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FEATURED CASE:

Search: Chalking of Vehicle Tire by Parking Enforcement is Unreasonable Search Under Fourth Amendment

Taylor v. City of Saginaw, no. 17-2126 (6th Cir. Apr. 22, 2019).

Reversing the district court, the Sixth Circuit has found that a city parking enforcement practice of chalking car tires to determine length of stay in a time-limited spot constitutes an unreasonable search which is not justified under the "community caretaker" exception.

Alison Taylor (Taylor) received 15 parking tickets over a three-year period from Saginaw, Michigan (City) parking enforcement officer Tabitha Hoskins (Hoskins)-each of which bore the date and time of her infraction. Taylor brought a Section 1983 action against the City and against Hoskins, alleging that chalking her vehicle's tires to determine length of stay in a time-limited parking spot, without her consent and without a warrant, violated her Fourth Amendment rights. The district court agreed with Taylor that the chalking process constitutes a warrantless "search"

for constitutional purposes, but that the search was reasonable under the "community caretaker" exception to the warrant requirement, and that a lesser expectation of privacy applied to a vehicle parked on a public street. It dismissed the action.

In a decision which has inspired as much commentary from IMLA members as any in recent memory, the Sixth Circuit reversed. Its analysis is worth reviewing:

Chalking constitutes a search: The Circuit agreed with the lower court that chalking is a search. It first referenced the most prevalent and widely-used search analysis, articulated in *Katz v. United States*, 389 U.S. 347 (1967), which advises that a search occurs when a government official invades an area in which "a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). Under *Katz*, a search is analyzed in two parts: "first that a person exhibit an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. As the Circuit pointed out, a "physical intrusion" is not necessary for a search to occur under *Katz*.

The Circuit found a useful comparator in the more recent Supreme Court decision in *United States v. Jones*, 565 U.S. 400 (2012), which found that that the unauthorized attachment of a GPS device to a vehicle in order to track its movement for evidentiary purposes violated the Fourth Amendment. In *Jones*, the Court applied a seldom used "property-based" approach to Fourth Amendment search inquiry, finding that when governmental invasions areaccompanied by physical intrusions, a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information. *Id.* at 404-405.

While conceding that "*Jones* does not provide clear boundaries for the meaning of common-law trespass," the court found language in the Restatement (Second) of Torts to conclude that "there has been a trespass in this case because the City made intentional physical contact with Taylor's vehicle." That trespass was further "conjoined with . . . an attempt to find something or to obtain information," constituting a search.

The search is unreasonable: The district court had found that the City's warrantless search of Taylor's vehicle was reasonable due to a lesser expectation of privacy with automobiles. The Circuit disagreed. Though an automobile enjoys a "reduced expectation of privacy" due to its "ready mobility," that reduced standard is encompassed in the "automobile exception" to the warrant requirement. That exception permits officers to search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime-a factor not present in this case. Here, the Circuit held, "the City commences its search on vehicles that are parked legally, without probable cause or even so much as 'individualized suspicion of wrongdoing'-the touchstone of the reasonableness standard."

The community caretaker exception doesn't apply: The community caretaker exception applies when government actors perform "caretaking" functions rather than traditional law-enforcement activities. To apply, the function in question must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The community caretaker exception "does not provide the government with refuge from the warrant requirement except when delay is reasonably likely to result in injury or ongoing harm to the community at large." While it has been applied to allow warrantless inventory searches of vehicles, those were situations where the vehicles were impeding traffic flow and had been towed to promote public safety and prevent hazards, or were abandoned in suspicious circumstances that triggered concerns about contraband or explosives. Here, the City could not demonstrate how its chalking-based search promoted public safety; to the contrary, at the time of the search, Taylor's vehicle was lawfully parked in a proper parking location, imposing no safety risk whatsoever. According to the Circuit, "Because the purpose of chalking is to raise revenue, and not to mitigate public hazard, "the City was not acting in its role as a community caretaker."

Opportunity for reconsideration? In the end, the Circuit appeared to allow room for a revised

challenge to its determination:

> The City does not demonstrate, in law or logic, that the need to deter drivers from exceeding the time permitted for parking-before they have even done so-is sufficient to justify a warrantless search under the community caretaker rationale. **This is not to say that this exception can never apply to the warrantless search of a lawfully parked vehicle. Nor does our holding suggest that no other exceptions to the warrant requirement might apply in this case.** However, on these facts and on the arguments the City proffers, the City fails to meet its burden in establishing an exception to the warrant requirement.

NOTE: IMLA is informed that the parking spaces in question were not metered and did not therefore "raise revenue" in the traditional sense of the word. We note furthermore that the Circuit acknowledged in a footnote that *Cady* speaks to violation of a *criminal* statute, and the City was merely seeking evidence of violation of a civil statute, but the court avoided that discontinuity: "However, because we hold that the community caretaker exception fails in other regards, we need not reach this issue."

