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Equal Protection: Disproportionate Inclusion of Black Offenders in "Focused Deterrence Program" Does Not, Without More, Create Disparate Impact

Alston v. City of Madison, No. 16-1034 (7th Cir. Apr. 10, 2017).

A Wisconsin "Focused Repeat Offender Deterrence Program" in which a majority of the participants were black did not violate a candidate's Equal Protection or Due Process rights, despite statistical disparities along racial lines.

The Madison Police Department (Department) established a "focused deterrence program" to increase surveillance of repeat violent offenders and provide additional resources to help them become productive members of society. To identify program candidates, the Department relied on its lists and those from the department of corrections, both of which identified the most violent

offenders released within the past year. From those lists, detectives made qualitative and quantitative judgments about the candidates and likelihood of reoffending; they ultimately chose 18 profiles for presentation to a selection committee. Profiles included the individual's age, gang membership (if any), criminal conduct, and pending cases. Candidates were notified by their probation officer that they were required to attend a meeting to learn more about the program.

Eric Alston (Alston) filed suit under §1983, alleging he had been selected for the program based on race, in violation of his Equal Protection rights. He contended that his Due rocess rights were violated because he was stigmatized by being selected and was subjected to increased surveillance, penalties, and reporting requirements and assigned a biased probation examiner.

Arguing that that the program was designed to make examples of minority offenders, Alston presented evidence that blacks accounted for only 4.5 percent of Madison's population but 37.6 percent of arrests and 86 percent of the program. Four candidates from allegedly black gangs were selected while the one candidate associated with an allegedly white gang was not. Quotes from two high-ranking police-department officials revealed that the disparity in minority incarceration was a concern when creating the program. The district court granted Madison summary judgment. The Seventh Circuit affirmed. Alston failed to produce sufficient evidence to showing that the program had a discriminatory effect or purpose or that Alston's legal rights were altered by inclusion in the program. Even though Madison admitted that the arrest statistics were regrettable, the numbers did not address *specifically* whether Alston's treatment deferred from other members of an unprotected class. And the officer's comments that the program was intended to address racial disparity in the system did not indicate that the program was intended to negatively impact minority populations.

The court was slightly more open to Alston's second Equal Protection argument- that the inclusion of gang was a proxy for race during the selection process. However, it ultimately held that since the issue had not been raised in district court, it could not be considered on appeal. Further, the court suggested that the argument would likely fail since Alston could not show that selections based on race/gang had a discriminatory purpose. They referenced both *Yick Wo* and *Arlington Heights* in their discussion of disparate impact and discriminatory intent.

The court dismissed Alston's Due Process argument that inclusion in the program resulted in stigma-he was already in a heightened oversight status. And because Alston was a probationer with reduced liberty interests, the required notification meeting did not result in a long enough impairment of Alston's liberty to implicate due process.

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Evidence: Third Party's Prior Deposition not Admissible Where Defendants had no Opportunity to Cross-Examine and Third Party Now Refuses to Testify

Peppers v. Washington County, no. 16-5407 (6th Cir. Apr. 13, 2017).

Where a Tennessee inmate died while incarcerated and the deposition testimony of a nearby prisoner supported the estate's argument that the decedent had been asphyxiated by prison guards, such testimony could not be introduced on appeal because it had never been subject to cross-examination and the deponent would no longer agree to testify.

Stewart Peppers (Peppers) died while in the custody of jailers at Tennessee's Washington County jail (Jail) and his estate brought a §1983 wrongful death action against the Washington

County and various jail officials. The authorities claimed that Peppers died due to ingesting large amounts of illicit drugs and steroids. His estate argued that the death was due to the actions of six guards who tasered, pepper-sprayed and beat Peppers even after he had been lashed to a restraining chair. A prisoner in an adjoining cell gave an affidavit supporting the estate's version of the facts. Although he was not cross-examined by the defendants, the district court accepted his statements as true for purposes of summary judgment and denied defendants' motions to dismiss on qualified immunity grounds.

For purposes of trial, Peppers' estate attempted to depose the neighboring prisoner, but he would no longer cooperate. In lieu, the estate sought to introduce a prior deposition taken by defendants of the prisoner in preparation for trial which would support his affidavit statements. However, during that deposition, the estate's counsel had played portions of a prior interview to refresh the deponent's memory. The recording of that prior interview, which included allusions to deponent's desire for revenge against the jail, was not given to defendants' counsel until after the deposition-preventing defendants from examining the possibility of bias. The district court therefore refused to allow the deposition as trial evidence. It therefore reversed its prior denial of defendants' qualified immunity-based summary judgment motion.

