International Municipal Lawyers Association



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Courts: No Attorney's Fees Awarded in § 1983 Case Resolved through Informal Issuance of Court Directives

Aaron-Brush v. Att'y Gen. of Alabama, No, 16-10028 (11th Cir. Jan. 30, 2017).

Court directive outlining a list of suggestions for defendants' voluntary compliance does not indicate a change in legal relationship between plaintiff and defendant for purposes of assessing attorney's fees under *Buckhannon*.

April and Ginger Aaron-Brush, a same-sex couple, married in Massachusetts and moved to Alabama. When Alabama refused to recognize their legal marriage, they sued the Alabama Attorney General, Commissioner of Revenue, and Director of the Department of Public Safety

under 42 U.S.C. § 1983. The United States Supreme Court's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) settled the merits of the case, with Alabama agreeing to provide Aaron-Brushes new driver's licenses from the Department of Public Safety and to file their taxes jointly, but the couple appealed the district court's denial of their motion for attorney's fees.

While normally parties pay their own attorney's fees, Congress authorized attorney's fees to prevailing parties in § 1983 cases (under 42 U.S.C. 1988(b)). The Supreme Court's *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) sets out the test for when a party prevails for these purposes, specifically holding that it occurs when "an action of the district court involves a court-ordered change in the legal relationship between the plaintiff and the defendant," such as a judgment on the merits of her claim, a consent decree, or a settlement agreement that the district court either incorporates into its final order of dismissal or explicitly retains jurisdiction to enforce." On the other hand, a defendant's voluntary change in conduct lacks the necessary judicial *imprimatur* to win fees. The Aaron-Brushes argued the district court's directives - that the defendants submit a letter confirming that the couple could file taxes jointly, coordinate a trip to the Department of Public Safety for new driver's licenses, and file a notice with the court stating the defendants' intent to comply with *Obergefell* - fit the *Buckhannon* bill and therefore they should have been awarded fees.

The Eleventh Circuit disagreed, holding the directives were too "informal" in that the parties jointly notified the lower court that *Obergefell* resolved the case and outlined what steps should be taken in accordance with that decision. It was nothing more than the court supplying "the parties with suggestions for facilitating the defendants' voluntary compliance" and thus no attorney's fees were warranted.

LINK

Police: "Failure to Identify" Cannot Constitute a Violation of Law in the Absence of an Ongoing, Valid Arrest

Davidson v. City of Stafford, no. 16-20217 (5th Cir. Feb. 7, 2017).

Officers who arrested a protestor for "failing to identify" were not entitled to qualified immunity because they lacked probable cause to determine whether the protester had violated a Texas law prohibiting the obstruction of public areas; in the absence of such an underlying arrestable offense, an arrest for failure to identify could not lie.

In March 2013 Jonathan Davidson arrived at a Planned Parenthood clinic (Clinic) in Stafford, Texas (City) to protest and express his pro-life views. He stood near U.S. Route 59 in a green space between a parking lot and a commercial strip which included the Clinic, holding a sign that said "Pray to End Abortion," and waving at cars both on U.S. 59 and in the parking lot. If a car stopped, Davidson would speak to the passengers and offer them a card with a phone number to a service that offers free pregnancy tests and ultrasounds.

The Clinic ultimately called the Stafford Police Department (SPD) to report a man who was walking about in their parking lot, trespassing and interfering with Clinic clientele. Police arrived and began questioning Davidson. He did not produce an ID when asked, whereupon the officers arrested him, stating "when we're conducting an investigation, fail to give your name to the police, you go to jail."

Davidson was charged with failure to identify under Texas Penal Code § 38.02 and soon released. He later filed suit under § 1983 for violations of his First Fourth Amendment rights and challenged Texas Penal Code § 38.02 and § 42.04, which prohibits obstruction of a highway or

passage. He named the officers and the City as defendants.

The defendants' motions for summary judgment were granted on all claims. The district court granted the officers qualified immunity and found no policy by the City that caused Davidson's alleged constitutional violation.

On appeal, the Fifth Circuit reversed as to two of the officers. While the district court had found that they "at least arguably had probable cause" because they reasonably believed Davidson had obstructed passage into the parking lot, the relevant statutory language requires that perpetrator have acted "willfully" and provides other indicia which could not have been inferred by the officers. Given that "failure to identify" only becomes a cognizable offense incident to an otherwise justified arrest, the "failure to identify" statute clearly was not triggered.

