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LITIGATING SECTION 1983 FOURTH AMENDMENT CHALLENGES TO ARRESTS AND SEARCHES

*John R. Williams**

Honorable George C. Pratt:

Our next segment here is on litigating Fourth Amendment search and arrest claims. Our speaker is John Williams, a dedicated plaintiff's attorney. John is the attorney who gives municipal lawyers in the State of Connecticut fits. He has made important case law and we are delighted to have him here.

John Williams:

One of the realities that every trial lawyer knows is, whether one wins or loses a case has much more to do with the ability to make one's own particular side of the case viscerally appealing.

Now that presents an interesting problem when talking about force cases, where it is nice to discuss the "blood and gore and guts" and so forth. These are the factors that appeal to juries, rather than something a little more subtle like arrests, searches and seizures, because clearly from the plaintiff's perspective, one has to find a way to make these cases matter to juries.

The way to make simple arrest or search cases matter to juries, without violence, is of course, to have the kinds of cases or the kinds of clients the juries can identify with. Interestingly enough, that often is more frequently the case in arrest or search cases than it is in violence cases. The reason for that is that police officers are ordinarily somewhat less likely to assault people like your typical Long Island jury, than they are in an arrest situation.

For example, take a case like *Veiga v. McGee*¹ from the First Circuit in 1994. Here, the police arrested the passenger in an

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¹ 26 F.3d 1206 (1st Cir. 1994).

automobile.² He was a medical student arrested for the crime of not identifying himself when the police were in the process of giving a ticket to a driver.³ A jury can relate to a case like that. Another example is the 1994, Tenth Circuit decision of *Guffey v. Wyatt*, in Oklahoma. Apparently, people take basketball very seriously in Oklahoma. A police officer was watching a game and did not like the way the referee was making his calls, so he arrested him for not calling more fouls.⁴

The traditional Fourth Amendment⁵ law that has developed over the last several decades is applicable in the Section 1983 context. In fact, it may be more applicable than it is in criminal court because the Fourth Amendment has been redefined almost to the point of extinction in the criminal law context.

The Fourth Amendment retains its vitality in Section 1983 because the exclusionary rule has become less and less a reality in people's lives in the criminal context. It has become more of a reality in the civil context.

This of course forces one to address questions like collateral estoppel and *Heck v. Humphrey*⁶ issues, where, if one has taken a hit from the court in the context of a criminal case, how can one, nevertheless, have a viable Section 1983 case? The answer is, of course, that a ruling at the trial level on a suppression motion has no collateral estoppel effect at all unless it has been appealed.

² *Id.* at 1208.

³ *Id.* (the officers testified that Veiga was "ranting and raving" and protesting that the police had no right to ask him any questions).

⁴ *Id.* at 870 (Officer Wyatt was hired to provide security at the basketball game and believed that if the referee would keep more control over the game he would be able to control the intense crowd).

⁵ U.S. CONST. amend. IV. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

⁶ 997 F.2d 355 (7th Cir. 1993) (holding that an inmate's § 1983 claim was stayed by the doctrine of equitable tolling, when it was dismissed for failure to exhaust state remedies).

If one had, in fact, ultimately a good result in the criminal case, that is, losing a motion to suppress, but winning the criminal trial, then there is no collateral estoppel effect whatsoever from that trial judge's ruling. This is so because it could not be appealed. However, the ability to appeal that ruling in most States is a key component of collateral estoppel. The federal courts adopt state law in formulating its collateral estoppel rules. So, one must always look to state law in a particular district.

There are certain areas in Fourth Amendment law that are particularly interesting, and exciting these days. One of these issues comes up in the situation where probable cause exists at the time the arrest is made, but somewhere along the line disappears. This occurs because a police officer may acquire additional information on the way to the station house or at some point in the process, which when added into the picture, removes probable cause. When that time arrives, a police officer has an obligation to do something.

If the police officer does not do anything about that newly acquired information, and the result is that a person remains in custody or continues to be prosecuted beyond the point where he or she should be, then that is actionable as a Fourth Amendment violation. For example, *Rogers v. Powell*,⁷ in the Third Circuit last year, involved a person who had been arrested with what everybody agreed was probable cause.⁸ However, the police continued to hold that person at the scene of the arrest after having acquired additional information that made it clear that the person was innocent.⁹

Ultimately, in *Powell*, there was no formal arrest, but the detention went on for a period of time longer than it should have. That was held to be actionable by the Third Circuit in *Rogers*.¹⁰ In

⁷ 120 F.3d 446 (3rd Cir. 1997).

