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Courts: Amended complaints Not Barred by Statute of Limitations when they Relate Back to Original, Timely Complaint and Arise from Conduct and Occurrences set out in Original Complaint—Including any Illegal Search Claims that Stem from a False Arrest

Neita v. City of Chicago, No. 15-1404 (7th Cir. July 19, 2016)

Seventh Circuit remands case, holding that, pursuant to FRCP 15(c)(1)(b), Plaintiff's complaint is not barred by statute of limitations because it alleges illegal search that stems from false arrest alleged in first, timely filed complaint.

Vaughn Neita owned a dog-grooming business that included a rescue shelter in Chicago. In February 2012 he arrived at the city's Department of Animal Care and Control with two dogs – one that had attacked and killed another dog in his shelter and one that was very ill after giving birth to a litter of puppies. An animal control officer called the police upon Neita's arrival and soon after Neita was arrested on two counts of animal cruelty and thirteen counts of violating a dog owner's duty under Chicago law. A judge acquitted Neita on all charges, prompting him to a file a § 1983 suit alleging he suffered false arrest and illegal searches at the hands of the city and various employees involved in his case. A district judge granted the city's motion to dismiss the case for failure to state a claim, but the Seventh Circuit reversed it. As to the false arrest, the Court found that the facts did not show the officers had probable cause to arrest him. The two ordinances Neita was charged with provided that "[n]o person or owner may beat, cruelly treat, torment, starve, overwork or otherwise abuse any animal," (animal cruelty) and that animal owners [must] provide "(1) a sufficient quantity of good quality, wholesome food and water; (2) adequate shelter and protection from the weather; (3) veterinary care when needed to prevent suffering; and (4) humane care and treatment"

(dog owner's duties). The Court found no probable cause for these crimes given the operative facts were that Neita arrived at the animal control department with a healthy, but aggressive dog, and a second one sick from birthing puppies; Neita had taken the sick dog to a veterinarian; and without any other facts indicating Neita had caused injury to the animals.

Having found the officers lacked probable cause to arrest Nieta, the Court easily found the search of his person carried out incident to that arrest was not, as required for an exception to the warrant requirement, a search incident to a *lawful* arrest. The Court thus reversed the lower court with regard to this search. As to Neita's claim that his car and business were also illegally searched once the officers illegally obtained his keys from his pocket in the initial unlawful search, the Court also reversed the district court. The lower court had deemed these claims barred by the statute of limitations since Neita did not allege them until his second amended complaint, filed nine months after the two-year statute of limitations expired. The Circuit, however, found this claim related back to the original, timely complaint given it arose, as required under FRCP 15(c)(1)(B), from conduct and occurrences set out in that original complaint. The Circuit remanded the case.

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Immunity: No Qualified Immunity for Firing Beanbag Rounds from Close Range at Compliant Detainee

Smith v. City of Chandler, No. 14-15969 (9th Cir. July 18, 2016)

The Ninth Circuit has reversed an Arizona federal district court, finding that an officer who fired beanbag rounds at a compliant detainee from close range was on notice that such action violated Fourth Amendment standards.

Chandler, Arizona police officers entered Brandon Smith's patio area, with knowledge that he was emotionally disturbed and suicidal, with their guns drawn. They began issuing commands to Smith. Smith thought he heard an officer say "stand up." He had a knife cradled in his arms pointed at himself. He was eight feet from the nearest officer, who was pointing a gun at him. When Smith stood up another officer shot Smith with two beanbag rounds. Smith filed an excessive force claim, and the district court granted summary judgment to the officers, ordering Smith to pay attorney's fees and non-taxable costs.

Smith appealed successfully. The Ninth Circuit determined, taking the facts in a light most favorable to Smith, that material facts were outstanding as to what Smith heard with regard to the commands—making summary judgment inappropriate. As for the officer's alternative argument that, no matter the material facts, he was entitled to

qualified immunity for shooting the beanbag rounds, the Court denied such relief. It cited Circuit precedent clearly establishing that under these facts it was unreasonable to discharge beanbag rounds at close range against Smith. Given these reversals, the Circuit also vacated the award of fees and costs and remanded the case.

