearly established that officers may not, without provocation, start beating, pepper-spraying, kicking, and otherwise mistreating people standing around a restaurant parking lot (even in the middle of the night).”

Hollins v. City of Milwaukee, ___ F.3d ___ (7th Cir. 2009)

Hollins, a freelance photographer was walking on the sidewalk across the street from where police were conducting a high risk search warrant. When he stopped and began taking photographs, an officer crossed the street and told him, in disputed language, to move south from the location. He moved a short distance and was told to move further but refused asking for the officer’s name and badge number, at which point he claims the officer responded, “that’s it, fucker, you are going to jail.” This officer and another then allegedly used force to arrest Hollins which he claimed included being thrown to the ground, maced, choked and resulting in the breaking of his camera. He was subsequently found guilty of violating an ordinance stating that, “an officer may order a citizen from a public place when the officer perceives that the safety of the citizen, other citizens or officers in the area may be put at risk...”

The Court first addressed Hollins’ failure to train claim. Finding that the City presented evidence indicating the officers were trained in the areas of civil rights, constitutional law, arrest and detention procedures, use of force and the Milwaukee Code of Ordinances, including the one in question, the Court dismissed the failure to train claim.

Hollins’ first amendment claim also failed as the officers testified that his picture taking had nothing to do with his arrest. He was directed to leave as he stood directly across the street from a purported drug house where a high risk search warrant was being executed and he failed to comply with the officer’s instructions.

Sherouse v. Ratchner, 573 F.3d 1055 (10th Cir. 2009)

Three armed robberies took place in quick succession including one at “Shoes on a Shoestring.” Witnesses described the robber as a black female, 5’2” and 110-120 lbs. Some described her as approximately seventeen, while others suggested that she was in her twenties. Shortly after the robberies police received an unrelated call from a resident regarding two suspicious young females sitting on a curb in front of an apartment complex near “Shoes on a Shoestring”. Concluding that the description matched, Officer Stone handcuffed Ms. Sherouse, patted her down and placed her in the back of a cruiser. The police brought witnesses to the scene but it is disputed as to whether any of them firmly identified Ms. Sherouse. Both girls were transported to the police department. The officers claimed to have probable cause to believe Ms. Avila aided, abetted or conspired by going into her apartment and retrieving her sweater to disguise the robber’s identity. Sherouse, 14 years old and Avila, 13 years old, were brought to the police station on suspicion of criminal activity and thereafter released. Both sued claiming the transport to the police department was tantamount to an arrest. The jury found in favor of the defendants. On appeal plaintiffs challenged jury instructions including one that stated, “A police officer’s probable cause determination is not negated if the officer reasonably but

mistakenly believed that probable cause existed at the time of the arrest.” The Court found that this instruction was consistent with Illinois v. Rodriguez, 497 U.S. 177, 185 (1990) which held that, “...a police officer’s reasonable mistake of fact does not negate probable cause, noting that the Fourth Amendment does not require ‘factual accuracy.’”

On the judgment as a matter of law, the Court denied Sherouse’s motion determining that if three witnesses had either positively identified her as the robber or suggested that it was likely that she was the perpetrator, according to the officer’s testimony, then a reasonable jury could have decided in favor of the defendants.

The Court did determine that Ms. Avila’s motion should have been granted as the police belief that Ms. Avila may have been helping Ms. Sherouse conceal her identity, by providing her a sweater, was insufficient to support probable cause. Association with known or suspected criminals is not enough in itself to establish probable cause. The Court further explained that, “Where an officer observes inherently innocuous behavior that has plausible innocent explanations, it takes more than mere speculation or possibility to give rise to probable cause to arrest.”

