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FEATURED CASES

Police Search and Arrest Upheld by Eighth Circuit, But Retaliatory Gun-Pointing Claim Survives in City of Ferguson MO Case

***Watson v. Boyd*, No. 22-3233 (8th Cir. Oct. 21, 2024).**

The Eighth Circuit affirmed in part and reversed in part the district court's grant of summary judgment to a Ferguson police officer and the City of Ferguson in a lawsuit brought by a driver alleging constitutional violations during a traffic stop encounter. The court upheld the officer's search of the driver's vehicle as lawful under the search incident to arrest exception but found a triable issue on the driver's claim that the officer pointed a gun at him in retaliation for requesting the officer's badge number, which is protected speech. The court's 2-1 decision revived the driver's First Amendment retaliatory use of force claim against the officer and a related *Monell* claim against the City, with the dissent arguing that the officer's gun-pointing was justified by the driver reaching for his phone, not by speech retaliation.

Background: Fred Watson ("Watson") filed suit against the City of Ferguson, Missouri and Officer Eddie Boyd ("Officer Boyd") under 42 U.S.C. § 1983 after an encounter between Watson and Officer Boyd at a Ferguson Park.

Watson was resting in his parked car after playing basketball when Officer Boyd approached Watson's vehicle, which had tinted windows and no front license plate.

During the encounter, Watson asked for Officer Boyd's name and badge number, but Boyd refused. Watson briefly reached for his phone, and Officer Boyd yelled at him to put it down. Boyd then allegedly pulled his gun, pointed it at Watson, and threatened to shoot, saying no one would care.

Officer Boyd ordered Watson to throw his keys out of the car and exit the vehicle, but Watson did not immediately comply out of fear. After backup arrived, Watson exited the car with his hands raised. Officer Boyd then handcuffed Watson and searched his vehicle.

Officer Boyd issued Watson several citations, including for not having a driver's license, failure to register his vehicle, making a false statement regarding his identity, and failure to obey the officer's commands. Watson contested the charges, which were ultimately dismissed.

Watson sued Officer Boyd and the City of Ferguson under 42 U.S.C. § 1983, alleging violations of his First, Fourth and Fourteenth Amendment rights through unlawful search and seizure, retaliatory arrest and use of force, and malicious prosecution. He also brought *Monell* claims against the City.

The key factual disputes centered on the justification for Officer Boyd's actions, including whether he had probable cause for the various citations and whether he used excessive force against Watson in retaliation for Watson's protected speech requesting Boyd's name and badge number.

The district court granted summary judgment to the defendants on all counts. Watson appealed the grant of summary judgment on his First Amendment retaliation claim (Count II), his Fourth Amendment unreasonable search claim (Count I), and his *Monell* claim against the city (Count IV).

Questions of Law:

1. Did the district court err in granting summary judgment to Officer Boyd on Watson's First Amendment retaliatory arrest and retaliatory use of force claims?
2. Did the district court err in granting summary judgment to Officer Boyd on Watson's Fourth Amendment unreasonable search claim based on the search incident to arrest exception?
3. Did the district court err in granting summary judgment to the City on Watson's *Monell* claim?

Holdings:

1. The district court properly granted summary judgment on Watson's retaliatory arrest claim because Officer Boyd had at least arguable probable cause for arresting Watson. However, the district court erred in failing to address Watson's retaliatory use of force claim. Viewing the facts most favorably to Watson, a genuine issue of material fact exists as to whether Officer Boyd pointed his gun at Watson in retaliation for Watson asking for his name and badge number.
2. The district court correctly granted summary judgment on Watson's unreasonable search claim. The search of Watson's vehicle was lawful as a search incident to Watson's arrest for making a false statement regarding his identity. Under *Arizona v. Gant*, officers may search a vehicle incident to arrest when reasonable to believe the vehicle contains evidence of the offense of arrest.
3. Because a factual issue remains on whether Officer Boyd violated Watson's First Amendment rights through retaliatory use of force, the district court erred in granting summary judgment to the City on Watson's *Monell* claim. If Officer Boyd is found to have violated a clearly established right, the City could be liable.

