United States Supreme Court Decides that an

Arrest with Probable Cause can still Violate the Arrestee’s First Amendment Rights

In a very narrow holding, the United States Supreme Court held that where a municipality has an ongoing dispute with a citizen, such that the policy of the municipality is to retaliate against the citizen, an arrest supported by probable cause may still be actionable as a First Amendment violation.

In *Lozman v. City of Riviera*, the United States Supreme Court delved into an ongoing dispute between the City of Riviera Beach, Florida and one of its citizens, Fane Lozman. The original dispute in this case began when Lozman towed his floating home into a marina owned by the City. Lozman became a vocal critic of the City and its elected officials particularly with respect to the City’s plan to use its eminent domain power to seize waterfront homes for private development. Lozman had filed a lawsuit against the City alleging that an agreement between the City and developers was illegal as a violation of the open-meetings law. In 2006, the City Council held a closed-door meeting at which Lozman’s lawsuit was discussed. Lozman alleges that during the 2006 meeting the Council developed a plan to intimidate him and that a number of his problems with the City after this meeting were retaliation by the City. The Court noted that, “according to a transcript of the meeting, Councilmember Elizabeth Wade suggested the City use its resources to ‘intimidate’ Lozman and others who had filed lawsuits against the City. Later in the meeting a different councilmember asked whether there was a ‘consensus of what Ms. Wade is saying,’ and others responded in the affirmative.” The Court also noted that the City indicated that the consensus was regarding putting the money and resources into defending the litigation.

Several Months after the closed-door meeting in 2006, Lozman attended a council meeting. During the “public comment” portion of the meeting, Lozman took the podium to speak. The Court detailed what occurred as follows:

As he had done on earlier occasions and would do more than 200 times over the coming years, Lozman stepped up to the podium to give remarks. He began to discuss the recent arrest of a former county official. Councilmember Wade interrupted Lozman, directing him to stop making those remarks. Lozman continued speaking, this time about the arrest of a former official from the city of West Palm Beach. Wade then called for the assistance of the police officer in attendance. The officer approached Lozman and asked him to leave the podium. Lozman refused. So Wade told the officer to “carry him out.” The officer handcuffed Lozman and ushered him out of the meeting. The incident was recorded on video.. According to the City, Lozman was arrested because he violated the City Council’s rules of procedure by discussing issues unrelated to the City and then refused to leave the podium. According to Lozman, the arrest was to retaliate for his open-meetings lawsuit against the City and his prior public criticisms of city officials. Under arrest, Lozman was escorted to police headquarters. He was charged with disorderly conduct and resisting arrest without violence and then released. Later, the State’s attorney determined there was probable cause to arrest Lozman for those offenses but decided to dismiss the charges.

Mr. Lozman brought a lawsuit against the City alleging that the 2006 arrest was made in retaliation of his exercise of First Amendment rights. The trial judge instructed the jury that in order for Mr. Lozman to win his case he had to show that the “arresting officer was himself motivated by impermissible animus against Lozman’s protected speech and that the officer lacked probable cause to make the arrest.”

At the United States Supreme Court, Lozman conceded that there was probable cause for his arrest.

Lozman’s claim is that, notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials. The question this Court is asked to consider is whether the existence of probable cause bars that First Amendment retaliation claim.

The Court found that the claim here was not similar to when a law enforcement officer is alleged, in the heat of the moment, to have made an arrest in retaliation to the subject’s speech or expressive conduct. The Court pointed out that Lozman was not suing the officers noting: “the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman’s prior speech or any motive to arrest him for his earlier expressive activities.” “Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an ‘official municipal policy’ of intimidation.”

The Court noted that when an individual officer retaliates against a citizen, the citizen has redress in the form of seeking discipline or termination whereas when the government is retaliating the citizen’s options are limited. The Court also noted that when the government is the intimidator there is an even greater need to provide a remedy for the citizen.

The Court pointed out that Lozman’s lawsuit is unique and that a person who wants to bring a similar lawsuit must have some objective evidence of a policy by the governmental entity. The Court cited the fact that Lozman had the transcript from the closed-door council meeting, and the video of his arrest as objective evidence. The Court indicated that because Lozman had objective evidence that the City was retaliating against him as a matter of policy, Lozman did not need to prove there was a lack of probable cause for his arrest.

The Court remanded the case to the lower court for consideration of other issues that had been left open.