Nor was arrest justified based on allegations that Davidson was "walking around" near the Clinic. Short of actually standing in the way of Clinic visitors and obstructing them, Davidson was not in breach of the relevant Texas statute. The Fifth Circuit found that "no reasonable officer would conclude that probable cause existed to arrest Davidson."

The Circuit upheld the denial of liability by the City. Although Davidson pointed to several instances where SPD officers had incorrectly made arrests based on § 38.02, the sporadic instances did not rise to the level of policy or practice.

Finally the Circuit agreed with Davidson that the district court had failed to consider adequately his First Amendment claim. Citing *McCullen v. Coakley*, it directed that, on remand, the lower court fashion a declaration which would clarify the metes and bounds of Davidson's permitted protest at the Clinic.

LINK

Police: No Probable Cause Based Solely on Matching Gender, Race and Name of Suspect without Other Independent Verification

Smith v. Munday, no. 15-1092 (4th Cir. Feb. 3, 2017).

The Fourth Circuit has reversed a district court holding that police had probable cause to arrest a black woman for allegedly selling crack cocaine based only on the fact that her gender, race and name matched the description of the suspect. The grant of qualified immunity to an officer was also reversed.

In March 2009, Lincolnton, North Carolina police officers Munday and McGinley conducted an undercover drug investigation using a confidential informant who was wired with audio and video recorders. The informant purchased cocaine from a "skinny" black female he identified as "April Smith", but the recording equipment failed to function properly. Munday subsequently scanned police databases for Lincoln County and came across an "April Smith," who had been convicted of selling crack cocaine in 1993, 1997, and 2005-as well as at least two other "April Smiths" with criminal records.

Nine months after the sale Munday applied for and received an arrest warrant for Smith on charges of possession with intent to sell crack cocaine and selling or distributing cocaine. He and other officers then arrested Smith at her home, more than 11 miles from the scene of the sale. She was held for some 80 days until the Lincoln County District Attorney's Office dismissed charges, during which time she allegedly lost her job.

Smith brought a §1983 claim alleging violations of the Fourth and Fourteenth Amendments, and state-law claims for intentional or negligent infliction of emotional distress, negligence, negligent supervision, gross negligence, assault, battery, false imprisonment, and false arrest.

The district court found no constitutional violation, reasoning that the officers were looking for a black woman named April Smith who sold drugs, and they found such a person. The one factor counseling against probable cause was Smith's weight--the seller was a "skinny" woman, while Smith was 160 pounds upon arrest, and alleged that she weighed more than 200 pounds in March 2009, when the sale occurred. The district court reasoned that 160 pounds was not so different from "skinny," especially with an intervening nine months, so as to discredit a finding of probable cause.

The Fourth Circuit reversed. While there were precedents where probable cause had been upheld for an incorrect common name, those instances involved additional efforts to confirm the identity of the arrestee. Here, the officers had done virtually nothing to ascertain whether Smith had been at the drug sale. This was far below the effort required: "An investigating officer need not 'exhaust[ ] every potential avenue of investigation.' (citation omitted). But an investigating officer must still conduct some sort of investigation and assemble individualized facts that link the suspect to the crime."

While the magistrate's issuance of a warrant is normally accorded great deference, here the basis for such issuance was completely inadequate. This flaw undermined officer Munday's qualified immunity claim: Although the issuance of a warrant by a neutral magistrate is normally "the clearest indication that the officers acted in an objectively reasonable manner," qualified immunity does not apply "where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

DISSENT: Judge Agee dissented, finding that the facts sufficiently resembled other cases involving mistaken "same name" arrests which were deemed reasonable and which sustained qualified immunity.

LINK

Prisons: No Immunity for Failing to Inform Prisoner of Hepatitis Diagnosis While Prescribing Ibuprofen Which Could Damage Liver

Jones v. Neven, No. 12-16571 (9th Cir. Feb. 1, 2017).

Deliberate indifference to medical needs found where prison failed to inform prisoner of positive hepatitis C test; however, no deliberate indifference found where prisoner made allegations of environmental tobacco smoke exposure and mattress deprivation.