McBride v. Grice, ___ F.3d ___ (7th Cir. 2009)

McBride claimed that he had the right under Illinois law to remove a disgruntled employee from his clothing store as she was shouting profanities, throwing clothes on the floor, turning over clothes racks and breaking clothes hangers. The officer interviewed Guyton, the employee, and told him that McBride had hit her on the left side of the head with a closed fist and dragged her out of the store. The officer noticed minor swelling of the left eye and a scratch on her forehead. He also watched one of two videos which did not clearly confirm either story, but refused to watch the other video.

The Court ruled that in order for a wrongful arrest claim to succeed under Section 1983, a plaintiff must prove that the police lacked probable cause. The trial judge had ruled that once the officer had probable cause he had no duty to watch the second video or otherwise continue the investigation. Given Guyden’s statement, her injuries and portions of the altercation viewed on the video, the officer had sufficient probable cause that justified the arrest. “There is no constitutional or statutory requirement that before an arrest can be made the police must conduct a trial.”

Manley v. Paramount’s Kings Island, 299 Fed.Appx. 524 (6th Cir. 2008)

Upon getting off a rollercoaster Goins noticed that her purse was missing from the cubicle where she had left it. She and a friend went to a bathroom calling her cell phone and heard it ringing in the bathroom stall. Plaintiff, Manley, emerged from the stall with a square bulge in her sweater. Manley, accompanied by a child, went behind a kiosk and when they left, Goins checked finding her purse which was empty. When Goins confronted Manley, she denied knowing anything about her property and proceeded toward the exit. Goins’ friend, who had retrieved a security guard, went to the parking lot and when the officer shined his flashlight in Manley’s direction, she and her family fled. When the officer caught up with her, she again professed her innocence and was never touched, searched or arrested, and was allowed to go on her own accord. After viewing the videotape, the officers observed Manley pointing to the purse and the juvenile, believed to be her daughter, taking the purse from the cubicle and leaving the area. A warrant was obtained for Manley’s arrest, but the court

dismissed all charges. Manley sued claiming that the stop was not based on reasonable suspicion and the arrest was not based on probable cause.

The Court ruled that the officer, in fact, seized Manley in the parking lot by shining his flashlight and chasing her which resulted in her yielding to the officer's authority. The stop was based on reasonable suspicion, there was no force or search. Manley's conclusory claim that she was stopped for too long a period of time was not based on any evidence and was refuted by independent witnesses who indicated the stop only lasted for a few minutes.

The Court found that given the victim and witness statements plus the video, there was probable cause to arrest Manley. In addition, there was undisputed evidence of her attempt to run when confronted by the officer investigating the theft. Her claim of innocence was of no import. "While the police may not ignore known exculpatory evidence in judging probable cause, they are under no obligation to give any credence to a suspect's story and need not halt the investigation just because the suspect gives a plausible explanation for her conduct."

SEARCH & SEIZURE

Brooks v. Rothe, 577 F.3d 701 (6th Cir. 2009)

Lt. Rothe arrived at a shelter for victims of domestic violence in response to a 911 medical call. The only employee there being concerned about the safety and security of persons in the shelter and questioning whether Rothe was a police officer refused to let him enter the premises. Shortly after he left, the ambulance arrived and determined that the medical call involved a drug overdose rather than the prior indication of back pains. The lieutenant, chief, a prosecuting attorney and a board member of the shelter, who was also an assistant prosecutor believed that a warrant was not required to enter the premises because of potential destruction of evidence and concern for the safety of the residents. When the Lt. and the board member/prosecutor arrived they were refused admittance to the shelter by the plaintiff. After repeated requests to enter the plaintiff was arrested. The appellate court in a divided opinion determined that the Lieutenant's demand to be admitted was justified by exigent circumstances based on the possibility of destruction of evidence and the risk of serious injury to other shelter residents including children. Therefore, his order to be admitted was lawful. Michigan law, in pertinent part, allows for an arrest for obstruction when a person refuses to comply with a lawful command. "A warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146 (2004). The validity of the arrest does not depend on whether the suspect actually committed a crime. Michigan v. DeFillippo, 443 U.S. 31 (1979). In this case the plaintiff not only admitted she refused to allow the lieutenant entry into the premises but also indicated that she had her left hand on the door and her left foot at the edge of the door, blocking the entry.

