FALL 2014 NEWSLETTER

CIVIL RIGHTS LAW UPDATE

By Josh Skinner

United States Supreme Court

***Carroll v. Carman*, No. 14-212 (November 10, 2014)**

Police officers were entitled to qualified immunity because prior case law did not place beyond debate the question of what door police should use when availing themselves of the "knock and announce" exception to the Fourth Amendment warrant requirement.

Two police officers went to the Carman residence based on information that a wanted individual was there. They stated that it appeared that there were two doors to the residence that looked like "customary entrances." The officers went up on a deck to one of the entrances, a sliding glass door. Andrew Carman appeared and acted in a belligerent manner and would not tell the officers his name. The police restrained Mr. Carman and his wife appeared. She explained who they were, denied that the wanted individual was present in the residence, and consented to a police search of the premises. However, the Carmans subsequently brought suit alleging that the officers violated the Fourth Amendment by entering the deck and proceeding to the back sliding door.

On appeal, the Third Circuit ruled that the police officers violated the Fourth Amendment and denied qualified immunity, asserting that the law was clearly established. In a per curiam opinion, the Supreme Court reversed the decision of the Third Circuit, holding that prior case law did not place the Fourth Amendment issue "beyond debate." Consequently, the officers were entitled to qualified immunity.

United States Court of Appeals for the Fifth Circuit

***Luna v. Mullenix*, 765 F.3d 531 (5th Cir. August 28, 2014)**

State Trooper denied qualified immunity because use of deadly force to end vehicular flight violated clearly established law in light of fact question as to whether the plaintiff posed a substantial and immediate risk of danger to other officers or bystanders. This opinion would appear to conflict with the Fifth Circuit's decision earlier in August, *Thompson v. Mercer*, discussed below.

A police officer attempted to arrest Israel Leija, but Leija fled in a vehicle onto the highway. The ensuing pursuit involved speeds of between 80 and 110 MPH, but traffic on the highway was light and as in a rural area. During the pursuit, Leija twice called police dispatch on his cell phone, claiming (falsely, as it turned out) that he had a gun and that he would shoot at police officers if they did not cease the pursuit. The police set up a series of three tire spikes. However, Trooper Mullenix shot at Leija before he reached the tire spikes, killing Leija. Leija's family brought suit. Mullenix moved for summary judgment, arguing that he was entitled to qualified immunity. The district court

denied the motion and Mullenix appealed.

The Fifth Circuit affirmed the denial of qualified immunity to Mullenix, stating that there was a fact question as to whether Leija posed a substantial and immediate risk of danger to other officers or bystanders and that, in consequence, Mullenix violated clearly established law. The Court focused on facts such as the rural nature of the area, the fact that the police had not actually seen whether Leija had a firearm, and the upcoming tire spikes.

Update: Mullenix filed a motion for rehearing en banc with the Fifth Circuit. The Court requested a response to the motion for rehearing en banc and is currently considering the motion.

***Munn v. City of Ocean Springs*, 763 F.3d 437 (5th Cir. August 18, 2014)**

Municipal noise ordinance that set an objective standard for determining violations of the ordinance was facially constitutional. The use of the word "annoys" in the ordinance did not render it constitutionally defective.

Munn operates a bar and nightclub that includes live music. In the early morning hours of November 21, 2011, the police received three successive complaints about the noise from Munn's club. An officer went out each time to request that the music be turned down. On the third time, the officer issued a criminal citation for violation of the City's noise ordinance. The City ultimately dismissed the citation and did not prosecute Munn. Munn, however, demanded that the ordinance be repealed and, when it was not, he filed suit. The district court granted summary judgment to the City, holding that the ordinance was not unconstitutionally vague. Munn appealed.

The City's ordinance prohibits noise that "annoys ... a reasonable person of ordinary sensibilities." The Fifth Circuit held that, because the word "annoys," is tied to a reasonable person standard, it is constitutionally permissible under the First Amendment and is not impermissibly vague. The Court expressed concern, however, about the issuance of the citation in the case. The Court noted that the officer testified that he did not think the music was unreasonably loud, but that he issued a citation based purely on anonymous complaints. Nevertheless, the Court did not reach that issue because the club had filed a facial challenge to the statute and had not challenged its application to Munn's establishment.

***Thompson v. Mercer*, 762 F.3d 433 (5th Cir. August 7, 2014)**

Sheriff's use of deadly force to end vehicular flight was reasonable and did not violate the driver's constitutional rights, regardless of whether the roads were relatively abandoned at the time he was shot.

