

SUPREME COURT OF WASHINGTON

Furfaro v. City of Seattle, 144 Wash. 2d 363

27 P.3d 1160 (2001) · No. No. 68971-7 · Decided August 2, 2001

SUMMARY

The Supreme Court of Washington held that warrantless arrests of nude dancers under Seattle Municipal Code 6.270.100 did not violate the First or Fourth Amendments as a matter of law. It also held that claims under 42 U.S.C. § 1983 cannot be based on violations of the Washington Constitution or state law. The court nevertheless remanded for a new trial because the jury instruction improperly permitted a finding of probable cause without considering whether the dancers' expressive conduct was obscene and therefore unprotected.

CASE DETAILS

COURT	Supreme Court of Washington
WRITING FOR THE COURT	Richard P. Guy, J.; Smith, J.; Madsen, J.; Ireland, J.; Bridge, J.; Sanders, J.; Alexander, C.J.; Johnson, J.
JURISDICTION	Washington
DECIDED	August 2, 2001
DOCKET	No. 68971-7
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The City of Seattle sought review of a Washington Court of Appeals decision reversing a trial-court judgment and remanding the respondents' 42 U.S.C. § 1983 damages claim for a new trial.
STANDARD OF REVIEW	The court reviewed the legal requirements for warrantless arrest, the sufficiency of a § 1983 claim, and the jury instruction for legal error and prejudice. Jury instructions are reviewed as a whole to determine whether they misleadingly or incorrectly stated the law to the prejudice of the objecting party.
PRECEDENTIAL VALUE	published precedential opinion of the Supreme Court of Washington, decided en banc
PARTIES	City of Seattle v. Nick Furfaro, Brandy Kidder, Esmeralda Silva, JJR, Inc.

TOPICS

first amendment

fourth amendment

section 1983

probable cause

appellate procedure

PRACTICE AREAS

constitutional law

civil rights

municipal law

criminal procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the warrantless arrests of nude dancers for alleged violations of Seattle Municipal Code 6.270.100 deprived them of rights under the First, Fourth, or Fourteenth Amendments.
2. Whether a plaintiff may recover under 42 U.S.C. § 1983 for violations of the Washington Constitution or Washington law.
3. Whether officers had probable cause to arrest under Seattle Municipal Code 6.270.100 without determining whether the dancers' expressive conduct was obscene and therefore outside the ordinance's protected-expression exception.
4. Whether the trial court's jury instruction concerning probable cause and obscenity was erroneous and prejudicial.
5. Whether the individual officers were entitled to qualified immunity.

HOLDINGS

1. The Constitution did not require warrants for these arrests. Nude dancing receives only minimal First Amendment protection, and the asserted right to a warrant before an arrest of this type was not established by prior federal or Washington authority.
2. A claim under 42 U.S.C. § 1983 requires deprivation of rights secured by the United States Constitution or federal law; violations of the Washington Constitution or Washington law alone do not support a § 1983 claim.
3. When expressive conduct is involved, probable cause to arrest under Seattle Municipal Code 6.270.100 requires facts sufficient for a reasonable person to believe that the conduct was obscene and therefore unprotected under section 6.270.100(C). The jury instruction that allowed the jury to find probable cause for a conduct arrest without considering obscenity incorrectly stated the law and was prejudicial.
4. The individual officers were entitled to qualified immunity because, at the time of the arrests, the asserted constitutional right to perform nude dancing without fear of warrantless arrest was not clearly established.

KEY QUOTATIONS

“Since SMC 6.270.100(C) says that “[t]his chapter shall not be construed to prohibit protected expression,” before officers may make arrests for violation of the standards of conduct in SMC 6.270.100(A), the arresting officers or a judicial officer must make a determination, where expressive conduct is involved, that the expressive conduct is obscene as defined in SMC 6.270.100(D).” (27 P.3d at 1168-69)

“The instruction incorrectly states the law because an officer making an arrest for conduct must consider obscenity if the conduct is expressive, as was the case here, and because a jury determining whether an officer

had probable cause to make the arrests here must consider whether a reasonable person would believe that the expressive conduct was obscene.” (27 P.3d at 1170-71)

“Because we find that a jury instruction was erroneous and misleading, and that the error was prejudicial to respondents, we reverse the trial court's judgment of dismissal and remand this case for a new trial consistent with this opinion.” (27 P.3d at 1171)

FACTUAL BACKGROUND

Two undercover Seattle police officers entered an adult nightclub to investigate alleged violations of Seattle's standards-of-conduct ordinance. After observing and recording the dancers' activities, officers returned and arrested thirteen dancers, including Brandy Kidder and Esmeralda Silva, and the club manager Nick Furfaro, without warrants. One dancer was acquitted and charges against the others were dismissed; the respondents then sued the City and individual officers under federal civil-rights theories. The officers treated the observed activity as conduct violations and did not determine whether the dancers' expressive conduct was obscene or protected under the ordinance's exception for protected expression.

