

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-2

Date issued: March 21, 1989

Requested by: Owen K. Mehrer, Stark County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a sheriff is authorized to enter locked gates on posted property forcibly to take possession of personal property on which the sheriff has levied.

II.

Whether a sheriff is entitled to immunity for acts done in the course of levying on property.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a sheriff is authorized to enter locked gates on posted property forcibly to take possession of personal property on which the sheriff has levied.

II.

It is my further opinion that, depending upon the facts of the case, a sheriff may be entitled to absolute quasi-judicial immunity, qualified immunity, or statutory immunity for acts done in the course of levying on property.

- ANALYSES -

I.

A sheriff is usually required to take possession of personal property on which the sheriff has levied. N.D.C.C. '28-21-08(3). The statute does not specify, however, to what extent the sheriff may use force to seize the property.

The general rule is that a sheriff may forcibly enter a building other than a dwelling to levy pursuant to an execution. In O'Connor v. McManus, 299 N.W. 22 (N.D. 1941), the North Dakota Supreme Court held that a sheriff may forcibly open a safety deposit box to levy on the contents. The court stated: "Generally speaking a sheriff may force an entry into any enclosure except the dwelling house of the judgment debtor in order to levy an execution." Id. at 24.

It is true that in O'Connor v. McManus the court was considering the validity of an order in aid of an execution, rather than a sheriff's authority to act without such a court order. However, the court's analysis was not dependent upon the existence of that court order.

Therefore, based on the North Dakota Supreme Court's decision and statements in O'Connor v. McManus, it is my opinion that a sheriff may forcibly enter a locked gate on posted property to take possession of property on which the sheriff has levied.

II.

There are at least three types of immunity to which a sheriff may be entitled for acts done in the course of levying on property: 1) absolute quasi-judicial immunity, 2) qualified immunity, and 3) statutory immunity pursuant to N. D. C. C. ' 32-12.1-04. Whether a sheriff will be immune under any of these theories may depend at least in part upon the facts of each case.

First, a sheriff may be entitled to claim absolute quasi-judicial immunity. This quasi-judicial immunity is related to the absolute judicial immunity from suits for damages possessed by judges who are performing judicial acts within their jurisdiction. See Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). This immunity extends to other government officials whose actions and duties are intimately associated with the judicial process. See Butz v. Economou, 438 U.S. 478 (1978); Imbler v. Patchman, 424 U.S. 409 (1976).

Neither the United States Supreme Court nor the North Dakota Supreme Court have held that a sheriff is entitled to absolute quasi-judicial immunity for executing a money judgment by levying on property. Other courts, however, have held that a sheriff or other law enforcement officer is entitled to absolute quasi-judicial immunity for executing a court order or judgment.

In Henry v. Farmers City State Bank, 808 F.2d 1228 (7th Cir. 1986), for example, the Seventh Circuit held that a sheriff was entitled to absolute quasi-judicial immunity with regard to a claim under 42 U.S.C. ' 1983. That case arose out of a mortgage foreclosure. The plaintiffs claimed that the sheriff had wrongfully entered their home, seized their non-exempt personal property, and later sold their property at a public auction. Id. at 1238. The Seventh Circuit held that the sheriff was entitled to absolute quasi-judicial immunity:

Non-judicial officials whose official duties have an integral relationship with the judicial process are entitled to absolute immunity for their quasi-judicial conduct. . . . Although immunity is normally extended to those performing discretionary and not ministerial acts, "those performing ministerial acts under a judge's supervision and intimately related to judicial proceedings have quasi-judicial immunity." . . .

Sheriff Massey was at all times acting pursuant to an official court order to enforce a validly entered judgment when he performed the allegedly wrongful acts of which the [plaintiffs] now complain. It is difficult to think of a task more intimately

related to a judicial proceeding than that of enforcing a money judgment entered by a court. Because the Sheriff was acting in furtherance of his "official duties in aid of the court," . . . he is entitled to quasi-judicial absolute immunity from suit for damages arising from those acts.

Id. at 1238-39.

Similarly, in Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), cert. denied, 424 U.S. 975 (1976), the Eighth Circuit held that a chief of police was entitled to absolute quasi-judicial immunity for attaching and selling the plaintiff's hogs pursuant to a bench warrant. The plaintiff claimed in that section 1983 action that the attachment and sale took place in violation of his constitutional rights. Id. at 591. The Eighth Circuit concluded that although the defendants, including the chief of police, had acted in excess of their jurisdiction, they were acting within their general powers under state law in attaching and selling the hogs and were, therefore, entitled to absolute quasi-judicial immunity. Id. at 591-93.

