

Summaries of Selected Opinions

No. 17-5048. *United States v. Adams*. 4/26/2018. N.D.Okla. Judge Hartz. *Sex Offender Registration and Notification Act—Registration Requirement—Transient or Homeless Persons.*

Defendant was a convicted sex offender. One of the conditions of his supervised release was that he comply with the Sex Offender Registration and Notification Act (SORNA). His probation officer filed a petition alleging that defendant, who was homeless at the time, violated the conditions of his supervised release, including by failing to keep his SORNA registration up to date when he moved from Oklahoma City to Tulsa. The district court revoked his supervised release and sentenced him to a term of incarceration.

On appeal, defendant argued that there was no evidence that he had changed his residence to Tulsa for SORNA purposes. SORNA requires an offender to appear in person not less than three days after changing his residence to update his registration information. The Attorney General's guidelines discuss the statute's application to homeless persons and require a sex offender to register where he habitually lives. Homeless or transient persons are required to provide a more or less specific description of the place or places where they habitually live, such as a shelter, public building, restaurant, or library that the sex offender frequents. A person habitually lives in a place if he lives there for at least 30 days. Here, there was ample evidence that defendant was living with some regularity in Tulsa, and it was undisputed that he never registered as a sex offender there.

The judgment was affirmed.

No. 16-2170. *United States v. Salas*. 5/4/2018. D.N.M. Judge Kelly. *Crime of Violence—Residual Clause—Unconstitutional Vagueness.*

Defendant firebombed a tattoo parlor. He was found guilty of various arson-related offenses

and of using a destructive device in furtherance of a crime of violence under 18 USC § 924(c)(1). The bulk of defendant's 35-year prison sentence resulted from a 30-year mandatory minimum sentence on the § 924(c)(1) count.

On appeal, defendant argued for the first time that § 924(c)(3)(B), the "residual clause," could not be used to characterize his arson conviction as a crime of violence, because the definition was unconstitutionally vague. The residual clause provides that to qualify as a "crime of violence," the underlying felony must "by its nature, involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Tenth Circuit noted the similarity between the residual clause and similarly worded definitions of a "crime of violence" or "violent felony" found in other federal statutes that were held to be unconstitutionally vague in *Sessions v. Dimaya*, No. 15-1498, 2018 WL 1800371 (U.S. Apr. 17, 2018), and *Johnson v. United States*, 135 S.Ct. 2551 (2015), and determined that § 924(c)(3)(B) is likewise unconstitutionally vague. Thus, the district court erred. Further, an error is plain if it is "clear or obvious at the time of the appeal." Here, by the time of defendant's appeal, the Supreme Court had directly ruled on the constitutionality of identical language in *Dimaya*, and the error was plain.

The case was remanded for resentencing with instructions to the district court to vacate the § 924(c)(1) conviction.

No. 16-5168. *Matthews v. Bergdorf*. 5/8/2018. N.D.Okla. Judge Baldock. *Foster Care—Abuse and Neglect—Qualified Immunity—Special-Relationship Exception—State-Created Danger Exception.*

Plaintiffs were children who suffered neglect and abuse in their foster home. After the

foster parents were convicted of child abuse, plaintiffs sued the Oklahoma caseworkers involved, alleging violations of their Fourteenth Amendment substantive due process rights. The caseworkers filed a motion to dismiss based on qualified immunity, and the district court denied the motion.

On appeal, the Tenth Circuit analyzed whether qualified immunity applied by considering (1) whether the complaint stated a constitutional claim against each caseworker, and if so, (2) whether those claims were clearly established at the time of the alleged constitutional violations. A state actor generally is not liable for harm inflicted by a private actor. Exceptions exist where (1) the state created a special custodial relationship with the victim, or (2) the state actor intentionally or recklessly created the danger that precipitated the deprivation.

The special-relationship exception requires a plaintiff to allege, among other things, that the plaintiff had a special relationship with the state. A state's affirmative act of placing a child in involuntary foster care triggers constitutional protection under the exception. But a child who is alleged to be adopted, living with an adult under a guardianship, or simply living with an adult is not in the custody of the state and does not have a special relationship with the state. In conducting a qualified immunity analysis, courts must consider whether each defendant's alleged conduct violated the plaintiff's clearly established rights. Here, the district court did not analyze whether the complaint stated a claim under the special-relationship exception as to each caseworker. Further, the complaint alleged that some of the children were placed in the home by the department of social services, but other children were in the home through a foster care program, were adopted by the foster parents, had a legal guardianship with the foster parents, or were just living there. Therefore, with one exception, the complaint failed to state a claim under the special-relationship exception.

Under the state-created-danger exception, a state actor cannot be held liable absent affirmative conduct on the state actor's part that places a plaintiff in danger of private violence. Thus, the exception does not apply

where the misconduct is failure to protect the plaintiff from harm (e.g., a caseworker receives a report of neglect and abuse and fails to respond by moving the child to a safe environment). Further, the law was clearly established that a caseworker's affirmative actions allegedly designed to protect the foster parents in light of repeated child abuse reports could give rise to constitutional liability under the state-created-danger exception. Here, the complaint alleged that two named caseworkers gave the foster parents advance warnings of home visits, these warnings put plaintiffs at substantial risk of serious and immediate harm, the risk was obvious, the caseworkers acted recklessly in conscious disregard of the risk, and such conduct was conscience-shocking. Accordingly, plaintiffs stated a cause of action against these two caseworkers under the state-created-danger exception. But the complaint failed to allege affirmative conduct on the part of other caseworkers and thus did not give rise to a claim under the exception as to the other caseworkers.

