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Pleadings: Parents of Unarmed, Non-resisting Decedent Tased for 90 Seconds are Allowed to Substitute Proper Party and Proceed with Excessive Force Claim

Jones v. Las Vegas Metropolitan Police Department, No. 14-17388 (9th Cir. Oct. 20, 2017).

Reversing the lower court, Judge Kozinski and a Ninth Circuit panel have held that parents of a Las Vegas driver who was tased for 90 seconds and died should be allowed to substitute a correct party plaintiff and to assert Fourth Amendment claims, given that such aggressive action toward an unarmed, non-resistant arrestee was clearly improper under then-existing precedent.

In December 2010, a lone Las Vegas Metropolitan Police Department (LVMPD) officer pulled over Anthony Jones (Jones) for a routine traffic stop. Jones exited his vehicle as ordered but when the officer drew his weapon due to Jones' much larger size, Jones ran away.

The officer called for backup and caught up with Jones. Believing that Jones did not have a weapon, the officer avoided use of deadly force, instead using his taser to subdue the larger man, who fell to the ground. The officer knelt on Jones' back, keeping his taser pressed to Jones's thigh and repeatedly pulling the trigger. The officer continued to tase Jones for 90 seconds, even after four backup officers arrived and handcuffed Jones. For ten seconds, another officer simultaneously applied a taser to Jones' upper back.

Once the officers stopped tasing Jones, his body went limp and he was nonresponsive. The officers tried and failed to resuscitate him but he was pronounced dead shortly thereafter. The coroner's report concluded that "police restraining procedures"-including the tasings-contributed to his death.

Jones's parents sued the LMPD and the officers involved, alleging Fourth and Fourteenth Amendment violations as well as various state law torts. The district court granted summary judgment for defendants on all claims, determining that plaintiffs failed to assert their Fourth Amendment claims as executor or administrator of Jones's estate, as required by the Nevada survival statute, and thus lacked standing. On appeal, the plaintiffs dropped their *Monnell* claims and proceeded solely against the two officers who had applied their tasers.

The Ninth Circuit panel affirmed in part and reversed in part. It held that under the wording of Fed. R. Civ. P. 17 and Circuit precedent, the lower court had abused its discretion by failing to give plaintiffs a reasonable opportunity cure their defective complaint by substituting a proper party. Plaintiffs' mistake was "reasonable" and "honest" under the circumstances and the public interest in having cases heard on their merits required reversal of the lower court on this issue.

The panel held that whether the officers were reasonable in the degree of force used was a triable question of fact; evidence presented at summary judgment would support a finding that the officers' continuous and overlapping use of tasers for more than 90 seconds was unreasonable--a jury could reasonably conclude that the officers knew or should have known that they were creating a substantial risk of serious injury or death. The Circuit found that any reasonable officer would have known that such lengthy and simultaneous tasings could only be justified by an immediate risk of serious injury or death to officers or the public. Such force generally cannot be used on a prone suspect who is not suspected of a violent crime, has no weapon, is not resisting and is surrounded by officers. Because there was clearly established Fourth Amendment precedent on the issue, and a jury could reasonably conclude that the officers used excessive force, the question of qualified immunity must proceed to trial.

Summary judgment denying plaintiffs' Fourteenth Amendment claims was affirmed.

DISSENT: Concurring in part and dissenting in part, Judge N.R. Smith would have affirmed the district court's decision to dismiss the Fourth Amendment claims pursuant to Fed. R. Civ. P. 17. He did not find that the district court abused its discretion in dismissing plaintiffs' Fourth Amendment claims because they failed to name the proper party in interest.

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Prisons: Inmate's Disclosure of Serious Medical Condition Fulfills Exception to PLRA "Three Strikes" Rule, Requiring Court to Consider Deliberate Indifference Case

Mitchell v. Warden, No. 16-12043 (11th Cir. Oct. 17, 2017).

Where an inmate filed a complaint alleging the prison's deliberate indifference to his

hepatitis C, his serious medical infirmity fell within an exception to the Prison Litigation Reform Act's "three strikes" rule and the district court improperly dismissed the inmate's claim.

