



EIGHTH CIRCUIT GRANTS IMMUNITY TO TROOPER WHO ARRESTED PROTESTER

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Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

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On October 17, 2017, the Eighth Circuit Court of Appeals decided *Weed v. Jenkins et al.*¹, which serves as an excellent explanation regarding liability for arresting a protester for failing to disperse at a protest. The relevant facts of *Weed*, taken directly from the case, are as follows:

On Saturday, August 17, 2013, Weed and others held signs protesting the President's policies, from a pedestrian sidewalk on an overpass over Interstate 70 in St. Charles, Missouri. Protesters faced the highway below, targeting motorists.

Traffic that day was more congested than usual. The highway's left lane was closed for construction. A festival taking place nearby was accessible by the next exit. At that exit, there was construction for traffic leaving the highway. The traffic approaching the protest was heavy and intermittently congested, backing up to the next exit.

That day there were five accidents on the stretch of highway approaching the protestors. One occurred before they arrived. A Missouri Department of Transportation worker told the investigating officer that the protestors were causing a traffic safety hazard. Investigating the second accident, a state trooper "observed drivers making evasive maneuvers and honking their horns in response to protestors standing on [the] overpass above." The driver in the third accident told the investigating trooper "he was distracted by protestors above on the overpass, and that the crash would not have occurred if the protestors had not been there." A driver and passenger in the fourth accident said that "the crash occurred because too many people were looking up at the protestors and not paying attention to the road." The trooper investigating that accident "was almost struck by a car that swerved to avoid hitting another car" and "observed numerous vehicles change lanes when it was unsafe to do so, drivers slam on their brakes, and vehicles run off the road into the grass to avoid collisions." The driver and passenger of the car hit in the fifth accident also said the protestors were distracting.

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Corporal T.R. Jenkins—the highest-ranking officer from the Missouri State Highway Patrol (MSHP) that day—was responsible to decide whether to ask the protesters to leave. The troopers who investigated the accidents told Jenkins that the protesters were creating a traffic safety hazard, causing or contributing to the accidents. After the third accident, Jenkins was not personally convinced that the protesters were causing or contributing to the accidents and decided to take a "wait and see" approach. Jenkins went to assist at the scene of the fifth accident. He noted that traffic was heavier than earlier that day. The trooper who had investigated the fourth and fifth accidents told him she had observed unsafe driving, had almost been hit, and that the motorists in the accidents thought the protesters were the cause. Jenkins had also been told that "numerous persons had called the MSHP and reported the protesters were causing a distraction."

Jenkins determined "that the protesters were creating a traffic hazard and causing or contributing to traffic accidents." He decided they should be removed from the overpass. After the St. Charles police refused to remove them, Jenkins sent MSHP officers to the overpass. When Jenkins arrived, most of the protesters were already dispersing, but Weed and another protester were arguing with two other officers. The officers explained several times why they were asking them to leave the overpass and said they could return another time. Weed maintained he had a right to be on the overpass and believed that because he had only been "asked" to leave, he had no obligation to do so. Jenkins asked Weed whether he was going to leave and said that if he did not, he would be arrested. Weed refused to leave. Jenkins arrested him for willfully opposing a member of the highway patrol in violation of § 43.170 RSMo.

A week later, Weed returned to the same overpass for another protest. No one was arrested. He has since attended many other overpass protests.ⁱⁱ

Weed subsequently sued the arresting trooper, and the Missouri Highway Patrol (MSHP) Superintendent for violating his rights under the First and Fourth Amendment for arresting him under Missouri state law for willfully opposing a member of the highway patrol (see Section 43.170 RSMo.). This article will not discuss Weed's constitutional challenge of the statute for which he was arrested; however, it is noted that the court upheld the constitutionality of that statute.

The first issue the court examined was whether the trooper's order to disperse violated Weed's rights under the First Amendment. The court noted, that they will not reach the merits of that issue because the trooper is entitled to qualified immunity from suit under the First Amendment claim. The Eighth Circuit stated

Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). **"In determining whether a right is clearly established, we ask 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"** *Frye v. Kansas City Missouri Police Department*, 375 F.3d 785, 789 (8th Cir. 2004), quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001).ⁱⁱⁱ

Stated another way, if another reasonable officer in the same situation could have believed the trooper in Weed's case acted reasonably, the trooper is entitled to qualified immunity, even if the trooper did, in fact, violate the constitution.

Here, the statute for which Weed was arrested was Section 43.170 RSMo, which prohibits a person from "willfully resisting or opposing" a member of the highway patrol. Further, the court noted that this statute only applies after a person "fails to comply with a trooper's 'proper order.'" A "proper order" is "one that is issued under *another* law."^{iv} The "other law" the trooper relied upon in this case was actually a city ordinance from St. Charles, particularly, Section 340.020, which makes it "unlawful for any person to obstruct in any manner any...public highway...by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles."^v

The court of appeals then examined Eighth Circuit precedent that is applicable to Weed's case. The court stated

[The trooper's] conduct matches the officer's conduct in the *Frye* case. See 375 F.3d at 787-90; see also *Stahl*, 687 F.3d at 1040 n.1 (noting *Frye* is consistent with *Stahl*). **There, this court holds that officers arresting protesters who refuse to stop displaying graphic posters—causing traffic obstruction—impose a reasonable, content-neutral restriction and are entitled to qualified immunity.** *Frye*, 375 F.3d at 787-90, 792. "[T]he Supreme Court 'has regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *Id.* at 790, quoting *United States v. Grace*, 461 U.S. 171, 177-78 (1983) (internal quotation marks omitted). "[A]n officer on duty in the field is entitled to make a reasonable interpretation of the law he is obligated to enforce." *Id.* at 789, quoting *Habiger v. City of Fargo*, 80 F.3d 289, 296 (8th Cir. 1996).^{vi} [emphasis added]

The court then stated that a reasonable officer in the trooper's position could have interpreted the St. Charles ordinance Section 340.020 to prohibit overpass protests that hinder or impede vehicular traffic. Further, the ordinance would provide the trooper with a reasonable belief he had the legal authority to issue a proper order to disperse. However, since the ordinance did not apply in this case, the order was actually not lawful. However, regarding qualified immunity on the First Amendment claim, the court stated

The doctrine of qualified immunity protects Jenkins from First Amendment damages because he had no reason to know, based on preexisting law, that his order was unlawful.^{vii}

The next issue the court examined was whether the trooper violated the Fourth Amendment when he arrested Weed. However, the court did not decide the merits of this issue because the trooper is entitled to qualified immunity. The court, stated

In a claim for damages, officers are 'entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so, provided that the mistake is objectively reasonable'—that is, officers are not liable if they had 'arguable probable cause' to make the arrest." *Bernini v. City of St. Paul*, 665

F.3d 997, 1003 (8th Cir. 2012), *quoting Amrine v. Brooks*, 522 F.3d 823, 832 (8th Cir. 2008).^{viii} [emphasis added]

The court then stated that, when Weed resisted the order to disperse, which was one a reasonable officer could consider proper under preexisting law, the trooper then had “arguable probable cause” to believe that Weed violated state law under Section 43.170. This entitles the trooper to qualified immunity.

Therefore, the court of appeals affirmed the decision of the district court dismissing the suit.

ⁱ No. 16-3629 (8th Cir. Decided October 17, 2017)

ⁱⁱ Id. at 2-4

ⁱⁱⁱ Id. at 4-5

^{iv} Id. at 5

^v Id.

^{vi} Id. at 5-6

^{vii} Id. at 6

^{viii} Id.