



Municipal courts did not provide required counsel for indigents

Federal judge declines to dismiss suit

By: Heath Hamacher ◉ May 29, 2018

Two Lowcountry municipal courts are going to have to defend allegations that they unconstitutionally incarcerated numerous indigent defendants without providing counsel, a federal judge has ruled.

In *Bairefoot v. City of Beaufort*, several plaintiffs state Section 1983 claims for violations of the Sixth Amendment and the equal protection clause of the 14th Amendment. In his May 16 order, U.S. District Judge Richard Gergel denied a motion to dismiss by the city of Beaufort and the town of Bluffton, finding that municipalities are responsible for indigent defense in municipal courts.

The *Bairefoot* plaintiffs were arrested for shoplifting, third-degree assault and battery, and driving under a suspended license, among other misdemeanor charges. According to court documents, all three defendants-turned-plaintiffs' incomes are below federal poverty guidelines, and none were advised of their right to counsel before being sentenced to jail by municipal judges, all of whom are practicing attorneys.

The plaintiffs' local counsel, Stuart Andrews of Nelson Mullins in Columbia, provided *Lawyers Weekly* with a statement from Ezekiel Edwards, lead counsel for the ACLU, which filed the lawsuit. Edwards applauded the decision allowing the suit to proceed, calling the defendants' actions a "systemic violation of poor person's right to counsel."

"As Plaintiffs have made clear, Defendants created municipal courts to prosecute, convict, and jail people and yet refused to provide lawyers for people who could not afford them as required by the Constitution, or even to advise people of their rights," Edwards wrote.

Pay or else

Tina Bairefoot, who stole from Walmart, was ordered by Judge Ned Tupper to pay \$2,220 or spend 30 days in jail. Beaufort court records indicate that Bairefoot was jailed because she couldn't pay the fine, wrote Gergel, who added that Bairefoot alleges with specificity that she was sentenced to incarceration immediately upon conviction.

Seventeen-year-old Dae'Quandrea Nelson was accepted to pretrial intervention after a school fight led to an assault charge. But when he failed to complete certain program requirements, records show, Bluffton Judge Dustin Lee ordered Nelson to pay a fine and court costs of \$3,212.50 or to serve two concurrent 30-day jail sentences. Nelson was incarcerated immediately after sentencing.

Nathan Fox was convicted of driving while under suspension, speeding, and other traffic-related offenses and ordered by Tupper to pay a cash bond of \$2,926.25 or go to jail. After three weeks behind bars awaiting trial, Fox appeared before municipal Judge Mary Sharp. He was not represented by counsel nor informed of his right to counsel, the opinion states, and pleaded guilty to the charges.

Sharp, who did not hold a plea colloquy with Fox, sentenced him to nearly \$3,000 in fines and court costs, and five consecutive 10-day jail sentences for his five charges. South Carolina law, Gergel wrote, does not authorize imprisonment for one of those charges—speeding less than 10 mph.

There was fair warning

Before 2009, 14th Judicial Circuit public defenders represented indigent defendants in Beaufort and Bluffton municipal courts. When the cities ignored the public defender's office's request for funding, according to court records, the office ceased its services and told the municipalities that they needed to contract with private attorneys to provide indigent defense.



In 2015, the state legislature required cities that chose to have municipal courts to provide adequate funding for indigent defense.

Essentially, cities were given four options: Negotiate an agreement with the circuit public defender; contract with an independent attorney for a fee or pro bono; remove the threat of jail time for indigents; or close the municipal court and try municipal cases in magistrate court.

The Municipal Association of South Carolina warned cities that failure to provide indigents with counsel "could expose cities to liability," but the defendant cities in this case "nonetheless failed to provide counsel for indigent defendants before Plaintiffs were sentenced to jail in 2017," Gergel wrote.

At an April 2017 Beaufort City Council meeting, the city operations manager discussed a request for \$10,000 for fiscal year 2018 to contract with a private attorney and comply with state law, the court opinion said.

The municipal court's annual budget is approximately \$500,000 and it generates approximately \$220,000 in revenue. The operations manager noted the public defender's case backlog and opined that the city would get more "bang for the buck" from a local attorney.

According to Gergel's order, Councilman Philip Cromer asked if the city could simply pay a fine rather than provide counsel to indigent defendants as required by law.

Around that time, at least 50 unrepresented defendants were sent to jail in Beaufort and Bluffton, and more than one-third of the Beaufort County jail was comprised of inmates who were unrepresented and incarcerated on municipal court charges.

In a September 2017 memorandum, state Supreme Court Chief Justice Donald Beatty told all municipal judges that all defendants facing incarceration must be informed of their right to counsel and, if indigent, appointed counsel before trial. Failure to do so, the memo added, would be a clear violation of the U.S. Constitution.

A 'matter of local concern'

In October 2017, the ACLU filed the instant case on behalf of the plaintiffs and those similarly situated. The defendants motioned to dismiss for failure to state a claim.

Under the Sixth Amendment, no one (absent a waiver) can be imprisoned without having been represented by counsel. The Equal Protection Clause of the 14th Amendment provides that it is unconstitutional to imprison a person for any period of time for his or her inability to pay a fine.

"Under those well-established constitutional rules, sentencing Plaintiffs to incarceration—either immediately or for inability to pay a fine—without assistance of counsel was a clear violation of federal law," Gergel wrote.

The defendants did not argue that point, but rather, contended, *inter alia*, that they were not liable for any constitutional violations because it's a duty of the judiciary, not the municipality, to provide counsel for indigent defendants. They cited 1990's *Reed v. Lexington*, a case in which the 4th U.S. Circuit Court of Appeals held that the town held no control over a municipal judge because, according to state law, South Carolina's municipal courts are part of the state's unified judicial system, the responsibility of the judicial system pursuant to the state constitution, and "not a matter of local concern."

The district court found the arguments without merit, pointing to subsequent state legislation that "clearly" makes cities responsible for providing indigent defense in municipal courts.

The defendants also argued that a municipal failure to comply with state law is not actionable under Section 1983. Again, the district court disagreed, finding that deliberately creating criminal courts that operate without providing counsel to indigent defendants violates the Sixth Amendment, "which is certainly actionable under under § 1983."

This was foreseeable

The defendants also argued that since they have no control over municipal judges, their failure to fund defense counsel did not proximately cause a violation of the plaintiffs' rights. According to the municipalities, judges could



have ordered an attorney to represent indigent defendants. The attorney could then sue the municipality for fees. Alternatively, the judges could refrain from sentencing unrepresented defendants to jail, thereby avoiding a constitutional violation.

But according to the district court, those arguments imply that a judge's decision to violate the constitution is a superseding cause of the violation that relieves the municipalities of liability.

That defense doesn't fly, Gergel held, unless third-party damages are unforeseeable.

"Here, it was foreseeable that defendants' failure to provide for indigent defense in courts of their own creation, as required by state law, would result in a violation of the Sixth Amendment," Gergel wrote. "Defendants were on notice that their courts had been sentencing unrepresented persons to incarceration for years and in large numbers. They were also on notice that they had a duty to provide counsel."

Attorneys for the defendants, Kenneth Woodington and William Davidson II of Davidson & Lindemann in Columbia, did not immediately return a message seeking comment.

The 16-page decision is *Bairefoot v. City of Beaufort* (Lawyers Weekly No. 002-105-18). A digest of the opinion is available online at sclawyersweekly.com

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