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Guns: Seventh Circuit Upholds Local Ban on Assault Weapons

Friedman v. City of Highland Park, No. 14-3091 (7th Cir. Apr. 27, 2015).

Adding to the need for further Supreme Court elucidation of the Second Amendment gun rights, the Seventh Circuit has upheld a local ordinance banning assault weapons and large-capacity magazines. The city of Highland Park enacted an ordinance prohibiting the possession of assault weapons. Plaintiff-appellant, an owner of the banned weapons, sought to enjoin enforcement of the ordinance, arguing that it violates the Second Amendment of the U.S. Constitution. The court, relying on *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), upheld the ban.

The court opted for a narrow interpretation of *Heller*, noting that the decision in that case did not call into question every law regulating firearms or abolish "long standing prohibitions" on weapons considered "dangerous" or "unusual." Moreover, the court stated that *Heller* confirmed that at least some categorical limits on the kinds of weapons private citizens can possessed are appropriate.

The plaintiffs argued that there was no "historical tradition" of banning semi-automatic weapons because such bans have only been recently enacted, and as such, the Highland Park ordinance violated the Second Amendment. The court rejected this argument, finding that the length of time after which an ordinance prohibiting certain weapons is enacted is an unworkable framework to establish whether there is a sufficient "historical tradition" to overcome a Second Amendment challenge. In other words, under the court's reasoning, when a gun ban is enacted shouldn't make it more or less susceptible to challenge under the Constitution.

The court also concluded that the Second Amendment protects weapons that the government would expect citizens to bring with them when a state militia is called into service. Based on this principle, the plaintiffs argued that semi-automatic weapons are commonly owned for lawful purposes, and therefore fall within the protected class of weapons under the Second Amendment. The court rejected this argument, noting that the *Heller* court contemplated that weapons owned by citizens would change over time and that the Appellant's arguments were "circular" because whether a weapon is commonly used depends largely on the regulations in place at the time. Put simply, the court ruled that the existence (or nonexistence) of a law cannot be the source of its constitutional validity.

The city argued that assault weapons are "dangerous and unusual" within the meaning of *Heller*, and therefore the ban is proper. The court acknowledged the lack of empirical evidence on the level of danger or usage of assault weapons when compared to handguns. The court deferred these questions to the legislature.

In analyzing the validity of the ban, the court declined to apply traditional levels of scrutiny and, relying in part on *Heller*, articulated a new standard:

> "[W]e think it better to ask whether a regulation bans weapons that were common at the time of ratification [of the Second Amendment] or those that have "some reasonable relationship to the preservation or efficiency of a well-regulated militia"… and whether law-abiding citizens retain adequate means of self-defense.

With this standard in mind, the court reasoned that weapons prohibited by the Highland Park ordinance were not common when the Second Amendment was ratified. However, it conceded that some of the weapons prohibited by the ban are commonly used for military and police functions, and therefore, bear a relation to the preservation and effectiveness of state militias. Ultimately, the issue turned on whether the ordinance provides ample alternative means to exercise the inherent right of self-defense. The court found that it did, noting the availability of alternative weapons not banned by the statute. Additionally, the court reasoned that while assault weapons were beneficial for self-defense purposes, bans on these weapons reduced gun violence and made the public feel safer. Balancing these competing considerations, the court affirmed the lower court's decision affirming the ban.

The dissent argued that the majority opinion bans weapons commonly used throughout the country and infringes on the fundamental right of people to defend themselves in their homes. The dissent also argued that the majority misread the holding of *Heller*, finding that *Heller* established an individual right to bear arms that does not depend on any association with a militia. He also disagreed with the "novel" test used by the majority, and offered an alternative framework for addressing Second Amendment challenges to gun bans.

LINK (last accessed May 5, 2015).

Land Use: Requirement That Developer Submit To Additional Development Review Before Reinstating Low-Income Project Does Not Violate Due Process

Teresi Investments III v. City of Mountain View, No. 13-15029 (9th Cir. May 1, 2015).

