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Due Process: Illinois EZPass Toll System Is Sufficiently Clear and Affords Sufficient Procedural Safeguards to Overcome Class Action by Aggrieved Ohio Driver

Cochran v. Illinois State Toll Highway Authority, No. 15-2689 (7th Cir. July 8, 2016)

In a costly use of judicial resources over a $64.50 dispute, the Seventh Circuit has rebuffed a class action mounted by an Ohio driver who claimed unfamiliarity and confusion over Illinois' automated toll system which requires payment upon entering the toll road rather than upon exiting, as is the practice in Ohio. The court refused to find due process or equal protection violations in Illinois' toll road markings, hearings process and distinctions between cash payers and EZPass users.

Jeffrey Cochran, an Ohio resident, was used to the Buckeye State's toll roads where tolls are assessed when the driver leaves the system. He was driving through Illinois and sped through three ezpass stations, which require payment in advance. He received a letter from Illinois notifying him that he had owed $64.50 in Illinois tolls—this amount reflected three $20 fines in addition to the tolls. The letter indicated that Cochran had a right to a hearing in the matter, but he simply paid the fine. He then filed a putative §1983 class action alleging that the Illinois State Toll Highway Authority violated the class's Due Process and Equal Protection rights for failing to clearly notify drivers of the advance-payment requirement. The district court granted Illinois' motion to dismiss, leading Cochran to appeal.

The Circuit Court found that Cochran had been due process, including notice of toll violations, a right to a hearing, and a seven-day grace period to pay the tolls without incurring a fine, in light of the deprivation suffered, a $20.00 fine for each offense. The Court also rejected his argument that the signage did not provide adequate notice of how the tolls worked (paying during travel on the highway, rather than only when existing the highway), since states do not have to post signage – "a statute or regulation is adequate notice in and of itself as long as it is clear." The Circuit also rejected his argument that, since a toll violation is a strict liability offense, a hearing would not have provided him a meaningful opportunity to be heard; the court held that the hearing process was not rendered meaningless merely because Cochran could not argue a knowledge defense, as other defenses remained available. Finally, Cochran argued that Illinois law violates the Equal Protection Clause since it treats ezpass users and non-ezpass users differently – affording the latter a second seven-day grace period. The Court held however that ezpass use is not a protected class and does not involve a fundamental right, thus requiring the state only prove a rational basis for the distinction. The state met this standard, noting that ezpass use reduces traffic, decreases state resources required to run tolls, thus increasing government and traffic efficiency, both of which the Court deemed sufficient and rational government interests. The Circuit thus affirmed the district court.

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Due Process: State Law Lengthening Time Between Parole Reconsideration Hearings Does Not Violate Due Process and Is Not Ex Post Facto Deprivation

Clark v. Fallin, No. 16-6109 (10th Cir. June 28, 2016)

Affirming the lower court, the Tenth Circuit has denied an inmate's claim that Oklahoma's lengthening the time period between parole hearings from one year to three years does not deprive a prisoner of due process or constitute an ex post facto deprivation of his rights.

Herman Tracy Clark, serving life term for robbery and homicide, applied for parole in March 2015 and was denied. He then filed suit against Oklahoma's governor alleging the state's Truth in Sentencing Act violates the U.S. Constitution's Ex Post Facto Clause because it increased the time between parole reconsideration hearings from one year to three years and violates the Due Process Clause. A magistrate recommended dismissal of the claims, with which the district court agreed in full.

In affirming the lower court the Tenth Circuit first stated the ex post facto issue as whether the Oklahoma parole law increased the risk or severity of punishment attached to the specific crimes for which Clark was convicted. The Court found Clark failed to proffer any evidence showing that the practical application of the law would result in him

being incarcerated longer than under an earlier rule. It thus affirmed the lower court with regard to the ex post facto charge.