Christopher A. Jones, a prisoner in Nevada, challenged his confinement as a violation of his Eighth Amendment rights, specifically saying the defendants (1) failed to inform him that he tested positive for hepatitis C; (2) exposed him to unsafe levels of environmental tobacco smoke; and (3) forced him to sleep on the floor in a constantly illuminated and noisy solitary cell. The district court granted summary judgment in favor of the defendants, prompting his appeal and a reversal, in part, by the Ninth Circuit.

Starting from the basic premise that Jones had to show that the defendants were deliberately indifferent to his medical needs, the Ninth Circuit first tackled his Hepatitis C diagnosis. The Court found Jones was diagnosed in 2004, that it was determined his liver enzyme levels were

elevated at that time, but that he was never informed of the diagnosis. Furthermore, the Court noted he was prescribed 800mg of Ibuprofen three times a day, risking serious damage to his liver, during the same period. It thus found a reasonable jury could well find the defendants' disregarded Jones' Hepatitis C and that the contraindicated Ibuprofen was an unnecessary and wanton infliction of pain. Moreover, it found the official-defendants were not entitled to qualified immunity, thus reversing the lower court.

As for being exposed to environmental tobacco smoke, the Court noted Jones' allegation that his cellmate was a "heavy smoker" lacked the specificity the Supreme Court had the advantage of evaluating in *Helling v. McKinney*, 509 U.S. 25, 35 (1993) - "a five-pack-a-day smoker" - and therefore the lower court properly granted summary judgment on this issue.

Finally, it found the defendants were entitled to qualified immunity for the final allegation because "there is no clear legal guidance on whether mattress deprivation [requiring sleeping on a concrete floor] was an Eighth Amendment violation," meaning the defendants were not on notice that depriving Jones of a mattress was unlawful.

LINK

Search and Seizure: Detention Ended after Officer Delivered Speeding Ticket and Said "Have a Safe Day;" Driver's Conversation Thereafter was Consensual

Tibbetts v. State of Wyoming, 2017 WY 9 (Wyo. Feb. 1, 2017).

The detention created when a police officer pulls over a driver concludes after the officer issues a citation (or not) and indicates that the driver is free to go. If the driver then agrees to continued conversation with the officer, that interaction is deemed to be voluntary and outside the scope of the original stop.

On May 3, 2013 a state trooper stopped Michael Scott Tibbetts (Tibbetts) for speeding outside Gillette, Wyoming. The trooper obtained Tibbetts' driver's license and proof of insurance, wrote the speeding citation, handed it to Tibbetts and told him to "drive safe and have a safe day." As the trooper was walking away from Tibbetts' truck, and while the lights on the police cruiser were still flashing, he turned around and asked Tibbetts if he would mind answering a few questions. Tibbetts said he had no issues with answering further questions.

The trooper made a variety of inquiries, including Tibbetts' travel plans and whether he had anything he should not have in the car. Tibbetts handed over prescription pills for which he did not have a prescription and, ultimately, methamphetamine. Tibbetts filed a motion to suppress arguing his statements and the methamphetamine were the product of an unlawful detention that exceeded the scope of the trooper's original justification for the traffic stop. The district court concluded a reasonable person in Tibbett's situation would have felt free to leave after the trooper bade him farewell and turned to go, meaning Tibbetts consented to answering further questions voluntarily. Tibbetts appealed.

The Wyoming Supreme Court noted Tibbetts did not contest the trooper's initial reasonable suspicion for speeding, but rather that the trooper unlawfully extended the detention without reasonable suspicion of criminal activity after the speeding investigation was complete. The Court disagreed with this contention, finding instead that the investigative detention *ended* when the trooper wished Tibbetts a good day and told him to drive safely. At that point a *new, consensual* interaction began because Tibbetts was free to leave, but *agreed to speak further* with the trooper at his request; he was under no obligation to do so according to the Court.

Tibbetts focused on the fact that the trooper's overhead lights were still on and that the officer did not let him begin to leave, e.g. begin to drive away. These arguments fell on deaf ears as the Court noted no authority was cited for these arguments and pointed out that the trooper clearly indicated he could leave: he bid him a good day, turned away and began walking toward his cruiser. The overhead lights are but one factor in the totality of the circumstances analysis and in this case they were not "coercive." The Court affirmed the lower court.

