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Elections: "Representational Nexus" is Necessary for Inclusion of Non-voting Population within Voting District

Davidson v. Cranston, C.A. No. 14-91L (D.R.I. May 24, 2016)

The Rhode Island federal District Court has held that Cranston's redistricting plan, which included an entire prison population in one of its wards for purposes of apportionment, is unconstitutional because the majority of the prisoners received no benefits from local government and possessed no influence over local policy and lawmaking decisions.

ACLU of Rhode Island, along with four registered Rhode Island voters brought suit against the city of Cranston (City), alleging that the City's 2012 redistricting plan violated the Due Process and Equal Protection clauses under the 14th Amendment as a result of including the entire prison population within a single ward. Historically, Cranston's census bureau counted prison inmates as residents of the ward where their prison was located—the only prison in the state. Of the 3,433 prisoners counted in the 2010 census, it was estimated that at any given time, only six to seven inmates would actually be eligible to vote in Ward Six under a Rhode Island law requiring inmates to vote via absentee ballot in their pre-incarceration domicile. This was both because of the transient nature of the remaining prison population and the fact that approximately 37% of the prison population was serving a felony sentence and was ineligible to vote.

Further, the inmate population was found to not participate in the civic life of Cranston—a point emphasized by the court. Prisoners were only rarely allowed to leave the facility or make use of public roads, transportation or parks in the area. Because the prison was run by the State, the City provided only minimal services to the prison and the local

Cranston police had limited interactions with the prison that predominantly related to delivering prospective inmates. Additionally, prisoners had limited contact with elected officials and no influence over local policy decisions.

Judge Lagueux held that, unlike local college students and other non-voting populations who are, nonetheless, affected by municipal decision-making and possess the ability to lobby for policy changes, prisoners are wards of the state and thus could not benefit from the Constitution's "one person one vote" principal, which covers those who are otherwise meaningfully represented. Accordingly, he denied the City's motion to dismiss and ordered the City to not hold an election until a new election map could be drawn.

Arguing that hasty redistricting could result in "electoral chaos," Cranston has appealed the decision to the First Circuit and has requested an expedited stay on the District Court's ruling. A decision is expected this week.

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Employment: Unused Benefits Must Be Included When Calculating Overtime Pay under Fair Labor Standards Act

Flores v. City of San Gabriel, Nos. 14-56421; 14-56514 (9th Cir. June 2, 2016)

Affirming in part and reversing in part a district court, the Ninth Circuit has upheld a decision that unused health benefits, paid to employees in the form of cash, must be included as part of workers' "regular rate" of compensation for purposes of calculating overtime under the FLSA.

Under the FLSA, an employer must pay workers one and one-half times their "regular rate" of compensation for all hours worked in excess of 40 hours over a seven-day work week. "Regular rate" means "all remuneration for employment paid to, or on behalf of, the employee." Where the employer willfully fails to make such payments, it is liable not only for the unpaid overtime but additional liquidated damages—and faces an increased statute of limitations.

Historically, San Gabriel has provided approximately $2.4 million in health care benefits to its police officers—roughly 55% of these were taken by police as vision, dental and other health services, with the balance (roughly 45%) being taken in cash. Beginning in 2003, San Gabriel began to exclude the unused benefits from its overtime calculations, resulting in approximately $1.3 million per year of cash-paid-in-lieu-of-benefits being uncounted towards the "regular rate" of pay.

Police officers in San Gabriel (City) brought an action under the FLSA alleging that the City improperly excluded the value of unused benefits when calculating their regular

rate of pay, resulting in an underpayment of statutory overtime benefits. They further alleged that because the City's violation was willful, they were entitled to a three-year statute of limitations (versus a two-year limitation period for non-willful violations) and liquidated damages.

The district court found the City liable for the increased overtime but declined to allow the extended statute of limitations. It also found the City entitled to a reduction in damages based on an assumed 80 hours of work during any consecutive 14-day period. The officers appealed.

A panel of the Ninth Circuit affirmed in part, agreeing that the increased overtime was payable. It also agreed that the 80-hour/14 day threshold for overtime would apply to limit the City's liability. But it reversed on the statute of limitations issue, determining that the City had not affirmatively acted in good faith in its original overtime calculations, meaning that a three-year limitation period applied. Affirmed in part, reversed in part and remanded.

