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Bail - No Equal Protection Violation where Ordinance Allows Municipal Court to Hold Indigent Arrestees for up to 48 Hours

Walker v. City of Calhoun, no. 17-13139 (11th Cir. Aug. 22, 2018).

Finding that the Constitution does not prohibit distinctions based on financial status, the Eleventh Circuit has upheld a Georgia municipal court's bail order which allows for the detention of indigent arrestees for up to 48 hours pending an inquiry into the bona fides of their financial circumstances.

In September 2015, Maurice Walker (Walker), a 54-year-old unemployed man with a mental health disability, was arrested in Calhoun, Georgia (City) for being a pedestrian under the influence of alcohol, in violation of Ga. Code Ann. § 40-6-95. That violation "is a misdemeanor and is punishable upon conviction by a fine not to exceed $500.00." The statute does not provide for any possible jail sentence.

Walker alleges that, after he was taken to jail, he was told by an officer that "he would not be released unless he paid the standard $160 cash bond." Given that his income consisted only of

$530 per month in Social Security disability payments, Walker said that neither he nor anyone in his family was able to post bond. A bond was subsequently tendered for Walker by one of his attorneys, and his criminal case was closed in October 2015.

He filed suit, alleging on behalf of himself and a class of similarly situated indigent arrestees that the City was violating the Equal Protection clause by "jailing the poor because they cannot pay a small amount of money." Shortly thereafter, Calhoun Municipal Court altered its bail policy by issuing a Standing Bail Order. It created three types of bond scenarios: arrestees would be released immediately if able to post deposit money; violators of State law who did not post bail immediately would have to wait for a bail hearing with court-appointed counsel, to take place arrest--those who could prove they were indigent at the hearing would be released on a recognizance bond-meaning no bail amount was set, either secured or unsecured. Third, all arrestees charged with violating City ordinances would be released on unsecured bond, meaning that they need deposit no collateral immediately but would be assessed the bail schedule amount if they failed subsequently to appear in court.

The district court twice enjoined the Standing Bail Order, finding that it "violates the Constitution insofar as it permits individuals who have sufficient resources to post a bond . . . to be released immediately, while individuals who do not have those resources must wait forty-eight hours for a hearing." It enjoined the City "from detaining indigent . . . arrestees who are otherwise eligible for release but are unable, because of their poverty, to pay a secured or money bail."

The Eleventh Circuit reversed. It cited *San Antonio Independent School District v. Rodriguez*, which considered a wealth-based equal protection challenge to Texas's system of apportioning school funds based principally on local tax bases. 411 U.S. 1 (1973). There, the Court concluded that instances where wealth-based distinctions were impermissible "shared two distinguishing characteristics: because of their impecunity[, the indigent] were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." Id. at 20 (emphasis added). Mere diminishment of a benefit was insufficient to make out an equal protection claim: "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." Id. at 24.

The Circuit disagreed with the City that the Eighth Amendment controlled, and found that the Equal Protection issue did not require strict scrutiny analysis:

> Under the Standing Bail Order, Walker and other indigents suffer no "absolute deprivation" of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of time to receive the same benefit as the more affluent. Indeed, after such delay, they arguably receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security. Such scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence.

Under a reduced level of scrutiny, the Standing Bail Order survived:

> Whatever limits may exist on a jurisdiction's flexibility to craft procedures for setting bail, it is clear that a judicial hearing with court-appointed counsel is well within the range of constitutionally permissible options. The district court's unjustified contrary conclusion was legal error and hence an abuse of discretion.
>
> In sum, Walker failed to make the necessary showing that he is likely to succeed on the merits of his claim that the Standing Bail order is unconstitutional. Neither the 48-hour window for a bail determination nor the use of an adversarial bail hearing in lieu of an affidavit-based process runs afoul of the Constitution.

LINK

Eighth Amendment: Ordinance Prohibiting Homeless People from Sleeping in Public Spaces--even if no Shelter is Available--is Cruel and Unusual

Martin v. City of Boise, No. 15-35845 (9th Cir. Sept. 4, 2018).

