

Recent Developments in the Law of Qualified Immunity in the Seventh Circuit

BY TIMOTHY P. O'CONNOR, MEYER & O'CONNOR, LLC

It would be impossible for public officials, and law enforcement officers in particular, to function if they could be sued for every mistake they make. The doctrine of qualified immunity is one of the principle limitations on the ability of private citizens to sue public officials. “Qualified immunity protects public officials from liability for damages if their actions did not violate clearly established rights of which a reasonable person would have known.”¹ “The doctrine allows ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.”² “The purpose of the doctrine is to shield officials from harassment, distraction, and liability when they perform their duties reasonably” and “to protect public officials from guessing about constitutional developments at their peril...”³

Because qualified immunity is “an *immunity from suit* rather than a mere defense to liability,” the question whether qualified immunity bars a claim “ordinarily should be decided long before trial” and an interlocutory appeal (i.e., an appeal before final resolution of the case on the merits) may be taken from the denial of qualified immunity so long as the appeal raises legal, rather than factual, issues.⁴ Courts apply a two step test (laid out in a seminal Supreme Court case known as *Saucier*) to determine whether the defense of qualified immunity is applicable: “(1) whether the defendant violated the plaintiff’s constitutional rights and (2) whether the right at issue was clearly established.”⁵

This article sets forth some highlights from the decisions of the United States Court of Appeals for the Seventh Circuit over approximately the last eighteen months that discuss either the procedure by which the defense of qualified immunity is asserted or the assertion of such a defense to excessive force or false arrest claims against law enforcement officers, for whom the defense of qualified immunity is especially important.⁶

PROCEDURAL DEVELOPMENTS

After requiring for years that courts apply the *Saucier* test for qualified immunity in rigid order (i.e., *first* decide whether a right was violated and, if so, *then* decide whether that right was clearly established), the Supreme Court held in 2009 that the two prongs of the *Saucier* test need not be applied in any particular order.⁷ The Seventh Circuit (“the Court”) has employed this freedom to resolve some cases (most notably in the First Amendment context) by simply holding that the right

at issue was not clearly established, without considering whether a violation occurred.⁸ Otherwise, the Court’s approach to qualified immunity seems not dramatically different, with many cases still resolved through a determination that no constitutional right was violated, thus eliminating the need to consider whether any such right was “clearly established.”⁹

A public official confronted with a pretrial denial of qualified immunity enjoys a rare opportunity: the ability to take an interlocutory appeal from the adverse ruling. But recent decisions illustrate the limits of this right. Thus, the Court dismissed an appeal where the district court expressly deferred ruling on a qualified immunity defense asserted under Rule 12(b)(6) because assertion of the defense was “premature.”¹⁰ “Unless the district court delays so long in ruling that the delay becomes a de facto denial,” the Court held, “a decision not to rule on a motion is just that: inaction,” which provides no basis for appeal.¹¹ The Court also dismissed a number of appeals from the denial of qualified immunity on the ground that appellants sought to argue factual issues, thus depriving the Court of jurisdiction.¹²

EXCESSIVE FORCE CLAIMS

The Court decided a number of cases in which qualified immunity was asserted as a defense to an excessive force claim – i.e., a claim that a law enforcement officer “used excessive force in the course of an arrest, investigatory stop or other seizure”¹³ – and, in the course of deciding certain of these cases, the Court set forth clear guidance on particular aspects of the application of force to effect a seizure.

