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The Informer – July 2022

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CASE SUMMARIES

United States Supreme Court

Vega v. Tekoh, 142 S. Ct. 2095 597 U.S. ___ (2022)

In March 2014, Terrence Tekoh was working as a certified nursing assistant at a Los Angeles medical center. When a female patient accused him of sexually assaulting her, the hospital staff reported the accusation to the Los Angeles County Sheriff's Department, and Deputy Carlos Vega responded. Deputy Vega questioned Tekoh at length in the hospital, and Tekoh eventually provided a written statement apologizing for inappropriately touching the patient's genitals. The parties dispute whether Deputy Vega used coercive investigatory techniques to obtain the statement, but it was undisputed that he never informed Tekoh of his rights under [Miranda v. Arizona](#). In [Miranda](#), the Supreme Court held that during a custodial interrogation police officers must inform a suspect that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning."

Tekoh was arrested and charged in California state court with unlawful sexual penetration. The trial judge denied Tekoh's motion to suppress his written statement, ruling that Tekoh was not in custody when he provided it to Deputy Vega. At trial, the jury acquitted Tekoh.

Tekoh subsequently sued Deputy Vega under 42 U. S. C. §1983 in federal district court. At trial, Tekoh asked the court to instruct the jury that it was required to find that Deputy Vega violated the Fifth Amendment right against compelled self-incrimination if it determined that he took a statement from Tekoh in violation of [Miranda](#) and that the statement was then improperly used against Tekoh at his criminal trial. The district court declined, finding that a [Miranda](#) violation could not, by itself, provide a ground for liability under §1983. After the jury found in Deputy Vega's favor, Tekoh appealed.

The Ninth Circuit Court of Appeals reversed the district court, holding that the "use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a §1983 claim" against the officer who obtained the statement. Deputy Vega appealed, and the Supreme Court granted certiorari, agreeing to hear the case.

Section 1983 provides a cause of action against any person acting under color of state law who "subjects" a person or "causes [a person] to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This Clause "permits a person to refuse to testify against himself at a criminal trial in which he is a defendant" and "also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"

In [Miranda](#), the Court concluded that additional procedural protections were necessary to prevent the violation of this important right when suspects who are in custody are interrogated by the police. To afford this protection, the Court required that custodial interrogation be preceded by

the now-familiar warnings mentioned above, and it directed that statements obtained in violation of these new rules may not be used by the prosecution in its case-in-chief.

In this case, the Court disagreed with Tekoh’s assertion that a violation of Miranda automatically constituted a violation of the Fifth Amendment right against self-incrimination. The Court explained that Miranda and subsequent cases made it clear that Miranda imposed a set of “prophylactic rules,” that while “constitutionally based,” are rules, nonetheless. The Court added that at no point in Miranda “did the Court state that a violation of its new rules constituted a violation of the Fifth Amendment right against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation.”

Consequently, the Court reversed the Ninth Circuit Court of Appeals, and held that a violation of Miranda was not itself a violation of the Fifth Amendment right against self-incrimination; therefore, such a violation did not constitute “the deprivation of [a] right . . . secured by the Constitution.” Additionally, the Court saw no justification for expanding Miranda to confer a right to sue under §1983.

For the Court’s opinion: https://www.supremecourt.gov/opinions/21pdf/21-499_gfbh.pdf

Circuit Courts of Appeals

Sixth Circuit

United States v. Zabel, 35 F.4th 493 (6th Cir. 2022)

On August 4, 2020, United States Park Ranger William Jaynes responded to an incident report at Mammoth Cave. When he arrived at the parking lot, he encountered a female archaeology technician whose job was to monitor a trail restoration project inside the cave. She explained that Jason Zabel, one of the contractors working on the restoration project, had just pinned her against a wall and attempted to kiss her, grabbed her buttocks and breasts, and exposed his penis to her without her consent while she was leaving the cave. After obtaining Zabel’s description and location, Ranger Jaynes and another park ranger entered the cave to find him.

