

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2008-
2009



Leadership is a behavior, not a position

U.S. SUPREME COURT
CASE SUMMARIES
2008-09 TERM



John W. Bizzack, Ph.D.
Commissioner





The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.



DOCJT.KY.GOV

Leadership Branch

J.R. Brown, Branch Manager
859-622-6591

JamesR.Brown@ky.gov

Legal Training Section

Main Number
General E-Mail Address

859-622-3801
docjt.legal@ky.gov

Gerald Ross, Section Supervisor
859-622-2214

Gerald.Ross@ky.gov

Carissa Brown, Administrative Specialist
859-622-3801

Carissa.Brown@ky.gov

Kelley Calk, Staff Attorney
859-622-8551

Kelley.Calk@ky.gov

Thomas Fitzgerald, Staff Attorney
859-622-8550

Tom.Fitzgerald@ky.gov

Shawn Herron, Staff Attorney
859-622-8064

Shawn.Herron@ky.gov

Kevin McBride, Staff Attorney
859-622-8549

Kevin.McBride@ky.gov

Michael Schwendeman, Staff Attorney
859-622-8133

Mike.Schwendeman@ky.gov

NOTE:

General Information concerning the Department of Criminal Justice Training may be found at <http://docjt.ky.gov>. Agency publications may be found at <http://docjt.ky.gov/publications.asp>.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

2008-2009 United States Supreme Court Case Summaries

SEARCH & SEIZURE - ARREST WARRANT

Herring v. U.S.

--- U.S. --- (2009)

Decided January 14, 2009

FACTS: On July 7, 2004, Investigator Anderson (Coffee County, Alabama, Sheriff's Department) learned that Herring was at the office to retrieve something from an impounded vehicle. Knowing that Herring was "no stranger to law enforcement," Anderson checked for warrants. There were none in Coffee County, so Pope, the clerk, checked with her counterpart in Dale County, the neighboring county. Morgan, the Dale clerk, reported an active FTA warrant. Pope relayed the information to Anderson, at the same time asking for a faxed copy of the warrant. Anderson and another deputy stopped Herring as he was leaving the lot and arrested him. Incident to the arrest, they searched and found methamphetamine and a pistol - Herring was a convicted felon, and he was charged for the weapon and the drugs.

However, it turned out that the warrant had been recalled some months previously and had simply not been removed from the computer system. But, by the time that was discovered, the incriminating evidence had already been located. Herring was indicted in federal court and moved for suppression. The trial court, and ultimately the Eleventh Circuit, concluded that the Coffee County deputies were "entirely innocent of any wrongdoing or carelessness" so suppression was not appropriate.

Herring requested certiorari from the U.S. Supreme Court, which accepted the case.

ISSUE: Does the Fourth Amendment require evidence found during a search incident to arrest be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent?

HOLDING: No

DISCUSSION: The Court began its opinion by noting that "[w]hen a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation." In this case, the "Coffee County officers did nothing improper," and in fact, "the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant." Even though the error was likely negligence on the part of another government agency, Dale County, the Court did not find it reckless or

deliberate. The Coffee County deputies acted in “good faith” reliance on the representations of another government official.¹

The Court stated that “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” The rule is intended to “deter deliberate, reckless, or grossly negligent conduct, or in some instances recurring or systemic negligence.”

The Court found no indication that the error that occurred was anything more than a simply mistake on the part of an unidentified Dale County clerk. Even if agreed to be negligence, that negligence was not so egregious as to trigger the exclusionary rule.

Herring’s conviction was upheld.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-513.pdf>

42 U.S.C. §1983 - QUALIFIED IMMUNITY

Pearson v. Callahan

--- U.S. --- (2009)

Decided January 21, 2009

FACTS: In 2002, Bartholomew, a narcotics task force informant, told Officer Whatcott (Central Utah Narcotics Task Force) that Callahan “had arranged to sell Bartholomew methamphetamine later that day.” He went to Callahan’s home at about 8 p.m. on the night in question, and confirmed that the methamphetamine was available and for sale. He then told Callahan he needed to go get money for the purchase, and left to meet the task force members. Bartholomew was searched and given money for the buy, along with a transmitter.

Officers drove Bartholomew to Callahan’s home and he was admitted by Callahan’s daughter. Callahan parceled out a gram of methamphetamine and made the transaction. Bartholomew gave the agreed-upon signal and officers entered through the porch. The officers saw Callahan drop what was later determined to be methamphetamine. They arrested Callahan and did a protective sweep of the home. At some point they found syringes in the home, as well. Callahan was charged.

The trial court admitted the evidence, finding that “the warrantless arrest and search were supported by exigent circumstances.” Upon appeal, the “Utah attorney general conceded the absence of exigent circumstances, but urged that the inevitable discovery doctrine justified introduction of the fruits of the warrantless search.” However, the Utah Court of Appeals disagreed and vacated Callahan’s conviction. Callahan then filed suit under 42 U.S.C. §1983, “alleging that the officers had violated the Fourth Amendment by entering his home without a warrant.”

The officers moved for summary judgment, which the U.S. District Court granted, “noting that other courts had adopted the ‘consent-once-removed’ doctrine.” That “permits a warrantless entry by

¹ See U.S. v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984)

police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view.” Although the District Court stated that it believed that the principle would change in the future, given that it was “in tension” with the decision in Georgia v. Randolph,² the Court agreed that the “officers were entitled to qualified immunity because they could reasonably have believed that the consent-once-removed doctrine authorized their conduct.”

The Tenth Circuit Court of Appeals disagreed, holding that the officers’ actions violated Callahan’s Fourth Amendment rights. The panel “took no issue with application of the doctrine when the initial consent was granted to an undercover law enforcement officer, but the majority disagreed with decisions that ‘broade[n] this doctrine to grant informants the same capabilities as undercover officers.” Further, the Court ruled that the right was clearly established in the Tenth Circuit, given that the officers knew they did not have a warrant, that Callahan “had not consented to their entry,” and that “consent to the entry of an informant could not reasonably be interpreted to extend to them.”

The Court noted that the Tenth Circuit followed the analysis laid out in Saucier v. Katz³. However, the Court acknowledged that Saucier “has been criticized by courts at all levels,” and that “lower court judges ... have been required to apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages.”

Callahan requested certiorari, which the U.S. Supreme Court granted.

