
IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 2183
September Term, 2016

KELVIN SEWELL,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

On Appeal from the Circuit Court for Worcester County, Maryland
(Hon. D. William Simpson, Judge)

**BRIEF OF AMICI CURIAE NATIONAL ORGANIZATION OF BLACK LAW
ENFORCEMENT EXECUTIVES, PUBLIC JUSTICE CENTER, AMERICAN CIVIL
LIBERTIES UNION OF MARYLAND, HISPANIC NATIONAL LAW ENFORCEMENT
ASSOCIATION, UNITED BLACK POLICE OFFICERS' ASSOCIATION AND
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN
SUPPORT OF APPELLANT KELVIN D. SEWELL**

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INTRODUCTION

Amici are civil rights and police organizations writing to provide background about the troubling circumstances surrounding the criminal prosecution of Chief Kelvin Sewell, the first Black police chief of Pocomoke City and one of only a handful of Black chiefs in the history of Maryland's Eastern Shore. Although the brief that follows is unusual, so too is this case. And the tangled story of race discrimination and retaliation behind the misdemeanor charge alleging misuse of police discretion by Chief Sewell is relevant context for this appeal.

By all accounts, Chief Sewell was highly successful as Pocomoke Police Chief. During his three-year tenure, crime dropped substantially in the small, racially-divided town. Sewell and his officers became friendly and familiar faces walking the beat, and relations between police and residents improved significantly. Chief Sewell was respected by most Pocomoke residents and beloved in the Black community, where people took great pride in his service.

Then, in 2015, Sewell stood up for another Black officer who faced race discrimination, and both became targets for retaliation by white officials. Soon after, Sewell was abruptly fired without explanation. The community was thrown into turmoil. Hundreds protested Sewell's firing, turning out at packed public meetings to urge his reinstatement and emphasizing that Sewell had made the police part of the community for the first time in their experience. City Councilwoman Diane Downing, Pocomoke's lone Black public official, repeatedly spoke out, saying she believed Sewell's firing was unjust and discriminatory. *See, e.g.,* Sheryl Gay Stolberg, *A Maryland Town Fires Its Black Chief, Exposing a Racial Rift*, N.Y. Times, Aug. 2, 2015.

Town officials rebuffed these pleas. Rather than reinstating Chief Sewell, they forced out the other Black officers who had complained about discrimination, Det. Franklin Savage and Lt. Lynell Green.

In January, 2016, Sewell, Savage and Green filed suit in federal court challenging the race discrimination and retaliation they suffered at the hands of officials from state and local agencies operating in Worcester County. *Franklin Savage, et al. v. Mayor and City Council of Pocomoke City, et al.*, Civil Action No. JFM-16-0201 (“*Savage v. Pocomoke*”). The Equal Employment Opportunity Commission (EEOC) found reasonable cause to believe the three had suffered unlawful treatment, including a specific finding that Chief Sewell was illegally fired in retaliation for standing up for his subordinates. The United States Department of Justice took the extraordinary step of intervening in the lawsuit, supporting Chief Sewell and the other plaintiffs as a party independently challenging the race discrimination and retaliation. *See Savage v. Pocomoke*, Docket No. 122, Department of Justice Plaintiff-Intervenor’s Complaint (“DOJ Complaint”) (Dec. 1, 2016).

Amid this controversy, but six months after Sewell’s filing of suit and a full year after his termination, Sewell was charged by the Office of State Prosecutor (“OSP”) with misconduct in office. The stated basis was Sewell’s exercise of discretion in processing a property-damage-only car accident that had occurred nearly two years earlier and about which Sewell had never before been questioned.

Amici contend this criminal investigation and case were fueled by the animus of local actors who were offended by the allegations of Black officers – local actors who

had already resorted to extreme measures to punish them. These individuals unjustly sought to convince the OSP that Sewell and the officers he supported were corrupt. Sadly, they succeeded.