The park rangers used an elevator to enter the cave and then walked approximately 25 minutes through its dark, narrow passages until they heard a group of workers speaking. Ranger Jaynes recorded the ensuing encounter from his body camera, which began with the park rangers introducing themselves to the group as law enforcement officers. They then asked, “Is there somebody here named Jason?” When Zabel raised his hand and confirmed his identity, the rangers said, “Come this way and chat with us for a few minutes.”

Zabel followed the park rangers around the corner for less than 2 minutes where his coworkers could not hear their conversation. There, Zabel asked if he could use the restroom, and the park rangers replied, “Is there a bathroom around here?” Zabel stated there was a restroom near the cave’s entrance, but the rangers responded that “we’re quite a ways from there” and “you’re going to have to hold it for a few minutes.”

Before the park rangers told Zabel about the accusations made against him, they explained that he was “not under arrest,” that he was “free to go,” that he had “no warrants,” that he did not have to talk to them, that it was his “option” to do so, and that they would much rather he be quiet than

lie to them. As an alternative to using the restroom near the cave's entrance, Zabel requested to walk to a nearby location where there were "a couple of empty buckets" because he was unsure how "much further than that [he'd] be able to make it." The park rangers responded "Alright, first," and then proceeded to question Zabel about what happened with the female employee that morning.

Zabel made several incriminating statements during the interview, including that he had grabbed the female employee's butt in the elevator, asked to kiss her, and showed her his penis, during which he "may have been a little" erect or excited. The interview lasted less than 20 minutes, after which the park rangers told Zabel he would need to exit the cave with them. The rangers frisked Zabel for weapons and eventually allowed him to use the restroom, but they did not handcuff him until they reached the cave's surface due to the potentially dangerous nature of the walk out.

The government charged Zabel with knowingly engaging in sexual contact with another person without that other person's permission, in violation of 18 U.S.C. § 2244(b). Zabel filed a motion to suppress his incriminating statements, arguing that the park rangers improperly obtained those statements during a custodial interrogation without first advising him of his Miranda rights. The district court held that the park rangers were not required to provide Zabel the Miranda warnings because, under the totality of the circumstances, he was not in custody during the interview. Upon conviction, Zabel appealed.

To determine whether a person is "in custody" for purposes of Miranda, courts focus on whether, under the totality of the circumstances, "the interviewee's freedom of movement was restrained to a degree associated with formal arrest." The Sixth Circuit Court of Appeals has identified four, non-exhaustive factors to help make this determination: (1) the location of the interview; (2) the length and manner of the questioning; (3) whether there was any restraint on the individual's freedom of movement; and (4) whether the individual was told that he or she did not need to answer the questions.

After reviewing the body camera footage of the encounter, the Sixth Circuit Court of Appeals agreed with the district court and held that the circumstances surrounding Zabel's interview would not lead a reasonable person to believe that he was in custody until the park rangers frisked him and informed him that he would be placed under arrest.

First, the location of the interview was inside Mammoth Cave, Zabel's place of employment for the prior 6-7 months. The court noted that "police questioning taking place in the suspect's . . . place of work is likely to be less intimidating than questioning taking place at the police station.

Second, the court held that the length and manner of the interview weighed against a finding of custody. The park rangers questioned Zabel for less than 20 minutes. The court added in other cases it has held that suspects questioned for longer lengths of time were not in custody for Miranda purposes. In addition, the park rangers' demeanor was not hostile and was consistent with the respectful nature of the interview, and Zabel asked if he could shake the park rangers' hands when the interview concluded.