As for due process, Clark's contention was that the process by which his parole was denied violated his rights. The Court made quick work of this allegation, pointing out that there is no constitutional right to be conditionally released before the expiration of a valid sentence. Instead states may create a liberty interest that would be protected with a guarantee of due process, but Oklahoma has not done so; its parole system is discretionary. As a result, the Court affirmed the lower court on this issue as well.

LINK

Education: Temporary Suspensions from Public Schools Require Notice, Explanation of Evidence, and Opportunity for Accused Students to Present Their Case

Dietchweiler v. Lucas, No. 15-1489 (7th Cir. June 28, 2016)

An Illinois school system's procedure for temporary suspensions was considered by the Seventh Circuit to be at the outer limits of what is constitutionally acceptable and passed constitutional muster, despite the school board's failure to follow its own procedural safeguards.

In January 2013 a student at Watseka High School in Iroquois County, Illinois told the dean of students that a student, M.M., was distributing drugs at the school. With that allegation, the school began investigating, calling the student to the office, questioning him, and searching his belongings, all of which culminated in finding found two prescription drug pills and a list of names with numbers next to them. One of the names, Noah Dietchweiler, had a ten listed next to it, prompting school officials to call him to the office and question him. After some questioning, Dietchweiler was told he could either confess to the drug use and possession or be expelled, at which point he signed a statement saying he was suspended for ten days for possessing and consuming drugs. Dietchweiler's parents had him drug tested that same night and found he had no drugs in his system, prompting an appeal through the school's process. The suspension was upheld and Dietchweiler subsequently filed suit against the school and a variety of officials involved in his suspension, alleging a due process violation. The district court determined the school provided the necessary due process for a ten-day school suspension.

On appeal to the Seventh Circuit the Court began by noting that students do have a liberty interest in public education, but that the procedural safeguards required for a temporary, brief suspension are not "extensive." Specifically the Supreme Court held in *Goss v. Lopez*, 419 U.S. 565, 581 (1975) that "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the

charges against him, and if he denies them, an explanation of the evidence the authorities have, and an opportunity to present his side of the story." The Court found Dietchweiler's version of events, taken as true at the summary judgment stage, met this standard – he was given oral notice of the drug charges, an explanation that another student had named him and had evidence of his buying drugs in school, and then was provided a hearing to present his evidence to the school board. The administrator's threat of suspending Dietchweiler if he did not admit the charges gave the Court pause and "troubled" the panel, but it did not negate the due process he was provided. Dietchweiler's additional complaints that the school changed the charges when he got to the hearing without warning and did not follow its own procedures further "troubled" the Court but did not persuade it, as these actions did not amount to a deprivation of federal due process rights under the Supreme Court standard. The Court upheld the lower court ruling.

LINK

Guns: Ninth Circuit Affirms That Second Amendment Does Not Confer Absolute Right to Concealed Carry

Peruta v. County of San Diego, No. 10-56971 (June 9, 2016)

The Ninth Circuit, sitting en banc, has affirmed a district court determination that there is no inherent Second Amendment right ato carry concealed firearms in public.

Under California law, an applicant for a concealed carry permit must show "good cause." The state law authorizes county sheriffs to establish and publish policies defining good cause. Appellants contended that San Diego and Yolo Counties' policies defining good cause violated their Second Amendment right to keep and bear arms.

The en banc court held that the history behind the Second Amendment as incorporated by the Fourteenth Amendment leads to the conclusion that the right of the general public to carry concealed firearms in public is not, and never has been, protected by the Second Amendment. Therefore, a prohibition or restriction which a state imposes on concealed carry, including requiring a showing of "good cause" is necessarily allowed under the Constitution. The Ninth Circuit stated that Supreme Court Second Amendment opinions have not established that there is a Second Amendment right for a member of the general public to carry a firearm in public.

Concurring opinions stated that, even if the Second Amendment did allow the carrying of concealed weapons in public, the provisions at issue would be constitutional. One dissent stated the counties' limited licensing of the right to carry concealed firearms amounts to a complete ban on the right of citizens to carry firearms in public for self-defense. A further dissent argued that the challenged laws are unconstitutional under

the Second Amendment because they do not survive any form of heightened scrutiny analysis.