In Hevelone v. Thomas, 423 F. Supp. 7 (D. Neb.), aff'd, 546 F.2d 797 (8th Cir. 1976), a federal district court held that a sheriff was entitled to absolute quasi-judicial immunity in carrying out an eviction order. 423 F. Supp. at 9. The court held: "[A]uthorities performing orders issuing from a court are provided immunity when they do nothing other than perform such orders." Id. (quoting Rhodes v. Houston, 202 F. Supp. 624 (D. Neb.), aff'd, 309 F.2d 959 (8th Cir. 1962), cert. denied, 372 U.S. 907 (1963) and 383 U.S. 971 (1966)). See also Coverdell v. Department of Social & Health Services, 834 F.2d 758, 764-65 (9th Cir. 1987) (A social worker who executed a court order directing that a juvenile be apprehended and placed in temporary shelter care was entitled to absolute quasi-judicial immunity in a civil rights action.); Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980) ("Judicial immunity extends as well to those who carry out the orders of judges."); Hunziker v. German-American State Bank, 697 F. Supp. 1007, 1012-13 (N.D. Ill. 1988) (A sheriff and deputies who served a writ of replevin were entitled to absolute quasi-judicial immunity.); Shipley v. First Federal Sav. and Loan Ass'n of Del., 619 F. Supp. 421, 438-39 (D. Del. 1985) (A sheriff was entitled to absolute quasi-judicial immunity for serving a writ in a foreclosure case.); Doe v. McFaul, 599 F. Supp. 1421, 1431-32 (E. D. Ohio 1984) (A sheriff who incarcerated juveniles pursuant to a court order was entitled to absolute quasi-judicial immunity.).

Under the holdings of these cases, a sheriff acting pursuant to his general powers in carrying out a court order, including executing a judgment by levying on property, would be entitled to absolute quasi-judicial immunity from suit for damages arising from those actions.

Some other courts have been somewhat more restrictive in their application of the quasi-judicial immunity doctrine in these circumstances.

In Teddy's Drive In, Inc. v. Cohen, 47 N.Y.2d 79, 416 N.Y.S.2d 782, 390 N.E.2d 290 (1979), the New York Court of Appeals held that a sheriff who was authorized to seize property under a writ of attachment or execution was entitled to immunity from suit only so long as the writ was facially valid and the sheriff had not stepped outside the scope of his authority. 416 N.Y.S.2d

at 783. In that case, the court found that because the sheriff had ignored information showing that the true owner of the property he had sold was someone other than the delinquent taxpayer, the sheriff stepped outside his authority in not delaying the sale to inquire further. Id. The court, therefore, took a narrow view of the sheriff's scope of authority and considered how the sheriff acted in that particular case rather than the general nature of the sheriff's actions and scope of his authority.

The Third Circuit has held that whether a sheriff acting pursuant to a court order is entitled to absolute quasi-judicial immunity is a question of fact. In Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976), the Third Circuit stated that whether a sheriff was entitled to absolute quasi-judicial immunity depended upon the extent of the judicial supervision of the sheriff's actions. The court stated that if the sheriff was directly involved in the judicial process, he was entitled to absolute quasi-judicial immunity. Absent direct judicial supervision, however, the court held that the sheriff could only claim qualified immunity. See also Coggins v. Carpenter, 468 F. Supp. 270, 284 (E.D. Pa. 1979). It seems that generally a judge would not be "directly supervising" a sheriff executing a judgment.

However, under the law of most jurisdictions (including the Eighth Circuit), it appears that a sheriff would be entitled to absolute quasi-judicial immunity for his actions in executing a judgment. Yet, there may be questions of fact in particular cases with regard to whether the sheriff was acting within the scope of his or her authority.

Even if a sheriff is not entitled to absolute quasi-judicial immunity, in an action against a sheriff pursuant to 42 U.S.C. ' 1983 a sheriff may be protected by the qualified immunity doctrine. In a section 1983 suit a government official is entitled to qualified immunity from suit for damages if his or her conduct does not violate clearly established constitutional or federal statutory rights of which a reasonable person would have known. Malley v. Briggs, 475 U.S. 335, 341 (1986); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Again, whether a sheriff is entitled to qualified immunity in a suit based on the sheriff's actions in levying on property would depend upon the circumstances of each case.

Finally, even absent absolute quasi-judicial immunity or qualified immunity, a sheriff may not be held personally liable for acts done in the course of levying on property unless those acts constitute reckless or grossly negligent conduct or willful or wanton misconduct.

N. D. C. C. ' 32-12.1-04 provides in part as follows:

32-12.1-04. Political subdivision to be named in
action -- Personal liability of employees --
Indemnification of claims and final judgments.

1. An action for injuries proximately caused by the alleged negligence, wrongful act, or omission of an employee of a political subdivision occurring within the scope of the employee's employment or office shall be brought against the political subdivision. If there is any question concerning whether the alleged negligence, wrongful act, or omission

occurred within the scope of employment or office of the employee, the employee may be named as a party to the action and the issue may be tried separately. . . .

2. An employee shall not be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of the employee's employment or office.
3. No employee may be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment unless the acts or omissions constitute reckless or grossly negligent conduct, or willful or wanton misconduct. An employee may be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment or office.

A sheriff is an employee of a political subdivision. See N. D. C. C. ' 32-12.1-02. He or she is required by law to levy on a debtor's property pursuant to an execution. N. D. C. C. ' 28-21-11. The manner of levy may include seizure of the debtor's property. N. D. C. C. ' 28-21-08(2). Acts necessary in accomplishing a levy, therefore, are "within the scope of the employee's employment or office."

As a result, a sheriff may not be held personally liable for merely negligent or wrongful acts done in the course of levying. The sheriff may be personally liable only if such acts "constitute reckless or grossly negligent conduct, or willful or wanton misconduct." Again, this would be a question of fact.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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