To be Argued by:
DAVID M. LEE
(Time Requested: 15 Minutes)

APL 2018-00120
Erie County Clerk's Index No. 2016/70

Court of Appeals

of the

State of New York

In the Matter of the Application of

COREY KRUG,

Petitioner-Respondent,

– against –

CITY OF BUFFALO,

Respondent-Appellant,

For Relief Pursuant to Article 78 of the
Civil Practice Law and Rules

BRIEF FOR RESPONDENT-APPELLANT

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STATEMENT AS TO RELATED LITIGATION

Devin Ford, a non-party to this appeal, commenced an action in Supreme Court, Erie County, alleging, among other things, that Respondent Corey Krug, a Buffalo Police Officer, assaulted him on November 27, 2014 in Buffalo, New York. Appellant City of Buffalo denied Krug's request to be defended in Ford's action. The Appellate Division, Fourth Department, held that the City's denial of a defense to Krug was arbitrary and capacious, from which the City is now appealing. Ford's action is still pending, bearing Erie County index number 813021/2015.

Krug is also under federal indictment in the Western District of New York (WDNY) for, among other things, allegedly violating Ford's constitutional rights under color of law in connection with the November 27, 2014 incident. Upon information and belief, Krug pleaded not guilty to the charge and his criminal trial is scheduled to begin on January 23, 2019. The WDNY case number is 15-cr-157-A.

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QUESTION PRESENTED FOR REVIEW

This appeal raises the following question of law: whether a municipality's denial of a police officer's request for a defense in a civil action was rational, where the officer is caught on video beating a defenseless citizen with a baton. The Appellate Division, Fourth Department, agreed with the police officer and answered "No."

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal pursuant to CPLR 5601(a) because two justices at the Appellate Division dissented on a question of law in favor of the appellant City of Buffalo (R. 136-41). Furthermore, the Appellate Division's order finally determined the proceeding by ordering the City to provide for respondent Corey Krug's defense in an underlying civil action (R. 142-49). The City preserved the legal issue presented for review in its Supreme Court papers (R. 62-66) and Appellate Division brief (Brief for City, pp. 1-7)[1].

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 27, 2014, Buffalo Police Officer Corey Krug, armed with a baton, attacked and assaulted Devin Ford, a defenseless citizen who was lying prone on his back in the street. Ford displayed no aggression or resistance

[1] The parties' Appellate Division briefs were filed with the Court in support of the City's letter submission justifying the retention of subject matter jurisdiction over this appeal.

during the encounter. When the assault ended, Krug did not place Ford under arrest or charge him with any offense. Ford simply got back to his feet and walked away. The incident was captured on video (R. 73).

Ford filed a civil lawsuit against Krug and the City of Buffalo alleging several causes of action stemming from the assault (R. 31-53). The City, through its Corporation Counsel, determined that Krug was not entitled to a taxpayer-funded defense in Ford's action (R. 56). Krug commenced this CPLR Article 78 proceeding to challenge the Corporation Counsel's determination as arbitrary and capricious (R. 23-56; 57-81; 82-113; 114-18; 119-23; 124-29). Supreme Court, Erie County (James H. Dillon, J.), agreed with Krug and annulled the City's denial of a defense (R. 4-22). The City appealed (R. 2-3) and, in a 3-2 decision, the Fourth Department affirmed (R. 136-41). With two dissents in the Appellate Division, the City appealed as of right to this Court (R. 133-35).

ARGUMENT

IT WAS NOT ARBITRARY AND CAPRICIOUS FOR THE CITY TO DETERMINE THAT KRUG DID NOT ACT WITHIN THE SCOPE OF HIS EMPLOYMENT AS A POLICE OFFICER DURING THE INCIDENT THAT GAVE RISE TO THE UNDERLYING CIVIL ACTION.

In an Article 78 proceeding, a municipal determination may be challenged on the ground that it was arbitrary and capricious. See CPLR 7803(3). Rationality is the test for the arbitrary and capricious standard. That is, if there is a

rational basis for the determination complained of, then it should be upheld. See Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 N.Y.2d 222, 231 (1974). A court may not substitute its judgment for that of the municipality merely because it may disagree with the municipality's decision. Id. at 232. Stated somewhat differently, a determination will not be characterized as arbitrary and capricious so long as "[r]easonable [people] might differ as to the wisdom of such a determination." Sinacore v. New York State Liquor Auth., 21 N.Y.2d 379, 384 (1968). In sum, if the determination under review has a rational basis it should be sustained, even if a different result could be reached.

Municipalities are legally responsible for the torts of police officers committed within the scope of their employment, which the law defines as the "immediate and actual performance of a public duty . . . for the benefit of the citizens of the community." See General Municipal Law §50-j(1), (2).

