

## *Zullo v Vermont Summary*

### FACTS

Based on these facts, Mr. Zullo filed a civil lawsuit against the State of Vermont for monetary damages, alleging that Trooper Hatch's conduct violated Article 11 of the Vermont Constitution.

Like the 4<sup>th</sup> Amendment to the US Constitution, Article 11 is the provision in the Vermont Constitution that “protects citizens against unreasonable searches and seizures.” *Zullo* at par. 57.

#### **Article 11 provides:**

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

#### **The Fourth Amendment provides:**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States is a country with dual sovereignty, the federal government and 50 different states, each with their own governments and constitutions. The US Supreme Court has the final say on what the US constitution means, and the Vermont Supreme Court has the final say on what the Vermont constitution means.

The VSC's decision here in *Zullo* was based solely on the Vermont Constitution. This is critically important because the VT Supreme Court has long held that Article 11 is more protective than the 4<sup>th</sup> Amendment. Over a series of decisions going back more than 30 years, the Court analyzed the different language, history, and context of Article 11 to conclude that its scope was more protective than the 4<sup>th</sup> Amendment. The Court has done this many times, and it did so again right here in the *Zullo* case, as we'll see in a few minutes.

Since this decision was based on the Vermont not the US Constitution, could it be appealed to the US SCT?

Mr. Zullo's suit alleged that Trooper Hatch's conduct violated Article 11 in 4 separate ways: (1) the initial traffic stop was unlawful because Trooper Hatch did not have reasonable suspicion of any traffic violation; (2) the exit order was unlawful because Trooper Hatch did not have reasonable suspicion of danger or the commission of a crime; (3) the seizure of Mr. Zullo's car was unlawful because there was no probable cause; and (4) the search of his car was unlawful because it was done without probable cause

It is important to note this is not a criminal prosecution, it is a civil suit for damages. Most often these issues would come up in a motion to suppress in a criminal case, but remember that couldn't happen here because there were no criminal charges brought against Mr. Zullo, so the exclusionary rule is not available as a remedy.

So the first question the Court had to answer was whether the State can be sued for damages for an Article 11 violation. This question raises complex issues of sovereign immunity and when the state can be sued under the common law and the Vermont Tort Claims Act. The Court did a lengthy, detailed, and highly technical analysis on this subject, but you'll be happy to know that I'm not going to get into that, because there are other major issues in the opinion that are more in this Committee's wheel house and that you deal all the time. For our purposes here, it's enough to say the Court held that under certain circumstances civil lawsuits for damages can be brought for Article 11 violations under the Vermont Constitution.

This is a significant decision, and it raises the obvious question, under what circumstances? If civil suits can be brought for damages when there is a search and seizure violation, when can they be brought and what does the plaintiff have to prove? The Court obviously recognized the importance of its decision and it was quite specific about what would have to be shown.

The Court explained that a plaintiff seeking damages against the State directly under Article 11 based on a law enforcement officer's alleged violation of that constitutional provision must show that: (1) the officer violated Article 11; (2) there is no meaningful alternative remedy in the context of that particular case; and (3) the officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith. "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S. Ct. 305, 308 (2015) (quotation omitted). Bad faith, which may exist even when the officer's conduct could be viewed as objectively reasonable, is characterized by ill will or wrongful motive, including discriminatory animus. [Note: This was a rejection of the US SCT's approach under the 4<sup>th</sup> Amendment, since the Court had held that the officer's bad faith is irrelevant if there is an otherwise neutral and reasonable basis for the search]

The Court then applied this standard to each of the alleged Article 11 violations.

### The Vehicle Stop

A temporary stop of a vehicle is a "seizure" subject to Article 11 protection. Although seizures generally require probable cause, temporary vehicle stops are permitted to meet a lesser standard

that is satisfied if the officer has a reasonable suspicion of criminal activity or a traffic violation.

The State argued that there was reasonable suspicion for the stop because the obscured registration sticker was violating 23 V.S.A. § 511, which required license plates to be “kept entirely unobscured, the numerals and the letters thereon should be plainly legible at all times.”

However, the Court held that the partially obscured registration sticker did not actually violate § 511 at all because it did not obscure the numbers on the license plate. Since there was no traffic violation at all, there could be no reasonable suspicion of one, and as a result the stop violated Article 11.

The Court’s reasoning is also a good example of how legislative action can influence a court decision. The Court found it relevant that after the stop took place the Legislature amended § 511 to make clear that registration stickers had to be unobstructed. In the Court’s view, the fact that the Legislature added this language showed that prior to the amendment there had been no such requirement.

### Search and Seizure of the Vehicle

In contrast to a temporary stop, a search and seizure is an unconstitutional violation of Article 11 unless it is supported by probable cause.

The State argued that Trooper Hatch was justified in seizing and towing Mr. Zullo’s vehicle because he had probable cause to

believe it contained marijuana on the basis of the detection of the faint odor of marijuana, the presence of air freshener and visine in the vehicle, and Mr. Zullo's acknowledgement that he had smoked marijuana within the past few days.

The Court first noted that once Trooper Hatch no longer believed Mr. Zullo was driving impaired, all the factors other than the faint odor of marijuana were no longer relevant to whether there was marijuana in the vehicle.

The Court then held that the faint odor of marijuana by itself, without any other evidence that marijuana might be present, does not establish probable cause that marijuana will be found in a vehicle. As a result, since there was no probable cause, the seizure of Mr. Zullo's vehicle violated Article 11.

Having found violations of Article 11, the Court remanded case back to the Superior Court for a determination of whether damages should be awarded based on the principles that the Court established in its decision. As the Court noted at the end of its opinion in footnote 23, it will be relevant in this determination that Mr. Zullo "has consistently suggested throughout these proceedings that Trooper Hatch's stated reasons for his actions were driven by implicit discriminatory bias." This is because the Court made clear that a claim for damages based on the officer acting in bad faith could be made by showing that officer acted with "discriminatory bias." This is a very significant result of the decision, that when an officer acting out of discriminatory bias violates a person's constitutional search and seizure rights, the State can be sued for damages under Article 11 of the Vermont Constitution.