

Reichle v. Howards
--- U.S. --- (2012)
Decided June 4, 2012

FACTS: On June 16, 2006, Vice President Cheney was visiting Beaver Creek, Colorado. The Secret Service, including Reichle and Doyle, were members of his protective detail. Howards, also at the mall, was overheard by Agent Doyle while speaking on the cell phone, and heard to say “I’m going to ask [Cheney] how many kids he’s killed today.” Agent Doyle shared that with the detail and he and Reichle (and a third agent) began to monitor Howards more closely. Howards entered the line to speak to the president, and when he approached him, he told Cheney that his “policies in Iraq are disgusting.” At some point Howards also touched Cheney’s shoulder.¹ Cheney thanked Howards and moved along.

It was determined that Agent Reichle would question Howards. He had not heard Howards’ initial statement nor observed his interaction with the Vice President, but had been briefed as to both. He approached Howards and asked to speak to him, but Howards refused and attempted to leave. Agent Reichle stepped in front of Howards and asked him if he’d assaulted the Vice President. Howards denied having done so. He then “falsely denied” having touched the president. Reichle confirmed that Agent Doyle had seen the touch, and then arrested Howards. Howards was handed over to the local sheriff’s office, where he was charged with Harassment under Colorado law. Eventually, that was dismissed.

Howards brought suit against a number of parties under 42 U.S.C. 1983 and under Bivens v. Six Unknown Fed. Narcotics Agents.² He alleged that he was arrested and searched in violation of the Fourth Amendment and in retaliation for the criticism, in violation of the First Amendment. (Only Reichle and Doyle remained defendants, however, the others having been given summary judgment at the lower court levels and not successfully appealed.) Both moved for qualified immunity and summary judgment. The District Court in Colorado had denied that claim. The Tenth Circuit Court of Appeals agreed that the two agents were entitled to summary judgment on the Fourth Amendment arrest claim, as he had made a “materially false statement to a federal official.”³ However, the Court denied qualified immunity on the First Amendment claim, as it ruled that Howards had established a “material factual dispute regarding” their motivation in making the arrest. The Court looked to precedent in finding that Hartman v. Moore did not prevent such a claim when it involved an allegation of a retaliatory arrest, even if the arrest was supported by probable cause.⁴

¹ There was dispute about whether it was a simple pat or something more, but that distinction was not critical to the Court’s decision.

² 403 U.S. 388 (1971).

³ 18 U.S.C. 1001.

⁴ 547 U.S. 250 (2006)

The agents requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is an officer protected under qualified immunity for making an arrest (supported by probable cause) that is allegedly in violation of the First Amendment because it is retaliation for a criticism made by the subject?

HOLDING: Yes

DISCUSSION: The Court initially agreed to review two questions: “whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards’ arrest so held.” The Court concluded it would review only the second question, however. The Court noted that for such claims to be successful, “the right allegedly violated must be established, ‘not as a broad general proposition,’ but in a ‘particularized’ sense so that the ‘contours’ of the right are clear to a reasonable official.”⁵ The Court stated the issue to be whether “the right in question is not the general right to be free from retaliation for one’s speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.” The Court further ruled that the existing Tenth Circuit precedent would further not have a “dispositive source of clearly established law in the circumstances of this case.” Hartman involved a retaliatory prosecution, not a retaliatory arrest, but a “reasonable official” could have interpreted Hartman to apply to both, particularly since the prosecutor is, in effect, a third-party to the actual case.

The Court continued:

An officer might bear animus toward the content of a suspect’s speech. But the officer may also decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat.⁶

The Court concluded that “Hartman injected uncertainty into the law governing retaliatory arrests, particularly in light of Hartman’s rationale and the close relationship between retaliatory arrest and prosecution claims.” However, it agreed that “when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.”

The Court reversed the decision of the Tenth Circuit and remanded the case back for an award of qualified immunity for both agents.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-262.pdf>

⁵ Brousseau v. Haugen, 543 U.S. 194 (2004); Anderson v. Creighton, 483 U.S. 635 (1987)

⁶ Wayte v. U.S., 470 U.S. 598 (1985).