LINK

Immunity: Marshall Acting on Instructions from Judge is not Performing Adjudicative Function, Cannot Claim Absolute Immunity

Brooks v. Clark County, No. 14-16424 (9th Cir. July 7, 2016)

The Ninth Circuit has affirmed a Nevada district court which denied absolute immunity to a marshall who injured the plaintiff while acting on a judge's request to remove him from the courtroom. Even though maintaining order in the court was critical to the judicial process, it did not rise to the level of an "adjudicative" function. (However, qualified immunity did apply, given the lack of clear precedent establishing a Fourth Amendment violation).

Adam Brooks and fellow bail enforcement agents entered a Las Vegas courtroom in pursuit of two women who were then appearing before Justice Deborah Lippis, and who had failed to keep the surety company apprised of their whereabouts.

Justice Lippis demanded that the bail agents leave her courtroom and cease disrupting the proceedings but they refused. She then requested that her marshall, Jim Keener, "escort" Brooks out of her courtroom. Keener did so, pushing Brooks forcefully through the swinging doors. Brooks claimed that his back was injured in the process and brought suit under §1983, alleging Fourth Amendment violations. Keener and Clark County defended on the basis of absolute and/or qualified immunity. The district court denied each defense.

The Ninth Circuit agreed with the lower court that absolute immunity was inapplicable. Such an extraordinary remedy protects against any liability for damages-even for violations of clearly established federal rights, and even if done intentionally. "The upside is that officials acting with absolute immunity may discharge their duties with undampened ardor, and all of us—not only, or even primarily, the officials — are better off as a result. . . [I]n some contexts, we are willing to tolerate the denial of individually effective remedies because the harm of such episodic injustices is outweighed by the systemic benefits a well-calibrated immunity regime engenders."

But absolute immunity is sparingly applied. Judges are among those officials who "have long enjoyed a comparatively sweeping form of immunity," and the need to free the judicial process of harassment or intimidation has led courts to extend absolute judicial immunity beyond the judges themselves, including "to Executive Branch officials who perform quasi-judicial functions." In all cases, the Supreme Court has emphasized that "immunity is justified and defined by the *functions* it protects and serves, not by the

person to whom it attaches." The Court has defined the touchstone for the doctrine's applicability as the "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.

Here, although the marshall was acting on instructions from a judge, he was not performing an adjudicative function. While maintaining order in the courtroom is undeniably central to the judicial process, it is not adjudicative and does not require heightened levels of immunity. As the Ninth Circuit had held in a case where a judge personally assaulted the plaintiff in a courtroom:

> The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached. . . . More importantly, we cannot believe that the purpose of the judicial immunity doctrine—to promote 'principled and fearless decision-making'—will suffer in the slightest if it is held that judges who physically assault persons in their courtrooms have no automatic immunity. *Gregory v. Thompson*, 500 F.2d 59, 64 (9th Cir. 1974).

Defendant Keener also cited *Mireles v. Waco*, 502 U.S. 9 (1991), in which the Supreme Court held that a *judge* retains absolute immunity even when he expressly and specifically orders a police officer to use excessive force to seize a person in his courtroom. The Court did not decide whether the officer who carried out such a bizarre order—doing as he was told and no more—would also receive absolute immunity. But even assuming he would it would do Keener little good, because he allegedly employed *more* force than Judge Lippis ordered him to use. "That distinction makes an enormous difference."

Having denied absolute immunity, the Ninth Circuit analyzed Keener's qualified immunity defense. Here, it applied the *Graham* "objective reasonableness" standard. Whether the violative nature of the defendant's conduct was clearly established had to be analyzed in the specific context of the case at hand, and "existing precedent must have placed the statutory or constitutional question beyond debate."

