Case No. 08-35902

United States Court of Appeals

for the Ninth Circuit

Brian P. Carr

Plaintiff-Appellant

versus

The State of Oregon through
Hardy Myers in his official capacity as Attorney General of the State of Oregon and
The City of Portland through
Linda Meng in her official capacity as City Attorney of the City of Portland

Defendants-Appellees

Appeal from an Order of the United States District Court

for the District of Oregon, Case No. 3:08-CV-398-HA

The Honorable Ancer L. Haggerty, Judge Presiding

Reply Brief of Plaintiff-Appellant

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Table of Contents

Table of Cases and References

Table of Statutes and References

Table of Record and References

1 Mr. Carr did not previously file or serve Excerpts of Record. As an unrepresented litigant according to Ninth Circuit Rule 30-1.2, he is not required to do so. On January 27, 2009, the city served and filed the City Appellees' Excerpts of Record, hereafter referred to as 'CER'. In the state's Reply Brief, the state referred to supplemental Excerpts of Record, hereafter referred to as 'CP', which has not been served on Mr. Carr or filed as of the date of preparation of this brief. Cotemporaneously with the filing of this brief, Mr. Carr has filed and served Excerpts of Record hereafter referred to as 'PER'.

Preliminary Statement

The defendant-appellee's briefs do not address critical questions but rather endeavor to obscure these questions with unrelated matters..

Revised Statement of Facts

In the state's 'Statement of Facts', the state claimed:

> The state court denied relief, concluding that his arrest record did not qualify for the set-aside remedy in Or. Rev. Stat. § 137.225 because violation of a protection order was not a criminal offense in Oregon. (C.E.R. 11, Complaint).[2]

but this is inaccurate. The state court (and the state before the state court) only referred to the Washington state Order for Protection as a restraining order.[3] The difference between 'restraining order' and 'protection order' is important because in Oregon the closest equivalent to a Washington Order for Protection[4] is the Oregon Stalking Protection Orders (SPO)[5] as violations of both are defined to be crimes (the apparent significance of using 'protection' rather than the more common 'restraining'). In 'C.E.R. 11, Complaint'[6], Mr. Carr explains the difference between restraining orders (referring to FAPA orders in Oregon)[7] and protection orders.[8] The state's incorrect citing of ' C.E.R. 11, Complaint' is an apparent effort to continue this confusion.

The distinction is especially important because Mr. Carr attempted to explain this difference to the state court, but the state court claimed that it could not consider any of his arguments[9] (itself a violation of due process as there were significant property interests at stake) and simply accepted the state's conclusory claim that the arrest was for a violation of a restraining order.[10] It appears that the state prosecutor never reviewed the

2 DktEntry 6807226, State's Reply Brief, February 12, 2009, page 6, ¶ 1.
3 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.
4 RCW 26.50.
5 ORS 163.750.
6 CER 11, Record 1 Complaint, March 15, 2008.
7 Hathaway v. Hart, 300 Or 231 (1985).
8 ORS 163.750.
9 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.
10 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.

relevant Oregon and Washington statutes concerning protection orders and the state courts simply went along with the state prosecutor. This court should not be misled by this obfuscation by the state.

Issues

1 Did the state courts have jurisdiction to hear Due Process questions?

2 Did the Complaint seek relief not considered by the state courts?

3 Was there a 'full and fair opportunity to be heard'?

4 Are damages precluded by the statute of limitations?

5 Does Anti-Injunction Act, 28 U.S.C. § 2283.3, preclude injunctive relief?

6 Does the Eleventh Amendment preclude damages or injunctive relief?

7 Was it proper to deny a Motion to Amend the Complaint before the Defendants' had answered the Complaint?

Argument

1. Jurisdiction of State Courts

The state claims that:

> the state court was competent to resolve all of his [Mr. Carr's] federal constitutional claims in the proceedings to set aside his arrest under Or. Rev. Stat. § 137.225. See Feldman, 460 U.S. at 483, n. 16 (noting that state courts are competent to adjudicate federal constitutional claims and that state courts should have the first opportunity to consider federal constitutional arguments to state statutes and, if appropriate, apply a saving construction)[11]

