

BARNA v. CITY OF PERTH AMBOY
42 F.3d 809 (3d Cir. 1994)

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Louis and Theresa Barna (“Mr. and Mrs. Barna”) sued eight police officers, the City of Perth Amboy [N.J.],[†] and the Town of Woodbridge for violations of their constitutional rights stemming from an alleged assault and the subsequent detention of Mrs. Barna and arrest and prosecution of Mr. Barna. We conclude that judgment as a matter of law was proper on Mr. Barna's assault-based claim because the evidence could not support a finding that the officers were acting under color of state law. [. . .]

I.

The relevant facts as established by the plaintiffs' presentation of their case at trial are as follows. On the evening of December 21, 1990, Louis and Theresa Barna went to dinner with Mrs. Barna's sister, Mary Haelson (“Aunt Mary”), and Mrs. Barna's mother. After dinner, and after taking Mrs. Barna's mother home, Mr. and Mrs. Barna and Aunt Mary went to a bar. Mr. and Mrs. Barna each consumed significant quantities of alcohol during the evening.¹

The Barnas and Aunt Mary left the bar to return to the Barnas' home. On the way, they stopped at a Christmas tree business owned by a longtime friend of Mrs. Barna's family, Bobby DeHane. Mr. and Mrs. Barna were also in this line of business and Mrs. Barna was angry at Mr. DeHane, believing that earlier in the day he had reported electrical code violations at the Barnas' Christmas tree lot to a government agency. Mrs. Barna got out of the car and unsuccessfully sought out DeHane in order to confront him. Aunt Mary coaxed her back into the car.

DeHane's Christmas tree lot was across the street from another bar. Coincidentally, Perth Amboy Police Officers Paul Otterbine and Richard Echevarria were outside that bar in Officer Echevarria's truck. Officer Otterbine is the brother of Mrs. Barna and Aunt Mary. Although the officers were off-duty and not in uniform, they were armed with their service revolvers and with their police-issue “PR-24” nightsticks. Otterbine noticed his mother's car, and saw his two sisters and Mr. Barna. Aunt Mary signaled to her brother that Mr. and Mrs. Barna were drunk and wanted to damage the DeHane property and asked Otterbine to follow her home. Otterbine explained to his partner that there was a problem with Mr. and Mrs. Barna and asked Echevarria to accompany him. The two officers, in Echevarria's truck, then followed Mr. and Mrs. Barna and Aunt Mary back to the Barnas' home.

At the Barnas' home, Aunt Mary attempted to leave with her sister, Dena Otterbine, who had been babysitting the Barnas' children. Mr. Barna testified that, when he saw his sisters-in-law pulling away in their car, he signaled for them to stop by standing in the path of their car and waving his arms. Aunt Mary, who was driving, stopped the car. Mr. Barna testified that he then went to the side of the car, knelt down to speak with Aunt Mary through the driver's side window, and asked her to stay with Mrs. Barna and the children while he went out. Instead, Aunt Mary drove slowly away, dragging Mr. Barna who was holding onto the driver's side door. Aunt Mary stopped the car after dragging Mr. Barna fifty or sixty feet.

[†] Text in [Brackets] represents additions or edits of the original opinion. Elipsis in brackets [. . .] represents deletions from the text of unnecessary material. Footnotes are retained with the original text. --Editor.

¹ According to their own testimony, Mr. Barna consumed a total of 14 to 16 servings of alcohol during the evening, and Mrs. Barna consumed the equivalent of 8 to 9 servings.

Officer Otterbine, who apparently witnessed this, began yelling at Mr. Barna and accused him of hitting his sister, Aunt Mary. Mr. Barna argued with Officers Otterbine and Echevarria, telling them: "Look, you guys are out of your jurisdiction. Just get out of here, go home, this is none of your concern." Echevarria then responded: "Jurisdiction? I'll show you jurisdiction." Echevarria and Otterbine then attacked Mr. Barna and beat him up. Mr. Barna testified that he was largely passive during the fight, and that at one point Officer Otterbine used his nightstick to place Mr. Barna in a chokehold. Mr. Barna's testimony was in large part corroborated by Bobby Borrero who had followed the Barnas home to receive a paycheck from Mr. Barna.

After beating up Mr. Barna, Officers Otterbine and Echevarria left Mr. Barna on the sidewalk and returned to Echevarria's truck. They attempted to leave the scene, but Mrs. Barna prevented their departure. She slapped her brother in the mouth and told the two officers not to go anywhere.

