SELF-HELP REPOSSESSION VERSUS THE FOURTH AMENDMENT

Hensley v Gassman

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Law enforcement officers are often called to conduct "stand-bys" for repossession agents ("repo-agents") as they conduct self-help repossession of behalf of creditors. Self-help repossession is simply repossession of collateral based on terms of a contract rather than a court order. This is often allowed pursuant to state law, as long as a breach of the peace does not occur. Typically, law enforcement officers are called to the scene of self-help repossessions in order to prevent violence or to keep the peace. However, law enforcement officers must be mindful that it is very easy for them to overstep the permissible or constitutional limits of their authority in these incidents. For example, consider the recent case of *Hensley et al. v. Gassman et al*.[i] from the Sixth Circuit Court of Appeals.

The facts of *Hensley*, taken directly from the case are as follows:

> On August 13, 2008, at approximately 3:15 a.m., Gassman, who repossessed collateral for lenders in the Ogemaw County, Michigan area, went to the Hensley residence in Prescott, Michigan, to repossess a four-door Buick. Plaintiff McClellan Hensley, Sr. (Hensley Sr.), owned the Buick, but his wife, Sheila Hensley, drove it. After observing the Buick in the driveway at the Hensley residence, Gassman and his helper, Christian Wottrich, drove down the road and called the sheriff's department to request police presence, also known as a "civil stand-by," during the repossession. Gassman requested police assistance because Hensley Sr.'s conduct during a previous repossession resulted in an assault charge against Hensley Sr., and Gassman was concerned about potential violence.
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> Deputies Scott and Gilbert were dispatched to assist Gassman. The Deputies met Gassman and followed him to the Hensley residence. When they arrived, the Deputies pulled their patrol

car onto the Hensleys' property, and Gassman backed his tow truck into the driveway toward the Buick, which was parked facing the house. At some point, apparently after they arrived, Gassman told the Deputies that he had a repossession order and showed them a file containing some documents. The Deputies did not read the documents.

At the time, Hensley Sr. was away at work, but Sheila and their adult son, McClellan Hensley, Jr. (Hensley Jr.), were at home sleeping. As the Deputies walked toward the Buick, Sheila and Hensley Jr. woke up and went to the door. Sheila and Hensley Jr. stepped outside onto the porch and began telling Gassman and the Deputies that they should not take the Buick. Hensley Jr. stood between the Buick and the tow truck to prevent Gassman from hooking up the Buick. Hensley Jr. shouted at Deputy Gilbert, who was standing nearby, as well as Gassman and Wottrich, telling them that they could not take the vehicle and had to leave the property. Deputy Gilbert responded that they were not going to leave and that Gassman was taking the Buick. Deputy Scott ordered Hensley Jr. to step out of the way. Hensley Jr. moved to the side of the Buick after Gassman bumped him with the tow truck while backing up to the Buick.

While Hensley Jr. was shouting at Deputy Gilbert, Sheila explained to Deputy Scott that her payments were up to date and the car was not supposed to be repossessed. Deputy Scott responded that he did not care and, if that were the case, she could take her paperwork to Gassman or Burns Recovery (Gassman's client) in the morning to sort things out. In spite of Sheila's protest, Deputy Scott said that Gassman still had to take the Buick. In response, Sheila got into the Buick, started it, and locked the doors. She then lowered her window and shouted for Hensley Jr. to get her cell phone from the house. Hensley Jr. retrieved the phone and handed it to Sheila as she put the window down. By this time, Gassman and Wottrich were out of their truck and lying on the ground attempting to hook chains to the Buick's rear axle. At some point, Deputy Scott went to the Buick's driver-side window and ordered Sheila to exit the vehicle. She did not comply. Deputy Scott continued to shout at Sheila and threatened to break the window because Sheila had put the car in drive and was pulling the tow truck, which by then was chained to the car, toward Gassman and Wottrich as they were on the ground next to the rear wheels of the Buick. When Sheila still refused to get out, Deputy Scott unsuccessfully tried to break the car window with the butt of his handgun.

After Gassman hooked up the Buick and with Sheila still inside, Deputy Scott told Gassman to pull it out of the driveway and into the road. Once the Buick was parked on the road, Deputy Scott ordered Sheila several times to exit the vehicle, but she did not comply. Deputy Scott then used a hammer to break the passenger-side window, reached inside, and unlocked the doors. Deputy Gilbert then opened the driver-side door and pulled Sheila from the car. Deputy Scott opened the passenger-side car door, began moving items from the back to the front seat of the car, and told Sheila that if she wanted anything from the car, she should "get it out now." After Sheila and Hensley Jr. retrieved Sheila's personal belongings, Gassman re-hooked the Buick and towed it away.

Lo and behold, later that morning Gassman discovered that Sheila was indeed telling the truth about the payment. He had another tow truck driver return the Buick to the Hensleys.

