Cases



Civil Rights

EMT Response and Weather

The plaintiffs in this case, the representatives of the estate of Curtis Mitchell, claimed that the City of Pittsburgh and its staff violated Mitchell's right to substantive due process granted by the Fourteenth Amendment by failing to come to his rescue and take him to the hospital.

At 4:30 p.m. on February 5, 2010, a record snow storm began in the City of Pittsburgh. It would result in an accumulation of more than 21 inches of snow over an approximately 24-hour time-span. At 2:00 a.m. on February 6, Mitchell's girlfriend called 911 asking for an ambulance, as Mitchell was experiencing abdominal pains. Due to the heavy snow, the ambulance was unable to cross a bridge approximately a quarter-mile from Mitchell's home. The emergency medical technicians (EMTs) called Mitchell to ask him to walk to the ambulance. Mitchell's girlfriend said he was unable to walk and that she couldn't carry him. The EMTs abandoned the call and left. The same occurred when a second ambulance was called. A third ambulance was able to get to within a block of Mitchell's home, but EMTs were told that Mitchell had fallen asleep and would not walk the remaining distance. Early on February 7, the girlfriend call 911 to say that Mitchell had died. Firefighters responded and arrived at the home in a few minutes.

The plaintiffs claimed that the City's failure to establish policies and procedures, and failure to train its EMTs, resulted in Mitchell being abandoned while in need of medical assistance; further, that the defendants, acting under color of state law, affirmatively created a danger to Mitchell because he relied upon assurances from the defendants that emergency aid was forthcoming and did not seek alternative forms of assistance. The defendants moved to dismiss the Section 1983 claim on the basis that the plaintiffs failed to plead allegations sufficient to state a substantive due process violation. The district court agreed and granted the motion.

Accepting the plaintiffs' allegations as true, it held they failed to state a claim of a substantive due process violation. Under *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989), there was no affirmative right to government aid — including rescue services, competent or otherwise. Addressing the "state-created danger" exception advanced by the plaintiffs, the court, referring to *Brown v. Commonwealth of Pennsylvania, Dep't of Health Emergency Med. Serv. Training Inst.*, 318 F.3d 473, 475 (3d Cir.2003), held that reliance on a 911 operator, without more, could not establish state-created danger liability because the plaintiffs had no constitutionally-recognized reliance interest in the first place. Assurances that ambulances would be dispatched to assist Mitchell (and, in fact, were dispatched) did not constitute affirmative acts that rendered him more vulnerable to danger than had the defendants not acted at all, and Mitchell's freedom to seek outside help was not restrained by these assurances. "[U]nder clearly established controlling law, a citizen not in state custody has no constitutional entitlement to rescue services from the State, even if the State has undertaken to provide them. Indeed, even if in providing such services, the State does so in an incompetent manner, it still does not rise to a constitutional violation." *Thornton v. City of Pittsburgh*, No. 10–1436, 2011 WL 1327662 (W.D. Pa. April 06, 2011).

Section 1983 and "Right" to Referendum

In 2008, the Howard County Council in Maryland passed a zoning ordinance that substantially increased the size of a store to be built in one community. A group, Howard County Citizens for Open Government (HCCOG), sought to challenge the ordinance by way of referendum, as permitted by the County Charter. This allowed a referendum petition to be submitted to the registered voters of the County, to approve or reject at the polls any law or part of any law of the Council. The Maryland Code set out the requirements for a valid referendum petition. In November 2008, HCCOG filed requests with the Board of Elections, seeking an advance determination regarding the sufficiency of the proposed referendum petition language and signature sheet, and on December 1, 2008, the County Board found that the proposed petition complied with the necessary local and state law requirements. On December 19, the Court of Appeals of Maryland issued a decision, *Doe v. Montgomery Cnty. Bd. of Elections*, 962 A.2d 342 (Md. 2008), interpreting Maryland Code provision § 6–203 as requiring that the voter sign his or her name "as it appears on the statewide voter registration lists or the individual's surname of registration and at least one full given name and the initials of any other names;" adding that these provisions were mandatory, not suggestive.

Twelve days later, HCCOG presented the County Board with the necessary amount of signatures to get an extension of time for the collection of the referendum petition signatures, and these were found to be adequate and sufficient. By February, HCCOG presented the County Board with an additional 6,079 signatures. However, in March, the County announced it was reversing its decision to certify the first set of signatures on the petition, based on the decision in *Doe*. (The Board had conducted a second review of a statistically valid sample of signatures from the initial set and, using the *Doe* criteria, found 87% of these were now invalidated.)

