Evidence: Inmate's Prior Nolo Plea on Assault Charge Is Not Admissible By Officers in Defense of Section 1983 Action

Sharif v. Picone, no. 12-4468 (3d Cir. Jan. 21, 2014).

On March 11, 2009, Iman Sharif, an inmate at Pennsylvania's Northampton County Prison, allegedly "sucker-punched" Corrections Officer Nathan Picone; Sharif claimed that Picone initiated the altercation. Picone testified that he and another officer then attempted to restrain Sharif, while Sharif asserted that Picone and others entered his cell and joined in the attack by choking him. Sharif was then moved to a "restraint chair." He contended that while in the restraint chair, he was punched repeatedly by unnamed corrections officers--all of which was observed and permitted by a commanding officer.

Sharif was charged with aggravated assault. He entered a plea of nolo contendere and was convicted.

Sharif later brought an excessive force claim under 42 U.S.C. § 1983, alleging that the officers were liable for attacking him in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Sharif sought relief of "nominal, compensatory, and punitive damages."

Pre-trial, Sharif filed a motion to exclude evidence of his nolo contendere plea under FRE 410. The district court denied Sharif's motion to exclude, accepting the officers' argument that "it would be inconsistent to allow [Sharif] to have taken the position in a prior court proceeding that he wasn't going to contest the charges."

Pursuant to the lower court's ruling, during cross-examination of Sharif, the officers' counsel twice referred to Sharif's plea of nolo contendere to suggest that the plea was inconsistent with his statement at trial that he had done nothing wrong. The district court allowed the officers to introduce evidence of Sharif's five prior convictions, including the conviction for assault resulting from his nolo plea, despite Sharif's argument that the minimal probative value of these convictions was outweighed by their prejudicial effect. (The other convictions were for simple assault and for false reporting to a police officer; all were all admitted for the purpose of assessing Sharif's character for truthfulness).

The jury returned a verdict against Sharif, and he appealed.

HELD: The Third Circuit reversed and remanded, finding that the prior nolo plea should not have been admitted and that the evidentiary value of the prior conviction for assault did not outweigh its resulting prejudice to Sharif.

DISCUSSION: FRE 410 states, in relevant part, "[i]n a civil or criminal case, evidence of [a nolo contendere plea] is not admissible against the defendant who made the plea." Fed. R. Evid. 410(a)(2). This prohibition is based on the fact that a nolo plea is not a

factual admission that the pleader committed a crime. ("Throughout its history . . . the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency.") *North Carolina v. Alford,* 400 U.S. 25, 35 n.8 (1970). As the Third Circuit stated, “An important policy consideration animating Rule 410 is that it encourages compromise in criminal cases, which, in turn, lessens the burden on courts, defendants and prosecutors, producing a more efficient criminal justice system. Thus, the use of a nolo plea as tantamount to an admission of guilt would defeat one of its primary purposes.”

The Court of Appeals reviewed several precedents construing FRE 410. In *Walker v. Schaeffer,* 854 F.2d 138 (6th Cir. 1988), two African-American men were threatened a mob of several hundred white high school students in a parking lot. As they attempted to flee, they were arrested for disorderly conduct and reckless driving; after pleading no contest to those charges, the defendants sued the arresting police officers for false arrest and wrongful imprisonment. The officers asserted a qualified immunity defense. The court found that the plaintiffs were "estopped" from arguing that their rights had been violated because, by pleading nolo contendere, they had "in effect, admitted facts in open court evidencing [their] guilt."

Walker had been cited by district courts within the Third Circuit as well as by the Tenth, for the proposition that nolo contendere pleas are not always precluded by FRE 410. Here, the Third Circuit found *Walker* to be fallible. “We view *Walker* as imprecise, and in any event, distinguishable . . . *Walker's* reference to a defendant "having admitted facts" through a nolo plea . . . misconstrues the nature of the plea. Indeed, we held in *United States v. Adedoyin,* 369 F.3d 337, 344 (3d Cir. 2004), that a nolo plea is not an admission.”

The Third Circuit also cited the Supreme Court's decision in *Heck v. Humphrey,* 512 U.S. 477 (1994), where the Court held that when a Section 1983 claim amounts to a collateral attack on a criminal conviction, the conviction or sentence must be reversed, or invalidated by other means, before a court can entertain the claim. Here, *Heck* did not apply, because inmate Sharif’s claim of excessive force “does not amount to a collateral attack on his aggravated assault conviction.” The Court of Appeals noted that the officers had conceded that Sharif did not admit any "facts which would indicate no civil liability on the part of" the corrections officers (citing *Walker*). Given those considerations, the Third Circuit held that FRE 410 barred the admission of Sharif's plea of nolo contendere.

The Court of Appeals also considered Sharif’s claim that evidence of his *conviction* (rather than the nolo plea underlying the conviction) should also be excluded. “While the nolo plea is not a *factual* admission of guilt, and is to be excluded in light of the policy reasons we have discussed, the conviction resulting from the nolo plea is a *legal* finding of guilt, and there are no similar policy reasons that would support its exclusion.” Consideration of this issue was governed by FRE 609, which reads in pertinent part:

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: (1) for a crime that . . . was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, *subject to Rule 403,* in a civil case or in a criminal case in which the witness is not a defendant.

Fed. R. Evid. 609(a)(1)(A) (emphasis added).

FRE 403 has been construed as requiring that four factors be weighed against the potential for prejudice in admitting a conviction: (1) the nature of the conviction; (2) the time elapsed since the conviction; (3) the importance of the witness's testimony to the case; and (4) the importance of credibility to the claim at hand. Here, the Third Circuit found the district court's review to be inadequate: "In denying Sharif's motion in limine and admitting his four assault convictions, including the 2009 conviction underlying his § 1983 claim that is the focus of his appeal, the District Court failed to conduct the required Rule 403 analysis."

Because the lower court had allowed all three of Sharif's prior assault convictions to be admitted, "we agree that the additional probative value of the March 2009 conviction regarding Sharif's truthfulness was minimal, if not nil." (In a footnote, the Third Circuit cited precedent from a DC Court of Appeals case which discounts the connection between acts of violence and veracity: "In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence . . . generally have little or no direct bearing on honesty and veracity." (citation omitted).

Reversed and remanded.

http://www2.ca3.uscourts.gov/opinarch/124468p.pdf (last accessed Jan. 23, 2014).

Juries: Ninth Circuit Rules Peremptory Strikes Based On Sexual Orientation Require "Heightened Scrutiny"—Gay Jurors Protected Under *Windsor*

Smithkline Beecham Corp. v. Abbott Laboratories, Nos. 11-17357, 11-17373 (9th Cir. Jan. 21, 2014).

At the beginning stages of a controversial case involving allegations of antitrust and unfair trade practice between two big pharma corporations, an openly gay man was dismissed from the jury pool based purely on his sexual orientation. The case centered on a licensing agreement dispute over the pricing of HIV medications. Abbott Laboratories (Abbott) elected to use its first peremptory challenge to dismiss the