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Mootness: Where Discriminatory Impact Remains after Legislature Prohibits Voluntary Sterilization Policy, Case is not Moot

Sullivan v. Benningfield, No. 18-5643 (6th Cir.Apr.4, 2019).

Even though a judge rescinded his policy granting inmates 30 days' credit if they were sterilized-and the legislature banned such a policy-inmates who had not been given such an option and could not reduce their terms would thereby be delayed in potential expungement of their records, meaning that the Equal Protection claims had not been mooted.

Judge Sam Benningfield ("Benningfield") of White County, Tennessee issued an order in May 2017 that offered inmates a 30-day sentence credit in exchange for submitting to sterilization:

> For good cause shown including judicial economy and the administration of justice, it is ORDERED any White County inmate serving a sentence for the General Sessions Court who satisfactorily completes the State of Tennessee, Department of Health Neonatal Syndrome Education (NAS) Program be given two (2) days credit toward completion of

> his/her jail sentence. Any such female inmate who receives the free [N]explanon implant or any such male inmate who has the free vasectomy as a result thereof shall be given an additional thirty (30) days credit toward completion of his/her jail sentence.

There was public outcry. The judge issued an order declaring the program was no longer available. He then issued a third order clarifying the sentence-credit of those who had already enrolled. The Tennessee State Legislature, within months, passed a state law outlawing courts' conditioning sentencing determinations based on a defendant's willingness to consent to sterilization. Three inmates that rejected the offer and were thus *denied the sentencing credit that other inmates obtained* filed suit challenging Benningfield's orders under the Equal Protection Clause, arguing that the orders subjected inmates to differential treatment on the basis of their procreative rights and their sex. The district court deemed the case moot after the state legislature's bill passed and in light of the judge's second and third orders. They appealed.

The Circuit summed up mootness succinctly: "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." The defendant judge argued the case was moot because the challenged order has been rescinded and Tennessee has passed a new law making the challenged practice illegal which shows that they stopped engaging in the conduct at issue and there is no reasonable expectation it will be repeated.

The court first noted voluntary cessation rarely moots a case. To do so subsequent events have to show that the behavior cannot reasonably be expected to recur and that the subsequent events have "completely and irrevocably eradicated the effects of the alleged violation." The Court rejected both arguments, pointing out that the judge's third order specifically said "eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit regardless of whether those individuals ultimately had the procedure." With this in the briefing, the Circuit confirmed at oral argument that anyone who initially agreed to undergo sterilization would still be eligible to receive a 30-day credit under the terms of the second and third orders. By definition it thus held the differential treatment *did not end*. The issue of the enactment of the state law fared no better since, while it affected inmates *going forward* by impacting sentences imposed after the effective date of the statute, it did not have any impact on the plaintiffs.

The final argument was that the case was moot because all three plaintiffs have been released from the White County jail following the filing of this lawsuit. But this also failed since the plaintiffs did show that *being awarded* the 30-day sentencing credit would still provide meaningful relief -- the credit would impact collateral rights under state law *that turn on the date their sentences were terminated*. In plain terms, the plaintiffs could apply for expungement of their sentences 30 days earlier had they not suffered the unequal treatment of being denied the 30-day credit. The Circuit reversed the district court.

LINK

Search: Using SWAT Team to Conduct Warrantless Code Enforcement Inspection of Adult Entertainment Club Violates Fourth Amendment

WBY, Inc. d/b/a/ Follies, et al., v. Dekalb County, Georgia, No. 18-12616 (11th Cir. Mar. 13, 2019).

The Eleventh Circuit has upheld a lower court finding that Dekalb County overstepped its authority when it sent more than 50 law enforcement personnel including 36 SWAT

team members to inspect an adult establishment for permit violations.

