SUPREME COURT OF THE UNITED STATES

No. 92–833

KEVIN ALBRIGHT, PETITIONER *v.* ROGER OLIVER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 24, 1994]

JUSTICE GINSBURG, concurring.

I agree with the plurality that Albright's claim against the police officer responsible for his arrest is properly analyzed under the Fourth Amendment rather than under the heading of substantive due process. See *ante*, at 4. I therefore join the plurality opinion and write separately to indicate more particularly my reasons for viewing this case through a Fourth Amendment lens.

Albright's factual allegations convey that Detective Oliver notoriously disobeyed the injunction against unreasonable seizures imposed on police officers by the Fourth Amendment, and Albright appropriately invoked that Amendment as a basis for his claim. See App. to Pet. for Cert. A–37, A–53. Albright's submission to arrest unquestionably constituted a seizure for purposes of the Fourth Amendment. See *ante*, at 5. And, as the Court of Appeals recognized, if the facts were as Albright alleged, then Oliver lacked cause to suspect, let alone apprehend him. 975 F. 2d 343, 345 (CA7 1992); see *post*, at 2–3 (STEVENS, J., dissenting).

Yet in his presentations before this Court, Albright deliberately subordinated invocation of the Fourth Amendment and pressed, instead, a substantive due process right to be free from prosecution without probable cause.[1] This strategic decision appears to

[1]Albright's presentations essentially carve up the officer's conduct, though all part of a single scheme, so that the

have been predicated on two doubtful assumptions, the first relating to the compass of the Fourth Amendment, the second, to the time frame for commencing this civil action.

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actions complained of match common law tort categories: first, false arrest (Fourth Amendment's domain); next, malicious prosecution (Fifth Amendment territory). In my view, the constitutional tort 42 U. S. C. §1983 authorizes stands on its own, influenced by the substance, but not tied to the formal categories and procedures, of the common law. According the Fourth Amendment full sway, I would not force Albright's case into a different mold.

Albright may have feared that courts would narrowly define the Fourth Amendment's key term "seizure" so as to deny full scope to his claim. In particular, he might have anticipated a holding that the "seizure" of his person ended when he was released from custody on bond, and a corresponding conclusion that Oliver's allegedly misleading testimony at the preliminary hearing escaped Fourth Amendment interdiction.[2]

The Fourth Amendment's instruction to police officers seems to me more purposive and embracing. This Court has noted that the common law may aid contemporary inquiry into the meaning of the Amendment's term "seizure." See *California* v. *Hodari D.*, 499 U. S. 621, 626, n. 2 (1991). At common law, an arrested person's seizure was deemed to continue even after release from official custody. See, *e.g.*, 2 M. Hale, Pleas of the Crown *124 ("he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers"); 4 W. Blackstone, Commentaries *297 (bail in both civil and criminal cases is "a delivery or bailment, of a person to his sureties, . . . he being supposed to continue in their friendly custody, instead of going to gaol"). The purpose of an arrest at common law, in both criminal and civil cases, was "only to compel an appearance in court," and "that purpose is equally answered, whether the sheriff detains [the suspect's] person, or takes sufficient security for his appearance, called bail." 3 *id.*, at *290 (civil cases); 4 *id.*, at *297 (nature of bail is the same in criminal and civil cases). The common law thus seems to have regarded the

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[2]Such a concern might have stemmed from Seventh Circuit precedent set before *Graham* v. *Connor*, 490 U. S. 386 (1989). See *Wilkins* v. *May*, 872 F. 2d 190, 192–195 (1989) (substantive due process "shock the conscience" standard, not Fourth Amendment, applies to brutal "post-arrest pre-charge" interrogation).

difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite.[3]

This view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.[4]

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[3]For other purposes, *e.g.*, to determine the proper place for condemnation trials, "seizure" traditionally had a time- and site-specific meaning. See *Thompson* v. *Whitman*, 18 Wall. 457, 471 (1874) ("seizure [of a sloop] is a single act"; "[p]ossession, which follows seizure, is continuous").