> The Deputies did not arrest Sheila that morning, nor, apparently, did they even mention that she had committed a crime. About a week later, however, on August 21, 2008, they submitted a warrant request to the prosecutor seeking felonious assault charges. On August 28, 2008, a judge signed a felony warrant charging Sheila with two counts of assault with a dangerous weapon in violation of M.C.L. § 750.82, based on her pulling the tow truck toward Gassman and Wottrich while they were on the ground. Following a preliminary examination, Sheila was bound over on two counts of felonious assault and a charge of reckless driving. On May 19, 2010, Sheila pled no contest to both counts of felonious assault and to a misdemeanor charge of attempted aggravated assault.[ii]

Ultimately, the Hensley's filed suit against the deputies and the repossession company under state law (which we will not discuss here) and *Section 1983* for a violation their *Fourth Amendment* rights regarding the seizure of the vehicle. The deputies filed a motion for summary judgment based on qualified immunity. The district court found that the deputies did violate the Hensley's *Fourth Amendment* rights but nonetheless granted qualified immunity to the deputies. The Hensley's appealed to the Sixth Circuit Court of Appeals regarding the grant of qualified immunity.

In order to determine if a law enforcement officer is entitled to qualified immunity, the court will typically first determine if a constitutional or federal right was violated. If the court finds that the officer violated a constitutional right, then the court will next examine whether that right was "clearly established" such that another reasonable officer in the same situation would have known that he or she was violating the plaintiff's constitutional rights.

Thus, the Sixth Circuit first set out to determine if the officers violated the Hensley's *Fourth Amendment* rights during the repossession of their vehicle. At the outset, the Sixth Circuit noted

> The *Fourth Amendment* protects a person's right to his personal property without interference from the police absent consent or reasonable suspicion or probable cause that a crime has been, will be, or is being committed. Property is seized "when 'there is some meaningful interference with an individual's possessory interests in that property.[iii]

A constitutional violation occurs when the seizure of a person's property is deemed unreasonable under the *Fourth Amendment*.

In Hensley's case, the person that sought the seizure of the property was a private person, rather than a law enforcement officer. These repo-agents were attempting to engage in self-help repossession, which is allowed by Michigan statute, as long as the repossession can be accomplished without a breach of the peace. Thus, since the repo-agents were the individuals seeking to seize the property, the deputies could only be held liable if there was a finding of "state action" or participation. The Sixth Circuit stated

> Governmental actors such as the Deputies normally can be held responsible for a private decision only when [they have] exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the *Fourteenth Amendment*. *Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)* (internal citations omitted).[iv]

Thus, the court had to determine whether the deputies' conduct in Hensley's case amounted to state or government action. The Sixth Circuit first stated

> As a starting point, we note that a police officer's presence during a repossession solely to keep the peace, i.e., to prevent a violent confrontation between the debtor and the creditor, is alone insufficient to convert the repossession into state action. *Coleman, 628 F.2d at 964; see also Wright v. Nat'l Bank of Stamford, 600 F. Supp. 1289, 1295 (N.D.N.Y.), aff'd without opinion, 767 F.2d 909 (2d Cir. 1985*)[v]

However, an officer can overstep the permissible bounds of the *Constitution* when he or she takes a more active role in the repossessions or does an affirmative act that aids or facilitates the repossession. The court quoted the Ninth Circuits holding in *Howerton v. Gieda* and stated

> [A]n officer's presence at a repossession may constitute state action if accompanied by affirmative intervention, aid, intimidation, or other use of power which converts him from a neutral third party to, in effect, an assistant of the repossessing party. *708 F.2d 380, 383 (9th Cir. 1983*). [vi]

Further, the Sixth Circuit noted that, even absent active or physical participation in a repossession, an officer may still be found to have facilitated the repossession if he or she stifles a plaintiff's right to object to the self-help repossession. The court stated

> Even without active participation, courts have found that an officer's conduct can facilitate a repossession if it chills the plaintiff's right to object. As numerous state court cases and secondary authorities have recognized, an objection, particularly when it is accompanied by physical obstruction, is the debtor's most powerful (and lawful) tool in fending off an improper repossession because it constitutes a breach of the peace requiring the creditor to abandon his efforts to repossess. A police officer's arrival and close association with the creditor during the repossession may signal to the debtor that the weight of the state is behind the repossession and that the debtor should not interfere by objecting. *See Booker v. City of Atlanta, 776 F.2d 272, 274 (11th Cir. 1985)* ("Even if a jury were to find that Couvillion did not actively assist with the repossession, it nevertheless could find that Couvillion's arrival with the repossessor gave the repossession a cachet of legality and had the effect of intimidating Booker into not exercising his right to resist, thus facilitating the repossession."); *Jones, 909 F.2d at 1213* (holding that a jury could conclude that the officer's presence with the landlord while the landlord disconnected the tenant's electricity "could have engendered fear or intimidation," causing the tenant to refrain from exercising his right to resist the improper disconnection).[vii]

