

Right to Refuse Treatment

Prisoner's Claim That Conditioning Eligibility for Parole on Taking Potentially Medically Inappropriate Medication Violated His Due Process Rights Is Not Frivolous

In *Bundy v. Stommel*, 168 Fed.Appx. 870 (10th Cir. 2006), the U.S. Court of Appeals for the Tenth Circuit reversed the U.S. District Court for the District of Colorado's ruling that the prisoner plaintiff's allegation was a legally frivolous claim. The prisoner plaintiff claimed that conditioning his eligibility for parole on agreeing to take what he considered clinically inappropriate medication violated his right to due process.

Facts of the Case

Arthur Bundy, sentenced in 1992 to 22 years for first-degree sexual assault, began participation in the Colorado Sex Offender Treatment and Monitoring Program (SOTMP) in 1999 as a prerequisite for consideration for parole. Part of the SOTMP required Mr. Bundy to sign a contract agreeing to take recommended psychotropic medication. A Colorado Department of Corrections (CDOC) psychiatrist diagnosed obsessive-compulsive disorder with deviant fantasies, and prescribed Zoloft, which Mr. Bundy took willingly, with beneficial results.

In June 2002, the SOTMP program coordinator required Mr. Bundy to begin taking Prozac instead of Zoloft. This decision was not clinically based, but was due to a CDOC-wide formulary decision that changed all CDOC Zoloft prescriptions to Prozac (letter from Anthony A. DeCesaro, Step III Grievance Officer, to Arthur Bundy dated October 9, 2003. Available at <https://ecf.cod.uscourts.gov>. Accessed December 15, 2006; Motion to Dismiss Civil Action 04-cv-2490-MSK-CBS, *Bundy v. Stommel*, dated August 4, 2006. Available at <https://ecf.cod.uscourts.gov>. Accessed December 15, 2006).

Mr. Bundy objected but took the Prozac for fear that refusal would lead to his termination from the SOTMP and make him ineligible for parole. He alleged numerous side effects of Prozac, including migraine headaches, rashes, insomnia, paranoia, and aggression. He also alleged that his subsequent

termination from the SOTMP for aggressive behavior was a result of the switch to Prozac. Mr. Bundy was later transferred to another facility, switched back to Zoloft, and experienced resolution of the side effects.

After exhausting his administrative remedies to no avail, Mr. Bundy filed a *pro se* civil rights complaint under 42 U.S.C. § 1983 (2005) in the U.S. District Court for the District of Colorado alleging that requiring unwanted medication as a condition for parole eligibility violated his due process rights. Mr. Bundy's complaint was dismissed by the district court as legally frivolous under 28 U.S.C. § 1915A (2005) (Prisoner Litigation Reform Act of 1995, passed in 1996). Mr. Bundy appealed the decision.

Ruling and Reasoning

The U.S. Court of Appeals for the Tenth Circuit reversed the district court's dismissal of the complaint as legally frivolous and remanded to the lower court for further proceedings. The court of appeals explained that 28 U.S.C. § 1915A is a screening provision to be applied to prison litigants who bring civil suits under 42 U.S.C. § 1983 against a governmental employee, officer, or entity. When a lawsuit with a prisoner-plaintiff is dismissed as legally frivolous under 28 U.S.C. § 1915A and appealed, the court explained, the dismissed case is reviewed for frivolity by the higher court.

The district court saw Mr. Bundy as blaming the change in medication for his behavioral problems (which caused him to be discharged from the program and therefore to be ineligible for parole). The district court, with this view, proceeded to conclude that he did not have a liberty interest in avoiding the medication and dismissed his claim as frivolous.

However, the Tenth Circuit construed Mr. Bundy's *pro se* argument as lamenting that conditioning his eligibility for parole on his agreement to take Prozac violated his recognized and significant liberty interest to be free of the "unwanted administration of antipsychotic drugs." The court discussed three cases in which clinically appropriate involuntary medication was administered to prisoners or parolees.

In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court first recognized a prisoner's significant liberty interest in avoiding unwanted antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. In *Harper*, the medication

was administered involuntarily to a prisoner, whereas Mr. Bundy had an apparent choice between taking medication and being ineligible for parole. The Tenth Circuit saw this choice as similar to that in a Seventh Circuit case, *Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992).

In *Felce*, the Seventh Circuit considered whether a state could condition actual parole on an agreement to take unwanted antipsychotic medication. The Seventh Circuit concluded that the parolee plaintiff had a liberty interest in being free of the unwanted administration of antipsychotic medication, and the state therefore had to use an independent decision-maker to determine whether antipsychotic medication was medically appropriate. However, Mr. Bundy's eligibility for parole is the issue in the current case as opposed to the greater denial of liberty in revoking parole, as in *Felce*.

Finally, the Second Circuit considered a Ninth Circuit decision, *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004), in which the prisoner plaintiff challenged a condition of supervised release that required him to take psychotropic medications for his mental illness. In *Williams*, the Ninth Circuit concluded that the liberty interest in avoiding unwanted antipsychotic medication required that before mandatory medication was imposed as a condition of release, the lower court must make an informed finding of medical necessity for any mandated medication. The Second Circuit concluded that, in light of these three decisions by other courts of appeals, Mr. Bundy's claim was not frivolous, and his liberty interest must be considered.

The Tenth Circuit did not rule on whether Colorado violated Mr. Bundy's due process rights by forcing him to choose between unwanted medications and eligibility for parole. Nor did the court rule on Mr. Bundy's separate argument that the actions of Colorado officials were deliberately indifferent, explaining that answering either of these questions was not their charge, as they reversed the lower court's finding of Mr. Bundy's complaint as frivolous and remanded the case to the district court for further deliberation.