Thus, in a case arising from injuries alleged to have occurred as a result of placing the plaintiff in handcuffs for twenty minutes, the Court set forth common sense rules: “[A]n officer may not knowingly use handcuffs in a way that will inflict unnecessary



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pain or injury on an individual who presents little or no risk of flight or threat of injury. Of course, whether an officer knows that a given action unnecessarily will harm a particular individual will depend on the circumstances of the arrest... [A] reasonable officer cannot be expected to accommodate an injury that is not apparent or that has not otherwise been made known to him.”¹⁴

And in a case where an innocent person was mistaken for a drug dealer and arrested after a physical struggle, the Court stated “that, [while] there was nothing unreasonable about [a group of officers’] initial failure to identify themselves” in making the arrest, which occurred in a public place, “[t]he ... [officers’] ... continuing failure to identify themselves after” the arrest was underway (thus arguably provoking a greater struggle from the putative arrestee) was “more problematic.”¹⁵ While the Court ultimately held that the officers were entitled to qualified immunity because “it is far from clear that the Fourth Amendment requires police officers to identify themselves in the course of carrying out an arrest in a public place,” the Court nonetheless warned that it was “a close question whether the defendants’ failure to identify themselves was unreasonable under the circumstances.”¹⁶

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The Court also set forth guidance regarding the use of tear gas and “flash bang” devices. The Court held that the “use of tear gas is unreasonable when: (1) attempting to subdue individuals as opposed to mass crowds; (2) when the individual does not pose an actual threat; (3) when the individual is not holding hostages; (4) when the individual has not committed a crime and the officers are not in the process of attempting to make an arrest; (5) when the individual is armed but merely suicidal as opposed to homicidal; (6) when the individual is not attempting to evade arrest or flee from the police; and (7) when the individual is incapacitated in some form.”¹⁷ With respect to flash bang devices, which the Court described as “essentially grenades,”¹⁸ the Court had “previously indicated that the use of flash bang devices should be limited and is not appropriate in most cases.”¹⁹ But the use of flash bang devices can be reasonable “when there is a dangerous suspect and a dangerous entry point for the police” and where “the officers ha[ve] a significant reason to be concerned about their personal safety.”²⁰ And if the use of flash bang devices otherwise is

appropriate, “a sufficiently careful (or perhaps reasonable) use of a flash bang device occurs when officers take a moment to look inside a residence or a room to ensure that no one would be injured by the device before tossing it and where officers carry a fire extinguisher to quickly extinguish any fires resulting from deployment of the device.”²¹

Finally, the Court continued its disapproval of the pointing of firearms at persons absent compelling circumstances, affirming the denial of qualified immunity where an officer pointed a submachine gun at persons he was detaining, where the crime under investigation was nonviolent, the persons did not attempt to flee or resist and the officers had no reason to believe they faced any threat.²²

FALSE ARREST CLAIMS

An unlawful arrest occurs where a person is arrested “without probable cause.”²³ While “it does not take much to establish probable cause,”²⁴ a number of the Court’s recent decisions illustrate that unreasonably sloppy police work resulting in a false arrest will not be protected by the “forgiving” probable cause and qualified immunity standards,²⁵ even where facts arising after the arrest support the belief that the arrestee in fact committed a crime.

Thus, where an officer stopped and handcuffed a driver because he simply failed to read the third line of a “LEADS” report which indicated that the license plate of the driver’s car in fact did not belong to a stolen car, the Court held that the officer’s actions were not “objectively reasonable” and reversed a district court ruling that the driver’s false arrest claim was barred by qualified immunity.²⁶ And in multiple cases the Court held that evidence coming to light after an arrest is not relevant to the question of whether the police had probable cause at the time of arrest.²⁷

Finally, although the probable cause standard is generous and is made more generous by qualified immunity, this lenience is considerably reduced in an appeal from an adverse jury verdict. “[T]he probable cause standard does not trump [the Court’s] duty to defer to a jury’s findings.”²⁸ “Instead, [the Court] make[s] all reasonable credibility determinations and inferences in favor of ... [plaintiffs], asking whether under their

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The Public Sector Energy Efficiency Portfolio, administered by the Illinois Energy Office, provides grants and rebates to public sector entities for electric system efficiency improvements including lighting, motors, variable frequency drives, HVAC equipment, traffic signals and street lights.

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- Qualifying projects could receive up to 75% of project costs.

EXAMPLES OF TYPICAL PROJECTS

HIGH BAY LIGHTING – A school that replaces its traditional HID gym lights or a municipality that replaces its convention center lights with T5 fluorescent replacement fixtures.