Mr. Barna, fearing for his wife's safety, retrieved an unloaded revolver from his house. He pointed the gun into the cab of the truck in which Otterbine and Echevarria were sitting and told the officers not to go anywhere until other police arrived. At his wife's bidding, Mr. Barna stopped pointing his gun at the officers and walked over to see if his wife was okay. Otterbine and Echevarria then jumped out of the truck, drew their weapons against Mr. Barna, and told him to drop his gun. Mr. Barna stepped backwards, tripped over the curb, and, as he fell, flung the revolver in his hand over his shoulder into a hedge.

Mr. Barna then ran into his house and retrieved a twelve-gauge pump action shotgun. He walked out onto the porch and "shuffled" the pump action of the shotgun [. . .]. He told Otterbine and Echevarria not to leave. At that point, he testified, he ran into the house, bolted the door, picked up the telephone and called his mother and his mother-in-law.

After Mr. Barna went back into his house, Officers Otterbine and Echevarria apparently called for backup and additional Perth Amboy police officers arrived on the scene, including Benjamin Ruiz and Orlando Sanabria. According to Mrs. Barna, Otterbine was drunk, and both he and Officer Echevarria continued to point their weapons at the Barnas' front door, stating that they were going to kill Mr. Barna. Mrs. Barna testified that she "was grabbing on [Otterbine's] arm, [yelling at him and] trying to get his attention," but "[h]e didn't want to pay attention to me." Otterbine thereupon instructed Officer Ruiz to remove Mrs. Barna from the scene, but when Ruiz attempted to do so, she resisted. Officer Ruiz tried to restrain Mrs. Barna by holding her arms, while she struggled to elude his grasp. Ruiz was finally able to handcuff Mrs. Barna and, with the assistance of Officer Sanabria, place her into a patrol car. At that point, she attempted "with all [her] might" to kick her way out of the patrol car.

Officers Ruiz and Sanabria took Mrs. Barna to the Raritan Bay Medical Center, where they checked her in for intoxication. Upon arriving at the Medical Center, Ruiz removed the handcuffs and Mrs. Barna tried to leave, but the hospital staff placed her in restraints. "I was hysterical," she testified, "I was still combative, I wanted to go home." After a time, Mrs. Barna calmed down and she was released from the hospital; she returned home at about 3:00 a.m.

While Mrs. Barna was at the hospital, events at the Barna home escalated. Based on the representations of Officers Otterbine and Echevarria that Mr. Barna had barricaded himself in his home with his children, the Woodbridge police officers who had been called to the scene contacted then Middlesex County Prosecutor (now Judge) Allen A. Rockoff and informed him that a hostage situation was taking place at the Barna home. As the chief law enforcement officer for the county, Rockoff ordered the county's hostage negotiation team to go to the Barnas' home. As part of the hostage situation response, the Barnas claim that Officer Charles Hawkins intercepted Mr. Barna's telephone conversations. After a period of time, Mr. Barna voluntarily surrendered to the police. He was arrested and detained for three

hours, then taken to a hospital for treatment for his injuries, and finally transported to the Middlesex County Adult Corrections Facility. He was released when bail was posted. Officers Otterbine and Echevarria later charged Mr. Barna with a number of criminal offenses in connection with these events.

Mr. and Mrs. Barna subsequently filed a civil complaint in the District Court for the District of New Jersey, alleging violations of their civil rights under 42 U.S.C. § 1983 by the City of Perth Amboy; the Township of Woodbridge; Officers Otterbine, Echevarria, Ruiz, Sanabria, Hawkins; and others. [The complaint] alleged that Officers Otterbine and Echevarria “assaulted” Mr. Barna and thereafter caused his arrest, depriving him of his constitutional rights under the Eighth and Fourteenth Amendments. [. . .]

[The district court dismissed a number of the police officer defendants prior to trial.] At the close of the Barnas' case [at trial], the [remaining defendants] moved for judgment as a matter of law. The district court granted their motions. [. . .] The district court explained . . . that the events of that evening should be viewed as comprising two distinct incidents: (1) a “family altercation” between the officers and Mr. Barna; and (2) the officers' response to Mr. Barna's brandishing of firearms following their attempt to leave. The court found that the evidence viewed in the light most favorable to the plaintiffs could not support a claim under 42 U.S.C. § 1983 because [. . .] the officers' actions were not performed under color of state law. [. . .]

II.

