Fences, Free Speech, and a Trump Rally Tussle: Ninth Circuit Upholds Phoenix's Crowd-Control Tactics in Puente

Description

The Ninth Circuit Court of Appeals issued a recent decision in *Puente v. City of Phoenix*[1], a case that examines law enforcement's application of force when attempting to maintain order in response to large crowd-control situations. Arising from a protest outside a rally for then-President Trump in Phoenix, Arizona in 2017, the Phoenix Convention Center drew a crowd of demonstrators that required a safety-response plan coordinated between the Phoenix Police Department (PPD) and other federal, state, and local security agencies. To maintain order, the PPD established two distinct zones: a Free Speech Zone for demonstrators and a separate Public Safety Zone that was restricted to the public. The two areas were divided by a pedestrian fence standing three feet high.

For several hours, the protest remained peaceful, with about 6,000 individuals gathered to express their views. However, 30 minutes after the rally began, tensions escalated when unknown individuals standing within the Free Speech Zone started throwing water bottles at police officers and rally attendees waiting in line. Roughly an hour later, PPD officers identified members of Antifa within the crowd. According to officers, these individuals engaged in aggressive behavior, shouted profanities, shoved another demonstrator who attempted to stop them from throwing objects, and carried signs affixed to tall poles—items previously used in other demonstrations to breach security barriers. Some protesters began distributing unidentified items from a bag, while others pushed against the pedestrian fence separating the two zones.

In response, PPD fired pepper balls at the ground in an attempt to deter further breaches. Despite this, objects continued to be thrown at officers, including water bottles, rocks, and a pyrotechnic munition that burned for several minutes before officers extinguished it. In an effort to disperse the crowd, PPD deployed additional measures, including inert smoke, tear gas, other chemical irritants, and flash-bang grenades. Nearly three hours after the first water bottle was thrown, police declared the gathering unlawful and ordered the area to be cleared. By the end of the night, officers had arrested five individuals—none of whom were plaintiffs in the lawsuit.

Two organizations and four individuals later filed a lawsuit against the City of Phoenix and its officers, alleging that the PPD violated their rights under the First, Fourth, and Fourteenth Amendments. The plaintiffs argued that law enforcement's crowd dispersal tactics constituted excessive force, unlawful seizures, and viewpoint-based suppression of speech. At the district court, the court granted summary judgment in favor of the city and its officers on most claims, except for individual Fourth Amendment excessive force claims brought by three plaintiffs against individual PPD officers. This partial ruling led both parties to appeal the decision to the Ninth Circuit Court of Appeals, with officers contending they were entitled to qualified immunity.

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As a legal basis, when courts evaluate a use-of-force case challenging the application of force used in the seizure of a person, they consider whether that force was excessive under the Fourth Amendment's "objective reasonableness" standard from *Graham v. Connor.*[2] In contrast, when considering claims of injuries resulting from alleged excessive force applied "outside the context of a seizure," courts apply a Fourteenth Amendment substantive due process standard. This standard asks whether the police behavior "shocks the conscience."[3] The "seizure" of a "person" can take the form of physical force or a show of authority that in some way restrains the liberty of the person. A seizure by show of authority, such as an order for a suspect to halt, does not constitute a "seizure" within the meaning of the Fourth Amendment unless and until the individual complies with the demand. But a seizure by physical force may occur even "if the force, despite hitting its target, fails to stop the person."[4] The court evaluates whether an officer had the objective intent to restrain or detain an individual, rather than simply disperse them. This intent to restrain for a Fourth Amendment seizure is present only when the force applied objectively aims at detaining or confining the person.

On appeal to the Ninth Circuit, the court applied this framework and first examined whether the officers' use of pepper balls, tear gas, and other crowd control methods constituted a seizure of the plaintiffs who were present in the Free Speech Zone. The court affirmed the district court's summary judgment, holding that the PPD's dispersal of class members by the airborne transmission of chemical irritants and auditory or visual irritants did not constitute a seizure within the meaning of the Fourth Amendment because officers did not employ force with the intent to detain or confine individuals. Instead, the officers' objective was to clear the area, which does not meet the definition of a seizure under Supreme Court precedent. To emphasize this point, the court distinguished prior cases where officers used force with the specific objective of restraint—such as applying pepper spray directly to the faces of detained individuals or striking individuals with batons in a manner that physically prevented them from leaving. By contrast, in this case, officers' use of airborne irritants as a means of dispersal rather than detention or restraint indicated the lack of "objective intent to restrain." Thus, no seizure occurred.

Next, finding that the excessive force claims arose "outside the context of a seizure," the court analyzed the plaintiffs' claims under the Fourteenth Amendment's "shocks-the-conscience" test. This test evaluates situations that escalate so quickly that the officer must make a snap judgment, finding that the officer's use of force "shocks the conscience" only if the officer acted with "a purpose to harm the plaintiff for reasons unrelated to legitimate law enforcement objectives."[5] Applying the test under the "purpose to harm" standard, the court explained that, given the fast-moving and escalating nature of the situation, officers acted with legitimate law enforcement objectives rather than a purpose to cause harm. Plaintiffs cited no recorded evidence indicating that the officers employed chemical irritants and flash-bang grenades for any improper reason, rather than for the legitimate objectives of self-protection and public safety. The use of force was not so excessive as to imply an intent to cause harm, especially given the undisputed evidence showing that officers had exercised restraint in managing the protest before deciding to clear the Free Speech Zone. Plaintiffs pointed to a commemorative coin—created after the protest and mocking a protester being hit by a munition—to suggest an improper motive. But

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the court deemed these later events minimally relevant because they occurred after the officers' use of force and did not alter the officers' intent at the time. Because the Fourteenth Amendment's "purpose to harm" standard governed here (rather than the Fourth Amendment's "reasonableness" standard), and because the record contained no viable claim of the requisite purpose, the Circuit held that the district court properly granted summary judgment in favor of the defendant officers on the class-based excessive force claims.

For law enforcement, this case serves as a reminder that while managing large and potentially volatile crowds, officers must act with a clear purpose rooted in public safety. Maintaining control over public demonstrations is a complex task, but it is essential that officers balance the need to maintain order with the constitutional rights of those assembled by strictly following protocols and complying with supervisors' orders.

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