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Evidence: Facebook Video Showing Defendant Wielding Gun Used in Crime is Admissible

United States of America v. Jackson, No. 18-1482 (8th Cir. Jan. 22, 2019).

The Eighth Circuit has affirmed a lower court's admission into evidence of a Facebook video posted by a defendant in which he acquires and shoots a firearm which he later used to commit a bank robbery-the video was not being introduced as extrinsic character evidence, but as probative of the elements of the crime itself.

Daniel Louis Jackson (Jackson) was convicted of bank robbery for his role in making away with just over $8,000 from the Citizens State Bank of Hopkinton, Iowa. He challenged a variety of issues, but of note was the admission of Facebook videos showing Jackson and his accomplice acquiring a firearm and ammunition, shooting the gun toward houses in a neighborhood, and shooting it at an abandoned industrial site. He contended the district court erred in admitting the evidence as an exception to FRE 404. The Eighth Circuit affirmed the lower court.

Under FRE 404 evidence of a crime, wrong, or other act is not admissible to prove a person's

character or that a person acted in accordance with his/her character. But "evidence of other crimes [that] is so blended or connected . . . or tends logically to prove any element of the crime charged, [] *is admissible as an integral part of the immediate context of the crime charged* . . . . [I]t is *not extrinsic* and therefore *not governed by Rule 404(b)*." Here the prosecutor argued the Facebook videos were so probative that they tended to logically prove elements of the crime charged (robbery). The Circuit affirmed the lower court's concurrence with this argument based on a few key facts about the videos: 1) they showed Jackson acquiring the firearm and ammunition actually used in the robbery just days before they were used in the robbery, 2) they showed Jackson's knowledge of his partner's use and familiarity with the weapon just days before the robbery, and 3) in conjunction with messages, the videos showed the firearm connected specifically to the plan to commit the robbery for which Jackson was charged. As a result, the Circuit agreed these videos were not governed by FRE 404 because they were not character evidence, but rather tended to prove the elements of the robbery charge and were properly admitted.

LINK

Immunity: Suit for Wrongful Arrest Requires Determination of whether Clerk of Court is Employee of State or Municipality

Ramona Evans v. City of Helena-West Helena, No. 17-2005 (8th Cir. Jan. 14, 2018).

Where a city resident was wrongfully arrested due to incorrect records about her payment of prior fines, her action could only proceed if the clerk of court responsible for such inaccuracies was a municipal employee; neither the state nor its employee could be sued.

Ramona Evans (Evans) is a resident of the City of Helena-West Helena, Arkansas (City). She was stopped by an officer for a traffic infraction, during which it was determined she had outstanding fines due, at which point she was arrested, her car was towed, and she was held at the police station until it was discovered that she had paid the fines for which she was arrested. She filed suit against the City alleging a deprivation of her constitutional rights under §1983, specifically that the court clerk's failure to document payments had become "a practice, custom and habit" and the City's "unconstitutional policies" caused a deprivation of her liberty and property. The district court dismissed the case because the "Clerk and the District Court are state-government officials who are neither employed by Defendant, nor amenable to suit."

The Eighth Circuit reversed. While the Circuit conceded the clerk and the Phillips County District Court may well not be "amendable to suit," it highlighted for the lower court the fact that the *defendant was the "City of Helena-West Helena*" and that the municipality does not enjoy immunity from suit. The nuanced mistake, as the Circuit saw it, was that while a municipality *cannot* be liable *without* an unconstitutional act by a municipal employee, there is *no requirement* that a plaintiff establish that the municipal employee who acted unconstitutionally *be personally liable*.

The City defended the lower court's dismissal under its second rationale: that the clerk is a state government official whose actions are not attributable to the City. For this, the Circuit found there was a more complicated answer, specifically that on whose behalf a court clerk acts (the city, state, or county) depends on both state law and the definition of his/her functions. Because the lower court resolved the case on a motion to dismiss, the "record ha[d] not been developed with respect to the clerk's duties and responsibilities, the source of the clerk's pay, or the degree of control that state or local officials, respectively, exercised over the clerk," and as a result the

Circuit found there was at least a plausible claim that the clerk was a city official at the time relevant to the case. It reversed and remanded the case.

LINK

RLUIPA: Requiring Church to Obtain CUP to Operate in Residential Area Violates RLUIPA; City Cannot Exclude Use as of Right

The Church of Our Lady and Savior Jesus Christ, v. City of Markham, No. 18-1432 (7th Cir. Jan. 17, 2019).

