IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Wilson and Dameon Sanders, individually and for a class,	)	
Plaintiffs,	)	14-cv-8347
-vs-	)	*(Judge Lee)*
City of Evanston, Illinois,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The City of Evanston requires its police officers to search arrestees and seize and inventory the arrestees' property. (Statement of Undisputed Facts, ¶ 4.) Plaintiffs do not challenge the policy of seizing arrestee property. *See Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). This case involves a challenge to Evanston's policy of not returning that property.

Evanston will return all property (other than contraband, items subject to forfeiture proceedings, or property being held as evidence) to an arrestee who is released from the police station, either on bond or without charging. (Statement of Undisputed Facts, ¶ 5.) This policy is also not at issue in this case, which involves arrestees who are transferred by Evanston to the custody of the Sheriff of Cook County.

When an arrestee is transferred to the custody of the Sheriff of Cook County, Evanston retains some types of property that the Sheriff refuses to accept.[1] (Statement of Undisputed Facts, ¶¶ 6-8.) Evanston kept plaintiff Wilson's backpack, which contained the shoeshine equipment he used in his trade, as well as a valuable ring. (Statement of Undisputed Facts, ¶ 10.) Evanston kept items plaintiff Sanders had when he was arrested, including a prepaid debit card with a value of about five hundred dollars. (Statement of Undisputed Facts, ¶ 10.)

Evanston provides arrestees whose property it retains with a "Notification Regarding Your Property," which informs arrestees that Evanston will dispose of their property if it is not claimed within 30 days of arrest. (Statement of Undisputed Facts, ¶ 24.) Plaintiffs were unable to claim their property within 30 days of arrest because they were in custody at the Cook County Jail. (Statement of Undisputed Facts, ¶ 12 (Wilson), ¶ 17 (Sanders).) Evanston applied its policy to the property of the named plaintiffs by destroying their property. (Statement of Undisputed Facts, ¶¶ 13 (Wilson), 18 (Sanders).) Plaintiffs show below that Evanston's policy has deprived

[1] The types of items that Evanston will transfer to the Sheriff are enumerated in Statement of Undisputed Facts, ¶ 7.

plaintiffs and each class member of rights secured by the Fifth and Fourteenth Amendments to the Constitution of the United States.

I. The City of Evanston May Not Lawfully Sell or Destroy Arrestee Property

The Takings Clause of the Fifth Amendment "prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994); *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 231–32 (2003). Evanston's arrestee property policy does not satisfy either condition.

A. Public Use Requires a Legislative Judgment

A "public use" for the taking of private property requires a "legislature's judgment of what constitutes a public use." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). There has not been any legislative judgment in this case. The burden is on the government to show that a taking was for a "public purpose." *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445, 460 (7th Cir. 2002). Defendant cannot meet this burden.

1. Illinois Law Does Not Authorize Evanston's Taking of Arrestee Property

Evanston has consistently asserted throughout this litigation that the "Illinois Law Enforcement Disposition of Property Act," 765 ILCS 1030/1,

does not apply to arrestee property.[2] (Defendant's Reply in Support of Motion to Dismiss, ECF 17 at 11 n.5.) The parties differ on whether the Act applies to Evanston's policy, but there cannot be any dispute that Evanston's policy does not comply with the procedures required by the Act.

The sole Illinois case interpreting the "Illinois Law Enforcement Disposition of Property Act" applied the "primary rule of statutory construction" by "looking at the language of the statute." *People v. Patterson*, 308 Ill. App. 3d 943, 947, 721 N.E. 2d 7978, 800-01 (1999).

The statute, in relevant part, applies to "all personal property of which possession is transferred to a police department." 765 ILCS 1030/1. This plain language includes the arrestee property that defendant retains after transferring custody of an arrestee to the Sheriff of Cook County.

