



UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
CASE SUMMARIES FROM BRIEFS FILED ON APPEAL
West Virginia University College of Law
February 19, 2019

18-1454, Bianca Johnson v.
Andrew Holmes
(Moon, J. W.D.VA.)

CIVIL: Whether plaintiffs advanced sufficient evidence of discriminatory effect of alleged selective enforcement in violation of Fourteenth Amendment.

Appellants' Summary of Argument

Each of these consolidated cases allege that race was a consideration in the decision to stop and to search these African-American citizens. Since the district court found that although there was enough evidence of intent to go to the jury, Plaintiffs failed to present evidence of disparate impact, both of which were necessary in this equal protection claim. Specifically, the district court held that a plaintiff must present evidence of similarly situated drivers of a non-protected class who were treated better than the minority plaintiff by identifying white drivers whose "circumstances present no distinguishable legitimate enforcement factors that might justify making different enforcement decisions with respect to them."

Plaintiffs maintain that the district court gave too narrow a definition of *similarly situated* for the purpose of this case since it would be impossible to identify people who were not stopped and/or were not searched. Plaintiffs' statistics show that 1) Officer Holmes stopped, as a percentage, three times as many African-Americans as Caucasians as compared to all officers on the force and more than twice as many as compared to all officers who worked the exact same sectors; and 2) Officer Holmes' pattern was long lasting.

Plaintiffs also allege that the district court erred when it ruled that the testimony of Captain Byers--that he had never sought a search warrant to look for a suspension notice from DMV nor had he heard of any other officers doing so--was inadmissible. These facts, which showed a deviation from normal procedure, are valid evidence from which one can draw an inference of discriminatory intent.

Appellee's Summary of Argument

The district court followed this court's precedent when it ruled that Appellants failed to adduce sufficient evidence of discriminatory effect in this selective enforcement case. This court has adopted the standard from *United States v. Armstrong*, 517 U.S. 456 (1996), as the standard for selective enforcement cases. Accordingly, in order to prove their case, Appellants had to establish sufficient evidence of discriminatory intent and discriminatory effect. Appellants relied on raw statistics to prove the discriminatory effect prong of their selective enforcement case. The statistics were insufficient to demonstrate that similarly situated individuals of another race were treated differently. The statistics failed to account for legitimate enforcement factors that justify making different enforcement decisions notwithstanding race. The statistics did not represent similarly situated white individuals who could have been targeted for traffic stops and searches but were not.

Because the statistics proffered by Appellants were insufficient and irrelevant to prove the discriminatory effect element, the district court properly excluded their admission for that purpose. The court also properly excluded testimony that Captain Byers had never sought a search warrant in connection to a "driving on a suspended license" charge. Officer Holmes' encounter with Canada was the first opportunity he had to use the search warrant tactic after learning about it. Appellants produced no evidence to establish that Captain Byers, or any other ACPD officer, had ever before encountered a similar situation. Accordingly, whether Captain Byers had sought such a warrant before had no bearing on whether Officer Holmes deviated from standard procedure. The district court properly awarded summary judgment to Officer Holmes.

18-1497, John Doe v. Wallace
Loh
(Xinis, J. D. MD.)

CIVIL RIGHTS: Challenge to district court's dismissal of procedural due process and gender bias claims stemming from university's procedures related to student's sexual misconduct proceedings.

Appellant's Summary of Argument

Plaintiff never admitted to entering Jane Roe's¹ room on a dare, nor did he admit that any of the sexual activity that occurred with Roe was non-consensual. As such, he had the right to test the credibility of the hearsay evidence against him through some form of cross-examination, and the right to call witnesses that a biased investigator failed to contact. He also had the right to be properly informed of the procedures used against him, the right to obtain exculpatory evidence in the hands of the Defendants, the right, under the circumstances of these circumscribed rights, to have his case decided by a higher standard of proof than "preponderance of the evidence," and the right to have a reasonable time to prepare for the hearing that resulted in his expulsion. These violations, taken as a whole, denied the Plaintiff a fundamentally fair hearing. Accordingly, it was error for the district court to grant the Defendants' motion to dismiss his procedural due process claims.

Additionally, the Plaintiff made plausible allegations that the changes in the procedures used by the University of Maryland that denied him the previously enumerated rights, and the application of those procedures by officials motivated by gender bias in his case, caused an erroneous outcome that resulted in his expulsion. He was entitled to get past the pleading stage of his complaint and obtain discovery to prove his allegations. Accordingly, the district court committed reversible error in granting the Defendants' motion to dismiss his Title IX discrimination claims.

Appellees' Summary of Argument

Doe was expelled because he violated the University's Sexual Misconduct Policy under his own version of the facts. Based on Doe's own admissions, the Committee correctly found that Doe engaged in non-consensual sexual activity with Roe because she did not know she was engaging in sexual activity with Doe and not with K.P, given that she was asleep at the time Doe entered the room and began to touch her. The Committee also disbelieved Doe's after-the-fact denial that he had not already formed an intention to trick Roe while she was sleeping by entering the room on a "dare" to see how long it would take before Roe noticed he was not K.P. Therefore, Doe was not prejudiced by not being able to cross-examine Roe, as Roe could not offer any testimony as to Doe's motives when he got into bed with her (since she was sleeping at the time), and because it is undisputed that Roe did not know she was engaging in sexual activity with Doe. Accordingly, this court should not accept Doe's invitation to overturn its precedents, relating to the level of process that should be afforded in school disciplinary proceedings, by mandating trial-like proceedings with cross-examination when in this case the level of process offered would not affect an outcome based entirely on Doe's own admissions and own credibility.

