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Guns: Revised Concealed Carry Permitting Process Must Be Utilized in lieu of Challenging Outdated Process; Licensing Board Members' Prior Law Enforcement Careers do not Disqualify Them

Berron v. Illinois Concealed Carry Licensing Review Board, No. 15-2404 (7th Cir. June 17, 2016)

The Seventh Circuit has upheld a challenge to the State's concealed carry permitting scheme, finding that plaintiffs who had previously been denied an appeal process under a former permitting scheme were required to utilize the new scheme which provided for appeals, rather than litigate the validity of the former scheme. The Circuit Court further declined to find bias in the permitting reviewers merely because they had previously worked in law enforcement.

After the Supreme Court's *McDonald* holding, Illinois developed a scheme to allow individuals to carry guns in public and created the Illinois Concealed Carry Licensing Review Board to carry out the law. Under the statutory scheme, individuals apply for a permit and pay a fee. As long as carrying a concealed weapon does not pose a danger to themselves or others, they may receive a permit. Law enforcement agencies may file objections to any application, which often are the foundation for denial of a permit. Under the initial statutory scheme, applicants did not get any information about why a permit was denied. Realizing this due process problem, the state reworked the system to give applicants notice of the objection and what law enforcement agency filed it, and provided an appeal period to answer the objections.

This case represents four consolidated complaints in which applicants were denied permits under the initial scheme and challenged the denial. Each plaintiff sought an

injunction against the new scheme and requested that they automatically receive a permit. The lower-court judges in the cases held that the proper relief was neither of those, but rather that each plaintiff file a new application under the revised scheme. The plaintiffs argued on appeal that if they were to reapply as the lower courts ordered, the Review Board would not reveal enough information for them to respond to the objections with relevant arguments. The Circuit Court construed this as a charge that the revised statute is unconstitutional on its face and held that a "federal court should not assume that the state will choose the unconstitutional path when a valid one is open to it." It thus agreed with its district counterparts that it would be premature, given the new state scheme has not been given a chance to apply to these individuals, to consider the appeal.

The plaintiffs made three other objections, which the Court also rejected. First, they argued that, like prior restraint of speech, it is unconstitutional to require a concealed carry permit at all. This was a nonstarter with the Court, which noted that the Supreme Court has been clear that the Second Amendment right is confined to law-abiding citizens, and not available to everyone like the right to free speech. Next, the plaintiffs argued the state could only deny a license based on "clear and convincing evidence" and nothing lesser, to which the Court responded that without Supreme Court guidance on licensing under the Second Amendment, the administrative rule that a state can use a preponderance of the evidence standard applies. Third, the plaintiff's argued that since five of the seven members on the Review Board were previously employed in law enforcement they are biased, and the Circuit Court rejected this as well. It noted "[T]he Supreme Court has never suggested that one's work experience compromises partiality. Due process requires disinterested adjudicators but not inexperienced or naïve ones" and affirmed the lower courts' holdings.

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Prisons: Terminating Impaired Inmate's Job in Prison System May Be Actionable Under ADA

Fauconier v. Clarke, No. 15-6109 (4th Cir. June 20, 2016)

The Fourth Circuit has reversed and remanded a Virginia federal district court dismissal of a complaint brought by a prisoner who was denied the opportunity to keep working in the prison system after suffering repeated hospitalizations due to a neuromuscular disease. The Circuit Court found that the prisoner's claims of violations of the Fourteenth Amendment and the ADA had been improperly dismissed and required further review by the lower court.