Disagreeing with the lower court, which held that so long as a Church could apply for a Conditional Use Permit, the locality's zoning scheme was acceptable, the Seventh Circuit has found that the absence of any area where the Church could operate as of right constituted a RLUIPA violation.

As such cases often do, there is a long administrative record recounting the history between the City of Markham, Illinois (City) and the Church of Our Lady and Savior Jesus Christ (Church). Suffice it to say the conflict culminated with the Church seeking a CUP to operate in a residential district and the City Council denying the application. The Church brought three RLUIPA claims thereafter: an "equal terms" claim, an "unreasonable limitations" claim, and a "substantial burden" claim. The district court saw the case as hinging on whether the Church could continue operating and required the Church file to applications and variances and held, if the City granted them and enabled the Church to continue operating, then "it didn't make any difference" whether the religious use was a permitted or conditional one. In reviewing the summary judgment granted to the City, the Seventh Circuit firmly disagreed, framing the case as squarely hinging on whether religious use is a permitted or conditional use on the specific property because, even if the Church was granted "a conditional use permit, [that] *does not moot* the Church's claim that it does not need one and is entitled to be treated as a permitted use as of right."

After reframing the case, the Circuit tackled the district court's holding that the case was not ripe and overturned it. The lower court had found that, having failed to apply to the City for the variances available to it, the Church "sought to bypass the administrative process and, in essence, asked for a court-ordered variance." To show the problem with the lower court's perspective the Circuit pointed out that a variance would not redress Church's core claim, namely that the City's *zoning classifications* as a whole, not variances, were the problem. For example, a variance would not redress the Church's RLUIPA equal terms claim because the essence of that claim is that churches are treated inequitably under the City's zoning code because there is *no district where a church is permitted by right.* Similarly, the RLUIPA "unreasonable limitations" claim would also not be redressed under the lower court's logic because the essence of that claim is that treating churches as a conditional use everywhere in the entire City means the City's land use regulation unreasonably limits religious assemblies in the City.

A relatively brief portion of the Seventh Circuit opinion is also noteworthy: it reversed the district court's holding that the Church's damages were "speculative." The Church filed an affidavit of its pastor saying the City's affirmative state-level lawsuit to enjoin its operations and the protracted litigation generally "distracted the church's leadership from its religious objectives and placed stress on the congregation." While the Circuit recognized that these are not "easily quantifiable," it said they are compensable damages and that the lower court erred in dismissing them "out of hand." It held the damages should have survived summary judgment. The case was reversed and remanded for further litigation.

LINK

Signs: Severability Clause Allows Excising of Constitutionally-Suspect Variance Provisions, Avoiding Prior Restraint Damages

International Outdoor, Inc. v. City of Troy, No. 17-10335 (E.D. Mich. Jan. 18, 2019).

Confirming the importance of otherwise boilerplate severance clauses in ordinances, a Michigan court has denied a claim for damages to a billboard company that had validly alleged improper prior restraint in a city variance process; the severance clause allowed excision of the improper variance provision, meaning the ordinance's size limit provisions still applied to foreclose plaintiffs' signs.

International Outdoor. Inc. (Outdoor), a billboard advertising company, challenged a sign ordinance (Ordinance) enacted by the City of Troy, Michigan (City). Section 85.01.04(A) of the Ordinance requires a permit for each sign, unless it meets one of several enumerated exceptions. Billboards are considered "ground signs," defined as "[a] freestanding sign supported by one or more uprights, braces, or pylons located in or upon the ground and not attached to any building." § 85.01.03. Ground signs are subject to specific zoning district regulations outlined in section 85.02.05(C), which limit a sign's size, height, and location.

Pursuant to section 85.01.08(B)(1), the City's Building Code Board of Appeals (CBA) may grant a variance to signs that do not comply with the requirements of the Ordinance, upon a showing of each of the following:

1. The variance would not be contrary to the public interest or general purpose and intent of this Chapter; and
2. The variance does not adversely affect properties in the immediate vicinity of the proposed sign; and
3. The petitioner has a hardship or practical difficulty resulting from the unusual characteristics of the property that precludes reasonable use of the property. § 85.01.08(B).

Outdoor sought to erect two digital billboards which exceeded the Ordinance's size and height limitations, and sought a variance. The CBA denied Outdoor's request because "[t]he applicant has not proved the variance would not be contrary to the public interest or general purpose and intent of Chapter 85"; "[t]he applicant has not proved the variance does not adversely affect properties in the immediate vicinity"; and "[t]he applicant has not proved a hardship or practical difficulty."

Outdoor challenged the constitutionality of the Ordinance, alleging that the subjective and imprecise variance process created an unconstitutional prior restraint on speech.

