19-2431-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CLARISSE BENNETT,

Plaintiff-Appellant,

v.

DUTCHESS COUNTY, NEW YORK, DET. FRANK LETIZIA, SHERIFF ADRIAN "BUTCH" ANDERSON, DET. JAMES DANIELS,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York (White Plains)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

I. DETECTIVE DANIELS WAS PERSONALLY INVOLVED IN VIOLATING APPELLANT'S CIVIL RIGHTS

Personal involvement of a defendant may be shown where (1) the defendant participated directly in the alleged constitutional violation; "… or (5) the defendant exhibited deliberate indifference by failing to act on information indicating that unconstitutional acts were occurring. *Vaher v Town of Orangetown*, 133 F.Supp.3d 574, 588 (S.D.N.Y. 2015) (internal citations omitted).

A. Direct Participation in the Constitutional Violation

Det. Daniels is the property officer responsible for handling requests for the return of property for the Dutchess County Sheriff's Office [A319-A321; A365]. Defendants concede that Det. Daniels' "role is to advise his supervisor [Chief Deputy Jason Mark] of what weapons are being held and provide the supervisor with all the information he has with respect to them." [Def. Br. at p. 30; A329-A330]. Deputy Mark is responsible for approving the release of property. [A328; A405; A509].

Upon receiving counsel's May 2017 letter requesting the return of Appellant's firearms, Det. Daniels asked Det. Letizia about the status of Appellant's pistol license for purposes of returning her handguns.[1] [A293-A294].

[1] While possession of a handgun requires a valid New York State pistol license, no license is

Det. Letizia confirmed there were "no flags or nothing [ ] that prohibits her from having firearms…however, her husband is a convicted felon." [A293-A294].

Det. Daniels did not thereafter advise Deputy Mark of the above information, as he was required to do. [Def. Br. at p. 30; A329-A330]. Once Det. Daniels learned of Mr. Bennett's conviction he terminated the process; the return of Appellant's firearms became moot. [A293-A294]. Det. Daniels noted in his file, "DENY Per Det. Letizia, she admitted[2] that her husband is living in residence. (Convicted Felon) Refer to Letizia for further." [A514].

Det. Daniels was personally and directly involved in impeding the return of Appellant's property. Det. Daniels did not respond to counsel's May 2017 letter, did not investigate Appellant's ability to store her firearms, and did not advise Deputy Mark of the situation. In fact, the first time Deputy Mark heard of Clarisse and Kelvin Bennet was when Det. Daniels presented him with a release of property form to sign in December 2017 – two months after the commencement of the action below. [A405; A328; A509].

required to possess rifles and shotguns in New York State. See, N.Y. Penal Law § 265.00(3) (defining the term "firearm"), § 400.00 (setting standards for firearms licensing).

[2] Det. Daniel's choice of the word "admitted" further illustrates that Appellant's cohabitation with Mr. Bennett barred the return of her firearms.

B. Deliberate Indifference to the Constitutional Violation

Det. Daniels exhibited deliberate indifference by failing to act on information in counsel's letter that Appellant's Constitutional rights were being violated. Det. Daniels learned that when Appellant contacted the Sheriff's Office to retrieve her property, she "was informed that it was the policy of the Dutchess County Sheriff's Office not to return property to individuals who reside with an individual who is barred from possessing firearms and/or long guns. This policy is a direct violation of [Appellant's] Constitutional Rights…This blanket policy not only violates the property owner's right to Due Process, it has the effect of causing financial harm to an individual seeking to recover their own property as they will be forced to retain an attorney to file an action in Supreme Court..." [A519]. The letter further advised there was no legal basis to retain Appellant's property. [A520].

Det. Daniels failed to take any action to remedy the wrong. If there were no blanket policy of retaining the firearms of those living with an ineligible person, Det. Daniels should have reached out to Appellant, her counsel, or Deputy Mark – so that the professed policy of returning firearms [safe storage] Could be implemented. If that policy did exist, Det. Daniels was on notice of the likelihood that the policy violated Appellant's civil rights. Yet, he kept silent. Det. Daniels terminated the return of property process, did not talk about it with

his supervisor, and sought no guidance from his supervisor, the sheriff, or any superior officer. Det. Daniels' termination of the return of property process and decision not to take any action illustrates his deliberate indifference to Appellant's civil rights.

