



ISSN 1935-0007

Cite as: 2008 (3) AELE Mo. L. J. 101
Civil Liability Law Section – March, 2008

Enforceability of Civil Liability Release Agreements

Contents

1. Introduction
2. A Key U.S. Supreme Court Ruling
3. Factors Indicating Voluntary Agreements
4. Putting It “In Writing”
5. Other Issues
6. Resources

1. Introduction.

Civil lawsuits against police officers, supervisory personnel, law enforcement agencies, and prosecutors all grow out of the same activities which result in the filing and pursuing of criminal charges against arrestees.

In some instances, “release-dismissal” agreements are entered into in which criminal charges against a particular defendant are dismissed in exchange for them executing a release of possible civil liability claims, whether federal or state or both, against governmental employees or entities.

There are also instances when, after criminal charges against them are dropped, and they are not longer in jeopardy of prosecution, such defendants attempt to change their minds as to the release part of the agreement, and proceed to file and attempt to pursue civil lawsuits concerning their arrest, the use of force against them, the search of their home or business, or other aspects of their treatment by the criminal justice system.

When are such “release-dismissal” agreements enforceable? What factors will courts look at to determine whether they are constitutional? What are some considerations that law enforcement personnel should take into account in connection with such agreements? That is the subject of this article. It does not discuss the subject of the impact of state legal ethics rules on such agreements.

2. A Key U.S. Supreme Court Ruling

In [Newton v. Rumery](#), No. 85-1449, 480 U.S. 386 (1987), the U.S. Supreme Court rejected any argument that a release of civil liability against police or other governmental employees or entities, when entered into in exchange for the dismissal of pending criminal charges, was per se unenforceable, and discussed, at some length, the factors required for enforceability.

In this case, the plaintiff, Rumery, learned that a friend had been indicted by a New Hampshire county grand jury on charges of aggravated felonious sexual assault. He sought more information about the case from a mutual acquaintance, who was the victim of the assault and was expected to be the principal witness against his friend. The victim called the town's police chief, and told him that Rumery was trying to force her to drop the charges.

Subsequently, Rumery was arrested and accused of tampering with a witness, a felony under state law. Rumery's attorney and the prosecutor negotiated a deal under which the prosecutor would dismiss the charges against Rumery if he would agree to release any civil liability claims he had against the town, its officials, or the victim for any harm he suffered from his arrest.

Three days later, Rumery signed the "release-dismissal agreement," and the criminal charges against him were dropped. He evidently changed his mind later, and wished to pursue a federal civil rights claim against the town and its officers, which he filed in court ten months later, alleging that they had violated his constitutional rights by arresting him, as well as defamed him and subjected him to false imprisonment.

When the lawsuit was dismissed by the court on the basis of the signed release-dismissal agreement, Rumery argued that the agreement violated public policy. A federal appeals court ruled that such agreements were per se unenforceable.

The U.S. Supreme Court disagreed. It noted that a promise is unenforceable if the interest in its enforcement is "outweighed" in the circumstances by a public policy harmed by the enforcement of the agreement.

The Court acknowledged that there may be some cases in which release-dismissal agreements could infringe on important interests of either the criminal defendant or of society as a whole. But it reasoned that the mere possibility of such harm did not support a rule invalidating all such agreements.

The Court noted that the "risk, publicity, and expense" of a criminal trial might intimidate a defendant, even if he believed he had a meritorious defense, but that this possibility did not invalidate all release-dismissal agreements. In many

instances, it stated, a choice by a defendant to enter into a “release-dismissal” agreement will stem from a “highly rational” judgment that the certain benefits of escaping a criminal prosecution outweighs the “speculative” benefits of possibly prevailing in a civil lawsuit.

The Court, in this case, found that Rumery’s “voluntary decision” to enter into the agreement here reflected just such a rational choice. The decision pointed to the fact that Rumery was a “sophisticated businessman,” was not in custody in jail at the time, and was represented by an “experienced criminal lawyer,” who actually drafted the agreement at issue. Further, Rumery, far from rushing into things, considered the agreement for three days before he signed it.