LINK

Search and Seizure: Warrantless Drug Search of Juvenile Detention Center Officer is Valid under the Fourth Amendment

Washington v. Unified Government of Wyandotte County, No. 15-3181 (10th Cir. Feb. 6, 2017).

An officer in a juvenile detention center does not have a Fourth Amendment challenge to the center's policy of requiring urine samples for warrantless drug testing, even in the absence of any suspicion of drug use.

Roberick Washington served as a Wyandotte County (County) Juvenile Detention Center lieutenant, having started in 1995 and working his way up to the post by 2002. He failed a random drug test in 2012, precipitating his firing. Washington filed suit alleging the drug test was an illegal search that violated his Fourth Amendment rights. The district court granted summary judgment to the County, and Washington appealed.

The issue was whether the County's use of suspicionless drug testing was warranted - e.g. whether its classification of Washington's job as a "sensitive safety position" met the test for an exemption from the warrant requirement. The Tenth Circuit thus evaluated whether the County showed a legitimate special need, looking at "(1) whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public; and (2) whether the testing scheme would effectively detect and deter drug use."

The Circuit sided with the lower court, noting first that as a lieutenant in the Juvenile Detention Center, Washington was entrusted with ensuring the safety of juveniles under the County's full-time care, including many youths that had struggled with drug and alcohol addiction already. The Court found Washington's privacy interests were overwhelmed by this legitimate need under the balancing portion of the test, noting that as a corrections officer he already had a diminished privacy interest and that urine tests are minimally invasive.

The Court easily determined that the primacy of the County's interests. The Supreme Court has held that drug use by those with *in loco parentis* obligations present a special risk, warranting searches. Secondly, because Washington worked in a correctional facility, he had law enforcement duties including being called on to secure the facility, meaning his potential for drug use presented unique and higher safety risks. Washington's answer that his job focused on administrative duties and thus should not fall under the County's suspicionless testing policy was to no avail, because he had admitted he was sometimes called to help with juveniles, despite the mostly administrative nature of his work. The Tenth Circuit affirmed.

LINK

Speech: Adult Bookstore Ordinance which Focuses on Secondary-Effects-Not Content--and Allows for Alternative Locations Conforms to First Amendment

Cricket Store 17, LLC v. City of Columbia, No.16-1065 (4th Cir. Jan. 25, 2017).

Affirming the district court, the Fourth Circuit has upheld a Columbia, South Carolina ordinance which required an adult bookstore to relocate, finding that the extensive legislative record documenting the deleterious secondary effects of such businesses overcame an argument that the ordinance was content-based.

"Taboo," a store in Columbia, South Carolina (Columbia) sells adult merchandise. Shortly after it opened, Columbia enacted an ordinance comprehensively regulating the locations of such businesses. In doing so Taboo could no longer operate from its location. After utilizing a two-year window in which non-conforming businesses were to relocate, Taboo then challenged the regulation as a content-based restriction in violation of the First Amendment. The lower court upheld the regulation, finding it to be a content-neutral regulation which was focused on secondary effects. It also found that the Columbia ordinance allowed for ample alternative locations where Taboo could operate. Taboo appealed and the Fourth Circuit affirmed.

The Circuit Court began by reviewing the information provided to the Columbia legislature regarding secondary effects - which was over 2200 pages and included 47 judicial decisions - and what those effects were. The Court also highlighted that the purpose of the regulation was specific to limiting those secondary effects and protecting sensitive land uses from them. Taboo argued that the timing of Columbia's enactment of the ordinance - immediately after Taboo opened - and a councilmember's comment about the store showed that the regulation was aimed at its business and thus content-based. The Court rejected the argument, noting the "mere fact that an adult business has prompted a regulation . . . does not mean that the regulation is targeted at the eradication of any erotic message the business may convey." The evidence provided by the legislature and the public record were the focus of that determination.

The Court also addressed Taboo's argument posed by its expert that the studies relied on by the city should have led to a different regulation or policy. The Court agreed that the City *could have* reached a different conclusion from the studies, but that the conclusion reached was *supported by the evidence* in the record. The Circuit thus affirmed the district court's holding.