Given the standard governing excessive force claims, the allegations in Brooks' complaint were not sufficient to survive a qualified immunity defense. Assuming that all of plaintiff's allegations were true, it still could not be said that Keener's use of force was *indisputably* unconstitutional -- a reasonable marshal could have believed that the Fourth Amendment permitted him to use the amount of force Brooks described. For that reason alone, Keener was entitled to qualified immunity, and the district court should have granted his motion to dismiss. As the Supreme Court has stated more than once, on the merits "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham*, 490 U.S. at 396.

The Circuit Court reversed the lower court's denial of qualified immunity.

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Immunity: No Minimum Time Period Before a Constitutional Claim of Deliberate Indifference May Accrue

Dadd v. Anoka County, No. 15-2482 (8th Cir. June 30, 2016)

The Eighth Circuit has found that officers can be personally liable for denying an inmate prescribed medication for four days.

On March 28 Patrick Dadd had serious dental surgery requiring cutting into his jaw bone and extracting a tooth. He was arrested the night after and brought to jail. He told the arresting officers as well as those at the jail that he needed the prescription Vicodin as prescribed by his dental surgeon. The arresting officer took the drug with him to the jail. However, throughout Dadd's stay at the Anoka County Jail, despite complaining of excruciating pain to multiple officers during booking, to those near his cell once locked up, and to the nurse the next day, he was never permitted to take his prescribed medicine. He was eventually given some ibuprofen on March 30. However, this did not reduce the pain and he remained unable to sleep or eat during his stay. He was released without ever having accessed his medicine on the 31st. Dadd filed a complaint alleging deliberate indifference to his serious medical needs in violation of his right to substantive due process under the Fourteenth Amendment. The district court denied Anoka County's motion for qualified immunity, prompting an appeal.

The Eighth Circuit agreed that the jail staff were aware of Dadd's medical condition and upheld the lower court. It denied the county's argument that since the delay in medical attention was not weeks or months, the claim should fail, holding instead that there is no minimum time before which a constitutional claim for deliberate indifference can be brought. It also denied the county's argument that the right was not clearly established in this case, instead saying it is clear that a detainee has a constitutional right to adequate medical care. Put plainly, the Court said "[w]hen an official denies a person treatment that has been ordered or medication that has been prescribed, constitutional liability may follow."

LINK

Pensions: Reduction in Prospective Payments Does Not Violate Texas Constitutional Protections for "Benefits Accrued"

Van Houten v. City of Fort Worth, No. 15-10416, 15-10796 (5th Cir. July 1, 2016)

The Fifth Circuit has upheld a lower court determination that Fort Worth's modification of a defined benefits pension plan formula which reduces future accruals does not contravene a Texas Constitution prohibition against impairing "benefits accrued by a person." Plaintiffs, a group of firefighters and police, had argued that the benefit formula itself was "accrued" and could not be amended.

Fort Worth (City) operates a defined benefits pension plan (Plan). In 2012, seeking to remedy an underfunding problem, the City modified the Plan, shifting from a "High 3" formula (averaging the 3 highest years of pay and using a 3% multiplier per year of service) to a "High 5" formula (averaging the 5 highest years and using a 2.5% multiplier per year of service). Plaintiffs (a group of police officers and firefighters employed by the City and who were vested in the Plan) challenged the modifications under a provision of the Texas Constitution which prohibits changes in retirement benefits "accrued by a person."

Article XVI, Section 66(d) of the Texas Constitution (Section 66) provides:

> On or after the effective date of this section, a change in service or disability retirement benefits or death benefits of a retirement system may not reduce or otherwise impair benefits accrued by a person if the person:
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> (1) could have terminated employment or has terminated employment before the effective date of the change; and
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> (2) would have been eligible for those benefits, without accumulating additional service under the retirement system, on any date on or after the effective date of the change had the change not occurred.

Plaintiffs argued that Section 66 prohibits pension reform that would decrease expected but as-yet unearned benefits. "If 'benefits' means the right to the formula, then the right becomes 'accrued' under the Constitution once the employee vests in the plan." In short, according to plaintiffs, a benefit *formula* accrued at the moment of *vesting* and became constitutionally protected -- meaning that even wholly prospective formula adjustments would be foreclosed by Section 66.