The Sixth Circuit then set out to apply the above discussed law to the facts of Hensley's case. The court noted the following relevant facts: (1) the deputies responded to the scene of the repossession at the request of the repo-agents; (2) a deputy ordered Hensley Jr. to move from behind the vehicle as he was protesting and attempting to prevent the repossession; (3) the deputies ignored demands to leave the property; (4) a deputy told Hensley Jr. that the repo-agents were going to take the vehicle; (5) a deputy ignored Mrs. Hensley's protests and told her that the repo-agents were going to take the vehicle; (6) a deputy told a repo-agent to tow the vehicle out of the driveway as Mrs. Hensley was in the vehicle; (7) a deputy broke out the window to the vehicle in which Mrs. Hensley was seated and unlocked the door; and (8) a deputy ordered Mrs. Hensley to exit the vehicle and remove her belongings. After examination of these facts, the Sixth Circuit stated

> Equally clear is that this conduct was not only active participation, but was instrumental to [the repo-agent's] success in completing the repossession. [Mrs. Hensley] asserted her right to object not only through words, but by physically taking control of the Buick. At that point, [the repo-agent's] right to pursue his self-help remedy terminated, and he was required to cease the repossession.[viii]

As such, the court held that the deputies were engaged in state action.

Next, the court had to determine whether this government action and the seizure amounted to an unreasonable seizure under the *Fourth Amendment*. On this issue, the court stated

> The Supreme Court has said that the existence of a court order in a case such as this is a game-changer: "Assuming . . . that the officers were acting pursuant to a court order, . . . a showing of unreasonableness on these facts would be a laborious task indeed." *Soldal, 506 U.S. at 71*.[ix]

The court then examined the facts relevant to the issue of the reasonableness of the seizure. The court noted the following relevant facts: (1) the deputies knew this was a private, civil matter and were unaware whether a court order authorizing repossession existed; (2) the repo-agent claimed they were authorized to repossess the vehicle; (3) the Hensley's disputed the repossession and gave a specific reason; and (4) the deputies lacked any evidence which supported the repo-agents claim of authority (i.e. a court order).

The court then held that these facts are sufficient to allow a jury to decide that the seizure was unreasonable under the *Fourth Amendment*.

Since the court determined that the deputies participated in an unreasonable seizure of the Hensley's vehicle in violation of the *Fourth Amendment*, the next issue relevant to qualified immunity for the deputies is whether the law was clearly established such that a reasonable officer should have known that his conduct was unlawful. To issue, the court stated

> This court has long recognized that individuals have "a clearly established right not to have property in which [they] enjoy[] a lawful possessory interest seized by state action in violation of the constitution." *Haverstick, 32 F.3d at 994* (footnote omitted). The Supreme Court's decision in Soldal, which was decided in 1992, confirms that state actors violate the Fourth Amendment by taking an active role in private evictions and repossessions when there is no apparent legal basis for such action. *Cochran, 656 F.3d at 309*. Moreover, in *Cochran*, this Court affirmed that the law was clearly established in this respect "well before" the events here at issue. See *id. at 310*.[x]

Thus, the court held that the deputies should have known their conduct violated the Hensley's *Fourth Amendment* rights and as such, they are not entitled to qualified immunity from suit.

Practice Pointers

So, what can law enforcement officers learn from this case regarding standy-by's involving self-help repossession? Officers should remember the following:

1. Officers should only be present to keep the peace or prevent violence.

2. Case law seems to suggest that if an officer that threatens to arrest a person for protesting a self-help repossession he or she may be found to have facilitated the repossession by preventing a person from exercising their right to protest.

3. In states where state statute only allows self-help repossession if it can be accomplished with no breach of the peace, if a person protests a self-help repossession, the officers on scene would be wise to advise the repo-agent that, due to a breach of the peace, the repo-agent will need a court order to proceed with the repossession. This is dependent upon state law regarding self-help repossession, but this is a good rule of thumb to avoid constitutional issues in light of the United States Supreme Court holding in *Sodal v. Cook County*.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*

CITATIONS:

[i] Nos. 11-1071/1129, 2012 U.S. App. LEXIS 19025 (6th Cir. Decided September 11, 2012)
[ii] Id. at 3-6
[iii] Id. at 13-14 (quoting Soldal v. Cook County, 506 U.S. 56, 61 (1992))
[iv] Id. at 16
[v] Id. at 17
[vi] Id. at 18
[vii] Id. at 19-20
[viii] Id. at 27
[ix] Id. at 28
[x] Id. at 33