Douglas Fauconier has been a prisoner in the Virginia Department of Corrections (VDOC) system since 2004. Between 2004 and 2010 he had several jobs within the prison system, including as a cafeteria server and a janitor. He suffers from myasthenia

gravis, a neuromuscular disease, for which he has been hospitalized numerous times while in prison, yet he was always allowed to return to work, until 2010. Since a hospitalization that year, though his medical status code within the prison system did not change, the VDOC has refused to allow him to work, despite his applications to do so. Fauconier filed suit under § 1983 against the VDOC and several of its officials after working his way appropriately through the prison grievance system, alleging a violation of Title II of the Americans with Disabilities Act, and "provisions of the Fourteenth Amendment" for Equal Protection and Due Process. He sought an injunction ordering prison officials to stop discriminating against him, and requested monetary damages. The district court promptly dismissed for failure to state a claim under 28 U.S.C. 1915A, which requires federal courts to screen inmate complaints as soon as practical after docketing. The district court interpreted his claim as alleging violations under the Fourteenth Amendment Due Process Clause and Title II of the ADA, and held that no constitutional violation had been alleged since prisoners do not have a cognizable right to participate in work programs and since the Eleventh Amendment bars the ADA claim. Fauconier timely appealed.

The Fourth Circuit construed the complaint liberally, as required for pro se prisoners, finding that it sought declaratory, injunctive and monetary relief and included a Title II ADA claim, an Equal Protection claim, and a Due Process claim. It found that the district court had improperly failed to address Fauconier's request for injunction, because the Eleventh Amendment does not bar prospective injunctive relief, and held that the lower court had improperly failed to address Fauconier's Equal Protection claim. The Circuit Court rejected arguments by the Virginia Department of Corrections that it should affirm the dismissal based on mootness (Fauconier had since been transferred to a different prison), the Equal Protection claim was insufficiently plead, and the prison officials would have qualified immunity anyway. It replied that it is a court "of review, not first view," and since none of those arguments had been raised in the court below, it would instead vacate and remand the case for further consideration by the lower court.

LINK

Punishment: No Eighth Amendment Violation Where Inmate's Injury Does Not Result From Policy of Deliberate Indifference

Solazzo v. Bynes, No. 15-1270 (10th Cir. June 24, 2016)

The presence of a low-hanging strand of razor wire in a prison exercise ground which caused injury to a Colorado inmate did not, without specific pleadings showing awareness and inaction by prison officials, constitute actionable deliberate indifference.

Inmate Solazzo was seriously injured by a low-hanging piece of razor wire in the corner of a Colorado prison recreation yard. The wire tore his scalp, causing such profuse

bleeding that he required plasma and the gashed had to be stapled. He suffered migraine headaches, dizziness, and pain for a month.

He brought an Eighth Amendment action but the district court concluded that his complaint "fail[ed] to assert his claims in a manner that is clear and concise and allows the Court and each Respondent to understand and respond to each asserted claim." The court directed Solazzo to file an amended complaint, instructing him that he must explain what each defendant did and how each violated his constitutional rights. The court then denied Solazzo's motion for the appointment of counsel.

Solazzo's amended complaint asserted that named prison officials were fully aware of the dangerous wire but had not taken action to resolve the danger, constituting deliberate indifference.

The magistrate judge denied the second request for counsel. He recommended that the district court dismiss the amended complaint and deny the motion to amend the complaint. Over Solazzo's objections, the district court adopted the recommendation and awarded costs to the defendants. Solazzo appealed.

The Tenth Circuit affirmed. Although *Iqbal* provides a reasonable threshold for the sufficiency of a complaint, it does not save clearly inadequate pleadings: "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."
Solazzo's pleadings were short on specific facts—a deficit which "do[es] not permit the court to infer more than the mere possibility of misconduct." Therefore, the amended complaint failed to state an Eighth Amendment claim.

Solazzo also appealed from the denial of his motions for appointed counsel, stating that was not familiar with the law and had no help. This did not require reversal: "Only in those extreme cases where the lack of counsel results in fundamental unfairness will the district court's decision be overturned." Here, the legal issues were relatively straightforward, and only a small number of attorneys were available for such requests.

LINK

Search and Seizure: Exclusionary Rule is a Prudential Doctrine, Not a Constitutional Doctrine, Does Not Apply in §1983 False Arrest Suit

Lingo v. City of Salem, No. 14-35344 (9th Cir. June 27, 2016)

Following sister courts, the Ninth Circuit has granted immunity to officers sued for false arrest; although their grounds for arresting the plaintiff was the "fruit of the poisonous tree" for evidentiary purposes, the exclusionary rule is designed to protect defendants from improper prosecutions and had no bearing in this qualified immunity context. For qualified immunity probable cause purposes, the relevant inquiry is what information was known to the officer, not whether that information would ultimately be admissible.