Amici represent several police and civil rights organizations, including two providing counsel to Chief Sewell in his civil rights case. The criminal charges against Sewell, like his firing, have sent a chilling message to Black Shore residents and to minority officers that even a well-respected Police Chief cannot avoid retaliation for challenging racism in the law enforcement community. The experiences of Officers Savage, Green and Sewell echo those of other Black law enforcement officials in southern and rural regions. Rather than furthering accountability of public officials, this prosecution reinforces the notorious “code of silence” that prevents police from reporting wrongdoing within their ranks. *See, e.g.*, “The Blue Wall of Silence,” A Curated Collection by the Marshall Project, <https://www.themarshallproject.org/records/605-blue-wall-of-silence>

The nature of the charges lend support to these concerns: The State’s contention is that Chief Sewell *abused his broad discretion* in determining that a car accident was indeed an accident. The government’s theory as to how this discretionary judgment of the sort police make every day amounted to “misconduct in office” was that the driver of the car was a member of the same Mason’s lodge as Sewell – the local *Black* lodge. The State never alleged that Sewell received any *quid pro quo*. Indeed, the State never proved that the driver and Sewell were any more than passing acquaintances, nor that either attended the lodge regularly. All the State could show to support its theory that

Sewell would jeopardize his good name and long police career by intentionally mischarging the incident was that Sewell and the driver were both in the same Black Mason's lodge – a theory initially put forth by the local actors aggrieved by charges of race discrimination. That is not enough to support criminal culpability.

Amici submit that this criminal case would never have been brought if Officers Savage, Green, and Sewell had not filed race discrimination charges against state and local officials. It is not plausible to assert otherwise given the events preceding and surrounding the State's investigation, and after reviewing OSP records concerning comparable cases.

STATEMENTS OF INTEREST

National Organization of Black Law Enforcement Executives (NOBLE) was founded in 1976 with the mission to ensure equity in the administration of justice in the provision of public service to all communities, and to serve as the conscience of law enforcement by being committed to justice by action.

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to protecting constitutional rights and ensuring that citizens are free from unlawful restraint at the hands of law enforcement. The PJC often participates as *amicus curia* in cases seeking to protect the right to be free from police misconduct.

American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union (“ACLU”), a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. Since its founding in 1931, the ACLU of Maryland has appeared before Maryland courts and administrative bodies in numerous civil rights cases. ACLU is co-counsel in a federal civil rights lawsuit brought by Chief Sewell and two other Black officers against various Eastern Shore public officials.

Hispanic National Law Enforcement Association (HNLEA) is a Maryland-based, national nonprofit organization of professionals involved in the administration of justice and dedicated to advancement of minority interests in law enforcement service and in the betterment of relationships between police and minority communities.

United Black Police Officers' Association (UBPOA) is a Maryland-based police organization with the mission of creating meaningful relationships between law enforcement officers and the culturally diverse communities they serve. Through efforts like this, UBPOA works in the courts and in the community to help bridge the all-too prevalent divide between police and minority communities.

Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) works to create legal, economic and social equity through litigation, client and public education and public policy advocacy since 1968. Although the WLC fights discrimination against all people, it recognizes the central role that current and historic race discrimination plays in sustaining inequity. The WLC is co-counsel for Chief Sewell in his federal civil rights lawsuit.

ARGUMENT

I. CHIEF SEWELL'S REFUSAL TO RETALIATE AGAINST A BLACK SUBORDINATE FOR REPORTING RACE DISCRIMINATION LED TO HIS FIRING AND CHARGES OF CORRUPTION.

Kelvin Sewell came to Pocomoke City after a distinguished career as a Baltimore homicide detective and quickly became known for making the community safer. But notwithstanding this success, he eventually fell victim to a culture that insists that Blacks know their place. As Sewell refused to buckle to pressure from the white establishment to fire a Black officer who complained about race discrimination, white officials came to see Sewell as part of the problem, rather than a partner, and Sewell himself became a target.

A. Chief Sewell was highly regarded until he sided with Franklin Savage in his race discrimination complaint

Chief Sewell brought progress to Pocomoke in many ways. “The report card on Kelvin Sewell’s first year as police chief shows a dramatic decrease in overall crime,” wrote the Salisbury Daily Times in 2012. *In Pocomoke, crime down under new police chief*, Salisbury Daily Times, Dec. 6, 2012. *See also* E. Bean, *End-of-year 2012 report labels Pocomoke ‘successful and exciting’*, Salisbury Daily Times, Feb. 18, 2013 (“Sewell’s walk-the-beat techniques significantly lowered crime in Pocomoke, with murders decreasing 200 percent and theft and larcenies down 87 percent.”). This success was attributed to Sewell’s hands-on approach and active engagement in the community, with Sewell himself walking the beat alongside his officers. *Id.* Chief Sewell’s successes were lauded by his officers, Pocomoke residents, and even Mayor Bruce Morrison. *Id.*

But things changed for Sewell in the summer of 2014, after he stood up for his supervisee, Detective Savage.