Analysis: Regarding the retaliatory arrest component of Count II, the Eighth Circuit agreed with the district court that Officer Boyd had at least arguable probable cause to arrest Watson for various offenses, including driving without a license in possession, failure to register his vehicle, making a false statement, and failure to obey. The court rejected Watson's arguments that Officer Boyd lacked arguable probable cause for these charges. Under *Nieves v. Bartlett*, the existence of probable cause defeats a First Amendment retaliatory arrest claim.

However, the Eighth Circuit found that the district court erred by ignoring Watson's distinct claim that Officer Boyd violated his First Amendment rights through retaliatory use of force. To establish a retaliatory use of force claim, Watson must show he (1) engaged in protected activity, (2) Officer Boyd took action that would chill a person of ordinary firmness, and (3) the action was motivated by

the protected activity. Watson presented sufficient evidence on each element to survive summary judgment. Criticizing a police officer and requesting their badge number is protected speech. Pointing a gun at Watson and threatening to shoot would chill a person of ordinary firmness. And Watson testified that Officer Boyd did not pull his gun until after Watson asked for his badge and Boyd became visibly upset, raising an inference of retaliatory motive. The court distinguished retaliatory use of force claims from retaliatory arrest claims subject to Nieves' no-probable-cause requirement.

On the Fourth Amendment search claim, the court relied on *Arizona v. Gant*, which allows warrantless vehicle searches incident to arrest when reasonable to believe evidence relevant to the crime of arrest might be in the vehicle. The court found it reasonable to believe Watson's vehicle contained evidence related to the offense of making a false statement regarding his identity, as Officer Boyd had not yet located Watson's actual identification proving the falsity at the time of the search. The court analogized the facts to *United States v. Campbell-Martin*, where it upheld a vehicle search incident to arrest for providing false identification.

Because the court found a triable issue on Watson's First Amendment retaliatory use of force claim, it also reversed summary judgment for the City on the *Monell* claims. It was clearly established that the First Amendment prohibits retaliatory actions for protected speech, so if Officer Boyd is found to have violated that right, the City could be liable under *Monell*.

Dissent: Circuit Judge Gruender concurred in part and dissented in part. He dissented from the majority's holding on Watson's First Amendment retaliatory use of force claim against Officer Boyd (Part II.A.2) and the related *Monell* claim against the City of Ferguson (Part II.C).

Judge Gruender agreed with the majority's analysis that Watson engaged in protected activity (requesting Officer Boyd's badge number) and that Officer Boyd's action of pointing his gun at Watson could chill a person of ordinary firmness. However, he disagreed that Watson raised a triable issue on the causation element of the retaliation claim.

In Judge Gruender's view, the "obvious alternative explanation" for Officer Boyd pointing his gun at Watson was not retaliation for the protected speech, but rather Watson's intervening act of reaching for his phone. He emphasized that Officer Boyd did not point the gun immediately after Watson requested his badge, but only after Watson removed his hands from the steering wheel to grab his phone, which prompted Officer Boyd to yell at Watson to put the phone down and then point his gun.

Judge Gruender criticized the majority for focusing too narrowly on the temporal proximity between Watson's protected speech and Officer Boyd's display of force while ignoring the even closer proximity of Watson reaching for his phone. He believed the full sequence of events showed that Officer Boyd was reacting to Watson's phone grab, not engaging in speech retaliation.

Because Judge Gruender concluded that Officer Boyd was entitled to qualified immunity on the retaliatory use of force claim based on the intervening event of Watson reaching for his phone, he also would have granted summary judgment to the City of Ferguson on the *Monell* claim, as municipal liability requires an underlying constitutional violation by the individual officer.