The City argued that the issue was moot after it amended the Ordinance's variance provision effective October 1, 2018, to provide additional structure and clarity. While Outdoor conceded that the amendments rendered its claims for declaratory and injunctive relief moot, it argued its claim for monetary relief arising from the prior Ordinance and variance process was not moot.

Outdoor was correct. Although claims become moot "when the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome," the Sixth Circuit has held that a change in the law renders moot claims for declaratory and injunctive relief, but not claims for monetary damages. Therefore, Outdoor's damages claim preserved its "backward-looking right to challenge the original law and to preserve a live case or controversy over that dispute."

The court thus reviewed First Amendment prior restraint standards: The Supreme Court has specifically recognized "two evils" that it will not tolerate in this context: "First, a scheme that places 'unbridled discretion in the hands of a government official or agency;" laws effecting the restraint of a license' must contain "narrow, objective, and definite standards to guide the licensing authority.'" "Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible."

Under these parameters, the prior Ordinance imposed an impermissible prior restraint, requiring either a permit or a variance. The court agreed that the standards for granting a variance contained criteria - such as "public interest," "adverse[] affect," "hardship," and "practical difficulty" - that were vague and undefined, and left too much discretion in the hands of the CBA.

This was not the end of the issue, however. The City pointed out that the variance provision was severable from the rest of the Ordinance and, under the valid provisions of the Ordinance, Outdoor's signs would not be permitted because they exceed the allowable dimensions.

Severability of an ordinance is a matter of state law, and the Michigan Supreme Court "has long recognized that '[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand.'"

While the court had previously agreed with Outdoor that the variance provision was not severable, the City brought to the court's attention the official version of the Ordinance, which was not completely reproduced on its website, and which contains the following severability clause: "Should any word, phrase, sentence, paragraph or section of this Ordinance be held invalid or unconstitutional, the remaining provision of this ordinance shall remain in full force and effect." That clause clearly evidenced that the City intended that any unconstitutional provision should not be fatal to the entire Ordinance. Accordingly, the constitutionally-suspect variance provision could be excised, leaving Outdoor to confront the still-valid size restrictions-which eliminated its claim for monetary damages.

LINK

Signs: Failure to Exhaust Administrative Remedies Dooms Request for Declaratory Judgment Regarding Sign Permit Moratorium

Crossroads Outdoor, LLC v. City of Troy, No. 18-CV-12050 (E.D. Mich. Jan. 22, 2019).

Where it was still possible that a City Board of Appeals might grant the applicant a variance for three pending sign permits which had been stalled due to a moratorium-despite the City Attorney's opinion that suspension of the permits was valid-the failure to pursue the appeals process meant that litigation in federal court was premature.

From February, 2017 through October, 2017, Crossroads Outdoor LLC and Troy Outdoor LLC (collectively, Crossroads) obtained permits to erect eight 200 square foot electronic message center billboards in various locations in the City of Troy (City). By November, 2017, five of the signs had been constructed and Crossroads had invested in the three additional signs by expending money on consultants and contractors, and otherwise beginning work. The City received complaints about the first five signs and thus, enacted a 180-day moratorium on all new signs on November 20, 2017. The next day, the City notified Crossroads that it was suspending the three permits for the remaining signs, based on the moratorium. Plaintiffs did not appeal to the City Board of Appeals (CBA).

Shortly thereafter, in December 2017, the City modified the moratorium to apply only to new electronic messages and ground signs exceeding certain height and area restrictions. The moratorium continued until September 24, 2018, when the City Council approved amendments to its Sign Ordinance (Ordinance) which became effective on October 4, 2018. Under the new Ordinance, Crossroads' signs would no longer pass muster as all are 200 square feet, whereas the Ordinance limited ground signs to a maximum of 100 square feet.

Crossroads filed a three-count complaint under § 1983 and state law. Count I alleged the moratorium was an unconstitutional prior restraint in violation of the First and Fourteenth Amendments, and sought declaratory, injunctive, and monetary relief. Count II alleged a violation of Crossroads' substantive and due process rights under the Fifth Amendment and also sought declaratory, injunctive, and monetary relief. Count III sought a declaration that the December 2017 moratorium and extension on May 22, 2018, related to new signs and did not apply to the three permits at issue, which were granted before that date and thus, were valid and complete at the time of issuance.

In this specific case, Crossroad sought partial summary judgment on Count III, seeking a declaration that the moratorium did not apply to their three permits. The City opposed the motion for three reasons: (1) the court lacked subject matter jurisdiction over the supplemental state law claim; (2) the court should dismiss Count III for Plaintiffs' failure to exhaust administrative remedies, or (3) should the court reach the issue on the merits, the court should rule that the permits were properly suspended in accordance with the moratorium.

The court disagreed with the City as to the jurisdictional question, concluding that it had subject matter jurisdiction over Plaintiffs' supplemental state law claim because it arose "from the same set of facts as claims over which the court has original federal-question jurisdiction." So long as Crossroads' federal claims were pending, the federal court retained jurisdiction over the pendant state law claim arising from the common nucleus of operative fact.

However, Crossroads stumbled on the next issue, which required that they exhaust their administrative remedies. Under Michigan law, "[i]t is well established that where an administrative grievance procedure is provided, exhaustion of that remedy, except where excused, is necessary before review by the courts."

Here, Crossroads was seeking declaratory relief in the form of a legal conclusion that the moratorium did not apply to their last three signs-but they had not availed themselves of an appeal to the City Board of Appeals (CBA), which could determine that the moratorium did not apply to Crossroads' three permits or grant a variance based on the unfairness of suspending the permits on which Crossroads may have reasonably relied. Crossroads argued unsuccessfully that it fell within at least one of three narrow exceptions to the exhaustion requirement: (1) the relief requested is purely declaratory and the facts are undisputed, (2) seeking an administrative remedy would be futile, and (3) the issue is a legal question.

As the court put it, "None of these exceptions apply." The facts were not undisputed, starting with the possibility that the CBA might rule in Crossroads' favor on appeal-therefore the issue was not solely a legal question. And seeking an administrative remedy would not be futile-although Crossroads stated that the City Attorney's opinion that the moratorium allowed suspension of the permits would foreclose further consideration by the CBA, the City had represented at oral argument that the CBA was not so foreclosed.

LINK

Telecommunications: No Private Right of Action under Section 253 of

Telecommunications Act for Failure to Grant Franchise

CNSP, Inc. v. City of Santa Fe, No. 18-2041 (10th Cir. Jan. 14, 2019).

Rebuffing an applicant who was denied a franchise, the Tenth Circuit has sided with other Circuits that have declined to find that a private right of action was intended by the drafters of Section 253 of the Telecommunications Act of 1996.

In January 2015, CNSP, Inc. (d/b/a/ NMSURF) applied for a telecommunications franchise with the City of Santa Fe (City) to construct intrastate wireline infrastructure in the public right-of-way. When the application was not promptly granted, NMSURF sued the City, alleging it delayed and prohibited the application, harming their business. NMSURF further alleged that while its application was pending, the City granted other telecommunications companies access to the public right of way and did not require them to pay the customary 2% internet access fees. The City moved to dismiss, claiming NMSURF failed to plead a claim because 47 U.S.C. § 253 does not provide a private right of action. The district court granted the City's motion. While the appeal was pending, the City passed an ordinance granting NMSURF a telecommunications franchise.

On appeal, the Tenth Circuit affirmed in part and reversed in part, remanding for further proceedings. It began by citing the relevant statutory language: Section 253, entitled "Removal of barriers to entry," is part of the Telecommunications Act of 1996 and preempts local laws that "have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Despite that prohibition, local governments retain the authority "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." Id. § 253(c).

The singular but significant hurdle for NMSURF was that the Tenth Circuit had previously held - using the Supreme Court's 2002 *Gonzaga* framework - that "nothing in the text or structure of §253 indicates a [ ] [congressional] intention to create a private right." NMSURF first argued that the correct test for determining whether a private right of action existed in §253 was not *Gonzaga,* but instead was the Supreme Court's *Cort* case, which the Sixth Circuit recently used to find that §253 *does provide* a private right of action. The panel countered first by saying it could not agree with this argument even if it wanted to since it was bound by the Circuit precedent, and, second, by pointing out that the Supreme Court used *Gonzaga itself after the Sixth Circuit* in its own telecommunications case when it addressed whether Congress intended to create a private right of action to enforce limitations on a local government's regulation of antenna towers. Lastly, it noted that after the Supreme Court decided that case (*City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005)), the Eighth and Second Circuits have both determined that §253 does *not* create a private right of action. It affirmed the lower court on this issue, maintain the status quo of three circuits finding there is no private of action derived from §253 and one circuit holding there is.

LINK

Trials: Organization Seeking to Challenge Home-Sharing Ordinance Must Show that its Members Would have Standing on their own Behalf

Keep Chicago Livable v. City of Chicago, Nos. 17-1656 & -2846 (7th Cir. Jan. 14, 2019).

