

Short Circuit 140

Anthony Sanders 00:07

Hello, and welcome to short circuit, your podcast on the federal courts of appeals. My name is Anthony Sanders, I am the director of the Center for Judicial Engagement at the Institute for Justice. And with me today are two Institute for Justice attorneys, Wesley Hottot and Diana Simpson. We're going to start with Diana today, talking about a case out of the Eighth Circuit, which I think could be subtitled, "I shot the sheriff, too bad I was the deputy."

Diana Simpson 00:35

Thanks, Anthony. This Eighth Circuit case is one of those where it's a relatively straightforward legal principle. But it's always interesting to read about but then the facts are just absolutely wild. And so it's a fun one to talk about. But this is coming out of Christian County, Missouri, which is in the southwest corner of the state. And so they had a sheriff for the county who ended up pleading guilty to embezzling \$50,000 from the county, he had recorded department finances in a paper ledger with a pencil to the tune of \$4.6 million. And overtime was able to embezzle a good chunk of change from that. He ends up resigning from the sheriff's office, and he spends about a year in prison. And in the interim, he had stockpiled about three tons of food in the county jail basement. And so he did this to prep for the "End Times." And so he goes to jail, they kind of figure out what all they have to fix following this guy in office. And then there's a new election for Sheriff and there are four candidates who end up running. And there are kind of two main candidates Cole and Mills. And so Mills had already been working at the sheriff's office, he was the only internal candidate. And so he had the support of a bunch of the employees, including deputy sheriff's Curtis and Bruce who had campaigned for him. They were both pretty vocal about the fact that they really wanted Mills to win. Unfortunately for them, Cole ends up winning, and the day that he assumes power, he fires the two of them. And so they end up suing and saying that this is a violation of their First Amendment rights. And it is in retaliation for their political speech and their political activity. Normally, government cannot fire or demote an employee because of their support of a particular political candidate. They can't fire employees because of their political affiliation, unless it's a job requirement. And that exception ends up making a lot of sense, because for example, you've got politicians who hire staff, and they likely ought to share political affiliations. But that's really the exception, the general rule is that government can't fire employees because of their politics. So the test that the circuit talks about is whether there are these positions are confidential or

policymaking positions for which political loyalty is necessary for effective job performance. So the court goes through that and says, you know, in Missouri deputy sheriffs are the alter egos of the sheriff's. The sheriff's are elected, the deputy sheriffs are at will employees that are holding the office at the pleasure of the sheriff. And the deputies aid the sheriff in discharge of his duties, and they have all the powers and may perform any duties that the sheriff does. And so because of those elements, the deputy sheriffs are the alter egos of the sheriff. And so the sheriff is allowed to fire them, because they need to have this same political affiliation. So that, you know, the sheriff is going out and has, you know, all of his ducks in a row as it were. And so because Cole was allowed to fire them, he wins on the constitutional claims. And then the county who the deputies had sued as well, also wins. Because, you know, there's no constitutional violation here. And so it's kind of an interesting conversation, I think about, you know, public employees and their First Amendment right in the scope of them, because I think for most people, you wouldn't necessarily anticipate being fired for having a particular political affiliation. But in this circumstance, these sheriffs or these deputy sheriffs were and so they were out looking for another job afterward.

Anthony Sanders 04:10

And Diana, I totally understand if you know, you're say a spokesperson for a politician. I think I remember back in in First Amendment class in law school, the example given was the President's press secretary, the President's press secretary came out and said, I totally disagree with this policy decision the president just made, but you know, I'll take some questions if you want, that person could be fired and there would be absolutely no First Amendment that defense to that. Deputy Sheriff, it seems that I mean, they're with the sheriff. They're part of his team, but their job isn't really speaking. I mean, it's part of their job, but most of their job is you know, arresting people and stuff that sheriff's do. So what is like kind of the middle range between those two, you know, examples and then a normal public employee. And did the court make any what allowance that the court make for that?

Diana Simpson 05:08

You know, I think because of the particular role of the deputy sheriff here, and the relationship between the deputy, the deputy sheriff and the sheriff, I think that's kind of where this rule is coming from. Because there's no real distance between what the sheriff is empowered to do by law and what the deputy sheriffs are empowered to do. They share the same powers and the same duties. And so in some ways, I think it makes sense for an elected official who has these underlings who can do all the same things as the official, and then for whom that the official is responsible, that they would then have to at least be loyal. And I think part of this might come out of, you know, the history of sheriffs in the

United States, we've had sheriffs for a very long time. It's kind of a peculiar job, in the sense that you have these police officers, but they're elected. And so it ends up being a very kind of different relationship in law enforcement than this, like neutral enforcement that you might otherwise expect.

Anthony Sanders 06:08

And there's a bit of a survey, it seems like this might happen a lot from like, there's a discussion in North Carolina law and a different Fourth Circuit case and in some other state, does it seem like this is pretty standard? Is it really specific as to what your state actually has you do?

