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ADA: No Evidence that, but for Decedent's Mental Illness, Officers Would Have Treated Him Differently During Knife Attack

King v. Hendricks County Commissioners, no. 19-2119 (7th Cir. Mar. 31, 2020).

Where a mentally ill man brandishing a kitchen knife and running towards a deputy was shot, there was insufficient evidence to overcome summary judgment that the officer acted reasonably and no indication that but for the decedent's mental infirmity he would have been treated differently.

Bradley King (King), a 29-year-old resident of Hendricks County, Indiana (County), suffered from paranoid schizophrenia. In November 2016, two County reserve deputies went to King's home to perform a "welfare check" after he called 9-1-1. They testified that upon their arrival, King approached them and pulled a ten-inch knife out of his shorts pocket. The deputies backpedaled, drew their firearms, and yelled at King to stop, but he disregarded their commands, raised the knife in his left hand, and ran towards them. One deputy fired, killing King. The bullet grazed his left upper arm and entered his chest, directed "left to right, downwards, and slightly front to back." A large knife, which King's father identified from the family's kitchen, was recovered nearby; it did not reveal any latent fingerprints.

King's father disputed the officers' account, asserting that King was never violent, even when suffering a psychotic episode, and would not have charged at the police. He urged that circumstantial evidence, including but not limited to the bullet trajectory, the lack of fingerprints on the knife, and the fact that King was right-handed and thus would not have held the knife in his left hand, substantially undermined the deputies' account.

He brought Section 1983 claims against the deputy, the County Commissioners, the County Sheriff's Department and the Sheriff. He also brought claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act against the Commissioners and the Sheriff's Department, as well as state civil rights and tort claims. The district court granted summary judgment to all defendants on the federal claims and declined to exercise supplemental jurisdiction over the state-law claims, concluding that there was no genuine dispute of material fact for trial, that the deputy's actions did not violate King's Fourth Amendment rights, and there was no ADA or Rehabilitation Act violation.

On appeal, the Seventh Circuit affirmed. While a court reviewing a grant of summary judgment views the facts in the light most favorable to the nonmoving party, it does not extend to drawing inferences that are supported by only speculation or conjecture.

Fourth Amendment Violation: Applying the *Graham* deadly force lens of "a reasonable officer on the scene," the Circuit acknowledged that mental illness should be considered in an officer's response, but that the immediacy of a threat of serious harm to officers or the public overrode mental health considerations: "If the person of interest threatens the officer with a weapon, deadly force may be used, because the risk of serious physical harm to the officer has been shown. This is so even if a less deadly alternative is available to the officers. And this is so whether or not the targeted person suffers from a mental illness . . ." (citations omitted).

The critical question was therefore whether King posed an immediate threat. King's father contended otherwise, that the deputies planted the knife and fabricated the story about King's at them. He pointed to King's nonviolent nature, the absence of prints on the weapon, King's righthandedness, and the bullet's angled trajectory when King was supposedly shot head-on.

As the Circuit saw it, "[T]he evidence supporting that version of events does not rise above speculation or conjecture. It creates only metaphysical doubt and requires us to make logical leaps rather than reasonable inferences." As to the lack of latent fingerprints, "We have previously warned in criminal cases that "successful development of latent prints on firearms is difficult to achieve . . .In reality, very few identifiable latent prints are found on firearms, a fact that has been discussed in both literature and the judicial system." (citation omitted). There was insufficient evidence to create a genuine issue of fact as to whether King's Fourth Amendment rights had been violated.

Monell Claim: The absence of an underlying constitutional violation foreclosed an inquiry into the liability of the County and other municipal defendants. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." Unlike the Eighth Amendment, where an agency may be subject to Monell liability for deliberate indifference at the policy level to prisoners'

serious medical needs even when its individual agents did not act with deliberate indifference, "a government entity cannot passively commit a Fourth Amendment violation." Even accepting the argument that the County failed to provide adequate training in how to deal with the mentally ill, no liability could attach without the underlying constitutional violation.

ADA Claim: Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Whether Title II applies to law enforcement investigations and arrests, and if so to what extent, is an open question in the Seventh Circuit, and other circuits are split. The Fifth Circuit has found that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life," whereas the First Circuit recently stated that "For present purposes, it is sufficient for us to assume … that Title II of the ADA applies to ad hoc police encounters … and that exigent circumstances may shed light on the reasonableness of an officer's actions."

