Nieves et al. *v.* Bartlett (U.S. Supreme Court 5/28/19)

Does Probable Cause trump a First Amendment retaliatory arrest claim?

Background: Prior to this case, Circuit Courts had split authority on the answer.

Nieves

- Respondent Russell Bartlett was arrested by police officers Luis Nieves and Bryce Weight for disorderly conduct and resisting arrest in a remote part of Alaska.

- According to Sergeant Nieves, he was speaking with a group of attendees when a seemingly intoxicated Bartlett started shouting at them not to talk to the police. When Nieves approached him, Bartlett began yelling at the officer to leave. Rather than escalate the situation, Nieves left.

Nieves

- Bartlett disputes that account, claiming that he was not drunk at that time and did not yell at Nieves. Minutes later, Trooper Weight says, Bartlett approached him in an aggressive manner while he was questioning a minor, stood between Weight and the teenager, and yelled with slurred speech that Weight should not speak with the minor. When Bartlett stepped toward Weight, the officer pushed him back.
- Nieves saw the confrontation and initiated an arrest. When Bartlett was slow to comply, the officers forced him to the ground. Bartlett denies being aggressive and claims that he was slow to comply because of a back injury. After he was handcuffed, Bartlett claims that Nieves said “bet you wish you would have talked to me now.”

Nieves

- Bartlett sued under 42 U. S. C. §1983, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech—i.e., his initial refusal to speak with Nieves and his intervention in Weight's discussion with the minor.

- The Ninth Circuit held that Bartlett could bring a First Amendment retaliatory arrest case even though there was probable cause to arrest him because a retaliatory arrest would "chill a person of ordinary firmness from future First Amendment activity" and "Bartlett had presented enough evidence that his speech was a but-for cause of the arrest."

Nieves

- The Supreme Court disagreed 6-3 holding that probable cause ***generally*** defeats a retaliatory arrest claim.
- Chief Justice Roberts, writing for the majority, relied primarily on *Hartman v. Moore* (2006), where the Court held that probable cause defeats retaliatory prosecution claims.
- In *Hartman*, the Court noted that proving causation is difficult in retaliatory prosecution cases because "the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity."

Nieves

- Similarly, it is difficult to determine if protected speech is the cause of an arrest because “protected speech is often a ‘wholly legitimate consideration’ for officers when deciding whether to make an arrest. Officers frequently must make ‘split-second judgments’ when deciding whether to arrest, and the content and manner of a suspect’s speech may convey vital information—for example, if he is ‘ready to cooperate’ or rather ‘present[s] a continuing threat.’ If probable cause doesn’t defeat a First Amendment retaliatory arrest claim “[a]ny inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation.”

Nieves

- **But**, the Court's caveat is the "no-probable cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

- An example Chief Justice Roberts offers is a person complaining about police misconduct being arrested for jaywalking. Police officers typically "exercise their discretion" and don't arrest people for very minor crimes like jaywalking.

Nieves

- The exception, “a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose a risk that some police officers may exploit the arrest power as a means of suppressing speech.”
- While a person’s speech may be important indicator of their intent, officers should never decide to arrest or book rather than cite a person because their First Amendment protected speech offended or upsets the officer.

Gamble. U.S. (U.S. Supreme Court 6/17/19)

- Gamble pleaded guilty to a charge of violating Alabama's felon-in-possession-of-a-firearm statute. Federal prosecutors then indicted him for the same instance of possession under federal law. Gamble moved to dismiss, arguing that the federal indictment was for "the same offence" as the one at issue in his state conviction, thus exposing him to double jeopardy under the Fifth Amendment.


DOUBLE
JEOPARDY!

Gamble

The Supreme Court declined to overturn the longstanding dual-sovereignty doctrine. The Double Jeopardy Clause protects individuals from being “twice put in jeopardy” “for the same offence.” As originally understood, an “offence” is defined by a law, and each law is defined by a sovereign. Thus, where there are two sovereigns, there are two laws and two “offences.”

NOTE- police officers can be tried in state and fed court

Timbs *v.* Indiana (U.S. Supreme Court 2/20/19)

- Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchase for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction.

Timbs

Held: The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause.

Remanded to determine if this seizure was excessive.

Mitchell v. Wisconsin 588 U.S. _____(2019)

Is the administration of a blood test without a warrant on an unconscious drunk driving suspect reasonable under the 4th Amendment?

- Gerald Mitchell was arrested for OUI, after a preliminary breath test registered a (BAC) that was triple Wisconsin's legal limit for driving. Mitchell was transported to a police station for a more reliable breath test using evidence-grade equipment.
- Upon arrival, Mitchell was too lethargic for a breath test, so the officer took him to the hospital for a blood test. Mitchell was unconscious upon arrival at the hospital, but his blood was drawn anyway under a state law that presumes that a person incapable of withdrawing implied consent to BAC testing has not done so.

Mitchell

- The blood analysis showed Mitchell's BAC to be above the legal limit, and he was charged with violating two drunk-driving laws. Mitchell moved to suppress the results of the blood test as a violation of his 4th Amendment right against "unreasonable searches" because it was conducted without a warrant.