Diana Simpson 06:26

It seems, perhaps both. It does seem to be a pretty standard outcome given, like I said, the particular roles of the deputy sheriff and the under law, what they are entitled to do in relationship with what the sheriff is entitled to do. You know, but this does seem to be a pretty standard outcome. I think there are perhaps a lot of cases about this, because people don't like to be fired for what they perhaps don't see as a political job. It's not this, you know, presidential spokesperson or whomever, like the example that you gave this is, you know, these are people who are out perhaps just enforcing the law, and they don't see it as a political entity. And so they end up suing, and then you just, it really ends up becoming a question of state law, what kind of roles are coextensive and, and from there? What is the difference? What is the daylight between those two particular roles?

Wesley Hottot 07:17

It seemed to me that the key for the court here was that Missouri State law made the deputies effectively sheriffs in and of themselves, they could step in and exercise all the powers of the sheriff. They could be made sheriff in an instant. So it is a bit like, you know, the Vice President criticizing the President's policies.

Anthony Sanders 07:39

Yeah. And one thing that I and I guess this is just a part of how these positions work, but one thing I thought it was interesting in the in the facts was that as it seemed likely that the one who won was going to win, people in the sheriff's office started saying things like, "Oh, we got to, we got to get ready for this, this guy coming in, I'm going, to you know, make sure that I'm seeing as part of his team," but it seemed like for the two plaintiffs, they were so all in for, for the person they were supporting that, you know, they didn't really have that. That option kind of reminds me of the scene and death of Stalin when the Politburo are all building and they look at each other's hands as they're going up to make sure that

the votes unanimous, and they're not on the wrong side. But I guess these guys didn't, unfortunately, didn't have that option.

Diana Simpson 08:31

I think it's probably challenging for someone to kind of switch sides after they've gone around within the sheriff's office and told their co-workers that if you elect this particular candidate, you're trading one crook for another. That's a that's a quote from the case. And I think that's probably a little bit hard to walk back even if you tried.

Anthony Sanders 08:50

Yeah, that would be some interesting exercise of your free speech rights, I think to get out of that one. Well, from free speech, I think we'll move on to another fundamental right, and it's basically my read is the right not to be beaten up. Wesley, could you discuss that right for us?

Wesley Hottot 09:09

Sure. This case is Wright, that's with a W, v. the city of Euclid. And yes, for those lawyers out there, wondering this is the same. Euclid that is in the famous village of Euclid v. Amber case that gave us Euclidean zoning. Just an update on the history of that little village since the 1926 decision. In Euclid v. Amber. They've become a city and did so in the midst of the Great Depression. So now it's Wright v. City of Euclid. The panel here is unanimous with Judge Bush writing, no relation to the Bush family. And it starts, his opinion starts with this great sentence "that this appeal involves a Chris Rock video and a cartoon but it is no laughing matter." From that colorful sentence we hear the sad story of Lamar Wright a man, a black man, who pulled up to a friend's house and spoke with him from the driveway. Friend stayed on the porch didn't approach the vehicle. Mr. Wright backed away and drove off. Two plainclothes police officers then started following him. They had been watching his friend's house on suspicion of drug activity. And after he allegedly failed to use his turn signal twice, they initiated a stop. Now, he complied with the officers' request to stop. I think he'd actually pulled into someplace to write a text message. And as he glanced up from his text he saw in his mirror two black clad individuals with guns drawn rapidly approaching his car. He thought he was about to be robbed, put the car into reverse, and backed up a couple of feet before he looked at the other sideview mirror and saw a badge and heard the officers yelling "shut off the engine, stop the car." He complied. You can sort of imagine what happens next. You know the officers open the door, order them out of the vehicle. They didn't know at the time that Mr. Wright had recently undergone surgery for die ... I knew I was going to mess this up. Diverticulitis,

Diana Simpson 11:32

Diverticulitis.