⁸ *Id.* at 451.

⁹ *Id.* at 452 (the arresting officers were informed that the prison could not locate an outstanding warrant or detainer for Rogers' arrest, however, they were unclear as to whether as to whether an outstanding warrant or detainer for Rogers' arrest existed).

¹⁰ *Id.* at 456.

other words, the old police expression “one cannot un-arrest somebody” is not true. One can and one must.

Similarly, after the prosecution has been initiated by an indictment, or through the filing of an information, and the case is in court, a police officer who acquires exculpatory evidence of innocence, has a duty to turn that evidence over to the prosecutor. If the officer does not, and the result of the failure to do so is a prosecution that continues beyond the point where it should have, then attorneys fees would have run up beyond what they would have been and incarceration would have run longer than it might have. This situation is actionable as a Fourth Amendment violation.

Now, is incarceration necessary in an arrest context before there is a Fourth Amendment issue? That often comes up in the case of a written summons. This commonly occurs where an officer, instead of taking the person in, simply issues a street summons, typically for a minor crime like breach of the peace.

In the Ninth Circuit decision of *Washington v. Lambert*,¹¹ the Court held that when an individual is detained by police at gun point and is forced to lie on the ground while being searched, this individual has an actionable Fourth Amendment violation. However, it will be actionable only if formal charges are not brought.¹²

An area of great interest to practitioners, in the Fourth Amendment arrest context, is malicious prosecution. Malicious prosecution is now well recognized as a separate cause of action under the Fourth Amendment. This is supported by the United States Supreme Court decision of *Heck v. Humphrey*.¹³ Currently, all of the circuits recognize malicious prosecution as a valid cause of action under the Fourth Amendment. This can be extremely important for a couple of reasons. For example, there are cases

¹¹ 98 F.3d 1181 (9th Cir. 1996).

¹² *Id.* at 1194 (Judge Posner reasoned that it would be a sad day for the United States if two African-American men who only somewhat resemble a very general description of men suspected of robberies in the same general area of a major metropolis can for that reason alone be subjected to the terrifying and humiliating experience that Washington and Hicks endured).

¹³ 512 U.S. 477 (1994).

such as *Hygh v. Jacobs*,¹⁴ which have held that the damages one can get for a false arrest are cut off at the point where there is an independent, intervening cause.¹⁵ The independent, intervening cause, typically, is the magistrate's finding of probable cause to go forward, or a grand jury's turning of an indictment. If it is malicious prosecution, malicious in that the officer makes false claims that cause the prosecution to take place, then the damages continue to accrue, because that is the result of what the officer has done.

The typical situation, of course, is the *Franks v. Delaware*¹⁶ situation, which has been widely applied in the cases of arrests and cases of searches and seizures.¹⁷ The other great advantage and great interest in the malicious prosecution cause of action is the late accruing statute of limitations. This has often been a lifesaver for plaintiff's attorneys, and it is also something that is beloved by our malpractice carriers. This is because many prosecutors, having what they think is a bad arrest, will delay the case in court if they cannot get a release.

Essentially, the courts that have constitutionalized malicious prosecution under the Fourth Amendment have adopted all of the common law rules, including the favorable termination rule.

A situation can become dangerous if the courts consider the termination of a prosecution to be favorable in the sense that it is necessary to support a cause of action for malicious prosecution. That is a tricky question because here again the courts, in general, look to state law. The laws of the states vary widely as to what is or is not a favorable outcome.

For example, in New York State, the common law has developed in a way that is very harsh. Under this development, not every dismissal is considered a favorable termination. Now this has created an interesting problem in the Second Circuit because the

¹⁴ 961 F.2d 359 (2d Cir. 1992).

¹⁵ *Id.* at 366.

¹⁶ 438 U.S. 154 (1978).