II. 'SAFE STORAGE' CONCERNS PLAYED NO PART IN DEFENDANTS' RETENTION OF APPELLANT'S FIREARMS

The record exposes the 'safe storage' defense as an idea promulgated after-the-fact - and after retaining counsel. Neither Det. Letizia nor Det. Daniels had any information about Appellant's ability (or inability) to safeguard her firearms until after the federal complaint was filed.[3]

Neither detective spoke with Deputy Malone or the deputy who accompanied him about the details of the seizure [A285-A286; A376] and Deputy Malone's report is silent on the issue of storage. [A515]. Neither detective knew that Appellant had a gun safe and trigger locks when the firearms were seized nor did they know that the gun safe inspected in December 2017 was a second gun safe, purchased at defense counsel's request as a condition to the release of Appellant's property. [A153-A154; A295; A344].

[3] Safe storage was not a consideration during the initial seizure. It was Det. Malone's "intention [before executing the Revocation Order] to seize all firearms" not just those affected by the Order because Mr. Bennett was convicted of a felony, notwithstanding that the scope of the Order was confined to handguns, pistols, and revolvers. [A367-A369; A87].

The detectives did not know, and did not care, how the firearms were stored or would be stored because it did not matter. Residing with a felon was a *de facto* disqualifier to the return of firearms. [See Point I above]. Det. Letizia confirmed the existence of such a policy. When asked, "…is it the case that… because Mrs. Bennett's husband had a felony conviction…the department was not willing to return her property?", Det. Letizia responded, "I would say yes. Like I said, yeah." [A295]. Det. Letizia confirmed there are "extenuating circumstances" when there is a person living in the residence who is prohibited from possessing firearms [A288; A295].

Defendants accuse Appellant of being "factually inaccurate" by asserting that she had the ability to secure her firearms from Mr. Bennett on the day they were seized [Def. Br. at p. 15]. Defendants are wrong. A second gun safe was not necessary to secure Appellant's firearms. All her handguns and most of her long guns were secured in her existing gun safe, which had one key. [A145-A147]. For the remaining long guns that did not fit into the gun safe, but were stored within the padlocked gun closet, Appellant had trigger locks for each. [A495]. Appellant only needed to secure the key to the gun safe and the keys to the trigger locks from Mr. Bennett to comply with Penal Law § 265.45. In the alternative, Appellant could also have purchased a new combination padlock to secure the door to the gun closet. [A145-A148].

III. DEFENDANTS MISAPPLIED THE *MATHEWS* FACTORS

Defendants' use of the terms 'co-ownership' and 'partial interest' to suggest that Appellant's property interest was diminished by Mr. Bennett's conviction is disingenuous and misleading. Appellant has a protected property interest in her firearms irrespective of Mr. Bennett's eligibility to possess firearms.

Likewise, Appellant's legal right to possess her property was not diminished by Mr. Bennett's conviction. As with every other firearm owner in New York State, Appellant was subject to Penal Law § 265.45 even before Mr. Bennett was ineligible to possess firearms. Thus, how Appellant was required to store her firearms was [minimally] affected by Mr. Bennett's conviction, but her property rights were unabridged.

A. Appellant Has a Protected Property Interest in Her Firearms

There is no dispute that Appellant has a protected property interest in her handguns and longarms and that the County's retention of her firearms affected that interest. See, e.g., *Panzella v Sposato*, 863 F.3d 210, 218 (2d Cir. 2017).

Defendants unsuccessfully attempt to negate Appellant's property interest by comparing her to the plaintiff in *Spinelli v City of NY*, 579 F.3d 160 (2d Cir. 2009), whose firearms were integral to her livelihood, however, the private use of her firearms does not extinguish her private interest. Ms. Spinelli's 'business

use' simply heightened the level of the 'private interest' affected.[4] Appellant's property interest was stronger than Spinelli's because no license is required to possess rifles and shotguns. C.f., *Spinelli v City of NY*, 579 F.3d at 169. Appellant's possession of long guns was a protected right, not a privilege subject to licensure.

B. Defendants Erroneously Conflate 'Knowledge' with 'Notice'

In confusing fashion, Defendants equate Appellant's knowledge of the reasons for the initial seizure from Mr. Bennett to having notice of Defendants' for refusing to return them to her.

When Deputy Malone seized the guns, he told Appellant and Mr. Bennett that he was "given orders to take the firearms." [A144-A145]. Appellant was not provided with a copy of the Revocation Order. [A144]. Appellant later learned that the firearms were removed, and Mr. Bennett's pistol license was revoked, because his conviction prevented him from possessing firearms. [A143].

