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FEATURED CASES

Constitutionally Adequate Notice: A Warning Slip on the Windshield Suffices for Portland, Ninth Circuit Holds

Grimm v. City of Portland, 23-35235 (9th Cir. Jan. 3, 2025).

The Ninth Circuit held that a warning slip placed on a car's windshield two days before towing provided constitutionally adequate notice under the Fourteenth Amendment's Due Process Clause. The court emphasized that the standard set forth in *Mullane v. Central Hanover Bank & Trust Co.* requires notice reasonably calculated to apprise interested parties of the action, balancing the interests of the state and the individual. By finding Portland's pre-tow notice practices sufficient, the Ninth Circuit reinforced that actual notice is not necessary and that a warning slip can strike the appropriate balance between municipal parking enforcement needs and individual property rights. The decision provides guidance to cities on constitutionally sound towing notice procedures and clarifies that failing to remove citations from a windshield does not inherently invalidate notice.

Background: Andrew Grimm parked a car on a street in downtown Portland, Oregon and paid for 1 hour and 19 minutes of parking using the Parking Kitty mobile app. Grimm left the car parked on the street for seven days without moving it or adding parking time.
Over those seven days, City of Portland parking enforcement officers placed multiple parking citations on the car's windshield for being unlawfully parked without payment and for failing to display current registration tags. On the fifth day, an officer added a red slip

explicitly warning the car would be towed if not moved. Grimm did not move the car, and two days later it was towed.

Grimm sued the City, alleging its procedures for notifying him about the impending tow were deficient under the Fourteenth Amendment's Due Process Clause. The district court initially granted summary judgment for the City. In a 2020 decision, the Ninth Circuit reversed, holding the district court applied the wrong legal standard. On remand, the district court again granted the City's motion for summary judgment. Grimm appealed.

Questions of Law:

1. Did the red warning slip placed on Grimm's car two days before it was towed provide constitutionally adequate notice under the Fourteenth Amendment's Due Process Clause and the standard articulated in *Mullane v. Central Hanover Bank & Trust Co.*?
2. Did the fact that the parking citations and warning slip remained on Grimm's car windshield undisturbed provide the City actual knowledge that its attempt at notice had failed, thereby requiring the City to take additional steps to notify Grimm?

Holdings:

1. Yes, the red warning slip placed on Grimm's car windshield two days before the tow, which explicitly stated the car would be towed if not moved, provided notice reasonably calculated to inform Grimm of the impending tow as required by the Fourteenth Amendment.
2. No, the fact that the citations and warning slip remained on Grimm's car windshield undisturbed did not provide the City actual knowledge that its attempt to notify Grimm had failed. The City was not obligated to take additional steps to notify Grimm.

Analysis: The Ninth Circuit explained that under *Mullane v. Central Hanover Bank & Trust Co.*, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." This standard requires balancing the interests of the state and the individual. Actual notice is not required.

The court noted its prior precedents in *Clement v. City of Glendale* and *Scofield v. City of Hillsborough* established that a ticket or similar document placed on a car's windshield can provide constitutionally adequate notice before a car is towed in most circumstances. Here, the red warning slip placed on Grimm's car two days before the tow explicitly warned the car would be towed if not moved. This provided notice reasonably calculated to alert Grimm.

The court distinguished this case from those like *Mennonite Board of Missions v. Adams*, where notice by mail was required before real property could be sold, emphasizing the different interests at stake between temporary loss of a car and permanent loss of real property. The court stressed that requiring the City to mail notice, call, or email in addition to the warning slip would strike the wrong balance between the state and individual interests.

Addressing Grimm's argument under *Jones v. Flowers* that the undisturbed citations and warning slip gave the City knowledge its notice attempts failed, the court disagreed. Unlike in Jones where the certified mail notice was returned unclaimed, alerting the government the notice was not received, nothing about the City's notice procedure required Grimm to confirm receipt. Absent specific information demonstrating notice was not received, the notice does not become inadequate simply because Grimm failed to remove the citations and warning from his windshield. The court therefore affirmed summary judgment for the City.

***Grimm v. City of Portland*, 23-35235 (9th Cir. Jan. 3, 2025).**

SHORT SUMMARIES:

4th Circuit – Wrongful Conviction – Collateral Estoppel – Emotional Distress

After serving 32 years in prison, the State released the Plaintiff on a writ of actual innocence. He sued for the wrongful conviction. The lower court found that he had not presented sufficient evidence of emotional distress. The lower ruled that collateral estoppel prevented the Plaintiff from relying on the recantation by the prime witness because the Plaintiff had argued in a Habeas proceeding that the recantation supported relief but was denied as being unreliable in that proceeding. The panel concluded that the Plaintiff's writ of actual innocence overwrote the earlier habeas proceeding, thus collateral estoppel did not apply.. Similarly, the panel concluded that the Plaintiff had presented sufficient evidence of emotional distress.

