

NINTH CIRCUIT COURT

Harvey v. Waldon et al, 98-36112.425.000.

SEARCH & SECTURE: \$1983 claim for illegal seizure of antique gaming machines... judicial immunity affirmate statute of limitations ruling reversed... civil seizure claim that if successful would imply invalidity of conviction in pending criminal prosecution does not accrue as long as potential for conviction continues... Shantronn affirmed, reversed.

In 1/88 DOBI Investigator David Waldon and Billings detectives Jesse Johnson, Dave Comfort, and Terry SL John entered Billings Trading an antique business owned by William Harvey, without limitation or seek out warrant even though it was not yet open to the public and seized 25 antique gaming devices which were more than 25 years old and not used for gambling. Harvey was charged with illegal possession of gaming devices on violation of HKC A3-5T33 (1988). In 1992, while charges were still pending, Yellowstone Co. registered National Court leave to destroy the devices of cocaine them to a museum. Harvey was not given notice of the motion by Hernandez granted the motion. The County changed the devices to Billings in 12/94 the County changed the charges from Henry but he was not notified until 5/95. In 6/95 he moved Justice Court for return of the devices. Hernandez denied the motion and informed Harvey that the device had been given to the City Harvey Institute this \$1983 action claiming that Defendants violated his right to be free from unreasonable searches and seizures and violated due process when they permanently deprived him of the devices without notice, opportunity to be heard, and just complained. Judge Shantronn dismissed Hernandez on the basis of judicious immunity; the also dismissed Doug Deo Cavity Dale Mucki, and the Billings PD-Harvey does not appeal those dismissals.) Shantronn subsequently dismissed the remaining defendants on the basis of statute of limitations. Harvey appeals.

Shantronn properly dismissed Hernandez based on judicial immunity. Harvey admits that Hernandez's actions "might have been judicial in nature," but contends that the "action" is complete absence of jurisdiction over the protected disposal of the property without notice & hearing. However, as long as a judge has jurisdiction to perform the "general act" in question he is immune. "however erroneous acts are may have been... however injurious in its consequences I may have proved to be plaintiff." and irrespective of motivation. Deswinger (US 1985). The "general act" which Hernandez was performing 77 an ex parte order to destroy contraband 77 is a function that he has jurisdiction to perform. He is therefore immune from liability for it, however injurious the consequences and irrespective of motivation.

The Montana statute for tort actions for recovery of damages for personal injuries, and therefore for \$1983 actions, is a result of a breach of 37-29/2010. Harvey seeks recovery under \$1983 for both seizure of his property in 11/88 and permanent deprivation of it resulting from the capacity of disposal of the 72% life does not dispute that his actions affect filed in 5/97 more than 3 years after both the statute and other laws, however, relying on Heck US 1984, he contends that his claims do not "accrue" until 6/95 when he learned that charges had been dismissed and the property had been disposed of. Because Heck "applies only to those claims that would necessarily imply invalidity of any conviction that might have resulted from prosecution of the dismissal ... charges," we must assess each of Harvey's claims to determine whether it has yet occurred.

Defendants argue that Heck is incapable to Harvey's warranties search & seizure claim because he was never convicted. Although this Circuit has not addressed this issue, several others have filed that Heck applies to not only convictions, but also to pending and dismissed charges. A claim by a defendant in an ongoing criminal prosecution which necessarily challenges legality of a future conviction as a pending criminal charge has far the intersection of balance and state. Civil Rights Act of 1971. We agree with the Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits that Heck applies to pending criminal charges and that a claim that if successful would necessarily imply invalidity of a conviction in a pending criminal prosecution does not accrue as long as the potential for a conviction continues.

Neither this Court nor the Supreme Court has explicitly addressed applicability of Heck to \$1982 claim alleging damages attributable to an allegedly illegal search & seizure. However, a footnote in Heck stated that:

a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in state criminal trial resulting in the \$1983 plaintiff's still outstanding conviction. Because of doctrines like independent source and inevitable discovery and alleged warranties, errors such as \$1983 actions, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

There is a split as to how this footnote should be interpreted. We agree with the Second and Sixth Circuits that a \$1983 action infringing illegal search & seizure of evidence upon which criminal charges are based does not accrue until the charges have been dismissed or the conviction is overridden. Such holdings will avoid the potential for inconsistent determination on legality of a secure, a seizure in the civil and criminal cases and therefore fulfill Heck's objectives of preventing consistency and finality and preventing a collateral attack on ill conviction through the vehicle of a civil staff. "The seized gaming devices were an essential element of the crime of which Harvey said charged. He said gaming claims were therefore cognizable under Heck but in the criminal charges were dismissed in 12/94. Thus his \$1983 action claiming illegal search & seizure, filed less than 3 years later, is not statutorily barred.

Heck does not apply to Harvey's due process claim "because the alleged denial of due process in disposing of his property without adequate notice of the sale and without following proper prosecution would not impede the validity of any conviction for illegal possession of gaming devices. This claim therefore accrued when he knew or should have known that the property had been disposed of without prior notice or compensation. When the devices were issued before possession was illegal under Montana law, he he was amended in 1991 to permit possession and a set of gaming devices 27 years old. After this amendment legislation released devices Harvey agreed to comply by the Deputy Co. Attorney that Harvey would be returning. However, it was reasonable to limit to believe that until the charges were dropped or the was convicted or acquitted the County would retain the devices that were an essential element of the crime. Thus, until he was actually informed that charges had been dropped he did not have access to believing that the County would dispose of them. He filed charges for charges had been dropped in 5/95, moved for return of the devices in 6/94, and was informed for the first time in 6/95 that the devices had been disposed of. Thus his due process claim did not accrue until 6/95. In his complaint, filed less than 3 years later, is not statutorily barred.

Reinhardt, Thompson, T Nelson.

William Harvey, Littleton, Colo, pro see Randall Nelson (Nelson Law Firm), Billings, and Dep. Yellowstone Co. Airy, Thomas Earl for Defendants.