Third, the court found that the strongest factor in Zabel's favor was that the park rangers did not immediately allow him to use the restroom upon request. However, before describing the allegations against him, the park rangers explicitly told Zabel that he was not under arrest and that he did not have to talk to them. The court recognized that the most important factor in the Miranda custody analysis is "whether investigators inform a suspect that he is free to leave or to refuse to answer questions." Consequently, even if a reasonable person in Zabel's position may have felt

restrained when the park rangers denied his requests to use the restroom, their repeated assurances that he was free to leave and was not required to speak with them negated any notion that he was restrained to a degree associated with formal arrest or that the interview was custodial in nature.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/21-5766/21-5766-2022-05-23.pdf?ts=1653334240>

Eighth Circuit

Davis v. Dawson, 33 F.4th 993 (8th Cir. 2022)

On August 5, 2017, Shawn Davis stabbed Preston Davis outside a gathering at his home. Several people, including Crystéal Davis (the victim's wife), Damon Davis (his brother), and Iisha Hillmon (his cousin), witnessed the stabbing. When Des Moines Police Department officers arrived, they took Shawn Davis into custody while paramedics took the Preston Davis to the hospital.

All the witnesses, including the family, told the officers that Shawn stabbed the victim, and they wanted to go to the hospital. Crystéal and Damon tried to leave in their cars, but the officers stopped them. At least three officers told the family they would take them to the hospital, so they got into two patrol cars. Once in the patrol cars, officers told Crystéal, Damon, and Iisha that they were going to the police station to be interviewed instead of going to the hospital. After being told this, the family members repeatedly demanded to be taken to the hospital and Crystéal stated, "I would have never gotten in this car had I known they were taking me for questioning."

When they arrived at the police station, Crystéal asked, "Are we like literally for real held captive? If we tried to walk out, would we be arrested?" An officer responded: "You guys are not free to leave. The detectives want to talk to you." During their three-hour detention, Damon repeatedly asked if Crystéal could go see her husband, but this request was denied. Preston Davis died while his wife and other family members were detained at the police station. Afterward, officers admitted there was no probable cause to believe Crystéal, Damon, or Iisha had committed a crime, acknowledging that they were being interviewed solely as witnesses to a homicide and never as suspects.

Crystéal Davis, Damon Davis, and Iisha Hillmon (Plaintiffs) sued several police officers under 42 U.S.C. § 1983, alleging the officers unreasonably seized them in violation of the Fourth Amendment and for common law false arrest. The district court denied the officers qualified immunity and entered judgment for the Plaintiffs. The officers appealed.

Police officers are "entitled to qualified immunity unless: (1) the evidence, viewed in the light most favorable to [the plaintiffs], establishes a violation of a constitutional or statutory right; and (2) the right was clearly established at the time of the violation, such that a reasonable official would have known that his actions were unlawful."

First, the Eighth Circuit Court of Appeals considered whether the Plaintiffs established that an unreasonable seizure occurred. A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. In this case, the court found that an officer told Crystéal and Damon they were going to the police station, not the hospital, after they were in the

“cage” in the back of a moving patrol car. Crysteal and Damon immediately and repeatedly objected to the changed plans. When they arrived at the station, Crysteal asked if they were being “held captive,” and an officer responded, “You guys are not free to leave.” Under these circumstances, the court concluded that the Plaintiffs could reasonably assume they were not free to leave; therefore, they were seized under the Fourth Amendment.

Next, the court held that the seizure of the Plaintiffs was unreasonable. The court noted that all witnesses told the officers that Shawn Davis was the perpetrator and they had him in custody. In addition, the officers admitted they had no reason to believe the Plaintiffs had committed a crime and acknowledged that they were being interviewed solely as witnesses to a homicide and not as suspects. The court found that the three-hour detention was “a most intrusive means of questioning survivors after a violent crime,” as officers transported the Plaintiffs to the police station, separated them, took away Iisha’s phone, and expressly prevented her from telling Crysteal that her husband had died.