Savage was the first and only Black officer assigned to the “Criminal Enforcement Team” (CET), a multi-jurisdictional drug task force involving state and local agencies. Savage filed an EEOC charge alleging that he was subjected to outrageous and overt racism from CET members, including frequent use of the racial slur “n-----,” widespread display of media using racist stereotypes and imagery, and talk about local KKK activities, including lynchings. Savage also filed a complaint with the Attorney Grievance Commission regarding State’s Attorney Beau Oglesby’s repeated use of the slur “n-----”.

Rather than investigate Savage's concerns, local officials sought to discredit Savage and anyone who stood by him, including Sewell. Retaliation ranged from spreading false, often racially-tinged, rumors, to sabotaging employment, to refusing to provide emergency support services, to campaigns for termination and removal.¹

In particular, after learning of Savage's complaint against him, State's Attorney Oglesby used the imprimatur of his office to campaign aggressively for Savage's firing. Although conceding to the EEOC that he repeated some variation of "n-----" *eight times* in a meeting with Savage, Oglesby denied any impropriety and contested Savage's characterization of the incident.² Oglesby rallied other officials, even sending a formal letter to Pocomoke's Mayor and Council challenging Savage's veracity *because of his discrimination complaint* and declining to use him as a witness in future cases. Oglesby later reiterated this, noting his "office would not prosecute even minor traffic violations if Officer Savage was involved." DOJ Complaint ¶ 55. Amici are aware of no other instance where the Worcester County State's Attorney has taken such action.

B. Sewell's refusal to fire Savage led to his own firing

White Pocomoke officials began pressuring Sewell to fire Savage almost immediately upon learning of his complaints. *See* DOJ Complaint ¶ 54-64; 65-75. They indicated that everything would be resolved if Sewell would just fire Savage. *Id.* at 67-

¹ *See, e.g.*, DOJ Complaint ¶¶ 44-45 (false allegations against Savage); ¶¶ 51-52 (WCSO told Sewell that it would not respond to emergency calls from Savage).

² Oglesby was particularly upset that Savage did not take up Oglesby's suggestion that anyone offended could leave. *See Savage v. Pocomoke*, Docket No. 45-5 Ex. B-2 (Oglesby correspondence).

68, 71-72. As white officials realized that Sewell would not “go along to get along,” Sewell himself came under fire, leading to his own EEOC complaint against Pocomoke City in March 2015.³ Sewell amended his charges in mid-June to include the City Manager referring to him as an “ungrateful ass n-----” and new charges against the WCSO. Two weeks later, Sewell was fired. The only councilmember to vote against Sewell’s termination was Councilwoman Downing, who said that Sewell had done an “outstanding job” and that his removal was unjustified. Vanessa Junkin, *‘We want our chief back,’* Salisbury Daily Times, July 16, 2015.

Following Sewell’s firing, City officials appointed MSP Lt. Earl Starner as Interim Chief. At the time, Starner was MSP’s Berlin Barrack commander, overseeing two officers who had engaged in racial harassment against Detective Savage.

II. THE OSP INVESTIGATION WAS COMPROMISED BY THE RETALIATORY MOTIVES OF LOCAL OFFICIALS

A. Officials hostile to Sewell initiated OSP’s investigation

Intentionally or not, the OSP investigation was driven by allegations and theories put forth by local actors who bore deep hostility toward Officers Savage, Green and Sewell as a result of their discrimination complaints. The OSP failed to insulate its investigation from those with retaliatory motives, nor apparently even to consider the possibility that their complaints had merit.

Ironically, OSP’s inquiry began after Sewell sought OSP’s assistance. On June 26, 2015, Lt. Green contacted Sewell about an anonymous note Green had received

³ OSP’s investigation corroborated this turning point. *See* Appellant Br. at 10, citing OSP notes that “the root causes that triggered Sewell’s termination stemmed from Savage’s return to PCPD from CET in June ’14.”

asserting that drugs had been planted in his car and home and at the Pocomoke police station to incriminate him and Sewell, also asserting that County officials were preparing search warrants to uncover those drugs. Sewell began calling area police agencies looking for an outside department to conduct an independent search. Starner of the MSP, Sewell's first choice, refused, citing Savage's race discrimination complaint against an MSP officer,⁴ and indicating that Sewell should contact MSP Superintendent William Pallozzi if he wanted confirmation of MSP's refusal to assist. Pallozzi confirmed that MSP would not assist because Savage's sustained complaint against MSP personnel had caused ill-will. The Superintendent suggested that Sewell contact OSP, which Sewell did.