Manzanares v. Higdon, 575 F.3d 1135 (10th Cir. 2009)

Albuquerque Police investigating a rape arrived at the plaintiff's home as the plaintiff had indicated to another officer that he had some information related to the crime. The plaintiff consented to the entry of the officers into his home and after a discussion about the suspect, who he worked with, he indicated that he did not know the suspect's last name or his address. He eventually decided to end the interview and asked the officers to leave his home. The officers refused and when he became

agitated the plaintiff was handcuffed. Officers claimed they handcuffed him because they were afraid he might warn the suspect if released. There was also some suggestion that they were in somebody else's home and did not know if he had any weapons. They held him inside the home until a sergeant arrived (approximately two hours later), at which point plaintiff agreed to take the police to the home of the suspect. They brought him to the home of the suspect where he remained handcuffed in the backseat for several hours until the suspect exited his house and was taken into custody. The plaintiff was returned to his home after being detained and handcuffed in the squad car for more than three hours.

The defendants attempted to justify their detention of the plaintiff as an investigative detention based on reasonable suspicion that he was obstructing an officer and that he was being detained as a witness. It was undisputed that the officers entered the home with consent. It was also undisputed that the plaintiffs told them to leave the home. The officers guessed that the plaintiff was violating the law which was based on pure speculation that he could have been more cooperative and could have shared more information. The officer's detention of a witness for information and fear of potential interference in an ongoing investigation did not justify their remaining in the plaintiff's home.

The Court noted that witness detentions are confined to the type of brief stops that interfere only minimally with liberty. The Court could find no basis for an investigative detention within the plaintiff's home, indicating that any such detention must be based on probable cause. The officers were constitutionally compelled to leave his home when he withdrew consent. Combining the Payton line of cases regarding warrantless entries and the Jimeno case regarding the control of consent, the Court concluded that once consent is withdrawn an officer must have probable cause to remain on the premises. Precedent in Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006), allowing officers to require witnesses to remain in their home did not justify the plaintiff's detention.

The next question was whether or not the plaintiff was unlawfully detained in the rear of the police cruiser. The Court first noted that a detention of 90 minutes or longer has never been determined to be less than an arrest by the Supreme Court or the 10th Circuit. Second, the plaintiff was handcuffed and locked in a confined space for the entire time of the detention. Defendants argued that the police department standard procedure calls for handcuffing those who ride in the back of squad cars but the Court stated that such a policy could not control the analysis of liability for the constitutional violation.

A brief detention of a witness may be permissible if reasonable. Reasonableness requires a balance of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty. Brown v. Texas, 443 U.S. 47 (1979) noting that police have less authority to detain those who have witnessed a crime for investigatory purposes than to detain criminal suspects the Court found plaintiff's detention to be unreasonable under the Fourth Amendment.

Spinelli v. City of New York, ___ F.3d ___ (2d Cir. 2009)

In the wake of September 11th, New York City Police began an inspection program of sensitive locations including firearms stores. A warrantless inspection turned up security concerns in plaintiff's store, resulting in the suspension of her dealer's license and the seizure of three hundred weapons without a warrant. The Court found the warrantless inspection of the store to be objectively reasonable

given the reduced privacy interest in a closely regulated industry such as gun dealerships, and the concomitant heightened governmental interest.

The plaintiff also claimed a denial of due process as the suspension notice did not adequately apprise her of the grounds for the suspension and the weapons were seized without an adequate hearing. The Court found that, “While a person does not have a protected interest a ‘possible future [business] license... the situation changes once the license is obtained.” Citations omitted. “While a ‘possible future license’ involves a purely speculative property interest, once the government has granted a business license to an individual, the government cannot ‘depriv[e] [the individual of] such an interest... without fourteen appropriate procedural safeguards’”. Citations omitted. “[A] state-issued license for the continued pursuit of the licensee’s livelihood, renewable periodically on the payment of a fee and revocable only for cause, creates a property interest in the license.”