LINK

Jails: Official's Reliance Upon Previous Sentence Calculation Prior to Inmate's Complaint and Official's Forwarding of Selected Portions of Inmate's Master File to Chief Record Office Does Not Amount to a "Thorough" Investigation of Inmate's Complaint

Figgs v. Alex Dawson et. al., No. 15-2926 (7th Cir. July 25, 2016)

Seventh Circuit remands case for trial where the actions of a jail record supervisor in calculating inmate's sentence were found to be so ineffectual that a jury could find it rose to the level of criminal recklessness.

Livell Figgs was convicted of murder and sentenced to 40 years' imprisonment in Illinois. He served the final portion of his sentence at Logan Correctional Facility and was ultimately released in June 2012. Figgs argued, through a variety of correctional department procedures and state-court cases, that his sentence was miscalculated. Ultimately, the corrections division recognized he should have been released on January 11, 2011. After his release, Figgs filed a § 1983 suit alleging that corrections officers and a former warden at Logan Correctional Facility violated his Eighth and Fourteenth Amendment rights. The district court granted the defendants' motions for summary judgment, promoting Figgs to appeal.

Using the deliberate indifference standard, the Seventh Circuit affirmed Figgs claims against one defendant and reversed against a second. As to the first defendant, the former warden, the Court noted while the facts showed he knew there was a possibility Figgs was being held beyond the date to which he was entitled to be released, the conduct did not amount to deliberate indifference. The former warden was not responsible for calculating release dates, but nonetheless the Court found he checked whether the prison's release date for Figgs matched the most recent sentence calculation sheet, asked the prison record's office whether the date was correct, and confirmed that the record supervisor had reviewed Figgs's file and that she believed the release date to be correct. Thus, the warden did not ignore the risk, nor act criminally negligent, as required for a valid claim under the Eighth Amendment.

On the other hand, the record supervisor, whose job it was to manage release dates, was erroneously dismissed from the case by the lower court. According to the Court the record supervisor took the following actions "(1) relied upon the sentence calculation

made prior to Figgs's arrival at Logan; (2) forwarded certain documents to the chief record office; and (3) relied upon that office's determination that the sentence calculation was correct." The Court found she did not have a conversation with the state's Chief Records Office to ensure accuracy, nor even send along the entirety of Figg's record so that office could ensure a full accounting of his time served and, thus, his correct release date. In short, the Court found the record "belie[d] [the record supervisor's] assertion that her investigation . . . was 'thorough.'" Instead, the Court found evidence that her actions were so "ineffectual" that a jury could find it rose to criminal recklessness and thus remanded these claims for trial.

LINK

Liability: Negligence on the part of a Private Defendant is Not Enough to Demonstrate a "Meeting of the Minds" for Purposes of Determining Municipal Liability Under § 1983

Wilson et al. v. Warren County, Illinois et al., No. 15-1939 (7th Cir. July 18, 2016)

Municipality not complicit in violating Fair Housing Act when private defendant negligently represented that he had obtained a court order to remove former business partner's belongings from property.

Thomas Wilson and Ronald Hanson were business partners, but the relationship soured and a dispute arose about property ownership – a property Wilson was occupying. Hanson blamed Wilson for the business failure. In September 2009 Warren County, Illinois sent a letter to Hanson requiring the disputed property be cleaned up within 30 days. Hanson (and a few associates) then sought to forcibly remove Wilson's belongings from the property through the courts, but failed to get a court order. Despite the lack of a court order, Hanson and his associates began removing Wilson's belongings from the property, inspiring Wilson to call the police and a deputy to show up on scene. The deputy was shown legal papers upon arrival at the property and was told it included a court order, leading the deputy to stand by, but not prevent the action.

Wilson filed a § 1983 suit alleging Hanson and his compatriots and the county were responsible for depriving him of his right under the Fair Housing Act, which makes it unlawful to deny a person a dwelling because of a handicap. He alleged the county was, essentially, complicit in Hanson denying him the disputed property because of his disability. The district court granted summary judgment to all defendants and the Seventh Circuit followed suit.

In order to hold Warren County liable for violating the FHA, the Circuit Court had to find more than mere negligence by the municipality. Looking at the facts, it found that

Hanson and his compatriots misinformed the deputy that arrived on scene about whether they had a court order among the papers they handed him. Though the officer could have made a more sincere effort to verify they had a court order, perhaps by reading the papers or calling the court, the officer's failure to do so, while still considered to be misconduct, only amounted to negligence.

