

Searches, Sovereign Immunity and Funeral Protests

By: IMLA Editorial Board

Search and Seizure: Failure to Provide Jury with Clear Terry Instruction Requires Remand

***Doornbos v. City of Chicago*, No. 16-1770 (7th Cir. Aug. 18, 2017).**

Vacating a district court finding for the City, the Seventh Circuit has found that jury instructions were flawed because they did not explicitly state that law enforcement must reasonably believe that a civilian is armed and dangerous to justify a frisk.

Joseph Doornbos (Doornbos) was exiting a Chicago train station when two plainclothes Chicago police officers confronted him, threw him to the ground and ultimately arrested him for resisting arrest. Doornbos challenged the charge and won at trial. He then sued Chicago, alleging excessive force and malicious prosecution. This case also went to trial and Doornbos lost, prompting him to appeal to the Seventh Circuit, alleging the judge erred in his jury instruction regarding *Terry* stops.

The Seventh Circuit found the judge's instructions were inadequate. The court pointed out a *Terry* stop has two elements – first that the officer performing the initial stop reasonably suspects the person of committing or about to commit a crime and second, to *graduate from a stop to a frisk*, that the person is armed and dangerous. The judge's instruction, which was the defendant's version and which was objected to by Doornbos, was that "[a] police officer is allowed to conduct a brief investigatory stop of a citizen, not rising to the level of an arrest, if the officer performing the stop has a reasonable suspicion that criminal activity is afoot." Doornbos's request for an instruction on frisks to explain that an officer *must have reasonable suspicion that a civilian is armed and dangerous to justify a frisk*, was denied.

The court found this was erroneous because the officer's own testimony suggested the frisk was unjustified and thus unconstitutional – specifically because the testimony lacked a showing of reasonable suspicion that Doornbos was armed and dangerous, meaning the officer, arguably, could not legally grab him as he testified to having done. The lower court's election "not to include an instruction on frisks deprived the jury of the law it needed to reach a sound verdict." The Circuit vacated the judgment and remanded for a new trial.

Search and Seizure: Lack of Cooperation by Occupants Does Not Justify Further Police Searching of House after Making Arrest

***United States of America v. Nelson*, No. 16-3292 (10th Cir. Aug. 17, 2017).**

Reversing the district court, the Tenth Circuit has refused to find that, because officers were not immediately allowed entry into a residence and were initially mislead as to the location of a suspected probation violator, they were therefore justified in making a "protective sweep" for additional dangerous occupants which led to discovery of weapons.

A US Marshall was informed by a homeowner that Stephen Nelson (Nelson), wanted for probation violations, was hiding in the informant's residence in Kansas City, Kansas. The homeowner authorized the Marshals to search his home. When officers inquired at the front door as to Nelson's whereabouts, a resident initially tried to shut the door on them and then told them Nelson was upstairs. He was ultimately discovered in the lower level of the house and arrested. Officers continued searching the dwelling, resulting in the discovery of two firearms that were attributed to Nelson, for which he faced additional charges. He challenged the search, arguing that it violated the Fourth Amendment, but the district court found the post-arrest search was a valid protective sweep because the officers "could have reasonably believed that someone other than [Nelson] was hiding in the house." By means of a conditional plea, Nelson continued to fight the Fourth Amendment case.

The Tenth Circuit vacated. It identified the relevant exception for when police officers may search a residence without a warrant, specifying that officers may "conduct a protective sweep beyond areas immediately adjoining the arrest if there are articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The facts identified by the government to justify the sweep that netted the firearms at issue and that the lower court relied are were that: "(1) [the person that opened the door (not Nelson)] attempted to shut the front door on the deputies; (2) [this person] incorrectly informed the deputies that Nelson was upstairs, on the fourth level, when in fact he was on the first level; and (3) Nelson failed to immediately show himself to the deputies when they instructed him to do so."

