



SAN DIEGO COUNTY SHERIFF'S DEPARTMENT

LEGAL AFFAIRS

UPDATE

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Probable cause to make an arrest defeats a First Amendment retaliatory arrest claim, unless the plaintiff presents "objective evidence that the plaintiff was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

Plaintiff Russell Bartlett was arrested by Sergeant Nieves (SN) and Trooper Weight (TW) for disorderly conduct and resisting arrest. SN first encountered Bartlett while asking partygoers to move their beer keg into their RV. According to SN, Bartlett was highly intoxicated began yelling at the owners to not speak with police. While their accounts differ, both claimed that Bartlett refused to speak with SN and SN left. Several minutes later, Bartlett approached TW while he was asking minors if they had been drinking. According to TW, Bartlett approached in an aggressive manner, stood between TW and the minor, and yelled that TW should not speak with the minor. TW claimed that Bartlett stepped very close to him in a combative way, so TW pushed him back. SN saw the confrontation, arriving right after TW pushed Bartlett, and immediately initiated an arrest. Bartlett was slow to comply with orders, and the officers utilized force.

The State dismissed criminal charges against Bartlett, and Bartlett sued the officers claiming that the officers violated his First Amendment rights by arresting him in retaliation for his protected speech. Bartlett claimed that his protective speech was his refusal to speak with SN earlier in the evening, and his intervention in TW's discussion with the minors. Bartlett denied being aggressive, claimed he stood close to TW to speak over loud music, and claimed that he was slow to comply due to a back injury. Further, Bartlett claimed that after he was handcuffed, SN said, "Bet you wish you would have talked to me now."

The District Court granted summary judgment for the officers. The Ninth Circuit reversed. On appeal, the

United States Supreme Court considered the issue of whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment. *Nieves v. Bartlett* (May 2019).

"[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." A government official may be held liable for a retaliatory action claim if a plaintiff establishes that the official acted with a retaliatory motive and the motive caused plaintiff's injury – the action against plaintiff would not have been taken absent the retaliatory motive.

The Court likened retaliatory arrest cases to retaliatory prosecution cases and determined that the plaintiff must prove the absence of probable cause for the underlying criminal charge. Absent such a showing, the claim fails.

However, the Court included an exception for cases where officers have probable cause to make arrests, but typically exercise their discretion not to do so. Under those circumstances, probable cause alone does not defeat a claim where "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."

Here, the Court held that Bartlett's retaliatory arrest claim could not survive summary judgment because the officers had probable cause to arrest him. Further, Bartlett provided no evidence that he was arrested when similarly situated individuals were not.

WHAT THIS MEANS:

As always, deputies must ensure that they have probable cause to initiate an arrest. Where arrests are discretionary, suspects exercising their first amendment rights should be treated the same as other individuals not exercising their first amendment rights.