Knowing that the firearms were taken because Mr. Bennett cannot legally possess guns does not provide Appellant with notice of the reasons why Defendants would not return them to her. Neither Defendants nor the lower

[4] Notwithstanding the above, as a Certified NRA Instructor who was unable to teach any firearms classes during the time in which Defendants' retained her firearms, Appellant's circumstances are more comparable to those of Ms. Spinelli than Defendants disclose. [A120-A122].

court have identified any cognizable legal precedent imputing post-deprivation notice to an innocent property owner because s/he has knowledge of the basis for the initial seizure.

C. Risk of Erroneous Deprivation is Substantial

The risk of an erroneous deprivation 'under the procedures used' is substantial because the County had no procedures until August 2017. The risk was even higher because the reasons for seizing the firearms from Mr. Bennett differed from the reasons Defendants offer for retaining them. Aside from a 'possible risk', the lack of any post-deprivation procedure *in fact* caused the erroneous deprivation of Appellant's firearms.

The value of additional or substitute procedural safeguards" is considerable because Defendants had no "safeguards" in place to prevent an unacceptable risk of arbitrary and erroneous deprivations of personal liberties. *Spinelli*, 579 F.3d at 174.

Defendants assert, "…given the full due process provided [to] Mr. Bennett in his criminal case which resulted in the conviction and Revocation Order no 'other safeguards' were necessary". [Def. Br. at p. 19].

Defendants' repeated intertwining of Appellant's civil rights and Mr. Bennett's circumstances lacks candor. Whatever due process was afforded to Mr. Bennett is irrelevant. Appellant's right to post-deprivation due process exists

independent of Mr. Bennett. Procedural safeguards are fundamental to protect the right to due process.

Defendants vigorously reject their duty to provide post-deprivation notice in favor of the lower court's decision[5], which places the burden on the property owner to speculate about the government's reasons for retaining the property and then provide evidence to allay the [supposed] government's concerns.[6]

It is Defendants who have turned due process on its head, as no legal precedent creates such a burden. [A31]. C.f., *Butler v Castro*, 896 F.2d 698, 703-704 (2d Cir. 1990) (finding that plaintiffs were entitled to post-deprivation notice of the remedy for an arrestee's reclaiming of seized property, regardless of the existence of other remedies); *McClendon v. Rosetti*, 460 F.2d 111 (2d Cir. 1972) (finding New York City's procedures "fatally deficient" because they placed the burden of proof on the plaintiff to commence a civil suit for the return of property).

[5] The district court posited, "Plaintiff creatively argues that when defendants learned she had an ownership interest in the firearms, their failure to inform her of the Safe Storage Act or how to comply with it violated her Fourteenth Amendment right to procedural due process." [A594]. Appellant does not claim that Defendants had a duty to instruct her on SAFE Act compliance. Defendants had a duty to provide notice of the specific reasons for retaining her firearms and promptly provide her with an opportunity to be heard.

[6] Viewing the record in the light most favorable to Defendants, no notice was provided to Appellant. Appellant continues to maintain that Det. Letizia informed her that the firearms would not be released to her because Mr. Bennett, a convicted felon, was living in the home.

The fact that Appellant ultimately recovered her property after filing a lawsuit "neither cures the constitutional infirmity, nor erases the risk of erroneous deprivation inherent in the [County]". *Spinelli*, 579 F.3d at 171. Defendants' failure to comply with basic due process requirements warrants judgement in favor of Appellant on her Fourteenth Amendment claim.

D. Defendants Failed to Address the Third *Mathews* Factor

The third *Mathews* factor examines "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Spinelli*, 579 F.3d at 174 citing, *Mathews v Eldridge*, 424 U.S. 319, 335 (1976). The relevant inquiry is whether Defendants had a legitimate interest in not providing Appellant with meaningful post-deprivation due process. *Id.*

Defendants advance no legitimate interest for failing to comply with post-deprivation due process. Upon learning of Appellant's property interest in the firearms, Defendants were required to provide notice of the specific reasons for retaining her firearms and promptly provide her with an opportunity for her to respond. *Spinelli*, 579 F.3d at 171-172 citing, *Mathews v Eldridge*, 424 U.S. at 335. Such notice would have provided Appellant with knowledge of Defendants' storage concerns, notified her that, upon proof of her ability to safely store the firearms, they would be released, or in the alternative, that Appellant was entitled

to a hearing before a neutral hearing officer upon request.

Defendants provided none. Instead, they adopted the flawed reasoning of the lower court that providing such information is akin to dispensing legal advice, which it is not. Considering the substantial fuss Defendants make over the idea of providing notice, it is no surprise the Sheriff and his staff refused to follow the Return of Firearms Policy implemented by the County's Law Department in August 2017.