Watson v. Boyd

SHORT SUMMARIES:

3rd Circuit – Labor – First Amendment – Project Labor Agreement -Standing - Mootness

Philadelphia, like many large urban communities, adopts various requirements as part of its procurement process. One of those requirements became the subject of this lawsuit. The city put out to bid several projects and as part of its bidding template incorporated a requirement that award winners enter into a Project Labor Agreement that set several diversity standards and required affiliation with a local trade union. Several contractors sued claiming interest in the contracts and alleging that the PLA's violated their First Amendment rights. Shortly after the suit was filed, the city abandoned the PLA requirements of affiliation with the local trade union. The contractors' employees were members of the United Steelworkers Union which was not affiliated with the local trade union and would not agree to the diversity requirements imposed by the city. The lower court found that the contractors did not have standing and concluded that in any event the claims were mooted by the city's decision to rescind the PLA's. The panel concluded that standing existed as to both the claims for First Amendment violation associated with the trade union mandate and an Equal Protection claim associated with the diversity requirements. The court concluded that the Plaintiffs showed injury in fact and met the other standing requirements and concluded that the suit was not moot.

Road-Con v. Philadelphia

4th Circuit- State Law Claims

In this case the panel of the 4th Circuit slaps down a lower court judge for the temerity to ignore its mandate; The opinion starts:

> "We deal here with the unfortunate instance of a district court failing to follow our clear mandate to dismiss the state law claims against the school officials in this case. We again reverse the judgment and reiterate what we said in the prior appeal—that the state law claims were not remanded for further proceedings but were instead to be dismissed. No exceptions to the mandate rule applied, and their invocation here would risk allowing the exceptions to swallow the rule."

R.A. v. McClenahan

6th Circuit – Excessive Force – (or not)

The event in this case occurred in Dearborn, Michigan. Of course, I was curious as to what the etymology of the city's name could be. Was it because the city was a foundling raised close to the hearts of those present at its birth? Apparently not, Henry Dearborn an American Revolutionary War General and Secretary of War under Thomas Jefferson allowed the city to bear his name. With this behind us, I ask the next question about how much chutzpa do we believe Plaintiffs lawyers have? Here may be the answer. A fellow, wearing a Covid mask and winter hat walks into a police

station. The officer on duty asks how he's doing. Without so much as a how do you do in return, the fellow pulls out a handgun, points it at the officer and fires, but the gun malfunctions. He tries to work its mechanism back into functioning and while doing so, the officer throws open the window separating him from the public, pulls his service weapon and shoots the fellow dead. Among the arguments: The fellow never actually fired a bullet; the fellow was fixing the gun so it would fire when shot, but not actually at that moment in time a danger; the office was behind bullet proof glass which the officer pulled open to fire; failing to give a verbal warning before shooting; etc. These arguments proved insufficient to overcome a qualified immunity defense. The court concluded that there had been no constitutional violation and that the state law causes of action also failed for lack of sufficient facts to sustain them.

Naji v. Dearborn

6th Circuit – Arrest – Probable Cause – Qualified Immunity – Malicious Prosecution

In this case a Sheriff's deputy arrives at the scene of a single vehicle crash. The deputy checks the registration and finds the owner lives only a short walk away. The deputy proceeds by vehicle to the home of the owner, passing a young man walking away from the home and towards the crash site. The deputy knew that the owner had prior problems with DUI and when the deputy gets to the house meets the owner who tells him that her son was the driver and was on his way back to the crash site. She's drunk. She and the deputy converse under circumstances in which the deputy perceives that the son is a decoy and that she's likely the driver. She swears she's been on the phone for a couple of hours and phone records could prove it. Eventually, she tells him to get out of her house and that she needs to check on her son. As the deputy is leaving, he sees the woman begin walking towards the crash site. He orders to stop as being in an inebriated condition she could be a danger to others. She ignores the order and is arrested. Lower court finds no liability. Panel finds lower court erred on the question of probable cause to arrest, but finds for the deputy on qualified immunity grounds.