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– The technology of street lights has advanced rapidly in recent years, with LED and induction lighting offering viable options for replacing existing street lighting with lights that are much more efficient and that last for many years.

Applicants interested in taking advantage of DCEO's Public Sector Energy Efficiency Rebates should fill out the application form from the DCEO website www.illinoisenergy.org and submit it to illinois.energy@illinois.gov.



version of the facts a reasonable officer could conclude that there was probable cause to arrest."²⁹

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¹ *Catlin v. City Of Wheaton Et Al.*, 574 F.3d 361, 365 (7th Cir. 2009)

² *Gonzalez v. City Of Elgin Et Al.*, 578 F.3d 526, 540 (7th Cir. 2009)

³ *Catlin*, 574 F.3d at 365; *Gonzalez*, 578 F.3d at 540

⁴ *Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008) (internal quotations and citations omitted; emphasis in original); *Viilo v. Eyre Et Al.*, 547 F.3d 707, 711-12 (7th Cir. 2008) (no jurisdiction to hear interlocutory appeal where disputed issues of fact argued on appeal)

⁵ *Stainback v. Dixon*, 569 F.3d 767, 770 (7th Cir. 2009); see also *Saucier v. Katz*, 533 U.S. 194, 201 (2001)

⁶ *Pearson v. Callahan*, 129 S.Ct. 808, 815-16 (2009)

⁷ See *Matriciano v. Randle Et Al.*, 569 F.3d 723, 729 (7th Cir. 2009);

Chaklos Et Al. v. Stevens Et Al., 560 F.3d 705, 711 (7th Cir. 2009)

⁸ See, e.g., *Stainback*, 569 F.3d at 773 (application of handcuffs did not violate plaintiff's right to be free from use of excessive force to carry out arrest)

⁹ *Khorrani v. Rolince Et Al.*, 539 F.3d 782, 786 (7th Cir. 2008)

¹⁰ *Khorrani*, 539 F.3d at 786

¹¹ See *Viilo v. Eyre Et Al.*, 547 F.3d 707 (7th Cir. 2008); *Levan v. George Et Al.*, 604 F.3d 360, 2010 U.S.App.LEXIS 8787 at *10 (7th Cir. April 28, 2010)

¹² *Gonzalez*, 578 F.3d at 539

¹³ *Stainback*, 569 F.3d at 772-73

¹⁴ *Catlin*, 574 F.3d at 368

¹⁵ *Catlin*, 574 F.3d at 369

¹⁶ *Estate Of Escobedo v. Bender Et Al.*, 600 F.3d 770, 783 (7th Cir. 2010)

¹⁷ *Estate Of Escobedo*, 600 F.3d at 786

¹⁸ *Estate Of Escobedo*, 600 F.3d at 784

¹⁹ *Estate Of Escobedo*, 600 F.3d at 784-85 (discussing holding in *Molina v. Cooper*, 325 F.3d 963, 973 (7th Cir. 2003) and statements made in dicta in *United States v. Morris*, 349 F.3d 1009, 1012 n. 1 (7th Cir. 2003))

²⁰ *Estate Of Escobedo*, 600 F.3d at 784 (discussing statements made in dicta in *United States v. Folks*, 236 F.3d 384, 388 n. 2 (7th Cir. 2001))

²¹ *Baird v. Renbarger*, 576 F.3d 340, 345-46 (7th Cir. 2009)

²² *Gonzalez*, 578 F.3d at 537

²³ *Fox Et Al. v. Hayes Et Al.*, 600 F.3d 819, 833 (7th Cir. 2010)

²⁴ *Fox*, 600 F.3d at 833

²⁵ *Phelan v. Village Of Lyons Et Al.*, 531 F.3d 484, 490 (7th Cir. 2008)

²⁶ See *Wheeler v. Lawson Et Al.*, 539 F.3d 629, 637 (7th Cir. 2008)

²⁷ *Fox*, 600 F.3d at 833

²⁸ *Fox*, 600 F.3d at 833-34