

SPRING 2013 NEWSLETTER

CIVIL RIGHTS LAW UPDATE

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United States Court of Appeals for the Fifth Circuit

***Tolan v. Cotton*, No. 12-20296, 2013 U.S. App. LEXIS 8548 (5th Cir. Apr. 25, 2013)**

In order to overcome the properly raised defense of qualified immunity, a plaintiff must show: 1) that the official's conduct violated a constitutional or statutory right; and 2) that the official's actions constituted objectively unreasonable conduct in the light of clearly established law at the time of the conduct in question. If the court finds that the plaintiff does not meet his burden under the second prong, the plaintiff cannot overcome qualified immunity, and the court can successfully avoid addressing the constitutional issue of the first prong. Under a totality of the circumstances, an Officer's use of deadly force against an individual suspected of stealing a car and use of non-deadly force against the suspect's mother at the scene of the incident was not objectively unreasonable in light of clearly established law.

Robbie Tolan was seen with a friend driving a black Nissan on December 31, 2008, shortly before two o'clock in the morning. A patrol officer witnessed the vehicle quickly turn down a side street. According to the officer this was suspicious behavior since 12 vehicles had been burglarized in the area the night before. The officer followed and observed the vehicle as it parked at the end of the street in front of a house and Robbie Tolan and another male exited the vehicle. The patrol officer checked the vehicle's license plate number, inadvertently entering an incorrect character. The incorrectly entered license plate came back with a report indicating that the vehicle was stolen and simultaneously notified other officers in the area that a stolen vehicle had been located. The patrol officer approached the vehicle, drawing his pistol and ordering the two males to the ground. At this time Robbie Tolan's parents, Bobby and Marian Tolen came out of the house. Robbie Tolan and the other man only complied with the patrol officer's orders of dropping to the ground after being urged by the parents. Bobby Tolan identified Robbie as his son and Marian told the officer that the vehicle belonged to them. The patrol officer radioed for assistance, perceiving the scene, which now included four individuals, as chaotic and confusing. Sergeant Cotton arrived on the scene and told Marian Tolen to move away from the officers and go stand against the garage. Marian Tolen refused and Sergeant Cotton physically moved Marian Tolan to the garage door. Upon seeing his mother pushed into the garage door, Robbie Tolan yelled at Sergeant Cotton to get his hands off of his mother and began to stand up, drawing his outstretched hands into his torso. Fearing that Robbie Tolan was reaching for a weapon, Sergeant Cotton drew his pistol and fired three shots at Robbie, one striking him and causing serious internal injury. Between arriving on the scene and the discharge of this weapon a total of 32 seconds elapsed.

In May 2009, the Tolans filed a Section 1983 claim against the City of Bellaire, the patrol officer and Sergeant Cotton claiming that the officer and Sergeant Cotton violated their right to be free from excessive force under the Fourth Amendment and incorporated by the Fourteenth

Amendment, and that both Officers acted in furtherance of the City of Bellaire's official policy of racial profiling and discrimination. The Officers invoked qualified immunity and moved for summary judgment. The district court granted summary judgment for all defendants, and Robbie and Marian Tolan appealed, contesting only the grant of summary judgment in favor of Sergeant Cotton.

The Fifth Circuit affirmed summary judgment in favor of Sergeant Cotton, finding that he was entitled to qualified immunity. In so finding, the Fifth Circuit stated that after the defense of qualified immunity is properly invoked by a defendant, the plaintiff then bears the burden of rebutting its applicability to the case at hand. In order to meet his burden a plaintiff must show: 1) "the official's conduct violated a constitutional or statutory right;" and 2) "the official's actions constituted objectively unreasonable conduct in the light of clearly established law at the time of the conduct in question." The Fifth Circuit reiterated that the sequence of the analysis of the two prongs was immaterial and that deciding the second prong first is preferred, since in so doing the court can avoid deciding a constitutional question unnecessarily. The Fifth Circuit found that in order for Robbie Tolan to show a genuine issue of material fact, thereby overcoming Sergeant Cotton's claim for qualified immunity, he would have needed to show that "every reasonable official would have understood" that Sergeant Cotton's use of deadly force was objectively unreasonable under the circumstances and clearly established law. This determination is made by looking at a totality of the circumstances as viewed by a reasonable, on-the-scene-officer without the benefit of retrospection. The Fifth Circuit determined that under the circumstances as viewed by Sergeant Cotton, his split second decision to use deadly force did not amount to the "plain incompetence necessary to divest" an officer of qualified immunity. Under a similar argument, the Fifth Circuit also found that Sergeant Cotton's use of nondeadly force against Marian Tolan was not objectively unreasonable in light of clearly established law. Since neither Robbie nor Marian met their burden under the second prong, the Fifth Circuit did not address the constitutional issues raised by the Tolans.