ISSUE: Are the courts required to use the two-pronged Saucier analysis in deciding qualified-immunity cases?

HOLDING: No

DISCUSSION: The Court reviewed the doctrine of qualified immunity, which “protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”⁴

The Court continued:

Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.

The protections afforded by qualified immunity “applies regardless of whether the government official’s error is a ‘mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” Further, the Court emphasized, it had “made clear that the ‘driving force’ behind creation of the qualified immunity doctrine was a desire to ensure that ‘insubstantial claims’ against

² 547 U.S. 103 (2006).

³ 533 U.S. 194 (2001).

⁴ See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

government officials [will] be resolved prior to discovery.”⁵ It stated that “[b]ecause qualified immunity is ‘an immunity from suit rather than a mere defense to liability’ ... it is effectively lost if a case is erroneously permitted to go to trial.” As such, the Court has “repeatedly ... stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”⁶

In Saucier, the “Court mandated a two-step sequence for resolving government officials’ qualified immunity claims.”

First a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct. Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.

Prior to Saucier, court had held that “the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.”⁷ Saucier “made that suggestion a mandate,” requiring that the question of the constitutionality of the officer’s actions “*must* be the initial inquiry.”

In the case at bar, the Court discussed “whether the Saucier procedure should be modified or abandoned.” First, the Court addressed the doctrine of stare decisis and noted that reconsideration of prior decisions must be approached with “utmost caution,” but stopped short of making it “an inexorable command.”

The Court noted that:

Because of the basis and the nature of the Saucier two-step protocol, it is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure. This experience supports our present determination that a mandatory two-step rule for resolving all qualified immunity claims should not be retained.

The Court concluded that “while the sequence set forth [in Saucier] is often appropriate, it should no longer be regarded as mandatory.” Instead, the lower courts “should be permitted to exercise their sound discretion in deciding 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.”

The Court” continue[d] to recognize that it is often beneficial” to use the Saucier analysis. “At the same time, however, the rigid Saucier procedure comes with a price.” It “sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.” Some cases are “so fact-bound that the decision provides little guidance for future cases.” In addition, a “constitutional decision resting on an uncertain interpretation of state

⁵ See Anderson v. Creighton, 483 U.S. 635 (1987).

⁶ Hunter v. Bryant, 502 U.S. 224 (1991).

⁷ County of Sacramento v. Lewis, 523 U.S. 833 (1998).

law is also of doubtful precedential importance," leading some courts to skip that first step in the analysis.

The Court concluded that its decision "does not prevent the lower courts from following the Saucier procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases."

With respect to the case the bar, the Court concluded that the conduct of the officers did not violate clearly established law. As such, the officers were entitled to qualified immunity. In 2002, the "consent-once-removed" doctrine had gained acceptance in the lower courts." Although the Tenth Circuit had not ruled upon the issue, "no court of appeals had issued a contrary decision." As such, the "officers ... were entitled to rely on those cases."

The decision of the Tenth Circuit Court of Appeals was reversed, and the officers granted qualified immunity.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-751.pdf>

EMPLOYMENT - SEXUAL HARASSMENT INVESTIGATION

Crawford v. Nashville and Davidson Cty., TN

--- U.S. --- (2009)

Decided January 26, 2009

FACTS: In 2002, the Metro government of Nashville and Davidson County, TN, were investigating rumors of sexual harassment by a school district supervisor (Hughes). Crawford, a long-time employee, was asked by a human resources investigator if she had ever "witnessed 'inappropriate behavior'" by that employee. She replied with several instances of when she had been sexually harassed by that employee, in the form of sexual comments and overt behavior. Despite the fact that two others had accused him, as well, Metro took no action against Hughes. They did, however, fire both Crawford and the two accusers shortly after ending the investigation. (With respect to Crawford, they claimed it was for embezzlement.)

Crawford filed a complaint with the EEOC and followed that with a lawsuit in the U.S. District Court. The trial court granted summary judgment for Metro and the U.S. Court of Appeals, Sixth Circuit, affirmed that decision. Crawford requested certiorari and the U.S. Supreme Court accepted the case.

ISSUE: Does Title VII of the 1964 Civil Rights act protect a worker from being dismissed because they cooperate (by answering questions) with an employer's internal investigation of sexual harassment?

HOLDING: Yes

DISCUSSION: The Court began:

The Title VII antiretaliation provision has two clauses, making it “an unlawful employment practice for an employer to discriminate against any of his employees ... [1] because he has opposed any practice made an unlawful employment practice ..., or [2] because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing⁸

The first clause is known as the “opposition clause,” the second is called the “participation clause.” Crawford accused Metro of violating both. Both the District Court and the Court of Appeals ruled that the opposition clause did not apply because “she had not ‘instigated or initiated any complaint,’ but had ‘merely answered questions by investigators in an already-pending internal investigation initiated by someone else.’” Both courts agreed it failed under the second because the participation clause confines such protections to instances where “an employee’s participation in an employer’s internal investigation ... occurs pursuant to a pending EEOC charge.” (The investigation was internal but there was no EEOC action pending at the time.)

The Court, however, found that Crawford’s statement is “covered by the opposition clause,” because her response was certainly “resistant or antagonistic” towards Hughes’ behavior. The Court found it odd to protect “an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”

Further, in response to the assertion that this would reduce the incentive for employers to not investigate allegations of discrimination; the Court noted that under both Burlington Industries, Inc. v. Ellerth⁹ and Faragher v. Boca Raton¹⁰, employers have a “strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability.”

The Court stated:

The appeals court’s rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the inquiries the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it “exercised reasonable care to prevent and correct [any discrimination] promptly” but “the plaintiff employee unreasonably failed to take advantage of ... preventative or corrective opportunities provided by the employer.” Nothing in the statute’s text or our precedent supports this catch-22.

Because the Court ruled that Crawford was protected under the opposition clause, it did not explore her argument under the participation clause. The Court reversed the earlier decision and remanded the case for further proceedings.

⁸ 42 U.S.C. §2000e-2(a).

⁹ 524 U.S. 742 (1998).

¹⁰ 524 U.S. 775 (1998).

