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Code Enforcement: Enforcement Officer Has Immunity from Fourth Amendment Claim When Inspecting Exterior of Vacant Residence

Davis v. City of Milwaukee, No. 15-2978 (7th Cir. May 17, 2016)

A code enforcement officer who inspects a vacant, foreclosed home from walkways connected to public sidewalks is not conducting an illegal search from the home's curtilage and has immunity for § 1983 purposes, according to the Seventh Circuit.

A Milwaukee residential code-enforcement inspector inspected the exterior of a vacant building owned by Brian Davis numerous times over a 14-month period, finding various code violations. He did not have a warrant. Davis brought a Fourth Amendment action under § 1983, arguing that a reasonable inspector would have known that walking around an open lot to inspect the outside of a house was an unlawful invasion of protected curtilage.

The district court disagreed, and the Seventh Circuit affirmed. True, it said, "curtilage" is afforded Fourth Amendment protection, because it is "the space that surrounds a home" which the home's residents "may reasonably expect to 'be treated as the home itself,'" and harbors "the intimate activity associated with the sanctity of a [person's] home and the privacies of life." (citations omitted). While the front porch of a home is part of its curtilage, and the backyard may also be curtilage in certain circumstances, "open fields" are not, being "unoccupied or undeveloped" areas that "do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance." (citation omitted). A warrantless search of a home's interior conducted from its curtilage, such as a dog-sniff from the front porch,

violates the Fourth Amendment, but a warrantless entry onto an unoccupied, accessible open field to conduct an outside search, even in the face of a "No Trespassing" sign, does not.

Therefore, to defeat the enforcement officer's qualified immunity, Davis had to show established case law from before the search that treated the ungated grounds surrounding an *unoccupied* house as curtilage that a government inspector could not enter for purposes of visual inspection. He was unable to cite such a precedent.

LINK

Mental Health: Requirement that State Provide Mental Health Evaluations for Pretrial Detainees within 7 Days Violates Due Process Reasonableness

Trueblood v. Washington State Department of Social and Health Services, No. 15-35462 (9th Cir. May 6, 2016)

The Ninth Circuit has reversed a lower court order requiring Washington State to provide mental health evaluations of all pretrial detainees with 7 days, finding that such expedited treatment could not be mandated under the reasonableness requirements of the Due Process clause.

The Washington State Department of Social and Health Services has faced a slew of challenges arguing that city and county facilities fail to provide, unconstitutionally so, timely mental health evaluations for pretrial detainees. In the most recent case to work its way through the courts, Cassie Cordell Trueblood filed a §1983 suit on behalf of a single plaintiff who received a timely initial evaluation, which deemed him incompetent and in need of restorative treatment, only to be left in solitary confinement awaiting transfer for that restorative treatment. After the case was filed a second class joined, namely individuals whose initial competency evaluations were *not* timely. The district court ordered, after a bench trial, a permanent injunction directing Washington State to provide both services – the initial evaluation and admittance into restorative services – within seven days.

The State appealed the requirement that all initial evaluations be within seven days, arguing that requiring every individual held in every county and municipal facility to have an initial mental health evaluation within seven days did not comport with the Due Process Clause's reasonableness requirement. Although the Ninth Circuit recognized the lower court's challenges in fashioning a remedy for Washington given its "consistent pattern of intentionally disregarding court orders . . . and [its] established de facto policy of ignoring court orders which conflict with [its] internal policies," it agreed with the State. The Circuit held the lower court simply did not ask or determine whether there was a

reasonable relationship between the timing of the evaluations and the confinement and did not determine the difference between a reasonable delay in providing initial mental health evaluations versus a reasonable delay for restorative services. It thus vacated the lower court holding and remanded, leaving the lower court the opportunity to take the first crack at fashioning "reasonable" limits under the injunction, in accordance with the Due Process Clause.

LINK

Police: No Immunity for Allowing Police Dog to Continue Biting Non-Resisting Arrestee

Becker v. Elfreich, No. 15-1363 (7th Cir, May 12, 2016).

The Seventh Circuit has denied qualified immunity to an officer who pulled a non-resistant arrestee down stairs and restrained him while a police dog bit the arrestee's leg.

Zachary Elfreich, a dog expert with the Evansville Police Department, was dispatched to a residence to execute an arrest warrant. He released Axel, his German Shepherd, into the home. The dog encountered Jamie Becker coming down the stairs and bit his leg. Despite the fact that Becker had his hands on his head and was attempting to surrender, Officer Elfreich knocked Becker down the remaining stairs, put his knee into Becker's back and allowed Axel to continue biting and shaking Becker's calf violently while Elfreich secured Becker with handcuffs. Becker was hospitalized and sustained permanent muscle and nerve damage to his leg. He brought an action under § 1983.