LINK

Speech: Federal Child Pornography Laws Are Content-Based, May Fail Under Strict Scrutiny Analysis

Free Speech Coalition, Inc. v. AG United States, No. 13-3681 (3d Cir. June 8, 2016)

The Third Circuit has found that a duo of federal child protection laws requiring producers of pornography to keep detailed records of the ages and identities of their performers and make those records available to law enforcement without a warrant is a facial violation of the Fourth Amendment under *City of Los Angeles v. Patel*, and has determined that such law is facially content-based under *Reed v. City of Gilbert*, requiring remand to assess whether the law is valid under strict scrutiny analysis.

The Child Protection and Obscenity Enforcement Act of 1988 requires producers of visual depictions of "actual sexually explicit conduct" to keep "individually identifiable records" documenting the identity and age of every performer. The Adam Walsh Child Protection and Safety Act of 2006 applies similar recordkeeping requirements for depictions of "simulated sexually explicit conduct" (collectively, "Statutes"). Producers subject to the Statutes are required to examine "an identification document" for each performer and to maintain records listing each performer's name and date of birth, linked to a copy of each sexually explicit depiction. Records must be maintained by the producer and made available for inspection by the Attorney General "at all reasonable times."

Failure to maintain the necessary records, to affix the necessary statement describing the records' location to each copy of a regulated depiction, or to permit a required inspection is a criminal offense.

Commercial pornography producers initially challenged the Statutes prior to *Patel* and *Reed.* The Third Circuit held that Plaintiffs stated viable as-applied and facial claims under the First and Fourth Amendments, finding that the Statutes were content-neutral regulations of speech and should be evaluated under intermediate scrutiny for First Amendment purposes. Relying on *Ward v. Rock Against Racism*, it focused on the purpose of the statute—protecting children from being used in child pornography—in

determining whether the Government enacted the Statutes as a means of discriminating against a form of protected speech. It also considered the opinions of the D.C. Circuit and the en banc Sixth Circuit, each of which had upheld the Statutes:

> We agreed with our sister circuits and held that the Statutes were content neutral because "Congress enacted the Statutes for the purpose of protecting children from exploitation by pornographers," and "[a]ny impact by the Statutes on Plaintiffs' protected speech is collateral to the Statutes' purpose of protecting children from pornographers." Accordingly, we determined that intermediate scrutiny was appropriate.

The Third Circuit found that the Statutes satisfied intermediate scrutiny because, unlike strict scrutiny, "the Government need not employ the least restrictive or least intrusive means." It affirmed the District Court's conclusion that the Statutes were not facially overbroad, as "the invalid applications of the Statutes that Plaintiffs have demonstrated still pale in comparison with the Statutes' legitimate applications." Their "broad legitimate sweep and the Government's exceedingly compelling interest in this case counsels against facial overbreadth."

That opinion was rendered on May 14, 2015. As the Third Circuit expressed it, “Two intervening Supreme Court cases now lead us to revisit our prior holdings in this case.”

In light of *Reed* and *Patel*, Plaintiffs filed a petition for rehearing. The Third Circuit vacated its judgment and re-examined the Statutes. The Circuit refused to analyze the challenged statute’s “secondary effects” implications—societal good such as reducing blight and crime in a given neighborhood—which might ameliorate otherwise deleterious First Amendment effects. It found that the “secondary effects” analysis had only been applied to zoning-based instances of live adult entertainment performances in brick and mortar facilities and did not apply here. More significantly, it held that *Reed* cast doubt on the continuing viability of “secondary effects” to resuscitate constitutionally questionable speech limitations:

> To allow the secondary effects doctrine to transform a facially content-based law into a content-neutral one any time the Government can point to a laudable purpose behind the regulation that is unrelated to protected speech would render *Reed* a nullity.

The court questioned whether the requirement that pornographers keep records of all performers of all ages was necessary to promoting the objective of protecting children. It vacated the district court’s denial of plaintiffs’ First Amendment claims and remanded for further consideration of whether the Statutes are narrowly tailored such that they survive strict scrutiny. It further remanded to the district court to enter a judgment declaring that the warrantless searches authorized by the Statutes are facially unconstitutional under *Patel*.

LINK

Speech: Ordinance Prohibiting "Begging" in Public Places Violates *Reed's* First Amendment Holding

City of Lakewood v. Willis, No. 91827-9 (Wa. July 21, 2016)

Applying Reed, the Washington Supreme Court has reversed lower courts and found that a local anti-begging law is content-based and fails under *Reed* analysis. The court found that the law did not prohibit "solicitation generally" but only requests for "money or goods as charity."