While the court assumed that the County could be held vicariously liable under Title II for the deputy's actions, and that "deliberate indifference" was the appropriate standard for analysis, the plaintiff was still required to show that "but for" King's disability, he would have been treated differently. Here, the deputies responded promptly to King's 9-1-1-call and there was no reason to believe that their response would have been different had someone not suffering from a mental illness rushed at them with a knife. The officers' "failure to disarm, or take the decedent under control, was not because he was inadequately trained to deal with disabled individuals, but because the decedent threatened him with a deadly weapon before he could subdue him." While King's father called for "additional training, oversight, and policy guidance," he could not define what the County should train its officers to do when interacting with people suffering from mental illness.

Affirmed.

Note: IMLA wrote an amicus brief in the aforementioned First Circuit ADA case, Gray v. Cummings, supporting the Fifth Circuit view that the protections of Title II do not arise in the context of an exigent arrest scenario unless and until law enforcement has established order and the threat of imminent injury or death have passed.

LINK

Agency: Contract Disclaimer Did Not Save Defendant from Principal Liability Through Agents' Wrongful Calls

United States v. DISH Network L.L.C., no. 17-3111 (7th Cir. Mar. 26, 2020).

The Seventh Circuit affirms a district court determination that an agency relationship existed between DISH Network and order-entry retailers, who under the control and direction of DISH, made wrongful calls.

DISH Network L.L.C. (Dish) sold its satellite TV service through its own staff and third parties, including about 50 order-entry retailers (Retailers) which made phone calls to sell nationwide. The Retailers entered customer orders directly into DISH's computer system. DISH was responsible for installing the necessary equipment and received payments from customers, remitting commissions to the Retailers. The United States, California, North Carolina, Illinois, and Ohio filed suit against DISH, alleging violations of federal and state laws. The district court found that DISH and its agents violated the Telemarketing Sales Rule, 16 C.F.R. §310, the Telephone Consumer Protection Act, 47 U.S.C. §227, and related state laws. A $280 million penalty was imposed. The appeal concerned the extent to which DISH was required to coordinate do-not-call lists with and among four Retailers: Dish TV Now, Star Satellite, JSR, and Satellite Systems Network or was otherwise responsible for their acts.

"Cause" Violations: On appeal, DISH challenged the district court's conclusion that it violated statutes and regulations merely by hiring others to sell its services. The Telemarketing Sales Rule makes it unlawful for a seller to "cause a telemarketer to engage in" violations. 16 C.F.R. § 310.4(b). Prohibited are (i) calls to people who placed their names on the National Do Not Call Registry, (ii) calls to people who placed their names on a vendor's internal do-not-call list, and (iii) "abandoned" calls (so named because a system that fails to put the consumer in contact with a live person within two seconds of the call connecting is deemed "abandoned"). Neither the regulation nor any judicial decision addresses what "cause" means. The Circuit noted that the central question should be "cause *what*?" rather than "cause" in the abstract. However, it did not come to a conclusion about the meaning of "cause," because the district court had found that the Retailers were DISH's agents, making DISH liable for their acts as a matter of state agency law. The Circuit affirmed the district court's agency ruling.

Liability Under Agency Relationship: DISH argued that the district court erred when it interpreted the contract between the Retailers and DISH as establishing an agency relationship. The contract, materially identical for all Retailers, contained a disclaimer that it did not create an agency relationship. However, it gave DISH the right to control their performance, and the Retailers acted directly for DISH, entering orders into DISH's systems; they did not have their own inventory and were not resellers of any kind.

The next question was whether DISH was liable as a principal for failing to ensure that it and all of its agents shared a single internal do-not-call list. Unless the Retailers acted collectively, any household could receive endless calls peddling DISH's service from different Retailers. The Retailers did not coordinate lists with DISH, and they also sold DISH's service by phone nationwide, many of which calls were in violation of state and federal rules. DISH knew of these violations, which the Circuit found was enough to make DISH liable as the principal.