Affirming the lower court, the Seventh Circuit declined to grant Elfreich summary judgment on the basis of qualified immunity. Critical to the court's decision was determining the "quantum of force" used by Officer Elfreich, because that "represents the nature and significance of the governmental intrusion" on Becker's Fourth Amendment rights.

For a particular application of force to be classified as 'deadly,' it must at least carry with it a substantial risk of causing death or serious bodily harm. The court could not determine whether using Axel invoked a substantial risk of causing serious bodily injury: unlike police dogs in other cases which were trained to bite specific body parts and inflicted lethal bites, Axel was not so trained and merely bit "the first thing he comes in contact with." Nor did it appear Axel was trained to seize a suspect and wait for the officer to secure him, because he bit Becker twice -- the second time ferociously, tearing his calf out. Based on the record, the court could not say whether the use of the "bite and hold" constituted deadly force in this instance. "But the force was clearly force at the

higher end of the spectrum, and the government's intrusion on Becker's rights was thus significant."

Against this significant intrusion, the court had to evaluate the government's interest. The action requiring Becker's arrest—threatening an occupant of the house with a knife—had occurred weeks earlier. While the initial release of Axel to find Becker may have been justified because the officers believed Becker was concealing himself in the house, once it became clear that Becker was actually near the bottom of the staircase, the force used by Officer Elfreich was no longer reasonable. Given the fact that there were two other officers accompanying Elfreich, his concerns about being attacked while handcuffing Becker also seemed unfounded. Under the totality of the circumstances, the Seventh Circuit concluded that a jury could find Officer Elfreich used excessive force.

Elfreich had argued that he was immune from suit because it was not clearly established at the time he arrested Becker that the force he used violated Becker's Fourth Amendment rights. The court disagreed:

> Case law makes clear that officers cannot use significant force on a nonresisting or passively resisting suspect. Further, as we have often said, "a case directly on point is not required for a right to be clearly established and 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" Thus, the relevant case law did not need to involve a police dog in order to clearly establish the principle that you cannot allow a dog to violently attack such a suspect.

The Seventh Circuit affirmed and remanded.

LINK

Police: No Immunity for Excessive Force Where No Crime is Being Committed and No Immediate Threat to Safety to Anyone

Harris v. Langley, No. 15-3861 (6th Cir. May 6, 2016)

The Sixth Circuit has denied a Cleveland police officer immunity from a Section 1983 action after he body-slammed and handcuffed plaintiff who had not exhibited any signs of threatening or at-risk behavior.

Ronald Harris, a mid-sixties retired nurse and vet, lived with his elderly mother in Cleveland when he noticed changes in her mental and physical capacities that appeared to him as precursors to a stroke. He called 911, twice, to request EMS service to help her. Instead, two Cleveland police officers appeared at his door. He clarified that

he needed EMS service and, when the officers ignored this clarification, he invited the officers in the house to check his mother. The officers declined. Harris then, in preparation to stay outside with the officers, turned to close and lock his door, at which point Officer Pendleton body-slammed Harris, knocking him to the floor on his back where he hit his head. He was then handcuffed until a supervisor arrived, at which point Harris filed a complaint against Officer Pendleton. The officers never inquired about the health status of Harris' mother. Harris filed suit against the officers and city, and the district court denied the summary judgment to the defendants, prompting an appeal to the Sixth Circuit.

The appellate court affirmed the district court, finding first that looking at these facts there was no reason to use *any* force at all against Harris, given no crime was being committed and no threat to safety and no hazard existed for anyone. The court termed it a "patently unreasonable use of force." As for whether the law was clearly established, the court simply stated there is "no opacity in the Fourth Amendment's prohibition on unprovoked body slams from police officers, whether this exact scenario has been held unlawful in a previous decision or not." The Circuit affirmed the lower court.

LINK

Religion: Whether Non-profits, Daycare Centers, etc. are Comparators to a Religious School Under RLUIPA is a Question of Fact

Tree of Life Christian Schools v. City of Upper Arlington, No. 14-3469, (6th Cir. May 18, 2016)

The Sixth Circuit has reversed a lower court which had granted summary judgment to the defendant City in a religious school's RLUIPA action, finding that the "Equal Terms" provision of RLUIPA requires factual analysis of ostensible "comparators" to the school.

Tree of Life Christian Schools (TOL) purchased the largest building in Upper Arlington, Ohio (City) from AOL/Time Warner and applied to rezone the tract for residential use, which would also allow schools or churches. The City denied the rezoning application because under its Master Plan, the tract including the building was zoned for commercial use, ostensibly to maximize income tax revenues, and because over 90% of the City's land was already zoned residential.

TOL sued under RLUIPA, arguing that the City failed to treat it on equal terms with nonreligious entities. After both parties moved for summary judgment, the district court granted summary judgment to the City, upholding the Master Plan zoning scheme.