LINK

Immunity: Officers Have Probable Cause to Arrest Apparent Child Pornographer, But Have Duty to Protect Arrestee from Assault by Fellow Officer

Figueroa v. Mazza, No. 14-4116-cv (2d Cir. June 3, 2016)

The Second Circuit has affirmed a finding that officers who wrongly arrested a man suspected of child pornography had probable cause and are protected under qualified immunity; however, the Circuit reversed the grant of qualified immunity where the arresting officers did too little to prevent or minimize an attack on the arrestee by a fellow officer.

Eli Samuel Figueroa called a New York City drugstore to request that certain photos submitted for developing be deleted. Store employees noted that the photos appeared to depict child pornography. In reality, the photos had been taken by a mother who wanted evidence to show police that her son was being abused by his father. She had changed her mind about the photographic evidence and Samuel, a local rabbi, called the store on her behalf. Police ultimately tracked the phone calls and traced Samuel to his mother's apartment. They entered without a warrant, arrested Samuel, roughing him up in the process, and placed him in their cruiser. Another officer then opened the back door and assaulted Samuel for some period. Samuel brought a § 1983 action against the officers for unlawful entry, false arrest, excessive force and assault.

The district court found for defendants on all counts.

On appeal, the Circuit Court affirmed as to false arrest and excessive force, finding that the officers could reasonably have believed that Samuel should be arrested. However, the Circuit reversed as to the assault in the vehicle, holding that the lower court wrongly concluded that the arresting officers had no meaningful opportunity to intervene in the beating. The Circuit also reversed as to the unlawful entry count, finding that Samuel had a reasonable expectation of privacy while in his mother's apartment.

LINK

Jails: Jailers are Obligated to Protect Threatened Prisoner, But Sheriff Has No Specific Duty to Reduce Overcrowding

Wright v. Collison, Nos. 15-6046, 15-6058 & 15-6123 (10th Cir. June 2, 2016)

The Tenth Circuit has denied immunity to jail officers in Oklahoma who placed the decedent in a cell with inmates who had verbally threatened to harm him, but granted immunity to the county Sheriff, finding he had no specific duty to reduce overcrowding through interim measures introduced by the decedent.

Cory Wright was in custody at the Woodward County Jail in Oklahoma when he was beaten severely by other inmates; he ultimately died of his injuries. Suit was filed against individual jailers, the sheriff, and the county. The district court denied immunity for all defendants in their personal capacity, prompting an appeal to the Tenth Circuit.

The Circuit noted Mr. Wright was a pretrial detainee subject to the Eighth Amendment rule that the jailers should have protected him from harm by other inmates, leaving him to show that "he [was] incarcerated under conditions posing a substantial risk of serious harm, the objective component, and that the prison official[s] w[ere] deliberately indifferent to his safety, the subjective component."

The denial of qualified immunity to the sheriff by the district court was reversed by the Circuit court under the "clearly established" prong of the qualified immunity analysis. It found that under the circumstances – including that the county jail was 32 years old and was overcrowded periodically, and that the sheriff advocated and took measures to reduce the overcrowding in light of his statutory duty to take all inmates sent to the jail by local courts – it was not constitutionally established in 2011 that the sheriff had a duty to reduce overcrowding by the specific measures suggested by the plaintiff (early release, bond reduction, and ankle monitor bracelets).

On the other hand the facts dictated that the denials of qualified immunity for the two officers that handled the inmates were correct, given that the officers were directly told by the three inmates involved not to put them together in the same cell because "it would not work" and "they would fight" and, instead of heeding this, put them together

resulting in a fight within one minute that subsequently caused Mr. Wright's injuries. The Court found it clearly established in 2011 that prison authorities had a constitutional obligation to protect a prisoner plausibly threatened by other inmates and that these officials failed to uphold that obligation.

LINK

Remedies: Judicial Remedy for Loss of Evidence Is Not Applicable in Every Case; Rationally-based Limitations Comport with Due Process and Equal Protection

Dawson v. Coffman, No. 15-1365 (10th Cir. June 8, 2016)

Where a criminal defendant unsuccessfully argued diminished capacity due to intoxication, the state's subsequent loss of his blood and urine evidence—which had not been used in his trial—did not require a judicial remedy, and denial of that remedy did not violate his Due Process or Equal Protection rights.