The Court noted that in determining how much process is due, the court must weigh (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards, and (3) the government’s interest. Matthews, 424 U.S. at 335. Given the exigent circumstances involved in ensuring the security of the gun shops following 9/11, the Court found that the post-deprivation process by which Spinelli actually had her license reinstated, was adequate.

Sanchez v. Canales, 574 F.3d 1169 (9th Cir. 2009)

Officer Canales, six other career criminal detail officers and a probation officer arrived at the home of Oscar Sanchez, who was on probation and had prior arrests for robbery. Sanchez’ mother, father, grandmother, sister and four year-old nephew were all inside the residence. Upon knocking and announcing, his sister opened the door but closed it when she saw it was the police. Officers continued knocking and were told that Oscar was in prison. When the door was finally opened the officers entered the house and made all of the occupants leave except for the grandmother who was suffering from cancer. The family members remained outside for between 10 and 45 minutes. Upon being shown a letter sent by Oscar from prison, the officers remained for ten more minutes.

The Court relying on Mueller v. Mena and Michigan v. Summers concluded that if the officers had probable cause to believe Sanchez was at the home they would have the right to enter the home without a warrant and the additional intrusion of detaining the occupants was appropriate under the Summers justifications of preventing flight, minimizing risk of harm to the officers and facilitating the orderly completion of the search.

The dissenting judge considered the officer’s failure to exercise due diligence as egregious. Sanchez had been in prison during the preceding ten months and the officers never tried to call his probation officer or check his current rap sheet or call the California prison authorities.

Hartline v. Gallo, 546 F.3d 95 (2d Cir. 2008)

The plaintiff, a 21 year-old woman was driving a pick-up truck running errands for her employer. Upon being stopped for a missing rear license plate the officer saw a stem of marijuana plant on the floor of her truck. The officer told her that if she showed him all of the marijuana she would not be arrested. Hartline answered that there might be some usable bits of marijuana in the

truck at which time she was handcuffed, the truck was searched and the officer found seeds, a pipe and the butt of a marijuana cigarette. She was arrested for a misdemeanor possession charge.

Pursuant to department policy which provided that all females be strip-searched, a female officer conducted a strip-search during which Hartline was crying hysterically. The Court, in a footnote, indicated that since the strip search policy pertained only to females, the plaintiff might have had an equal protection claim which was not alleged.

After being booked the plaintiff was returned to a female cell where she noticed a video-camera focused in the area where she had been strip-searched. She claimed a violation of her Fourth Amendment rights based on the fact that she had been strip-searched in the absence of individualized suspicion that she was secreting contraband on her person and that the strip-search was telecast to male officers in the police department for their amusement. The Court found that the facts did not support reasonable suspicion that plaintiff was secreting contraband on her person, as the officer did not find any usable narcotics, did not see the plaintiff take any suspicious actions suggesting she was hiding something, there was nothing about her physical appearance that suggested she was hiding drugs and the officer did not engage in a less invasive pat-down search.

The Court did list a number of factors which may lead to a justifiable search including (1) excessive nervousness; (2) unusual conduct; (3) an informant's tip; (4) computerized information showing pertinent criminal propensities; (5) loose-fitting or bulky clothing; (6) an itinerary suggestive of wrongdoing; (7) discovery of incriminating matter during routine searches; (8) lack of employment or a claim of self-employment; (9) needle marks or other indications of drug addiction; (10) information derived from the search or conduct of a traveling companion; (11) inadequate luggage; and (12) evasive or contradictory answers. None of these factors were present in this case.

The Court concluded that Hartline's Fourth Amendment rights were violated because she was subjected to a strip-search in the absence of reasonable suspicion that she was hiding contraband on her person. The Court also found that the search was conducted pursuant to the municipal policy and, therefore, vacated the Court's grant of summary judgment in favor of the Village.