While it is interesting that the state now argues that the state courts did have jurisdiction to consider those matters, the state previously argued before the state courts that the state courts did not have jurisdiction to hear those matters. This is not of relevance in any case as the state courts found:

> Mr. Carr this court is confined to the statutory requirements under 137.225 and is not legally entitled to look behind the arrest to determine whether the arrest had probable cause or address the other points that you raised.[12]

referring to numerous Fourteenth Amendment issues. According to the *Rooker-*

11 DktEntry 6807226, State's Reply Brief, February 12, 2009, page 13, ¶ 1.
12 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.

Feldman doctrine cited by the state[13] and city[14], the federal district courts can not contradict this finding of lack of jurisdiction to hear Fourteenth Amendment issues in an ORS 137.225 hearing. Further, even if the federal district court were to find that the state court could have and should have heard those constitutional issues, the fact remains that the state court did not consider those issues because the state court concluded that it did not have jurisdiction to consider them. A finding by one court that it does not have jurisdiction to consider an issue does not in any way preclude another court from hearing that issue.

2. Relief sought not considered by state courts

Both the city and the state attempt to restate the relief sought as an effort to relitigate Mr. Carr's request to have his arrest record sealed under ORS 137.225 while, in fact, Mr. Carr carefully avoided ever seeking any relief under ORS 137.225. The relief sought to correct Mr. Carr's criminal record and, potentially, seal the record of the arrest, applies only to records considered for employment purposes and is based on the due process requirements of the Fourteenth Amendment. Had the state court been able to consider to these issues, then *Rooker-Feldman*, *res judicata*, and preclusion might apply. However, the state courts concluded that they could not consider these issues with '*this court ... is not legally entitled to ... address the other points that you raised*'[15] and so these constitutional issues can and should be addresses by the federal district court as they are serious questions which can and should be heard by federal courts.

3. Full and Fair Opportunity to be Heard

The city states that 'Plaintiff had a full and fair opportunity to be heard',[16] but this claim is not supported by the record. While Mr. Carr had applied to have his arrest record sealed, his request was denied without any trial[17] based on the court's conclusion that it did not

13 DktEntry 6807226, State's Reply Brief, February 12, 2009, pages 11-14.
14 DktEntry 6785979, City's Reply Brief, January 27, 2009, pages 10-13.
15 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.
16 DktEntry 6785979, City's Reply Brief, January 27, 2009, page 13, ¶ 3.
17 PER 6, Record 29-7 Order Denying Motion to Set Aside, April 18, 2006.

have jurisdiction to go beyond the limits ORS 137.225 and set aside arrests in the absence of any crime.[18] The state court did not make any findings of facts[19] and relied exclusively on the unsupported allegations of the state in reaching its conclusion, ignoring all the evidence and arguments Mr. Carr submitted.[20] The state court said *'this court ... is not legally entitled to ... address the other points that you raised'* referring to numerous Fourteenth Amendment issues.[21] When any court finds that it does not have jurisdiction to address the issues, there is no 'full and fair opportunity to be heard' to which the Oregon courts give preclusive effect.[22]

4. Facial Challenge of ORS 137.225

The state noted:

> *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003) ... at 1157 (recognizing that *Rooker-Feldman* does not bar facial challenges that are "unrelated to any particular application" of the challenged statute to the federal plaintiff). ... plaintiff's claims require the district court to "go beyond mere review of the state rule as promulgated, to an examination of the rule as applied by the state court to the particular factual circumstances of [plaintiff's] case," which *Rooker-Feldman* prohibits. *Worldwide Church of God v. McNair*, 805 F.2d 888, 892 (9th Cir. 1986)[23]