The statute permits disposition of this property "under circumstances supporting a reasonable belief that such property was abandoned." 765 ILCS 1030/1. Evanston could argue that any arrestee who disregards the 30-day period set out in the "Notification Regarding Your Property" (Statement of Undisputed Facts, ¶ 24), should be deemed to have abandoned that

[2] Evanston has retained an expert who is prepared to testify, as he did at his deposition, that 765 ILCS 1030/1 does not apply to arrestee property. (Plaintiff's Motion to Bar, ECF. No. 115 at 111, Latta Dep. 70:13-17.) Any such testimony would contravene the Court's order barring Mr. Latta from providing opinions about the "meaning and applicability" of Evanston's municipal ordinance. (Mem.Op., Sept. 25, 2019, ECF No 131 at 5.)

property, even when, as in this case, that person is in custody and unable to reclaim property at the Evanston Police Department.

Evanston could not, however, plausibly argue that its policy complies with the notice provision of 765 ILCS 1030/2(a), which provides as follows:

> (a) Such property believed to be abandoned, lost or stolen or otherwise illegally possessed shall be retained in custody by the sheriff, chief of police or other principal official of the law enforcement agency, which shall make reasonable inquiry and efforts to identify and notify the owner or other person entitled to possession thereof, and shall return the property after such person provides reasonable and satisfactory proof of his ownership or right to possession and reimburses the agency for all reasonable expenses of such custody.

765 ILCS 1030/2(a).

The plain language of this provision, read together with 765 ILCS 1030/1, means that after the police department has determined that the property has been abandoned, it must then "make reasonable inquiry and efforts to identify and notify the owner or other person entitled to possession thereof." Evanston does not follow this procedure; it does not provide *any* notice after it deems the property to be abandoned.

Evanston's "Notification Regarding Your Property" declares in all capital letters "THIS IS THE ONLY NOTICE YOU WILL RECEIVE ABOUT YOUR PROPERTY." (Statement of Undisputed Facts, ¶ 24.) Thus, even though Evanston might plausibly argue that property not claimed within the 30-day period set out in the notice has been abandoned,

the City may not then argue that it was complying with "legislative judgment" because it fails to provide the post-abandonment notice required by 765 ILCS 1030/2(a).

Nor may Evanston plausibly contend that its policy complies with the disposal provisions of 765 ILCS 1030/3. This section of the "Illinois Law Enforcement Disposition of Property Act" establishes a six-month period beginning with the abandonment of the property for the police department to ascertain "the identity or location of the owner of the owner or other person entitled to possession of the property" before it may sell the property at public action or, if the property is worth less than one hundred dollars, donating it. (Statement of Undisputed Facts, ¶ 35.) Evanston has never applied a six-month period; at one time, Evanston granted arrestees 90 days to retrieve their property, but it shortened that time to 30 days "to call attention to the fact that an individual needed to take action sooner rather than later to reclaim their property." (Statement of Undisputed Facts, ¶ 23.)

2. Evanston Has Not Enacted an Ordinance to Authorize Its Taking of Arrestee Property

Evanston has also consistently asserted throughout this litigation that its ordinance entitled "Possession and Disposition of Lost or Stolen Property," Evanston Code of Ordinances, Chapter 7, Section 9-7-1, does not apply to detainee property. (Statement of Undisputed Facts, ¶ 32.) Again,

while the parties differ on the applicability of the ordinance, there cannot be any dispute that Evanston's policy does not comply with the procedures required by the ordinance.

The ordinance requires that any property "seized or taken" by Evanston police officers shall be held by Evanston's "custodian of lost or stolen property." (Statement of Undisputed Facts, ¶ 29.) This plain language applies to property that is seized from arrestees.

The ordinance grants authority to dispose of such property if it is not claimed "within sixty (60) days from the date of the final disposition of the court proceedings in connection with which such property was seized or otherwise taken possession of." (Statement of Undisputed Facts, ¶ 29.) The policy at issue in this case, however, is not keyed to the final disposition of court proceedings; Evanston starts its 30-day clock (rather than the 60 days required by the ordinance) upon arrest, rather than on termination of court proceedings. (Statement of Undisputed Facts, ¶ 25.)