Follies is an entertainment club in Dekalb County, Georgia ("County") serving both nude dancing and alcohol. Under an existing settlement agreement Follies obtained "non-conforming status" and agreed to be bound by the County's Adult Entertainment Ordinance, DeKalb Cty. Code §§ 15-400-15-424, ("Ordinance"). Among the Ordinance's various parts is a provision for inspection by appropriate County departments (police, fire, health, etc.) that allows inspections between 8:00am and 5:00pm. One other relevant portion of the Ordinance is that employees working in such clubs must have a permit that is available for inspection on premises. Inspections pursuant to the Ordinance before April 2013 involved a handful of officers checking a few entertainers and staff for permits in the back of the club and not interfering with the ongoing business operation. In April 2013 a lieutenant in the DeKalb County Police Department's ("DKPD") vice unit determined more "aggressive enforcement" was needed to curtail "criminal conduct-including disorderly conduct, prostitution, drug trafficking, and drug use-at adult clubs across the county." The chief of DKPD signed off on the idea, which resulted in an action at Follies that included: 34 County employees from the SWAT team, a twelve-officer "Strike Unit," permit-unit officers and code compliance officers and every detective in both the vice and narcotics units, all descending on Follies when it was at capacity (236 patrons and employees), stopping all business via officers in full "battle dress uniform" with sidearms and some with masks concealing identity, spreading out throughout the club yelling and cursing at patrons and employees alike to sit down and not move. The operation ultimately took over two hours. In the end six arrests resulted (obstruction, a probation violation of a would-be patron that was in the parking lot, disorderly conduct), and three minor citations were issued.

Follies filed suit alleging violations of its First and Fourth Amendment rights. The Fourth Amendment claim went to a jury and it concluded the inspection was an unreasonable search and seizure and assigned damages of $10,392.00. The County replied with a motion for judgment as a matter of law after the case, arguing that the evidence was insufficient to establish a constitutional violation because the inspection was reasonable in scope and execution and was not a pretext for a criminal investigation. The district court ruled against the County and it appealed the Eleventh Circuit.

The Circuit had a single question to address: whether sufficient evidence supported the jury's finding of a Fourth Amendment violation. The Court was dealing, clearly, with administrative inspections and the corresponding standard that an administrative inspection must be "appropriately limited in both scope and execution and may not serve as a backdoor for undertaking a warrantless search unsupported by probable cause." The Court reviewed its relatively robust precedent in this area. First, it had decided two cases where inspections were deemed *unreasonable* based on 1) a high number of officers being present, 2) SWAT officers drawing and/or exposing weapons, 3) the corralling of employees and/or patrons in one area to detain them, and 4) multiple-hour detentions of the patrons and employees that were intermittently searched. These cases were characterized as more akin to "raids" and exceeded administrative inspection authority. On the other hand, the Circuit had also decided one case where 40 officers were used to address a patron group of 400, without drawing or brandishing weapons and, because they were there specifically for under-age drinking, took time to check the IDs of each patron (54 convictions for under-age drinking resulted). In this case the Circuit found the facts indicated the inspection was reasonable.

The Circuit had little trouble finding the totality of the circumstances before it was analogous to the two unlawful inspections. In addition to repeating the facts highlighted above as a basis for its decision, the court noted the incongruity between inspections prior to April 2013 and the Follies experience made it wholly reasonable for the jury to reject the County's contention that it needed the force it showed because "clubs are dangerous places" and an AR-15 had been seen on Follies' premises recently. Moreover, the court refused to accept the County's argument that since 40 officers had been deemed reasonable where inspecting 400 *patrons*, 34 officers was reasonable for the 236 *persons* in this case. It pointed out that the former necessitated dealing with every patron, whereas Follies' inspection, which the County said was in order to inspect the

employees' permits, did not involve patron interaction by definition. The County's liability was affirmed.

LINK

Seizure: Not Clearly Established that Theft by Police of Property Seized Pursuant to Warrant Violates Fourth Amendment

Jessop v. City of Fresno, No. 17-16765 (Mar. 20, 2019).

Surprisingly, the question of whether police officers violate the Fourth Amendment when they allegedly steal cash and valuables seized pursuant to a warrant is not clearly resolved in the Ninth Circuit-and there is a significant split among the others.

Fresno, California police officers ("City Officers") were investigating illegal gambling machines and obtained a search warrant for three properties of Micah Jessop and Brittan Ashjian ("Appellants"). If any of the City Officers seized any monies, negotiable instruments, or other things of value pursuant to the warrant they were "to retain it in [their] custody, subject to the order of the court as provided by law." After executing the warrant the City Officers provided Appellants with an inventory list of what they seized. It listed $50,000 from all three properties. The Appellants contended the City Officers actually seized $151,380 in cash and another $125,000 in rare coins. Appellants filed suit in district court alleging the City Officers stole the money, this took the form of a §1983 suit under the Fourth and Fourteenth Amendments. The district court granted qualified immunity to the officers and the Appellants appealed.