On appeal, the Sixth Circuit affirmed. The deposition was inadmissible hearsay, being a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Although the Federal Rules provide an exception for "Former Testimony," which allows for admission of hearsay testimony if it "was given as a witness at a trial, hearing, or lawful deposition" and "is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination" (Fed. R. Evid. 804(b)(1)), the defendants never had an opportunity to explore fully the implications of the deponent's potential bias.

It was well within the district court's discretion to determine that the probative value of such evidence was outweighed by its prejudice to defendants

LINK

FMLA: Mere Notice that Employee Intends to "Take a Sick Week" Is Not Adequate to Support FMLA Retaliation Claim

Germanowski v. Harris, no. 16-1306 (1st Cir. Apr. 12, 2017).

Where a municipal employee who was suffering increasingly debilitating medical and psychological problems emailed her supervisor that she would be "taking a sick week" shortly before being fired, that notice did not create a sufficient awareness by the employer of a potential FMLA-based leave of absence to support a claim of retaliatory termination.

Heidi Germanowski (Germanowski), a long-time employee at the Berkshire Massachusetts Middle District Register of Deeds, was placed under the supervision of Patricia Harris (Harris) in 2013. Germanowski soon began to experience job related anxiety, a condition which was exacerbated when Harris pressured Germanowski to make a financial contribution to the then-Secretary of the Commonwealth of Massachusetts. Her medical problems worsened, eventually resulting in a nervous breakdown. Harris subsequently questioned whether Germanowski's receipt of a handgun for Christmas created a danger and even accused Germanowski of having an affair.

In late January 2015 Germanowski received an email from Harris telling her not to come to work

the next day, and she was subsequently denied entry to her building. Germanowski then emailed Harris saying that she was "out sick for the week" and was "scheduled to see her doctor." Her psychiatrist advised her in writing to take a leave of absence, but she did not provide this letter to Harris. On February 6, 2015, Germanowski was notified that her employment had been terminated.

She sued Harris and Massachusetts alleging that she had been fired in anticipation of her taking a leave of absence under the Family Medical Leave Act (FMLA), which provides for 12 weeks of absence from work due to a "serious health condition" preventing job performance. Her claim against Massachusetts was dismissed on Eleventh Amendment grounds. The district court dismissed as to Harris because Germanowski had failed to allege that Harris knew of her intent to take FMLA-protected leave.

On appeal, the First Circuit noted that, while pleadings need not establish a prima facie case, they must allege factual content that allows the court to draw a reasonable inference of misconduct by the defendant. In the context of an FMLA claim, where the employer has allegedly terminated the employee in anticipation of a protected leave of absence, that burden is not satisfied merely where the employee calls in sick. Furthermore, the chronology in this case, where there was a long period of deterioration in Germanowski's relationship with Harris-including being locked out of work-before she ever sent her "out for the week" notice, undermined the argument that her termination was due to an upcoming FMLA-protected absence.

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Guns: California's Ten-Year Ban on Gun Possession After Conviction for Domestic Abuse Does Not Violate the Second Amendment

Fortson v. Los Angeles County Attorney's Office, No. 15-55497 (9th Cir. Apr. 7, 2017).

Given that the federal lifetime ban on firearm possession after domestic abuse conviction has already been upheld, California's ten-year ban survives the Second Amendment, and removal of weapons and arrest under that law passes constitutional muster.

In 2009, Benjamin Fortson (Fortson) was convicted of a single misdemeanor domestic abuse violation. Under California law, he was therefore prohibited from possessing firearms for 10 years. The district court made an exception, allowing Fortson, a security guard, to keep and use firearms solely at his place of employment. By 2011, Fortson had satisfied all the terms of his domestic violence sentence, and his conviction was vacated and his probation and protective order were terminated. Fortson changed his plea from nolo contendere to not guilty, and the case was dismissed.

He incorrectly believed (apparently) that this restored his right to keep and possess firearms at home, and he soon acquired two guns and ammunition. California's Bureau of Firearms (BOF) noticed the purchase and sent officers to Fortson's residence, whereupon they seized the firearms and prosecuted him for unlawful possession.