William Mitchell (Mitchell) was a life-sentence inmate of Georgia's Autry State Prison (Autry) when he filed suit alleging the staff was deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights. The basis for his claim was that the Autry medical staff failed to treat his hepatitis C and that he developed liver cirrhosis as a result. Because Mitchell was a prisoner at the time of suit his case was subject to the Prison Litigation Reform Act ("PLRA"), requiring both that the district court assess whether he had previously filed three or more suits - the "three strikes" rule - and whether there was an applicable exception to the bar such a history would create. The district court found Mitchell had filed three previous suits between 1993 and 1995 and that he did not qualify for the "imminent danger of serious physical injury" exception to the three strikes rule. Mitchell ultimately died from liver cancer, a result of cirrhosis of the liver, itself a result of the hepatitis C that he alleged went untreated by Autry. His estate carried on the case and appealed the lower court's dismissal. The Eleventh Circuit reversed.

The Circuit agreed that Mitchell indeed had three strikes, but rejected the lower court's refusal to grant the medical exception to the three strikes rule. It noted its own 2004 *Brown v. Johnson*, 387 F.3d 1344 (11th Cir. 2004), opinion to define the types of medical situation that would qualify as an "imminent danger of serious physical injury" exception under the PLRA. In that case, the prisoner complained that the prison doctor withdrew his treatment and that because of that withdrawal he would die sooner. It found the allegation met the exception because "[l]iberally construed, Brown alleges a total withdrawal of treatment for serious diseases, as a result of which he suffers from severe ongoing complications, is more susceptible to various illnesses, and his condition will rapidly deteriorate."

The Circuit thus posed the question presented as determining whether "Mitchell's allegations meet that standard. More to the point, we must examine whether he alleged that the prison refused to treat his hepatitis C, as was the case in Brown, or whether he alleged that the prison merely refused to give him his desired treatment." It found the former since Mitchell stated in his complaint that he told the defendants, and his medical records confirmed, he had Hepatitis C and that because of a lack of treatment Cirrhosis had begun and Autry staff failed to give him medication and/or treatment. The Circuit conceded that his "allegations might lack the clarity of counseled pleadings," but that they nonetheless clearly met the pleading standard and precedent of *Brown*. The Circuit rejected the defendant's argument - accepted by the district court - that Mitchell only complained of not receiving the newest Cirrhosis drug because he referred to that specific drug in the pleading. The Circuit, instead, found the mention of the drug did not coincide with the allegation that he was being given a *different drug,* but that a plain interpretation indicated he was being given no drug at all. It reversed the lower court.

LINK

Qualified Immunity: Applying *Mendez*, Circuit Confirms that "Provocation Rule" Does Not Provide Independent Basis for Fourth Amendment Claims

Frederick v. Motsinger, No. 16-3523 (8th Cir. Oct. 17, 2017).

Where officers initially attempted tasing a woman who was brandishing a knife--after which the woman tried attacking the officers, who then shot and killed her--the act of tasing could not be characterized as a provocation which improperly amplified the

confrontation, particularly given the Court's recent decision in *Mendez*.

Officers from the Rogers, Arkansas Police Department were called to a local convenience store in August 2011. They confronted Fallon Frederick (Frederick) holding a four-inch knife, acting erratically, speaking incoherently, and pacing by the restroom. After Frederick failed to comply with repeated commands to drop the knife, an officer discharged a taser at Frederick, which she blocked with her purse and then followed up with charging the officers. At that point an officer shot and killed Frederick, prompting her estate to file suit alleging, among other things, excessive force Fourth Amendment claims under § 1983. The district court performed an analysis with the *Graham* factors and granted summary judgment to the police and associated municipality, leading the estate to appeal the dismissal.

In focusing on the excessive force claim the estate argued the district court erred under the Ninth Circuit's "provocation rule," which holds that "[w]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The Eighth Circuit noted first that during the pendency of this appeal the Supreme Court rejected the provocation rule in *Mendez*, deeming it fundamentally flawed because it "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." The Supreme Court further clarified in *Mendez* that the "objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Applying these clarifications to the facts at hand, the Eighth Circuit found that it was objectively reasonable for an officer to use deadly force against an individual wielding a knife and charging another police officer.

The estate did not contest this, but instead argued the tasing was a distinct Fourth Amendment violation (from the latter deadly force applied), thus requiring the Circuit to follow Supreme Court guidance and assess this alleged violation of Frederick's Fourth Amendment rights independently. In doing so the Circuit found this non-lethal application of force was objectively reasonable as well because when it was applied the officers faced Frederick in a "small commercial space, in front of restrooms that might have been occupied, and brandishing a weapon that posed a danger to the officers and store customers." It affirmed the lower court.

LINK

Qualified Immunity: Immunity Granted in Absence of Clear Precedent Establishing Student's Right not to Be Arrested for Wandering School Halls

Scott v. City of Albuquerque, No. 15-2154 (Oct. 5, 2017).