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/06-1595.pdf>

SEARCH & SEIZURE - PASSENGER FRISK

Arizona v. Johnson

--- U.S. --- (2009)

Decided January 26, 2009

FACTS: On April 19, 2002, Officer Trevizo and Detectives Machado and Gittings, members of a gang task force, were patrolling in Tucson “near a neighborhood associated with the Crips gang.” They pulled over a vehicle when a check showed that the vehicle’s registration had been suspended for a violation related to insurance. (The violation justified a citation.) The car had three occupants, the driver, a front-seat passenger and a back-seat passenger (Johnson). At the time of the stop, the officers had no suspicion of criminal activity.

When asked by Det. Machado, the occupants denied having any weapons. He had the driver get out. Gittings “dealt with the front-seat passenger, who stayed in the vehicle throughout the stop.” Officer Trevizo “attended to Johnson.” She had noticed that as they approached, “Johnson looked back and kept his eyes on the officers,” and wore clothing “consistent with Crips membership.” She also spotted a scanner in Johnson’s pocket. He produced no identification, but when requested, he provided his name and date of birth. He volunteered his hometown as one known for a Crips gang, and told her that he’d served time for burglary.

Wanting intelligence about his gang membership, she had him get out of the car. Suspecting (based upon the above observations) that he might have a weapon, she “patted him down for officer safety.” During that frisk, she found a gun. He struggled and was handcuffed. He was ultimately charged for possession of the gun, since he was a convicted felon, in state court.

Johnson requested suppression, but the trial court denied his motion. He was ultimately convicted. Johnson appealed to the Arizona Court of Appeals, which reversed his conviction, concluding that Officer Trevizo had no right to frisk Johnson. Arizona appealed, but the Arizona Supreme Court denied review. Arizona requested certiorari to the U.S. Supreme Court, which agreed to hear the case.

ISSUE: If a vehicle is stopped for a minor traffic violation, may a passenger be frisked when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

HOLDING: Yes

DISCUSSION: The Court quickly reviewed the precepts set forth in a line of cases beginning with Terry v. Ohio¹¹ and focusing specifically on three cases related to traffic stops: Pennsylvania v. Mimms¹², Maryland v. Wilson¹³, and Brendlin v. California.¹⁴ In Mimms, the Court noted, it was

¹¹ 392 U.S. 1 (1968).

¹² 434 U.S. 106 (1977).

appropriate to have a driver get out of a vehicle, and further, to frisk that driver “if the officer reasonably concludes that the driver ‘might be armed and presently dangerous.’” In Wilson, the Court extended that rationale to passengers. However, the Wilson Court acknowledge that there might be no reason to stop or detain passengers if the driver has committed a minor vehicular offense, but it emphasized “the risk of a violent encounter in a traffic-stop setting ‘stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.’” Finally, in Brendlin, the Court agreed that since a vehicle stop necessarily also stops the passenger, that a passenger “has standing to challenge a stop’s constitutionality.” Further, in an intervening case, in dictum, the Court had ruled that officers may frisk drivers and passengers upon “reasonable suspicion that they may be armed and dangerous.”¹⁵

The Court concluded:

A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.¹⁶

The Court agreed that a traffic stop “communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will.” The Court, however, ruled that the officer “was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.”

The judgment of the Arizona Court of Appeals was reversed, and the case remanded for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-1122.pdf>

42 U.S.C.§1983 - ABSOLUTE IMMUNITY

Van de Kamp v. Goldstein

--- U.S. --- (2009)

Decided January 26, 2009

FACTS: In 1998, Goldstein, a state felon, filed a habeas corpus petition in a California federal court. He alleged that his 1980 murder conviction was flawed because it “depended in

¹³ 519 U.S. 408 (1997).

¹⁴ 551 U.S. 249 (2007).

¹⁵ Knowles v. Iowa, 525 U.S. 113 (1998).

¹⁶ Muehler v. Mena, 544 U.S. 93 (2005).

critical part upon the testimony of Fink, a "jailhouse informant," which he claimed was "unreliable, indeed false," and that Fink had "received reduced sentences for providing prosecutors with favorable testimony in other cases." He further alleged that LA District Attorneys knew about this and that they had not shared this "potential impeachment information" (as required) with Goldstein's attorney.

The Court agreed, after a hearing, that the information may have made a difference at the trial had Goldstein's attorney been made aware of it in a timely manner. The state was ordered to either retry Goldstein (who had already served 24 years) or release him, they chose the latter.

Goldstein then filed an action under 42 U.S.C. §1983 against individual district attorneys, the elected district attorney and others, complaining that the "prosecution's failure to communicate ... "violated the prosecution's constitutional duty to 'insure communication of all relevant information on each case [including agreements made with informants] to every lawyer who deals with it.'"¹⁷ He further alleged that "this failure resulted from the failure of petitioners (the office's chief supervisory attorneys) adequately to train and to supervise the prosecutors who worked for them as well as their failure to establish an information system about informants."

The LA County District Attorney petitioners claimed absolute immunity from suit. The trial court denied the claim, finding that "conduct asserted amounted to 'administrative,' not 'prosecutorial' conduct," making immunity inappropriate. The Ninth Circuit agreed. Goldstein requested certiorari, and the U.S. Supreme Court granted it.

ISSUE: Does a prosecutor enjoy absolute immunity for failing to disclose informant information in violation of Brady¹⁸ and Giglio¹⁹?

HOLDING: Yes

DISCUSSION: The Court analyzed the difference between prosecutorial functions and administrative functions and made it "clear that absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." To determine the nature of a particular task, the court "must take account of the 'functional' considerations" of that task. In the years since Imbler²⁰, the court had decided that, for example, "absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation,"²¹ but that it does apply when a prosecutor "appears in court to present evidence in support of a search warrant application."²²

The court agreed that Goldstein was attacking the "office's administrative procedures." The Court also agreed "purely for argument's sake, that Giglio imposes certain obligations as to training, supervision, or information-system management." However, the Court concluded that prosecutors enjoyed absolute immunity for such claims, because they are "directly connected with the conduct

¹⁷ Giglio v. U.S., 405 U.S. 150 (1972).

¹⁸ Brady v. Maryland, 373 U.S. 83 (1963).

¹⁹ Supra.

²⁰ Imbler v. Pachtman, 424 U.S. 409 (1976).

²¹ Burns v. Reed, 500 U.S. 118 (1997).

²² Kalina v. Fletcher, 522 U.S. 118 (1997).

of a trial," and that an "individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim." The Court noted that it "will often prove difficult to draw a line between *general* officer supervision or officer training (say, related to Giglio) and *specific* supervision or training related to a particular case."