Jones v. Naert

6th Circuit – Tax Sales

This case arises from the mess created when the Michigan courts and the Supreme Court of the US concluded that the Michigan tax sale procedures violated the Constitution by allowing local governments to sell property for taxes and retain excess proceeds of the sales above the cost of the sale and the taxes owed and not return those proceeds to the owners. This suit sought class action status under Section 1983 which the lower court granted. The panel reversed by discussing the requirements for pleading a class action. The court wrote: "Federal Rule of Civil Procedure 23 governs class actions and sets forth several requirements a plaintiff must satisfy to maintain a class. Under Rule 23(a), a plaintiff must show (1) that the proposed class is so numerous as to make joinder impossible, (2) that there are common questions of law or fact, (3) that the plaintiff's claims are typical of the class's claims and (4) that the plaintiff, as class representative, will adequately protect the class's interests. For a suit like this, Rule 23(b)(3) also requires that issues common to the class "predominate over [those] affecting only individual members" and that the class vehicle be

"superior to other available methods for fairly and efficiently adjudicating the controversy."" It also noted: "The Supreme Court has emphasized time and again that "'it may be necessary for [courts] to probe behind the pleadings before coming to rest on the certification question,' . . . and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis,'" that the class fits Rule 23. Wal-Mart, 563 U.S. at 350–51 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982))." Here the panel concluded that the lower court did not engage in a rigorous analysis.

Bowles v. Sabree

7th Circuit – First Amendment – Labor – Unionization

The Cook County, Illinois Sheriff's Office was embroiled in a labor issue in which a level of supervisor called "commander" sought to be represented by a union. Management was opposed believing that this level of employee fell outside the class of employee entitled to representation. The issue had existed for some time. Two coalescing events occurred that brought the issue to the courts. An ALJ with the state department of labor concluded that the employees were entitled to representation and at roughly the same time the Sheriff's Office was hit with a huge budget shortfall that required a significant reduction in spending. Various solutions were developed including one that would eliminate all commander positions. This solution was favored by the county budget staff, but there were other options to address the shortfall and other options regarding the elimination of the commander level positions including allowing those employees to bump lower ranked employees thereby retaining employment but at lower levels. The Sheriff chose to eliminate the position entirely and several of the affected employees sued claiming that their positions were eliminated due to their exercise of their Frist Amendment rights to advocate for unionization. About three months after the jobs were eliminated, the state department of labor reversed the ALJ's decision on appeal, but this decision had no effect in changing the Sheriff's decision. The lower court concluded that the Sheriff acted for legitimate budgetary reasons rather than to retaliate for the exercise of First Amendment rights and concluded that no reasonable juror could disagree. In a 2-1 decision the panel affirmed. The majority discussed the budget issues, the lack of attacks on other unionized members and the fact that all commanders' positions were eliminated as opposed to those only union supporters, and that the county's budget staff preferred this option as it believed the department was top heavy in management. The dissent viewed this case as fact bound and required a jury's view.

Consolino v. Dart

7th Circuit – Sanctions

Stephen Eberhardt, an attorney representing himself *pro se*, filed a 102-page, 19-count complaint in federal court against the Village of Tinley Park, its officials, attorneys, and residents. The complaint primarily focused on an alleged scheme by the Village to prevent Eberhardt from making public comments at Village board meetings and on Village-related Facebook pages. Eberhardt also brought two claims against the Village's outside counsel, Patrick Walsh, and his law firm, alleging that Walsh was unlawfully appointed to his role.

The district court dismissed the initial complaint without prejudice under Federal Rule of Civil Procedure 8, noting that it was "so lengthy, repetitive, and jumbled" that it was impossible to

ascertain the relevant facts and claims. Eberhardt filed an amended complaint, which was also dismissed. Following the entry of final judgment, Walsh's attorney filed a motion for sanctions against Eberhardt under Federal Rule of Civil Procedure 11, arguing that Eberhardt's filings against Walsh violated his ethical duties and demonstrated a lack of due diligence.

The district court granted Walsh's Rule 11 motion and ordered Eberhardt to pay $26,951.22 in attorneys' fees. The court found Eberhardt's claims to be frivolous and brought with inadequate investigation, lacking subject-matter jurisdiction, injury-in-fact, and evidentiary support. The court also determined that Eberhardt had brought these claims to be a nuisance, based on his extensive history of filing lawsuits and complaints against the Village and its officials. Eberhardt moved for reconsideration, which the district court denied.