These factors showed that Rumery’s actions were voluntary, and that he waived his right to sue for violation of civil rights. Accordingly, the enforcement of the agreement was not invalidated by any public interest against an involuntary waiver of constitutional rights.

The court also found that the prosecutor had a legitimate reason to enter into the agreement that directly related to his prosecutorial duties and was independent of his discretion as to bringing criminal charges. One significant consideration in his decision was attempting to spare the victim of the alleged sexual offense the public scrutiny and embarrassment that she would have suffered if she had been required to testify either in the criminal trial against Rumery, or in Rumery’s civil lawsuit concerning his arrest.

Newton v. Rumery, although a plurality opinion, stands for the proposition that “release-dismissal” agreements are constitutionally permissible so long as they are entered into voluntarily, are free from prosecutorial misconduct, and are not offensive to the public interest. Factors that may be looked at as to whether such agreements are voluntary include the knowledge and expertise of the defendant, whether the defendant was represented by a lawyer, and whether that attorney drafted the agreement, as well as whether the defendant is in custody at the time, and had time to consider the agreement.

3. Factors Indicating Voluntary Agreements

The element of enforceability laid out in Newton v. Rumery that the courts seem to spend the most time examining is that of whether or not the agreement was entered into voluntarily. What factors indicate that a “release-dismissal” agreement is voluntary? The case that follows presents a good example. In Franco v. Chester Township Police Dept., No. 05-5133, 2008 U.S. App. Lexis 743 (3rd Cir.), a Pennsylvania property owner was charged with drug possession, among other charges, arising from the search of her motor home pursuant to a warrant.

The warrant was part of an investigation into alleged criminal conduct by her son.

The search, however, yielded trace quantities of methamphetamine, marijuana, drug paraphernalia, and two handguns, and she herself was charged with drug possession, carrying a firearm without a license, and obstruction of justice. The officers also impounded the motor home, and the prosecutor's office filed a motion for its forfeiture.

The motor home owner responded by filing a federal civil rights lawsuit claiming that the prosecutor's office and the police department conspired to press frivolous criminal charges against her for the purpose of acquiring her motor home for their use at Philadelphia Eagles football games.

On the date of her criminal trial, the defendant and the prosecutor's office entered into a written agreement in which the criminal charges were withdrawn in exchanged for her voluntary dismissal, with prejudice, of her federal civil rights complaint, as well as a waiver of her right to seek attorneys' fees in the civil rights case.

While the agreement was drafted by the prosecutor's office, the defendant's attorney was allowed to review it and recommend changes, as well as discuss it with his client. The lawyer who was representing her in the federal civil rights lawsuit was also informed of the agreement by her criminal case attorney.

The judge in the state criminal proceeding engaged the defendant in a detailed discussion on the record, and "repeatedly" told her that she was waiving any rights she had with respect to the federal civil rights lawsuit. The prosecutor approved the settlement agreement after also reviewing the defendant's federal civil rights complaint, the police reports in the case, and the affidavit of probable cause, in addition to speaking to the police officers who were to testify.

While the prosecutor concluded that the federal civil rights lawsuit being dropped in exchange for the dismissal of criminal charges was "frivolous," she later stated that she agreed to the settlement with an aim of avoiding a waste of taxpayer money on defending a meritless lawsuit filed by a "relatively minor" suspect in the investigation.

Difficulties later arose with the settlement, however, when the defendant's lawyer in her federal civil rights case refused to sign papers that the defendant believed were necessary to dismiss that lawsuit. A federal trial judge therefore convened an emergency settlement conference, and during it allegedly expressed the opinion that the civil rights claim appeared to have merit, and also to have "expressed some disappointment" that the settlement did not provide for attorneys'

fees. The defendant then sought to repudiate the “release-dismissal” agreement in a motion and her lawyer made a motion for an award of attorneys’ fees, both of which were denied.

Upholding this result, and the enforcement of the “release-dismissal” agreement, a federal appeals court ruled that the agreement met all the conditions set forth in Newton v. Rumery. It found that the agreement was voluntary because the defendant was represented by a competent lawyer who was allowed to review and alter the agreement and to consult with her concerning its implications. The defendant was also thoroughly advised by the trial judge in the criminal case as to the meaning of the agreement she was entering into, and she signed it after indicating that she was fully aware of its terms.

