

Martinez v. City of Clovis, 2019 U.S. App. LEXIS 35974

United States Court of Appeals for the Ninth Circuit

December 4, 2019

I. BACKGROUND

Martinez and Pennington started living together in 2013 in Clovis. Pennington first physically and sexually abused Martinez in April 2013, while the two were staying at a hotel in Dublin, California. After that, a pattern of violence ensued. Martinez's § 1983 claims against Clovis, Sergeant Sanger, and the individual officers arise out of two incidents that took place on May 2, 2013, and June 4, 2013. We address these two incidents in turn.

A. May 2, 2013, Incident

Martinez was at her cousin's house on the evening of May 2, 2013. When Pennington arrived at the house, he became physically abusive. Pretending to leave, Martinez exited the house and hid outside. After Pennington left, she dialed 911 and took a taxi to the house where she lived with Pennington. Officers Hershberger and Jesus Santillan were dispatched to the home. The officers were onsite when Martinez arrived.

Pennington walked over to the taxi and warned her not to say anything to the officers. Martinez told Officer Hershberger that she did not want to speak to Officer Santillan because he was Pennington's friend. Officer Hershberger then spoke with Martinez outside of Pennington's immediate presence. According to Martinez, however, Pennington was still within eye and earshot.

Officer Hershberger testified that Martinez had told her about Pennington's physical abuse in Dublin but did not mention that Pennington had been physically abusive that evening. Officer Hershberger tried to probe further, but Martinez asked to go inside, insisting that she was fine. Martinez gave inconsistent testimony about whether she told Officer Hershberger that Pennington had pushed her down the stairs that evening, ultimately clarifying that she had. She claimed that Officer Hershberger asked her to "hold on just a second" and moved away. Pennington stared at Martinez in a manner she perceived as intimidating, so she walked toward him, because she didn't want him to think that she was talking to the officer.

While Martinez was standing in front of Pennington, Officer Hershberger returned. She had a tape recorder and asked Martinez to repeat her statements about what had happened in Dublin. Martinez testified that at that point she was scared because Officer Hershberger had said Dublin and she had said it in front of Pennington, so Martinez told her, "Nothing, nothing happened." Martinez heard Pennington clear his throat, which she contends he does when he is angry, and therefore acted like she didn't know what she was talking about.

Officer Hershberger had received domestic violence training. She believed that Martinez faced potential risk if she stayed with Pennington that night. She was aware that domestic violence victims might tend to recant accusations of violence out of fear of reprisal. However, she did not arrest Pennington. She did not advise Martinez of her right to make a citizen's arrest, her right to obtain a restraining order, or the possibility of staying at a shelter. She did not provide Martinez with Clovis's pamphlet for victims of domestic violence. She contends that this was because Martinez did not indicate that any violence had occurred that evening, and because she was responding to a check the welfare call, not a domestic violence call. Instead, she recommended that Martinez be contacted and interviewed again.

Officer Hershberger and Pennington had both worked with the Clovis Police Department ("Clovis PD") for about nine years. Officer Hershberger did not socialize with Pennington and had only a "neutral" opinion of him. Pennington testified that after Martinez went back inside the house, Officer Hershberger spoke with him briefly. As Pennington describes it, "she was asking me, you know, what I was doing dating a girl like Desiree Martinez and what was going on, what was going on in my life because I was recently divorced and, you know, that she didn't think that she was necessarily a good fit for me."

That night, Pennington physically abused Martinez. He called her a "leaky faucet" and asked her what she had told Officer Hershberger and whether she was trying to get him in trouble. The next day, Martinez spoke with a detective over the phone. Pennington had scripted the conversation, and Martinez denied everything that she had said to Officer Hershberger.

In May 2013, Martinez contacted members of the Clovis PD again about an incident unrelated to this appeal. To avoid further investigation by the Clovis PD, Martinez and Pennington moved to Sanger at the end of the month.

B. June 4, 2013, Incident

On the night of June 3, 2013, Pennington physically and sexually abused Martinez. Martinez stated that he choked, beat, suffocated, and sexually assaulted her. Martinez did not have access to a phone, but one of their neighbors made a 911 domestic violence call. Officers Yambupah and Sergeant Sanders arrived at the house with two other officers. When the officers arrived, both Martinez and Pennington were standing outside of the house.