Although the Court acknowledge that "sometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits," but that such immunity was essential for the functioning of the prosecutor's office.

The Court reversed the decision of the Ninth Circuit Court of Appeals, and remanded the case for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-854.pdf>

NOTE: This decision does not affect the ability of law enforcement officers to be sued for withholding evidence under Brady.

FEDERAL LAW - DOMESTIC VIOLENCE/WEAPONS

U.S. v. Hayes

--- U.S. --- (2008)

Decided February 24, 2009

FACTS: In 2004, Marion County (WV) officers responded to Hayes' home on "a 911 call reporting domestic violence." Hayes gave consent for a search of his home during the call, and officers found a rifle. Further investigation indicated he owned several other guns. Based upon that evidence, Hayes was charged the following year under 18 U.S.C. §§922(g)(9) and 924(a)(2) with three counts (for apparently three guns) "of possessing firearms after having been convicted of a misdemeanor crime of domestic violence." The charges were based upon a 1994 battery conviction in West Virginia, with the victim being Hayes's wife at the time, with whom he also had a child in common.²³

Hayes argued that the 1994 conviction did not qualify as a "predicate offense" under §922, maintaining that it "applies only to persons previously convicted of an offense that has as an element a domestic relationship between aggressor and victim." The statute under which he was convicted was a "generic battery proscription, not a law designating a domestic relationship between offender and victim as an element of the offense."

Hayes argument was rejected, and he then took a conditional guilty plea. He appealed. The Fourth Circuit Court of Appeals reversed his plea, holding that the predicate offense must "have as an element a domestic relationship between the offender and the victim." This created a split in the circuits, as nine circuits had already ruled in the opposite manner. The United States appealed the case, and the U.S. Supreme Court granted certiorari.

²³ The case suggested that the law at the time required more than just that the victim and abuser be married, it also appeared to require that the couple have a child in common and that the victim be cohabiting with the abuser as a spouse.

ISSUE: Must a federal charge under §922(g)(9) be based upon a state charge that includes, specifically, as part of the statute, that the victim be in a domestic relationship with the perpetrator?

HOLDING: No

DISCUSSION: The Court engaged in a lengthy statutory and linguistic construction debate on §922(g)(9), and all agreed that the definition "imposes two requirements." First, the crime must include "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." Second, it must be committed by a "person who has a specified domestic relationship with the victim." It found the question to be - does the charge requires that the relationship be a "discrete element" of the charged offense. The Court ruled that "in a §922(g)(9) prosecution, it suffices for the Government to charge and prove a prior conviction that was, in fact, for "an offense ... committed by" the defendant against a spouse or other domestic victim."

The decision of the Fourth Circuit Court of Appeals was reversed, and the case remanded for further proceedings consistent with the opinion.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-608.pdf>

INTERROGATION - CONFESSION

Corley v. U.S.

--- U.S. --- (2009)

Decided April 6, 2009

FACTS: On September 17, 2003, in Norristown, Pennsylvania, Corley was arrested by federal and state officers on a state warrant. The arrest occurred at about 8 a.m. Corley was held initially at a local police station. At about 11:45, he was taken to a local hospital for treatment of a minor injury, and from there, at about 3:30 p.m., he was taken to the local FBI office. There he was informed he was a suspect in a bank robbery. He was not taken before the local magistrate (who was located in the same building), but instead was questioned "in the hopes of getting a confession." At 5:27, "sold ... on the benefits of cooperating," Corley signed a Miranda waiver and gave an oral confession. About an hour later, he was asked to put it in writing but he told them he was tired and they "decided to hold him overnight and take the written statement the next morning." He repeated his confession the next day, it was reduced to writing, and he signed it. He was taken to a magistrate at 1:30 p.m., 29.5 hours after his arrest.

Corley was charged with armed bank robbery and related offenses and moved to suppress both his oral and written confession, based upon §3501. The U.S. District Court denied the motion, finding that the initial oral confession, subtracting the treatment time, was within the six-hour window mandated by §3501(c). Further, the District Court ruled that the written confession, given the next day, after a break requested by Corley, was admissible because that does not violate Rule 5(a).

Corley was convicted of conspiracy and armed robbery, and appealed. The Third Circuit affirmed the conviction, under a different rationale from the District Court. Corley appealed.

ISSUE: Is a confession made more than six hours after an arrest (by federal authorities) presumptively inadmissible?

HOLDING: Yes

DISCUSSION: The Court noted that the Government's argument focused on 18 U.S.C. §3501(a), "which provides that any confession 'shall be admissible in evidence' in federal court 'if it is voluntarily given.'" The Government essentially ignored, however, the rulings in McNabb v. U.S.²⁴ and Mallory v. U.S.²⁵ McNabb had provided that confessions obtained after an "unreasonable presentment delay" will be inadmissible. Rule 5(a) was enacted shortly thereafter, which codified the rule that individuals under arrest must be taken before a magistrate without undue delay. The Court noted that the "fundamental problem with the Government's reading of §3501 is that it renders §3501(c) nonsensical and superfluous." The Court noted that a basic rule of construction is that a statute must be read to include all sections, including the section that requires that a confession be made within six hours of arrest unless the suspect is taken before a magistrate. A few years later, Mallory applied Rule 5(a) and held that a confession given seven hours after arrest, when the suspect was held "within the vicinity of numerous committing magistrates" constituted unnecessary delay and was thus inadmissible. (Specifically, the Court noted that "delay for the purpose of interrogation is the epitome of 'unnecessary delay.'") In 1968, Congress enacted 18 U.S.C. §3501, which codified McNabb-Mallory to some extent, and which held that a pre-presentment confession made within six hours of arrest, that is otherwise found to be voluntary, will be admissible. (Those made after the six hours may also be admitted, if, for example, the Court agrees that transportation causes the delay.)

The Court concluded that "§3501 modified McNabb-Mallory without supplanting it." The Court ruled that a District Court faced with a "suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was 'reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]')." A confession made during those six hours that is voluntary will be admissible, so long as it meets other applicable evidentiary rules. "If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed."

The Court vacated the Third Circuit's decision, and remanded it back for a determination as to whether the delay was justifiable.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-10441.pdf>

²⁴ 318 U.S. 332 (1943).

²⁵ 354 U.S. 449 (1957).

SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST

Arizona v. Gant

--- U.S. --- (2009)

Decided April 21, 2009

FACTS: On Aug. 25, 1999, Tucson (AZ) officers received a tip that drugs were being sold from a particular address. Officers did a knock and talk, and spoke to Gant, who identified himself and stated he expected the owner to return later. The officers left and checked Gant's record, and learned that he had an outstanding warrant for driving on a suspended OL, and that his license was still suspended.

Officers returned later, and arrested several occupants. Gant then arrived, driving, and got out of the car. The officers arrested and handcuffed Gant, first contacting him when he was 10-12 feet from his car. When additional officers arrived, Gant was secured in the back of a patrol car, handcuffed. The officers searched the car, finding a gun and cocaine in a jacket on the backseat of the car. Gant was charged with possession of the cocaine and possession of drug paraphernalia (the plastic bag). He moved for suppression, arguing that *Belton*²⁶ "did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle."

The trial court denied his motion, but ultimately, the Arizona Supreme Court "concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment." Arizona sought certiorari, and the U.S. Supreme Court granted review.

ISSUE: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to the arrest conducted after the vehicle's recent occupants have been arrested and secured?

HOLDING: Yes

DISCUSSION: The Court reviewed, at length, the precepts of *Belton* and *Chimel v. California*.²⁷ The Court acknowledged that the *Belton* opinion "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search" including situations where the arrested subject has left the scene. Further, the Court noted, "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." In the case at bar, the Court stated that "[n]either the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case." The Court specifically noted that in this case, there were five officers present, with three arrested subjects who were already secured in vehicles.

²⁶ *New York v. Belton*, 453 U.S. 454 (1981); See also *Thornton v. U.S.*, 541 U.S. 615 (2004).

²⁷ 395 U.S. 752 (1969)

The Court ruled that Belton and Thornton “permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”²⁸ In addition, searches are permitted “when safety or evidentiary concerns demand.”

The Court concluded, “officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle’s recent occupant justify a search” and “[c]onstruing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis.” The Court stated:

Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

The Court upheld the decision of the Arizona Supreme Court.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-542.pdf>

SPECIAL NOTES:

- A. Although this case limits the application of Belton and Thornton, it does not affect a Carroll²⁹ search, a consent search, or a frisk of the vehicle for weapons pursuant to Michigan v. Long³⁰.
- B. Inventory of vehicles may be performed when the agency has a *proper inventory policy, and only when there is a legitimate need to actually tow the vehicle.*³¹ Under City of Danville v. Dawson, the Court agreed that a vehicle should only be towed when it is actually necessary to do so, and that an owner or operator should be given the option to find an alternative way to secure the vehicles. Specifically, the Court stated that the “practice of impounding vehicles following arrests for mere traffic violations is utterly unnecessary and indeed, is of questionable legality.”³² In addition, Wagner v. Commonwealth³³ controls in Kentucky, and states that:

“A vehicle may be impounded without a warrant in only four situations:

- 1. The owner or permissive user consents to the impoundment;
- 2. The vehicle, if not removed, constitutes a danger to other persons or property or the public safety and the owner or permissive user cannot reasonably arrange for alternate means of removal;

²⁸ The term - offense of arrest - means the offense for which the individual is initially being arrested. In Gant’s case, that would be the warrant for driving on a suspended OL, not the drug offenses for which he was ultimately charged.

²⁹ Carroll v. U.S., 267 U.S. 132 (1925).

³⁰ 463 U.S. 1032 (1983).

³¹ See South Dakota v. Opperman, 428 U.S. 364 (1976).

³² 528 S.W.2d 687 (Ky. 1975). Both Wagner and Dawson, are no longer valid on another point of law, as indicated by Estep v. Com., 663 S.W.2d 213 (Ky. 1983).

³³ 581 S.W.2d 352 (Ky., 1979).

- 3 The police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment the vehicle will be removed by a third party; or
4. The police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed."

The Wagner court further stated: "[i]f the only potential danger that might ensue from non-impoundment is danger to the safety of the vehicle and its contents no public interest exists to justify impoundment of the vehicle without the consent of its owner or permissive user. Because the vehicle is legally in his custody the driver, even though in police custody, is competent to decide whether to park the vehicle in a "bad" neighborhood and risk damage through vandalism or allow the police to take custody. Only when the vehicle if not removed poses a danger to other persons, property or the public safety does there exist a public interest to justify impoundment if the owner or permissive user is unable to reasonably arrange for a third party to provide for the vehicle's removal."

FEDERAL TRIAL PROCEDURE - HABEAS CORPUS

Cone v. Bell

--- U.S. --- (2009)

Decided April 28, 2009

FACTS: Cone was convicted in Tennessee for a 1980 double murder. He pursued direct appeal, raising numerous challenges. Eventually, Tennessee rejected his claims and Cone sought post-conviction relief, arguing ineffective counsel. Ultimately, in 1987, that was also denied. In 1989, he filed yet another petition, claiming that the "State had failed to disclose evidence in violation of his rights under the United States Constitution." That was again denied. Cone went through several other petitions over a number of years.

During this time, however, Tennessee ruled that criminal defendant was permitted to "review the prosecutor's file in [their] case." Cone requested his file and learned that "evidence had indeed been withheld from him at trial," included "statements from witnesses who had seen him several days before and several days after the murders," in which they described him as "wild eyed," "real weird" and "drunk or high." (Cone's defense was drug addiction, which had been discounted at trial.) The file also "contained a police report describing Cone's arrest in Florida following the murders," in which he was described as "looking around 'in a frenzied manner,' and 'walking in [an] agitated manner.'" Police bulletins describing him as a "drug user" and a "heavy drug user" were also in the file.

With that evidence, Cone amended his pending petition, claiming that the "State had withheld exculpatory evidence demonstrating that he 'did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past.'" He argued that there was a "reasonable probability that, had the evidence not been withheld, the jurors would not have convicted [him] and would not have sentenced him to death." He explained he had not raised the Brady claim at an earlier time because he had not had access to the material which proved the claim.

The postconviction court denied relief, stated that either he had waived the claim by not raising them at an earlier time, or that they were “re-statements of previous grounds” already litigated and decided. Cone ultimately requested certiorari from the U.S. Supreme Court, which accepted the case.³⁴

ISSUE: Is a claim under federal law (habeas corpus) “procedurally defaulted” because it has been presented twice to the state courts?