"Substantial Assistance": The Telemarketing Sales Rule makes it unlawful "for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates." § 310.3(b). As the principal to the Retailers, DISH was treated as the seller for all of their calls. The district court found DISH liable for "substantially assisting" Star Satellite in making abandoned calls. The Circuit disagreed, finding that Section 310.3 does not create liability for assisting oneself: "When an entity is vicariously responsible for another's acts (as a corporation is vicariously for the acts of its employees, and DISH is vicariously responsible for the acts of the order-entry retailers), it makes li]le sense to treat the entity as assisting itself." The Circuit required clearer language to support the district court's holding.

Statutory Defenses: DISH asserted statutory defenses. Under the Federal Trade Commission Act, liability attaches if the violator has either "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." 15 U.S.C. §45(m)(1)(A). DISH argued that it could not be held liable under this standard, because it did not know of each individual call placed by the Retailers and it did not know it would be liable for their actions. DISH's mistaken belief that a disclaimer in the contract could avoid liability did not provide a defense; the knowledge of the agent is imputed to the principal. DISH knew that it had control over the Retailers and that they were making unlawful calls, which was sufficient to establish knowledge of liability.

Damages: DISH argued that the maximum penalties allowed by the Telemarketing Sales Rule, the Telephone Consumer Protection Act, and related state laws, substantively violated the Due Process Clause because they are too high. The Circuit was unimpressed: "Someone whose maximum penalty reaches the mesosphere only because the number of violations reaches the stratosphere can't complain about the consequences of its own extensive misconduct. " Here, the maximum statutory penalty was $10,000 per violation, which would have given rise to a $660 billion penalty based on 66 million improper calls. The district court's penalty was $280 million, which was closer to $4 than $10,000 per improper call, based entirely on DISH's ability to pay, settling on 20% of one year's profit. The Circuit found that to be a problem, because relevant statutes do not include ability to pay as a permissible factor. It determined the proper method was to start from harm rather than wealth, then add an appropriate multiplier, after the fashion of antitrust laws (treble damages) or admiralty (double damages), to reflect the fact that many violations are not caught and penalized.

The Seventh Circuit affirmed, except for holding that DISH was liable for "substantially assisting" one Retailer (Star Satellite) and challenging the lower court's measure of damages. It remanded, instructing the district court to determine those issues consistent with the Circuit's opinion.

LINK

Contracts: "But-for" Causation Required in Section 1981 Discrimination Claim; "Motivating Factor" is Insufficient

Comcast Corp. v. National Association of African American-Owned Media, no. 18-1171, 589 U.S. _____ (2020).

Vacating a Ninth Circuit opinion which held that pleadings showing race played "some role" were sufficient in a Section 1981 contract discrimination claim, the Supreme Court confirms that a Section 1981 plaintiff must show that race was a "but-for" cause of its injury.

Entertainment Studios Network (ESN), the operator of seven television networks—Justice Central.TV, Comedy.TV, ES.TV, Pets.TV, Recipe.TV, MyDestination.TV, and Cars.TV, sought to have Comcast Corporation (Comcast) carry its channels. But Comcast refused, citing lack of demand for ESN's programming, bandwidth constraints, and its preference for news and sports programming that ESN did not offer. ESN contended these reasons were merely pretextual. After negotiations between the two media companies failed, ESN and the National Association of African American-Owned Media (collectively, ESN) sued, alleging that Comcast's behavior violated 42 U.S.C. § 1981(a), which guarantees, "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."

ESN amended its complaint twice. Each time, the district court concluded ESN did not plausibly show that, but for racial animus, Comcast would have contracted with ESN. It dismissed for failure to state a claim as a matter of law.

The Ninth Circuit reversed, disagreeing on the causation standard the district court applied. The Circuit held that ESN needed only to plead facts plausibly showing that race played "some role" in Comcast's decision-making process. Under this standard, ESN had pleaded a viable claim.

The United States Supreme Court vacated. The Court agreed to hear the case to resolve the primary issue on appeal—what is section 1981's causation requirement. ESN suggested that section 1981 created an exception to the "but for" rule—to overcome a motion to dismiss, a section 1981 plaintiff only bears the burden of proof of

showing that race was a "motivating factor." The Court found the statute's text, its history, and precedent strongly suggest that section 1981 follows the "but-for" common law causation test in tort law (a plaintiff must demonstrate that but for the defendant's unlawful conduct, its alleged injury would not have occurred). It held that the but for standard applies at the pleading stage and that burden remains constant.