Fortson filed a § 1983 action, alleging Second and Fourth Amendment violations, including the fact that he did not receive a *Miranda* warning. The district court dismissed the individual prosecutors and City Attorney's office on grounds of absolute prosecutorial immunity and dismissed the BOF on sovereign immunity grounds.

On appeal, Fortson argued that California's ten-year ban is facially invalid under the Second Amendment. The Ninth Circuit easily found that the California law survived constitutional challenge based on its prior holding in *United States v. Chovan*, where it upheld 18 U.S.C. § 922(g)(9), the federal law which imposes a lifetime ban on firearm ownership for those convicted of misdemeanor domestic violence. There, applying intermediate scrutiny, the Ninth Circuit had noted that the "core of the Second Amendment is 'the right of law abiding, responsible citizens to use arms in defense of hearth and home." (quoting *Heller*). The federal lifetime did not implicate the core of the Second Amendment because it "regulates firearm possession for individuals with criminal convictions."

> Looking to the purpose and history of the federal ban, we held that domestic violence has a high rate of recidivism, and when a gun is used, domestic violence is far more likely to result in the victim's death. Thus, there is a reasonable fit between preventing domestic gun violence and preventing domestic abusers from possessing or using guns. In light of this, we held that the federal lifetime ban was substantially related to the important government interest.

Given that California's ten-year ban advanced the same government interest as the federal law and was substantially related to that interest, the state law passed constitutional muster under intermediate scrutiny. Fortson's malicious prosecution and false arrest claims failed because his arrest and prosecution were supported by probable cause; the BOF officers knew that he possessed unauthorized firearms. His official capacity suit against BOF was dismissed on Eleventh Amendment grounds.

LINK

Land Use: College's Revocation of Fraternity's Status as a Student Organization Results in Zoning Violation

Dartmouth Corp. of Alpha Delta v. Town of Hanover, No. 2016-0304 (N.H. Apr. 11, 2017)

A Dartmouth fraternity whose hazing activities caused it to lose "college approved" status--meaning it was no longer related to an "institution," thereby violating Hanover's zoning regarding unrelated adult cohabitants--could not argue that its non-conforming status stretching back intermittently over decades should be grandfathered, because at the time the 1976 zoning ordinance was passed, the fraternity was a compliant "institutional use" entity.

Alpha Delta has been a fraternity at Dartmouth College (College) since the 1840s and is said to have, at least in part, inspired the hit comedy film, *Animal House*. In 2015, frat brothers branded the buttocks of at least 11 their new pledges with the Alpha Delta greek letters, in violation of the College's standards of conduct. Upon learning of the branding (which the brothers of course stressed was "voluntary"), the College revoked Alpha Delta's status as a student organization.

This meant the fraternity no longer had recognition as a "college approved" residential facility or use of College facilities and resources. It also meant that Alpha Delta's $1.4 million mansion would no longer be under the jurisdiction or protection of the College's department of safety and security. Furthermore, the College also notified the Town that Alpha Delta no longer had a relationship with Dartmouth College. This meant the fraternity house, which at the time housed eighteen individuals, was in violation of the town's current zoning ordinances since it was no longer being used in conjunction with an institutional use (per the specifications of the "Institution" district) and was housing more than three unrelated individuals.

Alpha Delta argued that, to the extent the zoning administrator had adopted recognition/derecognition status as a zoning requirement under the current zoning ordinance, Alpha Delta should be considered "grandfathered" because the existence and nature of recognition by the College had varied before the zoning ordinance was adopted in 1976. They argued that because Alpha Delta had housed Dartmouth students long before the 1976 ordinance was enacted, it had a grandfathered exemption from the "institutional use" requirement under the ordinance and it had not waived its rights to lawful nonconforming use through its voluntary association with the College.

Neither the ZBA nor subsequent courts bought this argument.

At the time of enactment of the 1976 zoning ordinance, the Alpha Delta was fully recognized by the College. A lawful nonconforming use is a use in fact existing on the land at the time of adoption; therefore, in order to be grandfathered under the current ordinance, Alpha Delta would have had to be nonconforming at the time of the ordinance's adoption.

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Qualified Immunity: No Immunity where Officer Omitted Material Discrepancies from Probable Cause Affidavit

Andrews v. Scuilli, No. 15-3393 (3d Cir. Apr. 10, 2017).

