LEGAL DEFENSE TRUST
TRAINING BULLETIN

MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

November 2011

Officer Who Testified Based On False Lab Report Was Not Entitled To Qualified Immunity

Michael P. Stone
and
Melanie C. Smith

In a decision issued October 4, 2011 - *Kerkeles v. City of San Jose* (2011) 199 Cal. App. 4th 1001 - the California Court of Appeal for the Sixth District held that an officer who testified against a criminal defendant based on a false "ruse" lab report was not immune from suit for constitutional rights violations.

Background

Michael Kerkeles was a criminal defendant in a rape case, who sued the City of San Jose and Officer Matthew Christian for violation of civil rights; abuse of process; malicious prosecution; false imprisonment; intentional and negligent infliction of emotional distress; negligence; and negligent hiring, retention, training, and supervision, based on Christian's testimony at the preliminary hearing which was based on a false lab report.

Christian had interviewed the rape victim, who said the assault took place on a blanket. The blanket was seized during the service of a search warrant on Kerkeles' house. A report generated by the crime lab revealed no semen on the blanket. Christian prepared a "ruse" lab report stating that Kerkeles' semen had been found on the blanket. The "ruse" report was apparently prepared to be used in an interrogation of Kerkeles, but was never used for that purpose because Kerkeles did not waive his *Miranda* rights after his arrest.

When Christian testified at the preliminary hearing, approximately a year later, he had apparently forgotten that he had created the fake report, and testified to the information in that report. Kerkeles was held to answer after the preliminary hearing.

At some point, Kerkeles' attorney realized he had two conflicting lab reports in his possession, and ultimately discovered that the one to which Christian had testified was fabricated. Christian was asked to prepare a supplemental report regarding the chain of events that led to the fake report being mistaken for the real report. Christian stated that he had forgotten all about the fake report

and had given it to the prosecutor with the rest of the file and testified to it at the preliminary hearing believing it was the genuine report. The charges against Kerkeles were ultimately dismissed by the district attorney as a result of these events.

Kerkeles alleged two causes of action based on civil rights violations: (1) that the deliberate use of the false report in the preliminary hearing deprived him of due process; and (2) that the constitutional violations were caused by the City's "customs, policies, directives, practices, acts and omissions," and that the City failed to supervise Christian, or alternatively "authorized, directed, condoned, and/or ratified" his conduct.

The City and Christian moved for summary judgment, which was granted by the trial court. The Court of Appeal reversed.

Court of Appeal reasoning

With respect to the first civil rights claim, defendants argued that Christian was entitled to qualified immunity. The inquiry, in determining whether an officer is entitled to qualified immunity, is whether the facts, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right, and whether the right was clearly established. *Saucier v. Katz* (2001) 533 US 194, 200-201.

Defendants argued that no constitutional due process violation could be shown because 1) the falsified evidence did not lead to a conviction, 2) there was no deprivation of liberty because the plaintiff was not incarcerated except briefly after his arrest, and 3) the mere fact that Kerkeles was held to answer after the preliminary hearing did not establish that the testimony based on the false report actually caused the continued prosecution of Kerkeles, because probable cause existed independently of that report and testimony. The Court rejected these arguments, as follows:

First, the Court affirmed that there need not be an actual conviction to establish the due process claim, because "the right to be free from criminal charges, not necessarily the right to be free from conviction, is a clearly established constitutional right." *Kerkeles*, slip op. at 8-9, *citing Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1075.

Second, the Court affirmed that incarceration is not required "as a sine qua non of a deprivation of a liberty interest" because "'the liberty secured by the Fourteenth Amendment is significantly broader than mere freedom from physical constraint.'" *Kerkeles*, slip op. at 9, *quoting Albright v. Oliver* (1994) 510 US 266, 294, and *Washington v. Glucksberg* (1997) 521 US 702, 718.

Third, the question whether probable cause still existed independently of the false report and testimony was a question of material fact that involved weighing the evidence, and was not an issue that the Court could resolve as a matter of law. *Kerkeles*, slip op. at 11-12.

Defendants also argued that, under *Devereaux v. Abbey*, Kerkeles' claim failed for lack of proof that Christian knew or should have known that Kerkeles was innocent. The plaintiff in *Devereaux* was a criminal defendant facing charges of sexually abusing

his foster children. He alleged that investigators deliberately fabricated evidence against him by aggressively and coercively questioning the children until they recanted their denials that any abuse had occurred. While acknowledging that a person has the right to be free from charges based on deliberately fabricated evidence, the Court in *Devereaux* determined that the plaintiff had not adduced any evidence supporting a deliberate-fabrication-of-evidence claim. The Court imposed the following test regarding the evidence required to support such a claim: "(1) Defendants continued their investigation of Devereaux despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." 263 F.3d at 1076.

However, the Court in *Kerkeles* declined to apply *Devereaux*, stating, "Unquestionably the *Devereaux* criteria are specific to the conduct of law enforcement personnel during investigations. The fact that the court discussed knowledge of the suspect's innocence cannot be divorced from its context - the use of coercive questioning techniques - and applied to every fabrication-of-evidence claim." *Kerkeles*, slip op. at 13.

Having determined that Christian was not entitled to qualified immunity, the Court did not reach the second step of the summary adjudication analysis (whether the plaintiff raised a triable issue of material fact with respect to the first civil rights cause of action).

As to the second cause of action, alleging that the constitutional violation was caused by the City's "customs, policies, directives, practices, acts and omissions," and a failure to train officers amounting to deliberate indifference, the Court concluded that the City had not sustained its threshold burden of presenting undisputed facts justifying adjudication of the action in its favor. For example, the Court pointed out, an officer on the department had expressed concern that a ruse document could be confused with a real document, but no action was taken, and the department never devised a formal policy to prevent this type of problem, despite the fact that something similar had happened before. *Kerkeles*, slip op. at 16-17.

What this means for you

Though Christian stated that at the time of his testimony in the preliminary hearing he believed the report was genuine, the Court held that he was not immune from Kerkeles' suit because the constitutional right to due process was violated when false evidence was used against Kerkeles in the criminal case.

You should always be sure to *carefully* review the facts and refresh your memory before giving testimony in any proceeding. Remember, too, that false or inaccurate testimony can put you at risk for more than a civil lawsuit, or even perjury charges - as a peace officer, it is your duty to be honest and truthful, and false statements or testimony can lead to your placement on the *Brady* list and disciplinary action up to and including termination. In this regard, it is helpful to consider our February 2003 publication entitled, "Some Points About Police Testimony - In Any Investigation or Testimony, Always Take Time to Review Prior Statements."

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 30 years, following 13 years as a police officer, supervisor and police attorney.

Melanie C. Smith is an associate with the firm and is a graduate of Loyola Law School, Los Angeles.