As noted, the Barnas brought this action under 42 U.S.C. § 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

42 U.S.C. § 1983. “To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988). The Barnas have alleged violations of their rights under the United States Constitution, claiming that the police officers' assault of Mr. Barna was unprovoked and involved the use of excessive force, and that the subsequent arrest, prosecution, and detention occurred without probable cause. They further contend that the defendants were acting in their official capacity as police officers-or were otherwise clothed in state authority, both during the altercation and during the ensuing events.[. . .]

“The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *West*, 487 U.S. at 49 (internal quotations omitted). Accordingly, acts of a state or local employee in her official capacity will generally be found to have occurred under color of state law. *Id.*; *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 n. 5 (1978). This will be so whether the complained of conduct was in furtherance of the state's goals or constituted an abuse of official power. *West*, 487 U.S. at 49-50; *Monroe v. Pape*, 365 U.S. 167, 184-87, (1961). “It is firmly established that a defendant in a section 1983 suit acts under color of state law when he abuses the position given to him by the State.” *West*, 487 U.S. at 49, 108 S. Ct. at 2255; *Screws v. United States*, 325 U.S. 91, 111, (1945) (“Acts of [police] officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.”).

“It is [also] clear that under ‘color’ of law means under ‘pretense’ of law.” *Screws*, 325 U.S. at 111. Thus, one who is without actual authority, but who purports to act according to official power, may also act under color of state law. In *Griffin v. Maryland*, the Supreme Court held that a deputy sheriff employed by a private park operator acted under color of state law when he ordered the plaintiff to leave the park, escorted him off the premises, and arrested him for criminal trespass. *Griffin v. Maryland*, 378 U.S. 130 (1964). While the deputy sheriff was in actuality acting as a private security guard and as agent of the park operator rather than as agent of the state, he “wore a sheriff’s badge and consistently identified himself as a deputy sheriff rather than as an employee of the park,” and consequently “purported to exercise the authority of a deputy sheriff.” *Id.* at 135.² The Court concluded that the privately employed deputy sheriff had been acting as a state actor, stating:

If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity.

Id. In this same vein, off-duty police officers who purport to exercise official authority will generally be found to have acted under color of state law. Manifestations of such pretended authority may include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations. [. . .]

On the other hand, a police officer's purely private acts which are not furthered by any actual or purported state authority are not acts under color of state law. See *Delcambre v. Delcambre*, 635 F.2d 407, 408 (5th Cir.1981) (holding that alleged assault by on-duty police chief at police station did not occur under color of state law because altercation with the plaintiff, defendant's sister-in-law, arose out of a personal dispute and defendant neither arrested nor threatened to arrest the plaintiff); [. . .] While a police-officer's use of a state-issue weapon in the pursuit of private activities will have “furthered” the § 1983 violation in a literal sense, courts generally require additional indicia of state authority to conclude that the officer acted under color of state law. Compare *Bonsignore v. City of New York*, 683 F.2d 635 (2d Cir.1982) (holding that officer who used police handgun to shoot his wife and then commit suicide did not act under color of state law even though he was required to carry the police gun at all times) with *Stengel v. Belcher*, 522 F.2d at 441 (finding evidence supported determination of “under color” where off-duty officer intervened in barroom brawl as required by relevant police department regulations) [. . .]

In this case, Officers Otterbine and Echevarria were off duty when the altercation with Mr. Barna occurred, and the evidence indicates that the underlying nature of their dispute was personal. The evidence would not support a finding that the officers were acting with actual police authority during the altercation. Nor would it support a finding that they purported to be acting with police authority.

While the fact that they were off duty is not dispositive of whether the officers were exercising actual police authority, there was no evidence to indicate that the officers were on official police business. First, the officers were literally “out of their official jurisdiction.” New Jersey law provides that a municipal police officer's jurisdiction is limited to the municipality in which the officer was appointed. N.J.Stat. Ann. § 40A:14-152 (West 1993); see *State v. Cohen*, 73 N.J. 331, 375 A.2d 259, 264 (1977). A police officer may act in his or her official capacity outside of this jurisdiction under only two circumstances: (1) when in hot pursuit of a person whom the officer believes to have committed a crime,

² Under a local ordinance, the county sheriff could deputize individuals who were employed to act as private security personnel. The individuals would be appointed as “special deputy sheriffs,” and although they were paid by and acted as agents for the company or individual on whose account the appointment was made, they “ha[d] the same power and authority as deputy sheriffs possess within the area to which they are appointed.” *Griffin*, 378 U.S. at 132 n. 1, 84 S.Ct. at 1771 n. 1 (quoting § 2-91 of the Montgomery County Code of 1955).