Prohibiting homeless people from sleeping in public spaces, including when no public alternative is available, violates the Eighth Amendment

This case began back on 2009 and has been through various iterations since then. The merits of the matter are that Boise, Idaho (Boise) has an ordinance prohibiting camping on public and private (without permission) property. Six individuals complained that the ordinance violated the Eighth Amendment's prohibition against cruel and unusual punishment. Notably the ordinance was amended in 2014 to prohibit enforcement against any homeless person on public property on any night when no shelter in the City had available space. The District Court (more than once over the years) granted summary judgment to Boise and the case reached the Ninth Circuit on appeal.

The issue was concisely stated by the Circuit up front: "does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter?" The Court's affirmative answer derived from the Supreme Court's 1968 *Powell* case in which a plurality held a Texas law criminalizing public drunkenness did not violate the Eighth Amendment. Four justices dissented in *Powell* - and Justice White concurred in result only - thus the Ninth Circuit found it lent credence to the idea that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." From this principle the Ninth Circuit deemed itself compelled to hold that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." The Circuit found that sleeping, lying and sitting are involuntary biologic conditions and, just as the government cannot criminalize the status of being homeless in public, it cannot criminalize these unavoidable consequences of that status.

The Court, in the sentence immediately following that holding, said its "holding is a narrow one," and highlighted that it is not dictating cities build shelters for all or allow anyone to sleep outside at any time in any place, but rather that if "there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." It reversed and remanded the case.

LINK

Employment-"Business Necessity" Justifies Termination / Refusal to Hire those Convicted of Crime of Dishonesty, Even if Disparate Impact Results

Williams v. Wells Fargo Bank, N.A., No. 16-4372 (8th Cir. Aug. 29, 2018).

A bank's determination to re-check current employees and potential hires for conviction of crimes involving dishonesty, leading to disproportionately high termination (or cessation of employment) among minorities, was necessitated by the prospects of a $1

Million per day fine.

Disparate impact under Title VII occurs when "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Under federal law no one that has been convicted of a crime of dishonesty can be employed at an FDIC-insured institution, though it is possible to get a waiver to work at such a place with a conviction on one's record, and an institution can even sponsor someone to do so (or to continue working if they are already employed). The penalty for an institution caught violating this law is $1 million per day.

Wells Fargo Bank reinvestigated every current employee and all candidates for hire starting in 2010 using a new fingerprint-based background check. As a result, it fired 136 African Americans, 56 Latinos, and 28 white employees because newly-discovered disqualifications and it also withdrew at least 1,350 conditional job offers it had made to African Americans and Latinos and 354 it had made to non-minorities. A class action followed alleging Wells Fargo's actions had a disparate impact on minorities.

The Eighth Circuit affirmed the lower court's rejection of the lawsuit, homing in on the business necessity exemption Title VII provides. The Circuit held, even if it is conceded that Wells Fargo's practice of summarily firing and not hiring such employees has a disparate impact on minority individuals - and the Court did note that minority individuals were fired and not hired at rates twice that of non-minorities - Wells Fargo *also presented* a business necessity for the action. The Court noted the Bank faced penalties of $1 million per day and that the Bank may well have considered it risky or unwise to have customers served by individuals with convictions for crimes of dishonesty. While the Court recognized the class' argument that the Bank could have provided notice and given employees an opportunity to obtain a waiver, which may have ameliorated the disparate impact, it found the class' statistical analysis insufficient to support the inference that allowing such a process would *actually* reduce the impact. The lower court's denial of the Title VII claim was affirmed.

LINK

Religion: Under *Lemon* and *Raburn*, Longstanding Cross on Public Property is Ordered Removed; *en banc* Review Urged

Kondrat'yev v. City of Pensacola, No. 17-13025 (11th Cir. Sept. 7, 2018).