Wesley Hottot 11:33

Exactly. I had it earlier, thank you. And he had a colostomy bag attached to his stomach. So this made it difficult for him to get out of the car. And as one officer is grabbing on to his left arm and pushing it behind him. He's using his right arm to try to press on the center console and get out of the car. This is interpreted by the other officer as an attempt to grab some sort of weapon, resist arrest. And at close range. He sprays him with pepper spray, the moment they pull this guy out of the car, they throw him onto the ground and tase him. And once they realized that he had this colostomy bag and could see blood coming out from the surgical wound. They called it ambulance and got him to the hospital. At that point, Mr. Wright was supposedly under investigation for buying drugs. And so the officers wanted an X ray. Mr. Wright declined saying like you know, I'm not giving consent for this because I have recently had surgery and shouldn't have the radiation exposed to my body. And the officers became very angry and demanded a CT scan. The hospital did the right thing here and consulted lawyers and refused to perform the exam without a warrant or Mr. Wright's consent. And the officers further angered took him to their police station, booked him, impressively his cousin comes 10 minutes later with the needed bond to get him out. But they won't release them. And they won't release them because they want Mr. Wright to undergo a body scan at a different prison, which of course it takes several hours for them to get him to. In all, he's in detention nearly 10 hours, four hours extra after posting bond. And he sues the city of Euclid and these two officers for excessive force, false imprisonment, intentional infliction of emotional distress, and a few other sundry claims. The District Court holds and is sort of the familiar qualified immunity holding that these officers can't be sued. And the city can't be sued under Monell because there's no clearly established right not to get roughed up by the police in this way. They reasonably thought he was resisting arrest. They didn't know that he had this injury that would lead to him being awkward trying to get out of the car pressing on the console and the like. And therefore, Mr. Wright was just out of luck in terms of damages under federal law. However, the Sixth Circuit unanimously reverses that decision. And I think in a very careful opinion walks through its reasoning for that establishing that it is clearly established law that number one, when you don't arguably have probable cause to think someone committed any crime other than failing to use their turn signal, you're not constitutionally allowed to approach that suspect with your gun drawn and you're not allowed to pepper spray that person at close range when a jury could reasonably conclude that you're not resisting arrest, and you're not allowed to tase that person, when a jury could reasonably conclude that you

weren't presenting some sort of threat to the officers, they were also troubled by the fact that in contravention to Ohio law, Mr. Wright wasn't released upon the payment of his bond. The justification for this continued drug investigation being nothing more than his proximity to a house that was under suspicion, there's no transaction between these two individuals, as he's sitting in the driveway initially, really broke the chain of the officers' legal theory that, you know, they thought he might have drugs, they thought he might have a gun, therefore, they had the right to essentially beat the heck out of this guy. So from the qualified immunity ruling, the court moves on to the question of can he sue the city of Euclid, and concludes that he can. Why? Well, in the course of this case, a couple of interesting things came out about how police are trained in the city of Euclid. They're trained by the man who reviews all of the excessive force claims once you're on the force. He's never found the use of force to be excessive. And he didn't think that the officers in this situation had done anything wrong. But when he's training those same officers, his program the standard PowerPoint, includes an extended Chris Rock video called "how not to get your ass kicked by the police." Where in, you know, Chris Rock, mockingly of course, is saying things like, we all know what happened to Rodney King. But Rodney wouldn't gotten his ass kicked. If you just followed this simple tip: when you see flashing police lights in your mirror stop. Everybody knows that if the police have to come and get you, they're bringing an ass kicking with them. The panel is also troubled by this image that really begins the PowerPoint, Euclid Police Department defensive tactics training. It depicts a riot clad officer standing over like a clipart citizen with no weapons or anything shielding themselves being beaten with a baton. And it says "protecting and serving the poop out of you."

Anthony Sanders 17:22

I have to say, Wes, I didn't even get what that even the joke was there getting at? Do you it just seems utterly bizarre?

Wesley Hottot 17:33

Well, to me, it seems juvenile in every way. I mean, it's taking the sacred sort of motto of police everywhere that you know, to protect and serve, and attempting to make a poop joke out of it. It's dumb. It's especially dumb, if you're self aware, legally enough to know that this sort of stuff comes out and discovery and excessive force claims. And I think what these really outlandish facts demonstrate is how hard it is to win against qualified immunity, how hard it is to establish that the police have used excessive force against a person under our qualified immunity framework that requires the law to be so clear that really it's unmistakably obvious that you shouldn't beat the crap out of people. And I think that's led to a lot of the problems that we have in policing today. I mean, I think the panel here not only

gets this right, but lays out his scholarly opinion that's going to be difficult to attack any further appeal. So, you know, they get it right here, but they do it based on what seems like really exceptional facts, and it would be nice to seek the Supreme Court. Well, I say nice. I mean, I think it's essential for the Supreme Court to reevaluate the qualified immunity doctrine. So it doesn't take this much for a person to get to a jury, you know, jury should be deciding whether police have used excessive force, not courts.

Diana Simpson 19:18

One of the things that I think helped Mr. Wright in this instance was that he, the police were wearing body cams in this particular incident. And so, you know, I know that we've talked about them quite a bit on Short Circuit over the in the past, but, you know, body cams are really proliferating in a way that, you know, they help protect the police against people who are making perhaps spurious claims of abuse and they also protect the public who are saying that police are you engaging in harmful activity and where in the past perhaps the courts were much more willing to just accept at face value, whatever the police were saying, you know, body cams are now leading the way and having the court really be able to review what actually happened. And so, you know, in here, the court goes through the body cam footage and what all happens. And, and one of the one of the things they say is that, you know, as the as the police officer is engaging in this, you know, in this activity, after he pulls Mr. Wright out of the car, and they had called the ambulance, they then start making these self serving statements suggesting that he was reaching like he had a gun and that they were afraid that he was going to shoot them. And they were clearly trying to create a, an essence a paper trail, or some kind of something they could point to later and say, Well, you know, he was clearly doing something that put us in harm's way. And so we were allowed to use the extent of the force that we did.