- The trial court denied the motion, and he was convicted. The Wisconsin Supreme Court affirmed the lawfulness of Mitchell's blood test.

Mitchell

- A valid drunk driving arrest, by itself, justifies a warrantless and nonconsensual *breath test*, but not a warrantless and nonconsensual *blood test*. *Birchfield v. North Dakota*, 579 U.S. ___ (2016).
- The natural dissipation of alcohol from a person's bloodstream *may*, but does not necessarily, create an exigent circumstance justifying a warrantless and nonconsensual blood test in every case in which a suspected drunk driver is arrested. *Missouri v. McNeely*, 569 U.S. 141 (2013).
- In *Schmerber v. California*, 384 U.S. 757, 770 (1966), for example, the delay in seeking a warrant that was caused by the officer being confronted with an emergency and pressing duties relating to an automobile accident would have threatened the destruction of blood alcohol content evidence and thus presented an exigent circumstance justifying a warrantless and nonconsensual blood test.

Mitchell

- The United States Supreme Court has concluded that: “When the police have probable cause to believe that a person has committed a drunk-driving offense and the driver’s unconsciousness or stupor requires him to be taken to the hospital or similar facility before the police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver’s BAC without offending the Fourth Amendment.”

Mitchell

- In essence, the driver's unconsciousness creates an exigent circumstance because the police are unable to administer a breath test, and it presents a medical emergency that creates a pressing need for action.
- The court's "almost always" rule is general and did "not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties."

Mitchell

The US Supreme Court held that there is clearly a “compelling need” for a blood test of drunk driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test. Specifically, the court cited the following compelling interests:

1. Highway safety is a vital public interest;

2. Federal and state lawmakers have long determined that BAC limits make a significant difference in safety;

3. Enforcing BAC limits requires a reliable test to withstand legal scrutiny. Additionally, such testing must be promptly administered due to the biological dissipation of alcohol in the bloodstream; and

4. When a breath test is unavailable to promote these public safety interests, a blood draw becomes necessary.

Mitchell

If there is time and/or no exigency, officers must obtain a search warrant for a blood draw. However, if the driver is unconscious, thereby creating the inability to obtain a breath test AND an exigency exists due to the dissipation of alcohol in the body and “pressing health, safety or law enforcement need that would take priority over a warrant application” then a warrantless blood draw may be legal.

But the suspected drunk driver will have the opportunity to challenge the warrantless blood draw, alleging that police only drew blood for BAC purposes AND that obtaining a warrant would not have interfered with other pressing law enforcement needs or duties.

Mitchell

- According to the Court majority, for the stated reasons, there is a "compelling need" for a blood test of drunk driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test.

- It must be exigency to allow for a warrantless draw!!

- Also, remember that your State may have Statutory or Constitutional provisions that are more restrictive than the 4th Amendment and require a search warrant in cases such as this.

McDonough v. Smith

- The Supreme Court considered when the statute of limitations begins to run on a constitutional claim that a state official used fabricated evidence to initiate and continue a criminal prosecution.

- The issue here is whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor, as the majority of circuits have held, or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use, as the U.S. Court of Appeals for the 2nd Circuit held.

McDonough

- During a 2009 primary election in the City of Troy, New York, several individuals forged signatures and provided false information on absentee ballots in order to affect the outcome of that primary. Those individuals then submitted the forged absentee ballot applications to Edward McDonough, who was responsible for processing those applications.

- McDonough approved the forged applications but subsequently claimed he did not know that they had been falsified. The plot to influence the primary was eventually discovered.

McDonough

- The state court then appointed a Special District Attorney to lead the investigation and potential prosecution. McDonough claimed that Smith then engaged in an elaborate scheme to frame McDonough for the crimes by, among other things, fabricating evidence. McDonough claims that Smith presented the fabricated evidence to a grand jury.

- The grand jury subsequently indicted McDonough on numerous counts. The case against McDonough proceeded to trial but ended in a mistrial. McDonough was then retried, again with Smith as the prosecutor. That trial ended in McDonough's acquittal on December 21, 2012.

McDonough

- On December 18, 2015, McDonough filed this action under 42 U.S.C. § 1983 for fabrication of evidence. New York argued that the statute of limitation passed. Lower Court and Second Circuit Agreed.

- The Supreme Court reversed; in a 6-3 opinion, the Court held that the statute of limitations on a Section 1983 claim of fabricated evidence does not start until the criminal proceedings have ended.

McDonough

- Court also relied on practical considerations, explaining that forcing criminal defendants to sue while their prosecutions are still ongoing would impose on them “an untenable choice” between letting their claims expire and “filing a civil suit against the very person who is in the midst of prosecuting them.”

- Thus, only when the criminal proceeding has ended favorably to a defendant can that defendant sue for malicious prosecution at common law.