OSP, through Investigator Timothy Frye, also declined to assist. But following Sewell's call, Frye, who had spent 25-plus years with MSP, contacted two "old acquaintances/colleagues" from MSP's Berlin Barrack. R. 153-154. OSP records show that from the start, these MSP officials—Earl Starner and David Sharp—sought to discredit Sewell and redirect OSP from investigating Sewell's concerns toward investigating Sewell, Green and Savage. For example, Sharp vaguely contended that Sewell was "not well-liked" by law enforcement in Worcester County and said MSP had heard "persistent rumors," though Sharp admitted he had no evidence of wrongdoing. *Id.* Starner, OSP's other primary MSP contact, was a longtime state trooper appointed to be interim Pocomoke Chief upon Sewell's firing. Immediately after taking office, Starner

⁴ This complaint, sustained by MSP internal affairs because of concrete proof, concerned white Trooper Brooks Phillips's text message addressing Detective Savage as "N----."

initiated an external investigation of Savage for potential “ethical violations” based upon Savage’s discrimination complaint against Oglesby, filed over a year before. DOJ Complaint ¶ 78.

Rather than opening an investigation into Sewell’s complaint about racist threats, OSP launched a wide-ranging investigation into Sewell and another of the Black officers, involving active participation of individuals implicated in the discrimination allegations.

B. Oglesby developed OSP’s theory of the case against Sewell

From its inception, OSP’s investigation of Sewell was a fishing expedition. OSP investigated everything from allegations that Sewell was involved in a scheme to obtain free alcohol from “Duck Inn Liquor” to wild claims that he sought to seduce a 75-year-old mother of a Pocomoke man investigated for drug offenses. *See* Appellant Br. at 13. These allegations were readily disproven, but OSP continued fishing for evidence of some wrongdoing.

Despite Oglesby’s key role as a target in the EEOC complaints, as well as his overt retaliation against Detective Savage, OSP investigators repeatedly reached out to Oglesby as an investigatory resource. Specifically, investigators solicited Oglesby—rather than Pocomoke police—for anything he might know about the handling of PCPD citations. R. 198-201. OSP did not ask Oglesby about any particular incident, but rather put forth an open-ended query inviting Oglesby to conduct his own investigation to identify incidents that could be characterized as improper in some way. This is exactly what Oglesby did, compiling a list of four incidents that he shared with OSP, including the accident that ultimately formed the basis for OSP’s criminal charges.

OSP's invitation to Oglesby was wholly improper. Essentially, it was *Oglesby* who came up with the theory of the case put forth in OSP's prosecution—that Sewell reassigned a case in order to influence the outcome, so as to benefit a fellow Black Mason. Following Oglesby's lead, even before investigating the merits, OSP investigators referred to the incident as the “Matthews hit and run.”

This is a far cry from OSP's representation to the trial court that Oglesby's involvement was limited to requests for “documentation,” and that “we keep ourselves very separate from Mr. Oglesby, a decision he totally respects because there is the civil suit.” Oct. 20, 2016 T. 14-15. Instead, Oglesby fed OSP the facts and theory of the case it would pursue.

C. OSP's pursuit of Sewell's case departs from OSP's prior practices

Analysis of prior investigations and prosecutions of police by OSP further suggests that Sewell's prosecution was unusual in several ways.

In order to understand how OSP made investigation and charging decisions, the ACLU requested, under the Maryland Public Information Act, records of all incidents in which OSP had pursued criminal charges for misconduct in office against any police official unrelated to financial crimes such as theft, embezzlement, or bribery. OSP initially produced annual reports since 1986. To supplement this information, the ACLU requested documentation regarding all complaints made to OSP since 2010 against law enforcement personnel for non-financial crimes that OSP chose not to prosecute. OSP produced this information.

Based on a review of these records, it seems clear that OSP has almost never pursued misconduct charges against police officers. Moreover, as best can be ascertained, OSP has never before pursued charges against a police officer for a discretionary decision such as whether or how to write up an incident. Since 2010, approximately 52 formal complaints against police officers have been filed with OSP. Most (65%) were closed without investigation. Four officers were charged with financial crimes related to theft. Until its prosecution of Sewell, OSP had prosecuted only one police officer in the last 25 years for a non-financial crime: Carroll County deputy Nicholas Plazio in 2012. Plazio violated the constitutional rights of two murder suspects, lied about it to other law enforcement, then perjured himself, compelling dismissal of all charges against the two suspects. OSP agreed not to bring perjury charges against Plazio if he pled guilty to misconduct in office and resigned.⁵

In contrast, Sewell was charged with misconduct in office for, according to OSP, declining to charge a driver with a “hit-and-run” after an accident in which the driver drove two blocks to his home before calling police. The ACLU is aware of no other instance in which OSP prosecuted a police official for a decision about whether or how to charge an individual with a particular offense.