The words chosen by plaintiff in framing a complaint, in alleging that an officer acted within the scope of his employment, do not control whether a municipality must defend the officer. See Salino v. Cimino, 1 N.Y.3d 166, 172 (2003). In the City of Buffalo, whether a particular tort was committed within the scope of a police officer's employment, such that the officer receives a taxpayer-funded defense, is a discretionary determination made by the Corporation Counsel

in the first instance. See Buffalo City Code §35-28 (R. 80). The duty to defend does not arise where the Corporation Counsel determines that the officer committed intentional wrongdoing. Id. Similar "first instance" clauses are found in other municipal codes and have been vindicated by the Court. See Salino v. Cimino, 1 N.Y.3d at n. 4; Williams v. City of New York, 64 N.Y.2d 800 (1985).

It is true that an employee's conduct taken for "wholly personal reasons" cannot be said to fall within the scope of his or her employment. However, as the dissent at the Appellate Division observed, the fact that an officer's actions were not wholly motivated by a personal matter does not necessarily mean that he was acting within the scope of his employment. If the conduct in question was wholly personal in nature, that is merely one way that an officer can step outside the scope of his employment. See Krug v. City of Buffalo, 162 A.D.3d 1463, 1467 (4th Dept. 2018).

It can always be argued that an on-duty incident involving a police officer is tangentially related to law enforcement. Thus, the proper inquiry as to the scope of employment issue in the context of this proceeding is whether the Corporation Counsel could have rationally determined that the alleged acts of wrongdoing against Krug, which are caught on video, do not constitute the performance of his public responsibility as a police officer for the benefit of the community. See General Municipal Law §50-j(2); Lemma v. Nassau Cty. Police

Officer Indemnification Bd., 31 N.Y.3d 523 (2018) (in sustaining the denial of defense and indemnification to a police officer, finding that not every act undertaken by an on-duty officer constitutes the "proper discharge of his duties").

Here, the majority's conclusion at the Appellate Division is premised on the view that the City's determination lacks sufficient factual support. The majority believes that the video is not enough. It is difficult to understand how anyone could view the conduct captured on video and determine that additional facts would be necessary to support the City's determination. But that is beside the point. The fundamental flaw in the majority's opinion is that it disregards the bedrock principles of judicial review of municipal decisions in Article 78 proceedings. The majority's interpretation of the video simply conflicts with that of the Corporation Counsel. And that is an insufficient basis for annulling an administrative determination as arbitrary and capricious. In fact, just the opposite is true: a difference of opinion between reasonable people should always lead the courts to confirm the administrative action.

Furthermore, the majority at the Appellate Division found that the criminal indictment against Krug is irrelevant. It is of course true that an indictment is only an accusation and raises no presumption of guilt. However, the Corporation Counsel did not find Krug guilty of committing any crime. Also, an indictment is not meaningless, inasmuch as it "conclusively determines the

existence of probable cause to believe the defendant perpetrated the offense alleged." Kaley v. United States, 571 U.S. 320, 328 (2014). The substance of all probable cause determinations "is a reasonable ground for belief" that an offense has been committed. See Brinegar v. United States, 338 U.S. 160, 175-76 (1949). The Corporation Counsel was not required to ignore that Krug was charged criminally, i.e., that a grand jury had reasonable grounds to think that Krug committed a crime. It was not irrational for the Corporation Counsel to take the indictment into account, in conjunction with the video, in making the challenged determination.

Finally, where a disciplinary proceeding is initiated against an officer, representation by the Corporation Counsel may be withheld until and unless the disciplinary proceeding results in the officer's exoneration. See Buffalo City Code §35-31 (R. 81). Here, it is undisputed that Krug is currently suspended from the Buffalo Police Department under departmental disciplinary charges stemming from the encounter with Ford, pending a formal disciplinary proceeding against him. Thus, at the very minimum, it was premature for the Appellate Division to order the City to provide for Krug's defense with disciplinary charges still pending against him.

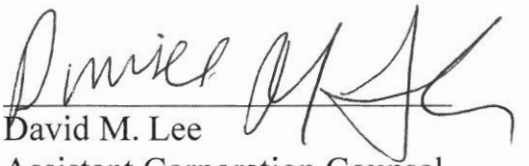
CONCLUSION

The order of the Appellate Division should be reversed because it was not irrational for the Corporation Counsel to deny a defense to a police officer who is seen on video beating a defenseless citizen with a baton. "Indeed, if the Corporation Counsel cannot withhold a taxpayer-funded defense when a police officer is caught red-handed assaulting a citizen, then we cannot image any circumstances in which he or she could validly exercise the discretion conferred by law to decline to defend a police officer at taxpayer expense." Krug, 162 A.D.3d at 1466.

Dated: Buffalo, New York
December 6, 2018

Respectfully submitted,

Timothy A. Ball
Corporation Counsel
Attorney for Appellant-Respondent

By: 
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CERTIFICATION OF WORD COUNT

I hereby certify pursuant to 22 NYCRR 500.13(c) that the total number of words in the body of this brief is 1,453.

Dated: Buffalo, New York
December 6, 2018

David M. Lee