IMLA will be providing amicus assistance for Saginaw in seeking *en banc* or other review of this decision.

LINK

Due Process: Recordation of Plats without Landowner's Permission is Basis for Section 1983 Due Process and Equal Protection Actions

Cherry Knoll, L.L.C. v. Jones, no. 15-50494 (5th Cir. Apr. 22, 2019).

Reversing the district court, the Fifth Circuit holds that, where the city council ratified the recording of plats which the landowner had expressly requested not be recorded, where recording those plats helped the city negotiate a reduced price to acquire part of the land for municipal purposes, and where a private contractor was deeply involved in the acquisition process, all the defendants were subject to suit for deprivation of the landowner's due process and equal protection rights.

In November 2006, Cherry Knoll L.L.C., a developer (Cherry Knoll) acquired land in the City of Lakeway, Texas (City). Cherry Knoll prepared two Subdivision Plats, one commercial and one residential, and provided them to the City Engineer but requested, because development funding was uncertain at the time, that the Engineer hold the plats but not record them. The Engineer agreed to do so.

In 2014, the City wrote to Cherry Knoll, stating that a road improvement project made it necessary to acquire a small portion of the Cherry Knoll property. An appraisal was produced for the land in question, but it was for $381,000, a much higher price than the City wanted to pay. A City official subsequently notified Cherry Knoll as follows:

> It has recently come to my attention that the approved subdivision plat documents known as CHERRY KNOLL FARMS SUBDIVISION PLAT and CHERRY KNOLL FARMS COMMERCIAL PLAT were found in our offices, having not been filed. Please allow this letter to serve as notice that the plat documents have since been executed by Water Control and Improvement District (WCID) No. 17, the Code Official, the Zoning and Planning Commission Chair and the Mayor and will be filed with the Travis County Clerk in the next five (5) to seven (7) days. We apologize for any inconvenience this may have

caused you.

Although Cherry Knoll immediately emailed the City again instructing that it did not want to file the plats, the City did not respond.

Internal City emails included conversations stating "We sent notice to the property owner last Friday of our intent to record the plat and we intend to record it this Friday. **We have concluded that we need to get them to the table to discuss a resolution and this creates pressure for them to act**." Other emails indicated a desire that the appraiser see additional documents with "key features" of the property-a flood plain and power line easements-which were contained in the plats and would reduce the cost per square foot; "**[p]lus once the plat is recorded, we would be in a position to better negotiate a settlement . . . "**

The City then attempted to reach a settlement with Cherry Knoll. It had received a revised appraisal was for $262,000, but that was not disclosed to Chery Knoll, and the City offered $130,000 for the needed parcel. Cherry Knoll ultimately settled with the City, selling the parcel for $240,000.

Cherry Knoll then sued to invalidate the agreement, asserting a claim against the City under Section 1983 for violating its rights to procedural due process, substantive due process, and equal protection. It contended that by filing the subdivision plats without its consent, the City deprived it of the right to determine the use of its land and imposed a significant encumbrance on the property. Alternatively, Cherry Knoll asserted claims against the City Manager and others-including a private contractor-- who, it contended, conspired to drive down the value of the Cherry Knoll parcel.

All defendants filed motions to dismiss , which the district court granted. The court found that the allegations did not demonstrate a municipal "policy or custom" of improperly recording plats, that the City Manager was entitled to qualified immunity, and that the private contractor was not part of a conspiracy. Given that the federal claims were dismissed, the court declined to exercise supplemental jurisdiction over the state law claims.

Reviewing the claims de novo, the Fifth Circuit disagreed. Noting that *Monell*-type liability may attach where the action in question is taken by an official or body responsible for establishing final policy regarding the subject matter in question. The Circuit found that here, the decisions to file the plats and to ratify the settlement agreement were made by the City Council-not merely by staff as the district court had determined. Cherry Knoll's well-pleaded factual allegations satisfied the standard for official municipal policy.

The Circuit also disagreed that the City Manager was entitled to qualified immunity. As the court noted, a defendant official must first satisfy his burden of establishing that the challenged conduct was within the scope of his discretionary authority, which he could not do. Cherry Hill correctly pointed out that the *applicant for plat approval* is the proper party to have plats recorded. This meant that the City Manager was not acting within his discretionary authority when he recorded the plats, and no qualified immunity attached.

The Fifth Circuit also saw the private contractor's role differently from the district court, which had found that the contractor merely acted on instructions from the City. Documents attached to Cherry Knoll's complaint reflected that the consultant was well aware that the plats had never been recorded and that taking such action would pressure Cherry Knoll. The Circuit found that Cherry Knoll's well-pleaded allegations made plausible its claim that the contractor was a "willful participant in joint action" with City officials. Therefore, the contractor, although not a state entity, was acting "under color of state law" for Section 1983 purposes.

