



Civil Rights Update

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Botched Investigation or Cover-Up? Either Way, It May Not Be a Constitutional Violation

Cases labeled as “police cover-ups” are common in Section 1983 litigation. They also attract headlines and, potentially, significant verdicts. Sometimes lost in the din, however, is the fact that a “cover-up”—like ineffective policing—does not automatically amount to a violation of a federal constitutional right. The Seventh Circuit’s recent opinion in *Rossi v. City of Chicago*, 790 F.3d 729 (7th Cir. 2015), illustrates this point well.

Facts and Procedural History

The allegations in *Rossi* are salacious enough to warrant headlines. James Rossi, the plaintiff, was summoned to meet with Jose Garcia, the president of a trucking company, at the company’s office. *Rossi*, 790 F.3d at 732. This made sense to Rossi, since Garcia owed Rossi for some work he had previously performed. *Id.* Unfortunately for Rossi, Garcia’s invitation had nothing to do with back pay. Upon his arrival, Rossi was bound with an electrical cord and duct tape and beaten repeatedly by Garcia, Garcia’s brother and two other goons. *Id.* He was questioned about the whereabouts of a Bobcat construction vehicle which was missing from the company’s yard. *Id.* Three hours into this process, a Chicago police officer arrived at the yard. Although usually a positive sign, on this day it was not. The officer, Catherine Doubek, was Garcia’s wife. *Id.* According to Rossi’s complaint, Doubek made a dramatic show of removing her badge and allowing the interrogation and beating to continue. *Id.* Rossi further alleged that Doubek assumed the role of lookout and, over the next several hours, used her radio to monitor police activity in the area. *Id.*

Early the next morning, Doubek was the only person guarding Rossi. He managed to dupe her into believing that the Bobcat was hidden on the other side of town. She left him alone to investigate. *Id.* With Doubek on a wild goose chase, Rossi was able to bite through his restraints and escape to a neighbor’s house. He was transported to the hospital and the police were notified. *Id.* at 733.

The detective assigned to the case met with Rossi in the hospital and, Rossi alleged, only interviewed him for five minutes. *Id.* During the interview, Rossi told the detective that a Chicago police officer was involved in the incident. He mistakenly assumed that Doubek shared the same last name as her husband, and thus identified her as “Officer Garcia.” *Id.* Over the next three days, Rossi learned the identities of each of his assailants. He called the investigating detective but was forced to leave a message. Rossi’s message included the name “Catherine Doubek” and Doubek’s home address. *Id.* Upon receiving Rossi’s detailed message, the detective allegedly did nothing. *Id.* According to the Seventh Circuit’s opinion, he failed to confirm through the police database that an Officer Catherine Doubek existed, failed to locate or question any of the suspects, failed to visit the construction yard where the incident took place, failed to look for witnesses, and even failed to return Rossi’s phone calls. *Id.* Several weeks later, the detective allegedly filed a report with Officer Doubek’s name misspelled, stating that he was unable to find any such person on the police roster. He requested



that the investigation be suspended. *Id.* Since a police officer was alleged to have committed a crime, an Internal Affairs investigator reviewed the file as a matter of course. He, too, made little effort and quickly closed the file for lack of evidence. *Id.*

Frustrated by a lack of police assistance, Rossi contacted the media and shared his story. *Id.* Faced with news reports of a police cover-up, the Chicago Police Department launched a thorough investigation. Now five months after the incident, most of the physical evidence corroborating Rossi's account was lost. *Id.* Nevertheless, prosecutors were still able to secure convictions against Garcia and his brother for aggravated battery and unlawful restraint. *See People v. Garcia*, 2011 IL App (1st) 102519-U; *People v. Garcia*, 407 Ill. App. 3d 1187 (1st Dist. 2011) (Jose Garcia's conviction repeatedly affirmed in Rule 23 Orders). Officer Doubek was neither charged criminally nor disciplined by the police department. *Rossi*, 790 F.3d at 734.

Rossi sued his assailants, including Doubek, and received a settlement. *Id.* He then turned his attention to the investigating detective and the City of Chicago (the proper party for a suit against the police department). Pursuant to 42 U.S.C. § 1983, Rossi alleged that the detective's failure to investigate interfered with his right to judicial access, a constitutional claim under the First and Fourteenth Amendments. *Id.* He also raised a *Monell* claim against the City, alleging that the inadequate investigation was the result of "a 'code of silence' that shields police officers from investigation and promotes a culture of misconduct among police that contributed to his assault." *Id.* The district court granted summary judgment for the defendants. It also awarded the City its costs as the prevailing party. Rossi appealed both orders. *Id.*

The Seventh Circuit's Analysis

On appeal, Rossi argued that the detective violated his right to judicial access by failing to investigate the crime and by intentionally concealing Officer Doubek's identity. *Id.* The Seventh Circuit first noted that, pursuant to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) and its progeny, Rossi did not have a constitutional right to any police investigation at all. *Rossi*, 790 F.3d at 735. Thus, the real issue was "not whether Rossi's case would have been better had the police conducted a worthy investigation, but whether their failure to do so limited his ability to obtain legal redress to such degree that it constituted a denial of judicial access." *Id.* The court discussed two cases, which represented opposite extremes, to illustrate its analysis.