IV. DETECTIVE LETIZIA AND DETECTIVE DANIELS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective level of reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987).

The detectives violated the clearly established constitutional right to post-deprivation due process of which a reasonable person would have known. The right to notice and an opportunity to be heard was clearly established over 40 years ago. "The touchstone of procedural due process is the requirement that a person in jeopardy of serious loss [be given] notice of and an opportunity to respond to the case against him." *Spinelli v City of NY*, 579 F.3d at 169 (quoting *Mathews v. Eldridge*, 424 U.S. at 348-49.

At a minimum, *Spinelli v City of NY*, supra., placed Defendants on notice of their obligation to provide Appellant with post-deprivation notice and an opportunity to challenge the retention of her firearms. Defendants identify no legal authority eliminating this duty, particularly for innocent property owners. Indeed, even in forfeiture cases where the property is the instrumentality of a crime, which it is not here, federal law requires the government to provide prompt notice and an opportunity to be heard. See, *Krimstock v Kelly*, 306 F.3d 40, 58 (2d Cir. 2002) ("…there is a heightened potential for erroneous retention where an arrestee, whether for DWI or some other suspected criminal conduct, is not the owner of the seized [property]. The plight of innocent owners…persuades us that an early retention hearing following seizure under N.Y.C. Code § 14-140 is constitutionally required."); *Property Clerk of Police Department of City of New York v Harris*, 9 N.Y.3d 237, 249 (2007) citing, *Krimstock*, 306 F.3d at 48, 56-58, 63 (as an innocent co-owner of property, the "risk of erroneous deprivation is heightened" where there is no opportunity to be heard), citing, *Krimstock*, 306 F.3d at 48, 56-58, 63.

Accordingly, the detectives are not entitled to qualified immunity.

V. DUTCHESS COUNTY IS LIABLE UNDER *MONELL*

When establishing *Monell* liability, a plaintiff can prove the existence of a "policy, custom, or practice" in one of four ways: (1) a formal policy officially

endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policymaker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees." *Vaher v Town of Orangetown*, 133 F.Supp.3d 574, 587-588 (S.D.N.Y. 2015).

A. Sheriff Anderson's Failure to Respond Illustrates a "No-Return Policy"

Counsel's May 2017 letter to Sheriff Anderson, Det. Letizia and Det. Daniels requesting the return of Appellant's firearms provided, "When [Appellant] requested…that her property be returned, she was informed that it was the policy of the Dutchess County Sheriff's Office not to return property to individuals who reside with an individual who is barred from possessing firearms and/or long guns. This policy is a direct violation of [Appellant's] Constitutional Rights…to Due Process [and]… has the effect of causing financial harm to an individual seeking to recover their own property as they will be forced to retain an attorney to file an action in [ ] Court." [A79-A80].

Sheriff Anderson and the named defendants remained silent. The lack of any response from Sheriff Anderson, the policymaker for the Sheriff's Office, bears out the existence of a "no-return of firearms policy" for individuals residing with ineligible persons and gives rise to *Monell* liability. This is particularly so considering the failure of the Sheriff's Office to comply with the Dutchess County Return of Firearms policy after its implementation in August 2017. See, *Dudek v Nassau County Sheriff's Dept.*, 991 F.Supp.2d 402, 412 (E.D.N.Y. 2013) (the Sheriff's failure to consider plaintiff's request for the return of his firearms raises a plausible inference that a no-return policy existed) citing, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12, 106 S. Ct. 1292 (1986); *Leather v. Ten Eyck*, 2 F.App'x 145, 149 (2d Cir. 2001) (holding that the county sheriff was sufficiently a policymaker for the County for it to be liable for his practices).

Moreover, Det. Letizia conceded that the department was unwilling to return Appellant's property because of her husband's felony conviction. [A295]. The existence of a "no-return of firearms policy" to owners residing with people who are prohibited from possessing firearms establishes *Monell* liability.

B. The Absence of a Post-Deprivation Procedure Creates *Monell* Liability

The absence of a post-deprivation procedure for returning firearms, prior to August 2017, reveals a custom and practice of deliberate indifference to

the due process rights of property owners.

C. Dutchess County Failed to Properly Train Defendants

Dutchess County is liable under *Monell* because it failed to provide adequate training and supervision to Det. Daniels and Det. Letizia to such an extent that it amounted to the detectives' deliberate indifference to Appellant's civil rights.