LINK

Employment: Second Circuit Adopts "But-For" Causation Standard in Employment Discrimination Claims

Natofsky v. City of New York, No. 17-2757 (2d Cir. Apr. 18, 2019).

Joining the Fourth, Sixth and Seventh Circuits, the Second Circuit has adopted a "but-for" causation standard in a discrimination case brought by a demoted New York City employee with a hearing disability who argued that a more lenient "motivating factor" standard should govern.

Richard Natofsky (Natofsky) suffers from a pronounced hearing difficulty. From 2012 to 2014, he was employed by the City of New York (City) the Director of Budget and Human Resources for the City's Department of Investigation, a position which provided him a private office and a salary of $125,000. Mayoral changes in the City resulted in new supervision over Natofsky, with negative results. His work was found to contain grammatical errors and his slow pace in responding to emails was criticized. He was demoted to a financial analyst position with a salary of $88,000 and a desk in a cubicle in a high-traffic area of the office.

Natofsky eventually resigned from that position, taking a job with the City's Department of Transportation for $100,000. He then sued the City and various City employees for violation of Section 504 of the Rehabilitation Act of 1973 (Rehabilitation) as well as state and City laws. He cited the foregoing adverse employment actions, which he claimed were due to his disability, and asserted that the City failed to accommodate his disability and retaliated against him. The district court held that no reasonable jury could have concluded that Natofsky had experienced any adverse employment action solely by reason of his disability and further held that Natofsky failed to establish a failure to accommodate or retaliation claim, and granted summary judgment to the City.

On appeal, the Second Circuit confronted an issue of first impression for it: reconciling the language of the Rehabilitation Act, which provides that no individual shall be subject to discrimination in any program or activity receiving federal financial assistance "solely by reason of her or his disability" with the wording in the ADA, which makes it unlawful for an employer to discriminate against an individual "on the basis of disability." As the Circuit noted, "Although the two acts appear to have different causation standards, Congress amended the Rehabilitation Act in 1992 to add a provision which states that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under title I of the Americans with Disabilities Act of 1990."

Whether that language "requires courts to use the ADA's causation standard for claims alleging employment discrimination under the Rehabilitation Act is an issue of first impression in this Circuit. . . . We now hold that when a plaintiff alleges an employment discrimination claim under the Rehabilitation Act, the causation standard that applies is the same one that would govern a complaint alleging employment discrimination under the ADA."

Natofsky argued that the result of this confluence was that he only need to show that his disability was a "motivating factor" in the adverse employment actions taken against him. The City argued that the standard to be applied to Natofsky's employment discrimination claims must be that "but for" the disability, the adverse action would not have been taken.

The Circuit agreed with the City. Reviewing the ADA's legislative history, including recent amendments thereto, as well as various precedents construing the ADA, it concluded that there is no express instruction from Congress in the ADA that the "motivating factor" test applies. "We, therefore, join the conclusion reached by the Fourth, Sixth, and Seventh Circuits that the ADA requires a plaintiff alleging a claim of employment discrimination to prove that discrimination was

the but-for cause of any adverse employment action." Accordingly, the Circuit affirmed the lower court's determination, albeit on slightly different grounds.

DISSENT: Judge Chin dissented. His review of the relevant caselaw and legislative history compelled an opposite result: "I respectfully disagree with the majority's conclusion that a but-for standard now governs ADA and Rehabilitation Act claims."

LINK

Sexual Orientation: City's Refusal to Refer Foster Children to Agencies that Discriminate Against Same-Sex Couples is not Religiously-Based and Survives First Amendment Challenge

Fulton v. Philadelphia, No. 18-2574 (3d Cir. Apr. 22, 2019).

A Catholic foster parenting agency that refuses to work with same-sex couples has been unsuccessful in its efforts to require Philadelphia to send foster children to it, based on the Third Circuit's finding that the City's practice is founded purely on anti-discrimination policies and does not implicate First Amendment expression or Establishment Clause rights.

In March 2018, a reporter informed the Department of Human Services (Human Services) of the City of Philadelphia (City) that two of its agencies would not work with same-sex couple foster parents. Human Services investigated and confirmed the allegation. Human Services considers the refusal to work with same-sex couples a violation of anti-discrimination law. The agencies refused to work with same-sex couples because of their views on marriage, and as a result Human Services ceased referring foster children to those agencies, and suspended their contracts with the agencies. One agency, Catholic Social Services (CSS) filed suit alleging the City violated its rights under the First Amendment's Free Exercise, Establishment, and Free Speech Clauses, as well as on a state law claim. CSS appealed a denial of its request for a preliminary injunction renewing the contractual relationship between the City and CSS while also allowing CSS to refuse to work with same-sex couples.