***RBIII v. City of San Antonio*, No. 11-50626, 2013 U.S. App. LEXIS 8267 (5th Cir. Apr. 23, 2013)**

When a State takes property and acts in order to "abate an emergent threat to public safety," predeprivation notice is not required under the Fourteenth Amendment procedural due process requirements.

RBIII owned a building in San Antonio that was subsequently demolished by the City. The events leading up to the demolition were as follows: On December 27, 2007, a code enforcement officer for the City of San Antonio responded to a neighbor's complaint that a structure was unsecured and dilapidated, by driving by and looking at a building. On December 28, 2007, the same officer and a certified building inspector conducted a thorough inspection and determined that the building was an "imminent threat to life, safety, and/or property, requiring immediate demolition." The building inspector also concluded that under the circumstances, no other abatement procedure was reasonably available. The building inspector presented his findings to the City's Planning and Development Services Department, who concurred in the building inspector's findings, and then presented the recommendation to the City's Neighborhood Services Department, who also concurred in the recommendation. During this time, the code enforcement officer obtained

an environmental survey, notified the City's Historic Preservation office of the planned demolition, arranged to have the gas and electric services cut-off, searched the City's permit records and determined that no permits had been obtained in order to repair the building, and revisited the property on January 9, 2008, determining that no repairs had been done to the building. The building was demolished the next day on January 10, 2008. On January 11, 2008, the City sent a letter notifying RBIII that the building had been demolished as an "Emergency Case." At no time during the thirteen day period preceding the emergency demolition did the City notify RBIII of the pending demolition.

RBIII filed suit against the City and the code enforcement officer's supervisor alleging claims under local, state, and federal law. The City removed to federal court. The district court granted summary judgment in favor of defendants on all claims except for two: 1) that the City violated RBIII's Fourteenth Amendment to procedural due process by demolishing the building without providing notice, and 2) that the City unreasonably seized the building in violation of the Fourth Amendment. The district court held a trial on the Fourth and Fourteenth Amendment claims and the jury found in favor of RBIII. The City appealed, arguing that the district court's jury instructions did not accurately reflect the applicable law and that under the correct legal standard they were entitled to judgment as a matter of law.

In deciding the appeal, the Fifth Circuit stated that, under the Fourteenth Amendment, predeprivation notice is not always required before the State takes property. Instead, there are exceptions where postdeprivation process will satisfy the procedural due process requirements of the Constitution. One such exception is when a State acts to "abate an emergent threat to public safety." In order to determine if adequate procedural due process has been granted where no prior notice is given for the deprivation of property, the court must evaluate: 1) the State's determination that there existed an emergency situation necessitating quick action, and 2) the adequacy of the postdeprivation process. At issue was the first prong, whether the building constituted a public emergency requiring summary abatement. The City claimed that the jury instruction given was improper. The instruction as given read: "The emergency situations in which it is considered reasonable to proceed without giving prior notice are generally limited to situations in which there is an immediate danger to the public." The Fifth Circuit agreed with the City and held that the instruction as given improperly shifted the jury's focus from the reasonableness of the City's determination that the building posed a public emergency to the accuracy of that determination. The City's decision to demolish the building should have been given deference, and proof of the City's compliance with the local ordinance should have been the standard for reasonableness given to the jury. The Fifth Circuit vacated and remanded the case for reconsideration based on the findings.

***Garner v. Kennedy*, No. 11-40653, 2013 U.S. App. LEXIS 6604 (5th Cir. Apr. 2, 2013)**

Under the facts presented to the court, the Texas Department of Criminal Justice's ("TDCJ") policy of prohibiting prisoners from growing a beard for religious reasons violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The question was characterized as a mixed question of fact and law, subject to the Fifth Circuit's de novo review.