The defendant was not in custody at the time, and had “many months” to become aware of the charges against her and to consult with her attorney. She was sophisticated, having had several years of college education.

The prosecutor, the court found, “conscientiously reviewed” the case and determined that the public interest in prosecuting a minor drug suspect was outweighed by the need to avoid the “substantial financial and practical” burdens of defending a “frivolous” civil rights lawsuit. The court found that avoiding the burdens of frivolous litigation is a “legitimate public interest to be served by release-dismissal agreements,” and it found no evidence of any other motivation by the prosecutor for entering into the agreement.

The court rejected the defendant’s argument that she was unfairly compelled to waive important constitutional rights by otherwise facing the possibility of a long prison sentence, a big fine, and the loss of her motor home. Forcing criminal defendants to make “difficult choices,” the court noted, is not a violation of the Constitution, and the “dilemma” faced by this defendant was not “more coercive” than those ordinarily faced by many other such defendants.

The court was “unpersuaded” by the defendant’s claim of prosecutorial misconduct, finding her allegation that the police and prosecutor conspired to seize her motor home for personal recreational use lacking “support in the record.”

In Vallone v. Lee, #91-8716, 7 F.3d 196 (11th Cir. 1993), on the other hand, the court found that a detainee was properly awarded \$200,000 in damages against county sheriff despite having signed an agreement releasing sheriff from liability prior to discharge from jail. The jury could properly determine that the release agreement was not voluntary and was therefore unenforceable.

The plaintiff in the lawsuit had been placed in jail pending trial because he

could not make bail, and remained there until, approximately seven months later, he signed a document which purportedly released officials from any liability arising from his arrest. He claimed that he had not signed the agreement voluntarily. After a jury awarded him damages in a federal civil rights lawsuit, a federal appeals court ruled that the trial judge had correctly instructed the jury that if the plaintiff had otherwise been entitled to be released on bail, and the defendant sheriff had blocked him from being released, then the signing of the release in order to end his detention did not amount to a voluntary relinquishment of his right to seek damages in a later civil lawsuit. The court found that the plaintiff sufficiently presented evidence of such alleged abuse to make it proper for the trial court to submit to the jury the issue of whether he voluntarily entered into the release agreement.

It should also be noted that, despite the criteria set forth by the U.S. Supreme Court and lower federal courts for the enforceability of “release-dismissal” agreements, individual states may establish different criteria on that issue. In Cowles v. Brownell, 73 N.Y.2d 382, 538 N.E.2d 325, 540 N.Y.S.2d 973 (N.Y. 1989), the highest court in the State of New York ruled that a criminal defendant's voluntary release of civil liability, given in exchange for the dismissal of criminal charges, was unenforceable in that state.

The case involved a motorist stopped and charged by a police officer, who allegedly suffered injuries during the incident. The prosecutor dismissed criminal charges against the motorist in exchange for an agreement to not bring a civil lawsuit against the city or the officer. The motorist subsequently filed a lawsuit against the officer for personal injuries, and trial court dismissed the lawsuit on the basis of the release-dismissal agreement.

The New York Court of Appeals, overturning the dismissal, argued that, unlike a plea bargain, in which admission of guilt leads to a mutually agreed upon punishment for wrongdoing, a release-dismissal agreement such as the one in this case does not further the ends of the criminal justice system. The court believed that the involvement of a prosecutor in essentially negotiating the resolution of a private civil matter on behalf of the police officer was a violation of his obligation to the public to prosecute crime, so that the agreement should not be enforced. Such agreements, the court reasoned, could create the appearance of impropriety or of a conflict of interest. They “may be viewed as undermining the legitimate interests of the criminal justice system solely to protect against the possibility of civil liability.”

In Polony v. City of Sterling Heights, No. 212958, 2001 Mich. App. Lexis 1728 (Mich. App.), the court enforced a release dismissal agreement entered into

by a motorist arrested for DUI who claimed that he had been suffering from a diabetic reaction at the time.

