The First Amendment & Law Enforcement: Probable Cause Generally Defeats Retaliatory Arrest Claims

Description

Our legal update today discusses an important case in understanding how the First Amendment affects law enforcement in modern times – *Nieves v. Bartlett*. The decision in *Nieves v. Bartlett* comes to us from the Supreme Court, and it is crucial in understanding how the court system weighs probable cause and the reasonableness of an officer's actions versus a retaliatory arrest claim. Retaliatory arrests refer to arrests by law enforcement officials against persons in retaliation for those persons' First Amendment free-expression rights.

FACTS

Russell Bartlett sued two police officers alleging that they retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest at an extreme sporting event in Alaska. On the last night of the event, Sergeant Nieves asked Bartlett to move beer kegs into RVs because some minors were participating in underage drinking. According to Sergeant Nieves, Bartlett was intoxicated and began yelling that he did not have to speak with the police. Sergeant Nieves walked away at this point and the situation did not escalate. Later, another officer began speaking with a minor who was drinking alcohol. At this point, Bartlett approached in an aggressive manner, standing between the officer and the teenager. The officer pushed Bartlett back to provide space. Sergeant Nieves witnessed the incident and ordered Bartlett to step away. Bartlett did not comply, and the police ultimately arrested him. Bartlett claimed that he was not aggressive, and he was slow to comply with Nieves's orders, not because he was resisting arrest, but because he did not want to aggravate a back injury. After Bartlett was handcuffed, he claims that Nieves said, "Bet you wish you would have talked to me now." Police charged Bartlett with disorderly conduct and resisting arrest.

The criminal charges against Bartlett were dismissed and he filed a lawsuit under 42 U.S.C. § 1983, arguing that the police violated his First Amendment rights by arresting him in retaliation for his speech. The officers responded that they arrested Bartlett because he interfered with an investigation and initiated a physical confrontation with one of the officers. The court determined that the officers had probable cause to arrest Bartlett and held that the existence of probable cause precluded Bartlett's First Amendment retaliatory arrest claim.

The Ninth Circuit disagreed and held that Bartlett had presented enough evidence that his speech was a but-for cause of the arrest. The only causal evidence relied on by the court was Bartlett's affidavit alleging that Sergeant Nieves said, "Bet you wish you would have talked to me now." If that allegation were true, the court reasoned, a jury might conclude that the officers arrested Bartlett in retaliation for his statements earlier that night.

SCOTUS OPINION

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The Supreme Court held that police had probable cause to arrest Bartlett; "As a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech.[1] If an official takes adverse action against someone based on that forbidden motive, and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may generally seek relief by bringing a First Amendment claim.[2]

The plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury," to prevail on such a claim.[3] It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must cause the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.[4]

The causal inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. Officers frequently must make "split-second judgments" when deciding whether to make an arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is "ready to cooperate" or rather "present[s] a continuing threat." Indeed, that kind of assessment happened in this case. The officers testified that they perceived Bartlett to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication.

The Supreme Court recognized that:

Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in "circumstances that are tense, uncertain, and rapidly evolving." To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness. Thus, when reviewing an arrest, we ask "whether the circumstances, viewed objectively, justify [the challenged] action," and if so, conclude "that action was reasonable whatever the subjective intent motivating the relevant officials." A particular officer's state of mind is simply "irrelevant," and it provides "no basis for invalidating an arrest."

The Supreme Court quoted the decision of the Ninth Circuit Court of Appeals finding that:

When Sergeant Nieves initiated Bartlett's arrest, he knew that Bartlett had been drinking, and he observed Bartlett speaking in a loud voice and standing close to one of the officers. He also saw the officer push Bartlett back. The test is whether the information the officer had at the time of making the arrest gave rise to probable cause. The Court found that a reasonable officer in Sergeant Nieves's position could have concluded that Bartlett stood close to the officer and spoke loudly in order to challenge him, provoking the officer to push him back.

As a result, because there was probable cause to arrest Bartlett, his retaliatory arrest claim failed.

Takeaways

The important note to take from this case is that SCOTUS sides with Law Enforcement when there is probable cause for an arrest, over First Amendment Rights. In other words, if "the circumstances, viewed objectively, justify [the challenged] action," than law enforcement should be protected.
So, probable cause generally defeats retaliatory arrest claims. While the First Amendment protects citizens in many ways, probable cause and public safety do outweigh someone's First Amendment

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[1] Quoting Hartman v. Moore, 547 U.S. 250, 256 (2006).

[2] Citing Crawford-El v. Britton, 523 U.S. 574, 593 (1998).

[3] Quoting Hartman, 547 U.S. at 259.

[4] Citing Hartman, 547 U.S. at 260 (recognizing that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway").

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