In essence, the conclusions of law reached by state courts can be challenged (facial challenges) while the findings of fact can not. However, given that the state courts made no findings of fact in this matter it is beyond question that Mr. Carr can only request a facial review of the state rule as promulgated as there are no factual circumstances which were determined by the state court. The statement by the state court that the state court could not and did not consider any of the evidence or issues raised by Mr. Carr and absence of any findings of fact by the state courts are exactly the circumstances when the exception to the *Rooker-Feldman* doctrine as specified in *Noel* applies. *Rooker-*

18 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.
19 PER 6, Record 29-7 Order Denying Motion to Set Aside, April 18, 2006.
20 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.
21 CP 29, Record 29-8 Transcript of Hearing of April 13, 2006, page 6, lines 5-14.
22 DktEntry 6785979, City's Reply Brief, January 27, 2009, page 13, ¶ 3.
23 DktEntry 6807226, State's Reply Brief, February 12, 2009, pages 12-13.

Feldman does not apply to the matter at hand.

5. Continuing Damages From Inaccurate Records

At the hearing before the state courts, the state contended that the arrest was for a violation of a civil restraining order and the court agreed.[24] However, the criminal record which is maintained by the Portland Police Bureau and distributed by the the state lists two entries which appear to be crimes, i.e. trespass and domestic violence.[25] Clearly the city and state are publishing information which they know is inaccurate to Mr. Carr's detriment, preventing him from fully pursuing his livelihood as he would be able were these inaccurate entries not listed. Mr. Carr has an otherwise spotless record and the inaccurate Oregon criminal record has had a significant detriment in his ability to seek employment.[26] The damages from this negligent behavior by the city and state was clearly never addressed previously and is on-going so that no statute of limitations is applicable as claimed by the city.[27]

The city continued with:

> The time commences to run when plaintiff knows of his injury. *Knox v. Davis*, 260 F.3d 1009 (9th Cir. 2001). Both plaintiff's arrest and the publication of the record occurred, and plaintiff had notice of them, more than two years before he commenced this action. The maintenance of the record is the inevitable consequence of the decision to enter it, and not the result of any "discrete act" by these defendants that occurred within the limitations period. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1059-61 (9th Cir. 2002).[28]

However, the basis for Mr. Carr's claim for damages was not the publication of the record, but the publication of known inaccurate information. There are no indications that Mr. Carr was aware of the contents of the arrest record before February 21, 2006[29]

24 PER 7-8, Record 29-8 Transcript of Hearing of April 13, 2006, page 5-6.
25 PER 1, Record 29-2 Arrest Record, February 21, 2006.
26 Record 29-1 Declaration of Plaintiff, June 25, 2008, ¶17-19,31.
27 DktEntry 6785979, City's Reply Brief, January 27, 2009, page 9.
28 DktEntry 6785979, City's Reply Brief, January 27, 2009, page 9, ¶ 2.
29 PER 1, Record 29-2 Arrest Record, February 21, 2006.

and no indications that this record was inaccurate until the state claimed that the arrest was for a violation of a civil restraining order[30] and not the crime of trespass listed in the arrest record. This claim by the state contradicted the city's records and was made on April 13, 2006 which is within the time period allowed by the statue of limitations. Further, the state entered a decision in that matter on April 18, 2006 and it was that entry which rendered the city's record of the arrest invalid. Indeed, had the state relied on the city's record of the arrest as being for trespass, amongst other things, then the court could have sealed the record as the arrest would have been for a crime.[31]

Also, the city did not fully consider *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045 (9th Cir. 2002) where it found that on-going enforcement of an unconstitutional statute could be considered without regard to any statute of limitation with '*Because the Ordinance was enforced against appellants within the limitations period, this was error.*' The city had directed requests to correct its records to the Oregon Circuit Courts with ORS § 137.225 proceedings, but the Oregon Circuit Courts found that it did not have jurisdiction to fulfill that function. This rendered the statute which allowed the state to publish these records with respect to employment decisions unconstitutional as there were no provisions for corrections[32] required by the due process requirements of the Fourteenth Amendment.

