FULLERTON POLICE DEPARTMENT
TRAINING BULLETIN
ROBERT DUNN, CHIEF OF POLICE

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THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT BARS CITY FROM PROSECUTING INDIVIDUALS CRIMINALLY FOR SLEEPING OUTSIDE ON PUBLIC PROPERTY WHEN NO SHELTER AVAILABLE

Courtesy of James R. Touchstone, Esq.

In *Martin v. City of Boise*, 2018 U.S. App. LEXIS 25032 (9th Cir. Sept. 4, 2018), the Ninth Circuit Court of Appeals held that a local ordinance violated the Eighth Amendment to the extent that it imposed criminal sanctions against homeless persons for sleeping outdoors, on public property, when they had no alternative shelter access available. The Court also held that two of the plaintiffs could be entitled to retrospective and prospective relief for the Eighth Amendment violation.

Background

The City of Boise ("City") had two ordinances at issue. Boise City Code section 9-10-02 (the "Camping Ordinance"), declared that use of "any of the streets, sidewalks, parks, or public places as a camping place at any time" was a misdemeanor. This ordinance defined "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." Boise City Code section 6-01-05 (the "Disorderly Conduct Ordinance") banned "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof."

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.

There were three homeless shelters in the City of Boise ("City") for the City's large and growing homeless population. Two of the three shelters were operated by BMR, a religious nonprofit organization, - one exclusively for men, and the other for women and children. These two shelters maintained a religious environment, and, in some situations, denied shelter if certain expectations of religious conduct were not met. Other rules or

practices denied stays for more secular reasons, such as limiting the stays to a certain number of days within a period.

The plaintiffs were six current or former residents of the City who are or were recently homeless. Each plaintiff alleged that, between 2007 and 2009, he or she was cited by Boise police for violating at least one of the two city ordinances. The plaintiffs filed action in federal court in the District of Idaho in October 2009. The plaintiffs alleged that their citations under the ordinances violated the Eighth Amendment's Cruel and Unusual Punishments Clause and accordingly sought damages pursuant to 42 U.S.C. section 1983. Two of the plaintiffs also sought prospective declaratory and injunctive relief to prevent future enforcement of the ordinances because they expected to be cited under the ordinances again in the future.

After the lawsuit was initiated, the City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol." Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police themselves have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, one of the three shelters has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

The District Court granted summary judgment to the City in July 2011, holding that the retrospective relief claims were barred and the prospective claims had become moot because the Boise Police Department had in January 2010 implemented procedures that prohibited enforcement of the two ordinances under certain conditions. The Ninth Circuit later reversed and remanded,[1] holding, among other things, that prospective relief claims were not moot and the January 2010 procedures were merely administrative policy and could be altered by the police department at any point. On remand, the District Court again granted summary judgment, holding that *Heck v. Humphrey*[2] barred all of the plaintiffs' claims for retrospective and prospective relief. Plaintiff again appealed.

Discussion

The Ninth Circuit considered on appeal whether the Eighth Amendment's prohibition on cruel and unusual punishment barred a city from criminally prosecuting individuals for sleeping outside on public property when they had no home or other shelter available.

Standing for Prospective Relief Claims

The Court first addressed whether the plaintiffs had standing to seek prospective relief. The Court explained initially that "on summary judgment, the plaintiffs 'need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements."

Observing that the City relied completely on the self-reporting by the shelters themselves about whether they were full, the Court observed that
one shelter was completely full on up to 50% of the nights and had reported that it had to frequently turn away people seeking shelter.

The other two shelters, run by BRM, had a policy of refusing further nights' stays to those who had already stayed a certain number of days. A plaintiff testified that after being denied shelter for this reason in the past, he had been forced to sleep outdoors. Individuals who arrived at the BMR shelters after 8 p.m. were also denied shelter. The two shelters denied stays for other reasons as well.

The Court thus found that, even assuming on the veracity of the shelters' self-reporting, there remained a genuine issue of material fact as to whether homeless individuals in Boise faced a credible risk of being issued a citation on nights when shelters were full or when shelters denied entry for reasons other than shelter capacity – effectively a situation where no shelter was available for those homeless individuals. The Court thus concluded that plaintiffs had standing to pursue prospective relief.

Heck v. Humphrey

The Court next addressed the applicability of *Heck* "and its progeny" to the case. The Court explained that Heck held that a plaintiff in a Section 1983 action must demonstrate "a favorable termination of the criminal proceedings before seeking tort relief." Thus, *Heck* bars a Section 1983 claim if it is inconsistent with a prior criminal conviction or sentence arising out of the same facts, unless the conviction or sentence has been subsequently resolved in the plaintiff's favor.