Washington v. Pelligrini

6th Circuit – Net Neutrality – Demise of Chevron

Frequent readers understand my limitations, so no need to explain, I'll just quote the court: "Using "the traditional tools of statutory construction," id., we hold that Broadband Internet Service Providers offer only an "information service" under 47 U.S.C. § 153(24), and therefore, the FCC lacks the statutory authority to impose its desired net-neutrality policies through the "telecommunications service" provision of the Communications Act, id. § 153(51. Nor does the Act permit the FCC to classify mobile

broadband—a subset of broadband Internet services—as a "commercial mobile service" under Title III of the Act (and then similarly impose net-neutrality restrictions on those services). Id. § 332(c)(1)(A). We therefore grant the petitions for review and set aside the FCC's Safeguarding Order." In so deciding the court recognized that previous reviews of earlier orders sustaining the FCC's actions in this area relied upon *Chevron* deference. As we know *Chevron* was overruled in *Loper Bright Enters. v. Raimondo,* 144 S. Ct. 2244, 2266 (2024).

In re MCP No. 185: FCC In the Matter of Safeguarding and Securing the Open Internet

6th Circuit – First Amendment Retaliation

Having lived in a small town, I can understand the dynamics that underpin what occurred in this case. The morale of town employees sank so low that the town brought in a consultant to investigate and recommend changes. At least one resident of the town had long suspected that the town manager's lack of supervisory skills and personality caused the divisiveness among the workforce. The resident gained access to the consultant's report which essentially confirmed the resident's position. At a public meeting the resident called for the manager's firing. The manager allegedly took umbrage at this and asked the police chief to pursue the resident for alleged criminal behavior towards the manager. The Chief refused and subsequently resigned. The manager placed an officer in the interim chief position. This officer sought to become the full-time chief and allegedly pursued the criminal claims against the resident on the manager's promise of support for the full time position. Ultimately, the police department convinced the DA to bring charges. The DA dismissed some of the charges in advance of trial and the resident was acquitted at a bench trial. The resident then brought suit against the police who were involved, the manager and the town. The lower court concluded that qualified immunity did not apply and refused to dismiss the complaint asserting that the claims as pled could make out a valid claim. Apparently, the allegations were fairly vague but on appeal the panel found them sufficient to survive a motion to dismiss. The Defendants sought to include several documents in support of their motion to dismiss, but the lower court refused to consider them at that stage. The analysis upholding this decision includes helpful discussion about judicial notice and how information outside the pleadings can be used to defend a motion to dismiss. Perhaps importantly, the facts asserted by the town manager to pursue the criminal charges occurred before the resident spoke out at the public meeting seeking the manager's termination of employment.

Learning point: This case arose at the pleading stage where facts alleged are to be construed in favor of the Plaintiff, so we need to bear that in mind. The allegations though remind us that we and our clients need to grow a thick layer of skin when we become the targets of resident complaints. Importantly, when considering to pursue a person for criminal charges or other sanctions, do not wait until the person publicly complains.

Blackwell v. Nocerini

8th Circuit – First Amendment Retaliation

In this case a non-partisan employee of the Missouri legislature was upset that the Assembly did not adopt a mask requirement during the Covid epidemic to protect its employees. Having failed to achieve accommodation for the employee's personal situation, the employee wrote to the elected leaders of

the Assembly to complain about having to work in an unsafe environment where masks were not mandatory. The day after emailing the complaint, the employee's supervisors fired the employee. Suit ultimately went to trial where a verdict in favor of the employee resulted in an award of punitive damages, compensatory damages and attorney fees. The panel upheld the judgment. The panel discussed the distinctions between a government employee's communications that when purely personal do not enjoy First Amendment protection and those that are made as a citizen which are protected.

Mayfield v. Missouri House of Representatives

8th Circuit – Excessive Force

The police were engaged in executing a search warrant on a home when the owners' son showed up with his girlfriend. Using the benefit of the handy camera feature on his phone the son attempted to interject himself into the proceedings and mentioned a few choice thoughts about what the police were doing and how they were responding to him. Eventually, after the officers had delineated a line across which he should not come, the son crossed that line. He was arrested and in his suit against the officers took great umbrage at the form and manner of his arrest. His claims were dismissed by the lower court. On appeal the panel agreed with all of the lower court's decisions except one involving claims that the officers had punched and beat the fellow while having him on the ground and restrained. The girlfriend claimed to have been "manhandled" by the police but was unable to convince the lower court or the panel that the police had actually done anything wrong. Once at jail, the Plaintiff was placed in an isolation chair for about 15 minutes. His claim about how being restrained in the isolation chair violated his rights failed as the court concluded that the Constitution does not prevent jail administrators from putting someone in a brief "timeout."

