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Public Protection: Witnesses

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1. Introduction

Successful criminal investigations and prosecutions depend on the availability of witnesses. It is well known that witnesses may face pressure, intimidation, threats, and violent acts from criminal suspects, organized criminal groups or gangs, and friends or family members of suspects.

In a number of instances, the alleged failure of law enforcement to provide needed protection against violence to witnesses has led to lawsuits seeking money damages. This article briefly addresses how the courts have assessed the possible liability of law enforcement personnel and agencies for failure to provide such protection. At the end of the article, a number of links to useful resources are provided. This article does not attempt to address in detail issues involved in the operation of witness protection programs that provide new identities and relocation for witnesses

2. Protection of Witnesses

Under the principles set down in DeShaney v. Winnebago County Dep't of Social Services, #87-154, 489 U.S. 189 (1989), there is no general duty under federal civil rights law to protect individuals against private violence. Exceptions have been made in some instances where a special relationship--such as having a person in custody, or very specific promises of protection that are reasonably relied on--or the existence of a "state-created

danger” is found. Based on this, courts have generally been reluctant to impose liability for failure to protect ordinary witnesses in criminal investigations and prosecutions.

In Rivera v. State of Rhode Island, #04-1568, 402 F.3d 27 (1st Cir. 2005), a 15-year-old girl was shot dead in front of her house in Rhode Island to stop her from testifying at a murder trial that she saw the defendant in the trial fleeing from the scene of the murder of another man. The defendant, who allegedly ordered her killing, was convicted of her murder and sentenced to life plus twenty years. The girl's mother filed a federal civil rights lawsuit claiming that the police violated her constitutional substantive due process right to life by failing, after promising to do so, to protect her from the danger posed by the murderer if she agreed to testify against him.

In addition to claims against individuals involved in the case, the complaint asserted that the city had a policy and practice of not protecting endangered witnesses who were given assurance of protection.

Upholding the dismissal of all these claims, a federal appeals court stated that it would be “inhumane” not to feel a sense of outrage over the girl's death or a “sense of deep sympathy” for her mother, who has lost her daughter.

> “But our question is one of federal law, not one of sympathy. The Supreme Court has said that only in very rare situations will the state's failure to protect someone amount to a constitutional violation, even if the state's conduct is grossly negligent. The Court has cautioned that “the doctrine of judicial self-restraint requires courts to exercise the utmost care whenever they are asked to break new ground in this field.” Collins v. City of Harker Heights, #90-1278, 503 U.S. 115 (1992). Based on the facts alleged in the complaint, we conclude that this is not one of those rare cases.”

In this case, the murdered girl was not in the state's custody. To assert a claim that the individual defendants' actions had “created” the danger to the decedent in violation of due process, a possible exception to the general rule that government does not have a constitutional duty to protect particular people, the governmental actions must “shock the conscience” of the court, the appeals court stated.

The plaintiff dropped the claim, on appeal, that there was a special relationship between the defendants and her daughter that imposed a duty to provide protection. What was left was an argument that the officers, prosecutor, and other defendants “created” the danger to the girl by their actions of identifying and securing her as a witness, providing her with

false promises of protection on which she relied, compelling her to act in the capacity of a witness, and issuing a subpoena to her to confront the killer in open court.

The appeals court noted that taking steps to identify the girl as a witness, and taking her statement in the course of investigating a murder compelled her to testify, and may well have "enhanced" the danger to her, but both are "necessary law enforcement tools, and cannot be the basis to impose constitutional liability on the state."

Similarly, issuing a subpoena to testify may have increased her risk, but this did not constitute a "state created danger." Every witness involved in a criminal investigation who is issued a subpoena to testify faces "some risk," and the use of such subpoenas is a "vital prosecutorial tool," which cannot become the vehicle for a constitutional claim for liability.

Finally, the court found, while false promises of protection, if given, and relied on, may have induced the girl into a false sense of security rendering her more vulnerable to the danger posed by the murderer and his confederates, "merely rendering a person more vulnerable to risk does not create a constitutional duty to protect." The appeals court found that the claims asserted in the complaint were ultimately "indistinguishable" from those in DeShaney v. Winnebago Cty. Soc. Servs. Dept., #87-154, 489 U.S. 189 (1989), in which the U.S. Supreme Court found that a state's affirmative constitutional duty to protect an individual from private violence arises when there is some deprivation of liberty by state actors. In DeShaney, the state was allegedly aware of the risk, expressed promises of help, and then failed to protect a young boy from his abusive father, but the Court found no liability.

In this case, the defendants' alleged promises, whether "false or merely unkept," did not deprive the girl of the liberty to act on her own behalf or force her, against her will, to become dependent on them. The defendants also did not take away her power to decide whether or not to continue to agree to testify. "Merely alleging state actions which render the individual more vulnerable to harm, under a theory of state created danger," the court argued, cannot be used as an "end run around DeShaney's core holding."

Once the plaintiff failed to establish that any constitutional deprivation occurred at all, the claims against the city for alleged policies causing such deprivations also must necessarily fail, the court concluded.

Liability claims were similarly rejected in Walter v. Pike County, Pa., #06-5034, 2008 U.S. App. Lexis 19760 (Unpub. 3rd Cir.), in which a witness' wife and children sued

prosecutors and the estate of a deceased police chief, claiming that they failed to adequately protect him from murder by a man accused of sexually molesting the decedent's children. A federal appeals court rejected a trial court's ruling that the facts supported the plaintiffs' claim of a “state-created danger” causing the decedent's death in violation of due process.

It ruled that a reasonable jury could not find that the defendants acted in a manner shocking to the conscience when they planned and carried out the accused man's arrest at the decedent's home and took his confession there. The court also found that the alleged failure to warn the plaintiffs about the accused man's prior threatening or menacing conduct towards the police chief could not be a basis of liability.