ESN asked the Court to apply the "motivating factor" causation test found in Title VII of the Civil Rights Act of 1991 (Title VII). Congress provided that a Title VII plaintiff who shows that discrimination was even a motivating factor in the defendant's challenged employment decision is entitled to declaratory and injunctive relief. § 107, 105 Stat. 1075. A defendant may still invoke lack of but-for causation as an affirmative defense, but only to stave off damages and reinstatement, not liability in general. 42 U.S.C. §§ 2000e—2(m), 2000e—5(g)(2)(B). However, there was no evidence to suggest that Congress meant Title VII and section 1981 to apply the same causation test. Moreover, Congress added the motivating factor test to Title VII and amended section 1981 (without mentioning motivating factors) at the same time.

The burden-shifting framework of *McDonnell Douglas* also provided no support for using the motivating factor test or allowing a complaint to survive a motion to dismiss when it fails to allege essential elements of the claim.

The Court concluded that "to prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." It remanded, instructing the Ninth Circuit to apply the proper standard to determine the sufficiency of ESN's pleading.

CONCURRENCE: Judge Ginsburg agreed with the holding but rejected Comcast's narrow view of section 1981's scope. Comcast argued that Section 1981's guarantee of "the same right . . . to make . . . contracts," only applied to the final decision to enter the contract, not the stages of the contract's formation leading to it. The statute defines "make and enforce contracts" to "includ[e] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions, of the contractual relationship." § 1981(b).

The Supreme Court had once declined to apply section 1981 to "postformation conduct," in a racial harassment claim after the formation of a contract. The right to "make" a contract "extend[ed] only to the formation of the a contract," and the right to "enforce" it encompassed only "access to legal process." *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-178. To repudiate that interpretation, in 1991, Congress enacted the definition of "make and enforce contracts" found in Section 1981(b), which applies to the entire contracting process Justice Ginsburg would require a broader inquiry into Comcast's actions:

> The complaint before us contains allegations of racial harassment during contract formation. In their negotiations, Entertainment Studios alleges, Comcast required of Entertainment Studios a series of tasks that served no purpose and

on which Entertainment Studios "wasted[d] hundreds of thousands of dollars.". . [I]f race indeed accounts for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract formation process.

LINK

Qualified Immunity: Protective Plan in Absence of Drug Abuse Violates Due Process; Impropriety of Warrantless Interview of Children Not Clearly Established

Schulkers v. Kammer, no. 19-5208 (6th Cir. Mar. 30, 2020).

Reversing in part and remanding, the Sixth Circuit finds that, where child welfare workers imposed a protective plan on a mother who had erroneously tested positive for opioids, and refused to lift the plan even after receiving negative test results, the state violated the parents' substantive and procedural due process rights; however, the state's interview of the plaintiffs' children at school without a warrant had not yet been clearly established as a Fourth Amendment violation.

In February 2017, Covington, Kentucky's St. Elizabeth Medical Center, Inc. (Hospital) admitted Holly Schulkers (Holly) for a scheduled labor induction. Unbeknownst to Holly, the Hospital tested a sample of her urine, which returned a "presumptive positive" result for opiates. Despite her explanation that she had taken prescription cough syrup and even though Hospital records indicated that Holly's prenatal lab tests had all been negative for substance abuse, a Hospital worker charted that Holly had a "substance use disorder."

That report was provided to the Kentucky Cabinet for Health and Family Services (CHFS), which opened a case because Holly's four children might be at "risk of harm." Before results of an umbilical cord test and second urine test were received, CHFS supervisor Elizabeth Kammer (Kammer) presented Holly with a "Prevention Plan" (Plan), requiring that she not be alone with her children unless supervised by her husband (David) or her mother in law; if she violated those terms, her children would be removed and placed in foster care. Holly and David signed the Plan.

The Hospital soon received Holly's second urine test results--"negative" for any illegal substances. The umbilical test was also negative. These results were communicated to Kammer. Holly was discharged from the Hospital, but CHFS refused to revoke the Plan.

Within days, Kammer and another CHFS worker interviewed each of the Schulkers' children, ages 8, 9, 9, and 13, at school. Each child was brought into a room and questioned about "mommy using drugs," alcohol use, and whether there was arguing or

physical violence in the house. No school personnel were allowed in, and the children were not free to leave until released. No warrants had been obtained and it was only when the children returned home stating that they were terrified of being "taken away" that Holly and David first learned of the interviews.