Regarding retrospective relief claims here, the Ninth Circuit observed that *Heck* bars a Section 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. The Ninth Circuit concluded that because none of the plaintiffs challenged their convictions on direct appeal (having expressly waived the right to do so as condition of their guilty pleas), most of their retrospective claims for injunctive relief were barred by *Heck*. Two plaintiffs, however, had also received citations that were dismissed, so, the Court held, *Heck* was not applicable to these claims and the District Court had erred in barring these particular claims.

The Ninth Circuit also concluded that the District Court erred in finding the plaintiffs' claims for prospective relief were barred by Heck. The Court understood *Wolff v. McDonnell*,[3] *Wilkinson v. Dotson*[4], and Edwards to have considered Heck to be focused on retrospective existing relief claims, not prospective injunctive claims for relief. The Court

thus concluded that the Heck doctrine "serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge."

Summarizing the Ninth Circuit's conclusions regarding *Heck's* application to the claims here, the Court held that all but two of the plaintiffs' claims for retrospective relief were barred by *Heck*, but none of the claims for prospective injunctive relief were barred.

Eighth Amendment

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. One of the ways the Cruel and Unusual Punishments Clause limits the criminal process is by placing substantive limits on what the government may criminalize, though this limitation is to be "one to be applied sparingly."[5]

In the seminal Eighth Amendment case of *Robinson v. California*,[6] the Court stated, the United States Supreme Court held that the Cruel and Unusual Punishments Clause invalidated a California law that made the "status" of narcotic addiction a criminal offense. The law, said the Supreme Court, punished the disease of narcotics addiction itself, and a law criminalizing a disease was an infliction of cruel and unusual punishment.

Powell v. Texas[7] interpreted Robinson as precluding only the criminalization of "status," not of "involuntary" conduct. But four dissenting Justices and concurring Justice White disagreed with the majority's view that *Robinson* left open the "question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary.'" Justice White noted that many chronic alcoholics were also homeless, for whom public drunkenness might be unavoidable as a practical matter. These people had "no place else to go and no place else to be" when they were engaged in the conduct of drinking, said Justice White. The four dissenting Justices similarly found that under *Robinson*, "'criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, . . . could not prevent himself from appearing in public places.'"

Thus, the Ninth Circuit explained describing *Powell*, five Justices "gleaned from *Robinson* the principle 'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" The Ninth Circuit said that this principle compelled the conclusion that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."

Reinforcing the Ninth Circuit's view was its non-binding decision in *Jones v. City of Los Angeles,*[8] which said, "'[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.' *Jones*, 444 F.3d at 1136. Moreover, any 'conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.' *Id*. As a result, just as the state may not criminalize the state of being 'homeless in public places,' the state may not

'criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.' *Id*. at 1137."

The Ninth Circuit declared its holding to be narrow, saying that it did not require cities to provide enough shelter for the homeless or allow anyone to sit, lie, or sleep anywhere at any time in any place. Quoting *Jones*, the Court said it held only that "'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'[Citation] That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."[9]

The Court acknowledged in a footnote:

"Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. [Citation]. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes. [Citation]."

Here, the Ninth Circuit said the two City of Boise ordinances criminalized the act of sleeping outside on public property in violation of the Eighth Amendment when no shelter was available. Accordingly, the Ninth Circuit Court of Appeals reversed and remanded regarding plaintiffs' claims for declaratory and injunctive prospective relief, and for the two retrospective claims pertaining to citations that were dismissed without conviction or sentence. The Court affirmed the plaintiffs' other retrospective relief claims.

HOW THIS AFFECTS YOUR AGENCY

This case may have a significant impact on cities with substantial homeless populations and inadequate or insufficient homeless facilities. The impact on a potential increase in homeless presence in public areas on the one hand may vie against the costs of additional homeless shelters on the other. Agencies should review their policies to stay in accord of this potentially impactful decision with regards to citations and protocols for issuance of such citations. The public in some cities, such as San Francisco, are already heavily

impacted by the large and increasing number of homeless individuals in public places, and their accompanying consequences. This case will not diminish that momentum.

It should also be noted that in *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), the Eleventh Circuit upheld an anti-camping ordinance similar to Boise's against an Eighth Amendment challenge. In *Joel*, however, the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space. *Id*. Those unrefuted facts were critical to the court's holding. *Id*.

As always, if you wish to discuss this matter in greater detail, please feel free to contact me at (714) 446–1400 or via email at jrt@jones-mayer.com.

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[1] Bell v. City of Boise, 709 F.3d 890 (9th Cir. 2013).

[2] 512 U.S. 477 (1994).

[3] 418 U.S. 539 (1974).

[4] 544 U.S. 74 (2005).

[5] Ingraham v. Wright, 430 U.S. 651, 667 (1977).

[6] 370 U.S. 660 (1962).

[7] 392 U.S. 514 (1968).

[8] 444 F.3d 1118, 1138 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007).

[9] Jones, 444 F.3d at 1138.

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