The Ninth Circuit has upheld a lower court ruling that requiring a developer to submit to additional development review before resuscitating a low-income housing project—which the developer initially intended to demolish in favor of a condominium complex—did not violate the developer's Due Process and Equal Protection rights.

Mountain View, California conditionally approved a development project that would have demolished a low-income housing complex and replaced it with a condominium complex. Two years into the project Teresi Investments III, the developer, ran into financial trouble and sought to instead resuscitate the low-income residential use. In order to do so Mountain View required that the company "(1) repay the $127,000 spent by the City to relocate the previous tenants at the Property and (2) submit to Development Review." Teresi rejected these requirements and instead sold the property. It then filed suit arguing the city violated Teresi's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court granted summary judgment to the city, holding it had not violated any of Terisi's rights. Teresi appealed.

HELD: The Ninth Circuit affirmed, holding none of the company's rights were violated.

DISCUSSION: Teresi's substantive due process claim required proving that the city's condition that it undergo a new Development Review was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Teresi argued the request was based on nothing more than "run of the mill" disputes between a developer and the city, and that it was an attempt to "legitimize a scheme to extort" $127,000 from the company. In contrast, the city argued it needed a new Development Review process to assess the overall scope of the project. The Circuit Court determined that since Teresi's "substantive due process challenge does not impinge on a fundamental right, [] the Court do[es] not require that the [City]'s action actually advance its stated purposes, but merely look[s] to see whether the [City] could have had a legitimate reason for acting as it did." With that standard, the court evaluated whether Teresi presented evidence that the city's motivations were unrelated to any legitimate health, safety, or welfare concern--and decided it had not presented any such evidence. As a result, the city had not violated Teresi's due process rights.

Teresi's final claim was that the city singled out Teresi for unequal treatment in violation of the Equal Protection clause. Teresi was thus required to prove that the city "(1) intentionally (2) treated [Teresi] differently than other similarly situated property owners, (3) without a rational basis." The court rejected this claim noting, decisively, that the developer that purchased the property from Teresi was itself required to undergo a Development Review before developing the property. The Circuit Court thus affirmed both district court holdings.

LINK (last accessed May 20, 2015).

Police: Independent Source of Probable Cause Negates Malicious Prosecution Claim

Glen R. Scotti v. City of Phoenix, No. 13-15209 (9th Cir. May 1, 2015).

Kimberly Lewis was involved in a protracted custody battle with Gary Rehkow. During the course of the proceedings, Rehkow hired a private investigator, Glen Scotti, to video and photograph Lewis and her daughter, send her threatening communications, and post confidential information about Lewis online. Moreover, Lewis suffered property and vehicle damage, which Rehkow appears to have been behind. Lewis also found her dog drowned in her pool. Mary Freund, a Phoenix detective, investigated the case to determine whether Scotti was an accomplice in Rehkow's stalking of Lewis. The court found that there was "poor quality police work" involved in the investigation, noting that the investigating officer relied on second-hand information rather than verifying it with sources. Scotti was arrested and prosecuted--based, in part, on this shoddy police work. Scotti filed claims against the city for malicious prosecution and negligence by the police under Arizona law. The district court granted summary judgment to the city and the individual officers. Scotti appealed.

HELD: The Ninth Circuit affirmed, holding that though there were problems with the investigation, there was also an independent source of probable cause supporting Scotti's arrest and prosecution, and therefore there was neither malicious prosecution nor negligence.

DISCUSSION: In order to properly charge Scotti with being an accomplice to stalking the Phoenix police needed reasonable suspicion that 1) Rehkow "knowingly engage[d] in a course of conduct[,] . . . directed toward another person[,] . . . that . . . [w]ould cause a reasonable person to fear death of that person or that person's immediate family member[,] and that person in fact" and 2) "Scotti intended to promote or facilitate Rehkow's alleged stalking conduct, and that Scotti counseled, agreed to aid, or attempted to aid Rehkow in planning or committing the offense, or at least provided Rehkow the means or opportunity to commit the offense."