The Fifth Circuit was unwilling to interpret "benefits accrued" to include expected benefits:

> This case comes down to the meaning of the word accrued—or whether it means anything at all. Section 66(d) has a two-part structure. The introduction of subsection (d) provides *which* benefits are covered—"benefits accrued by a person"—while subparagraphs (d)(1) and (d)(2) provide *who* is covered—vested present and past employees. In short, Section 66(d) prohibits the impairment of *accrued* benefits for *vested* employees. This understanding essentially resolves the case.
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> Benefits accrue on an ongoing basis as service is performed, and accrued benefits are those benefits that have been earned to date. Meanwhile, vesting is a one-time event giving rise to a right to the accrued benefits.

The Circuit Court found that “accrual” and “vesting” were distinct concepts in the Plan, and that plaintiffs’ key predicate claim—that the term "benefits" includes a "right to the formula"—was unsustainable. “The term "benefits" refers to payments and does not encompass the formula by which those payments are calculated.”

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Search and Seizure: Probable Cause to Arrest Is Not Limited to Evidence in Warrant Application; Totality of Information Can Be Considered

Goad v. Town of Meeker, No. 15-6085 (10th Cir. July 1, 2016)

In effecting an arrest, law enforcement is not limited to statements made within the four corners of a warrant application and may consider a totality of factors to determine if probable cause exists.

James Goad found a police car blocking the entryway to the pawn shop he operated in Meeker, Oklahoma (Town) with his brother and demanded that the vehicle be moved. When the officer declined, Goad filed a complaint against the officer, including the assertion that Goad owned the pawn shop in question. One year later, following additional conflict between Goad and law enforcement, the Town’s Chief of Police (Chief) obtained a warrant for Goad’s arrest based on false statements Goad made in the earlier complaint that he owned the pawn shop in question. Goad voluntarily turned himself in.

The charges were ultimately dropped, but Goad sued the Town and the Chief under a spectrum of counts including First Amendment retaliation and violation of his Fourth Amendment rights. The latter was based on Goad’s contention that the arrest warrant should not have been issued because the Chief’s warrant application lacked sufficient grounds.

The district court granted summary judgment to defendants.

On appeal, the Tenth Circuit affirmed. The relevant question was not whether the four corners of the warrant application provided a sufficient factual basis for issuance of a warrant; the question was whether there was probable cause to support arresting Goad. Therefore, the court was permitted to consider additional information known to the Chief which contributed to the finding of probable cause. Apart from the statement in the warrant application that official records did not show Goad to be the pawn shop owner, the Chief had also obtained information that Goad was a convicted felon who had served time for receiving stolen property—a crime which would clearly disqualify Goad from ownership of a pawn shop. That additional information supported probable cause to arrest Goad.

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Trials: Dismissal of Pro Se Complaint as "Frivolous" is Inappropriate Where Colorable Factual Basis for Excessive Force is Alleged

Felton v. City of Chicago, No. 14-3211 (7th Cir. June 28, 2016)

Reversing the lower court, the Seventh Circuit has remanded for further evidentiary findings in a case brought by an Illinois prisoner who was chased by police on a highway and repeatedly tasered, despite an inartful and insubstantial complaint.

Joseph Felton was driving in Harvey, Illinois when his car was approached by an unmarked police car with tinted windows. Felton feared for his life and turned onto the freeway toward Chicago, where the police "chased" him, fired guns at him while driving, ultimately causing him to swerve, lose control of the car and crash, after which he was tasered six times, leaving him in critical condition with broken bones, a concussion, lost vision, and bruises. While in custody he filed a §1983 suit against Chicago and the police superintendent, alleging the police used excessive force. The district judge reviewed the case under 28 U.S.C. §1915A, since Felton was a prisoner, and deemed the claims insufficient as against the parties named. Instead of permitting leave to amend the complaint, the judge moved on to evaluate what he deemed the "more grievous problems" with the complaint and, noting it was "painfully obvious" that Felton "omitted critical facts," the judge consulted newspaper articles about the incident for the absent facts and attached them as exhibits to his order. Felton's suit was dismissed suit as "frivolous" and he appealed.