The motorist signed a standardized form “to approve plea agreement,” stating that he would plead guilty to a charge of careless driving in exchange for the dismissal of the DUI charge. A paragraph in the form also stated that, as a condition of the plea agreement, the motorist agreed to release the city, its officers, “employees, and agents from any claims, damages or causes of action of any kind because of alleged injuries or other damages suffered by defendant that may arise from the incident which gave rise to this case or from prosecution of this case.” In addition to signing the overall plea agreement, the motorist initialed that paragraph.

The appeals court found that the agreement was voluntary and enforceable, and that there was insufficient evidence that the motorist had been coerced into signing it. There also was no evidence that there was prosecutorial misconduct, such as the bringing of unfounded or frivolous charges against the motorist in an attempt to protect police officers from civil liability. The motorist admitted that, when she was purportedly having a diabetic reaction, she behaved as though she was, and could appear to be drunk, and did not dispute that her driving was erratic.

Other cases of interest on the issue of whether a release-dismissal agreement was entered into voluntarily include:

* [Jimenez v. Brunner](#), #2:00-CV-954, 328 F. Supp. 2d 1208 (D. Utah 2004), ruling that a release agreement that an arrestee signed in connection with a negotiated plea on pending criminal charges was not enforceable when the available evidence failed to show that the arrestee voluntarily entered into an agreement to waive his right to sue a police officer and the prosecutor. The arrestee was not advised at either the arraignment or the plea hearing of his right to counsel concerning the entry of the plea.

* [MacBoyle v. City of Parma](#), No. 03-3784, 383 F.3d 456 (6th Cir. 2004), in which the court held that an arrestee's excessive force lawsuit against city and its officers was properly dismissed on the basis of a release-dismissal agreement he signed waiving the right to sue in exchange for the dismissal of two of the three criminal charges against him. He voluntarily signed the agreement, there was no indication of prosecutorial misconduct, and enforcing the agreement would not be against the public interest.

* [Penn v. City of Montgomery](#), Civil #01-F-955, 273 F. Supp. 2d 1229 (M.D. Ala. 2003), finding that an arrestee's agreement to release the city and police

officers of civil liability in exchange for the dismissal of pending domestic violence charges against her was voluntary and enforceable, and there was no evidence of overreaching or prosecutorial misconduct in obtaining the release.

* Woods v. Rhodes, 92-2052, 994 F.2d 494 (8th Cir. 1993), holding a release-dismissal agreement to be valid and enforceable, barring federal civil rights lawsuit, when the plaintiff had signed it voluntarily, had not been pressured into doing so, and the prosecutor had independent reasons for entering into it besides shielding officers and city from liability

* Dye v. Wargo, No. 00-3250, 253 F.3d 296 (7th Cir. 2001). In a case concluding that a police dog is not a "person" who can be sued for violation of civil rights under color of state law, a federal appeals court also upheld the enforceability of plaintiff's release agreement, which barred his suit against an officer.

* Hill v. City of Cleveland, #92-3259, 12 F.3d 575 (6th Cir. 1993), holding that a release of the right to bring lawsuit over an arrest in exchange for the dropping of criminal charges was voluntary, and therefore enforceable, based on the factual circumstances of the signing of the release.

* Gonzalez v. Kokot, #02-1514, 314 F.3d 311 (7th Cir. 2002), stating that release agreements which the arrestees had signed in exchange for the dropping of criminal charges were enforceable, barring their federal civil rights claims against the arresting officers for false arrest and excessive force.

Prowell v. Kentucky State Police, #01-6264, 40 Fed. Appx. 86 (6th Cir. 2002) is another case in which an arrestee's agreement to release his right to pursue a federal civil rights lawsuit against state police officials in exchange for prosecutor's dismissal of the remaining criminal charges pending against him was found to be valid and enforceable.

4. Putting It "In Writing"

One key element that should always be attended to in connection with entering into "release-dismissal" agreements is "putting it in writing." Those who don't, may, to their regret, subsequently learn the truth of film mogul Samuel Goldwyn's reputed statement that "An oral contract isn't worth the paper it is written on." The importance of this is supported by both common sense and by at least one court case.