In Cherry v. Philadelphia, #06-1322, 2007 U.S. App. Lexis 3008 (Unpub. 3rd Cir.), a witness to a gunfight between two rival drug gangs, who was subsequently shot after police allegedly publicly identified her as a cooperating witness, failed to show that police officials had done so as part of a “plot” to obtain her cooperation, that her life was deliberately put in danger, or that the police commissioner was directly involved in the purported plot. None of these allegations could be reasonably arrived at on the basis of newspaper articles that appeared concerning the gunfight and its aftermath.

Courts have rejected the argument that compelling a witness to testify by issuing them a subpoena provides a basis for liability if the witness is subsequently attacked.

In Clarke v. Sweeney, #No. 3:00CV717, 312 F. Supp. 2d 277 (D. Conn. 2004), for instance, a city and a police officer were not liable for the murder of the subpoenaed witness and her son allegedly by the brother of the suspect against whom the witness was to testify. The mere fact that the witness had been subpoenaed did not impose a duty to provide protection. The mere fact that some police protection was provided for a time and then subsequently withdrawn did not mean that the city created the danger to the witness.

Other courts have found possible liability on the basis of failure to provide protection specifically promised. In Lawrence v. City of Cambridge, 422 Mass 406, 664 N.E.2d 1 (1996), for example, the highest court in Massachusetts expressed its opinion that a city might be liable, under state law, for failure to provide police protection to a liquor store manager shot the evening before he was scheduled to testify at grand jury against armed robbers, as he was closing his store. There was no officer outside to protect him, although one had been present the three previous evenings. The issue was whether police assurance of protection was “explicit and specific” enough for him to rely on.

Finding that the court below improperly dismissed the store manager's lawsuit, the court ruled that the allegation that the city would provide the plaintiff protection "when [he] closed the store at night" certainly specified some of the most important terms of the assurance – "when and where. It would be unreasonable to insist that the police must have gone into greater detail into such matters as to which officers and how many would provide protection or how they would be deployed -- for instance on foot or in a patrol car."

Other cases of interest include:

- Falls v. Superior Court, #B096698, 42 Cal.App.4th 1031, 49 Cal. Rptr. 906, 1996 Cal App. Lexis 140, holding that prosecutors were entitled to absolute immunity from liability for a gang murder of a witness they subpoenaed to testify as a witness to a gang crime, despite alleged assurances to him that he would be safe.
- Hernandez v. City of Pomona, #B087779. 49 Cal.App.4th 1492, 57 Cal.Rptr.2d 406, 1996 Cal App. Lexis 955 (1996), ruling that officers questioning a gang member about a murder had no duty to provide him with protection against retaliation by fellow gang members for providing a statement implicating a fellow gang member.
- Greene v. City of New York, #93-01142, 613 N.Y.S.2d 418 (1994), concluding that a city had no duty to provide police protection to a grand jury witness after notification of threats on her life. Mere status as a grand jury witness did not create a special relationship and the city could not be held liable for the witness's later killing. Her estate failed to show that she was lulled into a false sense of security by promises of police protection to induce her to relax her own vigilance or to forego other available avenues of protection. Indeed, when her employer informed her of a threat that had been received, her reaction was that she feared nobody because she "did not say anything at the grand jury."
- Wallace v. City of Los Angeles, #B045271, 16 Cal.Rptr.2d 113 (Cal App. 1993), holding that a city and detective had a duty to protect a witness asked to testify in a murder prosecution against a suspect who had threatened witnesses in other pending investigations.
- Carpenter v. City of Los Angeles, #B047676, 281 Cal. Rptr. 500 (Cal App. 1991), ruling that a city had a duty to warn a robbery victim/witness of an accused robber's alleged plan to kill him. California immunity statutes did not bar suit against city for the shooting of a witness.

- State v. Powell, #90-02517, 586 So.2d 1180 (Fla. App. 1991), in which a Florida court overturned a $23 million award to a witness set on fire by a probationer outside a probation hearing she was subpoenaed to testify at. The state had no duty to provide protection to the witness, the court held.

In conclusion, there are a number of things worth remarking on:

- The mere fact that most courts have established rather high hurdles to imposing liability for failure to adequately protect witnesses is no justification for failure to take possible measures to provide protection. Even if the cost of failing to do so does not get reflected immediately in civil liability, the cost in unsolved crimes or unsuccessful prosecutions may become apparent, and a department whose failure to protect witnesses results in high profile assaults or killings may find crime victims and other witnesses increasingly reluctant to come forward, to cooperate with investigations, and to testify.

- Departments and individual personnel may face possible liability especially in instances when very specific promises of particular protective measures are made, can be anticipated to be relied on, and are not provided.

- Special care should be taken not to do anything that might increase the danger to witnesses, as one area in which courts have clearly expressed a willingness to impose liability is in instances of "state-created" danger.

3. Resources

The following are some useful resources related to the topic of this article:

- **Article:** "Hiding in Plain Sight A Peek into the Witness Security Program" By Douglas A. Kash, J.D., Senior Attorney, DEA, Arlington, Virginia, 73 FBI Law Enforcement Bulletin #5, pgs. 25-32 (May 2004). [PDF]. Also available in .html format.

- **Article:** "No Duty to Protect: Two Exceptions" by L. Cary Unkelbach, Assistant County Attorney representing the Arapahoe County Sheriff's Office, Centennial, Colorado. Police Chief magazine, Vol. 71, #7 (July 2004).

- "Good practices for the protection of witnesses in criminal proceedings involving organized crime," United Nations Office on Drugs and Crime (2008).

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