The Circuit denied that these facts – individually or as a whole - created an inference that someone other than Nelson was hiding in the house. The Court rejected the government's reliance on the fallback position that the officers had no way of knowing whether someone else was in the house. This was plainly unacceptable to the Circuit; such an argument eviscerates the entire fact-based analysis that makes this an

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exception to the general rule that officers *may not search private homes at will*. The Circuit reversed the lower court on this issue. The appeal, however, did provide the government the chance to argue the scope of the consent that the homeowner had initially provided; the Circuit Court declined to decide this issue of first impression on appeal and remanded.

Sovereign Immunity: Sovereign Immunity Available Where State Offers Deaf Litigant the Opportunity for a Court-Provided Interpreter

***King v. Marion Circuit Court,* No. 16-3726 (7th Cir. August 18, 2017).**

Where a deaf plaintiff voluntarily chooses to use private arbitration in a domestic relations case and eschews litigation through the courts where he would have been provided an interpreter, he cannot claim that the state has impaired his constitutional rights—and the state can assert sovereign immunity.

Indiana allows its counties to subsidize private dispute resolution in domestic-relations cases and Marion County instituted such a subsidy. Dustin King (King) sought to take advantage of the program in order to defray mediation costs. His participation in the program was authorized, but when King, who is deaf, also asked to have the court provide an American Sign Language interpreter, the request was denied. He ultimately used his father as an interpreter and succeeded in obtaining dismissal of the domestic-relations case.

He promptly sued Marion Circuit Court in federal district court, arguing it violated the Americans with Disabilities Act by refusing to provide him with a free interpreter in mediation, thus, "by reason of [his] disability ... den[ying him] the benefits of the services, programs, or activities of a public entity." After a bench trial, King was awarded $10,380.00 in damages, prompting the Marion Circuit Court to appeal.

The Seventh Circuit did not address the merits of the appeal, instead finding the threshold issue of sovereign immunity controlled. The Circuit noted the Marion Circuit Court is a division of the State of Indiana, meaning King actually filed suit against Indiana itself. Indiana had asserted sovereign immunity in the district court, but that argument had been rejected on the basis of *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane* – a disability case about a courthouse that had no wheelchair access at all to the second story courtrooms – the Supreme Court held the people have a broad "fundamental right of access to the courts."

The Circuit Court noted that Section 5 of the Fourteenth Amendment permits Congress to abrogate states' sovereign immunity 1) to protect substantive rights guaranteed by the Fourteenth Amendment's other provisions and 2) to authorize federal litigation to enforce rights guaranteed by the other Amendments that have been incorporated against the states via the Fourteenth Amendment--but that it *does not* permit Congress to authorize federal litigation against the states to enforce statutory rights.

In this case, the Circuit found the mediation program did not prevent King from accessing "judicial attention" because he was *not required* to participate in the mediation program and, especially, since the judge in the case offered him the option of going through the standard court process where a no-cost interpreter could be provided. King had rejected that offer however, instead choosing to go through the subsidized mediation program.

The Circuit reversed and remanded with instructions to dismiss without prejudice to King raising the Americans with Disabilities claim in state court – where Indiana is free to waive its sovereign immunity.

Speech: Nebraska's Two Hour/500-Foot Buffer Restriction against Picketing at Funerals is Valid

***Phelps-Roper v. Ricketts,* No. 16-1902 (8th Cir. Aug. 11, 2017).**

In the latest chapter of a continuing saga, the Eighth Circuit has upheld Nebraska's restriction against picketing within 500 feet of a funeral, between one hour before the service to two hours after, finding that a group of flag-bearing, silent bikers who were invited by the deceased soldier's family were not "picketing" under the Nebraska law, and that police failure to actively enable the protestors to display their signs did not constitute a "heckler's veto."

