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ENTRY INTO HOME BY “RUSE” NOT PERMITTED

Whalen v. McMullen, No. 17-35267

United States Court of Appeals for the Ninth Circuit,
filed October 30, 2018

While investigating the plaintiff, (Whalen), for possible social security benefit fraud, the defendant officer, (McMullen), gained Whalen’s cooperation and entry into her home by requesting her assistance in a fictitious criminal investigation. During the officer’s investigation, he secretly videotaped plaintiff both outside and inside her home. While no criminal charges were ever filed against Whalen, the footage recorded by the officer was used at her social security hearing.

The Court held that since the officer’s entry into plaintiff’s home during a civil fraud investigation was without her “consent”, it was unreasonable under the Fourth Amendment. The

Court, nevertheless, held that the officer had qualified immunity from a lawsuit, because the right of a person to be free from a search in the context of a civil or administrative investigation related to a determination of benefits had not been clearly established.

Whalen applied for Social Security benefits, claiming she had cervical dystonia, a neurological disorder that causes tremors. Her application was referred for investigation due to inconsistencies between Whalen’s allegations of severe functional impairments and her medical records. Whalen claimed difficulties with standing and walking, and reported severe memory loss, weakness, and loss

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of motor skills. The referral noted that Whalen had been prescribed an electric wheelchair, and asked the investigator to determine "how wheelchair accessible the house was, were the wheelchairs used, [were] clothes on them, etc."

The officer who conducted the investigation stated that "When conducting investigations, I do not enter a person's home in order to conduct a search of the residence. The purpose of my communication with any individual is to speak with and observe them in order to obtain information regarding their physical, mental and emotional faculties/responses." In this case, McMullen employed a "ruse". He introduced himself as a law enforcement officer, but concealed the purpose of the encounter. He told Whalen that he was investigating a potential identity theft ring, telling her that he found her name and address "handwritten on a piece of paper" and was looking for further information. McMullen invited her to speak with him outside. He was equipped with two hidden cameras which recorded video of the encounter. He designed the conversation and physical tasks, which included walking, writing, and turning over photographs "to observe her responses and bodily movement" in light of the information about Whalen's medical claims. During the conversation, Whalen discussed her daily activities. She also mentioned her recent

application for a shipping, receiving, and stocking job on a loading dock. Whalen suggested going inside, and McMullen entered the home "only to continue the conversation and not to conduct a search of Ms. Whalen's home." While inside, he observed a wheelchair, which held folded blankets.

There is a tort remedy for persons whose constitutional rights have been violated by state officials acting "under color of" law. (42 U.S.C. § 1983.) Whalen limited her claim to McMullen's entry into her home and his observations of areas inside her home not visible from the threshold.

The Court explained that "when the government 'physically occupie[s] private property for the purpose of obtaining information,' a Fourth Amendment search occurs." In this case, McMullen entered Whalen's home with her permission, which he obtained after he identified himself as a law enforcement officer, but misrepresented the purpose of his investigation. The Court noted that there was a distinction between "undercover" entries, where a person invites a government agent who is concealing he is a government agent into her home, and "ruse" entries, where a known government agent misrepresents his purpose in seeking entry. The "undercover" entry does not violate the Fourth Amendment, as long as the undercover agent does

not exceed the scope of his invitation while inside the home. But access gained by a government agent using a "ruse", "violates the [F]ourth [A]mendment's bar against unreasonable searches." The concern is that the government agent will "gain access to evidence 'which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust'." Here, McMullen appealed to Whalen's trust in law enforcement and her sense of civic duty to assist him in his "identity theft" investigation. He lied to her about his real purpose - to investigate her for possible social security fraud. Whalen's consent to McMullen's entry into her home is negated by his deception. McMullen obtained evidence which could only have been obtained inside Whalen's house, such as the fact the wheelchair was "being used as a blanket holder", which he secured through an unconsented, warrantless search. Under these circumstances, the Court concluded that McMullen's entry into Whalen's home "was an unreasonable search under the Fourth Amendment.

That conclusion did not end the Court's inquiry. To hold McMullen personally liable under §1983, Whalen's right to be free from a search in this context must have been clearly established. Although the Court concluded McMullen's warrantless "ruse" entry into Whalen's home was an

unreasonable search, it could not be said it "was clearly established that his conduct, in the context of a civil or administrative investigation, was a search or was unreasonable." While both parties agreed that if this was a "criminal" investigation, a reasonable officer would have known the "ruse" used to gain entry into the residence was unlawful, but the Court decided that at the time, "it would not have been clear to a reasonable officer that his conduct, in the context of this **civil** investigation, ... was unlawful" and, therefore, McMullen was "entitled to qualified immunity from this suit."

Take away - with the *Whalen v. McMullen* decision, officers are now deemed to know that they cannot use a "ruse" to gain entry into a residence in both criminal and civil/administrative investigations.

Stay Safe!

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