Finally, the court found that at the time of the incident, the Supreme Court had previously ruled that “while police have the right to request citizens to answer voluntary questions, concerning unresolved crimes they have no right to compel them to answer.” The court added that pursuant to Eighth Circuit case law, “officers of the Des Moines Police Department, in particular, were on notice that they could not detain someone for questioning against their will, even in a homicide investigation, without probable cause.” As a result, the court affirmed the district court’s denial of qualified immunity for the officers.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/21-2419/21-2419-2022-05-10.pdf?ts=1652196624>

United States v. Slim, 34 F.4th 641 (8th Cir. 2022)

South Dakota Division of Criminal Investigation Agent Toby Russell, acting undercover as a pimp during a local motorcycle rally, posted an advertisement entitled “Who Wants to Be Naughty” on a classified advertising website in its dating section under the category “women seeking men.” He attached three non-pornographic images of an adult law enforcement officer that were digitally altered to make her look younger. The ad’s description stated: “If you feel like being naughty hit me up.” The ad also specified the “poster’s” age was twenty and directed interested parties to text a phone number, which unbeknownst to readers was Agent Russell’s phone number.

Carlocito Slim twice texted the ad’s phone number on August 9, 2017, asking whether the photographed woman was “available” and whether she offered massages. Agent Russell responded by texting Slim that the photographed woman was available and indicated her age as “15 but gonna be 16.” Agent Russell also told Slim in a text message that it would cost \$150 for a half hour and \$200 for a full hour of sexual intercourse. Slim responded with: “OK would like to see her first bro[.]”

Receiving no response by the next afternoon, Slim reinitiated the conversation by again texting Russell whether the alleged minor was available that night and if she could “do one hour2\$\$00.” Slim and Agent Russell agreed to meet at 9:00 p.m. that night at a location to be decided.

A few hours later, the two men engaged in another text message exchange, in which Agent Russell outlined some rules that had Slim had to follow. Agent Russell told Slim that he had to “rock a

condom,” to which Slim replied, “Ok” “Sounds good.” Agent Russell also told Slim that he could not “scare” or “hurt” the alleged minor, to which Slim agreed. Agent Russell then told Slim to meet him at 9:00 p.m. at a gas station so he could be sure that Slim had the money and condoms. Afterward, Agent Russell told Slim that he could follow him to the room. Slim described the car he was driving and told Agent Russell that he would “be there in 20.” When Slim arrived at the gas station, he was arrested. Officers searched Slim’s car and found condoms, \$200 cash, and two cell phones.

The government charged Slim with sex trafficking-related offenses. Slim claimed that the officers lacked probable cause to arrest him; therefore, the evidence seized from his car should have been suppressed. The district court denied the motion. Slim appealed.

An officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed a crime. Probable cause exists “when the facts and circumstances are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense.”

In this case, the Eighth Circuit Court of Appeals held that officers established probable cause to believe Slim committed or was committing a crime. First, Slim texted Agent Russell to ask whether the alleged minor on the sexually suggestive dating ad was available and he reiterated his desire to see her even after Agent Russell told him the alleged minor was fifteen years old. Second, Slim agreed to bring condoms and cash to the gas station, to “rock a condom,” and to refrain from hurting the alleged minor. Finally, Slim then drove to the gas station where he had agreed to meet Agent Russell and the alleged minor. The court concluded that these facts sufficiently established probable cause for the officers to believe that Slim was attempting to commit sex trafficking crimes and to arrest him without a warrant.

Next, the court held that the warrantless search of Slim’s car was permitted under the search incident to arrest exception. Under this exception, officers may search a car incident to arrest and without a warrant if “it is reasonable to believe the vehicle contains evidence of the offense of arrest.” The court held that the officers reasonably believed the car contained evidence of attempted commercial sex trafficking of a minor and attempted enticement of a minor for sexual activity. Specifically, Slim agreed to bring a condom for the meeting, to pay \$200, and used a phone to plan his meeting with Agent Russell. Consequently, the court held that it was reasonable for officers to believe they would find this evidence in Slim’s car.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/21-2693/21-2693-2022-05-17.pdf?ts=1652799674>

N.S. v. Kansas City Bd. of Police Commissioners, 35 F.4th 1111 (8th Cir. 2022)

When Kansas City Police Officer William Thompson responded to a police dispatch concerning a suspected cell phone theft, he became engaged in a foot pursuit with a man later identified as Ryan Stokes. Officer Thompson chased Stokes as he ran into a parking lot and saw him stop at a red car. Officer Thompson then saw Stokes open and shut the driver’s side door. Officer Thompson, who was standing behind Stokes at the time, saw Stokes raise his hands to his waist. Officer Thompson shot Stokes, who later died from his injuries.

