because, according to the Court, “no individual defendant acted with deliberate indifference.” Although each defendant’s actions may well have been negligent and/or incompetent, they did not, as a matter of law, shock the conscience.

Plaintiffs also argued that their *Monnell* claim was supported by a state-created danger. The court again found for the City. State-created danger requires plaintiffs to show: “1) the harm ultimately caused was foreseeable and fairly direct; 2) a state actor acted with a degree of culpability that shocks the conscience; 3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant’s acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions, as opposed to a member of the public in general; and 4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.” In this case, the court found the plaintiffs stumbled on the first element. They had claimed two harms: 1) they were sent into a potentially dangerous building under the City’s approval and 2) they were then deprived of their property due to condemnation.

The court held neither harm was compensable under the state-created danger doctrine because the first was only a potential or threatened harm (not “ultimately caused”), and as for the second, the city’s occupancy permit did not lead “fairly directly” to the plaintiff’s harm (the deprivation of property was instead caused directly by the shoddy construction).

http://docs.justia.com/cases/federal/appellate-courts/ca3/13-2512/3011586430 (last accessed April 17, 2014).

Search and Seizure: Alternative Post-Deprivation Remedies Prevent Claim of Due Process Violation in Improper Sale of Impounded Auto

Marshall v. City of New York, No. 12 Civ. 7128 (S.D.N.Y. Apr. 15, 2014).

The existence of alternative post-deprivation remedies are sufficient to defeat constitutional challenges to the sale of an impounded auto only ten days after the plaintiff’s arrest, according to the Southern District of New York.

Plaintiff Kerry Marshall (Marshall) was stopped by a New York City police officer due to the tinted glass over his vehicle's license plate. Marshall responded that he could remove the tinted glass if it were a problem, and produced his driver's license, but was unable to produce his registration and proof of insurance. He was arrested and placed in confinement and his vehicle was impounded. Although Marshall then directed the arresting officer where to find his registration and proof of insurance, both were expired. Marshall remained in confinement for another five hours and was released for violating three New York City traffic laws -- Operating an Unregistered Vehicle; Operating an Uninsured Vehicle; and Obstruction of a License Plate. The citations eventually concluded in Marshall's favor.

Upon release, Marshall was told to return with valid registration, insurance and title and was provided a property voucher for retrieving his vehicle. Marshall noticed "that the back side of the property voucher reinforced [the police officer's] instructions regarding (120) days to retrieve his car or be faced with civil forfeiture."

Marshall made his first attempt to retrieve the car 59 days after his release. In fact, his vehicle had been sold at auction ten days after his arrest. Marshall brought six causes of action, based primarily on the Fourth and Fourteenth Amendments. First, he alleged that the arresting officer lacked reasonable suspicion to initiate an investigative stop and that his arrest and the duration of his confinement were unreasonable. The second, third, and fourth causes of action were brought against various officers alleging deprivation of Marshall's property without procedural due process. The fifth was brought against a case manager for the City Comptroller, alleging violation of the Equal Protection Clause because the City did not respond promptly to his request for a copy of his file. The sixth sought to impose Monell liability upon the City for failure to train and failure to supervise the individual defendants.

The defendants moved to dismiss.

HELD: The District Court for the Southern District of New York held for the defendants.

DISCUSSION: To succeed under Section 1983, Marshall had to establish that he was deprived of Constitutional rights, privileges, or immunities by a person acting under color of state law. The obscured license plate was a violation of New York law, creating ample grounds for investigation, and the officer reasonably determined that Marshall had been operating an unregistered vehicle—an offense which is punishable by fine and incarceration of up to 15 days under New York law. Therefore the arrest was not improper. Similarly, the confinement of five hours, while perhaps excessive under the circumstances, did not rise to the level of Fourth Amendment challenge.

Marshall's second, third, and fourth claims arose under the Due Process Clause as he alleged a deprivation of his property without procedural due process. When such a claim is "based on random, unauthorized acts by state employees," "the Due Process Clause of the Fourteenth Amendment is not violated when a state employee intentionally deprives an individual of property or liberty, so long as the State provides a meaningful postdeprivation remedy." *Hellenic Am. Neighborhood Action Comm. V. City of N.Y.*, 101 F.3d 877, 880 (2d Cir. 1996).

Because New York law provided postdeprivation remedies—in fact Marshall had filed two claims with the City Comptroller, the Due Process claims failed. "His pleadings contain no allegation, even when liberally construed, that this remedy is not 'meaningful.' The mere fact that Marshall has not prevailed in these processes, or other processes provided by the City and the State, does not permit this Court to conclude that there is no 'meaningful' remedy available to him."

Marshall's Equal Protection claim, relating to slow handling of his freedom of information request, was also flawed. To establish such a claim, he would have to demonstrate that "1) the plaintiff, compared with others similarly situated, was selectively treated; and 2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." (citations omitted).

Marshall did not identify any other persons who had been treated more favorably; hence his Equal Protection cause of action failed. And given that his underlying Fourth and Fourteenth Amendment claims were unavailing, his Monell allegations were fatally deficient.

http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2012cv07128/402227/38 (last accessed Apr. 17, 2014).

Search and Seizure: Officers Who Recorded Attorney-Client Conversations During Non-Custodial Interview Cannot Assert Qualified Immunity

Gennusa v. Canova, No. 12-13871 (11th Cir. Apr. 8, 2014).

The Eleventh Circuit has upheld a lower court decision rejecting the assertion of qualified immunity by two law enforcement officers who recorded conversations between a suspect and his attorney while inside the Sheriff's office.

In 2009 St. John's County (Florida) police suspected that Joel Studivant had violated a domestic violence injunction. Officer Marmo and Sgt. Canova conducted a non-custodial interview of Studivant in the Sheriff's office in the presence of Studivant's attorney, Anne Marie Gennusa. Unbeknownst to either Studivant or Gennusa the officers recorded and actively monitored the entire interaction in the interview room – including attorney-client conversations when the officers were not present. The officers had no warrant for this surreptitious recording.

Moreover, the officers did not have a warrant for the seizure of papers they took during the interview. At the beginning of the interview, Studivant had agreed to provide a written statement, but upon finding out at the end of the interview that he was going to be arrested, he decided against doing so. The officers argued with attorney Gennusa that she had to turn over the statement. This she refused to do, prompting the interviewing officer, Marmo, to leave the interview room and speak with Canova. The officers then saw Gennusa take the statement from Studivant to put in her bag. Sgt. Canova directed Marmo to go in immediately and take the statement. Marmo forcibly took the paper from Gennusa.

Gennusa, learning of the recording after the fact, filed suit. She alleged Section 1983 violations under the Fourth Amendment for the warrantless recording of privileged conversations and the seizure of the written statement, as well as under 18 U.S.C. § 2520(a), the Federal Wiretap Act, for the warrantless recording. The officers defended that they had qualified immunity. The district court denied the officers such protection. The officers appealed.

HELD: The Eleventh Circuit affirmed the district court, denying the officers qualified immunity.

DISCUSSION: The doctrine of qualified immunity protects officials from civil damages when their conduct does not violate clearly established law, which a reasonable person would know existed at the time of the alleged violation. The burden is on the plaintiff to prove that qualified immunity is not appropriate when officials act within their discretionary duty, meaning Gennusa