

The National Law Journal

March 9, 2005

Supreme Court to Weigh in on Due Process and Domestic Violence – Justices to Decide if Police are Liable

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A rare and tragic family law challenge in the U.S. Supreme Court will draw the justices this month into the serious nationwide problem of domestic violence and the continuing difficulty of enforcement of one of the most important weapons against that violence – protection orders.

In *Town of Castle Rock, Colorado v. Gonzales*, No. 04-728, the high court will consider whether a civil rights remedy is available to domestic violence victims whose pleas to enforce protection orders go unheeded by local police departments.

The high court case has at its core a claim under 42 U.S.C. 1983, which provides a civil remedy, including damages, when a person is deprived of his or her constitutionally protected property interest without due process.

The 10th U.S. Circuit Court of Appeals held last year that Castle Rock could be liable under §1983. The divided en banc court ruled that the combination of a protection order and a state statute mandating arrest of the person restrained when police have probable cause to believe the order has been violated creates a property interest in enforcement of the order.

“Really what’s at stake here is one’s vision of the Constitution in general and of the due process clause specifically,” said §1983 scholar Sheldon Nahmod of Chicago-Kent College of Law.

“In concrete terms: Does the government have a constitutional duty to protect us against private violence? Or is the Constitution, as has been put by several people, a charter of negative liberties – it keeps the government’s hands off of us?”

The implications of a high court ruling affirming the 10th Circuit are “vast,” said Nahmod, explaining, “You can often find some property interest.”

But the implications for local governments and domestic violence victims alone are huge, according to amicus briefs filed on both sides.

“People feel very strongly that the system is not working for women,” said Lorelie S. Masters of Chicago’s Jenner & Block, amicus counsel to the National Association of Women Lawyers and others. “We need to do something here to turn things around and have a sanction on the kind of failure in this case to enforce these mandatory arrest orders. Section 1983 is a way historically to provide a remedy for situations where violence was continuing in states because local legal regimes were not doing their jobs. This in our view is the same situation.”

But from a law enforcement perspective, “Where do we draw the line?” asked Brad D. Bailey of the Office of City Attorney in Littleton, Colo., amicus counsel to the International Municipal Lawyers Association and others.

“If, as the 10th Circuit indicated, there is an immediate property right, it becomes difficult to know when the police violate it. We’re looking at potential astronomical liability.”

TRAGIC EVENTS

On May 21, 1999, Jessica Gonzales obtained a restraining order limiting her husband’s contact with her and their daughters, aged 10, 9 and 7.

Despite the order’s terms, on June 22, 1999, between 5 and 5:30 p.m., according to Jessica Gonzales’ complaint, Simon Gonzales abducted the girls while they were playing outside their home. When Jessica Gonzales realized her daughters were missing, she suspected that her husband, who, she said, had a history of erratic behavior and suicidal threats, had taken them.

From about 7:30 p.m. until 1 a.m. the next morning, Jessica Gonzales placed five calls to the police department and met with police in person twice seeking to have her protection order enforced and her husband arrested. Each time, even after she confirmed that her husband had the children, police told her to wait, first, until 10 p.m., and then until midnight, before contacting them again.

At 1 a.m., she filed an incident report at the police station and the officer who took it did not act but allegedly went to dinner. At 3:20 a.m., Simon Gonzales arrived at the Castle Rock police station in his truck. He got out and opened fire on the station with a semi-automatic handgun. He was shot dead at the scene. The police found the bodies of the girls, who had been murdered by their father earlier that evening, in the cab of the truck.

Jessica Gonzales’ counsel, Brian J. Reichel of Broomfield, Colo., filed a lawsuit against the police department and the town in which he charged violations of substantive due process and procedural due process under §1983.

Both the Colorado district court and the 10th Circuit rejected the substantive due process claim because of a 1989 Supreme Court ruling – *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 – but the 10th Circuit did find a procedural due process claim. *DeShaney* is very much at issue now in the *Castle Rock* high court challenge.

In 1984, 4-year-old Joshua DeShaney became comatose and severely brain-damaged because of

physical abuse by his father who beat him over a long period of time. The county social services department received numerous complaints of abuse and visited the home on occasion but did not remove Joshua from his father's custody. His mother sued the department, charging a violation of substantive due process.