Garner, a Texas state prisoner in the custody of the TDCJ, claimed that as a Muslim he is

required to wear a beard. TDCJ's rules prohibit most inmates from having a beard, except for a limited number who are allowed to grow beards up to a quarter of an inch if they have specific skin conditions. Garner filed a *pro se* complaint against TDCJ pursuant to RLUIPA and Section 1983, claiming that the TDCJ violated RLUIPA and his constitutional rights by prohibiting him from growing a beard. The district court initially denied Garner's request to appoint counsel and granted summary judgment in favor of TDCJ. Garner appealed, and the Fifth Circuit reversed the district court's judgment on Garner's request for declaratory relief and injunctive relief with regards to his RLUIPA claim. On remand the district court appointed counsel and held a bench trial on Garner's RLUIPA claim. The district court found that the TDCJ failed to meet its burden in showing that its grooming policy regarding beards was the least restrictive means of furthering a compelling governmental interest. TDCJ appealed.

The Fifth Circuit affirmed the district court's findings. The Fifth Circuit articulated that the determination of whether the imposition of a burden on an individual's religious exercise is the least restrictive means of furthering a compelling governmental interest is a mixed question of fact and law, due to it being highly dependent on the underlying factors. In so finding, the Fifth Circuit applied a *de novo* review of the district court's findings, rejecting other circuits' holdings that the question is one of law and subject only to a review for clear error. The Fifth Circuit affirmed the district court's findings that the evidence presented by TDCJ in support of its contention that to alter its current grooming policy to allow for the growth of beards for religious preferences would create a significant economic impact on the TDCJ. The evidence presented by TDCJ was vague, conflicting, and speculative. The Fifth Circuit also found that the TDCJ did not present enough evidence to support a finding that the no-beard policy furthers the compelling governmental interest in promoting security at the prison. The Fifth Circuit was careful to say that based on the record before the court, the TDCJ had not met its burden to show that its no-beard policy is the least restrictive means of furthering a compelling government interest. In making that distinction, the Fifth Circuit left open the possibility that the TDCJ, based on a different record, might be able to meet its burden under RLUIPA.

***Curtis v. Anthony*, No. 11-20906, 2013 U.S. App. LEXIS 4654 (5th Cir. Mar. 6, 2013)**

Under the facts of the case, law enforcement's reliance on a "dog-scent" lineup was not objectively unreasonable, and therefore, a grant of summary judgment based on qualified immunity was appropriate.

Pikett, a former deputy, made use of scent discriminating bloodhounds in conducting lineups. Pikett would obtain a scent sample from the suspect under investigation by wiping the individual with a sterile gauze pad. The gauze pad containing the suspect's scent would then be stored in a Ziploc bag until the time of the lineup. At the time of the lineup, a second officer would arrange six cans, one containing the suspect's scent pad and the other five containing other persons' scent pads. The other scent pads were taken from persons of the same race and gender. Pikett would then expose a bloodhound to a scent sample taken from the crime scene. The bloodhound was trained to "alert" if the scent matched any of the scents from the six cans. The process would then be repeated with a second bloodhound in order to confirm the findings of the first bloodhound. From 2007 – 2009, Texas courts uniformly accepted Pikett as an expert in "dog-scent lineups." Appellants,

Curtis, Johnson, and Bickham, sued Appellee's, assorted law enforcement officers including Pikett, under Section 1983. Appellants challenged Appellee's reliance on "dog-scent lineups" which Pikett conducted, and which the municipalities used to arrest, charge, and hold Appellants. Appellees asserted qualified immunity defenses. The district court granted summary judgment in favor of Appellees, citing qualified immunity and insufficient evidence of constitutional violations.

The Fifth Circuit affirmed summary judgment, pointing out that in order for a plaintiff to overcome the shield offered by qualified immunity, a plaintiff must plead facts showing: "1) that the official violated a statutory or constitutional right, and 2) that the right was clearly established at the time of the challenged conduct." Qualified immunity protects "all but the plainly incompetent or those willing to violate the law." The Fifth Circuit held that Appellant's failed to show that the officers' actions were objectively unreasonable in relying on Pikett's dog-scent lineups. First, at the time the evidence obtained from the dog-scent lineups was used against Appellants, Pikett enjoyed a solid reputation in the community. At least one Texas court had held that "dog-scent lineups" were a legitimate field of expertise and that Pikett's methodology properly relied upon accepted principles in the field. Second, Appellant's offered no evidence of misconduct on the part of the officers who relied upon the results of the dog-scent lineups. Finally, Appellant's presented no evidence that Pikett had acted to secure a false identification. As such, the Fifth Circuit distinguished the facts presented in this case from earlier Fifth Circuit precedent that had not granted summary judgment based on qualified immunity to Pikett and other officers who had relied on a dog-scent lineup.

