

102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.))

(Not Selected for publication in the Federal Reporter)

(Cite as: 102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.)))

## C

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,  
Ninth Circuit.  
Arthur CARMONA; Veronica Sandoval Carmona,  
Plaintiffs-Appellants,  
v.  
CITY OF COSTA MESA; Costa Mesa Police Department; City of Irvine; City of Irvine Police Department, Defendants-Appellees,  
and  
Lawrence Hennen, individually and in his official capacity; Rene Meng, individually and in her official capacity; David Anderson, individually and in his official capacity; Matthew Mahoney, individually and in his official capacity; Gary Harvey; Shiloh Coleman, individually and in his official capacity, Defendants.  
**No. 03-55227.**

Argued and Submitted May 14, 2004.

Decided June 18, 2004.

**Background:** Former inmate, who was convicted of armed robbery, and who served two years of a 12-year sentence before being released as part of a plea agreement entered in connection with a habeas proceeding, brought a § 1983 suit with his mother against two cities and various individual defendants, alleging that the defendants violated his right to due process when they conducted a highly suggestive field identification. The United States District Court for the Central District of California, [Alicemarie H. Stotler](#), J., granted cities' motion for summary judgment, and plaintiffs appealed.

**Holding:** The Court of Appeals held that inmate failed to prove that police officers who conducted the field identification were acting pursuant to an official policy or custom.

Affirmed.

## West Headnotes

### Civil Rights 78 ↪ 1351(4)

#### 78 Civil Rights

##### 78III Federal Remedies in General

78k1342 Liability of Municipalities and Other Governmental Bodies

78k1351 Governmental Ordinance, Policy, Practice, or Custom

78k1351(4) k. Criminal Law Enforcement; Prisons. [Most Cited Cases](#)

Former inmate failed to prove that police officers who conducted an allegedly highly suggestive field identification were acting pursuant to an official policy or custom, thus precluding imposition of liability on cities in the inmate's § 1983 suit, even though one city had a policy that permitted officers to conduct one-person field identifications and an official spokesman for the city police department, endorsed the identification in the inmate's case. [42 U.S.C.A. § 1983.](#)

\*[75 Robert A. Mosier](#), Esq., [Holly H. McGregor](#), McGregor & Mosier, Laguna Hills, CA, [Gregory A. Patton](#), Law Offices of Gregory A. Patton, F. Edie Mermelstein, Santa Ana, CA, for Plaintiffs-Appellants.

[M. Lois Bobak](#), Esq., Daniel K. Spradin, Esq., Woodruff, Spradlin & Smart, Orange, CA, for Defendants-Appellees.

Appeal from the United States District Court for the Central District of California, [Alicemarie H. Stotler](#), District Judge, Presiding. D.C. No. CV 00-01215 AHS.

Before: [TASHIMA](#), [MCKEOWN](#), and [BYBEE](#),

102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.))

(Not Selected for publication in the Federal Reporter)

(Cite as: 102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.)))

Circuit Judges.

MEMORANDUM <sup>FN\*</sup>

**FN\*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [Ninth Circuit Rule 36-3](#).

**\*\*1** In February 1998, a Denny's restaurant in Costa Mesa, California, was robbed by an armed man. There were two eyewitnesses to the robbery, both of whom described the robber as a Hispanic male. Two days later, a Juice Club store in nearby Irvine, California, was robbed by an armed man. Eyewitnesses to the Juice Club robbery gave varying physical descriptions of the robber, but all agreed that the robber was a Hispanic male in his teens and that he was wearing a baseball cap. One Juice Club employee who was able to describe the cap in detail told the police that it was a Los Angeles Lakers cap with "crazy" writing on the front and emblems on both sides. The police located the cap soon after the robbery.

Several hours after the robbery, a Costa Mesa resident called the police to report that she had seen a young Hispanic male wearing a baseball cap with some sports insignia on it jumping the freeway overpass behind her backyard. Police responded to the neighborhood, encountered plaintiff Arthur Carmona walking down a sidewalk near the freeway overpass, and arrested him in connection with the Juice Club and Denny's robberies. Carmona was 16 years old at the time.

Two Juice Club employees who witnessed the robbery were brought to the place where Carmona was being detained to see if they could identify him. <sup>FN1</sup> One could not. The other felt 80 percent sure that Carmona was the robber. In order to aid the equivocal Juice Club employee in making his identification, Irvine and Costa Mesa police officers retrieved the distinctive cap worn by the robber,

brought it to the scene of the arrest, and placed it on Carmona's head. When the cap was placed on Carmona's head, the equivocal witness felt certain that he was the robber.