In Livingstone v. No. Belle Vernon Bor., #95-3252, 91 F.3d 515 (3rd Cir. 1996), cert. denied, 1997 U.S. Lexis 194, a federal appeals court overturned a trial

court's dismissal of a federal civil rights lawsuit based on a release-dismissal agreement which was never reduced to writing. The appeals court found that, in the absence of a written agreement, there was a genuine issue of fact as to whether the plaintiffs gave informed and voluntary consent to the agreement. Ultimately, it decided not to enforce the agreement.

5. Other Issues

When a release-dismissal agreement is entered into, care should be taken to make it clear just what claims, against what parties, are being released. In Taylor v. Windsor Locks Police Dept., No. 02-0100, 71 Fed. Appx. 877 (2nd Cir. 2003), the court ruled that an arrestee's release of "all" claims against town's chief of police could reasonably be interpreted as releasing claims against the police chief in his individual capacity. When a release does not specify the capacity in which a person is being released, it is reasonable to interpret it as including both their official and individual capacity, the court stated.

In Penn v. City of Montgomery, No. 03-14207, 381 F.3d 1059 (11th Cir. 2004), the court rejected the argument that a release-dismissal agreement violated certain provisions of Alabama state law. It held that an arrestee's release of city and officers from civil liability in exchange for dismissal of criminal charges of domestic violence against her was fully enforceable, and that an Alabama statute prohibiting the crime of "compounding," punishing agreements offering something of value in exchange for not seeking prosecution of a crime, did not apply to a city attorney's offer of a release agreement.

In Lynch v. City of Alhambra, #88-5957, 880 F.2d 1122 (9th Cir. 1989), the court found that an arrestee's allegation that he was forced to sign a release agreement on threat of prosecution, and that prosecution was unwarranted, was sufficient to question whether the release agreement was in the public interest and should be enforced.

Similarly, in Oliver v. City of Berkley, #01-CV-71689, 261 F. Supp. 2d 870 (E.D. Mich. 2003), the court held that, while a release agreement signed by an alleged victim of sexual assault by a former city police officer was voluntarily entered into in exchange for a plea agreement on pending intoxicated driving charges, there were "relevant public interests" which barred enforcement of the release. The court noted the evidence supporting the sexual assault claim and ruled that enforcement of the release could adversely affect a public interest in deterring police misconduct.

Some courts may be reluctant to enforce release-dismissal agreements when they are allegedly used too broadly. See Kinney v. City of Cleveland,

#1:99CV3054, 144 F. Supp. 2d 908 (N.D. Ohio 2001), holding that a release agreement required in every case where a criminal defendant sought placement in a first-offenders program involving dismissal of charges was "unenforceable as a matter of law" even if voluntary when allegedly no effort was made to distinguish between frivolous and meritorious civil rights claims being waived.

Also see, Cain v. Darby Borough, #91-1897, 7 F.3d 377 (3rd Cir. 1993) in which a federal appeals court held that a release of a civil rights claim obtained from an arrestee in exchange for ultimate dismissal of criminal charges was not enforceable when it was allegedly obtained pursuant to a prosecutor's "blanket" policy of requiring such release from any criminal defendant asking to be placed in special disposition program. The court believed that the requirement that the enforcement of the agreement must be in the public interest was not satisfied because there was no case specific determination that the arrestee's release would serve the public interest.

The blanket policy seemed to be motivated, the court believed, largely by a desire for "blanket immunity" from lawsuits rather than a desire to promote government thrift and prevent frivolous litigation. The court stated that the prosecutor should individually consider whether allowing a specific criminal defendant into the diversion program created a possible risk to society, and whether that defendant had a likelihood of successful rehabilitation. It believed that the prosecutor did not consider such factors, so that enforcement of the agreement violated public policy.

6. Resources

Andrew B. Coan, "The Legal Ethics of Release-Dismissal Agreements: Theory and Practice," 1 *Stanford Journal of Civil Rights and Civil Liberties* 371 (2005).
[Abstract](#).

AELE Monthly Law Journal

Bernard J. Farber

Civil Liability Law Editor

841 W. Touhy Ave.

Park Ridge IL 60068-3351 USA

E-mail: bernfarber@aol.com

Tel. 1-800-763-2802

© 2008, by the AELE Law Enforcement Legal Center

Contents may be downloaded, stored, printed or copied
but may not be republished for commercial purposes.

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)