On appeal, Eberhardt challenged both the sanctions order and the denial of his motion for reconsideration. The Seventh Circuit Court of Appeals affirmed the district court's decisions, finding no abuse of discretion. The court agreed that Eberhardt's tactics were designed to harass Walsh and that he had brought claims he knew were meritless and suffered from fundamental jurisdictional defects. The court also found that a hearing was not necessary before issuing sanctions, as the record was sufficient to determine the need for sanctions, and Eberhardt had only challenged one of the two independent grounds for imposing them. Lastly, the court found no error in the denial of Eberhardt's motion for reconsideration, as there was no manifest error of law or fact to correct, and no newly discovered evidence presented.

Eberhardt v. Walsh

8th Circuit – SWAT – No-Knock – 4th Amendment

I'll admit I'm confused by this case as it is not entirely clear to me what were the specific complaints in the suit. As best I can tell, the major complaint is that by obtaining a no-knock warrant and having it served by a SWAT that somehow the 4th Amendment is violated. Short facts, Officers hear from neighbors about a possible violation of the drug laws at a specific house in the area. The officers get a CI to go in the house and buy cocaine. The officers detail these facts in the application for the warrant including that they searched the CI before sending the CI into the house to make the buy and searched the CI after. As might be expected, the application asserted that the CI was clean (but had cash) going in and had a bag of cocaine on exiting (less the cash). When no-knock warrant executed officers only find marijuana. The homeowner files suit for a violation of Section 1983 apparently on the basis as indicated. It seems some of the other allegations included claims that the application for the warrant was hearsay and should not have been included in considering a motion for summary judgment, that the statements in the affidavit were most likely not true as the Plaintiff challenged both the credibility of the CI and of whether the officers actually searched the CI. The lower court granted summary judgment to the officers and the city. The panel affirmed in what seemed a longer opinion than needed.

Davis vs. Little Rock

8th Circuit – Equity Training

A school district required employees to attend equity training. Based on the course, some found it offensive and due its mandated nature violated their First Amendment rights. In an opinion issued in September the panel concluded that the lower court correctly dismissed the case but erred in granting attorney's fees. The full court has determined to reconsider the case.

Read More Here

8th Circuit – Protests – Excessive Force- First Amendment Retaliation

The litigation involving protests over the death of George Floyd continue to pop up in the courts of appeal. This case involves a protest in Kansas City in which officers were called to urge protesters to disband once the protest turned violent. Protesters threw innumerable objects at the police including returning tear gas cannisters that had been sent their way. The Plaintiffs claim to have been in the process of following police orders to leave when one of the officers who was urging the protesters along fired two projectiles intended to skip along the ground towards the protesters. All agreed that the officer did not select the Plaintiff or fire directly at the Plaintiff, but fired in the general direction of the melee. Unfortunately, shrapnel from the projectile hit the Plaintiff in the eye causing the Plaintiff to lose sight in one eye. A more callous observer might say that once a protest turns violent and you don't leave, you're pretty much contributorily negligent, but that was not the direction of the case. Rather the question was whether the Plaintiff made out a claim of First Amendment retaliation which failed because: "Here, Stearns's First Amendment retaliation claim fails because, viewing the record in the light most favorable to him, he fails to demonstrate a causal connection between his injury and a retaliatory animus." *i.e.*, if you're not targeting an individual or a specific group you can hardly be said to be retaliating against "that individual or group." No excessive force because no proof that the force was intended to cause harm.