Where an officer omitted from his affidavit in support of a warrant that the complainant's descriptions of an alleged sexual predator's vehicle were inconsistent, there were material questions as to whether the resulting warrant and subsequent arrest were supported by probable cause-requiring denial of qualified immunity.

A fifteen-year old was approached by a man in a vehicle while she walked in Stowe Township, Pennsylvania. He asked her to get into the car, and she refused. Upon returning home she described the driver (about 35, with dark hair); the vehicle (a red four-door sedan); and a partial license plate number to her mother and to Officer Robert Scuilli (Scuilli). The next day she believed that she saw the same vehicle at a local shopping center, watched as the driver exited the car, and then contacted Scuilli, who immediately drove to the location.

The shopping center vehicle was owned by 51-year old Robert Andrews (Andrews). When Scuilli presented the girl with various line-up photographs, the girl identified Andrews. Scuilli wrote a probable cause affidavit in support of a warrant, but neglected to state that the shopping center vehicle was only a three-door model and the license plate number was not a complete match to the girl's description the day before. Andrews was arrested for attempted luring of a juvenile, stalking and harassment. He was subsequently acquitted of all charges, and sued Scuilli for false arrest and malicious prosecution. The district court granted Scuilli summary judgment based on qualified immunity.

The Third Circuit reversed. While the discrepancies between the girl's original description of the driver and Andrews' actual appearance might be within acceptable tolerances, the difference between a three-door and four-door vehicle was significant enough to require mention in Scuilli's affidavit. Failure to do so meant that the probable cause underlying the arrest warrant was suspect. This undermined Scuilli's qualified immunity argument that he had not violated any clearly established Fourth Amendment right of Andrews, and required remand for a trial.

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Qualified Immunity: Search of Vehicle Parked 200 Yards from Address in Warrant is Not Objectively Reasonable

Rogers v. Lee County, no. 16-60537 (5th Cir. Apr. 3, 2017).

Where officers found 190 grams of crack cocaine in a truck located 200 yards from the address specified in the warrant and allegedly attempted to expand the scope of the warrant via a telephone call to the court, their search of the vehicle they described as "parked behind the residence" was not objectively reasonable and did not support qualified immunity.

Kermit Rogers (Rogers) was arrested in 2009 after officers executed a search warrant for "320 CR 401, Shannon, Lee County, Mississippi, together with all approaches and appurtenances thereto. Also, all vehicles and out buildings on the property." Five grams of crack cocaine was found at that residence, but a much bigger amount--190 grams--was found in a red truck parked at an adjoining property some distance away, at 320A.

Rogers was sentenced under Mississippi law for cocaine sale, served time and was released on probation. But federal authorities also pressed charges under a statute criminalizing possession of more than 50 grams of crack. Rogers provisionally pled guilty, but moved to suppress. The district court agreed, based on "fruit of the poisonous tree" analysis. It had initially declined to consider Rogers' suppression argument based on the government's assertion that the crack had been found in a truck "parked behind the residence" at 320. The court found otherwise upon further study:

> The property where the red truck was located-320A CR 401-is in no way part of that description. It has a different address. It is owned by someone other than the defendant. It is at least 200 yards away from the property at 320.

Rogers had served 452 days under the federal charges before being released. He sued a variety of defendants under §1983, including Lee County, the City of Tupelo and various law enforcement officers, alleging violations under the Fourth and Fourteenth Amendments as well as under Mississippi law. The district court dismissed each of them based on qualified immunity.

The Fifth Circuit reversed as to officer Sam Warren of the Lee County Sheriff's Department and Paul Howell of the Tupelo Police Department, disagreeing that a "good faith" exception applied to their actions. Although the officers had allegedly called the court to expand the scope of the warrant, there was no record of the call, and such a tactic would not have been legitimate under federal or Mississippi law. And although the good faith exception can rescue certain inconsistencies between an underlying affidavit and an actual search, law enforcement officials cannot establish objective good faith when the warrant is based on an affidavit "so lacking in indicia of probable cause as to render the official's belief in its existence entirely unreasonable." The Circuit disagreed with the lower court that the warrant for the 320 property might conceivably have been construed to include an "outbuilding" 200 yards away and not even visible from the primary residence. The search of the red truck was effectively warrantless and violated the Fourth Amendment.