B. The "Legislative Judgment" Contradicts Evanston's Arrestee Property Policy

Illinois law does not authorize Evanston to retain arrestee property, other than property that is contraband or which is being held as evidence in

a criminal prosecution.[3] The relevant portion of the Illinois Administrative Code, which has the force of law, *Fillmore v. Taylor*, 2019 IL 122626, ¶ 28, 137 N.E.3d 779, 787 (Ill. 2019), provides as follows:

> **(h) Personal Property**
>
> The Chief of Police shall determine what personal property, if any, a detainee may retain. Receipts must be issued for all personal property taken from a detainee. Personal property, except for items confiscated as evidence, shall be returned to the detainee or his or her designee upon release and such return shall be documented.

20 Illinois Administrative Code 720.25(h). This provision applies to a "jail or lockup," defined as follows,

> "Jail or lockup", hereafter referred to as jail, means a security facility operated by the municipal police department for the temporary detention of persons who are being held for investigation pending disposition of their cases by the judiciary or who are waiting transfer to another institution.

Thus, when an arrestee is transferred from the Evanston police lockup to the custody of the Sheriff of Cook County, all "[p]ersonal property, except for items confiscated as evidence shall be returned to the detainee or his or her designee upon release and such return shall be documented." 20 Illinois Administrative Code 720.25(h).

[3] *See, e.g.*, *Chambers v. Maher*, 915 F.2d 1141, 1144 (7th Cir. 1990) (police may retain arrestee property that might "constitute relevant evidence").

Another judge in this district recently concluded that the reference to "release" in Section 720.25(h) is defined in Section 470.20 of Title 20 of the Illinois Administrative Code and does not apply to a detention facility. *Conyers v. City of Chicago*, 12-CV-06144, 2020 WL 2528534, at *7 n. 7 (N.D. Ill. May 18, 2020), *appeal pending* 7th Cir., No. 20-1934. Plaintiff respectfully submits that this Court should not follow *Conyers*.

Section 470.20 is part of a chapter of the Administrative Code concerning "Release of Committed Persons" and is relevant only to persons convicted of offenses who have been incarcerated in the Illinois Department of Corrections. This section provides as follows:

> **Section 470.20 Definitions**
>
> "Department" means the Department of Corrections.
>
> ***
>
> "Released offender" or "releasee" means any person committed to the Department who has been released on parole, mandatory supervised release, discharged, or pardoned or any person committed to another state who has been released under the supervision of the Department in this State.

This definition has no application here. Arrestees, like plaintiffs in this case, are not persons "committed to the Department," an essential factor in the definition of "released offender" and "releasee" in Section 470.20. Moreover, as explained in *Dep't of Corr. v. Welch*, 2013 IL App (4th) 120114 ¶ 29,

990 N.E.2d 240, 246 (2013), provisions in "different sections of the Administrative Code" must be read as "separate and distinct."

Nothing in the Illinois statutes, or in the Illinois Administrative Code, entitles Evanston to retain arrestee property following release of the arrestee from police custody.

C. The Challenged Policy Does Not Provide "Just Compensation"

Neither the Illinois statute, 765 ILCS 1030/1 et seq., nor the Evanston Ordinance, Chapter 7, Section 9-7, provides any compensation to the person whose property has been sold or destroyed. The same is true for Evanston's actual policy.

Under 765 ILCS 1030/4, Evanston receives the proceeds of any sale of abandoned property:

> Proceeds of the sale of the property at public auction, less reimbursement to the law enforcement agency of the reasonable expenses of custody thereof, shall be deposited in the treasury of the county, city, village or incorporated town of which government the law enforcement agency is a branch.

765 ILCS 1030/4. Similarly, the Evanston ordinance states that the proceeds of any sale "shall be paid by the custodian of lost and stolen property to the Police Pension Fund of the City." (Statement of Undisputed Facts, ¶ 31.) Neither provision provides any compensation to the person whose property has been sold.

In addition, Evanston's policy, as articulated in the General Order attached to plaintiff's Statement of Undisputed Facts as Exhibit 20, does not provide any compensation to an arrestee whose property has been sold. Under the City's contract with PropertyRoom.com, the "net proceeds" of all auctions are paid to the City of Evanston (Statement of Undisputed Facts ¶ 38), which represented that it has "taken all actions under applicable law" to transfer title of detainee property. (Statement of Undisputed Facts, ¶ 39.)