PROCEDURAL HISTORY

Seattle police arrested nude dancers and a club manager without warrants for alleged violations of Seattle Municipal Code 6.270.100. The trial court granted summary judgment on several issues, the jury found probable cause, and judgment was entered for the City; the trial court later denied judgment as a matter of law or a new trial. The Court of Appeals reversed and remanded for a new trial, holding that the arrests required warrants, while affirming dismissal of claims against individual officers. The Supreme Court of Washington affirmed the Court of Appeals' judgment but rejected its warrant-based reasoning, reversed the trial court's dismissal, and remanded for a new trial because of an erroneous jury instruction.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for a new trial on the respondents' § 1983 damages claim against the City. The jury must determine probable cause with the entire ordinance, including the protected-expression exception, given effect and must consider whether a reasonable person would believe the expressive conduct was obscene. The fourth special-verdict question concerning an unreasonable arrest procedure, and questions arising from it, may not be retried. The trial court may not reopen issues concerning injunctive or declaratory relief or other issues specified as closed by the opinion.

CASES CITED

- Furfaro v. City of Seattle, 97 Wash. App. 537, 984 P.2d 1055 (1999)
- Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973)
- Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986)

- Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566, 571-72 (1991)
- City of Erie v. Pap's A.M., 529 U.S. 277, 284, 289 (2000)
- Roaden v. Kentucky, 413 U.S. 496, 504-06 (1973)
- Maryland v. Macon, 472 U.S. 463, 465-66, 471 (1985)
- Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33 (1975)
- California v. LaRue, 409 U.S. 109, 118 (1972)
- O'Day v. King County, 109 Wash. 2d 796, 799-803, 806, 749 P.2d 142 (1988)
- Kitsap County v. Kev, Inc., 106 Wash. 2d 135, 140, 720 P.2d 818 (1986)
- Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552, 557-58 (1975)
- Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 62, 65-66 (1981)
- People v. Adais, 114 Misc. 2d 773, 452 N.Y.S.2d 543 (N.Y.C. Crim. Ct. 1982)
- People v. Morgan, 86 Misc. 2d 377, 382, 382 N.Y.S.2d 666 (N.Y.C. Crim. Ct. 1976)
- Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)
- Barry v. Fowler, 902 F.2d 770, 772-73 (9th Cir. 1990)
- Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir. 1988)
- Torrey v. City of Tukwila, 76 Wash. App. 32, 37, 882 P.2d 799 (1994)
- Michigan v. DeFillippo, 443 U.S. 31, 36-37 (1979)
- United States v. Robinson, 414 U.S. 218 (1973)
- Whren v. United States, 517 U.S. 806, 813 (1996)
- Scott v. United States, 436 U.S. 128, 136, 138 (1978)
- Pyles v. Raisor, 60 F.3d 1211, 1215 (6th Cir. 1995)
- Yancey v. Carroll County, 876 F.2d 1238, 1243 (6th Cir. 1989)
- New York v. P.J. Video, Inc., 475 U.S. 868, 869-70, 876-84 (1986)
- Maddox v. City of Los Angeles, 792 F.2d 1408, 1412 (9th Cir. 1986)
- Binks Manufacturing Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1117 (7th Cir. 1983)
- Johnson v. Bryant, 671 F.2d 1276, 1280 (11th Cir. 1982)
- Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981)
- Aero International, Inc. v. United States Fire Insurance Co., 713 F.2d 1106, 1113 (5th Cir. 1983)
- Mid-Texas Communications Systems, Inc. v. AT&T, 615 F.2d 1372, 1390 n.16 (5th Cir. 1980)
- State v. Dixon, 78 Wash. 2d 796, 798, 479 P.2d 931 (1971)