In June 2010 Lia Lingo and her neighbor had a dispute, prompting the neighbor to call law enforcement. Though the Salem, Oregon police did not believe anything criminal took place, they offered to speak to Lingo about the dispute. They saw Lingo's rear outside light was on and, instead of using the front door, walked around back and knocked on that door. A guest answered and retrieved Lingo to speak with the officers. The officers thought they smelled marijuana, which Lingo denied, saying he was burning incense. They asked to check the house repeatedly, each time Lingo denied the request. When Lingo's child came out, the officers arrested her for endangering a child, after which they searched the house and found marijuana and a prescription drug. Lingo moved to suppress all the evidence obtained as a result of the officers' alleged unconstitutional entrance into her carport, a motion granted by the lower court that led to the dismissal of all criminal charges.

Lingo then filed a §1983 suit alleging the officers and city violated her First, Fourth, and Fourteenth Amendment rights by falsely arresting her without probable cause and for interfering with her right to familial association for taking her kids. The lower court agreed that the officers violated Lingo's Fourth Amendment right by entering the house curtilage, but held the exclusionary rule does not apply in §1983 cases, meaning that violation did not taint the ultimate arrest. It thus held the officers' smelling marijuana gave them probable cause to arrest her, that her children being removed temporarily was permissible, and that she failed to show municipal liability. It granted summary judgment to the defendants.

Lingo appealed only the ruling that her arrest was valid, saying since the officers could not be at her back door, they did not have probable cause to arrest her based on evidence they gathered from an unconstitutional vantage point. The Court began by noting the exclusionary rule is a prudential one, not a constitutional one, created by the judiciary to discourage constitutional violations by preventing illegally obtained evidence from being used in criminal prosecutions. The Supreme Court has refused to apply the exclusionary rule in grand jury proceedings, civil tax proceedings, civil deportation proceedings, or parole revocation proceedings. Similarly federal courts have refused to apply the rule in §1983 cases where the government invokes it to defend itself against

civil liability, as the deterrent effect it was created to achieve is not served. The Ninth Circuit joined its sister circuits here, holding "nothing within the fruit-of-the-poisonous-tree doctrine suggests that an officer must ignore facts that would give him probable cause to arrest a person merely because those facts were procured through an unlawful search. Indeed, as a general matter, probable cause determinations depend on the substance of the information known to the officer, not whether that information would be admissible in court." The Circuit affirmed the lower court.

LINK

Search and Seizure: Pet Dogs are Personal Property and Subject to Fourth Amendment Limits on Seizure

Mayfield v. Bethards, No. 15-3074 (10th Cir. June 20, 2016)

The Tenth Circuit has upheld a lower court denial of qualified immunity for Kansas police officers who shot a pet dog in the owners' back yard; despite their argument that they believed the animal had killed livestock, the evidentiary record did not support this supposition.

In July 2014, two deputies from Halstead, Kansas entered Kent and Tonya Mayfield's unfenced yard without a warrant and shot at their two dogs. One dog ran behind the house, but the second was shot three times on the front porch. The deputies dragged the dog's body off the property and, according to witnesses, tried to hide it amongst nearby trees to disguise where it had been shot. The Mayfields filed a §1983 suit claiming the officers violated their Fourth Amendment rights, and the district court denied the deputies qualified immunity.

On appeal, the deputies argued the dogs were not "effects" under the Fourth Amendment. The Tenth Circuit disagreed, holding the Supreme Court has long-held that the word "effects" in the Fourth Amendment is equated with personal property and that Kansas state law, in turn, has long deemed dogs personal property. Thus, the Circuit found it clearly unlawful to seize a dog without a warrant or without circumstances amounting to an exception to the warrant clause. The deputies also argued it was reasonable to kill the dog because they believed the animal had killed livestock and thought Kansas law allowed anyone to kill a dog reported to have killed livestock. The Circuit looked to the record to address this argument and found it contained a letter from the Mayfield's to the sheriff noting that the offending dog in the livestock incident, *which had occurred a year before the deputies killed their dog*, had already been shot by the livestock owner. The Tenth Circuit thus affirmed the lower court ruling denying qualified immunity.