The Third Circuit denied CSS's request for a preliminary injunction, in a case which attracted several hundred amicus participants, finding that the City's non-discrimination policy does not violate the First Amendment. The Circuit held that the policy was a neutral law of general applicability, and that CSS's religious views do not exempt it from that policy. Furthermore, the Court stated CSS failed to show that the City targeted the organization for its religious beliefs, nor was motivated by ill will against CSS's religion.

In that regard, the City's actions differed from those by Colorado authorities in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018), where the Supreme Court specifically found that the state's enforcement of ostensibly acceptable anti-discrimination policies was colored by religious animus towards Jack Phillips, the baker. As the Third Circuit described *Masterpiece*:

> The inference that Phillips was treated worse because of his religion was bolstered by the Commission's different treatment of other bakers who refused to bake cakes bearing homophobic expressions. The state Civil Rights Division found that these actions did not violate the state's civil rights laws because the requested message was offensive in nature. Id. at 1730-31. Thus it appeared that the state had "treated the other bakers' conscience-based objections as legitimate, but [Phillips's] as illegitimate-thus sitting in judgment of his religious beliefs themselves." Id. at 1730

Instead, the court found, the City's policy and application thereof to CSS was based on sincere opposition to discrimination on the basis of sexual orientation.

LINK

Statutes: D.C. Anti-Obstructing Law is Not Void for Vagueness, Despite Using the Word "Incommode"

Agnew v. District of Columbia, No. 17-7114 (D.C. Cir. Apr. 5, 2019).

The D.C. Circuit has upheld a lower court dismissal of a void-for-vagueness challenge brought by three City residents who were arrested after refusing to move out of public spaces following warnings by law enforcement to do so.

The District of Columbia (District) has an anti-obstructing statute that makes it unlawful for residents and visitors to crowd or obstruct the use of streets, sidewalks, or building entrance, and to continue to do so after being instructed by law enforcement to cease such activities:

> It is unlawful for a person, alone or in concert with others:
>
> > (1) To crowd, obstruct, or incommode: (A) The use of any street, avenue, alley, road, highway, or sidewalk; (B) The entrance of any public or private building or enclosure; (C) The use of or passage through any public building or public conveyance; or (D) The passage through or within any park or reservation; and
> >
> > (2) To continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding. D.C. Code § 22-1307(a).

In this case, three residents were arrested under the statute at different times. Two had been standing in the sidewalk in front of their own residences and one was in front of a store, and all refused to move after being instructed to do so. All of the cases were dismissed for want of prosecution. The residents then challenged the statute's constitutionality, claiming it is unconstitutionally vague on its face because it authorizes an unreasonably high degree of enforcement discretion, especially since it applies to nearly all places a pedestrian might be in public.

The D.C. Circuit sided with the District holding the anti-obstruction statute passes constitutional muster and is not unconstitutionally vague. The terms of the statute, according to the Court, are clear such as to shield from arbitrary enforcement and do not confer broad power to law enforcement because it only bars blocking or hindering access to the places the statute identifies. Moreover, an individual is only subject to arrest unless the individual refuses the command of law enforcement asking them to move. The statute does not criminalize such conduct and if a person is not imminently in the way of another's shared use, law enforcement cannot ask that person to move.

The Circuit took time to discuss and affirm the legitimacy of the word incommode:

> The statute's use of the word "incommode" also does not render it vague; the three words read together in context are plainly concerned with impediment or hinderance. "Incommode" on its own is admittedly less clear than "crowd" or "obstruct." As the district court recognized, "incommode" has both a subjective meaning-"[t]o subject to

> inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience"-and an objective meaning-"to hinder, impede, obstruct (an action, etc.)." Incommode, Oxford English Dictionary, www.oed.com/view/Entry/93672; see Agnew, 263 F. Supp. 3d at 98 & n.5. But the statute's grouping of "incommode" together with "crowd" and "obstruct" helps to sharpen the way the drafters were using it. Under the canon of *noscitur a sociis*, a word is generally known by the company it keeps.
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> * * *
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> The statute is not impermissibly vague just because the term "incommode" "may not roll off the average person's tongue today," and does "not mean the same thing to all people, all the time."

LINK

THIS JUST IN: Blacksburg, Virginia to Become First Drone-Delivery Municipality

An April 23, 2019 article in the *Washington Post* notes that Blacksburg, Virginia will be serviced by a drone delivery company, potentially within a few months:

> Wing, a delivery venture that is part of Google parent Alphabet, has become the first drone company to be certified as an "air carrier" by the Federal Aviation Administration, allowing it to launch a package-delivery service within months in Blacksburg, Va.
>
> Company executives said they plan to expand to other parts of Virginia and around the nation, though the timeline for that remains unclear. Uber, UPS and other companies are also working on securing related approvals from federal officials, who have been pushing to expand drone use even as concerns about security and privacy remain.

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