



THE FOURTH AMENDMENT AND FALSE ARREST

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On January 4, 2017, the Fourth Circuit Court of Appeals of decided *Pegg v. Herrnberger*, in which the court discussed the Fourth Amendment as it relates to false arrest, minor offenses, and excessive force. The relevant facts of *Pegg*, taken directly from the case, are as follows:

On August 4, 2013, Herrnberger and another trooper, William Beck, were examining an abandoned vehicle on the side of the road when Brandon Pegg drove by slowly in his truck with the driver's side window open. Herrnberger noticed the truck had an expired inspection sticker and called out to Pegg to stop the vehicle. Pegg did not stop and sped away. The troopers then left in pursuit of Pegg's truck and eventually pulled him over.

Beck approached the driver's side of Pegg's vehicle to speak with Pegg while Herrnberger approached the passenger side to speak with the front passenger, Robert Beever. When Herrnberger asked to see Beever's identification, Pegg asked why Beever needed to produce identification.

Herrnberger contends that Pegg then reached for something between his legs, a claim Pegg denies. Herrnberger asserts that Pegg's reaching motion appeared suspicious, so he approached the driver's door and ordered Pegg out of his truck. Pegg complied and followed Herrnberger to the rear of Pegg's truck. Herrnberger then instructed Pegg to face the truck, put his hands behind his back, and lock his hands together. Before Pegg turned to face the truck, Herrnberger demonstrated how Pegg should lock his hands together.

Pegg placed his left hand at the small of his back and began to bring his right arm behind his back, but did not interlock his hands as instructed. Herrnberger grabbed Pegg's right arm. Pegg then turned and said "Why is this happening or something along those lines" to Herrnberger and pulled his right arm away from the trooper. J.A. 46. Herrnberger then pushed Pegg against the truck with his left arm, and attempted to pull Pegg's right arm back, which Pegg resisted. Herrnberger then took Pegg to the ground, and both troopers pinned Pegg there and handcuffed him in an event that took less than forty seconds

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before Pegg was helped to his feet. As a result, Pegg claims he suffered minor scrapes and abrasions on his head, which he treated with peroxide and Neosporin, but did not seek medical attention.

The troopers arrested Pegg for assaulting a police officer (W. Va. Code § 61-2-10b(e)), obstructing an officer (W. Va. Code § 61-5-17(a)), and driving with an expired inspection sticker (W. Va. Code § 17C-16-9). Pegg was jailed for 8-12 hours before released. A magistrate judge dismissed the assault charge for lack of probable cause, and the prosecuting attorney dismissed the rest of the charges for reasons not apparent on the record.ⁱⁱ

Pegg filed suit in federal district court and alleged that Trooper Herrnberger violated his rights under the Fourth Amendment for unlawful arrest and excessive force and under the First Amendment for retaliatory arrest. The district court granted summary judgment for claim against the State (the official capacity claim) but denied qualified immunity for the claim against Trooper Herrnberger in his individual capacity. Specifically, the district court held that the arrest was unlawful because the trooper did not “principally” arrest Pegg for the expired inspection sticker violation, but rather, truly arrested him for obstructing an officer when he merely asked a question during the traffic stop. Thus, the unlawful arrest and retaliatory arrest claim survived. Further, the district court denied qualified immunity on the excessive force claim because it concluded that the trooper was “predisposed to using force to arrest Pegg.” Thus, the court relied upon the “subjective intent” of the trooper in that ruling. Trooper Herrnberger appealed the denial of the motion for qualified immunity to the Fourth Circuit Court of Appeals. [Note: This article will not discuss state law claims in this case.]

The first issue on appeal was whether the trooper violated the Fourth Amendment when he arrested Pegg. As previously stated, the district court, in denying the trooper’s motion for qualified immunity, looked at the trooper’s subjective (personal) intent for the arrest. The district court opined that the trooper actually arrested Pegg when he asked the trooper why the passenger had to present identification. However, the trooper argued on appeal, that the arrest was based upon Pegg’s expired inspection sticker, which was a violation of state law. Further, the obstruction arrest was based upon Pegg’s resistance to his arrest for the inspection sticker violation. On appeal, Pegg argued that the trooper was not permitted under state law to effect a custodial arrest for an expired inspection sticker. In other words, he argued that since that violation was not a jailable offense, the trooper could not make an arrest based on that offense.

The court of appeals first noted the constitutional law relevant to this issue and stated

The Supreme Court has stated unequivocally that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). **In *Atwater*, the arrestee committed a seat belt violation punishable only by a fine. Nonetheless, the Supreme Court held that the Fourth Amendment does not forbid a warrantless arrest for such a minor violation.** *Id.*ⁱⁱⁱ [emphasis added]

In light of the above law, the court then analyzed Pegg’s argument regarding the expired inspection sticker, as a non-jailable offense, being unable to support a valid arrest. The court stated

Pegg attempts to distinguish Atwater by arguing that unlike the Texas seatbelt statute at issue in that case, § 17C-16-9 is not an offense subject to a custodial arrest or punishable by incarceration. He argues that § 17C-16-9 is not among the list of traffic offenses that a separate statute, § 17C-19-3, enumerates as warranting arrest. But that contention -- even if a correct recitation of state law -- is of no consequence under Atwater for Fourth Amendment qualified immunity purposes. Id.