Officer Yambupah had received domestic violence training. She noticed that Martinez had injuries consistent with those of a victim of physical abuse, including a red cheek, scrapes on her knees, a manicured fingernail that was broken and bleeding, a torn shirt, and bruising on her arms. She photographed Martinez's injuries. Although Officer Yambupah later acknowledged that separating Martinez and Pennington was important because of the possibility of intimidation, Martinez testified that they were not separated by more than seven feet when she and Officer Yambupah spoke. Martinez, believing that Pennington was within earshot, whispered to Officer Yambupah that the injuries had been inflicted by Pennington, that Pennington had tried to smother her with a pillow, and that he had attempted to choke her.

Officer Yambupah believed that she had probable cause to arrest Pennington and determined that he was the dominant aggressor. She believed that this made Pennington's arrest mandatory under California Penal Code § 836(c)(1). She also believed that as a police officer, Pennington had access to weapons. Officer Yambupah learned from Martinez that Pennington was on administrative leave from the Clovis PD because of a domestic violence incident with an ex-girlfriend.

Officer Yambupah told Martinez that she was going to make an arrest, and huddled with the other officers. When Officer Yambupah informed them of Martinez's allegations and Pennington's position with the Clovis PD, Sergeant Sanders, who was acting as a supervisor on the scene, ordered her to refer the matter to the District Attorney instead of making an arrest. Officer Yambupah testified that had Sergeant Sanders not given the order, she would have arrested Pennington on that day in the interest of Ms. Martinez's safety.

The officers did not give Martinez the jurisdiction's domestic violence information handout, did not inform her of her right to effect a citizen's arrest, did not offer her transportation to a shelter, and did not issue an emergency protective order. Officer Yambupah testified that she did not give Martinez the handout because she did not want to leave her side. She asked Martinez to let her help her, but Martinez refused. She did not issue a protective order because Martinez was not willing to pursue any assistance from her at all. She foresaw a risk of continued violence, which she attempted, unsuccessfully, to address by verifying that Pennington was going to leave.

Officer Yambupah did not know that Pennington was an officer with the Clovis PD until Martinez informed her that he was. Pennington testified that he knew of Sergeant Sanders, but that they were not friends. Pennington's father, Kim, and Sergeant Sanders had known each other for at least 25 years. On leaving, Sergeant Sanders said that the Penningtons were "good people."

After the officers left, Martinez was again beaten and sexually assaulted by Pennington. He was arrested the next day, and a criminal protective order was issued.

Martinez continued to live with Pennington after his arrest on June 5, 2013. He physically and sexually abused her multiple times between July and September 2013, when she finally moved out. Pennington was eventually convicted of multiple counts of violating the criminal protective order. He also pled guilty to one domestic violence charge.

C. Procedural History

Martinez sued Pennington, the cities of Clovis and Sanger, Officers Hershberger, Santillan, High, Yambupah and Salazar, Sergeant Sanders, and Kim and Connie Pennington. She asserted claims under 42 U.S.C. § 1983 of municipal liability in denial of substantive due process and equal protection against Clovis and Sanger, and of individual liability against Hershberger, Santillan, Salazar, High, Yambupah, and Sanders. In her claims against the officer defendants, Martinez contends the officer defendants violated her right to due process under the state-created danger doctrine.

The cities and officer defendants moved for summary judgment on August 15, 2017. The district court granted summary judgment on all claims against the cities of Sanger and Clovis, as well as Hershberger, Yambupah, and Sanders. Partial judgment was issued. Martinez timely appealed.

QUALIFIED IMMUNITY DOCTRINE

The doctrine of 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. In evaluating whether an officer is entitled to qualified immunity, courts consider (1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and (2) whether that right was clearly established at the time of the incident. Qualified immunity applies either where there was no constitutional violation or where the constitutional violation was not clearly established. The court has discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

VIOLATION OF MARTINEZ'S CONSTITUTIONAL RIGHT

The Due Process Clause of the Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property, without due process of law. Because Martinez alleges that the individual officers deprived her of liberty by affirmatively placing her at greater risk of abuse, Martinez's claims are rooted in the substantive component of the Due Process Clause.