LINK

Speech: North Carolina Supreme Court Strikes State Cyber-Bullying Law as Impermissible Content-Based Restriction on Speech

State v. Bishop, 20 NC Lexis 440 (NC June 10, 2016)

The North Carolina Supreme Court has stricken the state's cyber-bullying law, finding that it restricts speech, is not content neutral and is not narrowly tailored to serve a compelling state interest.

During the 2011-2012 school year, defendant Robert Bishop and other students at a North Carolina High School began to post negative pictures and comments about a classmate, Dillion Price. When sexually themed screenshots were posted to Price's Facebook page, Price accused the posting student of altering or falsifying the screenshot and threatened to fight him over the matter. Bishop commented that Price's text was "excessively homoerotic" and accused others of being "defensive" and "pathetic for taking the internet so seriously." Additional Facebook postings followed, all involving Price, the defendant, and other commenters; many included accusations about each other's sexual proclivities, along with name-calling and insults. Price's parents ultimately became aware of the online attacks and the deleterious impact they were having on Price.

In February 2012, Bishop was arrested and charged with one count of cyberbullying under North Carolina's cyberbullying statute, N.C.G.S. § 14-458.1. Under that statute, it is "unlawful for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." In 2014, he was convicted in a county Superior Court. The North Carolina Court of Appeals subsequently affirmed, concluding that the cyberbullying statute "prohibits conduct, not speech"; that any burden on speech is "merely incidental"; and that this "incidental" burden "is no greater than necessary" to further the State's "substantial" interest in protecting children from the harmful effects of bullying and harassment. *State v. Bishop*, 774 S.E.2d 337, 344-45, 349 (2015).

On appeal, the North Carolina Supreme Court reversed. It confirmed that online text postings are a form of speech; that the statutory prohibition against posting "private, personal, or sexual information . . . with the intent to intimidate or torment" restricted not only conduct but speech as well. Unlike content-neutral restrictions which impose only time, manner and place limitations on speech and need only survive intermediate scrutiny, the North Carolina cyber bullying statute was clearly content-based, triggering strict scrutiny analysis as enunciated in *Reed:*

> Recently, however, in *Reed v. Town of Gilbert* that Court clarified that *several* paths can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny. This determination can find support in the plain text of a statute, or the animating impulse behind it, or the lack of any plausible

> explanation besides distaste for the subject matter or message. In short, "[b]ecause strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed*, U.S. at , 135 S. Ct. at 2228.
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> Here, it is clear that the cyberbullying statute is content based, on its face and by its plain text, because the statute "defin[es] regulated speech by [its] particular subject matter." *Id.* at , 135 S. Ct. at 2227. The provision under which defendant was arrested and prosecuted prohibits "post[ing] or encourag[ing] others to post . . . private, personal, or sexual information pertaining to a minor." N.C.G.S. § 14-458.1(a)(1)(d). The statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication.

The North Carolina Supreme Court looked in vain for statute's narrow tailoring in support of a compelling governmental interest.

> We hold that it does not. At the outset, it is apparent that the statute contains no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting. In addition, as to both the motive of the poster and the content of the posting, the statute sweeps far beyond the State's legitimate interest in protecting the psychological health of minors. Regarding motive, the statute prohibits anyone from posting forbidden content with the intent to "intimidate or torment" a minor. However, neither "intimidate" nor "torment" is defined in the statute, and the State itself contends that we should define "torment" broadly to reference conduct intended "to annoy, pester, or harass." The protection of minors' mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.

When carefully scrutinized, the law could actually prohibit a wide range of speech having no sexual import: "Were we to adopt the State's position, it could be unlawful to post on the Internet any information 'relating to a particular [minor].' Such an interpretation would essentially criminalize posting *any* information about *any* specific minor if done with the requisite intent."