HOLDING: No

DISCUSSION: During the lengthy proceeding, the “State of Tennessee offered two different justifications for denying review of the merits of Cone’s Brady³⁵ claim.” First, the Court addressed the claim that the “repeated presentation of a claim in state court bars later federal review.” The Court quickly concluded that it does not create a “bar to federal habeas review.” The Court stated that a “claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration – not when the claim has been presented more than once.”

The Court also agreed that Cone’s claim had not been waived by his alleged failure to raise the issue in a timely manner. The Court stated that “when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment.”

The Court further stated:

The documents suppressed by the State vary in kind, but they share a common feature: Each strengthens the inference that Cone was impaired by his use of drugs around the time his crimes were committed.

The evidence also included information that would have aided Cone’s attorney in impeaching witnesses that cast doubt on his drug addiction. The Court defined the “federal question that must be decided is whether the suppression of that probative evidence deprived Cone of his right to a fair trial.” The lower courts did not “distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment – an omission [it found] significant.” The Court agreed that “the materiality of the suppressed evidence with respect to guilt and punishment is significant in this case,” since the evidence of his guilt was overwhelming and that nothing indicated he was insane. The evidence, however, might prove critical in the sentencing phase of his case, with its “far lesser standard” necessary to “qualify evidence as mitigating in a penalty hearing in a capital case.”

The Court noted that the lower courts had not “fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone’s drug addiction ... was sufficiently serious” to have caused a jury to change its sentencing decision.

³⁴ The recitation of the case’s procedural history is lengthy and complex, and immaterial to the ultimate issue of the case.

³⁵ Brady v. Maryland, 373 U.S. 83 (1963).

The Court remanded the case back to Tennessee to determine if the suppressed evidence may have made a difference in his sentencing, "with instructions to give full consideration to the merits of Cone's Brady claim."

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-1114.pdf>

TRIAL PROCEDURE / EVIDENCE - SIXTH AMENDMENT

Kansas v. Ventris

--- U.S. --- (2009)

Decided April 29, 2009

FACTS: On January 7, 2004, Ventris and Theel conspired to shoot and kill Hicks. They were promptly arrested. Prior to Ventris's trial, "officers planted an informant in Ventris's holding cell, instructing him to "keep [his] ear open and listen" for incriminating statements." Ventris allegedly then confessed his involvement in the crime to the informant.

Ventris testified at trial and "blamed the robbery and shooting entirely on Theel." The prosecution sought to introduce his prior contradictory the statement via the informant; Ventris objected. The prosecution admitted that there might have been a violation of Ventris's Sixth Amendment right to counsel, " but nonetheless argued that the statement was admissible for impeachment purposes..."

The trial court allowed the statement to be introduced, but it cautioned the jury to carefully consider "all testimony given in exchange for benefits from the State." The jury ultimately convicted Ventris of burglary and robbery, but not murder. Ventris appealed, and the Kansas Supreme Court reversed his conviction, finding that his "statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony."

Kansas applied for certiorari, which the U.S. Supreme Court granted.

ISSUE: May a defendant's voluntary statement, obtained in violation of their right to counsel, be admitted for impeachment purposes?

HOLDING: Yes

DISCUSSION: After a discussion on the admissibility of evidence excluded in the case in chief, the Court considered the deterrent effect on admitting, or not admitting, such evidence. The Court stated:

Officers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of Massiah³⁶ would be of use for impeachment is

³⁶ Massiah v. U.S., 377 U.S. 201 (1964)

exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment. Not likely to happen—or at least not likely enough to risk squandering the opportunity of using a properly obtained statement for the prosecution’s case in chief.

The Court concluded that the statement “was admissible to challenge Ventris’s inconsistent testimony at trial,” and reversed the decision of the Kansas Supreme Court. The case was remanded to Kansas for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-1356.pdf>

FEDERAL LAW - IDENTITY THEFT

Flores-Figueroa v. U.S.

--- U.S. --- (2009)

Decided May 4, 2009

FACTS: In 2000, Flores-Figueroa, a Mexican citizen, sought work in the United States. Initially, he gave his employer a “false name, birth date, and Social Security number, along with a counterfeit alien registration card.” The numbers of the cards “were not those of a real person.” In 2006, he provided different counterfeit cards, with his real name, but “numbers on both cards [that] were in fact numbers assigned to other people.”

His employer forwarded the information the U.S. Immigration and Customs Enforcement, which discovered that the numbers belonged to real people. They charged him with, among other offenses, aggravated identify theft under 18 U.S.C. §1028(a)(a).

Flores moved for acquittal on that charge, arguing that the “Government could not prove that he *knew* that the numbers on the counterfeit documents were numbers assigned to other people.” The Government claimed that was unnecessary, and the District Court agreed. He was convicted, and the Court of Appeals agreed.

Flores-Figueroa requested certiorari, and the U.S. Supreme Court granted review.

ISSUE: Does the federal crime of identity theft require that a subject know that a Social Security number they are using actually belongs to another individual?

HOLDING: Yes

DISCUSSION: After a lengthy discussion on English grammar, the Court concluded that it was the intent of Congress to require “the Government to show that the defendant knew that the means of identification at issue belonged to another person.” (The Court distinguished this case from those where the defendant used the identification to commit overt fraud or theft on the person whose

identity the cards or number portray.) The decisions of the lower courts were reversed and the case remanded for further proceedings.

NOTE: This case involves federal identity theft, rather than state identity theft. Kentucky may rule differently in a similar situation, based upon state law.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/08-108.pdf>

FEDERAL LAW - DRUG TRAFFICKING

Abuelhawa v. U.S.

--- U.S. --- (2009)

Decided May 26, 2009

FACTS: Said was believed to be trafficking in cocaine and the FBI got a warrant to tap his cell telephone. They captured six calls between Said and Abuelhawa, during which time two transactions were arranged. The amount transacted, however, were so small as to be federal misdemeanors under 21 U.S.C §844 for Abuelhawa, although the charges against Said, the seller, were felonies under 21 U.S.C. §841. The FBI, however, charged Abuelhawa with six felony charges, "on the theory that each of the phone calls, whether placed by Abuelhawa or by Said, had been made 'in causing or facilitating' Said's felonies," in violation of another federal law.