Discussion

To understand *Bundy* requires some understanding of the laws governing civil torts against the government and the limits of these torts, as prescribed in 42 U.S.C. § 1983 and 28 U.S.C. § 1915A.

The Civil Rights Act (or Ku Klux Klan Act) of 1871 added 42 U.S.C. § 1983 to the U.S. Code and was originally intended to be a legal salve for civil abuses committed in Southern states after the civil war. As described by Justice Stevens in *Briscoe v. LaHue*, 460 U.S. 325 (1983):

The Ku Klux Act . . . was enacted on April 20, 1871, less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern States. *Cong. Globe, 42d Cong., 1st Sess.*, 236, 244 (1871). During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States. Hours of oratory were devoted to the details of Klan outrages—arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation—often committed in disguise and under cover of night. These acts of lawlessness went unpunished, legislators asserted, because Klan members and sympathizers controlled or influenced the administration of state criminal justice. In particular, it was alleged that Klan members were obligated, by virtue of membership in the organization, to protect fellow members who were charged with criminal activity [*Briscoe*, p 337].

Section 1983 actions, as this species of lawsuit has become known, especially began to proliferate after the Supreme Court decided *Monroe v. Pape*, 365 U.S. 167 (1961). In *Monroe*, the Court first allowed claims of liability, even if the state actor acted outside the bounds of state law. It is from this decision that many 42 U.S.C. § 1983 actions, including Mr. Bundy's, find legal standing.

Many complaints filed by prisoners claim § 1983 liability, and the sheer volume of prisoner lawsuits had increased 10-fold between the decision in *Monroe* and 1996, when Congress passed the Prison Litigation Reform Act (PLRA). The PLRA contained procedural constraints on prisoner complaints intended to reduce the number of these suits. The PLRA amended a "screening" function to 28 U.S.C. § 1915 that directs district courts to review promptly a complaint and dismiss it if it is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from liability (see Ostrom BJ, *et al.*: Congress, Courts, and Corrections: an Empirical Perspective on the Prison Litigation Reform Act. *Notre Dame Law Rev* 78:1525, 2003). It is this screening provision for frivolity that the Tenth Circuit held that the district court improperly applied.

The Tenth Circuit stopped short of deciding whether Mr. Bundy's claim that his liberty interests

were violated entitles him to relief under 42 U.S.C. § 1983. More important for forensic psychiatrists, the court also did not decide whether conditioning the mere possibility of being selected for parole on taking medication constitutes involuntary administration of medication. The court left the door open for a future court to reason that linking parole eligibility to medication could constitute involuntary administration of medication and therefore could be a violation of a prisoner's liberty interest to be free of unwanted medication. If that were to happen, it is reasonable to forecast that the remedy would be a judicial or administrative hearing to determine the clinical appropriateness of the medication, as previously established in *Washington, Felce, and Williams*.

Bundy highlights the role of forensic psychiatrists in informing the courts about what may appear to be a confusing panoply of psychiatric medications. First, Mr. Bundy's original complaint appears to stem from an administrative decision within CDOC to switch the formulary selective serotonin reuptake inhibitor (SSRI) from Zoloft to Prozac. Whether the medication change was the factor that led to Mr. Bundy's eventual discharge from the SOTMP, Prozac and Zoloft are different medications with different pharmacokinetics and side effect profiles. This case demonstrates a potential pitfall of allowing an administrative decision to override clinical judgment and of treating all medications within a pharmacologic class as the same. Second, the Tenth Circuit makes particular note of the side effects of Prozac and calls Prozac an "antipsychotic medication" on several occasions. As an SSRI antidepressant, Prozac has a pharmacodynamic profile quite different from an antipsychotic and, although this confusion does not appear to have affected the court's decision in *Bundy*, it should remind forensic psychiatrists that effective consultation and testimony includes dispelling these uncertainties and misconceptions about psychiatric medications.

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Civil Commitment

Based on the Clinical Picture, Social Workers Had at Least Arguable Probable Cause for Involuntary Recommitment of the Plaintiff and Are Therefore Granted Qualified Immunity From Suit

In *Vallen v. Connelly*, 2006 Fed.Appx. 22 (2d Cir. 2006), the U.S. Court of Appeals for the Second Circuit affirmed the U.S. District Court for the Southern District of New York's summary judgment for the defendants in a 42 U.S.C. § 1983 (2005) complaint. The plaintiff alleged that the defendants had violated his constitutional rights when they re-committed him to a mental institution.

Facts of the Case

Barry Lee Vallen, a man under treatment for paranoid schizophrenia, was re-committed to a mental institution in 1994, under N.Y. Mental Hyg. Law § 9.45, by the defendant-social workers involved in his treatment. Their reasons for recommitment were partially based on Mr. Vallen's history, including his 1984 murder of his parents, for which he was found not responsible by reason of mental disease; his threatening behavior toward relatives; and his long history of repeated involuntary commitments. More immediately, the social workers were concerned that Mr. Vallen had not been complying with his conditions of release from a 1994 hospitalization and had an increasingly negative attitude. They had also received an anonymous tip that Mr. Vallen was armed and ready to resist a possible recommitment on the 10-year anniversary of killing his parents.

Mr. Vallen sued the defendants under 42 U.S.C. § 1983, alleging that the defendants made false statements during the recommitment process that caused him to be unlawfully arrested and re-committed. The U.S. District Court for the Southern District of New York granted summary judgment for the social workers based on qualified immunity due the social workers, because they had at least arguable probable cause to find that Mr. Vallen's mental illness had worsened to the point that it was likely to result in serious harm to Mr. Vallen or others. Mr. Vallen appealed to the U.S. Court of Appeals for the Second Circuit.

Ruling and Reasoning

The U.S. Court of Appeals for the Second Circuit affirmed the district court's summary judgment for the social workers because the circumstances leading