Second, as best the ACLU can determine, until Sewell’s prosecution, in its 40-year existence, OSP had never initiated an investigation of a police officer *after* the officer

⁵ After the Sewell prosecution, on August 1, 2017, a grand jury indicted Trappe Chief George Ball with two counts of misconduct in office for allegedly seizing and failing to process a stolen gun and failing to investigate a theft of jewelry to benefit an acquaintance.

was terminated or resigned. OSP has only very rarely even continued to investigate officers after leaving their positions. Rather, on several occasions, OSP has ended its investigation when officers resigned: In 2001, Sheriff Vonzell Ward and Deputy Keith Helwig were accused of intimidating a woman by stalking her, baselessly administering a breathalyzer test, and giving her a ticket on trumped-up charges. OSP dropped its investigation when Ward resigned. Similarly, in 2001, OSP investigated misconduct charges against Sheriff Joseph Meadows based on allegations of on-duty sexual harassment of a subordinate. OSP found misconduct but agreed to drop the matter if Meadows resigned.

Against this backdrop, the decision to pursue a sweeping investigation and initiate criminal charges against Sewell *months after his termination* is conspicuous, particularly given OSP's limited resources.

Finally, OSP's investigation of Sewell was striking in breadth and unfocused in nature. OSP ran down rumor after rumor, regardless of how facially unbelievable. As noted, OSP investigated only about 35% of complaints it received regarding police officers. The cases that were investigated involved limited, concrete allegations of wrongdoing, rather than vague rumors that the officer "was not well liked."

III. THE FACTS LEADING TO THE PROSECUTION OF THIS CASE ILLUSTRATE HOW MINORITY OFFICERS ARE SILENCED TO THE DETRIMENT OF TRUE POLICE ACCOUNTABILITY

Amici NOBLE, HNLEA and UBLOA write to emphasize that, however surprising it may seem to those without firsthand experience as minority law enforcement officials, the allegations of Officers Savage, Green and Sewell ring true. They are consistent with

the accounts of their peers. *See, e.g.,* Kenneth Bolton Jr. and Joe R. Feagin, *Career Experiences of African American Police Executives: Black in Blue Revisited* v (2003) (describing experiences of officers subjected to racist conversations, racial epithets, and KKK references, even as they overcame race discrimination to be promoted).

In fact, Amici's experience is that the "racial divide" is even more stark *within* law enforcement than it is among the public at large. White police officials are far more likely than whites generally to deny the need to address racial inequality: 92% of white officers believe that "the U.S. has made the changes needed to give blacks equal rights with whites," compared to 57% of the general public. John Gramlich, Pew Research Center, Black and white officers see many key aspects of policing differently, Jan. 12, 2017, <http://www.pewresearch.org/fact-tank/2017/01/12/black-and-white-officers-see-many-key-aspects-of-policing-differently/>. Amici attribute this extraordinary gap to a characteristic of resisting racial progress in American police culture. "[E]ntry into law enforcement agencies was denied virtually all southern African-Americans until the 1960s." Bolton, *Black in Blue*, *supra* at vii.

Thus, in addition to routine race discrimination, Black officers face outright denial from colleagues and superiors that their claims about race discrimination are valid. Indeed, *only 1%* of white officers agree with the assessment that white officers are treated more favorably than minorities in assignments and promotions, compared to more than half of Black officers. Gramlich, Pew Research Center, *supra*.

It is no surprise to Amici that Sewell, Savage and Green faced hostility from the white law enforcement community on the Eastern Shore for breaking the "code of

silence” with respect to internal race discrimination. The law enforcement community does not forgive “traitors” within its own ranks, let alone traitors who are racial minorities. *See, e.g., “Blue Wall of Silence,” supra.* What Amici find particularly troubling in this case is the unwillingness of the OSP – an entity charged with rooting out corruption among public officials – to even consider the possibility that racism and retaliation fueled the rumors and innuendo that white law enforcement officials directed at Chief Sewell.

CONCLUSION

This prosecution was tainted from the outset by race discrimination and retaliation. Amici respectfully urge this Court to grant Chief Sewell’s request to dismiss the case with prejudice for the reasons argued in his opening brief.

Respectfully submitted,



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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3837 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief was prepared with proportionally spaced, Times New Roman font, size 13, in compliance with the requirements specified in Rule 8-112.



Debra Gardner

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2017, the foregoing brief of *amici curiae* was served electronically by the MDEC system and that two copies will be sent via first-class mail, postage prepaid, within one business day to:

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