[4]On the summons-and-complaint alternative to custodial

This conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers. For Oliver, the Fourth Amendment governed both the manner of, and the cause for arresting Albright. If Oliver gave misleading testimony at the preliminary hearing, that testimony served to maintain and reinforce the unlawful haling of Albright into court, and so perpetuated the Fourth Amendment violation.[5]

A second reason for Albright's decision not to pursue a Fourth Amendment claim concerns the

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arrest, see 2 W. LaFave, Search and Seizure 432–436 (2d ed. 1987).

[5]Albright's reliance on a "malicious prosecution" theory, rather than a Fourth Amendment theory, is anomalous. The principal player in carrying out a prosecution—in "the formal commencement of a criminal proceeding," see *post*, at 5 (STEVENS, J., dissenting)—is not police officer but prosecutor. Prosecutors, however, have absolute immunity for their conduct. See *Burns* v. *Reed*, 500 U. S. ___, ___-___ (1991) (slip op., at 7–12). Under Albright's substantive due process theory, the star player is exonerated, but the supporting actor is not.

In fact, Albright's theory might succeed in exonerating the supporting actor as well. By focusing on the police officer's role in initiating and pursuing a criminal prosecution, rather than his role in effectuating and maintaining a seizure, Albright's theory raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity. See *post*, at 19, n. 26 (STEVENS, J., dissenting) (noting that the issue is open); cf. *Briscoe* v. *LaHue*, 460 U. S. 325, 326 (1983) (holding that §1983 does not "authoriz[e] a convicted person to assert a claim for damages against a police officer for giving perjured testimony at his criminal trial"). A right to sue someone who is absolutely immune from suit would hardly be a right worth pursuing.

statute of limitations. The Court of Appeals suggested in dictum that any Fourth Amendment claim Albright might have had accrued on the date of his arrest, and that the applicable two-year limitations period expired before the complaint was filed.[6] 975 F. 2d, at 345. Albright expressed his acquiescence in this view at oral argument. Tr. of Oral Arg. 13, 20–21.

Once it is recognized, however, that Albright remained effectively "seized" for trial so long as the prosecution against him remained pending, and that Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure, then the limitations period should have a different trigger. The time to file the §1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges against Albright. See *McCune* v. *Grand Rapids*, 842 F. 2d 903, 908 (CA6 1988) (Guy, J., concurring in result) ("Where . . . innocence is what makes the state action wrongful, it makes little sense to require a federal suit to be filed until innocence or its equivalent is established by the termination of the state procedures in a manner favorable to the state criminal defendant."). In sum, Albright's Fourth Amendment claim, asserted within the requisite period after dismissal of the criminal action, in my judgment was neither substantively deficient nor inevitably time-barred. It was, however, a claim Albright abandoned in the District Court and did not

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[6]In §1983 actions, federal courts apply the state statute of limitations governing actions for personal injury. See *Wilson* v. *Garcia*, 471 U. S. 261, 276–280 (1985). The question when the limitations period begins to run, however, is one of federal law. See *id*., at 268–271; see generally *Connors* v. *Hallmark & Son Coal Co.*, 935 F. 2d 336, 341 (CADC 1991) (collecting cases).

attempt to reassert in this Court. The principle of party presentation cautions decisionmakers against asserting it for him. See *ante*, at 8.

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In *Graham* v. *Connor*, 490 U. S. 386 (1989), this Court refused to analyze under a "substantive due process" heading an individual's right to be free from police applications of excessive force. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of . . . governmental conduct," we said, "that Amendment, not the more generalized notion of `substantive due process,' must be the guide for analyzing these claims." *Id.*, at 395. I conclude that the Fourth Amendment similarly proscribes the police misconduct Albright alleges. I therefore resist in this case the plea "to break new ground," see *Collins* v. *Harker Heights*, 503 U. S. ___, ___ (1992) (slip op., at 9), in a field—substantive due process—that "has at times been a treacherous [one] for this Court." See *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977) (opinion of Powell, J.).