For all these reasons, the Court should grant summary judgment on liability in favor of the plaintiff classes on the takings claim.

II. Substantive Due Process

The Court summarized plaintiffs' substantive due process theory in its order allowing the case to proceed as a class action: "Plaintiffs argue that an Evanston ordinance requiring the EPD to store property for sixty days after the final disposition of court proceedings in connection with which the property was taken creates a constitutionally protected property interest" and that Evanston's policy to sell or destroy detainee property thirty days after arrest violates this property right. (ECF No. 75, Mem.Op., August 30, 2017, at 5.) This claim presents a pure question of law.

The 60-day time period dictated by the ordinance "rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005)

(quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978).) As the Seventh Circuit has explained, "where state law gives people a benefit and creates a system of nondiscretionary rules governing revocation or renewal of that benefit, the recipients have a secure and durable property right, a legitimate claim of entitlement." *Chicago United Indus., Ltd. v. City of Chicago*, 669 F.3d 847, 851 (7th Cir. 2012). This is because "[a] property interest of constitutional magnitude exists only when the state's discretion is 'clearly limited' such that the plaintiff cannot be denied the interest 'unless specific conditions are met.'" *Khan v. Bland*, 630 F.3d 519, 527 (7th Cir.2010) (quoting *Brown v. City of Michigan City*, 462 F.3d 720, 729 (7th Cir. 2006).)

Evanston's ordinance satisfies this test because it is a nondiscretionary rule; it creates a "duty of all officers and members of the Police Department," it states what the custodian of lost and stolen property "shall" do, and it provides the specific conditions that must be met before the police may dispose of arrestee property. Another court in this district recently applied this test to find that Illinois law on issuing dispensary licenses under the Illinois' Compassionate Use of Medical Cannabis Act created a property interest. *Quick v. Illinois Dep't of Fin. & Prof'l Regulation*, No. 19-CV-7797, 2020 WL 3429772, at *4 (N.D. Ill. June 23, 2020).

This Court should follow *Quick* and conclude that the Evanston ordinance creates a property interest for arrestees to not have their property destroyed until 60 days after the final disposition of court proceedings in connection with which the property was taken. As shown above at 6-7, there can be no dispute that the challenged policy does not comply with the Ordinance. The Court should grant summary judgment on liability in favor of the plaintiff class on the substantive due process claim.

III. Procedural Due Process

The crux of plaintiffs' procedural due process claim is that arrestees who remain incarcerated for more than 30 days after arrest are "unable to travel to [EPD] to retrieve their property" and Evanston's stated policy, which requires a personal visit by the arrestee or agent, is therefore constitutionally invalid. (ECF No. 75, Mem.Op., August 30, 2017, at 5-6.)

The Supreme Court set out the test for procedural adequacy in *Mathews v. Eldridge*, 424 U.S. 319 (1976): The test "generally requires consideration of three distinct factors:"

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335. That Evanston's procedure fails this test is shown by plaintiff's proposed "additional or substitute procedural safeguard:" postponing any sale or destruction of property for persons who are unable to secure pre-trial release. As explained above, this additional safeguard is already required by Evanston's ordinance. In addition, the additional safeguard will not burden Evanston, which for more than two years has voluntarily retained all unclaimed arrestee property pending the outcome of this case. (Statement of Undisputed Facts, ¶ 40.) The additional safeguard would provide members of the plaintiff class with an opportunity to show that they have not abandoned their property and thereby minimize erroneous deprivations. The Court should therefore grant summary judgment on liability in favor of the plaintiff class on the procedural due process claim.

IV. Conclusion

The Court should grant summary judgment on liability to plaintiffs.

Respectfully submitted,

/s/ Kenneth N. Flaxman
Kenneth N. Flaxman
ARDC No. 08830399
Joel A. Flaxman
200 S Michigan Ave, Ste 201
Chicago, IL 60604
(312) 427-3200
Attorneys for Plaintiffs