The lack of proper training to enforce the implementation of the County's Return of Firearms Policy warrants attributing *Monell* liability to the County. Despite the County's creation of a written post-deprivation procedure for the return of firearms in August 2017, neither the Sheriff nor his staff followed it. No letter of notice nor a prompt hearing was provided to Appellant as required by the Policy. [A506].

D. Defendants' Conduct Demonstrates a Consistent Custom and Practice

The record reveals a custom and practice within the Sheriff's Office of not returning firearms where an ineligible person resides in the home, i.e., convicted felons. Det. Letizia's response to Det. Daniels' inquiry into the status of Appellant's pistol license that her husband is a convicted felon; Det. Daniels' prompt termination of the process of returning Appellant's property; [A293-A294; A514]; Det. Letizia's admission that the department was unwilling to return the firearms because of Mr. Bennett's conviction and admission that there

are "extenuating circumstances" when there is a person living in the residence who is prohibited from possessing firearms [A288; A295]; Det. Daniels' handwritten notes "DENY Per Det. Letizia, she admitted that her husband is living in residence. (Convicted Felon) Refer to Letizia for further" [A293-A294; A514]; no communication with Appellant or her attorney after receiving the May 2017 letter [A275; A326]; Det. Daniels' failure to inform Deputy Mark [A328; A405; A509]; the absence of any investigation into Appellant's ability to secure her firearms [A328; A405; A509]; no knowledge of Appellant's storage capability [A285-A286; A376; A515].

Based on the above, Appellant's *Monell* claim should not have been dismissed.

VI. PROBABLE CAUSE IS NOT DISPOSITIVE OF APPELLANT'S CLAIMS

The existence of probable cause for the seizure of the handguns listed on Mr. Bennett's pistol license due to the revocation of his pistol license is not dispositive of Appellant's Fourth and Fourteenth Amendment claims. [See, Def. Br. at p. 13]. This is so because Defendants not only deprived Appellant of the handguns that were listed on both Appellant's and Mr. Bennett's pistol license, they also deprived Appellant of one handgun that was not registered to Mr. Bennett's pistol license, as well as her rifles and shotguns, which do not require a license.

Once Det. Letizia and Det. Daniels learned of Appellant's ownership interest, no information existed to support any legal authority to retain her property.

Defendants attempt to justify the Fourth Amendment violation claiming "no circumstances changed… Mr. Bennett's conviction was not overturned nor was the Order of Revocation withdrawn." [Def. Br. at p. 15], but this view improperly attributes *Mr. Bennett's* ineligibility to possess firearms to *Appellant*.

Penal Law § 265.45 does not prohibit an individual who resides with a prohibited person from possessing firearms. [See, the district court's Opinion and Order at A590]. Rather, § 265.45 imposes criminal sanctions upon a firearm owner who "stores or otherwise leaves a rifle, shotgun or firearm out of his or her immediate possession or control without having first securely locked such rifle, shotgun or firearm in an appropriate safe storage depository or rendered it incapable of being fired by use of a gun locking device appropriate to that weapon." See, Penal Law § 265.45.

Penal Law § 265.45 did not prevent Defendants from returning Appellant's firearms. Had Defendants been concerned about safe storage, they had an obligation to communicate their concerns and inform her that the firearms would be returned upon proof of her storage capabilities.

To be clear, no statute prevented Defendants from returning Appellant's firearms. The firearms owner has the responsibility to properly secure his/her firearms – whether from cohabitants or otherwise. The consequences of Appellant's failure to secure her firearms include criminal sanctions. Appellant had no affirmative duty to advise Defendants of her ability to safely store her firearms – whether from Mr. Bennett, overnight guests, her minor child, or trespassers, particularly where Defendants never questioned the issue.

CONCLUSION

Upon learning of Appellant's property interest in the firearms, Defendants were required to either return the property or provide notice of why the property would not be returned and offer a prompt post-deprivation hearing. Defendants provided neither.

The district court's decision eliminated the government's post-deprivation obligations, erroneously imputed knowledge to the property owner of the basis for the government's refusal to return the property, and improperly placed the burden on the property owner to *sua sponte* provide proof of compliance.

Based on the above, it is respectfully requested that the lower court's decision be reversed in its entirety.

Dated: May 3, 2020
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CERTIFICATE OF COMPLIANCE WITH FRAP 32(g)(l)

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b)(ii) because this reply brief contains 3,725 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7).

2. This brief complies with the typeface requirements of Fed. R. App.P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

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