In evaluating the police investigation, the court observed that it was poorly conducted and d led to misleading, or even entirely false, results. Specifically, the court found that

detective Freund failed to independently corroborate second-hand statements, which later turned out to be inaccurate.

Despite the less-than-perfect police work, the court found that there was independent probable cause for Scotti's arrest and prosecution. Accounting for Freund's poor police work, the court found that the Phoenix police still had evidence that Lewis feared for her life, and that her fear was based on Rehkow's threats towards her, the damage to her property and the drowning of her dog. As for Scotti and his involvement, it was undisputed that he was behind the posting of videos, photos, and sealed information about Lewis online. Moreover, the Phoenix police properly obtained a search warrant for Scotti's residence, where they found dry erase boards referring to the custody case, driving directions to the home of the judge for the case and detective Freund, sexually explicit video from the Lewis/Rehkow honeymoon and correspondence between Scotti and Rehkow discussing wiretapping Lewis' phone, rummaging her trash, and finding "anything" that could be used against her. As none of this was disputed or related to the dubious police work, the Court found reasonable suspicion that Rehkow did cause Lewis to fear for her life and that Scotti intended to and did assist Rehkow in that effort. The Court held that under the totality of circumstances, Scotti was an accomplice in stalking of Lewis.

Scotti's negligence claim was rejected by the court on the same grounds – the existence of evidence independent of the questionable police work was fatal to his claim. The district court ruling was thus affirmed.

LINK (last accessed May 19, 2015).

Qualified Immunity: State not Liable for Death of Prison Guard under State-Created Danger Theory

Estate of Ronald E. Johnson v. Douglas Weber, No. 14-2383 (8th Cir. May 4, 2015).

The Eighth Circuit has upheld a grant of qualified immunity where a prison guard was killed by inmates as they attempted a prison break, finding that although the prison system had moved the inmates to a minimum security facility despite knowing of their predilection for escape, such an action did not "shock the conscience" so as to override an immunity claim.

Rodney Berget and Eric Robert were prisoners in the South Dakota Department of Corrections system (DOC). Both prisoners had extensive histories of attempting escape. Notwithstanding this fact, both were housed in a minimum security facility with jobs that afforded them substantial freedom of movement. On April 12, 2011, Berget and Robert accessed an unauthorized area of the prison in yet another attempt to escape. The escape failed but in the process, they killed Ronald Johnson, a prison guard at the facility. They were ultimately convicted of his murder.

Johnson's estate brought a constitutional due-process claim against DOC, asserting liability for Johnson's death. The plaintiff argued that given the prisoners' violent pasts and multiple escape attempts, DOC should have kept them in a maximum security prison, rather than a minimum security facility, and should not have given them jobs that enabled them to move freely throughout the prison complex. Moreover, the plaintiff argued that DOC erred in not acting on at least two warnings of the attempted escape prior to the incident claiming Johnson's life. Despite these claims, the district court granted the DOC summary judgment, determining qualified immunity applied. The estate appealed.

HELD: The Eight Circuit affirmed the district court ruling.

DISCUSSION: In reviewing the lower court's grant of summary judgment, the appellate court engaged in a two-part test. First, the court considered whether the evidence demonstrated that the defendants violated Johnson's constitutional rights and, if so, whether the rights violated were clearly established. The plaintiff argued that the DOC and associated individuals were liable for Johnson's death under the state-created danger theory. The theory provides that the state owes a duty to protect an individual if it created the danger to which the individual was subjected. Under this theory, however, negligence and gross negligence do not suffice to create liability; rather the state's action must "shock the conscience" in order for the plaintiff to prevail.