James Dawson was charged with a variety of violent crimes, for which he defended himself by arguing he had diminished capacity based on being intoxicated and suffering drug-related impairment. Given this defense, the trial court ordered urine and blood samples be drawn from Mr. Dawson. The samples were never tested and a jury found him guilty of second-degree murder, attempted second-degree murder, second-degree assault, and commission of a crime of violence. His urine and blood samples were ultimately lost or destroyed over time. Subsequent to his conviction Colorado enacted Colo. Rev. Stat. § 1-1-414(b) which authorizes judicial remedies when law enforcement negligently loses or destroys biological evidence. Mr. Dawson filed suit in state court alleging he was a victim of the state negligently losing or destroying his urine and blood samples, and seeking relief under the new law.

The state court denied his claim, holding the law did not apply to those defending on the basis of diminished capacity and that the law only applied to DNA evidence. This prompted an appeal to the Tenth Circuit, wherein Mr. Dawson argued the limitations in the state law denied him due process and equal protection under federal law. The Circuit Court agreed with the federal district court's holding that statutory limitations on relief for some individuals did not violate federal law.

Plainly put, the legislature may set rational limitations on its authorization of a judicial remedy and the limitations in § 1-1-414(b) – that only defendants arguing actual innocence and the loss of DNA evidence, not those arguing diminished capacity and urine or blood evidence may utilize the new law – were rationally based and thus not a violation of federal due process or equal protection law.

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Search: Under "Special Needs" Test, Direct Observation of Drug Program Inmate While Providing Urine Sample Does Not Violate Fourth Amendment

Smart v. Intensive Supervision Program, No. 15-3502 (3d Cir. June 1, 2016)

The Third Circuit has held that jailers' direct observation of an inmate in a prison drug program while providing a urine sample is valid under the Supreme Court's "special needs" test and does not violate Fourth Amendment standards.

Salahuddin F. Smart was convicted of a crime in New Jersey and subsequently entered the state's Intensive Supervision Program ("ISP"), under which participants must maintain employment, follow curfew rules and submit to regular searches for drugs and/or alcohol. The drug testing policy of the program includes direct observation when obtaining urine samples from participants. Smart objected to being observed by an ISP employee but was ordered to comply anyway. He sued under § 1983, naming the individual ISP employee as well as the director of the program, complaining his Fourth Amendment rights were violated. The district court granted summary judgment to the defendants, a decision from which Smart appealed.

The Third Circuit affirmed the lower court, noting that state-compelled urine collection is a "search" within the meaning of the Fourth Amendment normally requiring a warrant, but that warrantless searches are constitutional where "special needs" are at issue. Specifically, the Supreme Court's "special needs" doctrine requires courts determine "reasonableness" by applying a three-part test "consider[ing]: (1) the nature of [the defendant's] privacy interest; (2) the extent to which the search intrudes on that interest; and (3) the nature of the governmental concern at issue and the efficacy of the means employed for meeting that concern." Here, the Court found Smart had a diminished privacy interest as a participant in ISP. It agreed that direct observation is "intrusive" but followed its longstanding principal that a search need not be the "least intrusive" search practicable, under the special needs doctrine, and found the government's interest in preventing ISP participants from cheating on drug and alcohol tests significant. It affirmed the reasonableness of direct observation in the case and affirmed the lower court.

LINK

Speech: Laws Regulating Professional Advertising are Rationally Related to Legitimate State Interest in Ensuring Competency and Honesty in Certain State-Licensed Professions

Young v. Rickets, No. 15-1873 (8th Cir. June 9, 2016)

The Eight Circuit has upheld the Nebraska Licensing Act, which prohibits non-licensed individuals from holding themselves out as licensed Nebraska real estate brokers, as a legitimate exercise of state power to regulate professional brokerage services.

Leslie Rae Young is a California resident and a real estate broker in that state. In 2010, the director of the Nebraska Real Estate Commission determined Young was advertising online properties in Nebraska for sale without a Nebraska real estate broker's license and ordered her to cease and desist immediately. Young responded by filing a § 1983 suit alleging the Nebraska officials were violating her First Amendment right to free speech. The district court granted summary judgment to the defendants, a decision from which Young appealed.

She argued on appeal that her internet listing properties for sale was First Amendment protected speech and that, therefore, the Nebraska officials' requirement that she get a license was a content-based prior restraint. The Circuit Court looked to Supreme Court precedent, itself relying on opinions from the 1940s, for the long-standing reasoning that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Acad. & Inst'al Rights, Inc*., 547 U.S. 47, 62 (2006). The Court explained the difference between regulation of a profession – e.g. where one has a client and purports to exercise judgment on behalf of the client – from government regulation of speech – e.g. where there is no nexus between the speaker and a client on whose behalf the speaker advocates. Young, the Court found, in fact had listing contracts with the owners whose properties she listed online and used her California status as a licensed real estate broker to access exclusive databases for those clients. It thus rejected her challenge and upheld the lower court's dismissal.