Despite finding that officers had overstepped their bounds in arresting a student who was wandering in a New Mexico school's hallways because they could not ascertain his intent to interfere with the educational process, there was no applicable precedent at the time which clearly established that standard-therefore the officers were entitled to qualified immunity.

Quentin Scott (Scott) was a 13-year old student when an Albuquerque, NM school resource office arrested him for violating N.M. STAT. ANN. § 30-20-13(D), which makes it a crime to "willfully interfere with the educational process" at a public school. Scott had an Individualized Education Program under federal law, indicating he had special needs. He had some accommodations from standard classroom protocols because of this, including being able to take "breaks" from class and leave when he was anxious or distracted. In January 2009 he left a class during which

he was frustrated and signaled to the teacher he was leaving. Whether he had permission to sit in the chair in the hall or wander the halls later became a dispute, but when the school resource officer saw him wandering the halls and asked the teacher whether he had her permission, she denied it. This ultimately led to Scott being detained in the officer's office and, ultimately, arrested for violating the state law. He was in handcuffs for at least a couple hours during the detention and during delivery to a juvenile detention facility. Scott sued the officer, the chief of police and the City of Albuquerque alleging that his arrest was unlawful and that the officer used unconstitutionally excessive force in effecting the arrest. The district court granted the defendants' motions for summary judgment, specifically that the officer was entitled to qualified immunity, leading Scott to appeal.

Scott argued that "(1) the arrest was unconstitutional, since Officer Hensley lacked probable cause; and (2) Officer Hensley should have been on notice that the arrest was unlawful because the Fourth Amendment right that he violated was clearly established at the time." The Circuit agreed with him only partially, leading to his loss on appeal. The court did find the arrest unlawful; specifically it identified the term "willfully" in the statute as a critical element of the crime and one not met in the case because, in its judgment, Scott did not intend, design, or willfully try to interfere with the educational process. It was unreasonable for the officer to believe that Scott left the classrooms and went into the hallway with the intent of distracting school employees from their tasks, and therefore there was no probable cause for the arrest--and it fell outside the legal constraints of the Fourth Amendment.

The difficulty for Scott was in showing whether this principle was clearly established. The court found a case from the Tenth Circuit that arose two years *after* the facts in this case, wherein the Tenth Circuit held it had no clearly established law on this exact statute, meaning there was no way for the court to identify precedent about which the officer should have known at the time of Scott's arrest. Thus, Scott's claim ultimately failed, and the court affirmed the lower court on this issue.

LINK

Qualified Immunity: Officer Arresting Protestors for Refusing His Order to Disperse Had No Reason to Know His Order was Unlawful

Weed v. Jenkins, No. 16-3629 (8th Cir. Oct. 17, 2017).

Affirming the lower court, the Eighth Circuit has found that an officer who arrested protestors who refused his order to disperse was protected by qualified immunity. Failure to follow an officer's order is a violation of state law-which the officer has every reason to believe justifies arrest; the officer is not deemed to know whether the underlying local ordinance would survive constitutional challenge.

On Saturday, August 13, 2013 Interstate 70 in St. Charles, Missouri was busy. There was a festival accessible by an exit just after an overpass, leading to heavy traffic, and one lane was closed for construction. Protestors lined up on the overpass to protest the then-President's policies. Five accidents occurred, four of which the drivers involved attributed to the protests. With these facts in mind Corporal T.R. Jenkins (Jenkins) of the Missouri State Highway Patrol was responsible for assessing whether the protestors should be dispersed, which he decided in the affirmative, based on the traffic hazard they created. While most left, Jimmy Duane Weed (Weed) and another protestor argued with police, refused to leave, and were ultimately arrested. Weed filed suit alleging his First Amendment rights were violated. The district court dismissed the case and he appealed.

The Eighth Circuit quickly determined it needn't reach the thorny merits of the case, relying instead on qualified immunity. Weed countered this line of reasoning by arguing that a 2012 Eighth Circuit case put Jenkins on notice that his order to Weed to disperse was clearly unlawful. The Circuit disagreed, noting that the 2012 case - *Stahl v. City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012) - involved a constitutional challenge to an ordinance directly, while in this case Weed was arrested for failing to obey the state trooper's *order to disperse based on a local ordinance* and he was arrested for violating a state law prohibiting refusal to obey a lawful order. As a result, the Circuit found that "[t]he doctrine of qualified immunity protects [Corporal] Jenkins from First Amendment damages because he had no reason to know, based on preexisting law, that his order was unlawful." It thus affirmed the lower court.