***Rogers v. Boatright*, No. 12-20063, 2013 U.S. App. LEXIS 3611 (5th Cir. Feb. 18, 2013)**

An Eighth Amendment claim of deliberate indifference should not be summarily dismissed when the inmate presents evidence that the defendant knew of the risk of harm, and in spite of that knowledge acted recklessly.

Rogers, a Texas prisoner, was being transported to a Veteran's hospital and was sitting on a bench in a prison van with his legs shackled in leg irons and his hands in handcuffs. Rogers was not provided a seatbelt. Rogers alleged that the corrections officer driving the van was driving recklessly and at high rates of speed. At one point the driver slammed on the breaks to avoid hitting another car, and as a result, Rogers was thrown headfirst into the prison van's cage. Because his hands and legs were shackled he could not brace himself or break his fall and he sustained head, neck, spinal, vision, and hand injuries. The driver proceeded onto the Veteran's hospital without checking on Rogers's condition. Upon arriving at the Veteran's hospital, Rogers was interviewed by a V.A. physician and the driver was instructed to take Rogers to the emergency room. The driver did not take him to the emergency room, and instead took him to the medical department back at the prison. Based on those events, Rogers filed a *pro se* civil rights complaint in district court naming as defendants the corrections officers and their supervisor. The district court concluded that the allegations against the corrections officers amounted to no more than negligence or gross negligence and did not amount to a constitutional claim, that Rogers failed to allege facts showing that the defendant's actions amounted to deliberate indifference to his serious medical needs, and that Rogers did not show that his condition was worsened by the delay in treatment. The district court *sua sponte* dismissed Rogers's complaint, finding that his claim was frivolous and failed to state a claim upon

which relief could be granted. Rogers appealed.

The Court of Appeals found that the district court erred in *sua sponte* dismissing at the initial screening stage Rogers's claim that the driver did not act with deliberate indifference to Rogers's safety. The Court of Appeals found that the fact that Rogers, in his affidavit, presented evidence that the driver was driving recklessly and knew of the potential risk to the prisoner was sufficient evidence to sustain summary judgment. The Court of Appeals did point out that the prison's failure to provide Rogers a seatbelt standing alone did not violate Rogers's Eighth Amendment rights. The Court of Appeals remanded for further proceedings, and in so doing pointed out that it was not expressing any opinion on the ultimate merits of Rogers's claim.

Texas Court of Appeals

***Dodson v. Colston*, No. 02-11-00336-CV, 2013 Tex. App. LEXIS 2297 (Tex. App.—Fort Worth Mar. 7, 2013, no pet.)**

The trial court may dismiss a claim without a fact hearing when a claim has no arguable basis in law. Additionally, prosecutorial immunity is an absolute immunity from suit when the claim arises out of the prosecutor's actions taken in his official capacity. As a result, the trial court did not err by dismissing an inmate's claims against a District Attorney ("DA") and Assistant District Attorney ("ADA") without a fact hearing.

Dodson, an inmate at the Texas Department of Criminal Justice ("TDCJ"), filed suit against the Tarrant County DA and an ADA, claiming among other things, that the defendants conspired to deprive him of his constitutional rights under the Fourteenth Amendment. The trial court dismissed the individual DA and ADA without first having held a fact hearing. Dodson appealed.

The Court of Appeals affirmed the trial court's decision, finding that the trial court was not required to have a fact hearing. The Court of Appeals pointed out that the trial court has the right to dismiss a claim as frivolous or malicious where the claim has no arguable basis in law. Here, the claims against the DA and the ADA, acting in their official capacity, were barred by the doctrine of prosecutorial immunity. Prosecutorial immunity grants a prosecutor absolute immunity from civil liability when the claims are pertaining to actions taken in his official capacity. As such, Dodson's claims had no arguable basis in law, and the trial court did not err in dismissing the claims without holding a hearing on the facts. The Court of Appeals affirmed the trial court's decision.