6. Anti-Injunction Act

The city cites the Anti-Injunction Act[33] which states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[34]

30 Record 29-8 Transcript of Hearing of April 13, 2006, page 2.
31 PER 7-8, Record 29-8 Transcript of Hearing of April 13, 2006, page 5-6.
32 ORS 181.555 and OAR 257-010-0035.
33 DktEntry 6785979, City's Reply Brief, January 27, 2009, page 10-11.
34 28 U.S.C. § 2283

but the city did not raise this objection before the trial court.[35] As such, this objection should not be considered as it was not raised in a timely fashion and there is no justification for why it was not raised previously.

Even so, the Anti-Injunction Act does not apply in this matter. The relief sought would not have prevented the state courts from acting on the matter, it would simply require the state courts to provide defendants with an opportunity to be heard before setting a bail amount or seizing their vehicles. Preventing defendants from appearing in a matter until they paid a bail amount set exclusively by the prosecutor is a clear violation of the due process requirements of the Fourteenth Amendment. To then seize the defendant's vehicle because the defendant was prevented from appearing is ludicrous and a further violation of the Fourteenth Amendment. It is clear that the federal District Courts have jurisdiction to prevent violations of the Fourteenth Amendment which is listed as an exception to the Anti-Injunction Act, 'when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions', *Younger v. Harris*, 401 U.S. 37 (1971).[36]

Further, while *Younger v. Harris*, 401 U.S. 37 (1971) holds that 'No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts', this does not apply to this matter as it is clear that this prosecution was made in bad faith. The city had informed Mr. Carr that his stolen car had been recovered and so was very aware that Mr. Carr had not abandoned his vehicle while at the same time continuing prosecution for an abandoned vehicle violation. There was no basis for the city's refusal to simply withdraw the matter.

There is the further question of whether the matter is a proceeding before a state court as

35 CP 41, Record 38 City's Response to Motion to Amend Complaint, August 13, 2008.

36 Citing *Ex parte Young*, 209 U. S. 123 (1908), 'The attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.'

the parties were never joined. By preventing Mr. Carr from appearing in the matter (to demonstrate that he had not abandoned his vehicle but had properly reported it stolen to the city), the state court also prevented jurisdiction over the matter. The measure of whether a courts actions are protected is defined in *Forrester v. White*, 484 U.S. 219 (1988) as '*the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court*', but until Mr. Carr is permitted to appear in the matter, the role of the court is merely administrative; only after the parties have joined the proceeding does it truly become a judicial matter.

7. Eleventh Amendment

The state claimed:

> Although a state can waive its immunity from suit in federal court, *Pennhurst*, 465 U.S. at 99, the state has not waived its immunity from suit in federal court in its tort claims act. Or. Rev. Stat. § 30.265; *Micomonaco v. State of Washington*, 45 F.3d 316, 322 (9th Cir. 1995) (state tort claims acts do not operate as a waiver of Eleventh Amendment immunity in federal court). As a result, the district court correctly dismissed the action against the state defendants.

However under ORS 30.265,

> every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or ...

but it then goes on to say:

> The remedy provided by ORS 30.260 to 30.300 is *exclusive of any other action or suit* against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action or suit. *No other form of civil action or suit shall be permitted*. If an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion the public body shall be substituted as the only defendant. [italics added for emphasis]

which is Oregon substituting itself for tort liability for the actions of its officers. This substitution is clearly stated to exclude other forms of tort liability in the broadest possible terminology which would include federal tort under 42 U.S.C. § 1981, 42 U.S.C.§ 1982, 42 U.S.C. § 1983, 42 U.S.C. § 1985 (3), and 42 U.S.C. § 1986. By

directly accepting liability for tort liability under federal tort law, Oregon is expressing waiving its immunity from such suits under the Eleventh Amendment. Even so, if this is not sufficient to meet the *Atascadero* tests, then Mr. Carr asks that this matter be returned to the district court where he be granted leave to amend the complaint to include currently unnamed parties who are city and state officials who violated his federal constitutional rights as provided for under the above statutes.