In any event, under West Virginia law, police officers have the authority to effect an arrest for minor traffic violations, including the one at issue here. The language of § 17C-19-3 does not support the reading of the statute that Pegg advances. See § 17C-19-3 (prescribing arrest for traffic violations in "any of the following cases," not in "only the following cases") (emphasis added). Similarly, the statute that controls the procedure for issuing traffic citations, § 17C-19-4, does not prohibit an officer from making an arrest instead of issuing a citation. That these two provisions do not prohibit an officer from making arrests for certain minor offenses is supported by yet another West Virginia statute pertaining to traffic regulations, § 17C-19-5, which provides that "the procedure prescribed [in Chapter 17] shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade." Such alternative method is described in § 15-2-12(b)(1), which empowers West Virginia State Troopers to make warrantless arrests when witness to "any offense or crime" (emphasis added). As noted earlier, Pegg does not deny that his offense of operating a motor vehicle with an expired inspection sticker occurred in the presence of Herrnberger. As a result, under Atwater and the West Virginia statutes, Herrnberger had probable cause to arrest Pegg for the expired inspection sticker violation.^{iv}

Therefore, based on the above reasoning by the court of appeals, and in light of the Supreme Court's precedent in Atwater, the court held that the trooper could legally, under the Fourth Amendment, effect a custodial arrest for the expired inspection sticker violation, as it was a violation of state law. As such, the trooper was entitled to qualified immunity on the unlawful arrest claim.

The court also discussed the district court's opinion that that the trooper did not actually intend to arrest Pegg, at the time of the arrest, for the expired inspection sticker, but rather arrested him because he asked a seemingly defiant question of the trooper during the stop (why the passenger had to show I.D). Regarding this, the court of appeals noted that, when analyzing officer conduct under the Fourth Amendment, the correct standard is "*objective reasonableness*," not "subjective (personal) intent." The court then stated

As the Supreme Court has previously explained, the "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." Devenpeck v. Alford, 543 U.S. 146, 153 (2004). Instead, the Fourth Amendment requires an analysis under which a police officer's action is not invalidated "as long as the circumstances, viewed objectively, justify that action." Id. (quoting Whren v. United States, 517 U.S. 806, 813 (1996)) (emphasis added). The objective and undisputed fact of Pegg's violation of § 17C-16-9 is fully sufficient, in and of itself, to justify his arrest.^v

As such, the court of appeals held that Trooper Herrnberger did not violate the Fourth Amendment and is entitled to qualified immunity on the unlawful arrest claim.

The court then examined the second issue on appeal, which was whether the trooper violated the First Amendment regarding a retaliatory arrest when he arrested Pegg after he asked a question during the traffic stop. The court quickly resolved this issue in favor of Trooper Herrnberger by stating

The probable cause inherent in Pegg's violation of § 17C-16-9 also defeats his First Amendment retaliatory arrest claim. The Supreme Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012). Since the Reichle decision, no such right has been recognized, so the Reichle principle is fully controlling here. **Pegg's violation of § 17C-16-9 gave Herrnberger probable cause to arrest Pegg; therefore his arrest was not retaliatory.^{vi} [emphasis added]**

Thus, the court ruled that the trooper was entitled to qualified immunity on the retaliatory arrest claim.

The final issue we will discuss on appeal was whether Trooper Herrnberger used excessive force when he arrested Pegg. The district court denied qualified immunity because that court looked to the trooper's possible subjective intent and reasoned that the trooper may have been "predisposed to using force" in Pegg's arrest.

The court of appeals first noted the legal principals that control this issue. The court stated

An inquiry into any predisposition for force on the part of Herrnberger is an improper mode of analysis for a Fourth Amendment excessive force claim. **"Subjective factors involving the officer's motives, intent, or propensities are not relevant."** Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994).

To determine whether a police officer applied excessive force in violation of the Fourth Amendment, we instead examine officers' actions "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397 (1989). Specifically, we examine "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. As when examining the lawfulness of an arrest, "[w]hether an officer has used excessive force is analyzed under a standard of objective reasonableness." Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011). [emphasis added]

Thus, the trooper's personal intent or motive is irrelevant to the issue of excessive force. The correct standard is "objective reasonableness" in light of the totality of the circumstance.

The court then applied the three factors above from *Graham v. Connor* to Pegg's case. The court noted that, while the crime was not severe, he did admittedly resist arrest. The court then looked at the undisputed facts of Pegg's case and stated

Viewing the evidence in the light most favorable to Pegg, after Pegg placed his left hand behind his back he failed to interlock his hands as Herrnberger had just demonstrated to him seconds earlier. Pegg then attempted to withdraw his right arm from Herrnberger's grasp. Herrnberger then briskly, but safely, took Pegg to the ground. Pegg remained on the ground for less than a minute and no longer than the time Herrnberger needed to handcuff him. According to Pegg's own statements, Herrnberger did not strike, kick, or verbally abuse him. Instead, Herrnberger performed a simple maneuver to ensure Pegg's compliance. Once Pegg was handcuffed, Herrnberger assisted Pegg back to a standing position and refrained from any further physical contact. As a result of the encounter, Pegg claims abrasions minor enough that he treated them at home with Neosporin and peroxide and did not seek medical assistance. An efficient, lawful arrest of a resisting suspect that causes the suspect to suffer only de minimis injuries does not constitute excessive force. Herrnberger's actions were objectively reasonable and he is entitled to qualified immunity as a result.^{vii}

Thus, based on Pegg's resistance, and the fact that the trooper simply took Pegg to the ground and handcuffed him, in less than a minute, and that force resulting in minor scuffs treated at home by Pegg, the court held that the troopers use of force was objectively reasonable under the Fourth Amendment. As such, he was entitled to qualified immunity on the excessive force claim.

Thus, the court of appeals reversed the decision of the district court.

ⁱ No. 15-1999 (4th Cir. Decided January 4, 2017)

ⁱⁱ Id. at 2-4

ⁱⁱⁱ Id. at 7-8

^{iv} Id. at 8-10

^v Id. at 10

^{vi} Id. at 11

^{vii} Id. at 13-14