Although acknowledging that the Supreme Court has indicated a weakening of the *Lemon* Establishment Clause Standards, the Eleventh Circuit has agreed with plaintiffs who argued that a massive 75-year old cross erected on public property violates the First Amendment.

After standing for nearly 75 years essentially without incident, four individuals filed suit asserting that a 34-foot tall cross in the eastern corner of Pensacola's Bayview Park violates the Establishment Clause. The district court found itself compelled under Eleventh Circuit precedent - *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) - to order the cross removed since the City's maintenance of the cross violates the Establishment Clause. The Circuit handled the appeal in an 82-page decision. The merits were brief because the cases contained nearly identical facts: a long standing (literally and figuratively) 30-plus-foot Latin crosses constructed on government property by private organizations that were both dedicated during annual Easter Sunday Services which had been held at the cross sites for many years prior to the dedication. Next, *Lemon,* the case upon which

Raburn's logic rests, still stands as Supreme Court precedent. Combining the two meant the Circuit panel was "require[d] to affirm the district court's decision." The City argued recent Supreme Court precedent undermined *Lemon* drastically and with it, *Raburn.* And while the panel agreed that recent Supreme Court caselaw indicates an undeniable weakening of *Lemon* and with it, *Raburn,* it also unanimously agreed that "our precedent about precedent is clear: "we are not at liberty to disregard binding case law that is ... closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." It thus affirmed the lower court and confirmed the cross had to be removed.

The majority of the pages were thus dedicated to two concurrences that can be summed up as agreeing *Raburn* was wrongly decided (and setting forth why in substantial detail), that it could not be squared with more recent Supreme Court precedent and urging the full Circuit to hear the case *en banc*. Stay tuned.

LINK

Searches: "Knock and Talk" Policy Requiring Officers to Surround House Violates Fourth Amendment

Morgan v. Fairfield County, No. 17-4027 (6th Cir. Sept. 6, 2018).

Although individual officers could claim qualified immunity because the applicable law was not "clearly established," an Ohio county was liable for an unconstitutional search policy under *Monell*.

Neil A. Morgan II (Morgan) and Anita L. Graf (Graf) owned a home together in Fairfield County, Ohio (County). The sheriff's department received an anonymous tip that the two were growing marijuana and cooking meth in the house, though clearly that was not sufficient to obtain a search warrant. As a result, officers conducted a "knock and talk" which, under County policy, consisted of officers surrounding a house prior to one officer knocking on the door - i.e. specifically it had officers enter the curtilage of the house at issue. In following this procedure at Graf and Morgan's house, and though Graf told the officer at the door he could *not come in and closed the door*, one of the multiple officers at the rear of the house observed marijuana plants on an elevated back balcony. Based on this observation the officer at the front entered the residence - because he feared the evidence would be destroyed - and got both Graf and Morgan out of the house, and awaited a search warrant before entering further. Officers thereafter found weapons, drugs, and drug paraphernalia, for which the couple was charged. The state court case was thrown out after a suppression motion was granted and the evidence was inadmissible as fruit of the poisonous tree. Graf and Morgan filed a 1983 suit alleging violations of their Fourth Amendment rights to be free from unreasonable searches and seizures against the officers, two county commissioners, the sheriff and the county itself. The district court granted summary judgment to all the defendants on all charges.

The Sixth Circuit reversed the district court's *Monell* ruling as to the County. Here the Circuit saw a straightforward allegation that the actual policy of the County - not an employee's interpretation thereof - was at issue and for that it applied a straightforward test: Morgan and Graf had to "(1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that [their] particular injur[ies] [were] incurred due to execution of that policy." First, the Circuit found the County's policy *required* officers to position themselves within the curtilage of the house - including the back of the house -- for every single property where they performed the "knock and talk" procedure. The sheriff acknowledged this policy did *not* give officers leeway to consider the constitutional limits they might face in carrying out the "knock and talk." The policy, having been carried out by the officers exactly as articulated, meant that it was easily connected to the County

and that Graf and Morgan's Fourth Amendment injuries derived directly therefrom.