LINK

Search and Seizure: Where Arrestee Gives Consent to Search Apartment, Evidence Obtained from Cohabitant is Admissible under Totality of the Circumstances Test

United States of America v. Cobo-Cobo, No. 16-4097 (8th Cir. Oct. 12, 2017).

Although an arrestee taken into custody because he was not legally in the US gave consent to search his apartment before having received *Miranda* warnings-which search led officers to another occupant with falsified social security documents-the Fourth Amendment did not prohibit use of that ssn information under a totality of the circumstances.

Nicolas Cobo-Cobo (Cobo-Cobo) was indicted for misusing a social security number based on the fact that immigration officers obtained an I-9 Form from an employer he worked for upon which he provided someone else's social security number. Cobo-Cobo argued the evidence of the I-9 Form should be suppressed because the document was obtained in violation of his Fourth Amendment rights. The district court disagreed, adopting the report and recommendation of a magistrate, leading Cobo-Cobo to appeal to the Eight Circuit.

Though there was a laundry list of facts leading to the ultimate search that resulted in discovery of Cobo-Cobo's I-9 Form, the relevant few are that immigration officers were assisting local police with an open stabbing case in Iowa, during which they approached and conversed with Elias Mendoza-Marcos (Mendoza-Marcos). Though they determined Mendoza-Marcos was not involved in the shooting, officers also determined he was not legally in the United States, leading to his immediate arrest. While handcuffed, in custody and before any Miranda warnings or the right to refuse consent were provided, Mendoza-Marcos was asked if he wanted to obtain things from his apartment before being taken to jail. He answered in the affirmative and, according to officers, then consented to the officers entering his apartment with him to obtain those things. This led the officers to a shared apartment, wherein they located Cobo-Cobo and his associated employer information, ultimately leading to the I-9 Form and the criminal charge. Cobo-Cobo's principal argument on appeal was that Mendoza-Marcos could not voluntarily consent to the search of the apartment, given his status in custody and without Miranda warnings, but the Circuit disagreed. They found these facts did not automatically render the consent invalid, but that instead they were *factors* in the balancing test performed to determine whether the consent was voluntary.

It then reviewed the facts considered in the totality of the circumstances test performed by the lower court- notably that Mendoza-Marcos was at least of average intelligence, that he was not

apparently under the influence or otherwise too impaired to understand his circumstances, that the officers did not brandish weapons, and that they did not make promises to him in exchange for or before requesting consent to enter his shared apartment- and found it did not clearly err by finding the consent voluntary. It thus affirmed the lower court.

LINK

Trials: Federal Courts are Not Precluded from Hearing Cases that Have Also Been Brought in State Court but Are Not Yet Final

Cooley v. Town of Kiowa, No. 17-7019 (10th Cir. Oct. 13, 2017).

Reversing a district court that dismissed a case because it had also been brought in state court, the Tenth Circuit finds that neither *Rooker-Feldman* nor claim/issue preclusion apply where the state court claim is not sufficiently final.

Andre Deshawn Cooley (Cooley) was pulled over and issued a ticket for speeding in Kiowa, Oklahoma. He did not pay the ticket nor appear in court on the assigned date, leading to the issuance of a driver's license suspension through the interstate Non-Resident Violator Compact. Cooley then challenged the decision in state court and filed a case in federal district court, in the latter of which he alleged a due process violation. The federal court dismissed the case on two grounds; first that it lacked subject-matter jurisdiction under the *Rooker-Feldman* doctrine and, second and in the alternative, that his claim was barred by the doctrines of claim and issue preclusion. Cooley appealed, and the Tenth Circuit reversed.

The Circuit first reviewed the baseline *Rooker-Feldman* doctrine, noting it holds that only the Supreme Court has jurisdiction to hear appeals from final state court judgments and that a state-court proceeding pending on appeal when a federal suit is filed is not sufficiently "final" such that the doctrine is triggered. Thus, it easily rejected the lower court's first basis for dismissing the case since there was no dispute that the state-court appeal was pending when the federal suit was filed. The alternative basis fared no better since the same lack of finality was at the root: claim preclusion and issue preclusion require looking to the law of the state that issued the prior and final judgment to determine the judgment's preclusive effect, but since there was no final judgment no such analysis could be performed. The Circuit remanded the case for further proceedings.

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