Caleb Nelson, a highly decorated Navy SEAL, died in Afghanistan when his vehicle struck an improvised explosive device. Days later, on a Nebraska street corner not far from where his church funeral would begin, a picketer wore a t-shirt announcing "GOD HATES FAGS" and held signs proclaiming in large font "THANK GOD FOR DEAD SOLDIERS," "SOLDIERS DIE 4 FAG MARRIAGE," "SHAME," and "DESTRUCTION IS IMMINENT."

Shirley Phelps-Roper and other Westboro Baptist Church (WBC) members consider military funerals to be "patriotic pep rallies" which suggest that God approves of national policies contrary to Biblical instruction. They picket to assert that God does not bless a nation that tolerates homosexuality and adultery. They coordinate with law enforcement and do not commit violence; their typical process is to begin picketing 45 minutes before the funeral and cease as soon as the service starts. Nebraska's Funeral Picketing Law (NFPL) as revised in 2011 prohibits picketing within 500 feet of a cemetery, mortuary, or church from one hour prior to the start of a funeral to two hours after it ends. Neb. Rev. Stat. §§ 28-1320.01 to .03.

Plaintiffs originally challenged the NFPL in December 2009, when the NFPL required a 300-foot margin; their motion to enjoin was denied at the district court. In 2011, a panel of the Eighth Circuit reversed—whereupon Nebraska filed for rehearing.

That petition was held in abeyance while the court considered a similar ordinance from Manchester, Missouri, which prohibited picketing within 300 feet of any funeral, from one hour before to one hour after the service. In a unanimous 2012 decision (*Phelps-Roper v. City of Manchester*) which reversed prior holdings on the issue, the Manchester ordinance survived, because "it serve[d] a significant government interest, it [was] narrowly tailored, and it [left] open ample alternative channels for communication."

Plaintiffs argued that Nebraska's larger buffer zone of 500 feet was unconstitutional--and also alleged that WBC had been unconstitutionally targeted by the Nebraska legislature, citing a newspaper article in

which a legislator stated that he wished WBC protestors could be banned from picketing funerals.

The Eighth Circuit disagreed. The increase of the buffer zone to 500 feet versus the 300-foot buffer in *Manchester* did not change the outcome—the Circuit found that the NFPL served a significant government interest by protecting citizens from disruption during a funeral and avoiding potential violence, was still narrowly tailored, and left open ample alternative channels for communication. Allegations of legislative motive--thinly supported by the evidence--had no bearing on the statute's validity as enacted. Plaintiffs' facial challenge failed.

Their as-applied challenge also floundered. Plaintiffs attempted to demonstrate that opposing viewpoints had been allowed expression while their views were suppressed. They pointed to the fact that a motorcycle group, the Patriot Guard Riders (PGR) had been allowed inside the 500-foot perimeter and formed a flag line. But the PGR stood on different footing than the plaintiffs. First, their silent participation did not constitute "protest" under the Nebraska law. More importantly, they had been invited to Caleb Nelson's funeral by his close relatives. Those distinctions doomed plaintiffs:

> In short, Phelps-Roper requests that this court create a rule that, because the WBC chooses to protest a funeral, all others already participating in or attending that funeral must likewise be considered "protestors" under the NFPL. We decline Phelps-Roper's request.

Plaintiffs further argued that they had not been allowed to display their messages effectively because other members of the public blocked their signs and were not stopped by the police. They cited a recent Sixth Circuit case, *Bible Believers v. Wayne County*, 805 F.3d 228, 234 (6th Cir. 2015) (en banc) ("The scenario presented by this case, known as the 'heckler's veto' occurs when police silence a speaker to appease the crowd and stave off a potentially violent altercation.") The court disagreed that a heckler's veto had occurred in Nebraska—there was no evidence that police silenced WBC or selectively allowed the crowd to act in an unlawful manner at WBC's picket:

> The decedent's family and other private parties are under no obligation to listen to WBC's message and can take whatever lawful means they wish to avoid hearing or seeing Phelps-Roper. The First Amendment guarantees free speech, not forced listeners. ML