A City of Lakewood police officer noticed Robert Willis walking into traffic lanes carrying a sign saying he was disabled and needed help. The officer cited Willis for "Begging In Restrictive Areas" in violation of Lakewood Municipal Code (LMC), which defines "begging" as "asking for money or goods as a charity, whether by words, bodily gestures, signs or other means," under the following conditions: (1) at on/off ramps leading to any City roadway; (2) at intersections of major/principal City arterials (3) within 25 feet of an ATM or financial institution; (4) within 15 feet of any occupied handicapped parking space, taxicab stand, or bus stop, train station or in any public parking lot; (5) before sunrise or after sunset in any public transportation facility or vehicle or (6) while under the influence of alcohol or controlled substances.

Begging under these scenarios is a misdemeanor. The jury was instructed on only the first two "conditions" listed in the ordinance: begging "at on and off ramps" and "at intersections of major/principal arterials." It found Willis guilty. He was sentenced to 90 days in jail and a $1,000 fine, with 90 days and $750 suspended. The court of appeals affirmed.

The Washington Supreme Court reversed. It found that begging, as protected speech, may be subject to time, manner and place restrictions—but because the Lakewood ordinance applied to a substantial number of locations that are traditional public forums (including sidewalks adjoining ramps and intersections) it was subject to the heightened judicial scrutiny, requiring that it be content-neutral, narrowly tailored to serve a significant governmental interest and must leave open ample alternative channels of communication. (Whereas, it said, laws restricting speech in a nonpublic forum must only be viewpoint-neutral and reasonable in light of the purposes served by the forum).

While the government could impose certain restrictions on speech in a public forum, such as reasonable time, place, and manner restrictions, it could not impose restrictions based on content. Based on *Reed's* analysis, the LMC provisions in question imposed content-based restrictions on speech.

> If there was any doubt about this when the City enacted the begging ordinance, that doubt has been definitively resolved by the United States Supreme Court's recent decision in *Reed v. Town of Gilbert*, (citation omitted). In that case, which

> addressed a local ordinance regulating the display of outdoor signs, the Court explained that a law is content based if "'on its face' [it] … define[s] regulated speech by particular subject matter … [*or*] *by its function or purpose*" (emphasis added, citation omitted). Lakewood's begging ordinance clearly meets this definition. It does not prohibit solicitation generally (it allows, for example, the solicitation of votes or customers), but only solicitation with a particular purpose: obtaining "money or goods as a charity."

The Washington State Supreme Court found facial and as-applied violations of the First Amendment and reversed.

LINK

Takings: No Protectable Property Interest in Development Opportunity Where City has Discretion to Approve or Deny Plan

Zia Shadows LLC v. City of Las Cruces, No. 15-2009 (10th Cir. July 22, 2016)

The Tenth Circuit has upheld a New Mexico district court finding that a mobile home operator submitting a PUD plan did not have a Constitutionally- protected economic interest where the city retained discretion to approve or deny the plan. The Court of Appeals also upheld the lower court's holding that plaintiff's "class of one" Equal Protection claim failed because it could not demonstrate unjustified and disparate treatment when compared to other mobile home operators in the city.

Zia Shadows LLC, a mobile home park in Las Cruces, New Mexico ("City") submitted a plan as required by the City's newly-adopted zoning code, seeking to change the park to a Planned Unit Development. Although the City's Planning and Zoning Commission recommended approval of the plan, the City Council required as a condition of approval that Zia Shadows LLC either widen the public road in the area or guarantee affordable housing. The process of working with the City on the PUD terms and working out the conditions for approval took several years.

Zia Shadows LLC was in financial trouble by the time the process was worked through. It ultimately filed bankruptcy to forestall creditors. Under such circumstances, the City required a bond to ensure that Zia Shadows LLC would fulfill the conditions on the project. This further delayed the project into 2006 when it was finally approved. But by then creditors had foreclosed on the property and sold it.

Zia Shadows LLC filed suit against the City, alleging Due Process and Equal Protection violations for the delays in approving and moving ahead with the PUD project. It also

alleged that the City had retaliated against it for publicly criticizing the City's actions. The district court granted the city's summary judgment motions for both the Due Process and Equal Protection violations and Zia Shadows LLC subsequently lost on its First Amendment retaliation claim at trial. It appealed those rulings.