The merits of the Fourth Amendment case broke down to the City Officers arguing that because they seized the assets *pursuant to a valid warrant*, there was no Fourth Amendment violation-while the Appellants contended that that the alleged *theft was an unreasonable seizure* that violated the Fourth Amendment. However, the Circuit avoided this thorny merits question by opting to evaluate the second prong of the qualified immunity analysis first: whether the right was clearly established at the time the allegedly unlawful conduct took place.

The Ninth Circuit had never addressed whether theft of property seized pursuant to a valid warrant violated the Fourth Amendment and it found that of the five circuits that had - or had addressed a very similar question - there was not a single answer. On one hand, the Second, Sixth, Seventh, and Eleventh Circuits have held that the "government's failure to return property seized pursuant to a warrant does *not* violate the Fourth Amendment," and on the other hand, the Fourth Circuit has held that "federal agents *violate* the Fourth Amendment when they steal property that is seized during the execution of a search warrant." The Ninth Circuit held this is *not* a case where the constitutional right at issue is "so obvious" that a reasonable officer would have known it: the circuit split evidenced that reasonable minds could disagree. The Circuit thus affirmed the lower court's grant of qualified immunity and did not add its weight to one side of the circuit split or the other. It only left lower courts with the arguably opaque statement that "[a]lthough the City Officers *ought to have recognized* that the alleged theft of Appellants' money and rare coins *would be improper*, they did not have clear notice that it violated the Fourth Amendment." The Circuit clearly recognized, however, the inequity at play:

> We sympathize with Appellants. They allege the theft of their personal property by police officers sworn to uphold the law. Appellants may very well have other means through which they may seek relief.1 But not all conduct that is improper or morally wrong violates the Constitution. Because Appellants did not have a clearly established Fourth or Fourteenth Amendment right to be free from the theft of property seized pursuant to a warrant, the City Officers are entitled to qualified immunity. AFFIRMED.

1Indeed, the district court noted in its Order Granting Defendants' Motion for Summary Judgment that Appellants "had access to an adequate post-deprivation remedy under California tort law."

LINK

Trials: Defendants in City's State Court Nuisance Property Suit Cannot File Civil Rights Action in Federal Court

Herrera v. City of Palmdale, No. 17-55761 (9th Cir. Mar.20, 2019).

The principles of *Younger* abstention preclude hotel owners who have been sued by the city in state court for nuisance and code violations from simultaneously commencing a civil rights action in federal court.

William Herrera and his wife, Mona "(Herreras"), operate a 48-unit motel in Palmdale, California ("City") that was licensed by the City in 2016. The motel, upon purchase by the Herreras, was upgraded to the tune of $250,000 and franchised as a Motel 6. In November 2016 the City investigated multiple suspected code violations at the motel with a civil inspection warrant, and subsequently issued a Notice and Order to Repair or Abate ("Notice and Order") in December 2016 alleging more than 400 violations. Two days after the Notice and Order was issued, the Herreras and all the tenants were evicted from the premises. The Herreras complained that the inspection was unlawfully carried out, included their private residence, and that they were prevented from appealing the Notice and Order. They followed up days later with a civil rights suit in *federal district court*, which was filed nearly simultaneously with the City's Nuisance Complaint in *Los Angeles County Superior Court*. The City then filed a motion for abstention, or, in the alternative, a motion to dismiss in the federal court, which was granted - i.e. the City sought to litigate the state case first. The Herreras appealed the federal court's abstention.

The Ninth Circuit easily described the *Younger doctrine* as based on the public policy against federal court interference with state court proceedings, and identified the three categories into which a state case must fall in order to win *Younger* abstention: "(1) parallel, pending state criminal proceedings, (2) state civil proceedings that are akin to criminal prosecutions, and (3) state civil proceedings that implicate a State's interest in enforcing the orders and judgments of its courts." Having identified the categories, the final outlined test was the Supreme Court's three-part inquiry to establish that "the state proceeding [was] (1) ongoing, (2) implicate[d] important state interests, and (3) provide[d] an adequate opportunity . . . to raise constitutional challenges." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

The Ninth Circuit found, first, that the Supreme Court clearly established in *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013) that a state nuisance proceeding may warrant *Younger* abstention because nuisances cases can be similar to state criminal cases. It then found that the facts here were analogous to *Sprint* because the City "initiate[d] an action for nuisance abatement and receivership, alleging that the motel property contains numerous violations of State and local laws and poses a severe life and health and safety hazard to any occupants, nearby residents, and the public." (internal citations omitted).