N.S., Stokes's child, by and through her mother and friend (Plaintiffs), sued Officer Thompson under 42 U.S.C. § 1983, alleging that he used excessive use of force in violation of the Fourth Amendment. The Plaintiffs also sued various Kansas City municipal officials, arguing that the "Hot Spots" program, which allows non-patrol officers to occasionally work the streets, and the lack of specific foot-pursuit training, amounted to a "deliberate or conscious choice" to ignore public safety.

The district court held that Officer Thompson was entitled to qualified immunity and dismissed the Plaintiff's lawsuit. The Plaintiffs appealed.

The Eighth Circuit Court of Appeals stated that, to determine whether Officer Thompson is entitled to qualified immunity, it had to answer two questions. First, did his actions violate a constitutional right? Second, was the right clearly established? To determine if a right is clearly established, the court will focus "on whether the officer had fair notice that his conduct was unlawful." If the answer to either question is no, then Officer Thompson is entitled to qualified immunity.

In this case, the court went directly to the second question and held that a reasonable officer would not have had "fair notice" that shooting Stokes in these circumstances violated the Fourth Amendment. To support this conclusion, the court cited Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001).

Hubbard involved "a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery." One of the suspects climbed over a short fence and fell to the ground. When he stood up, he "looked over his shoulder at [an officer] and moved his arms as though reaching for a weapon at waist level." When the suspect's arms continued to move despite an order to "stop," the officer fired a single shot into the suspect's back and killed him. No weapon was found. The court held that the officer's use of force did not violate the Fourth Amendment. Critical to the court's ruling was the fact that "an officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."

Even under the Plaintiff's version of the facts in this case, the court found that Officer Thompson faced a similar choice: use deadly force or face the possibility that Stokes might shoot a fellow officer. In addition, as in Hubbard, Officer Thompson could only see the suspect from behind, which obscured his view and required a "split-second judgment in circumstances that were tense, uncertain, and rapidly evolving."

The court recognized that there were differences between the facts in Hubbard and in this case. First, the suspect in Hubbard was fleeing from the scene of an armed robbery, a much more serious crime than stealing a cell phone. Second, Officer Thompson remained silent in the face of possible danger, whereas the officer in Hubbard shouted "stop" before using deadly force.

Despite these differences, the court concluded that a reasonable officer in these circumstances "might not have known for certain that [his] conduct was unlawful," particularly given that Stokes had just accessed the inside of an unknown vehicle before raising his hands. This uncertainty meant that Officer Thompson did not violate a clearly established right; therefore, he was entitled to qualified immunity.

The court further held that Officer Thompson was entitled to official immunity under Missouri law, as the Plaintiffs had not established that Officer Thompson acted "in bad faith or with

malice.” The court found there was no evidence suggesting that Officer Thompson was retaliating against Stokes for something that happened earlier or that they had a pre-existing relationship.

Finally, the court held that the Plaintiffs failed to offer evidence that the municipal officials had notice that any policies or procedures “were inadequate and likely to result in” a constitutional violation. Specifically, the court found that the Plaintiffs failed to link any policy or procedure to any other incident involving the use of excessive force.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/20-1526/20-1526-2022-05-31.pdf?ts=1654011031>

Ninth Circuit

Andrews v. City of Henderson, 35 F.4th 710 (9th Cir. 2022)

Detectives with the Henderson Police Department (HPD) established probable cause to arrest Daniel Andrews for armed robbery. While conducting surveillance, detectives saw Andrews and a woman walk into the Henderson Municipal Courthouse. To enter the courthouse, the pair had to pass through a security checkpoint that included a metal detector and x-ray scanner. One detective followed Andrews and the woman into the courthouse and tracked their location. The other detectives waited outside so they could arrest Andrews after he exited the courthouse because they knew he would be unarmed at that point, having passed through the courthouse’s metal detectors.