Stearns v. Wagner

9th Circuit – Group Homes – Sober Living Facilities – Zoning

The Fair Housing Act addresses issues associated with providing group living arrangements for the disabled. Generally, the friction arises between neighbors and group homes where the group homes provide services to the addicted. Fearing that a plethora of group homes for the addicted in a specific neighborhood creates a form of blight, cities generally try to impose some regulations so as to prevent the neighborhoods from beginning a downward trend into that blight. In this case the city imposed a requirement that group homes get a conditional use permit and that they meet certain separation requirements. The separation requirements generally tend to spread the group homes out throughout the community rather than have segregated neighborhoods seen from the outside as blighted or downtrodden. The panel concluded that the City's regulations did not violate the FHA. The case is interesting for the view of members of the panel that differentiated treatment to be in violation of the FHA that treatment must harm the people the Act intends to protect rather than benefit them. From the headnote:

Specially concurring, Judge Ikuta would hold that to establish a facial disparate treatment claim under the FHA and FEHA, a plaintiff must show that the protected group suffered unfavorable treatment compared to the unprotected group and not merely show that the protected group has been treated differently than the unprotected group. Concurring, Judge Forrest agreed with Judge Ikuta that a plaintiff should be required to prove adverse facially differential treatment as part of its prima facie case, but disagreed that a prima facie showing of unfavorable treatment is required under Ninth Circuit precedent.

The Ohio House, LLC v. City of Costa Mesa

9th Circuit – Mandates – Remand – Authority of Lower Court – Stay

I once had a dog that was quite an excitable creature. No matter what I did my command to stay seemed to fall on deaf ears. Somewhat akin to me and the dog, the 9th Circuit and the District Court got into a bit of a tussle over whether the District Court could stay a proceeding. In the case, the 9th Circuit had decided the matter and remanded the case for trial to the lower court. The parties agreed to ask for a stay while the City sought certiorari to the Supreme Court from the mandate. The District Court determined that it could not issue a stay as that would violate the mandate. On appeal, the panel concluded that it could not stay the mandate but that the lower court could stay the proceedings as requested.

Chinaryan v. City of Los Angeles

11th Circuit – Pleading – Incorporation by Reference -Qualified Immunity – BodyCameras

This case seems important as a resource for those facing claims in which the Plaintiffs refer to body camera footage. The facts in this case involve a person who police officers confronted and ordered to "drop the gun". The person, instead raised the gun and pointed it at the officers, who then shot and killed him. After the event the officers found that the gun was only a BB gun, but all conceded that the gun looked like a handgun. Suit is filed against the officers, etc. and as the court noted in a footnote included a claim captioned "Comprehensive Facts from Bodycam Videos and Reports." The lower court, over the objections of the Plaintiff, reviewed and considered the body camera footage. The panel affirmed noting that 11th Circuit precedent dealing with incorporation by reference informs: "Under the incorporation-by-reference doctrine, a district court may consider evidence attached to a motion to dismiss without converting the motion into a motion for summary judgment "if the document is (1) central to the plaintiff's claim; and (2) undisputed, meaning that its authenticity is not challenged." Johnson v. City of Atlanta, 107 F.4th 1292, 1300 (11th Cir. 2024)." The Plaintiff attempted to amend the complaint to include an ADA claim that the lower court concluded would not survive, so denied the request to amend. This too was upheld.

Swinford v. Santos

11th Circuit – Excessive Force

A VW Passat is stolen. Police and sheriff's deputies spot a VW Passat and begin tailing it. The driver and passenger are in the car. The car pulls into a driveway and a third passenger gets in the back. These are all teens. As the car pulls out of the driveway, the police have now blocked the roadway. The car, rather than heading away, backs out so it is headed towards the police vehicles. The vehicle moves towards the officers and the officers shout for it to stop. It does. The vehicle moves forward some more and the wheels of the car turn towards one of the officers. Over repeated shouts to stop the vehicle stops. It then starts up again and this time accelerates towards one of the officers who fires into the front windshield. The car continues toward the officer who now fires into the side windows. Two of the teens are killed. Suit is filed against a host of defendants, the officers, the deputy and the Sheriff. Summary judgment granted by the lower court. The appeal involves only the Sheriff and the deputy who shot the teens. The panel affirms and reviews in detail the body cam and other videos as well as expert testimony that described when the shots were fired in conjunction with what else was happening.

Baxter v. Santiago-Miranda