LINK

Search and Seizure: Probable Cause Can Arise from Inference that

Driver Transporting Known Drug Suspect is Also Engaged in Illicit Activity-Even Where Mistaken

Sampson v. Village of Mackinaw City, no. 16-1919 (6th Cir. Apr. 6, 2017).

The arrest of a driver who was unknowingly transporting the subject of a police drug sting operation did not constitute malicious prosecution or support Fourth Amendment claims based on lack of probable cause.

Darryl Sampson (Sampson) agreed to drive Darryl Duncan (Duncan) to various locations around Mackinaw City (City). Duncan, who was the subject of an outstanding warrant for drug charges, was being tailed by a confidential informant, allowing City police to follow Sampson's vehicle and pull Sampson over when he rolled through a stop sign. Sampson allowed a search of the vehicle, whereupon the police found heroin behind his seat. They arrested both Sampson and Duncan. All charges against Sampson were later dropped and he sued the City and a police officer for false arrest and malicious prosecution, and the City for municipal liability.

The Sixth Circuit affirmed the lower court's dismissal of each of Sampson's claims. Although Sampson argued that his driving was not sufficiently haphazard to provide probable cause for a traffic stop, both courts found that factor irrelevant: probable cause to stop Sampson stemmed from the outstanding warrant for Duncan, a passenger in Sampson's vehicle.

Given the outstanding warrant for Duncan, the arresting officer had reasonable grounds to assume that stopping the vehicle and arresting the occupants was a lawful activity. As the lower court had phrased it "In the context of a drug case, ... an officer may reasonably infer a common enterprise between the driver of a vehicle and a passenger under certain circumstances...." Here Sampson's chauffeuring Duncan to a hotel and other locations at 3 am supported such an inference, even if it was ultimately mistaken: "The fundamental question remains: Did Officer Klave have cause for a reasonable-even if mistaken-belief that Sampson had committed a crime based on the totality of the facts and circumstances within his knowledge? The record here establishes that he did."

LINK

THIS JUST IN:

Is a Riding Lawnmower a "Motor Vehicle" if You Steal It?

Deere John: The Supreme Court of Washington, which heard a mere 116 appeals in 2016, has agreed to spend a portion of its upcoming term hearing a case brought by Chelan County on the as-yet unsettled issue of whether a riding lawnmower constitutes a "motor vehicle" for purposes of Washington State's theft laws.

In 2015, Wenatchee resident Joshua Michael Barnes drove his to a local home, started up the resident's Craftsman riding lawnmower, and inched it up a ramp onto his pickup truck. He was confronted by the owner, unloaded the mower and sped off down Chumstick Highway. He was soon visited by law enforcement and quickly admitted to the attempted theft.

Chelan County prosecutors did not limit their charge to garden variety second degree thievery, bringing a more substantial count against Barnes- attempted theft of a motor vehicle.

The local judge dismissed the motor vehicle charge, finding that a riding mower is not covered

under the State's vehicular theft jurisprudence. The Court of Appeals agreed. Unsatisfied, the County appealed to Washington's highest tribunal.

Their persistence succeeded. On May 9, all nine members of the Evergreen State's Supreme Court will hear Chelan County Deputy Prosecutor Nicole Hankins' arguments that the lumbering self-propelled lawn cutting machine with the steering wheel is, for purposes of criminal law, a motor vehicle. The penal consequences to Barnes are significant-the motor vehicle charge could result in 29 month's incarceration, almost a year more than the lesser theft counts.

We may look into this weighty issue more closely in an upcoming *Municipal Lawyer*....

The original article published in ***The Yakima Herald*** on April 11, 2017, can be accessed HERE.

New Online Course for Municipal Bond Issuers

The Municipal Securities Rulemaking Board (MSRB) has made available an online course designed to educate municipal bond issuers about their legal responsibilities-including those applicable to municipal attorneys involved in the process.

As described by writer Jack Casey in The Bond Buyer on Wednesday, April 18, 2017, the new offering called "Being an Informed Bond Issuer" is 45 minutes long and is free of charge. It covers two scenarios-one involves funding a water treatment facility and the other tracks a hotel and convention center development. The course is part of a broader instructional suite offered by MSRB called "MuniEdPro."

The link to Mr. Casey's article is HERE.

We thank IMLA member (and upcoming speaker at our Seminar this weekend in Washington DC) Robert Doty for this head's up.

IMLA

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