Abuelhawa moved for acquittal, arguing that his efforts to buy the cocaine, by telephone, could not be so charged, but the District Court disagreed. He was convicted at trial. "Abuelhawa argued the same point to the Court of Appeals for the Fourth Circuit, with as much success." He requested, and the Supreme Court granted, certiorari.

ISSUE: Does the use of a telephone in a federal drug misdemeanor cause it to become a felony offense?

HOLDING: No

DISCUSSION: The Government argued that the use of a cell phone facilitates the drug transaction, and the Court noted, "on the literal plane, the phone calls could be described as 'facilitating' drug distribution" and made such distribution easier. However, it continued, "the Government's literal sweep of 'facilitate' sits uncomfortably with common usage." The Court found it "odd to speak of one party as facilitating the conduct of the other," when in fact, without a buyer, a sale is simply not possible. The Court did not agree with the Government's argument that somehow using a telephone to communicate "is different from borrowing the money or merely handing over the sale price for cocaine." The Court agreed, however that "[b]ecause cell phones, say, really do make it easier for dealer to break the law, Congress probably meant to ratchet up the culpability of the buyer who calls ahead."

Further, the Court stated, when the original "statute was enacted, the use of land lines in drug transactions was common, and in these days when everyone over the age of three seems to

carry a cell phone, the Government's interpretation would skew the calibration of penalties very substantially."

The Court reviewed the history of the statutes in question and noted that "history drives home what is already clear in the current statutory text: Congress meant to treat purchasing drugs for personal use more leniently than the felony of distributing drugs, and to narrow the scope of the communications provision to cover only those who facilitate a drug felony." Under the Government's interpretation, "in a substantial number of cases Congress would for all practical purposes simultaneously have graded back up to felony status with the left hand the same offense it had dropped to a misdemeanor with the right." The Court found it "impossible to believe that Congress intended 'facilitating' to cause [the] twelve-fold quantum leap in punishment for simple drug possessors."

The Court reversed the conviction and remanded the case back to the trial court for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/08-192.pdf>

INTERROGATION - SIXTH AMENDMENT

Montejo v. Louisiana

--- U.S. --- (2009)

Decided May 29, 2009

FACTS: Montejo was arrested on murder and robbery charges in Louisiana. He was interrogated and changed his story several times. He was brought before a judge for his state-mandated 72-hour hearing, where he was appointed counsel as he appeared indigent, even though he apparently did not request counsel, or even speak, at that time.

Later that same day, two detectives visited Montejo, and after some discussion, he was given his Miranda warnings and agreed to go on an excursion to attempt to locate the murder weapon. During the trip, he "wrote an inculpatory letter of apology to the victim's widow." When they returned, Montejo's court appointed attorney "was quite upset that the detectives had interrogated his client in his absence."

Ultimately, Montejo was convicted and sentenced to death. His appeals through the Louisiana state court system were unsuccessful, with the Louisiana Supreme Court holding that the protections of Michigan v. Jackson³⁷ did not apply, as Montejo did not actually request an attorney or otherwise assert his Sixth Amendment right at the hearing or before. (The Louisiana court ruled that "if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.")

Montejo requested certiorari and the U.S. Supreme Court accepted review.

³⁷ 475 U. S. 625 (1986).

ISSUE: When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

HOLDING: Yes

DISCUSSION: The Court initially noted that the issue was complicated by the fact that some states do not appoint counsel for an eligible defendant until that individual affirmatively requests counsel, while other states do so automatically. In Jackson, the defendant had properly requested counsel. The Court reviewed all of the questions that might arise in determining whether Jackson is triggered, including, for example, the mysterious notion of how a defendant would "affirmatively accept" counsel that is automatically appointed by the court. The possible ways to do so would be, at best, impractical, and at worst, virtually impossible, according to the Court. It would also mean that "[d]efendants in States that automatically appoint counsel would have no opportunity to invoke their rights and trigger Jackson, while those in other States, effectively instructed by the court to request counsel, would be lucky winners."

The court then addressed whether a Miranda³⁸ warning and waiver was sufficient to also waive the right to counsel, and agreed "that typically does the trick, even though the Miranda rights purportedly have their source in the Fifth Amendment." Under Edwards v. Arizona, the Court had "decided that once 'an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available,' unless he initiates the contact."³⁹

Further, the Court noted:

The Edwards rule is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights."⁴⁰ It does this by presuming his postassertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards."⁴¹ This prophylactic rule thus "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence."⁴²

Jackson represented a "wholesale importation of the Edwards rule into the Sixth Amendment."⁴³ The Jackson Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," despite doubt that defendants "actually inten[d] their request for counsel to encompass representation during any further questioning," because doubts must be "resolved in favor of protecting the

³⁸ Miranda v. Arizona, 384 U.S. 436 (1966).

³⁹ 451 U. S. 477 (1981).

⁴⁰ Michigan v. Harvey, 494 U.S. 344 (1990).

⁴¹ McNeil v. Wisconsin, 501 U. S. 171 (1991).

⁴² Texas v. Cobb, 532 U. S. 162 (2001)

⁴³ Id.

constitutional claim,” Citing Edwards, the Court held that any subsequent waiver would thus be “insufficient to justify police initiated interrogation.” In other words, we presume such waivers involuntary “based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily” in subsequent interactions with police.⁴⁴

The Court noted that “[w]hen a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary.” The Court found:

No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. Edwards and Jackson are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

As part of its decision, the Court was compelled to decide if Michigan v. Jackson was still valid law or if it should be overturned. The Court asked “What does the Jackson rule actually achieve by way of preventing unconstitutional conduct?” The Court noted that there were already three prophylactic rules in place to protect defendants: Miranda’s protections against “compelled self-incrimination” and its right to have an attorney present during custodial interrogations if desired, Edwards, which holds that once a defendant invokes the right, all interrogation must stop, and finally Minnick v. Mississippi, which states that “no subsequent interrogation may take place [following invocation] until counsel is present, ‘whether or not the accused has consulted with his attorney.’”⁴⁵

The Court continued:

These three layers of prophylaxis are sufficient. Under the Miranda-Edwards-Minnick line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the Miranda warnings. At that point, not only must the immediate contact end, but “badgering” by later requests is prohibited. If that regime suffices to protect the integrity of “a suspect’s voluntary choice not to speak outside his lawyer’s presence” before his arraignment,⁴⁶ it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then Jackson is simply superfluous.