The plaintiff argued the district court erred in finding the DOC's actions did not shock the conscience because the court had not adequately considered the lack of supervision of the prisoners or their earlier attempts to escape. The appellate court disagreed, noting the two prisoners had worked for years in similar jobs with no violent episodes and no escape attempts since 1989. As such, their prior attempts to escape were too far removed to warrant a finding that the state actions created an immediate danger to Johnson. The fact that the DOC received warnings in the years preceding the escape attempt did not sway the Circuit Court, which determined that the reports were not specific enough to put DOC staff on notice of an attempted escape.

The plaintiff specifically raised the fact that both prisoners engaged in hunger strikes and, allegedly, ended the strikes in exchange for transfers into a minimum security facility. The plaintiff noted that the paperwork procedures for the transfers for each were not followed correctly, indicating some impropriety. The court found these allegations also did not shock the conscience in light of the fact that under DOC policy, the warden has housing assignment discretion.

Finally, the plaintiff argued that the two prisoners were extremely dangerous inmates. The court disagreed, noting that prior to Johnson's death, neither prisoner had a history of violence in prison and the vague reports of escape plans were not sufficient to find the DOC deliberately indifferent to the threat the men posed. The Court of Appeals thus affirmed the district court's grant of summary judgment.

LINK (last accessed May 19, 2015).

Speech: Reinstating Blanket Prohibition on Non-attended Displays in Public Parks is Not Content-Based "Heckler's Veto" Response to Atheists' Objections

Santa Monica Nativity Scenes Committee v. City of Santa Monica, No. 13-55011 (9th Cir. Apr. 30, 2015).

Where a city eliminated an exception to a blanket prohibition against all non-attended displays in its public parks, that action did not fall within the "heckler's veto" category of content-based restrictions, according to the Ninth Circuit.

Since 1955 residents of Santa Monica have erected dioramas of various biblical scenes in the city's Palisades Park. Because putting up and taking down the dioramas was a substantial undertaking, the Santa Monica Nativity Scenes Committee (Committee) was formed in 1983 to manage the process.

In 1994 the city banned unattended displays in all its parks. Nonetheless the nativity scenes were unabated in Palisades Park. In 2003, recognizing the inconsistency, the city council added a "winter display" exception to the general rule, thus allowing anyone, not just the Committee, to erect unattended holiday displays in Palisades Park. The first-come, first-served allocation of the display spaces worked well for the next few years.

In 2011, winter display requests surged. Other groups, mostly atheists, began competing with the committee for the park space. A lottery system was used to divvy up the spaces among the applicants and the atheists won most of the spaces. The atheists and the Committee each vowed to flood the lottery in 2012. The city, recognizing the upcoming administrative nightmare and concerned about the significant public resources being dedicated to the process, opted to prohibit displays altogether, rescinding the Palisades Park exception.

The Committee filed suit, arguing the repeal ordinance, 2401, violated its right to free speech, specifically that its enactment amounted to a "heckler's veto." The district court dismissed, finding that the ordinance was not a heckler's veto, but rather a content-neutral time, place, and manner restriction.

HELD: The Ninth Circuit affirmed the district court, holding the heckler's veto doctrine was inapplicable and that the ordinance was a content-neutral time, place, and manner restriction that was narrowly-tailored to its legitimate purpose and left open alternative channels of communication.

DISCUSSION: The winter display war in Santa Monica started in earnest in 2010, after years of the Committee displaying its Christian message unopposed and without

competition. But in that year, every bit of space in the two-city-block sized display area was allocated and there were some applications competing for the same space. Anticipating even more applications and greater competition for space in 2011, the city developed a lottery system to divvy up the display space. There were twenty-one available spaces ad applicants could request up to nine each, and a random drawing would determine the winners. The city ultimately received thirteen applications for 109 spaces, of which the majority were won by atheists, one was obtained by Chabad of Santa Monica, and the Committee received only a few, limiting their displays to three from their traditional fourteen.