Doe attacks the University's finding that he violated the Policy on two grounds: that the University violated his procedural due process rights, and that it violated his Title IX rights under the "erroneous outcome" theory. Both claims fail as a matter of law based on the undisputed facts.

In the due process claim, Doe argues that due process requires that he be provided with a trial-like proceeding in which he could subpoena witnesses and confront and cross examine Roe. This Court has previously refused to impose such requirements in academic disciplinary proceedings. See, e.g., *Henson v. Honor Comm. of Univ. Va.*, 719 F.2d 69, 74 (4th Cir. 1983). Even those courts that have recently recognized a right to cross-examination in school disciplinary proceedings have found the right inapplicable in cases where, as here, the accused has admitted the key elements of the offense with which he is charged or the finder of fact does not have to resolve between competing narratives. See, e.g., *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). Both exceptions apply under the facts of this case. Specifically, Roe's credibility is not at issue because it is undisputed that she was sleeping when Doe entered the room, did not know she was in bed with Doe, and had no communications with him during the encounter prior to waking up and exclaiming, "You're not K.P.!". The only credibility determination even potentially at issue was Doe's, and here Doe had a full and robust opportunity to

present his defenses to the Committee. The Committee found his explanations “feeble,” and “not credible.” And, questions of Doe’s credibility were ultimately not relevant, since his *admitted* actions constituted a violation of the Policy because Roe did not give consent to engage in sexual activity *with* Doe, as the Committee specifically found.

Doe also alleges that his due process rights were violated because he was not given sufficient notice of the charges. The record, however, demonstrates that the University gave Doe ample notice of the claim: he was aware the very morning after the incident that Roe had alleged that he sexually assaulted her because he was interviewed by the police; the University provided him written notice of the Title IX investigation, indicating the date and location of the alleged incident, the nature of the charges, the range of discipline he faced, his right to an attorney or support person, and a link to the applicable policies; he was interviewed and invited to suggest witnesses with information; he was given a chance to review and comment on the draft investigation report; he was invited to attend an “outcome conference” to discuss the final report, which he declined to attend; he was given a week’s notice before the Committee hearing; and he was again provided written notice of campus resources that were available to assist him.

Similarly, Doe’s Title IX erroneous outcome claim fails as a matter of law. First, for the reasons stated above, he cannot establish any evidence demonstrating that he was actually innocent. Second, also for the reasons stated above, he cannot show flawed proceedings. Finally, he has not alleged any gender discrimination, especially by the members of the Committee who actually found him responsible for the Policy violation. His arguments that the University hosted sexual harassment prevention events, or that Defendant Carroll was previously an advocate for prevention of violence against women, cannot as a matter of law be imputed to the members of the Committee to demonstrate that they exhibited gender bias against Doe, especially under the facts of this case.

¹ The complainant in the sexual misconduct proceeding is referred to by the pseudonym Jane Roe pursuant to the district court’s order.

<p>18-1196, Elton Cansler v. Alan A. Hanks (O’Grady, J. E.D.VA.)</p>	<p>CIVIL RIGHTS: Propriety of jury instruction regarding use of taser; whether evidence supported verdict; other issues.</p>
<p style="text-align: center;"><u>Appellant’s Summary of Argument</u></p> <p>The jury instructions invited the jury error that occurred here. The district court declined to give plaintiff’s proposed instruction tracking verbatim this court’s holding in <i>Yates v. Terry</i>, 817 F.3d 877 (4th Cir. 2016), requiring an immediate safety risk to justify using a taser. Instead, the jury was instructed that it “may” consider a host of variables, one of which was an immediate threat. This was a materially inaccurate and prejudicial recitation of the law.</p> <p>Under settled law, in order to shoot a suspect with a taser (or a gun), an officer must have a reasonable, objective basis to believe that the suspect poses an immediate safety risk. This basis cannot be afforded by speculation regarding what the suspect may possibly be thinking of getting ready to do, untethered to objectively ascertainable support. The alternative is an untenable <i>carte blanche</i> to officers to use extreme force with impunity based on their unbridled assumptions regarding what others might be thinking, not what they are doing. Officer Hanks did not claim that at any time after Cansler assumed the hands-up position he thought he saw him furtively reach for his pocket or otherwise move in a manner consistent with an imminent assault with his pocket-knife. He claims the right to have shot Cansler with his taser based on what he imagined Cansler might be thinking about getting ready to do given the turn of his head as he completed turning towards the car. This justification, and the jury’s acceptance of it, was impermissible under this court’s settled precedent.</p> <p>The decision below opens the door wide to uncontrollable abuse based simply on officers’ alleged fears and speculation, however untethered to reality. The implications of Officer Hanks’ position are frightening and unacceptable, both socially and as a matter of Fourth Amendment jurisprudence. This court has recognized that use of a taser causes “a greater intrusion [on the subject’s Fourth Amendment interests] than other non-lethal</p>	

methods of force we have confronted.” *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 902 (4th Cir. 2016). A law enforcement officer cannot be permitted with impunity to shoot a suspect with a taser – or with a gun if the officer lacks a taser – because the officer imagines that the suspect may possibly be thinking of getting ready to take an action posing a threat to the officer or the public. If mere officer speculation unrelated to a suspect’s action suffices, there is no meaning to the Fourth Amendment’s reasonableness requirement and no limit to the “split-second decisions” that might be justified on this basis. The lucky victims, like Cansler, will be the ones shot by a taser.

Appellee’s Summary of Argument

A. The jury was properly instructed by the district court as to the standard for a Fourth Amendment excessive force claim, and the district court’s refusal to provide Instruction Seven was not an abuse of discretion.

B. The jury verdict was supported by the evidence presented at trial, and the district court properly denied Cansler’s motion for judgment notwithstanding the verdict.