Moving on to the three-part inquiry, the Court only had to tackle two of the Herreras' arguments: 1) that the case did not implicate important state interests and 2) that state proceedings did not provide an adequate opportunity to raise federal constitutional claims. As for the first, the Circuit easily found its own precedent foreclosed the Herreras' argument: it held in *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876 (9th Cir. 2011) that a "state action enforcing ordinances declaring waste to be a nuisance implicated important state interests."

The second argument was also unsuccessful, but for two reasons. First, the Herreras contested that the civil rights violations they sought to vindicate in federal court were *irrelevant* to the nuisance claim. The Circuit found, in contrast, that the burden on the Herreras' at this stage of the case was to show that the state procedural law *barred* presentation of their claims. They fell short of that of that higher standard and did not provide any basis for why they failed to raise the constitutional claims in the Los Angeles Superior Court case. Second and finally, the Herreras argued that the state case did not provide an adequate opportunity to raise their constitutional claims since Mona and her children *were not parties* to the state case. This seemed like the best of the arguments, but the Circuit rejected it under its own and Supreme Court precedent holding that there are "some circumstances in which *legally distinct parties* are *so closely related* that they should all be subject to the *Younger* considerations which govern any one of them." The court found these circumstances present because Mona, though not named, is a co-founder of state defendant "Palmdale Lodging," because all the Herreras live at that property, and because the state case arises out of a single proceeding to abate code violations at that property. The lower court was affirmed on all of these issues.

LINK

Trials: In Retaliatory Termination Action, Interlocutory Appeal of Qualified Immunity Denial Cannot Consider Issues of Fact

Liogghio v. Township of Salem, No. 18-1857 (6th Cir. Mar. 19, 2019).

Where a town supervisor was denied qualified immunity after being sued for retaliatory termination by a subordinate who had run on a ticket opposing the supervisor, his interlocutory appeal could not relitigate the lower court's determination that sufficient issues of fact had been raised to defeat summary judgment.

Carol Liogghio ("Liogghio") has served as the administrative assistant to the incumbent Town Supervisor of Salem, Michigan since 2001. In 2012 when the incumbent ran again for his job, Liogghio ran for Township Clerk as his running mate. They lost and Gary Whittaker ("Whittaker") became Town Supervisor. When Whittaker met with the defeated outgoing incumbent, he asked him to fire Liogghio, but the incumbent refused, prompting the response that Whittaker would "force her to quit."When Whittaker met with Liogghio herself, he told her he could not work with her because her husband had "criticized operations at his farm" and said he would not fire her, but that she would "not want to be there." Whittaker then reduced employee hours across the board, changed the retirement plan and, specific to Liogghio, reassigned some of her duties to others. Liogghio's doctor ultimately told her to stop working for various health reasons and she stopped coming to work. When Whittaker sent a letter noting her position was being held for her and asking when she planned to return to work, Liogghio's responsive letter did not say when she would return but did say he was trying "to make [her] working conditions so intolerable that . . . [she] would resign." She never returned to work.

Liogghio filed suit under § 1983, claiming that Whittaker had retaliated against her for exercising her First Amendment right to run in the 2012 Township election. The district denied Whittaker's motion for summary judgment, finding Liogghio had created genuine issues of material fact - a decision from which Whittaker appealed.

While the facts of the case may have made an interesting appeal story, the noteworthy point about the case is procedural. The procedural posture of the case meant the Circuit was reviewing it with interlocutory jurisdiction - specifically, to review the denial of qualified immunity under the First Amendment. Under Sixth Circuit precedent. that means the Circuit "cannot review the

district court's determination of which facts a party may, or may not, be able to prove at trial" or "review even of the district court's 'inferences' from the record-supported evidence." The heart of the case was the First Amendment claim - i.e. Liogghio had to establish first, that she engaged in constitutionally protected speech or conduct; second, that Whittaker took an adverse action against her that "would deter a person of ordinary firmness from continuing to engage in that conduct"; and third, that her protected conduct caused Whittaker's adverse actions against her. As the Circuit went through the elements and laid out the district court findings, however, the panel repeatedly said it "lacked jurisdiction to review the factual determinations." On one hand, Liogghio claimed Whittaker made her working conditions intolerable and caused a constructive discharge while, on the other, Whittaker countered that the allegedly retaliatory actions were not intolerable. Ultimately, the Circuit could do no more than repeat the district court's holding that the jury could find for Liogghio because "under [its] precedent, [it was] powerless to review that determination in this interlocutory review."