Keith Thompson stole a car with a passenger in it. The passenger managed to call 9-1-1 and the police heard Keith indicating that he planned to kill himself when he reached his destination and they learned from the passenger that there was a firearm in the vehicle. Multiple police vehicles chased Keith, with Keith leading what the Court described as a Hollywood-style police chase, in and out of traffic, on and off the road, at speeds in excess of 100 MPH. Sheriff Mercer laid in wait with a

semi-automatic assault rifle and shot Keith. Keith died. There were no bystanders in the area at the time and no traffic in the vicinity.

The Fifth Circuit held that the sheriff's use of deadly force was reasonable in light of the inherent danger of vehicular flight, even when no bystanders or other motorists are immediately present.

***Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. July 29, 2014)**

The State of Mississippi likely created an undue burden on a woman's right to an abortion by enacting a law that would shut down the one remaining abortion providing facility in the state.

The State of Mississippi enacted House Bill 1390, which requires physicians associated with abortion facilities to have admitting and staff privileges at a local hospital. The Jackson Women's Health Organization (JWHO) operates the only licensed abortion clinic in Mississippi. Of the three physicians at the clinic, only one has admitting privileges at a local hospital, but that doctor, Dr. Roe, only provides "extremely limited abortion services." While Dr. Roe could continue to provide abortion services under House Bill 1390, the parties apparently conceded that the effect of the law would be to shut down the one remaining abortion facility in the state. JWHO brought suit challenging the law and the district court entered a preliminary injunction. The State appealed.

The Fifth Circuit affirmed the preliminary injunction, with modifications to limit its application to the parties and this specific case. The State argued that, even if the law would shut down all remaining abortion facilities in the state, woman were not subject to an undue burden because they could travel to neighboring states for abortion services. The Fifth Circuit rejected this argument, concluding that JWHO had demonstrated a substantial likelihood of success on the merits because courts should determine whether the law creates an undue burden in a state based on the availability of abortion within the state, without taking into account nearby clinics in neighboring states.

Update: The State of Mississippi filed a motion for rehearing en banc with the Fifth Circuit. The Court requested a response to the motion for rehearing en banc and is currently considering the motion.

Note: The Fifth Circuit also issued decisions relating to a similar abortion-facility and physician statute in Texas. In *Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. March 27, 2014), the Fifth Circuit upheld, on a facial challenge, Texas' law requiring physicians performing abortions to have admitting privileges at a nearby hospital. Planned Parenthood filed a motion for rehearing en banc, which was denied on October 9, 2014. In *Whole Women's Health v. Lakey*, No. 14-50928, 2014 U.S. App. LEXIS 18896 (5th Cir. October 2, 2014), the Fifth Circuit considered the grant of a preliminary injunction in an as-applied challenge to the physician-admitting requirement and the requirement that abortion facilities meet the standards set out for ambulatory surgical centers. The *Lakey* panel stayed the preliminary injunction in large part, but left in place the injunction insofar as it applied to the facility requirements imposed on a clinic in El Paso.

***Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. July 14, 2014)**

Specialty license plates on motor vehicles are private speech entitled to First Amendment protection because a reasonable observer would understand the specialty license plates to be private speech. The State of Texas violated the plaintiffs' First Amendment rights by denying their request of a specialty license plate that includes the confederate flag.

The Texas Division of the Sons of Confederate Veterans (Texas SCV) submitted an application to the Texas Department of Transportation for approval of a specialty license plate, in accordance with TxDOT procedures. The proposed specialty license plate included two confederate flags. TxDOT denied the application. The Texas Department of Motor Vehicles subsequently assumed responsibility for the specialty license plates. Texas SCV renewed its application, and it was again denied. The DMV Board adopted a resolution explaining that it was denying the application because the general public finds the proposed license plate offensive and that such opinions were reasonable. Texas SCV brought suit, alleging violations of its rights under the First Amendment. Both parties moved for summary judgment. The district court concluded that the license plates were private, not government, speech, but that the restrictions were reasonable. Texas SCV appealed.

The Fifth Circuit reversed the grant of summary judgment to the State. The Court held that the license plates are private, rather than government, speech because a reasonable observer would understand that the specialty license plates are private speech. The Court noted that states have not traditionally used license plates to convey a particular message to the public. In addition, the Court concluded that the denial of the application was impermissible viewpoint discrimination rather than permissible content-based regulation.

Update: The State of Texas has petitioned for a writ of certiorari from the Supreme Court of the United States (No. 14-144).

Texas Court of Criminal Appeals

***Ex parte Thompson*, No. PD-1371-13, 2014 Tex. Crim. App. LEXIS 969 (Tex. Crim. App. September 17, 2014)**

The Court of Criminal Appeals ruled unconstitutional under the First Amendment a Texas statute making it a criminal offense to photograph or record by electronic means a visual image of another person in a public place when the photograph or recording is taken without the consent of the person photographed and is made with the intent to arouse or gratify the sexual desire of any person.