The Schulkers hired counsel, who emailed CHFS additional negative hair follicle drug test results and requested CHFS to lift the Plan. Despite being told by a supervisor to notify the Schulkers that the Plan had been voided, CHFS defendant Alison Campbell (Campbell) did not so inform the Schulkers. Over the next six weeks, despite repeated requests, CHFS did not lift the Plan. Holly and David allege that they "lived in fear the [CHFS] would take their children (as [it] promised to do) for their failure to follow the Prevention Plan" during that time. Finally, almost two months later, CHFS notified the Schulkers that the Plan was terminated.

They brought a Section 1983 action, alleging that defendants violated their childrens' Fourth Amendment rights. They further alleged violation of their substantive and procedural due process by imposing the Plan's supervision restrictions without reasonable suspicion of abuse or neglect. They alleged that defendants took these actions to obtain federal reimbursement funds, payable where children in suspected abuse scenarios are protected by a "supervision plan."

Defendants moved to dismiss or in the alternative for summary judgment on the basis of qualified immunity. The district court disagreed, finding that the Schulkers children had a clearly established Fourth Amendment right to be free from unreasonable seizures, which was violated by warrantless, in-school interviews, and that Holly and David had clearly established substantive and procedural due process rights. Defendants appealed the denial of qualified immunity.

In-School Interviews: The Sixth Circuit reversed as to the children's Fourth Amendment claims, finding that plaintiffs did not have a clearly established Fourth Amendment right to be free from warrantless, in-school interviews by social workers investigating child abuse. The Supreme Court has never held that a social worker's warrantless in-school interview of a child pursuant to a child abuse investigation violates the Fourth Amendment. The Sixth Circuit had addressed the issue in *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015), finding that a child's right to avoid warrantless, in-school interviews by social workers on suspicion of child abuse was not clearly established. The plaintiff in *Barber* did not benefit by two Sixth Circuit precedents which had found actionable Fourth Amendment violations where the interviews took place in the child's home. "Inasmuch as both decisions turned on the greater constitutional concerns surrounding government intrusion into a citizen's home . . . they offer [the plaintiff] little support in arguing that the in-school interviews violated [his] clearly established Fourth Amendment rights." (citation omitted).

Because the Circuit granted qualified immunity on the ground that the law was not clearly established, it did not need to reach the second prong of inquiry: whether the social worker's warrantless in-school interviews were in fact unconstitutional. But "after

carefully considering the Supreme Court's guidance on when a court of appeals should exercise its discretion to reach the underlying constitutional question in a qualified immunity case, we decide to reach that question now in order to 'promote[] the development of constitutional precedent'". Here, there was little doubt that the children had been "seized" for Fourth Amendment purposes; they clearly believed that they were not free to leave the interrogations. The corollary question-whether the seizure was reasonable-also weighed against the defendants. Before the CHFS social workers conducted the interviews, they knew that Holly's second confirmatory urine test and the umbilical cord test were negative. "We hold that the Fourth Amendment governs a social worker's in-school interview of a child pursuant to a child abuse investigation, and thereby clarify our decision in *Barber v. Miller*, 809 F.3d at 847. At a minimum, a social worker must have reasonable suspicion of child abuse before conducting an in-school interview without a warrant or consent." Defendants' conduct as alleged by the Schulkers was thereby unconstitutional, but did not, without having been clearly established, abrogate qualified immunity.

The Prevention Plan: Plaintiffs' Fourteenth Amendment claims fared better. In terms of substantive due process, the Circuit affirmed that "the right to family integrity and association without interference from the state—is the paradigmatic example of a substantive due process guarantee." (citations omitted). The lower court had correctly found that the Schulkers' right to make decisions concerning the care, custody, and control of their children without arbitrary government interference was clearly established at the time of defendants' conduct. While the defendants argued that the cases relied on by plaintiffs were inapposite because they involved a child's physical removal from the home, that nuance did not cure the deprivation suffered by the Schulkers. Numerous Supreme Court cases have found that a parent has a fundamental right to "the companionship, care, custody and management of his or her children," and that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

The district court correctly found that defendants were on fair notice that it would be a substantive due process violation to deprive Holly of her liberty interest in the companionship of her children without plausible suspicion of child abuse.