The Sixth Circuit reversed, finding summary judgment was inappropriate: “[T]he issue in this case is whether the government treats nonreligious assemblies or institutions that would fail to maximize income-tax revenue in the same way it has treated the proposed religious school. That is a factual, not a legal, question. Federal courts may not resolve genuine issues of material fact on motions for summary judgment…”

The operative provision under RLUIPA was the so-called Equal Terms clause, which provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." The question was, what “nonreligious” entities would serve as appropriate comparators to the TOL for RLUIPA Equal Terms analysis? The court noted that there are divergent views among the circuits as to the degree of similarity which must be shown by plaintiffs in a RLUIPA action—the Eleventh Circuit is the most hospitable to plaintiffs, allowing a wide span of entities to be comparators, while the Second and Third Circuits, by contrast, require that a comparator be "similarly situated" to the plaintiff religious assembly or institution with regard to the regulation at issue or to its purpose.

The City’s zoning law enumerated a wide class of comparators—as the court found, it “allows (in fact, encourages) nonreligious assemblies or institutions to use 5000 Arlington Centre Boulevard: businesses most obviously, but also nonprofit organizations such as hospitals, outpatient care centers, and daycare centers.”

The question of whether this type of entity would pay similar taxes as TOL’s school was a question of fact, requiring reversal and remand.

DISSENT: The dissent disagreed with TOL’s argument that secular schools, hospitals, and daycare centers were appropriate comparators: “I would affirm the grant of summary judgment to Upper Arlington on the basis that TOLCS failed to present a secular comparator that is similarly situated with respect to the relevant zoning criteria.”

LINK

Search and Seizure: Fourth Amendment Claim Not Viable Where Plaintiffs Fail to Allege Lack of Probable Cause: Merely Alleging Violation of Warrant Clause is Not Enough

Graves v. Mahoning County, No.15-3175 (6th Cir. May 12, 2016)

Where a group of exotic dancers challenged their arrest on drug and prostitution charges because police had used invalid warrants, their action failed, because the arrests were based on probable cause and did not require warrants--satisfying the Reasonableness Clause of the Fourth Amendment.

Shannon Graves and a group of other exotic dancers were arrested for a variety of charges related to drug distribution and prostitution. Claiming the police used invalid arrest warrants to arrest them, the dancers filed a § 1983 suit against the county and municipalities that employed the officers. The district court dismissed the case, holding the dancers' complaint was fatally flawed because they failed to allege the officers lacked probable cause. The Sixth Circuit agreed, delving into the two operative clauses of the Fourth Amendment – the Warrant Clause and the Reasonableness Clause. The dancers' correctly asserted the governments' warrants failed to include any independent probable cause determination, as required by the Warrants Clause.

However, in order to state a valid § 1983 claim under the Fourth Amendment, the dancers had to show a violation of the Reasonableness Clause – e.g. that their seizure was *unreasonable*. The arrests at issue did not require warrants – though the officers did take the time to get warrants, albeit invalid ones, prior to the arrest – but, as with all seizures, the seizures were required to be reasonable. The dancers' failed to allege that the arrests were unreasonable under the Fourth Amendment and thus the Sixth Circuit affirmed. Simply put, nothing in the dancers' complaints (they were given leave to amend four times) ever alleged that the police lacked probable cause to believe a crime was committed, thus no viable Fourth Amendment violation was alleged.

LINK

Speech: State Securities Regulators' Probe of Financial Advisor was Triggered Partly by Protected Speech But Did Not Constitute Actionable Retaliation

Bennie v. Munn, No. 14-3473 (8th Cir. May 11, 2016)

Although Nebraska regulators took into account a financial advisor's protected anti-government speech while investigating him for securities irregularities, that scrutiny was not enough to cause the advisor to cease expressing his views, according to the Eighth Circuit.

Robert Bennie worked as a financial advisor in Lincoln, Nebraska. Bennie's actions through 2009 and 2010 brought him to the attention of state regulators, including a promotional CD that appeared to be missing mandatory disclosure information, a commercial in which he offered those who invested with him a $100.00 towards a firearm, and statements that ran in the newspaper of him calling President Obama a "communist," "dishonest," and "an evil man." In November of 2010, Bennie's employer, armed with a few other noncompliant advertisements in addition to the one noted above, fired Bennie, prompting Bennie to file a public records request about the state regulator's investigation of him. Bennie filed suit against individual regulators, saying the investigation ultimately caused him to stop writing letters-to-the-editor and being

involved in Tea Party activities, and arguing the regulators retaliated against him for his protected First Amendment speech.