However, the Circuit ultimately agreed that the applicable law was not clearly established based on its own precedent at the time in 2012, meaning that the individual officers had qualified immunity.

LINK

State-Created Danger: Township's Allowing Officer to Drive after Seizures Does Not Shock Conscience or Constitute Affirmative Act

Hammon v. Kennett Township, No. 17-3708 (3d Cir. Aug. 22, 2018).

Where, after suffering a seizure, a police officer had undergone repeated neurological exams and had forfeited his driver's license for a period, before being allowed to again drive a cruiser, the Township had not created a danger to an injured member of the public.

Albert McCarthy (McCarthy) served as the police chief in Kennett Township, Pennsylvania (Township) when he hit his head on a steel beam, within 24 hours of which he suffered a seizure. The Township was notified by McCarthy and he continued to work. Three years later he suffered a seizure while driving a police cruiser and rear-ended another car. After this second incident he, again, notified the Township, but also the DMV, the public, and he stopped driving and was on medical leave. He lost his driver's license temporarily and voluntarily underwent neurological exams every three months. He was ultimately cleared, went back to work, regained his license and drove police cars again. Three years after that second seizure, another occurred and, again, he crashed his police car into another vehicle - this one driven by Michael Hammon (Hammon), who was injured sued the Township (as well as McCarthy and others) under a state-created danger theory. The Third Circuit reviewed the district court's grant of the Township's motion to dismiss.

The state-created danger theory required Hammon show four elements: "(1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." The Circuit found that Hammon fell short on three out of four of these (2-4). The Court recounted the serious and appropriate steps taken by the Township - from medical leave, to neurological exam requirements, to not driving after the second seizure, and noted the DMV had even reinstated McCarthy's license. As for the third element, Hammon argued he was a foreseeable victim because he was a "discrete class of drivers whom McCarthy would encounter while driving his police vehicle" based on his status as a resident and taxpayer of the Township. The Circuit noted "[w]here the state actor creates only a threat to the general population" a person cannot be a foreseeable victim and found this argument did not elevate Hammon above the general population. Lastly, the Court rejected the idea that allowing McCarthy to return to work was an affirmative act. Rather, it categorized this as an attempt recast the Township's inaction as an affirmative act. The lower court was affirmed.

LINK

Trials: No "Clear and Convincing" Evidence to Support Property Owner's FRCP 60 Motion for Relief from Judgment

Florimonte v. Borough of Dalton, No. 18-1490 (3d Cir. Aug. 24, 2018).

A plaintiff could not obtain relief from a judgment in favor of the municipality where it did not introduce clear and convincing evidence of egregious conduct.

Carolyn Florimonte (Florimonte) owns property in Dalton, Pennsylvania (Dalton). Florimonte filed a case in state court complaining of drainage pipes that Dalton allegedly installed on her property before she purchased it and which discharged water that damaged her property. The case resulted in equitable relief only - Dalton filled and capped the pipes in 2012. Since then she filed eight more cases, all of which were deemed barred under the doctrine of *res judicata*. Last year she filed another case in federal court - the subject of this appeal - alleging Dalton had only prevailed in all the previous cases via fraud and requested the district court use its authority under FRCP 60 to relieve her of the final judgment. The court declined.

The Third Circuit also declined, agreeing with the lower court's grant of Dalton's motion to dismiss her claim. The Circuit noted FRCP 60 does enable courts to relieve a party from a judgment, but "only to prevent a grave miscarriage of justice" and when it finds "egregious conduct" and a case supported by "clear, unequivocal, and convincing evidence." Here, Florimonte argued Dalton refused to admit it had installed the pipes on her property and that it destroyed documents pertaining to the matter. But the evidence, far from being clear or convincing, was that she was told by an anonymous source that unspecified documents were being destroyed by Dalton. Moreover, as to the *res judicata* issue, the Circuit noted the documents she included with her motion to the court were available during her first state court case. The lower court was affirmed and Dalton's motion to dismiss was granted in the ninth case it faced from the same plaintiff.

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