The judgment was affirmed in part and reversed in part, and the case was remanded.

No. 16-1492. M.A.K. Investment Group, LLC v. City of Glendale. 5/14/2018. D.Colo. Chief Judge Tymkovich. *Due Process—Notice to Property Owner—Blighted Property—Judicial Review.*

Plaintiff M.A.K. Investment Group, LLC (M.A.K.) owned property in the City of Glendale (Glendale). Glendale adopted a resolution declaring several of M.A.K.'s parcels blighted under state law, but never notified M.A.K. of its resolution or the legal consequences flowing from it. Consequently, M.A.K. failed to seek judicial review within the required 30 days. M.A.K. sued Glendale, claiming Colorado's Urban Renewal statute was unconstitutional. The district court granted Glendale's motion to dismiss.

On appeal, M.A.K. argued that Colorado's Urban Renewal statute violates due process as applied to M.A.K. because (1) it does not provide for adequate notice when a city finds a landowner's property blighted, (2) it does not provide for notice of the 30-day review period, and (3) M.A.K. in fact did not know about the

blight determination or the right of review within 30 days. The Urban Renewal statute limits a city council's discretion by providing 11 exclusive factors for its decision, and it provides property owners a right to judicial review for abuse of discretion. M.A.K. has a protected property interest in the statutory right to judicial review of the blight determination. M.A.K. did not otherwise learn about the blight determination, and it violated due process for Glendale not to send M.A.K. direct notice of the adverse blight determination.

However, Glendale was not required to send specific notice of the 30-day time frame in which to seek review; if M.A.K. had been notified of the blight finding, it would have been up to M.A.K. to determine available remedies under state law.

The grant of the motion to dismiss was reversed and the case was remanded.

No. 16-4193. Xyngular v. Schenkel. 5/15/2018. D.Utah. Judge Lucero. *Pre-litigation Conduct—Sanction of Dismissal.*

Xyngular sued Schenkel, one of its shareholder/employees, seeking a declaratory judgment that he was entitled to only 2,000 shares and that his position as master distributor was terminated along with accompanying rights. Schenkel filed various counterclaims, including claims that Xyngular's directors had engaged in illegal practices. Xyngular alleged that Schenkel had encouraged another employee to steal documents belonging to Xyngular, and moved for dismissal of Schenkel's claims with prejudice. The district court found that Schenkel had acted improperly in obtaining the documents from the other employee, had done so in anticipation of litigation, and had acted willfully, in bad faith, and with fault. Accordingly, the district court dismissed Schenkel's claims, excluded the doc-

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uments from evidence, and awarded Xyngular its costs and fees in bringing the sanctions motion.

On appeal, Schenkel argued that the district court exceeded its inherent powers by imposing sanctions for pre-litigation conduct. A trial court has broad discretion to impose sanctions. Here, the district court carefully analyzed the evidence and the parties' arguments. Addressing an issue of first impression, the Tenth Circuit held that termination sanctions are permissible when pre-litigation conduct is aimed at manipulating the judicial process and is unrelated to the conduct that gave rise to the substantive claims in a case.

The dismissal was affirmed.

No. 17-8035. United States v. Kahn. 5/17/2018. D.Wyo. Judge Hartz. *Due Process—Seized Assets—Post-Restraint, Pretrial Hearing—Cost of Attorney.*

Defendant, a physician, was charged with distribution of controlled substances and money laundering. The indictment included a criminal forfeiture count, which listed assets that the grand jury identified as fruits of the alleged crimes. Most of those assets had been seized by the government before the indictment was filed. Two weeks after the indictment, defendant challenged the seizure of over \$1.1 million of currency and bank accounts, arguing that he needed this money to retain private counsel of his choice. He asserted that his only unseized assets were a home encumbered by a substantial lien and a business that brought in less than \$3,000 a month after taxes. The district court declined to consider whether defendant's unseized assets were sufficient to retain counsel of his choice. It reasoned that it only had to determine whether defendant had any assets remaining after seizure, not whether

those assets were sufficient to cover the cost of his defense. Because defendant still had some unencumbered assets, the district court held that he was not entitled to a hearing, and therefore it did not consider whether the seized assets were traceable to his alleged offenses.

On interlocutory appeal, the Tenth Circuit determined that the appropriate test is whether a defendant lacks sufficient unseized assets to pay for the reasonable cost of his counsel of choice. Where a seizure prevents a defendant from paying for ordinary and necessary living expenses, or from retaining his counsel of choice, due process requires a post-restraint, pretrial hearing upon the defendant's properly supported motion. Here, defendant should be granted a hearing if he can (1) demonstrate that he has insufficient unseized assets to afford reasonable representation by counsel of his choice, and (2) make a prima facie showing that there is good reason to believe the grand jury erred in determining that the restrained assets constitute or are derived from gross proceeds traceable to the commission of the offense.

The order was reversed and the case was remanded. **CL**



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