A group challenging Chicago's Shared Housing Ordinance did not have standing to bring its action for injunction where it could not establish that its members could demonstrate injury and have standing in their own right.

Chicago passed a Shared Housing Ordinance in 2016 (Ordinance) to regulate home-sharing activities, including services offered by companies like Airbnb. The organization "Keep Chicago Livable"cand six individuals challenged the constitutionality of the Ordinance, seeking a preliminary injunction. The district court denied the request for the injunction on the primary basis that the Ordinance regulates conduct-in particular, economic activity-not speech. The Seventh Circuit vacated and remanded the case.

The sticking point for the Circuit Court was standing, particularly the element of establishing an injury in fact. Critically, the Circuit found that none of the six individuals had standing at the time of the appeal: one of the plaintiffs had since sold the property he had offered for rent on Airbnb and moved from the City; another plaintiff's affidavit complained of how she was "harassed" by the building's property manager--but not the City--for her short-term rental activity; two others were Chicago residents who no longer participated in Airbnb activities; and two were individuals who live outside of Chicago and had not returned there since the Ordinance went into effect, but the affidavits did not affirmatively link the lack of visiting to the Ordinance specifically. The Circuit characterized these situations as failing to "add[] up to the clear, requisite showing of an ongoing, concrete, and particularized injury caused by the Ordinance and capable of being redressed by a favorable ruling in these appeals."

The organizational standing was slightly more complex. To sue in a representative capacity, Keep Chicago Livable had to show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in their lawsuit." The Circuit assumed that for the purpose of the appeal (though it noted the pleadings did not prove it), that Keep Chicago Livable filed on behalf of its members. From there the court found an insurmountable hurdle with the first element because, as described previously, Keep Chicago Livable did not identify a single member-plaintiff with standing. The lower court decision was vacated and remanded, with the notable comment that "it may be on remand, perhaps following additional briefing or upon the filing of a second amended complaint, that at least one individual plaintiff is able to establish standing and thereby jumpstart this litigation, as the plaintiffs so plainly wish to do."

LINK

Trials: Under *Heck*, Plaintiff Pleading Nolo Cannot Bring Section 1983 Malicious Prosecution Claim Arising from Same Facts

Hoffman v. Beseler, No. 17-15580 (11th Cir. Jan. 14, 2019).

Where a woman entered a nolo plea to a misdemeanor fraud charge, that plea constituted a conviction under Florida law-meaning that she could not thereafter bring a §1983 civil claim against the locality for malicious prosecution and failure to train which arose out of the same facts underlying her misdemeanor prosecution.

In 2012 the Clay County, Florida Sheriff's Office (Sheriff's Office) received a report that Emily Hoffman (Hoffman) had embezzled money from a local business, Air Technology. The financial crimes unit took over the case and Hoffman's bank account was frozen. Hoffman was then arrested for various fraud and theft charges and, later, a warrant for her arrest was issued for witness tampering. Ultimately, in 2015, Hoffman pleaded no contest to a misdemeanor steaming

from these facts. In 2016 Hoffman filed a §1983 case (including various counts), which was met with multiple motions to dismiss from a slew of defendants from the Sheriff's Office, all of which the district court eventually granted. An appeal followed.

The first challenge to some of the dismissals attacked the lower court's holding that the statute of limitations had run, barring some of Hoffman's claims. In §1983 cases the statute of limitations is governed by the underlying state's limitations period for personal injury actions and begins to run when the facts support a showing that the prospective plaintiff should have been aware of a cause of action. In Florida that time period is four years. Reviewing the Complaint, the Circuit pointed out that Hoffman's bank accounts were frozen on February 17, 2012 and that that date constituted notice to Hoffman of her alleged injury. Since Hoffman's case was not filed until May 2, 2016, the Court affirmed the lower court's statute of limitations holding.

Next the Circuit tackled the dismissal of the malicious prosecution, failure-to-train and false arrest claims against various defendants. The Circuit affirmed the lower court's dismissal of all of these under *Heck v. Humphrey* (512 U.S. 477, 1994). *Heck* prohibits §1983 claims by plaintiffs *convicted* of a criminal offense that arises from the same acts that underlie the civil §1983 suit. To allow such suits - so the theory goes - would undermine the finality of criminal convictions because allowing the civil suit *necessarily implies* the invalidity of the underlying criminal conviction. To bring such a case a plaintiff, Hoffman included, would need to first "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Under Florida law, Hoffman's nolo plea constituted a conviction, which stood at the time of her civil case and the appeal and, as a result, the lower court properly prohibited her §1983 suit.

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