The Due Process Clause is a limitation on state action and is not a "guarantee of certain minimal levels of safety and security." Simply failing to prevent acts of a private party is insufficient to establish liability. The general rule is that a state is not liable for its omissions and the Due Process Clause does not impose a duty on the state to protect individuals from third parties.

There are two exceptions to this general rule. First, a special relationship between the plaintiff and the state may give rise to a constitutional duty to protect.

Second, the state may be constitutionally required to protect a plaintiff that it affirmatively places in danger by acting with deliberate indifference to a known or obvious danger. (see *Kennedy v. City of Ridgefield*, (2006) holding that the officer affirmatively created a danger to the plaintiff she otherwise would not have faced by informing her assailant of the accusations her family had made against him before they had the opportunity to protect themselves from his violent response to the news thus creating an opportunity for him to assault the plaintiff that otherwise would not have existed).

Martinez argues that the state-created danger doctrine applies because Officers Hershberger, Yambupah, and Sanders affirmatively exposed her to a greater risk of a known danger. To succeed on this claim, Martinez must establish three elements.

- First, she must show that the officers' affirmative actions created or exposed her to an actual, particularized danger that she would not otherwise have faced.
- Second, she must show that the injury she suffered was foreseeable.

- Third, she must show that the officers were deliberately indifferent to the known danger.

We analyze these elements and the officers' conduct below.

A. Actual, Particularized Danger

Martinez must first show that the officers affirmatively exposed her to an actual, particularized danger. We do not look solely to the agency of the individual or what options may or may not have been available to her. Instead, we consider whether the officers left the person in a situation that was more dangerous than the one in which they found.

Whether the danger already existed is not dispositive because, by its very nature, the doctrine only applies in situations in which the plaintiff was directly harmed by a third party—a danger that, in every case, could be said to have already existed. The relevant question is whether state action creates or exposes an individual to a danger which he or she would not have otherwise faced.

1. Officer Hershberger

Martinez argues that Officer Hershberger placed her in greater danger by failing to inform her of her rights or options, failing to provide her with the Clovis PD's handout for domestic violence victims, and failing to make an arrest.

Although these failures may have been a dereliction of Hershberger's duties, they were not an affirmative act that created an actual, particularized danger. In other words, Hershberger did not make the situation worse for Martinez. Hershberger simply left Martinez in the same position she was in before the police had arrived.

Martinez also maintains that Officer Hershberger failed to separate her from Pennington, causing her to recant her allegations of abuse out of fear of Pennington. But this alleged failure did not expose Martinez to a danger that she would not otherwise have faced. Failing to affirmatively separate Martinez from Pennington left her in the same position she would have been in had Hershberger not responded to the 911 call. At least under these circumstances, Officer Hershberger did not violate Martinez's right to due process.

However, the record also reveals that Officer Hershberger told Pennington about Martinez's testimony relating to his prior abuse, and also stated that Martinez was not "the right girl" for him. A reasonable jury could find that Hershberger's disclosure provoked Pennington, and that her disparaging comments emboldened Pennington to believe that he could further abuse Martinez, including by retaliating against her for her testimony, with impunity. The causal link between Hershberger's affirmative conduct and the abuse Martinez suffered that night is supported by Martinez's testimony that Pennington asked Martinez what she had told the officer while he was hitting her.

That Martinez was already in danger from Pennington does not obviate a state-created danger when the state actor enhanced the risks. (See Hernandez explaining that an officer

cannot avoid liability merely because the plaintiff had already been in a dangerous situation before contact with the officer). Because a reasonable jury could infer that Martinez was placed in greater danger after Hershberger disclosed Martinez's complaint and made comments to Pennington that conveyed contempt for Martinez, the first requirement of the state-created danger doctrine is satisfied.

2. Officer Yambupah

Officer Yambupah failed to separate Martinez from Pennington when conducting the interview, did not arrest Pennington despite Martinez's complaints of abuse, did not provide Martinez with information that may have allowed her to escape further abuse, and did not issue an emergency protective order. These were not affirmative acts that created an actual, particularized danger. Martinez was left in the same position she would have been in had Yambupah not acted at all. Yambupah's failure to protect Martinez against private violence thus did not violate the Due Process Clause.

