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Qualified immunity bars Section 1983 privacy claim

Co-council prevail in case.

By Eric T. Berkman | September 16, 2021

A federal judge has found that a state trooper who exceeded the scope of a permissible warrantless search of a public employee's personal cellphone by copying all its files was entitled to qualified immunity from the employee's Section 1983 suit.

The employee, plaintiff Joseph Wolski, a Gardner police officer, was questioning an informant in an active homicide investigation when he allowed the informant to type a brief message into his phone.

State Trooper Matthew Prescott, the defendant, later conducted a permissible, non-investigatory search of Wolski's phone pursuant to a Superior Court order that all communications generated by law enforcement in connection with the investigation be preserved and produced.

Rather than extracting only communications related to the investigation, Prescott extracted all files, including the contents of a locked "photo vault" containing intimate photographs of Wolski and his wife — of which word then spread throughout the Gardner Police Department.

In response to the Wolskis' Section 1983 suit, Prescott argued that even if he violated their Fourth Amendment rights as alleged, he was entitled to qualified immunity because those rights were not "clearly established" at the time of the violation.

U.S. District Court Judge William G. Young agreed.

"[R]ecent caselaw indicates that the right allegedly violated here is not clearly established," Young said, referencing and quoting Larios v. Lunardi, a 2021 decision by the 9th U.S. Circuit Court of Appeals. "[T]he Ninth Circuit held that this precise issue — 'whether it is unconstitutional to search or seize data from a personal cell phone under the workplace inspection exception to the warrant requirement for public employers' … is 'not clearly established.'"

The 19-page decision is Wolski, et al. v. Gardner Police Department, et al., Lawyers Weekly No. 02-266-21. The full text of the ruling can be found here.

'CLASSIC' QUALIFIED IMMUNITY

Prescott's attorney, Daniel J. Moynihan Jr. of Stoneham, called Wolski the "classic qualified immunity case."

"At the end of the day, it comes down to whether law enforcement can make reasonable decisions and make mistakes and still be allowed the benefit of the doubt without being held personally liable," he said.

Moynihan's colleague and co-counsel, Mark A. Russell, said it was noteworthy that Young nonetheless expressed concern about the type of "data dump" at issue in the case.

"He relayed a concern that law enforcement should work toward trying to figure out what is relevant to their case rather than just doing a

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complete dump of the data," Russell said. "The law was not clear, so we got the benefit of the doubt with qualified immunity, but the concern from the judge was heard."

Boston attorney Herbert S. Cohen, who represented the plaintiffs, did not respond to requests for comment, but other local civil rights attorneys were concerned by the decision.

"This is an example of why people want to abolish qualified immunity," said Howard Friedman of Brookline. "The ultimate irony is that cases like this assume police officers are reading District Court and appellate court decisions, which they are not. It's a legal fiction that protects public officials even when they're doing things where if they were competent they would know not only that it's wrong but that it violates the Constitution."

Michael L. Tumposky of Boston said Young essentially found that while there was a constitutional violation, he could not do anything about it because nobody else had successfully brought the same claim in the past.

"This means that even though there's a violation of the plaintiffs' rights, there's no recovery," he said. "This makes it incredibly challenging for people whose rights are violated when there's this extra burden they have to satisfy by proving someone else's rights were violated the exact same way as theirs, that person went to court, litigated the case, and decision was published."

That raises a question as to whether the doctrine should be modified or eliminated altogether, particularly since it is a creation of the courts that appears nowhere in Section 1983 itself, Tumposky said.

Haverhill attorney Marsha V. Kazarosian agreed, pointing out that recent decisions in which judges have reluctantly dismissed cases on qualified immunity "just scream" for the doctrine to be abrogated.

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Marsha V. Kazarosian

However, Timothy M. Burke of Needham, who represents police officers, said Wolski was a unique circumstance that illustrates how Section 1983 cases are not always the perfect remedy for every potential violation.

"On the more positive side, there are clearly other avenues for the plaintiffs in terms of other tort or state law violations that the court pointed out and did not take jurisdiction on," Burke said, adding that once there is a clearly established code of conduct for a particular situation, a Section 1983 action will obviously be upheld.

COMPLETE EXTRACTION

On Jan. 20, 2016, Prescott and two other state troopers traveled to Gardner to begin a homicide investigation.

During the investigation, two men, Francis Arbolay and his stepbrother Thomas Racine, became persons of interest.

Wolski, claiming a rapport with Racine, offered to locate him for State Police.

Once Wolski located Racine, he interviewed him at the Gardner police station. In the interview room, Racine asked to use Wolski's personal cellphone, a request Wolski granted.

Racine then typed a message into Wolski's phone and gave it back to him to read.

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After Wolski read the message, he told Racine he would delete it.

Wolski, who normally used his personal phone to communicate with informants, then deleted the message and did not tell anyone in the Gardner Police Department what had happened.

Arbolay was ultimately indicted for murder, and a Worcester Superior Court judge granted his motion to compel preservation and production of all communications generated by law enforcement during the investigation of the case.

A Gardner police lieutenant, Eric McAvene, told Wolski of the order and Wolski handed over his personal cellphone, explaining that it was not the same phone he had been using at the time.

Prescott, allegedly a trained specialist in computer and cellphone extractions, subsequently received Wolski's phone and used software on his laptop to conduct a data extraction.

The program in question apparently did not provide an option to pick and choose data to be extracted. Instead it copied all files on Wolski's phone.

After the extraction, Prescott returned Wolski's phone to him, gave a copy of the data on a disk to a fellow state trooper, did not copy or share the data again, and deleted the data from his laptop hard drive.

Included in the copied data was a "locked photo album vault" containing photos of Wolski and his wife engaging in sexual activity.

Lt. McAvene later learned of the intimate data, told colleagues about it, and word spread throughout the department.

In December 2018, the Wolskis sued the State Police, the Gardner Police Department, McAvene, Prescott and two other state troopers, alleging invasion of privacy in violation of Section 1983 and a host of other tort counts.

Claims against the other defendants were dismissed primarily on jurisdictional grounds, leaving the Section 1983 claim against Prescott as the sole remaining claim. Prescott moved for summary judgment.

NOT CLEARLY ESTABLISHED

Young acknowledged that the data extraction indeed violated the Wolskis' Fourth Amendment rights because it was unreasonably intrusive in scope.

Specifically, Young noted, the order was limited to communications generated as part of the homicide investigation, and the extraction was not even on the same cellphone Wolski was using during his meeting with Racine.

Still, Young found Prescott was entitled to qualified immunity because the Wolskis did not show that their rights were "clearly established" at the time of the alleged violation such that a reasonable officer would understand that such conduct violated them.

"'[O]wing to a legal deus ex machina — the "clearly established" prong of qualified-immunity analysis — the violation eludes vindication,'" Young said, granting summary judgment to the defendant.

Wolski, et al. v. Gardner Police Department, et al.

THE ISSUE: Was a state trooper who exceeded the scope of a permissible warrantless search of a public employee's personal cellphone by copying all files from the device entitled to qualified immunity from the employee's Section 1983 suit?

DECISION: Yes (U.S. District Court)

LAWYERS: Herbert S. Cohen of Boston (plaintiffs) Michael J. Akerson of Reardon, Joyce & Akerson, Worcester; Gerard T. Donnelly of Hassett & Donnelly, Worcester; Joseph P. Kittredge of Rafanelli & Kittredge, Acton; Daniel J. Moynihan Jr. and Mark A. Russell, of Law Office of Daniel J. Moynihan, Stoneham (defense)