Kendall, who had signed the petition, brought a Section 1983 action claiming that the County and its officials, "in interpreting the signature requirements as they did," totally and completely disenfranchised the signatories in violation of the First and Fourteenth Amendments. The defendants asserted the complaint failed to state a claim upon which relief could be granted and the district court agreed, dismissing the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). A plaintiff pursuing a Section 1983 claim was required to plead that the defendants unlawfully deprived him of a right secured by the Constitution and laws of the United States. The court ruled that, while federal law did secure, in a limited sense, the right to referendum, and that the right to vote was fundamental, the state-conferred privilege to undertake ballot initiatives and referenda was not. Such right, also, was permissibly subject to non-discriminatory and content-neutral limitations. The state law, as construed in *Doe* and applied to Kendall, contained only nondiscriminatory, content-neutral regulations, and the statute imposed no unconstitutional restraints on Kendall's ability to petition for a referendum. Dismissal was also appropriate as to his remaining claims (alleging a denial of equal protection of the laws, substantive due process and procedural due process violations).

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed, finding that Maryland Code provision § 6–203 did not violate Kendall's right to freely associate, his right to petition the government, his right to vote, or his First Amendment right to engage in politically protected speech. "We agree with the district court's conclusion that there is no fundamental right to initiate legislation as there is a fundamental right to vote," and signing a petition to initiate legislation was not entitled to the same protection as exercising the right to vote. A state could validly establish non-discriminatory and content-neutral limitations on any referendum or initiative procedure, and, when analyzing state-created restrictions that met these requirements, the state's "important regulatory interests" in maintaining the integrity and fairness of its referendum process were "generally sufficient to justify the restrictions."

There was no denial of equal protection in applying Section 6–203 to Kendall's signature, as there was a rational relationship between separating those signatures which met Section 6–203's requirements from those which did not and the legitimate governmental purpose of detecting fraudulent or otherwise improper signatures upon a referendum petition. Kendall had failed to state a claim that his rights to substantive and procedural due process had been violated. *Kendall v. Balcerzak*, No. 09-2304, 2011 WL 1108257 (4th Cir. March 28, 2011).

First Amendment

Counter-Protesters' Rights

Michael Marcavage was an "open-air" preacher of evangelical Christian principles on the streets of Philadelphia. He and his group, "Repent America," attended gay pride events, held in public parks and streets pursuant to city permits, to condemn homosexuality and encourage the participants to abandon homosexual behavior. Marcavage and his group would preach to a crowd that reacted strongly to his message by shouting at, debating with, trying to surround, and getting physically close to, Marcavage and the others, and the police would relocate Marcavage and his group to the periphery or perimeter of the event. In one incident at City Hall, Marcavage was moved because the crowd was getting upset and the police advised they could not protect him. Marcavage was moved from the middle of the crowd to the outskirts. From their new locations, Marcavage and his group were still allowed to preach to the crowd with amplified sound, speak with participants passing by, hand out leaflets, and carry large signs. When the Marcavage group disobeyed a police directive to move to a less disruptive location, they were arrested.

In another incident, after a shoving match between one of Marcavage's group members and an event attendee, police physically removed the group member from the march and onto the sidewalk. When Marcavage objected, an officer allegedly grabbed Marcavage by the shoulder and physically moved him approximately five feet from the street onto the sidewalk. When Marcavage turned on his video camera, he alleged that an officer placed him in a choke-hold and a short (ten-second) scuffle ensued.

Marcavage initiated a Section 1983 lawsuit against the City of Philadelphia and various police officers as individual defendants, alleging a violation of his civil rights. He claimed that by restricting his movements on public sidewalks at gay pride events, the defendants employed a policy, custom, or practice that violated his First Amendment rights to free speech and free exercise of religion. He claimed that the incidents where officers physically restrained him violated his Fourth Amendment rights and amounted to excessive force. He also alleged a violation of his Fourteenth Amendment right to equal protection under the law, as he claimed he had been treated differently than the gay pride attendees because his movement was restricted, while theirs was not. The City and other defendants applied for summary judgment on the basis that there was no genuine issue of material fact and they were entitled to judgment as a matter of law.

The district court granted the motion for all counts. Open-air religious preaching was speech that was protected by the First Amendment, and all four incidents occurred at locations that qualified as public forums. However, the free speech claim failed because the defendants' actions were content neutral (not aimed at suppressing the plaintiff's message), the relocations were a "narrowly tailored" means of ensuring public order and safety, and the plaintiff was left with alternative adequate channels of communication at the site of his relocation. "Marcavage does not have a First Amendment right without limits and the City has a legitimate interest in preventing Marcavage—as a counter-protestor of a permitted event—from interfering with the message of the permit holder and ensuring the safety of both the participants as well as Marcavage and his group." Based on the valid permitting scheme, the defendants "had authority to reasonably remove, relocate, or exclude counter-protestors" from permitted events. Dealing with

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