Reversed.

LINK

Trials: Complaint Which Fails to State Claim Due to Lack of Factual Content Cannot be Augmented with Evidence Developed During Discovery

Agema v. City of Allegan, No.15-1431 (6th Cir. June 16, 2016)

Where plaintiffs failed to allege sufficient facts in their complaint to overcome dismissal for failure to state a claim, additional facts could not be drawn from the evidentiary record developed during discovery to support a *Monnell* claim.

In 2012 David Agema and three others sought to hold a public event at Allegan High School in Michigan in order to provide information about Agema's proposed legislation in Michigan to limit Sharia law in the state and educate people about the dangers of radical Islam in America. One of the featured speakers was to be an alleged former terrorist who had converted to Christianity and had allegedly had a $25 million bounty on his head. Police were aware of the threat and curtailed the event. Agema and his fellow speakers filed suit under §1983 against the City and its Police Chief, alleging that their First Amendment free speech and freedom of assembly rights were violated. The district court dismissed the case for failure to state a claim, specifically holding the plaintiffs failed to plead sufficient facts to support a *Monnell* claim.

The Sixth Circuit agreed with the district court, finding the pleadings were insufficient to support the plaintiffs' argument that the City had a policy or custom of giving the Police Chief unfettered discretion to prohibit free speech. The plaintiffs argued on appeal that the court could look to the evidence developed during discovery to determine the sufficiency of the complaint, but the Sixth Court rejected this view, finding that the City could not rely on facts developed in depositions of the Police Chief which had not been cited in the complaint. The plaintiffs cited to a Seventh Circuit case from 1985 for their proposition, but the court pointed out the pleading regime was different in 1985 and that current Supreme Court *Iqbal* standards require that the complaint itself sufficiently state a claim. It thus affirmed the district court's threshold holding and did not address the constitutional deprivation alleged.

LINK

Trials: Where Disposition of State Law Claims May Moot Federal Claims, Federal Case Should be Stayed Under *Pullman* Doctrine

Grand Juror Doe v. McCulloch, No. 15-2667 (8th Cir. June 20, 2016)

A Missouri federal district court wrongly dismissed a First Amendment claim brought by a Ferguson grand juror in the Michael Brown shooting, and should instead have stayed the federal claim pending disposition of a related state law claim under the longstanding Supreme Court *Pullman* decision.

Juror Doe was on the grand jury in Missouri that declined to find probable cause to indict Darren Wilson for shooting Michael Brown in Ferguson, Missouri in 2014. Missouri grand jurors are required by law, prior to and after being empaneled, to swear an oath of secrecy not to reveal how any individual member of the grand jury voted and to keep all evidence presented a secret. Violating the oath subjects a juror to a Class A misdemeanor. Juror Doe filed suit in January 2015 alleging that, as applied, this law violates her First Amendment Free Speech protection. The St. Louis County Prosecuting Attorney, Robert McCulloch, replied that the court should abstain from deciding the issue under the *Pullman* doctrine and dismiss the case, a suggestion the district court agreed with leading it to dismiss the case. This prompted Doe to file both a review of the Missouri law in state court and move to alter or amend the federal district court decision such that her federal case be stayed and not dismissed. The district court replied that it had not, as the opinion seemingly stated, dismissed the case under *Pullman*, but rather under *Burford*, and that her motion was denied.

Doe thus appealed, arguing that *Burford*, under which a federal case is dismissed based on a state's successful argument that a complex state regulatory scheme is at issue, was an inappropriate basis for the dismissal. The Circuit Court agreed with Doe that the Missouri juror oath law at issue was not a complex regulatory scheme, required no special state law knowledge, and thus did not implicate the principles of *Burford*. It agreed that *Pullman* squarely applied and that the lower court, if it had applied *Pullman,* properly abstained given that the federal issue Doe raised could be mooted by the pending state law case. It thus ruled the lower court, rather than dismissing the federal case outright, should have stayed the proceedings while the state law case is litigated. The Circuit vacated and remanded the case.

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