The lower court judge did not clarify whether the dismissal as frivolous was based on legal or factual problems, leaving the Seventh Circuit to analyze both. As for factual frivolity, the Circuit reversed the lower court, holding it abused its discretion because Felton's complaints that officers chased him on a highway, rammed his vehicle, and

stunned him with tasers is not "fanciful," "delusional," "fantastical," or "wholly incredible." As for legal frivolity, in order to be such, Felton's claim had to be "based on an indisputably meritless legal theory." The Circuit overruled the lower court on this theory as well, saying "Felton's theory is familiar: he says officers used excessive force in arresting him, which violates the Fourth Amendment." The Court went on to note that even if Felton failed to state a claim substantively in a first complaint, plaintiffs, especially *pro se* ones, should be given leave to amend. The Court reversed and remanded the case for further evidentiary inquiry.

LINK

Trials: No Qualified Immunity for Prosecutor Whose Declaration Contained Falsehood and Functioned as Witness Statement

Garman v. County of Los Angeles, No. 12-55109 (9th Cir. July 5, 2016)

The Seventh Circuit has granted a prosecutor absolute immunity for performing traditional functions of an advocate by issuing a subpoena duces tecum, but denied her qualified immunity for an accompanying declaration in which she gave a false statement. The court considered the false statement comparable to presenting facts, which is the function of a witness rather than an advocate. The Circuit also found that the lower court abused its discretion by denying plaintiff leave to amend her complaint because she had multiple liability theories available that would not have conflicted with original complaint.

Detrice Garman's son was charged with murder and she was set to be an alibi witness; however, she had to undergo brain surgery prior to the trial. Faced with the uncertain outcome of such serious surgery, she was deposed and authorized the disclosure of her medical records *only as related to her brain surgery* to the prosecution. The lead prosecutor in the case, Deputy Los Angeles County DA Michele Hanisee, then erroneously represented to Kaiser Permanente Medical Group that Garman *was the murder* victim and issued a subpoena *for all her* medical records. Garman survived the surgery and subsequently testified at her son's trial, wherein Hanisee used the medical records to undermine her credibility. Garman filed suit under §1983 seeking monetary damages against Hanisee and LA County. The district court, adopting in whole a magistrate's Report and Recommendation, granted Hanisee and the County's dismissal motions, the former since the prosecutor enjoys absolute immunity and latter because the prosecutor violated a county policy. Garman appealed.

On appeal the Ninth Circuit began with Hanisee's actions, dividing them into three separate acts - issuing the subpoena duces tecum, drafting its supporting declaration and publicizing Garman's medical records at trial to discredit her testimony. The Court agreed that she enjoyed absolute immunity for the first and third acts, since they clearly are "traditional functions of an advocate," but denied her such protection for the second.

In line with Supreme Court precedent, it noted that presenting facts, as Hanisee did in the affidavit, is the function of a witness, not a lawyer, thus she should have been stripped of her immunity by the lower court for the erroneous supporting declaration.

As for the county, the Court agreed with lower court that Garman failed to proffer facts sufficient to show Hanisee acted in accordance with county policy. However, Garman did not appeal the merits of that ruling, instead arguing the lower court erroneously denied her leave to amend her complaint, a charge the Circuit agreed with. The Court noted district courts abuse their discretion if they deny leave to amend a complaint when a complainant could refile the complaint without contradicting allegations in the original complaint. Here, it found the lower court violated that standard since Garman had multiple liability theories available to her under §1983, some of which would not have required contradicting statements in her original complaint. It thus reversed the lower court on this issue as well and remanded the case, ordering the court to grant Garman leave to amend.

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