LINK

Trials: No Stay of Injunction in Redistricting Case; Evidence that One Election was Unaffected did not Satisfy City's Claim of Likelihood of Success on Merits

Patino v. City of Pasadena, No. 17-20030 (5th Cir. Feb. 3, 2017).

The Fifth Circuit has refused to stay an injunction issued by a lower court against Pasadena, Texas' attempt to reconfigure its voting districts.

The City Council of Pasadena Texas (City) changed the city election system from eight single-member voting districts to six single-member and two at-large districts. Alberto Patino and

various other city residents filed suit alleging the change 1) diluted Latino votes in violation of § 2 of the Voting Rights Act and 2) that the City intentionally discriminated on the basis of race in violation of the Fourteenth Amendment. The plaintiffs succeeded in proving such allegations in a bench trial, leading the district court to enjoin the City from using the new districts for the May 2017 elections and requiring that the prior eight single-member plan be reinstated. The City sought a stay from the district court to give it time to appeal to the Fifth Circuit, which the district court denied. The City then applied to the Fifth Circuit itself for a stay pending appeal. The Fifth Circuit denied the motion.

When deciding whether to grant a stay pending appeal, the Fifth Circuit considers "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." The burden on one seeking a stay is characterized as a heavy one.

The Court examined whether the City's request was warranted under the plaintiffs' first theory - that the new voting system unlawfully diluted votes as proscribed by §2 of the Voting Rights Act. The City argued there was no showing of vote dilution or discriminatory effect under the new election scheme because in 2015 Latinos successfully elected their preferred candidates in half the single-member districts and one of the at-large districts. It argued the fact that Latinos won four of the eight available seats under the new plan showed the district court's finding was erroneous, and thus they were likely to succeed on the merits on an appeal and should be granted the stay.

The Fifth Circuit disagreed, saying that while the City raised "a serious legal question," it was "not persuaded that the likelihood of the City's success on the merits is so strong that this factor tips the balance in favor of a stay." The City's burden - that the equities must "heavily favor" a stay - was high and success in one election under the new plan did not meet that standard. Since the Circuit Court determined the City has failed to meet its burden to justify a stay pending appeal with respect to the district court's holding on discriminatory *effect*, it never reached the issue of whether there sufficient evidence of discriminatory *intent*. It denied the City's motion.

LINK

THIS JUST IN: Mosquito Vigilante Finally Meets His Match

The *Denver Post* reports that a Colorado rancher who waged war on mosquitoes by spraying pesticides that wafted over his neighbors' organic farm has been ordered to jail after months of fighting his conviction.

Last week, the Colorado Court of Appeals affirmed a ruling that the 80+ year old James Hopper must serve two days in jail and pay a $7,500 fine for spraying on his property, violating a 2012 court order protecting his vegetable-growing neighbors, one of whom has leukemia.

The decision bolsters a legal precedent that wafting pesticides can constitute a trespass against which adjacent landowners and people with health sensitivities are protected.

Hopper could not be reached for comment. He previously stated that he was motivated to eradicate mosquitoes after his wife nearly died from West Nile virus. In 2012, a District Court Judge had ruled that Hoppers had a right to protect themselves from West Nile virus but that their neighbors had a legally-protectible right not to have their property invaded by other people or things. He had ordered Hopper to his pesticide use.

LINK

THIS JUST IN: Maryland Seeks Alternatives to Incarceration for Lack of Bail

Following a national trend towards procedural justice discussed in the January-February *Municipal Lawyer*, on February 7, 2017, Maryland's highest court adopted a landmark rule aimed at ending the practice of keeping criminal defendants incarcerated before trial if they cannot afford bail.

As the *Baltimore Sun* relates, "The seven-member Court of Appeals unanimously agreed on a compromise that does not abolish money bail, as some advocates have urged, but instructs judges and court commissioners to look first to other ways to ensure a defendant appears for trial."

The rule, which won praise from both bail reform advocates and the bail bond industry, was largely based on advice from the state's Attorney General, who had increasingly challenged the constitutionality of incarcerating indigent defendants who could not afford bail before trial.

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IMLA

www.imla.org
51 Monroe Street
Suite 404
Rockville, MD 20850
202-466-5424