In analyzing the Due Process claim, the Tenth Circuit required Zia Shadows LLC to demonstrate that it had a protectable property interest—either an unassailable entitlement to operate the mobile home park under its existing special use permit or entitlement to the PUD approval. In essence, Zia Shadows LLC had to prove that the City was mandated under local land use law to grant these uses. Zia Shadows LLC fell short on both fronts. The City showed it had discretion to deny a special use permit and, as the Circuit Court put it, Zia Shadows LLC failed to cite "a single authority to the contrary;" and, second, it cited only a partial land use rule for PUDs, missing a critical provision that ultimately grants the City council full discretion to approve or deny a PUD. As a result, the Circuit found the lower court properly determined Zia Shadows LLC lacked a legitimate expectation or entitlement under the Due Process clause to a PUD on its property.

Zia Shadows LLC's Equal Protection claim was styled as a class of one, meaning it faced the uphill battle of showing the City lacked any rational basis for treating its mobile home park differently than others in the City. Zia Shadows LLC failed to meet this burden on several levels– it could not show that no other City mobile home park had to comply with the new zoning law or that that it faced greater financial scrutiny than other parks – and its appeal attempted to put the burden of proof on the City to defend its actions.

The Court held the burden to show the disparate treatment rested on Zia Shadows LLC, not the City, however, and denied the charge. As to the company's claim that it was treated worse than other mobile home parks, the Court ruled that although the company pointed to evidence, it was not enough evidence to survive summary judgment since it amounted to only two sentences from an affidavit by the company's owner about how other parks were treated in comparison to Zia Shadows LLC. The Circuit thus affirmed.

LINK

Trials: Fee for Electronic Court Filings Does Not Violate Equal Protection or First Amendment Speech and Free Association Rights

Whittington v. Chief Justice Jimenez Maes, No. 15-2122 (10th Cir. July 21, 2016)

A class action challenging New Mexico's modest fee for electronic filing of litigation documents on First Amendment speech or association rights has failed before the Ninth Circuit. The Court of Appeals also found that the class challenging the fee structure was inherently different from pro se plaintiffs, undermining their Equal Protection argument.

In 2007 New Mexico implemented an electronic filing program for its court system and included within the enabling legislation the power for the state supreme court to implement a reasonable fee structure. The law states that "electronic filing [is] mandatory for parties represented by attorneys in all civil cases, with the exception of domestic relations, domestic violence, sealed actions, habeas corpus or proceedings under the Children's Code." Stephen Whittington filed a class action suit in district court alleging the e-filing taxes impermissibly burdened the class' First Amendment speech and association rights to retain counsel; violated their Fourteenth Amendment right to access the courts; and violated their Fourteenth Amendment Equal Protection rights. The district court granted the defendants' motion to dismiss for failure to state a claim upon with relief could be granted.

The Tenth Circuit first examined Whittington's argument that the fee for e-filing is an impermissible tax on the class's right to counsel, which implicates First Amendment rights of speech and association. The Circuit found that the Supreme Court has been clear that fees may be constitutionally applied to free speech activities, such as permits to rally or protest, as long as the fee is designed "to meet the expense incident to the administration of the act and to the maintenance of public order." The Court easily found New Mexico has a legitimate interest in providing e-filing and that, in light of the $5,000,000 cost of the system, fees ranging from $3.70 to $6.00 are not prohibitive, but intended to defray the costs of operating the public service.

As for the second allegation that the fee unconstitutionally burdened the class's access to the courts, the Circuit pointed out that there is no absolute right to access the courts. Rather, the Supreme Court test for court-fees is a rational basis review, except where a fundamental right is at issue, and New Mexico's stated interest in recouping the cost of implementing and managing the e-filing system satisfied such a test.

Finally, the class's position that e-filing violated the Equal Protection clause failed because the class was not "similarly situated to pro se plaintiffs or other parties that are not required to pay the e-filing fee." Simply put, the Court found that in litigation pro se parties are treated differently from represented parties--and e-filing is no different since "retained attorneys are legally trained, familiar with legal rules and procedures, and

likely are more able to navigate e-filing systems." Thus, Whittingon failed to make the required threshold showing that the class was similarly situated to its comparator class, pro se litigants. The Circuit Court affirmed the district court on all three theories.

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