Guzman v. Chicago, 565 F.3d 393 (7th Cir. 2009)

The officers received information for the first time by a credible informant. The informant provided information on gangs which coincided with information that they had and he also identified from photos a number of gang members, further solidifying his credibility. The informant said he saw Estrada, a gang member, enter a two story dwelling and exit with a handgun. When the agents drove by the particular address, which was identified as single family home but had a small real estate sign in the front, they assumed that someone was running a small real estate business out of their home. Estrada had given the address previously, but it had been four years since he last provided that as his address. The defendant signed an affidavit requesting a search of Estrada, a felon, who was on bond for unauthorized use of a weapon and described the premises as a single family residence. Nine Chicago officers and seven FBI agents, upon entering the building, noted that it was not a single family residence, but rather housed a real estate office, an apartment on the first floor and another on the second. As the first floor apartment was vacant the officers entered the second floor apartment where they found the pregnant plaintiff, Guzman, in a loose fitting t-shirt. The officers forced the door open with a crowbar, entered with their guns drawn and ordered Guzman, who did not speak English, to lie

on the floor. She claims she was on the floor for about ten minutes, while officers conducted a security check. She was not allowed to get up and put pants on. She told an interpreter that Estrada did not live in the apartment and there was no hand gun there. Officers searched the apartment for thirty minutes, but found nothing.

The Court found that based on the apparent reliability of the informant given his personal knowledge, that the officers had probable cause, even though the informant's information turned out to be erroneous. The officers also took reasonable steps in attempting to verify the information.

The Court noted that the fact that a warrant is properly issued is only half of what the Fourth Amendment requires. The warrant must also be properly executed. A warrant cannot be executed by persons who know it to be ambiguous. Once the officers knew that this was not a single family dwelling, they should have called off the search, and not doing so violated Guzman's constitutional rights. Finding that the execution of the search of the apartment was illegal, the Court also reinstated the plaintiff's false arrest claims.

OFFICIAL CAPACITY CLAIMS

Waeschle v. Dragovic, 576 F.3d 539 (6th Cir. 2009)

Family members sued claiming that the incineration of their mother's brain following a criminal forensic investigation violated their Fourteenth Amendment right to due process. Well-settled law indicates that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to possession, control and burial of such body. However, the Court in discussing Ohio and Michigan law determined that the law is not clearly established with regard to the retention or disposal of bodily parts removed for forensic examination and testing. The Court granted the individual defendants' motion for summary judgment based on qualified immunity, but remanded the case to the State Supreme Court with regard to the official capacity claim on the following question. "Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next of kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?"

James v. Harris County, 577 F.3d 612 (5th Cir. 2009)

Deputy Sheriff conducted a consensual search following a stop for speeding. Upon finding a gun he returned to his vehicle to handcuff James who was in the backseat of his cruiser. During a struggle, he stated that he shot James once in the back and three times in the face. The jury was deadlocked on the excessive force issue, after which the judge entered a judgment on behalf of the County on the municipal policy issue. The family argued that the County's failure to thoroughly investigate officer involved shootings within the department created an expectation of impunity through the use of excessive deadly force. Their theory was supported by a criminologist who reviewed thirty-six such investigations finding them below investigatory standards. He suggested that an informal network of communication serves to inform officers as to what kinds of conduct would be permissible.

The appellate court assumed a constitutional violation and assumed the alleged policy was adopted with deliberate indifference in that it would spawn reckless police arrests in violation of the Constitution; however, the Court could not find evidence that supplied a direct causal link between the use of force in the alleged policies of lax investigation and discipline. The plaintiffs failed to establish that the officer in question had knowledge of the policy and the expert's testimony failed to supply a direct causal link between the excessive use of force and the alleged policy deficiency.