In *DeShaney*, the high court, led by Chief Justice William H. Rehnquist, held that there was no substantive due process violation because the due process clause does not require the government to protect an individual from third-party violence. Justice Harry A. Blackmun, in a haunting opening to his dissent, lamented, "Poor Joshua!"

In the *Castle Rock* challenge, the town, represented by professor John Eastman of Chapman University School of Law, argues that Gonzales' procedural due process claim is really a substantive due process claim, and so *DeShaney* governs.

"As several of the dissenting judges correctly noted below, Ms. Gonzales' complaint is not really about any lack of process – she actually had the opportunity to be heard, on several occasions – but about the police department's alleged failure to respond to her requests in the way she would have liked," said Eastman, who declined to be interviewed, in his brief.

The alleged procedural failing, he argues, derives only from the lack of a favorable result, and the only curative procedural remedy would presumably be one that guaranteed Gonzales a different result. "That is a substantive due process claim challenging the outcome, not a procedural due process claim concerned about the kind of hearing provided."

If the 10th Circuit is affirmed, Eastman added, *DeShaney* would be effectively overruled because every substantive claim barred by *DeShaney* could be recast as a procedural claim.

And an affirmance would open up a "hornets' nest of issues" on the kind of process that would be required. "Will listening to a complaint from the other end of a telephone line be an adequate hearing, or will police be obligated in every instance to hear the complaint in person?" he asks.

But Reichel countered, "We think the issue is separate. We're not arguing that my client had a right out of thin air under the Constitution to police protection. We're arguing that the restraining order, because of the way state law works, is tantamount to a property interest just as welfare benefits or any other state benefits would be a property interest. It's a state-created right."

Professor Joan Meier, director of the Domestic Violence Legal Empowerment and Appeals Project at George Washington University Law School, agreed. "The line of cases in which the Supreme Court has upheld procedural due process claims seems to me to be relatively weak compared to the case here," she said. "Unlike a lot of cases where the court affirmed such a right, here we have an unambiguous, mandatory statute."

Twenty states have mandatory arrest statutes for violations of domestic violence protection orders, enacted in "desperation," said Meier, who with Richard Smith of McDermott, Will & Emery filed an amicus brief on behalf of five police organizations supporting Gonzales.

“If in spite of a state speaking as clearly as it can, its agents can undermine or defy those mandates without any procedural fairness, then procedural due process goes out the window,” Meier said.

The 10th Circuit in *Castle Rock* said that the process due Gonzales was a reasoned, objective consideration of the complaint; an assessment of probable cause to arrest; a decision; and, if the decision were adverse, notice to the complainant of the decision and the reasons.

“We’re not asking for much here, just the best practices in police departments across the country,” said Reichel. “I don’t see how that imposes any undue burden on them.” Although the Bush administration, which is supporting *Castle Rock* and its other amici, contends that finding a property right would disrupt law enforcement, Reichel responded, “That’s a bunch of hooey.

“They’re still going to respond to restraining-order violations and still have discretion to make probable cause determinations,” he said. “In my case, they did nothing even though probable cause existed. I haven’t seen any facts supporting their contentions.”

Meier added that her amicus brief details more than 20 “best practices” in police departments around the country that are more demanding than the 10th Circuit’s due process requirements.

“We hope this will make it clear to the court that *Castle Rock*’s and their supporting amici’s claim that the sky will fall is silly, and, on its face, not credible,” she said.

REAL HURDLE: ‘DESHANEY’

But the real hurdle for Gonzales is *DeShaney*, said Nahmod, the §1983 scholar, who added that the *Castle Rock* case is “regrettably parallel to *DeShaney*.” The difference between substantive and procedural due process, he explained, is that substantive due process focuses on challenges to conduct. The focus in procedural due process, he said, is notice and opportunity to be heard.

“This case is really not about a hearing,” said Nahmod. “She wanted the police to enforce the protection order. It’s a challenge to conduct.”

But the American Civil Liberties Union and other civil rights groups devote an amicus brief to why this case stands apart from *DeShaney*. Among their arguments, they contend that while *DeShaney* refused to recognize a governmental obligation to protect individuals from third-party violence, “it did not consider a situation in which a court’s specific findings trigger specific statutory requirements that such protection be provided.”

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