NINTH CIRCUIT COURT

Harvey v. Waldron et al, 98-36112, 4/25/00.

SEARCH & SEIZURE: §1983 claim for illegal seizure of antique gaming machines... judicial immunity affirmed, statute of limitations ruling reversed... civil seizure claim that if successful would imply invalidity of conviction in pending criminal prosecution does not accrue as long as potential for conviction continues... Shanstrom affirmed, reversed.

In 11/88 DOR investigator David Waldron and Billings detectives Jesse Johnson, Dave Comfort, and Terry St. John entered Billings Trading, an antique business owned by William Harvey, without invitation or search warrant even though it was not yet open to the public and seized 25 antique gaming devices which were more than 25 years old and not used for gambling. Harvey was charged with illegal possession of gaming devices in violation of MCA 23-5-153 (1988). In 8/92, while charges were still pending, Yellowstone Co. requested Justice Court leave to destroy the devices or donate them to a museum. Harvey was not given notice of the motion. JP Hernandez granted the motion. The County donated the devices to Billings. In 12/94 the County dismissed the charges against Harvey but he was not notified until 5/95. In 6/95 he moved Justice Court for return of the devices. Hernandez denied the motion and informed Harvey that the devices had been given to the City. Harvey instituted this §1983 action claiming that Defendants violated his right to be free from unreasonable searches and seizures and violated due process when they permanently deprived him of the devices without notice, opportunity to be heard, and just compensation. Judge Shanstrom dismissed Hernandez on the basis of judicial immunity. (He also dismissed DOR, Dep. Co. Atty. Dale Mrkich, and the Billings PD; Harvey does not appeal those dismissals.) Shanstrom subsequently dismissed the remaining defendants on the basis of statute of limitations. Harvey appeals.

Shanstrom properly dismissed Hernandez based on judicial immunity. Harvey admits that Hernandez's actions ``might have been judicial in nature,'' but contends that he ``acted in complete absence of jurisdiction'' when he ordered disposal of the property without notice & hearing. However, as long as a judge has jurisdiction to perform the ``general act'' in question he is immune, ``however erroneous the act may have been, ... however injurious in its consequences it may have proved to the plaintiff,'' and irrespective of motivation. Cleavinger (US 1985). The ``general act'' which Hernandez was performing ??? an ex parte order to destroy contraband ??? is a function that he has jurisdiction to perform. He is therefore immune from liability for it, however injurious the consequences and irrespective of motivation.

The Montana statute for tort actions for recovery of damages for personal injuries, and therefore for §1983 actions, is 3 years pursuant to §27-2-204(1). Harvey seeks recovery under §1983 for both seizure of his property in 11/88 and permanent deprivation of it resulting from the County's disposal of it in 8/92. He does not dispute that this action was filed (in 5/97) more than 3 years after both the seizure and disposal. However, relying on Heck (US 1994), he contends that his claims did not ``accrue'' until 6/95 when he learned that charges had been dismissed and the property had been disposed of. Because Heck ``applies only to those claims that would necessarily imply the invalidity of any conviction that might have resulted from prosecution of the dismissed ... charge,'' we must assess each of Harvey's claims to determine whether it has yet accrued and if so when.

Defendants argue that Heck is inapplicable to Harvey's warrantless search & seizure claim because he was never convicted. Although this Circuit has not addressed this issue, several others have held that Heck applies to not only convictions, but also to pending and dismissed charges. A claim by a defendant in an ongoing criminal prosecution which necessarily challenges legality of a future conviction on a pending criminal charge lies at the intersection of habeas corpus and the Civil Rights Act of 1871. We agree with the Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits that Heck applies to pending criminal charges and that a claim that if successful would necessarily imply invalidity of a conviction in a pending criminal prosecution does not accrue as long as the potential for a conviction continues.

Neither this Court nor the Supreme Court has explicitly addressed applicability of Heck to §1983 claims alleging damages attributable to an allegedly illegal search & seizure. However, a footnote in Heck stated that:

a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a §1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

There is a split as to how this footnote should be interpreted. We agree with the Second and Sixth Circuits that a §1983 action alleging illegal search & seizure of evidence upon which criminal charges are based does not accrue until the charges have been dismissed or the conviction is overturned. Such a holding will avoid the potential for inconsistent determinations on legality of a search & seizure in the civil and criminal cases and therefore fulfill Heck's objectives of preserving consistency and finality and preventing "a collateral attack on [a] conviction through the vehicle of a civil suit." The seized gaming devices were an essential element of the crime of which Harvey was charged. His §1983 claim was not therefore cognizable under Heck until the criminal charges were dismissed in 12/94. Thus his §1983 action claiming illegal search & seizure, filed less than 3 years later, is not statutorily barred.

Heck does not apply to Harvey's due process claim ``because the alleged denial of due process [in disposing of his property without adequate notice of the sale and without following proper procedures] would not implicate the validity of any'' conviction for illegal possession of gaming devices. This claim therefore accrued when he knew or should have known that the property had been disposed of without prior notice or compensation. When the devices were seized their possession was illegal under Montana law. The law was amended in 1991 to permit possession and sale of gaming devices 25 years old. After this amendment legalized the seized devices Harvey was informed by the Deputy Co. Attorney that they would be returned. However, it was reasonable for him to believe that until the charges were dropped or he was convicted or acquitted the County would retain the devices that were an essential element of the crime. Thus, until he was actually informed that charges had been dropped he did not have reason to believe that the County would dispose of them. He first learned that charges had been dropped in 5/95, moved for return of the devices in 6/94, and was informed for the first time in 6/95 that the devices had been disposed of. Thus his due process claim did not accrue until 6/95, and his complaint, filed less than 3 years later, is not statutorily barred.

Reinhardt, Thompson, T. Nelson.

William Harvey, Littleton, Colo., pro se; Randall Nelson (Nelson Law Firm), Billings, and Dep. Yellowstone Co. Atty. Thomas Gai for Defendants.