The court explicitly pointed out the contrast to a qualified-immunity appeal under the *Fourth Amendment,* which would allow for a review of the alleged excessive force, and alluded to the futility of the appeal by reminding the parties that the two contested elements here - adverse action and causation-are questions of *fact* under Circuit precedent. It was left arguably no discretion: the district court determined under the facts that a reasonable officer in Whittaker's position would have known that he was violating Liogghio's rights and, thus, the Circuit had to affirm on the final prong of the analysis based on the factual findings.

LINK

Telecommunications: San Francisco's Ordinance Conditioning Grant of Wireless Facility Permits on Aesthetic Factors is Not Preempted Under State Law

T-Mobile West LLC v. City and County of San Francisco, No. S238001 (Cal. Apr. 4, 2019).

Upholding lower court determinations, the California Supreme Court holds that San Francisco's ordinance which requires telecommunications companies to accommodate aesthetic concerns is not preempted by state law authorizing the implementation of telephone infrastructure.

In January 2011, the San Francisco ("City") adopted ordinance No 12-11 ("Ordinance") which requires "any Person seeking to construct, install, or maintain a Personal Wireless Service Facility in the Public Rights-of-Way to obtain" a permit. In adopting the Ordinance, the board of supervisors noted that the City "is widely recognized to be one of the world's most beautiful cities," which is vital to its tourist industry and an important reason that residents and businesses locate there. Due to growing demand, requests from the wireless industry to place equipment on utility poles had increased. The board opined that the City needed to regulate the placement of this equipment to prevent installation in ways or locations "that will diminish the City's beauty." The board acknowledged that telephone corporations have a right, under state law, "to use the public rights-of-way to install and maintain 'telephone lines' and related facilities required to provide telephone service." But it asserted that local governments may "enact laws that limit the intrusive effect of these lines and facilities."

T-Mobile and other telecommunications entities sued, alleging that the Ordinance and implementing regulations are preempted by California law ("section 7901") which states that "telephone corporations may construct . . . telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts,

piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." (emphasis added for this eNews).

Plaintiffs argued that the City only had the power to regulate telephone line construction based on aesthetic considerations if section 7901's incommode clause could be read to accommodate that power. The court disagreed:

> That premise is flawed. As mentioned, the City has inherent local police power to determine the appropriate uses of land within its jurisdiction. That power includes the authority to establish aesthetic conditions for land use. Under our preemption cases, the question is not whether the incommode clause can be read to permit the City's exercise of power under the Ordinance. Rather, it is whether section 7901 divests the City of that power.

Noting that Webster's defines "incommode" to mean "give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something," the court pointed out that telephone lines and equipment, in addition to physically blocking spaces, "might generate noise, cause negative health consequences, or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment."

Plaintiffs unsuccessfully sought to introduce helpful precedents, but the court easily found that these involved the denial of franchises (preventing operation entirely-a right typically granted or withheld at the state level) rather than denial of permits-which merely set forth conditions to operation and are typically matters of local prerogative. The court further found no "inimical conflict" between section 7901 and the Ordinance and no legislative intent to create field preemption: "[A]lthough the granting of telephone franchises has been deemed a matter of statewide concern, the power to regulate the location and manner of line installation is generally a matter left to local regulation. The City is not attempting to regulate in an area over which the state has traditionally exercised control." As with the case of California's medical marijuana laws (and a recent decision allowing the City of Riverside to opt out of allowing dispensaries within city limits), the legislature had not evidenced an intent to completely usurp local autonomy.

The court also looked to the deference paid by California's Public Utilities Commission ("PUC") to municipalities, finding that, unless local restrictions threatened the actual development of utility infrastructure, they would generally be given credence.

Finally, the court was unmoved by the industry's oft-repeated and dire warnings about depriving society of essential progress:

> Plaintiffs argue our construction of section 7901, and a decision upholding the City's authority to enforce the Ordinance, will "hinder the roll-out of advanced services needed to upgrade networks [and] promote universal broadband" and will "stymie the deployment of 5G networks, leaving California unable to meet the growing need for wireless capacity created by the proliferation of . . . connected devices." This argument is premised on a hypothetical future harm that is not cognizable in a facial challenge.

LINK

NOTE: IMLA, the League of California Cities, the California State Association of Counties, and SCAN NATOA, Inc. filed an amicus brief in this case. We salute them on this win and acknowledge attorney of record Jeffrey Melching of Rutan & Tucker, LLP (Costa Mesa, CA) for his excellent advocacy in the case.

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