In particular, the Court noted it had “praised Edwards precisely because it provides ‘clear and unequivocal’ guidelines to the law enforcement profession.”⁴⁷ The Court ruled that “when the

⁴⁴ Harvey, supra.

⁴⁵ 498 U.S. 146 (1990).

⁴⁶ Cobb, supra.

⁴⁷ Arizona v. Roberson, 486 U.S. 675 (1988).

marginal benefits of the Jackson rule are weighed against its substantial costs to the truth seeking process and the criminal justice system, we readily conclude that the rule does not “pay its way.”⁴⁸ As such, the court overruled Michigan v. Jackson.

The Court concluded:

This case is an exemplar of Justice Jackson's oft quoted warning that this Court “is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.”⁴⁹ We today remove Michigan v. Jackson's fourth story of prophylaxis.

Because certain issues were not fully addressed during Montejo's criminal case, the Court agreed that the case would be remanded for a further consideration, on the state level, as to whether Montejo did, in fact, affirmatively assert his right to counsel prior to agreeing to accompany law enforcement on the “excursion for the murder weapon,” agreeing that had he done so, “no interrogation should have taken place unless Montejo initiated it.”

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-1529.pdf>

EMPLOYMENT – DISCRIMINATION

Ricci v. DeStefano

--- U.S. --- (2009)

Decided June 29, 2009

FACTS: In 2003, 118 firefighters in New Haven, Connecticut, took the lieutenant and captain promotional exam. The results of the exam would determine which firefighters would be eligible for promotion over the next two years, and the “order in which they would be considered.” When the test results came back, indicating that “white candidates had outperformed minority candidates,” a rancorous public debate ensued. Some minority firefighters threatened a lawsuit arguing that the test was discriminatory, while others argued the tests were “neutral and fair.” The City, “relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well.”

“Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials” under both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

The U.S. District Court granted summary judgment to the City, and the Second Circuit Court of Appeals affirmed. The firefighters requested certiorari from the U.S. Supreme Court, which was granted.

⁴⁸ U.S. v. Leon, 468 U. S. 897 (1984).

⁴⁹ Douglas v. City of Jeannette, 319 U. S. 157 (1943).

ISSUE: Do Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results?

HOLDING: No

DISCUSSION: The Court first reviewed the detailed process whereby the contractor for the City had developed the test in question, and noted, among other things, that the contractor "oversampled minority firefighters" to ensure that the test "would not unintentionally favor white candidates." The contractor, with the approval of the City and pursuant to union rules, developed a 100-question written test and an oral assessment board with the results weighted 60/40 to reach the final score for each candidate.

After the tests were administered, by the rules of their civil service board, the top 10 candidates were eligible for an immediate promotion to fill three existing lieutenant vacancies. All 10 were white. 9 candidates were eligible for promotion to captain, 7 were white and 2 were Hispanic.

Following the examinations, the "City expressed concern that the tests had discriminated against minority candidates." The contractor defended the tests. The City's counsel claimed that such a "statistical demonstration of disparate impact" was sufficient to serve as a "predicate for employer-initiated, voluntary[y] remedies- even ... race-conscious remedies." The Human Resources director agreed and the City raised the issue of possibly refusing to certify the results.

Even before they learned their actual score, several firefighter-candidates spoke in favor of certifying the test, believing that it was a fair test based upon accepted standards for firefighting and the department's own rules. Others, however, criticized the test as based upon practices not relevant to New Haven.

Over the next month, several meetings were held, with various parties arguing for and against certifying the test. The contractor explained the process and stated that all of the questions were "drawn from the source material and that the oral test accurately reflected real-world situations" relevant to the two positions. (Further, each oral examination panel included one white, one black and one Hispanic firefighter.) An expert from a business that actually competes with the contractor that prepared the test argued that the test was defective in several ways and the "scores indicated a 'relatively high adverse impact.'" He recommended the use of assessment centers. (That competitor eventually got a contract with the city to develop an assessment center process.)

On March 18, the city's attorney argued against certifying the test, stating that promotions under the list would be subject to challenge. Mayor DeStefano and other city officials involved in the process agreed. Firefighters, including Ricci, argued for certification of the test, but did not express a problem with changing the process in the future. The Civil Service Board voted, ultimately, not to certify the results, and a lawsuit ensued.

The plaintiffs are 17 white firefighters and 1 Hispanic firefighter, all of who passed the test but were denied a chance to be promoted. They sued under Title VII, which prohibits both intentional discrimination (disparate treatment) as well as "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities" (disparate impact). Although Title VII

originally covered only the first, subsequent court decisions had included the second, and eventually, it too became codified in law.

The firefighter-plaintiffs argued that the City's decision constituted a violation under disparate treatment, while the City countered that "its decision was permissible" because the tests may have violated disparate impact.

The Court noted that the City's reasons, "[w]ithout some other justification, ... violates Title VII's command that employers cannot take adverse employment actions because of an individual's race." The Court noted:

Whatever the City's ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race.

The Court then looked to whether the "City had a lawful justification for its race-based action." The Court noted that its decision "must be consistent with the important purposes of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity." The Court found itself "searching for a standard that strikes a more appropriate balance," between the concerns of the parties. The Court noted that prior court decisions had "held that certain government actions to remedy past racial discrimination – actions that are themselves based on race – are constitutional only where there is a 'strong basis in evidence' that the remedial actions [are] necessary."⁵⁰ That "standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination."

The Court continued:

Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.

Yet, they found "their efforts invalidated by the City in sole reliance upon race-based statistics." The Court noted that "once [a] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race." To do so "amounts to the sort of racial preference that Congress has disclaimed."

In this case, the Court found that there is "no support for the conclusion that [the City] had an objective, strong basis in evidence to find the tests inadequate...." The court agreed that the "racial adverse impact here was significant," given the numbers. However, the Court noted that the statistical disparity with nothing more, "is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results." The City would have been liable "only if the examinations were not job related and consistent with business necessity, or if there existed an

⁵⁰ Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."

The Court concluded:

... there is no evidence – let alone the required strong basis in evidence – that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

The Court found that the firefighters were entitled to summary judgment on their claim under Title VII, and thus it did not address the "underlying constitutional question" under the Fourteenth Amendment. The lower court's decision was reversed, and the case remanded for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf>