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State-Created Danger: Emboldening Accused to Continue Domestic Abuse Violates Victim's Due Process, but was not Clearly Established

Martinez v. City of Clovis, No. 17-17492 (9th Cir. Dec. 4, 2019).

The Ninth Circuit holds that, although police disclosure to a man accused of domestic abuse that his accuser has revealed past instances of violence, and offering supportive language to the accused, are affirmative acts which place the accuser in "state created danger," that fact pattern had not been clearly established as violative of due process.

Desiree Martinez (Martinez) and Kyle Pennington (Pennington) started living together in 2013 in Clovis, California. In May 2013, Martinez was at her cousin's house when Pennington arrived and became physically abusive. Martinez dialed 911 and took a taxi home. Clovis police officers were dispatched and were already there with Pennington when Martinez arrived, but Pennington was allowed to walk over to the taxi and warned her not to say anything to the officers, Martinez did confide to one officer that Pennington had abused her previously, but when the officer returned with a tape recorder and in full view of Pennington asked Martinez to repeat her statement, she was too intimidated to speak. After Martinez returned into the house, one officer, who had previously worked with Pennington in the Clovis police department, asked him what he was doing "with a girl like Desiree Martinez" and revealed that Martinez had spoken about previous instances of abuse.

The officer had received domestic violence training, and believed that Martinez faced potential risk if she stayed with Pennington that night. However, she did not arrest Pennington, nor advise Martinez of her right to make a citizen's arrest or obtain a restraining order, or the possibility of staying at a shelter. (As the Circuit noted in a

footnote, Section 836(b) of the California Penal Code states that "[a]ny time a peace officer is called out on a domestic violence call, it shall be mandatory that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest . . . This information shall include advising the victim how to safely execute the arrest.")

That night, Pennington physically abused Martinez.

In June 2013, Pennington choked, beat, suffocated, and sexually assaulted Martinez. Neighbors overheard the violence and called 911. An officer noticed various injuries on Martinez' arms and neck, and Martinez whispered that they had been inflicted by Pennington, who tried to smother her with a pillow. The officer believed she had probable cause to arrest, but a superior ordered her to refer the matter to the District Attorney instead of taking action. Again the officers did not inform Martinez of her right to make a citizen's arrest, offer her transportation to a shelter, or issue an emergency protective order. After the officers left, Martinez was again beaten and sexually assaulted by Pennington. He was arrested the next day, and a criminal protective order was issued. Martinez continued to live with Pennington after his arrest and was physically and sexually abused multiple times until September 2013, when she finally moved out. Pennington was eventually convicted of multiple counts of violating the criminal protective order and pleaded guilty to one domestic violence charge.

Martinez sued various officers and the cities of Clovis and Sanger, California, asserting claims of municipal liability under 42 U.S.C. § 1983 for denial of substantive due process and equal protection and liability against the officers for violating her right to due process under the state-created danger doctrine. Specifically, she alleged that "[w]hile there is no affirmative constitutional duty to protect a citizen from third party violence, when a state actor becomes involved and through her intentional actions worsens the citizen's situation and creates a danger worse or in addition to those faced by the citizen, that state actor has violated the citizen's substantive due process rights."

The district court granted summary judgment to the defendants on all claims.

On appeal the Circuit noted that, in applying the two-pronged qualified immunity analysis, the court has discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." While the Supreme Court has "warned against beginning with the first prong of the qualified-immunity analysis when it would unnecessarily wade into 'difficult questions' of constitutional interpretation that have no effect on the outcome of the case,'" it has also recognized that the two-step qualified immunity procedure "is intended to further the development of constitutional precedent." The Circuit chose to assess the first prong: whether a constitutional violation had occurred. Because Martinez alleged that the individual officers deprived her of liberty by affirmatively placing her at greater risk of abuse, her claims were rooted in the substantive component of the Due Process Clause.

Constitutional Violation: While the Due Process Clause is a limitation on state action, it is not a guarantee of minimal levels of safety and security, and simply failing to prevent acts of a private party is insufficient to establish liability. But there are two exceptions to this general rule—a special relationship may have been created between the plaintiff and the state, giving rise to a constitutional duty to protect. Or, the state may be constitutionally required to protect a plaintiff that it "affirmatively places . . . in danger by acting with 'deliberate indifference' to a 'known or obvious danger.'" Martinez argued the latter—that the state-created danger doctrine applied because the officers had affirmatively exposed her to a greater risk of a known danger. To succeed on this claim, she had to establish three elements: first, that the officers' affirmative actions exposed her to an actual, particularized danger that she would not otherwise have faced; second, that the injury she suffered was foreseeable; and third, that the officers were deliberately indifferent to the known danger.

Given the need for an affirmative act, the officers' failure to separate Martinez from Pennington or notify her of her citizen's arrest rights or options for shelter elsewhere—while a dereliction of duty--were not actions that created an actual, particularized danger. "In other words, [they] did not make the situation worse for Martinez." However, the evidence that one officer told Pennington about Martinez's testimony relating to his prior abuse, and stated to Pennington that Martinez was not "the right girl" for him was actionable. Here, the Circuit held that a reasonable jury could find that the disclosure provoked Pennington, and implicitly emboldened him to believe that he could further abuse Martinez, including by retaliating against her for her testimony, with impunity. And "[a]s a matter of common sense, the assaults Martinez suffered after the police interventions on May 2, 2013, and June 4, 2013, were objectively foreseeable." While the third necessary element, deliberate indifference, is "a stringent standard of fault" and requires a "culpable mental state," the likelihood of future abuse was so obvious that a reasonable jury could find that disclosing a report of abuse while engaging in disparaging small talk with Pennington constituted deliberate indifference to a known or obvious danger. Martinez had therefore demonstrated the three elements of state-created danger.

Clearly Established Right: However, Martinez was unable to pass the "clearly established" test. "'[C]learly established law' should not be defined 'at a high level of generality;'" rather, it "must be 'particularized' to the facts of the case." Stated otherwise, the Circuit said "[t]o deny immunity, we must conclude that every reasonable official would have understood, beyond debate, that the conduct was a violation of a constitutional right." Without binding precedent, the court must look to "whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts."

Martinez had cited a Second Circuit decision, *Okin v. Village of Cornwall-on-Hudson Police Department*, 577 F.3d 415 (2d Cir. 2009), as being factually similar. There, police had acted dismissively towards the female accuser, finding that her injuries appeared to be old ones and discussing sports with the alleged abuser while declining to arrest him. The Second Circuit concluded that a "reasonable factfinder undoubtedly could conclude

that defendants, by their affirmative conduct, enhanced the danger to Okin because they conveyed to Sears that he could continue to engage in domestic violence with impunity, and that defendants thus violated Okin's due process rights." While the Ninth Circuit had latitude to apply *Okin*, it declined, finding that *Okin*. has not been "embraced by a 'consensus' of courts," and noting that the Seventh Circuit has stated that *Okin* may be "in tension with" *DeShaney*.

The officers were thus entitled to qualified immunity, eliminating municipal liability as well. Martinez's experience could only serve as a bulwark for future Ninth Circuit abuse victims:

> We hold today that the state-created danger doctrine applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity. Similarly, we hold that the state-created danger doctrine applies when an officer praises an abuser in the abuser's presence after the abuser has been protected from arrest, in a manner that communicates to the abuser that the abuser may continue abusing the victim with impunity.

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(The Ninth Circuit also provides video footage of a January 2019 hearing in the *Martinez* case at

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