¹⁷ *Id.* at 172. The Court stated, "if the remaining content [of the search warrant] is insufficient, the defendant is entitled under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue." *Id.*

Second Circuit is so dominated by New York judges that they do not notice the laws of other states. Connecticut law would be one example. These Second Circuit judges have applied many aspects of New York law to all of the states in the Second Circuit. Nevertheless, as long as one is dealing with a straightforward termination of prosecution for which there is no trade law, then even in the Second Circuit that ordinarily is enough.

In the area of searches and seizures, it is not necessarily the case that one has to win the underlying criminal case in order to have a cause of action for illegal search and seizure. For example, one could imagine a circumstance where evidence might be suppressed, and yet, there is enough evidence left to convict. If the search is nevertheless illegal, at least theoretically, there should be a cause of action against the officers who perpetuated that illegal search and seizure.

Of course, as a practical matter, lawyers know that a convicted plaintiff is not a sympathetic plaintiff and so the reality of the situation may be that one is not going to get very far with a case like this. Instead, one is going to want to look long and hard at those cases before deciding to take it on.

There was a theory that developed in the Second Circuit in *Singer v. Fulton County Sheriff*.¹⁸ The theory focused on the next area of discussion, loss of liberty. *Singer* stood for the proposition that if one were to constitutionalize malicious prosecution under the Fourth Amendment, then there had to be a loss of liberty element involved in order to do that.¹⁹

For a brief period there were cases that suggested that when one had simply a street summons, although that might support a false arrest case, it would not support a malicious prosecution case because that was not enough of a loss of liberty. However, the courts now have come to understand that really is not so. The loss of liberty involved in even the street summons is sufficient to bring it up to Fourth Amendment standards. The Second Circuit recognized this in *Murphy v. Lynn*,²⁰ which was decided in 1997.

¹⁸ 63 F.3d 110 (2d Cir. 1995).

¹⁹ *Id* at 117.

²⁰ 118 F.3d 938 (2d Cir. 1997).

Murphy eliminated the loss of liberty element as one of the elements that must be established in order to have a malicious prosecution case.²¹

One of the elements that one must have for malicious prosecution is malice, which is one of the traditional elements of common law.

How does one prove malice? Malice is ordinarily proved simply by the absence of probable cause. So, if there is a lack of probable cause, then one can assume that there exists a malicious prosecution cause of action.

It is well-known that the Supreme Court has granted certiorari in *Wilson v. Layne*²² and *Berger v. Hanlon*,²³ two cases which come out on opposite sides in the reasonableness issue of bringing TV crews into a household when a search is being conducted.

In the search context, the unreasonable search is the most interesting from a plaintiff's point of view. The typical search of a home will be executed with the assistance of a warrant. If one has a search warrant the only time one is going to be able to have a viable cause of action under the Fourth Amendment is if there is a *Franks v. Delaware*²⁴ circumstance. But suppose that the search is

²¹ *Id.* at 947 (the court stated "In order to state a claim for the tort of malicious prosecution under New York State law, a plaintiff must prove '(1) the initiation or continuation of a criminal proceeding against the plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as motivation for defendant's actions.'" *Id.* (citing *Russell v. Smith* 68 F.3d 33, 36 (2d Cir. 1995)).

²² 141 F.3d 111 (4th Cir. 1998). In *Wilson*, the plaintiffs brought a Section 1983 action against federal and state law enforcement officers. Plaintiffs alleged constitutional violations stemming from the officers' entry into their house in an attempt to arrest their son. The Court of Appeals held that plaintiffs did not clearly establish their Fourth Amendment right to avoid an unreasonable search and seizure resulting from the officers' allowance of member of the media to record the execution of the arrest, without plaintiffs' permission.

²³ 129 F.3d 505 (9th Cir. 1997).

²⁴ *Franks*, 438 U.S. at 156. ("[W]here defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to finding of

valid. If the search is valid, one may nevertheless have a good cause of action based on the manner in which the search was carried out.

The reasonableness of a search is always at issue when the police are either in one's home or otherwise conducting a search. Reasonableness is ultimately determined by the jury. However, there are judges who want to substitute their judgment for the jury, and many of them will get away with it.

Typically, the case a plaintiff's lawyer is going to want, is the case where the police come in and they do not find anything incriminating. The search itself may have been based on probable cause, but they trashed the house or they abused the occupant.