The first case, *Bell v. City of Milwaukee*, 746 F.3d 1205 (7th Cir. 1984), involved egregious conduct that effectively denied the plaintiff access to the courts. *Rossi*, 790 F.3d at 735. In *Bell*, police officers shot and killed Daniel Bell. They then planted a knife on Bell and fictitiously claimed that Bell had threatened them with it. *Id.* Bell's father timely filed a wrongful death suit against the City in state court, but when an internal investigation cleared the officers of wrongdoing, the father elected to settle his lawsuit for "a meager sum." He refused to accept the check. *Id.* Two decades later (and long after the death of Bell's father), the truth about the officers' conduct finally came to light. *Id.* Bell's family filed a Section 1983 suit, resulting in a jury award of substantial damages. *Id.* On appeal, the Seventh Circuit recognized a constitutional violation for denial of judicial access because the decades-long cover-up "effectively foreclosed the ability of Bell's father to learn the facts of his case and to seek relief for any injury." *Id.* Since the period of limitations on the wrongful death claim ran (and, of course, Bell's father passed away), "the possibility of timely legal redress had been permanently thwarted by the cover-up." *Id.* at 736.



The second case, *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995), which also involved a police cover-up, led to a far different result. In *Vasquez*, the plaintiff, a young girl, was wounded in the ear by a shot fired by her intoxicated neighbor, an off-duty police officer. *Rossi*, 790 F.3d at 735. An ensuing police investigation, which the court characterized as “half-hearted,” found nothing. *Id.* Soon thereafter, however, a task force comprised of state and federal officials re-investigated the incident and identified the officer as the shooter. The victim was thus able to file a tort action against her neighbor before the limitations period expired. *Id.* The victim’s attempt to pursue a Section 1983 case against the original investigators for denial of judicial access was less successful. On appeal to the Seventh Circuit, the court concluded that the delay caused by the purported cover-up, although frustrating to the plaintiff and her family, was not of a constitutional magnitude. *Id.* at 736. Unlike in *Bell*, the cover-up in *Vasquez* did not prevent the plaintiff from receiving legal redress—it merely delayed the process. And, in light of the detailed facts uncovered by the task force, the delay may actually have aided the victim’s case against her neighbor. *Id.*

Unsurprisingly, the Seventh Circuit concluded that the facts of Rossi’s case more closely resembled those in *Vasquez* than *Bell*. *Id.* As in *Vasquez*, the inadequate police investigation (alleged to be a cover-up) did not so harm Rossi’s litigation posture as to preclude adequate relief. *Id.* Crucially, the detective did not conceal any facts that were not already known to Rossi. Rossi witnessed the entirety of the underlying criminal activity, and thus, was never dependent upon the detective or other police officials to provide him with additional facts or evidence necessary to prevail in a lawsuit. *Id.* As succinctly stated by the court, “Rossi was not denied judicial access because he knew all of the relevant facts of his case and was free to pursue legal redress at all times.” *Id.* Also similar to *Vasquez*, a subsequent “real” investigation—completed late but within the limitations period—effectively buoyed Rossi’s suit against his assailants. *Id.* Since Rossi was unable to establish a violation of his constitutional right to judicial access, the detective was entitled to qualified immunity. *Id.* at 737.

Rossi’s *Monell* claim against the City fared no better. He argued that the inadequate police investigation was either the product of a widespread practice to allow police officers “to consort with convicted felons despite an official policy prohibiting such associations” or an entrenched “code of silence” in which the police department failed to train officers as to ethical conduct. *Id.* The Seventh Circuit rejected the first theory as a non-starter: no evidence supported the notion of a widespread practice of inappropriate relationships by the police in violation of official policy. *Id.* at 737-38. The court characterized the “code of silence” theory as supported by “serious questions about accountability among police officers.” *Id.* at 737. Nevertheless, the facts as developed in this case, at most, tracked the conduct of a couple of individual officers. *Id.* at 738. Under *Monell*, a plaintiff must demonstrate the existence of a “widespread practice that permeates a critical mass of an institutional body.” *Id.* at 737 (emphasis in original). Rossi failed to do that here. His limited efforts included offering three expert reports from another case. *Id.* at 738. The Seventh Circuit affirmed the district court’s rejection of the reports because Rossi failed to disclose them to the defense in accordance with Federal Rule of Civil Procedure 26(e)(2). *Id.* Rossi’s other efforts to tie up his *Monell* claim were likewise unavailing, and the court affirmed summary judgment on behalf of the City. *Id.*

Finally, Rossi appealed the district court’s decision to award the City its costs, as the prevailing party, pursuant to Rule 54(d)(1). Rossi argued that he was unable to pay the \$7,443 award. The Seventh Circuit was unsympathetic in light of Rossi’s complete failure to include evidence supporting his claimed financial hardship. It affirmed the district court’s order. *Id.*



Conclusion

The *Rossi* decision reminds us that even salacious fact patterns suggesting a cover-up on the part of police officials may not rise to the level of a federal constitutional violation. Without actual harm to the plaintiff's ability to pursue legal redress for his injuries, the conduct of individual officers is of little moment. Practitioners should determine whether the plaintiff was ultimately deprived of his day in court. If, as in *Rossi*, that day was merely delayed, then one can successfully defend a "police cover-up" case predicated on the First and Fourteenth Amendments.

About the Author

John P. Heil, Jr. is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's drone law practice group and is vice-chair of the business and commercial litigation practice group. He also regularly defends complex civil rights cases, *qui tam* actions and catastrophic tort suits in state and federal court. Prior to joining *Heyl Royster* in 2007, Mr. Heil was an Assistant State's Attorney in Cook County for eleven years. He received his undergraduate degree from Bradley University in 1993 and his law degree from Chicago-Kent College of Law, with honors, in 1996. He is a member of the Illinois Association of Defense Trial Counsel, the Federal Bar Association, the Illinois State Bar Association, the Peoria County Bar Association, and the Abraham Lincoln American Inn of Court.

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