Boyd v. City and County of San Francisco, 576 F.3d 938 (9th Cir. 2009)

Cammerin was shot and killed by officers following a high speed pursuit after he attempted two separate kidnappings within minutes of each other. The police expert testified regarding suicide by cop and the jury ruled in favor of the defendants. Plaintiffs appealed a number of evidentiary rulings. Generally the court claimed that all of the challenged evidence was properly admitted since it had a tendency to make a fact or consequence more or less probable under the Federal Rules of Evidence, Rule 401.

1) With regard to evidence of the 1993 pursuit eleven years prior to the incident resulting in an accident where the plaintiff lost his legs, the Court ruled that this evidence was admissible as it made it more probable that the plaintiff resolved to place liability for his death on the police following a traumatic life changing event tied to police action. He further supported the expert suicide by police theory, as suicides occur more frequently around significant anniversaries, such as the date of the 1993 high speed chase.

2) Cammerin's criminal history, particularly the two kidnapping attempts and the potential sentence he faced made it more probable that he was trying to provoke police to engage in a shootout rather than surrender. This evidence was more probative than prejudicial and given the nature of the potential sentence it was relevant to his willingness to commit suicide. Evidence of an arrest in Oakland three days prior to the incident during which he exhibited facile ability to get down on the ground, in spite of his prosthetic devices, refuted the family's claim that he was going to his vehicle because he was unable to get on the ground. It was also relevant to the police experts' testimony that his actions in Oakland represented a practice run frequently observed in cases of suicide by cop.

3) Evidence of rap lyrics in the vehicle praising the murder of police officers was consistent with the theory of suicide by cop. It was highly probative of his animosity toward police. Other lyrics advocating prostitution were prejudicial but amounted to harmless error.

The Courts also found probative evidence that he had drugs in his system, prior lawsuits against police and the expert testimony regarding suicide by police.

Sanders-Burns v. City of Plano, ___ F.3d ___ (5th Cir. 2009)

Sanders entered a neighbor's home yelling profanities and began removing his belt and pants when the neighbor subdued him by placing him in a headlock on the floor and lying on top of him. When the defendant officer arrived he told the neighbor to get off of Sanders and handcuff Sanders who continued to lie face down on the floor, while the officer stood nearby speaking to witnesses. At one point, Sanders began to aggressively kick his legs, but eventually stopped. When the officer nudged him with his foot, and asked if he was okay, Sanders moved his head and mumbled something

that was not understood. Approximately five minutes after the initial officer arrived, the second officer entered the home and it was noticed that Sanders might not be breathing. More than forty-five minutes later Sanders arrived at the Medical Center and was pronounced dead due to sudden death, chest compression and restraint, known as positional asphyxia.

The initial defendant officer was sued only in his official capacity and the plaintiff amended his complaint to bring suit in the officer's individual capacity after the statute of limitations had run. The Court after discussing the split in the circuits determined that in this case the amended complaint related back to the original complaint as governed by Rule 15(c).

Both officers testified that they never received training regarding positional asphyxia. The Court still found that the plaintiff failed to produce sufficient evidence demonstrating that Plano's training, policy or procedures were inadequate. Both officers received certified training at the Academy in training on how to deal with individuals at a high risk of custodial death due to being handcuffed in a prone position. They were also trained in proper procedures for handcuffing, the importance of monitoring individuals in custody and when it is necessary to obtain medical help. Evidence failed to establish that Plano acted with deliberate indifference. There was no evidence with regard to a pattern of conduct and with regard to a single incident of liability the plaintiff failed to provide evidence to support her claim that the need for more training was obvious or failure to train was likely to result in a constitutional violation.

Estate of Moreland v. Dieter, 576 F.3d 691 (7th Cir. 2009)

A jury returned a verdict against two officers for excessive force in the amount of \$56.5 million dollars in damages including \$29 million dollars which were compensatory. This case discusses Indiana's statutes regarding indemnification.

The appellate court had previously upheld the judgment against the officers.

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