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Legal Sidebar

Amateur Strip-Club Arrests: Probable Cause & Qualified Immunity

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The Supreme Court overturned a lower court decision that had found a lack of probable cause, and had denied police officers qualified immunity for arrest of participants in a late-night, strip-club-like party held in a vacant sparsely furnished house. The case, *District of Columbia v. Wesby*, began when a neighbor called police to complain about loud noise coming from a party in a vacant house. When the police arrived, they found several scantily clad women entertaining the party goers with money protruding from the clothes the women were wearing. The party goers claimed to have permission for the affair from "Peaches," a woman who was not to be found in the house. As it turned out, the officers learned that Peaches was neither the owner nor a tenant of the house, but had merely been in contact with the owner about the possibility of renting. The owner denied giving permission for the party. The watch commander on the scene then ordered the officers to arrest the party goers for trespassing.

After charges were dropped, some of the party goers sued the District and individual officers for unlawful arrest under a federal civil rights statute, 42 U.S.C. §1983. The U.S. District Court determined that the officers had no probable cause to arrest; denied the officers qualified immunity; and granted the party goers summary judgment. As the appellate dissenters pointed out, the jury, convened to assess damages, awarded $680,000 to the party goers, which coupled with attorneys' fees left the officers personally liable for close to $1 million. A divided panel of the U.S. Court of Appeals for the District of Columbia affirmed. The full complement of the judges of the D.C. Circuit voted not to rehear the case en banc, but again over a dissenting minority.

The Supreme Court disagreed and reversed. Justice Thomas, in the opinion for the Court, found the D.C. courts had erred on two counts: probable cause and qualified immunity. Probable cause is a Fourth Amendment issue. The Fourth Amendment demands that arrests not be unreasonable. A warrantless arrest is reasonable if officers have probable cause to believe that an individual has committed a crime in the officers' presence. Whether officers have probable cause – that is, whether they have grounds to

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believe that "a probability or substantial chance of criminal activity" exists – is a matter of the totality of the circumstances in a given case. The question in *Wesby* was whether the officers had evidence that the party goers knew or should have known that they were partying "against the will of the lawful owner" of the house.

The Court concluded that the condition of the house and the conduct of the party goers provided that evidence. Neighbors had told the officers that the house had been vacant for months. The house, inside, bore no signs of recent normal occupancy. It was essentially unfurnished. There were no clothes in the closets. Moreover, from the Court's perspective, the revelers could not reasonably have thought that they had permission for their conduct. The Court observed that "most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy." From all of this evidence, "a reasonable officer could conclude that there was probable cause to believe that the party goers knew they did not have permission to be in the house." The Court explained that the lower federal courts had gone astray when they "viewed each fact 'in isolation, rather than as a factor in the totality of the circumstances.'"

The Court found the immunity assessment in the federal tribunals below faulty as well. Police officers in the performance of their duties enjoy qualified immunity from lawsuits for money damages. They lose that immunity if their conduct is in violation of clearly established law. The case might have ended with the determination that the officers were not in violation of the Fourth Amendment and in fact had probable cause to arrest the party goers. Nevertheless, the Court went on to declare that even in the absence of probable cause the officers' immunity would have remained uncompromised. According to the Court, there simply was no clearly established precedent that would have alerted the officers of the lawlessness of their conduct. In the Court's mind, "to be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." Moreover, "the rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a roust consensus of cases of persuasive authority.' It is not enough that the rule is suggested by then-existing precedent." In *Wesby*, "neither the panel majority [below] nor the party goers … identified a single precedent – much less a controlling case or robust consensus of cases – finding a Fourth Amendment violation 'under similar circumstances.'"

Justices Sotomayor and Ginsburg agreed with the Court that the officers were entitled to immunity but they did concur in the majority's Fourth Amendment analysis. Justice Sotomayor would have left the question of probable cause unaddressed. Justice Ginsburg would have preferred that the Court's Fourth Amendment analysis include an examination of the officers' purpose for the arrest.