Twenty minutes after entering the courthouse, Andrews and the woman reemerged, and Detectives Phillip Watford and Karl Lippisch walked slowly toward them without identifying themselves. When Detective Watford was approximately a foot away from Andrews, he lunged and tackled him to the ground. Detective Lippisch also jumped toward Andrews and Detective Watford and landed on top of them as they fell. Detective Lippisch kept his weight on Detective Watford’s back as Detective Watford handcuffed Andrews’s arms behind his back. The detectives’ takedown resulted in a fracture of Andrews’s hip, which required two surgeries.

After the arrest, Detective Watford prepared a “use of force” report detailing the event. Several of Detective Watford’s supervisors reviewed the report and video footage of the arrest and determined that the use of force did not violate HPD policy or warrant further action.

Andrews sued Detectives Watford and Lippisch under 42 U.S.C. § 1983, alleging a Fourth Amendment excessive-force claim against the detectives. Andrews also sued the City, alleging among other things, that the detectives’ supervisors “ratified” their allegedly unconstitutional use of force.

The district court denied the detectives qualified immunity, finding there was a genuine factual dispute regarding whether they used objectively reasonable force against Andrews. The district court also denied the City’s motion to dismiss Andrews’s ratification claim. The district court found that the detectives contradicting versions of the events, “in addition to the fact that the [detectives] were not disciplined, raises a genuine dispute as to whether their decision to use excessive force was ratified.” The detectives and the City appealed.

In evaluating a Fourth Amendment claim of excessive force, the court will ask whether an officer’s actions were objectively reasonable in light of the facts and circumstances surrounding

the incident. In making this determination, the court must consider: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officer or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.

First, even though the officers had probable cause to arrest Andrews for armed robbery, a serious crime, the court was bound to consider this fact in the full context that the officers faced. Specifically, the court noted that Andrews was not engaged in any violent or nonviolent criminal conduct when the detectives tackled him without warning. In addition, the detectives knew that Andrews was not armed as he exited the courthouse, which was the reason the detectives tackled him when they did. Accordingly, the court held that the risk of violence attributable to Andrews's suspected crimes was mitigated by the specific circumstances in which the officers chose to act.

Second, there was no evidence to show that Andrews otherwise posed a threat to the officers or the members of the public, as he was not exhibiting any aggressive behavior, and there were no bystanders within his close proximity when he exited the courthouse. Third, because Andrews did not know the detectives' identities before they tackled him, there was no dispute that he was not resisting arrest or attempting to flee. Under these circumstances, the court concluded that a reasonable jury could find that the degree of force used against Andrews violated his Fourth Amendment right against excessive force.

Even if a government official violates a constitutional right, the official is entitled to qualified immunity unless the violated right was clearly established at the time of the incident. The court held that its opinion, Blankenhorn v. City of Orange, 485 F.3d 463 (9th Cir. 2007), clearly established and put a prudent officer on notice that an officer violates the Fourth Amendment by tackling and piling on top of a relatively calm, non-resisting suspect who posed little threat of safety without any prior warning and without attempting a less violent means of effecting an arrest. Based on these reasons, the court affirmed the district court's denial of qualified immunity to the detectives.

Finally, the court held that it lacked jurisdiction to review the district court's denial of the City's motion to dismiss Andrews's ratification claim. As a result, the district court's decision to allow that portion of the lawsuit to go forward remained undisturbed.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/20-17053/20-17053-2022-05-23.pdf?ts=1653325273>