There are cases which have addressed the searches of bars, or other places of public accommodation, which may be conducted pursuant to a warrant, however, everybody still gets detained. Can that be done? There is authority that stands for the proposition that even if there is a warrant that specifically authorizes the police to detain or search everybody on the premises, then that is so plainly invalid that even a qualified immunity defense would not apply. The reason is because it is almost by definition a general warrant, and general warrants have been prohibited since the colonial era.

Also, no one could reasonably think that it is legitimate to go in with the purpose of searching one particular place and searching everybody else who is involved. Similarly, these kinds of abuses of people who are present on the premises are almost always actionable.

A big problem for plaintiffs in that kind of case is getting past the summary judgment motion. This is because too many judges have had most of their experience in the Fourth Amendment area in the context of criminal cases. These judges are used to denying the motion to suppress and saying basically anything goes in the war on drugs, or anything goes in the fight on crime. It is the lawyers' job to educate the judiciary. Lawyers must educate through the use of the language, as well as through the use of vivid examples of the horrors that clients experience, as well as educating on a more

probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.").

personal note. When these issues are personalized, it is easier for people to relate to what is going on around them.

This became true watching the President of the United States being subjected to grand jury abuse. Suddenly, the realities of grand jury abuse came home to the people. That kind of theoretical issue suddenly became real. The same can be true, and often is true, in Fourth Amendment litigation.

In a Second Circuit decision called *Golina v. City of New Haven*,²⁵ a fellow was arrested and prosecuted on a warrant charging murder.²⁶ After lengthy litigation, it developed that exculpatory information known to the police had been omitted from the warrant affidavit.²⁷ The police did not lie in the affidavit, there were no falsehoods, but they created a false impression by withholding exculpatory information.²⁸ The prosecution went on for many years, and eventually the case was dismissed.²⁹ At that point, a malicious prosecution issue arose, and a suit was filed under Section 1983 on a *Franks v. Delaware* claim.

In what way had *Franks* been violated? *Franks* had been violated by the failure to include known exculpatory information in the warrant affidavit. The Second Circuit has held that the omission of exculpatory material from a warrant is a valid Fourth Amendment cause of action.³⁰ This is one of the very interesting and exciting areas in which the law of search and seizure, as well as arrest, has been going.

More and more cases arise where police, after learning the lesson about the warrant requirement, acquire warrants in ways that are not legitimate, honest or straightforward. Why does that happen? Maybe it is because that is the way police officers are trained.

²⁵ 950 F.2d 864 (1991).

²⁶ *Id.* at 866.

²⁷ *Id.* at 867.

²⁸ *Id.* at 871.

²⁹ *Id.* at 866.

³⁰ *Id.* at 871. "Intentional or reckless omissions of material information, like false statements, may serve as the basis for a *Franks* challenge." *Id.* (citing *United States v. Campino*, 890 F.2d 588, 592 (2d Cir. 1989)).

There were a lot of cases in earlier years where courts have held that police did not have to include all of the information in their warrant applications, but that is no longer the law. Unfortunately, some police officers think that it still is the law.

Also, qualified immunity has come to play a significant role in this area, much to the dismay of those individuals who represent plaintiffs. Some also hold the opinion that qualified immunity, in the areas of both search and arrest, essentially is a reduced or watered down version of probable cause. In other words, if probable cause is held to be absent, then the qualified immunity question becomes: could a reasonable, properly trained policeman have thought that there was probable cause?

One of the interesting things is that in some circuits, the courts have recognized the intellectual dishonesty of watering down probable cause because, probable cause itself, as it has been defined over the years, has an element of reasonableness built into it. Further, in some circuits, with the exception of the Second Circuit, if one has established the absence of probable cause then that seems to be as far as one has to go.

It is important to remember that to the extent that one is dealing with qualified immunity on a summary judgment motion, all one has to do is have a genuine dispute of material fact and one is going to get that case from the judge. Once that case goes to the jury all of the means used by lawyers is essentially evaporated, and it is a question of the jury doing the right thing, which is of course the genius of the jury system in a democratic country.

Finally, Fourth Amendment cases are not as tough in the Section 1983 context as they are in criminal court. They have the ability to appeal to the hearts of jurors rather than just to their minds. They are cases that can be won and significant verdicts can be obtained.