The defendants' actions also transgressed Fourteenth Amendment procedural due process standards. Although a Sixth Circuit precedent holds that "when a parent voluntarily consents to a safety plan [in a child-abuse investigation], 'no hearing of any kind is necessary; hearings are required for deprivations taken over objection, not for steps authorized by consent,'" (citation omitted) that case involved a plan which stated on its face that the consent was voluntary and could be rescinded at any time, and those plaintiffs did not assert that they had been coerced into signing.

Here, the Schulkers contended their "consent" was premised on the misrepresentation made initially by Campbell and then by Kammer that if they did not agree to the Plan,

defendants would immediately remove their children and place them in foster care. Given this triable issue of fact, the Circuit found that the district court properly denied qualified immunity on the issue of procedural due process.

Defendants unsuccessfully raised the Parratt-Hudson doctrine to bar the Schulkers' procedural due process claim, arguing that the state had afforded adequate post-deprivation remedies. Parratt-Hudson applies when a state deprives an individual of a cognizable liberty interest "through random and unauthorized conduct of a state employee" such that "predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur," (citations omitted); in such situations, courts will allow meaningful post-deprivation procedures to satisfy due process.

Parratt-Hudson was inapplicable. Instead of "random and unauthorized" conduct by defendants, the Commonwealth of Kentucky had expressly delegated to CHFS "the authority to inject themselves into the otherwise private realm of family life in order to further the commendable and necessary goals of investigating and ending child maltreatment." Furthermore, the threatened deprivation was not ambiguous and there was no reason that predeprivation procedures could not have been articulated.
Reversed in part and remanded.

LINK

Search: Remand for More Factfinding About Cell Tower Simulator's Intrusion into Privacy

Andrews v. City of Baltimore Police Department, no. 18-1953 (4th Cir. Mar. 27, 2020).

Reversing a lower court's grant of summary judgment, the Fourth Circuit finds that there was an insufficient record about the scope and nature of cellphone data obtained by a cell tower simulator and whether a "Pen Register Order" satisfied a warrant requirement to use the simulator.

In 2014, the Baltimore Police Department (BPD), used a Hailstorm cell site simulator (Hailstorm) in pursuit of Kerron Andrews (Andrews) who was evading a warrant for attempted murder. Hailstorm, which appears to nearby cellphones to be the best local cell tower and causes the phones to transmit their unique identifying information, located Andrews' phone — and thus Andrews — inside an apartment building. The BPD used Hailstorm pursuant to a "Pen Register/Trap & Trace" order (Pen Register Order) which, while not explicitly disclosing use of Hailstorm, stated that police officers were "authorized to employ surreptitious or duplication of facilities, technical devices or

equipment to accomplish the installation and use of a Pen Register \ Trap &Trace and Cellular Tracking Device" and "initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonably available . . . ."

Andrews challenged the use of Hailstorm, arguing that its searching for his phone and in nearby homes by transmitting spoofed cell tower signals through walls required a warrant, citing *Kyllo v. United States*, 533 U.S. 27 (2001) (concluding that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search" where the technology is not in general public use. The BPD argued that the Pen Register Order satisfied the warrant requirement and that intrusions on third parties' privacy interests were irrelevant to Andrews.

Andrews prevailed in state court on a motion to suppress contraband obtained as a result of the Hailstorm search. The Maryland Court of Special Appeals found that the Pen Register Order's vague disclosure of a far-reaching new search technology failed to meet the probable cause and particularity prongs of the warrant requirement. Andrews then filed his Section 1983 suit alleging a warrantless search in violation of the Fourth Amendment. The district court found that the Pen Register Order constituted a warrant authorizing use of Hailstorm and granted BPD's motion for summary judgment.

The Fourth Circuit could not affirm, finding a lack of information in the record about the degree of intrusion into constitutionally protected areas that occurred via Hailstorm. "For instance, although we know that the Hailstorm simulator forced an identification signal from every cellular device in its as-yet-unspecified operational range, we lack further detail on how many devices were identified. Moreover, the simulator's information collection capabilities may extend even further." The Circuit cited the long lineage of Supreme Court precedents assessing increasingly sophisticated search technologies including the 1967 decisions in *Berger* (rejecting an order authorizing the use of an eavesdropping device in part because "the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation") and *Katz* (in evaluating a warrant, courts must ensure "no greater invasion of privacy [i]s permitted than [i]s necessary under the circumstances . . . by authorizing the carefully limited use of electronic surveillance").