As to injunctive relief, it is well established that federal courts have jurisdiction to grant such relief. In *Ex parte Young*, 209 U.S. 123 (1908) the Supreme Court stated '*the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States*.' This was stated more clearly in *Pennhurst State School & Hosp. v. Halderman* , 465 U.S. 89 (1984) with '*The Court in Ex parte Young, supra, recognized an important exception to this general rule: a suit challenging the federal constitutionality of a state official's action is not one against the State*.' In short, federal courts can direct city and state officials to comply with the federal constitution and statutes (as that is a part of their oath of office in any case) which provides the relief required without actually directing the state to comply. In this regard, Mr. Hardy and Ms. Meng are listed to represent those city and state officials who may be directed to comply with any injunctive relief which the federal courts may decide to provide.

8. Denial of Motion to Amend

The city incorrectly cited *Planned Parenthood v. Neely*, 130 F.3d 400 (9th Cir. 1977) with

> [t]he supplemental complaint filed by plaintiff[ ] involved a new and distinct action that should have been the subject of a separate suit,

but ignored the substantial qualifications which supported that conclusion. In parrticular,

> a final judgment had been rendered in the original action four years prior to plaintiffs' request to supplement their complaint. That judgment was not appealed and in no way would be affected by plaintiffs' supplemental complaint. Nor did the

district court retain jurisdiction after entering that order.[37]

None of those criteria apply to the matter at hand. The underlying determination is FRCP 15 (a) which states that a motion for leave to amend a complaint, "*shall be freely given when justice so requires*." This is expanded on in *Foman v. Davis*, 371 U.S. 178 (1962) with:

> In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

The criteria which justified denial in *Planned Parenthood v. Neely*, 130 F.3d 400 (9th Cir. 1977) was undue prejudice to the opposing party as the case had been resolved and closed with no jurisdiction retained by the distict court. Here, however, the case was at the very earliest phases and the defendants had not even answered the original complaint. None of the events in the new cause of action had occurred at the time when the original complaint was filed on March 31, 2008 (so there was no undue delay), but other than that there is nothing which would have prevented Mr. Carr from submitting the modified complaint in the first place. There would be no prejudice against the defendants as they would simply answer the new issues in parallel with the original issues. There would be no undue burden on the court or defendants, much less prejudice against the defendants.

Conclusion

A trivial review of the orders of the Clark County Superior Court Commissioners appointing four constitutional commissioners[38] is in clear violation of the Washington State Constitution, Article 4, Section 23 restriction on constitutional commissioners '*not exceeding three in number*' in any given county. As the commissioners were not properly appointed any orders they made were also void as well as any actions which were based on these orders.[39] The blatant disregard for the constitution and the law

37 *Planned Parenthood v. Neely*, 130 F.3d 400 (9th Cir. 1977).
38 PER 2-5, Record 29-5 Superior Court Commissioner Appointment Orders, 2004.
39 An order can be 'declared void for the reason that the ... court did not have jurisdiction to enter such decree.'

shown by Washington courts can not be ignored.

While Oregon courts declined to address this and other important federal constitutional questions, justice requires that they be heard. Mr. Carr has never been provided with an opportunity to be heard 'at a meaningful time and in a meaningful manner'.[40] This court is asked to remand the matter to the district court directing that the city and state's motions to dismiss be denied and Mr. Carr's motion to amend the complaint be granted..

Respectfully submitted, February 24, 2009 (Vancouver, WA).

s/ Brian P Carr
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Barker v. Barker, 31 Wn. (2d) 506 (1948). It is also well established that all subsequent actions based on the void order are void *ab inito* or void from the beginning *Beyerle v. Bartsch*, 111 Wash. 287 (1920). Any Orders for Protection, arrests and convictions based on these invalid orders are similarly void.

40 The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545 (1965) *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Certification

I certify that pursuant to FRAP 32 (a) (7) (C) and Ninth Circuit Rule 32-1, the attached opening brief uses a 14 point proportionately spaced font with serifs and contains less than 7,000 words (4,827 at last count).

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 24, 2009

Location: Vancouver, WA

s/ Brian P Carr
Signature of Plaintiff-Appellant

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