The district court dismissed the case, holding that, though the regulators did target Bennie partly for his protected speech, it was not enough to deter a person of ordinary firmness and constitution from continuing to speak, and thus fell short of a viable claim. The Sixth Circuit affirmed, noting that Bennie's "unorthodox" advertising drew regulators' attention *before* they read his comments about the President, that though his employer suffered increased attention by the regulators because of Bennie, he failed to show their actions affected his business. In the end, the Circuit Court found that though the facts "might well have supported a conclusion that an ordinary person's speech would have been chilled, it did not compel such a finding," leading to its ultimate conclusion that the lower court did not abuse its discretion.

LINK

Trials: After SCOTUS Retroactively Prohibits Life Without Parole for Juveniles, Sixth Circuit Vacates Michigan Juveniles' Life Sentences and Remands

Hill v. Snyder, No. 13-2661/2705 (6th Cir. May 11, 2016)

Following the Supreme Court's *Montgomery* v. Louisiana decision which clarified that *Miller v. Alabama's* prohibition against mandatory life sentences for juveniles applied retroactively, the Sixth Circuit has ordered that Michigan courts vacate juvenile life sentences and remand for further proceedings.
In the early 2000's Michigan law provided that anyone convicted of first degree murder would be sentenced to life imprisonment without parole—regardless of age. A class of juveniles so sentenced challenged the constitutionality of their sentences in 2010. While the case was pending, the Supreme Court decided *Miller v. Alabama* in 2012, involving two 14-year olds convicted of first-degree murder. The *Miller* decision held that mandatory life without parole for those under 18 years of age at the time of their crime violated the Eighth Amendment.

In response, Michigan amended its juvenile offender law to prohibit life-without-parole sentences for those under 18 years old—but did not apply the amended law retroactively, awaiting further guidance from the Supreme Court.

Then in 2016 the Supreme Court decided *Montgomery v. Louisiana,* in which it held *Miller* applied retroactively. Michigan state law had not yet caught up with this newest of Supreme Court holdings. The class of juveniles and the state cross-appealed after these three significant legal events. The district court issued an injunction against the State requiring compliance with *Miller,* given that *Montgomery* determined it applied retroactively. The parties then filed an interlocutory appeal to the Sixth Circuit. The State

argued the retroactivity ruling from the Supreme Court triggers Michigan law requiring resentencing in accordance with the State law. The juveniles, on the other hand, claim this is insufficient and that the case should be remanded to the district court to require the State to devise a mechanism for the meaningful opportunity for release for all juveniles serving mandatory life sentences without parole in the State.

The Sixth Circuit substantially agreed with the juveniles, noting the Supreme Court directs that when a legal landscape changes as it did in this series of events, such that claims may be moot, the "best practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." The Sixth Circuit followed this advice, providing the parties the opportunity to supplement the record, particularly in light of the amended State law.

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Trials: *In Forma Pauperis* Filing Cannot Be Opposed Under "Three Strikes Rule" Where Prior Frivolous Filings Had Only Been Denied, But Not Dismissed

Daker v. Commissioner, Georgia Department of Corrections, No. 14-12139 (11th Cir. May 4, 2016)

An *in forma pauperis* filing by a serial litigant could proceed, despite Georgia's "three strikes rule" which bars such filings where 3 or more of the litigant's prior filings have been dismissed for frivolousness or failure to state a claim for relief, because his prior filings had only been "denied" by a single judge and not "dismissed" by a panel of the court.

Waseem Daker is a serial litigant in the federal courts, having filed more than 1,000 pro se filings and more than 100 actions and appeals during his time in prison. His latest filing was opposed by the Georgia Department of Corrections, which argued he could not proceed under the Prison Litigation Reform Act's "three strikes" rule. Under the rule, *in forma pauperis* status is denied to prisoners that "on three or more prior occasions" have an action or appeal that was dismissed based on being "frivolous, malicious, or fail[ing] to state a claim upon which relief could be granted." The district court agreed with the Department of Corrections, holding Daker had six strikes against him.

The Eleventh Circuit disagreed in this issue of first impression for the Circuit. It noted that, of the cases that the lower court deemed fell under the rule, Daker had two dismissed for lack of jurisdiction and four dismissed for want of prosecution. The Circuit held those dismissed for lack of jurisdiction, by definition, mean the lower courts never reached the merits, meaning they could not be counted for purposes of the rule. It then held the other four were initially denied *in forma pauperis* status by a single judge

because Daker's arguments were frivolous--but, critically, the Circuit noted a single judge *cannot dismiss* such a case; the judge *denies* it and a panel of the Circuit must *then dismiss* it.

That is precisely what happened to Daker's cases, and the Circuit panel that dismissed the cases did not state its reasons in those cases as "frivolous, malicious, or failing to state a claim upon which relief could be granted." Rather, the panel had dismissed due to "want of prosecution" and that, simply put, under the statutory language is not sufficient as a strike. The Circuit thus reversed the lower court.

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