(As the Circuit noted, more recent Supreme Court cases have specifically discussed privacy concerns regarding cellphones—not so much because they are susceptible to discovery by Hailstorm and similar devices, but due to the trove of highly personal data they contain: in *Riley v. California*, 573 U.S. 400 (2014) the Court noted that searches of cell phones "bear little resemblance" to traditional searches because "[c]ell phones differ in both a quantitative and a qualitative sense" due to their ability to store "a digital record of nearly every aspect of [a person's] li[fe]—from the mundane to the intimate").

Here, the Circuit required more information, remanding for additional factfinding and, if necessary "updated conclusions of law as to whether the Hailstorm simulator's use was a constitutional violation."

On remand the district court was directed to determine:

(1) The maximum range at which the Hailstorm simulator can force nearby cellular devices to connect to it.

(2) The maximum number of cellular devices from which the Hailstorm simulator can force a connection.

(3) All categories of data the Hailstorm simulator may collect from a cellular device, regardless of whether such data is displayed to the Hailstorm simulator's operator in the course of locating a target phone, including by way of example and without limitation: cellular device identifiers (such as international mobile equipment identity ("IMEI") numbers, international mobile subscriber identity ("IMSI") numbers, and electronic serial numbers ("ESN")); metadata about cellular device operations (such as numbers dialed or texted, or webpages visited); and, most especially, the content of voice or video calls, text messages, emails, and application data.

(4) What data in (3) may be stored by the Hailstorm simulator.

(5) What data in (4) are accessible by law enforcement officers.

(6) All means by which the Hailstorm simulator was configured to minimize data collection from third party cellular devices not belonging to Andrews.

The Circuit also required findings as to whether the BPD had "any formal or informal policies, practices, or procedures that prevented BPD officers seeking a warrant or pen register/trap and trace order from stating to the reviewing magistrate that a cell site simulator would be used."

As the Circuit concluded, "We do not purport to direct the district court how to rule here, nor do we pass judgment on the result it has reached. We note only that, at this stage, more information is needed before an informed weighing of the interests may take place."

CONCURRENCE: Judge Wilkinson concurred, citing *Maryland v. King*:

> Where, as here, both significant governmental interests and significant privacy interests may well be at stake, the district court may find it profitable to inquire whether the important public interest in crime prevention and detection could have been served by means that were less intrusive and damaging to the "legitimate expectations of privacy" that citizens hold.

LINK

NOTE: The decision also cites a number of sources for further insights into cell tower simulator jurisprudence:

Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology, Dep't of Justice 2 (Sept. 3, 2015), LINK

Brian L. Owsley, *Triggerfish, Stingrays, and Fourth Amendment Fishing Expeditions*, 66 Hastings L.J. 183, 193-94 (2014).

Stephanie K. Pell & Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 Harv. J.L. & Tech. 1, 11-12 (2014)

Municipal Lawyer covered the Fourth Amendment implications of cell tower simulators in an article by Gary Schons of Best Best & Krieger: LINK

THIS JUST IN: Texas AG Includes Abortions Among "Medically Unnecessary" Procedures to be Deferred During Crisis; Religious Gatherings are Essential Services

On March 26, 2020, Texas AG Tom Paxton issued an order prohibiting unnecessary medical procedures as a mechanism to conserve scarce PPEs and similar resources as Covid-19 surges. He included abortions within the ambit of "unnecessary" procedures. Planned Parenthood and other organizations obtained a temporary restraining order at the Western District. Paxton, supported by amici states Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia, moved at the Fifth Circuit for a stay of the TRO.

On April 1, 2020, the Fifth Circuit granted the stay, requiring responsive pleadings by Friday April 3, 2020.

The Fifth Circuit Order is HERE.

The Planned Parenthood Memorandum is HERE.

The AG webpage which also includes the state's determination that religious gatherings are "essential services" but are nevertheless subject to social distancing and similar protections, is HERE.