Anthony Sanders 20:47

And I'm no expert on Monell claims on proving that, you know, municipality needs to be liable along with the officer. But Wesley it struck me that the discussion, the Monell discussion here, where they talked about those two colorful examples that you gave, it wasn't terribly extensive. The court, you know, gave those examples and said, "Look, there's something that smells here," which I'm guessing in most cases, it isn't that broad that short, not brusque, but that short of an analysis if the city is going to lose, but I think that the officers said, did so many wrong things. You know, I think earlier you listed, you know, they did this they did this, it was like five different things that were just clearly not good police practice, that it's obvious that in less these were, you know, absolutely rogue cops, that this is indicative of the entire department because they were always rubber stamped by their supervisor. And that's their

own behavior, indicted the police department, not the police department's own tactics. Do you have thoughts on that?

Wesley Hottot 21:59

Well, I think that's true, although the panel's careful to point out that they're not making the Monell analysis as to the city turn on what these officers did, or what officers examples of what officers have done since this incident, because they're hemmed in by Supreme Court precedent, they've got to look backwards as to what, you know, what's going on before this incident. And the officers and some of their supervisors just made some damning admissions, for example, asked in deposition: "if protecting and serving the poop out of you doesn't mean that officers should wantonly beat people. What does it mean?" And the supervisor apparently said to the effect, like, "I can't think of anything else it could mean." And the officers themselves, you know, acknowledged that at certain key junctures that, you know, they weren't concerned about, or that they didn't have probable cause, for example, to believe that he had purchased drugs, and yet nevertheless, booked this as a drug related investigation, leading to this extra detention and scans of his body that he didn't want and such. The Monell analysis here, I think, is short, because the lawyer being on the plaintiff side of this case appears to have been very good. They uncovered some pretty damning facts and admissions from the city. You know, what was going through my head Anthony was, I was surprised the city even turned this stuff over and discovery. I mean, I'm sure the rules required it. But we've had cases where, you know, we suspect that there's more of a policy and practice that we might be able to show on paper, but just have these terrible discovery fights about getting it out of the city. So once again, I mean, I arrive at the conclusion that this case is obviously correct. But the takeaway is not that that qualified immunity is all right, and it helps us make police accountable, but rather just how much it takes, how much of an outlier you really have to be even to get to a jury that can then decide whether or not based on the body cam footage based on all of this testimony, whether or not what happened was excessive. And I just think we've got to loosen the reins on that so that the public can police the police in the in the way that was meant to through the jury system.

Anthony Sanders 24:28

Absolutely. And I'd also recommend this case, to listeners if you haven't actually read it, because not only does it, talk about qualified immunity and the Monell claim, but you can see just how what is it a bad thing for police to do when they're encountering a citizen. This is basically a checklist of that. And this I think is indicative of a lot of the criticism going on of police right now that if this is standard, operating procedure for police. You start the things think things like well, maybe reforming the police is

a little too hard. Maybe defunding the police doesn't sound that crazy. I'm not endorsing that position. But I'm saying you start to think those things when you see officers acting this way, Diana.

Diana Simpson 25:19

Well, I mean, I just going back to that the training materials that they had like this is clearly not just in aberrant situation this isn't a bad apple in otherwise perfectly healthy tree. This is, this goes through and through the entire system and the entire you Euclid police department is trained with a perspective that what happened to Rodney King might be funny. And you know, I enjoy Chris Rock, I think some of his humor is particularly funny, but I'm also not the one who's actually engaging in using state sanctioned force against people. And it's just it's, it's not funny, it's, there's nothing about it. That's funny. And it's a situation that they should be taking the utmost care and seriousness and approaching, and instead, they've got the stick figures, and they've got this Chris Rock video. And so, you know, I think to Wesley's point a little bit earlier that, you know, you always you face these big discovery disputes? Well, I think this is this is absolutely why because these training materials are just such an indictment of the people who were engaging in the activity here, as well as the entire department that if I'm the lawyer for that side, well, I mean, I couldn't because I would spell out but you know, it's just really appalling that they've memorialized all of this into paper and they somehow think that this is acceptable. It's just not.

Wesley Hottot 26:42

Yeah, you might, you might call it Euclidean policing.

Anthony Sanders 26:45

Very good. With that memorable, quip by Wesley, I think we'll call it the end of the show. Thank you all for listening. We'll be back soon with another short circuit and until then, please remember to get engaged.