After the holiday season the city attorney submitted reports to the city council wherein she recommended against continuing the Palisades Park exception to the ban on unattended displays. As a basis for repeal the attorney highlighted that residents wanted to preserve the aesthetic value of the park and use it as originally intended--to enjoy the ocean vista. Moreover, she pointed out it was expensive to operate the lottery, using hundreds of hours of staff time. Ultimately, she said ending the ordinance exception would "serve the purpose[s] of resolving the controversy, eliminate[e] legal risks, conserve[e] the staff time and resources necessary to operate a constitutionally valid regulatory system, conform[] usage of Palisades Park to the long standing, City-wide standard which prohibits unattended displays in parks, and protect the views of the park and ocean." The city council unanimously agreed and passed Ordinance 2401.

All parties concurred that Palisades Park is a traditional public forum, requiring content-based regulations to survive strict scrutiny and any content-neutral time, place, and manner ones to serve an important government interest and leave open alternative channels of communication. The Committee argued, however, that Ordinance 2401, though seemingly content-neutral, should be considered content-based under the heckler's veto doctrine. This doctrine holds that "a regulation of speech is to be deemed content based when listeners react to speech based on its content and the government then ratifies that reaction by restricting the speech in response to listeners' objections." (internal citations omitted). Since, the Committee argued, the ordinance was a response to the atheists objections to the nativity scenes, the ordinance amounted to reacting to that controversy to suppress the speech altogether.

While the Court gave the Committee credit for a novel theory, it recognized that this case is "far afield from the heartland of the heckler's veto doctrine," as the prototypical case concerns particular speech of a particular speaker. The Committee's claim could theoretically have some merit if the city had banned all religious displays based on the atheists complaints, but it did not do so. Instead, after banning unattended displays in every city park except Palisades, the city tried to balance competing speech rights with a special policy there, but could not and only then passed an evenhanded regulation removing the exception it previously allowed. The Court was willing to agree this "in some sense ratif[ied]" the atheists' grievances about the nativity scenes, but it was not willing to "expand the heckler's veto doctrine significantly." It noted applying the "doctrine to neutral regulations that do not target particular speech," would go beyond the "logic underlying the heckler's veto doctrine . . . [which] is concerned with the

possibility that particular speech will be wrongfully excluded from the marketplace of ideas merely because it is offensive to some of [its] hearers." (internal citations omitted). Ultimately, it found this underlying logic was simply not furthered if "a regulation applies to all speech and does not allow for arbitrary enforcement based on particular speech's offensive[ness]."

Having determined it was not a heckler's veto, the Court went on to evaluate whether the regulation was a neutral time, place, and manner restriction. The important government interests were protecting the park for aesthetic purposes and conserving the government's resources. Though the Committee argued these were "insignificant" and that the ordinance furthered neither, the Court disagreed because the Committee failed to provide facts to support the argument.

The Court also found Ordinance 2401 was narrowly tailored. The Committee argued it was not appropriately tailored because there were a variety of solutions available to the city to achieve its stated interest, and the total ban on displays was not the least intrusive. The Court rejected this argument because, though it that may have been true, under the narrow tailoring test the city was not required to select the least restrictive means available to achieve its interest. Given there is no doubt the ban furthered the government's interest, the Committee's argument failed.

Finally, the Court found the city's ban left open alternative channels of communication, including that the Committee could "erect its unattended nativity scenes on private property, and it [could] speak in many other ways in Palisades Park, including erecting one-day, attended displays, leafleting, preaching, holding signs, and caroling." The Committee's argument that these methods prohibited it from reaching its "intended audience" fell on deaf ears, as the Court found they could reach their intended audience in Palisades Park, they just could not do it using unattended displays. The Committee also argued that the First Amendment protects its right to choose its means of communication. The Court was nonplussed by this as well, noting that "although [it] ha[s] held that speakers have a First Amendment right to choose a particular means or avenue of speech . . . to advocate their cause, we have also made clear that [t]his is not the same as saying that [speakers] have a First Amendment right to dictate the *manner* in which they convey their message within their chosen avenue. Government may regulate the *manner* of speech in a content-neutral way." (internal citations omitted). The Ninth Circuit affirmed the district court.

LINK (last accessed May 20, 2015).