**FN1.** This practice, commonly referred to as a "showup," is discouraged except in exceptional circumstances because it is a notoriously unreliable means of obtaining an accurate witness identification. See *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.").

Carmona was subsequently convicted of two counts of armed robbery based solely on eyewitness testimony and identifications. He was sentenced to 12 years' imprisonment. No physical evidence linking Carmona to the crime was ever found.

Carmona petitioned for a writ of habeas corpus in California state court alleging that the field identification was so highly **\*76** suggestive and unreliable as to violate his right to due process. Three hours before his evidentiary hearing, the state offered to stipulate that Carmona's habeas petition be granted, that his conviction be vacated, and that he be set free, in exchange for Carmona's stipulation that his conviction was not the result of police or prosecutorial misconduct. Carmona was given 20 minutes to review the stipulation and decide whether or not to sign. He decided to sign the stipulation and he was released, having served over two years of his twelve-year sentence. He was then 18 years old.

Carmona and his mother filed this action under [42 U.S.C. § 1983](#) against the cities of Irvine and Costa Mesa and various individual defendants, alleging that the defendants violated his right to due process when they conducted the highly suggestive field identification. The individual defendants were subsequently dismissed and the city defendants moved

102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.))

(Not Selected for publication in the Federal Reporter)

(Cite as: 102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.)))

for summary judgment. The district court granted the motion on the grounds that Carmona's signing of the stipulation precluded his recovery, and that he had failed to raise a triable issue of fact as to whether the field identification was conducted pursuant to an official policy or practice as required to establish municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). This appeal followed.

\*\*2 We have jurisdiction to review the district court's final order pursuant to 28 U.S.C. § 1291. We review the grant of a summary judgment motion *de novo*. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003). We affirm the district court because Carmona failed to raise a genuine issue of fact as to whether the police officers who conducted the field identification were acting pursuant to an official policy or custom.<sup>FN2</sup>

FN2. Because we affirm the district court on the ground that Carmona failed to show municipal liability, we need not address whether the stipulation was valid or whether the field identification violated Carmona's due process rights.

To establish municipal liability under *Monell*, a plaintiff must show that a municipal agent whose decisions represent official policy caused the deprivation of rights at issue either (1) by enacting "policies [that] affirmatively command that it occur," or (2) by "acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (citations omitted).

Carmona failed to introduce evidence creating a material issue of fact as to whether the Costa Mesa police officer who participated in the field identification was acting pursuant to a municipal policy or custom. Therefore, the district court did not err in granting summary judgment in Costa Mesa's favor.

As to the City of Irvine, Carmona introduced some evidence that the officers involved in Carmona's field identification were acting pursuant to a municipal policy or custom, but not enough to create a genuine issue of material fact. His only evidence tending to show a pre-existing policy with respect to field identifications is the city's Field Identification Admonition Form. That form establishes that the city has a policy that permits officers to conduct one-person field identifications, but it does not create a genuine issue of fact as to whether the permitted field identifications are so "unduly suggestive" as to violate due process. See *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir.1996) (holding that an identification procedure violates due process where it is "so unduly \*77 suggestive as to give rise to a substantial likelihood of mistaken identification").

Carmona also argues that the City of Irvine ratified the use of impermissibly suggestive field identifications when Lt. Allevato, the official spokesman for the Irvine Police Department, endorsed the identification in Carmona's case. But he points to no legal authority for the proposition that Allevato is endowed with policymaking authority. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (holding that whether an individual is authorized to make policy is a question of state law). Even if he were, Lt. Allevato did not ratify a "longstanding practice or custom." See *Jett*, 491 U.S. at 737, 109 S.Ct. 2702. He defended only the field identification conducted in Carmona's case. Finally, even if Lt. Allevato's testimony could be interpreted as a general policy statement that officers may under some circumstances conduct field identifications that include the use of articles of the perpetrator's clothing, he did not endorse conduct that necessarily violates due process. Courts assess the constitutionality of field identifications, like other highly suggestive lineup procedures, considering the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Although field identifications that use articles of the perpetrator's clothing may

102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.))

**(Not Selected for publication in the Federal Reporter)**

**(Cite as: 102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.)))**

violate due process in some circumstances, *see Foster v. California*, 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), they do not violate due process in every circumstance, *see Jones*, 84 F.3d at 1209.

**\*\*3** Accordingly, the judgment of the district court is AFFIRMED.

C.A.9 (Cal.),2004.

Carmona v. City of Costa Mesa

102 Fed.Appx. 74, 2004 WL 1380256 (C.A.9 (Cal.))

END OF DOCUMENT