LINK

Trials: Dismissal Based in Part on Lack of Personal Jurisdiction is Not Final Judgment on the Merits and is Does Not Constitute *Res Judicata*

Ruiz v. Snohomish County Public Utility District No. 1, No. 14-35030 (9th Cir. June 8, 2016)

A Ninth Circuit panel has held that plaintiff's case, which had previously been dismissed for lack of jurisdiction and untimeliness, is not barred by *res judicata*, citing Restatement (Second) of Judgments and other circuits as guidance.

From 1998 until her termination in 2010 Kim Ruiz worked for Snohomish County Public Utility District No. 1. In 2011 she sued the director of the Utility District, alleging sex discrimination, however, having failed to effect service, the suit was dismissed for *both* lack of personal jurisdiction and untimeliness. In 2013 Ruiz filed suit again for sex discrimination, which included facts from her 2010 termination, and the district court held it was barred by res judicata given the previous case. Ruiz appealed this second case.

The Ninth Circuit reversed. It noted first that *res judicata* only applies when three elements are present - an identity of claims; a final judgment on the merits; and identity or privity between parties. It noted a dismissal for lack of personal jurisdiction is not a dismissal "on the merits," but noted the Ninth Circuit has never determined the preclusive effect of an order that contains alternative grounds for dismissal when one basis is not on the merits, e.g. personal jurisdiction. It thus looked to sister circuit precedent and the Restatement (Second) of Judgments for guidance, holding such an order does *not* bar further proceedings.

The Court agreed with the Restatement reasoning that, first, a determination with two bases for dismissal "may not have been as carefully or rigorously considered as it would have if it had been necessary to the result" and, second, a losing party, though entitled to appeal such a decision may have been dissuaded from doing so with regard to the determination on the merits since the alternative determination that does not have preclusive effect is correct. Ultimately, the panel did not adopt a rule for applying *res judicata* for all judgments resting on two grounds of dismissal, and instead finding that the lower court's ruling that there was no personal jurisdiction, robbed it of the power to rule on the merits.

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Zoning-Federal Courts Have No Jurisdiction Where Plaintiff Fails to Follow City's Administrative Processes

E&R Enterprise LLC v. City of Rehoboth Beach, No. 15-3117 (3d Cir. June 1, 2016)

Where a developer failed to exhaust its administrative remedies before the city's Board of Appeals, federal courts did not have jurisdiction over the developer's suit challenging denial of a permit.

E&R Enterprise LLC acquired property in Rehoboth Beach, Delaware and sought to build a swimming pool but was denied a permit to do so since the city had placed a moratorium on such construction. The company failed to follow the administrative process (which required an appeal to the city's Board of Appeals), and instead filed suit directly in state court against the city, the mayor and various officials. The city removed to federal court – both state and federal claims were made – and promptly moved to dismiss the case based on a lack of subject matter jurisdiction. The district court granted the motion to dismiss, but not wholly on jurisdictional grounds—it also found that plaintiff had *failed to state a claim*.

The Third Circuit disagreed, holding that E&R's failure to appeal administratively to the city's Board of Appeals made all its claims unripe and thus ruled the district court *lacked subject matter jurisdiction and should have remanded the case* to the state court. In short, E&R failed to follow the well-known "finality rule" for appealing zoning decisions of municipalities.

E&R also had a substantive due process claim, and on this matter the Third Circuit held the lower court had applied the incorrect precedent. E&R argued that its failure to seek administrative relief was because the city did not follow its own procedure, depriving E&R of the ability to follow the municipal appeal channels, and that it was also stymied by relying on the city's false representations until the administrative appeal deadline passed. The lower court had dismissed this substantive due process claim (which can survive in federal court despite the zoning decision not having been appealed administratively if its resolution does not require reviewing the permit decision), analyzing it as an exception to the finality rule. According to the Third Circuit, since E&R's claim hinged on whether the city properly denied the building permit, it should have been reviewed within the finality rule--not as an exception to the rule. This analysis also required dismissal for lack of subject matter jurisdiction. The Court thus vacated the lower court's ruling and remanded the case to the district court with instructions for that court to remand the case to Delaware state court.

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