Cartia vs. Beeman

9th Circuit – Excessive Force

From the Court's headnote: "The officers responded to reports of a man walking around a residential neighborhood in the middle of the night with a "machete" or a "slim jim," behaving suspiciously and walking up to cars and houses. When they arrived, they attempted to engage Napouk for several minutes, but he refused to follow their commands and repeatedly advanced toward them with what the officers believed was a long, bladed weapon. When Napouk advanced upon the officers a final time with the weapon, coming within nine feet of Sergeant Kenton, both officers fired their weapons, killing him. Napouk's weapon turned out to be a plastic toy fashioned to appear as a blade." The Court's headnote synopsized the majority's analysis: "The panel held that the officers were entitled to qualified immunity from the Fourth Amendment excessive force claim. First, the totality of the circumstances based on the undisputed facts shows that Napouk posed an immediate threat to the officers at the moment they fired. No rational jury could find that the officers' mistake of fact as to Napouk's weapon, which objectively looked like a machete, was unreasonable. Second, as the district court determined, Napouk may have committed assault with a deadly weapon as the event unfolded by brandishing the object and refusing to respond to the officers' orders. Third, Napouk repeatedly failed to comply with the officers' orders to drop his weapon and to stop moving, and advanced toward the officers with the weapon. Accordingly, the officers' conduct did not violate the Fourth Amendment, but even if it did, they would

still be entitled to qualified immunity because they did not violate clearly established law." There was a dissent. The dissent agreed that the officers reasonably mistook the plastic blade for a real machete, but disagreed that Napouk posed a threat to the officers at the time of the shooting such that lethal force was justified especially reviewing the facts in a light favorable to the Plaintiffs.

Napouk v. Lvmpd

9th Circuit – Excessive fines – Code Enforcement

My subconscious tells me that Humboldt County California may be the absolute center of illegal cannabis growing in the United States. To address this local problem, the County adopted provisions to fine and otherwise address these illegal activities. Because the legal system provides relief to anyone, no matter their wrongdoing, residents of Humboldt County filed a class action claiming that the administrative penalties and fines imposed for the crimes violated the excessive fines clause of the Constitution. From the syllabus: "Pursuant to the County Code, illegal cultivation of cannabis can carry a daily fine of anywhere between $6,000 and $10,000. Once the County's Code Enforcement Unit serves a responsible party with a notice of violation ("NOV"), the party has ten days to abate all violations or face penalties, subject to an appeals process, during which the penalties continue to accrue. Plaintiffs contend that the County charges landowners with violations based on imprecise data, or on the conduct of previous property owners. The district concluded that because plaintiffs had yet to pay a fine, they lacked standing, the Eighth Amendment claim was unripe, and both the facial and as[1]applied challenges were untimely." The panel disagreed and found the Plaintiffs had standing and also found that in most instances the statute of limitations was not an impediment. As to the substantive result, I quote from the syllabus: "Turning to the merits, the panel held that plaintiffs alleged a plausible claim for relief under the Excessive Fines Clause. Plaintiffs alleged that the administrative penalties, which can reach millions of dollars, and the County's demolition orders are punitive, not remedial. They also plausibly alleged that the fines were excessive given that (1) at least some of the plaintiffs have been charged with violations that pre-date their occupation of their respective properties; (2) the violations were inaccurately charged or were the fault of previous property owners; (3) lesser penalties could accomplish the same health and safety goals; and (4) the alleged offenses caused no harm beyond a technical lack of compliance with the County's cannabis permitting regulations."

Thomas v. County of Humboldt

9th Circuit – Excessive Force – Qualified Immunity

From the syllabus: "Smith-Petersen and another police officer responded to a report of an attempted robbery with a knife. When they arrived, Singh held a knife to his own neck and asked the officers to shoot and kill him. He refused to drop the knife, and Smith-Petersen shot and seriously injured him. The district court held that although a reasonable jury could find that Smith-Petersen violated Singh's constitutional right, she was nevertheless protected by qualified immunity from Singh's 42 U.S.C. § 1983 suit because there was no clearly established law that would have put her on notice that her force was objectively unreasonable under the circumstances. The district court remanded the state claims to state court for resolution." The panel reversed.

Learning lesson: Until the state created danger argument gets traction under the Civil Rights Act, shooting someone who is arguably only a danger to him or her self will not overcome an excessive force claim and officers need to be taught this. These are cases where the argument for de-escalation should inform the result.

Singh v. City Of Phoenix