N.J.Stat. Ann. § 2A:156-1 (West 1985), or (2) when making an arrest anywhere in the state for a crime committed in the officer's presence, N.J.Stat. Ann. § 40A:14-152.1 (West 1993). Officers Otterbine and Echevarria, who were Perth Amboy police officers, thus could not have been acting with official authority under the facts of this case when they allegedly assaulted Mr. Barna at his home in the Town of Woodbridge. [. . .]

Otterbine decided to follow the Barnas to their home at the request of a relative and asked his partner, with whom he was sharing a social evening, to accompany him. The altercation began when Officer Otterbine accused Mr. Barna of hitting the officer's sister, Aunt Mary. His partner then intervened to support him and, at the end of the fracas, the two officers attempted to leave. The officers had not been called to the scene to conduct official police business, nor were they in pursuit of Mr. Barna on the belief that he had already committed a crime. Finally, the fact that they attempted to leave after the assault establishes that the officers were not trying to arrest Mr. Barna at the time they assaulted him. Thus, there was no evidence to support a finding that the officers were clothed with actual state authority during the initial phase of the altercation, prior to Mr. Barna's brandishing of firearms.

This situation is thus unlike that in *Black v. Stephens*, 662 F.2d 181 (3d Cir.1981), where we concluded that an on-duty police officer may act under color of state law when he performs official duties that arose in a quasi-personal context. In *Black*, the plaintiff brought a § 1983 claim against a police officer in connection with an arrest and prosecution that arose out of a traffic incident involving the plaintiff's and the officer's vehicles. We found sufficient indicia of state authority to uphold the denial of judgment notwithstanding the verdict because the police officer was an on-duty (although plain-clothed) detective, he wore a police academy windbreaker, and he had initiated contact with the plaintiff on the belief that the plaintiff's actions warranted official investigation. *Black v. Stephens*, 662 F.2d at 188. Here there was no evidence that the alleged assault occurred as a result of official police concerns; on the contrary, the evidence indicates that the assault arose out of the officer's familial and personal concerns.

Turning to the issue of whether the officers purported to be acting with state authority when they followed the Barnas home and accosted Mr. Barna, we also find no evidence supporting the Barnas' position. The officers did not identify themselves as police officers, they did not indicate that they were acting on official police business, and importantly, they did not attempt to arrest Mr. Barna, or otherwise invoke their police authority, during the initial phase of the altercation.

The only arguable connections between the officers' alleged assault of Mr. Barna and the use of police authority are: (1) Echevarria's comment, "I'll show you jurisdiction," made in response to Mr. Barna's statement that the officers were out of their jurisdiction, and (2) evidence that Echevarria used a state-issue "PR-24" nightstick to hold Mr. Barna during the assault—a weapon that Officer Echevarria could only legally carry in New Jersey because of his position as a police officer. We believe Officer Echevarria's comment regarding the officers' "jurisdiction" is too ambiguous to be of significant value on the issue of state authority. As noted, the officers were in fact out of their police jurisdiction. Instead of indicating that Echevarria intended to exercise official police authority, the comment could just as likely have been meant to convey that Echevarria intended, despite the lack of any real or purported authority, to put Mr. Barna in his place.

The use of a police-issue nightstick is undoubtedly the Barnas' strongest support for the view that the officers were acting under color of state law during the alleged assault. The nightstick was an objective indicia of police authority, and Echevarria was legally entitled to possess it only because of his position as a police officer. At the time it was used, however, Echevarria did not have actual authority to use the nightstick, since, by law, an officer may only carry the weapon while on duty or while traveling to or from an authorized place of police duty. See N. J. Stat. Ann. § 2C:39-3(e), (g). Nor, under the circumstances of this case, do we view the use of the nightstick to hold Mr. Barna during the assault as an

assertion by Echevarria of official authority. In short, we believe the unauthorized use of a police-issue nightstick is simply not enough to color this clearly personal family dispute with the imprimatur of state authority.

To hold otherwise would create a federal cause of action out of any unauthorized use of a police-issue weapon, without regard to whether there are any additional circumstances to indicate that the officer was exercising actual or purported police authority. We do not understand the under color requirement of § 1983 to be satisfied by such a tenuous connection to state authority. [. . .] The district court properly granted judgment as a matter of law in favor of Officers Otterbine and Echevarria on the assault-based claim because a jury could not reasonably find that the assault occurred under color of state law. [. . .]

IV.

[For the foregoing reasons, we] will affirm the judgment of the district court.