Quarles v. U.S., 587 U.S. ____ (2019)

- Quarles plead guilty to felon in possession of a firearm, but objected to the enhanced sentence under the Armed Career Criminal Ac, 18 U.S.C. 924(c).
- Quarles claimed that Michigan's statute swept too broadly as it applied to his conviction for third degree home invasion.
- District Court rejected Quarles claim
- 6th Circuit rejected Quarles claim
- Supreme Court rejected Quarles claim

Quarles

- Supreme Court held that Michigan's home invasion statute substantially corresponds to or is narrower then generic burglary.
- When deciding whether a state law is broader than generic burglary, the state law's "exact definition or label" does not control.
- So long as the state law in question "substantially corresponds" to, or is narrower than generic burglary, the conviction qualifies.

Madison v. Alabama, 586 U.S. ____ (2019)

- Madison was convicted of murder and sentenced to death.
- Madison subsequently suffered several strokes and was diagnosed with vascular dementia.
- Madison sought a stay of execution claiming that he could not recollect committing the crime.
- 11th Circuit granted Madison's habeas relief.
- Supreme Court reversed holding that failure to remember his crime does not clearly establish that a prisoner is incompetent to be executed.

City of Escondido v. Emmons, 586 U.S. ___ (2019)

- 4th Amendment Use of Force case
- 9th Circuit agreed with the District Court that the officers had probable cause to arrest Defendant, but remanded the excessive force claims back tot the District Court.
- Supreme Court (again!) held that the 9th Circuit's formulation of "clearly established" was far too general.
- An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

Yovino v. Rizo, 586 U.S. ___ (2019)

- After the vote on a case, but before the case was published, a 9th Circuit Judge (the author of the opinion) died.
- The 9th Circuit indicated that the majority opinion and all concurences were final and voting was completed before his death, therefore the opinion was still valid.
- The Supreme Court vacated, holding that a judge generally may change his position up to the moment when the decision is released.
- “Federal Judges are appointed for life, not for eternity”

Future….

Altitude Express v. Zarda

- Does Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination “because of…sex” encompass discrimination based on an individual’s sexual orientation.

Hernandez v. Mesa

- US Border Patrol Agent Mesa shoots a Mexican citizen, Hernandez, allegedly without justification. Mesa was in US, while Hernandez was in Mexico.
- 5th Circuit held Hernandez family could not assert a claim under 4th Amendment because Hernandez was a Mexican citizen on Mexican soil.
- Will the Supreme Court extend the Bivens decision allowing for civil liability in this case?

Kahler v. Kansas

- Can Kansas abolish the Insanity Defense?
- Does the 8th and 14th Amendment allow or prohibit a state from abolishing the insanity defense?

Kansas v. Glover

- Officer pulls over vehicle after running registration information indicating that R/O is revoked. R/O is the driver, but claims that officer needed more information prior to investigatory detention.
- Is it reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle (absent any evidence to the contrary).

Investigatory Detentions

- Rodriguez
- Campbell
- Burwell

Rodriguez (Supreme Court)

- The officer issued a warning citation, returned his driver's license, registration and proof of insurance and then had the driver and passenger wait approximately eight minutes, without reasonable suspicion of wrongdoing, while he conducted a canine sniff of the vehicle. The sniff revealed contraband, and Rodriguez was charged.

- The Supreme Court held the officer violated the Fourth Amendment with the extra eight-minute detention.

Rodriguez v. U.S.

- In overturning the 8th Circuit, the U.S. Supreme Court held that it was not whether the dog sniff occurred before or after the officer issued the ticket, but whether conducting the sniff added time to the stop. In this case, the court held that the time that the officer extended the stop was not de-minimus. This case signifies a shift in the court's analysis as to what is reasonable in terms of traffic stops.

Campbell (11th Circuit post Rodriguez)

- The 11th Circuit held that a 25 second delay violated Campbell's fourth amendment rights. In *Campbell,* an officer conducted a traffic stop of Campbell for having a tag cover that obscured part of his tag. As the officer was writing the warning, he paused and asked Campbell if he had any contraband such as counterfeit merchandise, drugs, or any dead bodies. Campbell said that he did not, and the officer asked for consent to search the vehicle. Campbell gave consent and the officer found a firearm and a ski mask. The questions were deemed to be regarding general criminal activity and outside of the scope of the traffic stop; they extended the stop 25 seconds, as seen on the video.
- Therefore, based on the facts of this case, the 11th Circuit held that the unrelated questions prolonged the stop and violated the 4th Amendment.

Burwell

- Burwell alleged four actions of the officer that impermissibly extended the duration of the traffic stop. The actions are as follows: (1) calling and waiting on a back-up officer; (2) explaining the situation to the back-up officer upon his arrival, including his suspicion that there may be drugs in the vehicle; (3) asking Burwell to exit the vehicle and conducting a frisk; and (4) asking Burwell additional questions about the fishing trip and travel plans as he wrote the warning citation.
- The court held that all four of the activities that Burwell argues impermissibly extended the duration of his traffic stop were all actually properly within the scope of the traffic stop. As such, no Fourth Amendment violation occurred.