3. Sergeant Sanders

Several of Martinez's allegations against Sergeant Sanders mirror those against Yambupah. With respect to Martinez's claims that Sanders did not separate her from Pennington, provide her with information, or issue an emergency protective order, we conclude that Sanders's conduct, like Yambupah's, does not support a § 1983 claim. But, in other respects, Sanders's conduct materially differed from Yambupah's.

Knowing that Pennington was an officer with the Clovis PD, Sergeant Sanders ordered Yambupah not to arrest Pennington. This decision, on its own, did not leave Martinez in a more dangerous situation than the one in which he found her, and thus was not itself unconstitutional.

But the record contains evidence of more than just Sergeant Sanders's order not to arrest Pennington. In instructing Yambupah not to arrest Pennington, which he did in Pennington's presence, Sergeant Sanders also expressed that the Penningtons were good people. Sergeant Sanders spoke positively about the Penningtons against the backdrop that everyone involved, including Sergeant Sanders, knew that Pennington and his father were police officers. While hearing Sergeant Sanders speak positively about the Penningtons, Martinez also heard Sergeant Sanders telling Yambupah that, you know, "We're not going to arrest him. We're just going to turn it over to Clovis PD, whatever."

Viewing the record in the light most favorable to Martinez, a jury could reasonably find that Sergeant Sanders's positive remarks about the Penningtons placed Martinez in greater danger. The positive remarks were communicated against the backdrop that Sergeant Sanders knew that Pennington was an officer and that there was probable cause to arrest — which the jury could infer Pennington, as a police officer, understood. A reasonable jury could find that Pennington felt emboldened to continue his abuse with impunity. In fact, the following day, Pennington abused Martinez yet again. Under these circumstances, the first requirement of the state-created danger doctrine is satisfied.

B. Foreseeability

To invoke the state-created danger doctrine, Martinez must next show that her ultimate injury was foreseeable. This does not mean that the exact injury must be foreseeable. Rather, the state actor is liable for creating the foreseeable danger of injury given the particular circumstances.

As a matter of common sense, the assaults Martinez suffered after the police interventions on May 2, 2013, and June 4, 2013, were objectively foreseeable. (See *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) stating the inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense).

C. Deliberate Indifference to a Known Danger

Under the state-created danger test, Martinez must finally show that the officers acted with deliberate indifference to a known or obvious danger. This is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. The standard is higher than gross negligence, because it requires a culpable mental state.

The state actor must recognize an unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff. In other words, the state actor must have known that something was going to happen, but ignored the risk and exposed the plaintiff to it anyway.

Given the foreseeability of future domestic abuse here, a reasonable jury could find that disclosing a report of abuse while engaging in disparaging small talk with Pennington, and/or positively remarking on his family while ordering other officers not to make an arrest despite the presence of probable cause, constitutes deliberate indifference to a known or obvious danger. That Pennington was already under investigation by the Clovis PD for allegations of abuse against an ex-girlfriend also suggests that future abuse was a known or obvious danger. By ignoring the risk created by Pennington's violent tendencies, the officers acted with deliberate indifference toward the risk of future abuse.

We hold that a reasonable jury could find that Officer Hershberger and Sergeant Sanders violated Martinez's due process right to liberty by affirmatively increasing the known and obvious danger Martinez faced.

CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT

We next turn to the question whether, at the time of the challenged conduct, the law was sufficiently well defined that every reasonable officer in the officers' shoes would have known that their conduct violated Martinez's right to due process. We conclude it was not. Qualified immunity therefore applies.

Qualified immunity balances two important interests-- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The doctrine of

qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established constitutional rights of which a reasonable person would have known

Hershberger and Sergeant Sanders are entitled to qualified immunity because the due process right conferred in the context before us was not clearly established prior to this case. Although the application of the state-created danger doctrine to this context was not apparent to every reasonable officer at the time the conduct occurred, we now establish the contours of the due process protections afforded victims of domestic violence in situations like this one. Significantly, it is the facts of this case that clearly establish what the law is going forward.

CONCLUSION

We hold today that the state-created danger doctrine applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity. Similarly, we hold that the state-created danger doctrine applies when an officer praises an abuser in the abuser's presence after the abuser has been protected from arrest, in a manner that communicates to the abuser that the abuser may continue abusing the victim with impunity. Going forward, the law in this circuit will be clearly established that such conduct is unconstitutional.