Law Enforcement Digest

August 2017

Law enforcement officers: Thank you for your service, protection and sacrifice.

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NINTH CIRCUIT COURT OF APPEALS

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CIVIL RIGHTS LAWSUIT: SUPERVISOR'S EMAIL DIRECTING OFFICERS NOT TO DISCUSS THE HIGHWAY PATROL'S CANINE PROGRAM OR DRUG INTERDICTION PROGRAM WITH NON-LAW ENFORCEMENT PERSONNEL VIOLATED THE CANINE OFFICER'S CLEARLY ESTABLISHED FIRST AMENDMENT RIGHTS. Moonin v. Tice, 868 F.3d 853 (August 22, 2017).

FACTS (portions excerpted from the opinion):

The Nevada Highway Patrol's canine program experienced problems with officers allegedly attempting to undermine the program. To address this situation, a supervisor sent an email to the canine officers to announce a new policy:

> Effective immediately, except for allied law enforcement agencies and High Intensity Drug Trafficking Area representatives, there will be NO direct contact between K9 handlers or line employees, with ANY non-departmental and non-law enforcement entity or persons for the purpose of discussing the Nevada Highway Patrol K9 program or interdiction program, or direct and indirect logistics therein. All communication with ANY non-departmental and non-law enforcement entity or persons regarding the Nevada Highway Patrol K9 program or interdiction program, or direct and indirect logistics relating to these programs WILL be expressly forwarded for approval to your chain-of-command. Communication will be accomplished by the appropriate manager/commander if deemed appropriate. Any violation of this edict will be considered insubordination and will be dealt with appropriately.

A canine officer believed this policy violated his First Amendment rights.

PROCEDURAL HISTORY:

A canine officer filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the supervisor who sent the email. The district court denied the supervisor's motion for summary judgment, and found that the supervisor was not entitled to qualified immunity. The district court granted the canine officer's motion for summary judgment, and found that the policy violated his clearly established First Amendment rights. The supervisor appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed with the district court.

ISSUE: Whether a policy that prohibits law enforcement officers from discussing their work with anyone outside of law enforcement violates the officers' clearly established First Amendment rights.

ANALYSIS: (portions excerpted from the opinion):

Courts use a two-step test to determine if restrictions on a government employee's speech violates the employee's First Amendment rights: (1) whether the restriction impacts a government employee's speech as a citizen on a matter of public concern; and (2) if so, whether the employing agency had an adequate justification for treating the employee differently from any other member of the general public.

In this case, the Ninth Circuit found that the policy affected the officer's speech as a citizen on a matter or public concern, and the supervisor did not have adequate justifications for prohibiting the officers from discussing their work with anyone outside of law enforcement. The Court reasoned:

(1) Even if some speech implicated by the supervisor's email edict might fall within the officers' official duties, much of the potentially affected speech does not. The policy, drafted very broadly, could reasonably be understood to forbid, on penalty of employee discipline, speech made by K9 troopers in their capacities as citizens.

(2) The email policy includes the officers' opinions about the K9 program and drug interdiction program. It also reaches legitimate whistleblower complaints about the program.

(3) The email policy applies not only to speech intended for the media but also speech directed to community groups, to city and state legislators, to state and federal officials, and even to family members and friends.

(4) At least some of any communication about the K9 program or drug interdiction program implicates matters of public concern. The email policy includes the officers' informed opinions about the K9 program, such as disputes about management of the K9 program that garnered media attention. The officers' freedom to offer their informed opinions about the direction of the K9 program on their own time, as concerned citizens, is a prerogative that the First Amendment protects.

(5) The policy makes no distinction between speech about that K9 program that reasonably could be expected to disrupt law enforcement operations (e.g., disclosing information about an active investigation) and speech that plainly would not, or that would do only inasmuch as it engendered legitimate public debate about the management of the program. The policy is not tailored to prevent the release of factual information or official records that would jeopardize ongoing or future investigations.

RESULT: The Ninth Circuit affirmed the district court's orders denying the supervisor qualified immunity, and granting the canine officer's motion for summary judgment by finding that the policy violated the officer's clearly established First Amendment rights.

CIVIL RIGHTS LAWSUIT: QUALIFIED IMMUNITY IS NOT AVAILABLE TO POLICE OFFICER ACTING AS AN OFF-DUTY SECURITY GUARD BECAUSE THE OFFICER WAS NOT SERVING A PUBLIC, GOVERNMENTAL FUNCTION WHILE BEING PAID BY A HOTEL TO PROVIDE PRIVATE SECURITY. Bracken v. Okura, 869 F.3d 771 (August 23, 2017).

FACTS (portions excerpted from the opinion):

On New Year's Eve, Dillon Bracken attended a party at the Kyo-ya Hotel and Resort's Rumfire Restaurant. Aaron Okura, a security guard for hotel, saw Bracken step over a rope without a wristband indicating he was entitled to be there. Okura moved toward Bracken, while Bracken tried to walk further into the party.

An off-duty Honolulu Police Department (HPD) officer (off-duty officer) observed this interaction, approached and, together with Okura, stopped Bracken. The hotel had hired the off-duty officer as a "special duty" officer to provide security for the event. Although the off-duty officer wore his police uniform, and HPD approved his employment at the hotel, the HPD website says "HPD officers hired for special duty assignments are off-duty." The off-duty officer was paid directly by the hotel for his employment at the hotel – not by HPD. The off-duty officer also acted at the hotel's direction in helping to stop Bracken, doing so because hotel personnel had decided to issue Bracken an internal "trespass" warning, pursuant to the hotel's internal policies.

When the off-duty officer and Okura confronted Bracken, Bracken began recording video on his cell phone. The video shows the off-duty officer asking Bracken for his identification and telling him he was being "trespassed," while Bracken repeatedly asked whether he could leave. Shortly thereafter, other hotel security guards arrived. The security guards then tackled Bracken, allegedly assaulted him and took him to the hotel's security office. Except for the initial takedown, the video does not show the alleged assault, because Bracken's phone fell to the ground. The audio recorded Bracken's voice screaming in pain, cursing and asking the guards to stop hurting him. The off-duty officer was not involved physically in the alleged assault, but the phone audio and video show he was present the entire time.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Bracken filed suit against the hotel, the hotel security guards and the off-duty officer. Among other claims, Bracken brought 42 U.S.C. § 1983 (Section 1983) claims under the Fourth and Fourteenth Amendments for unlawful seizure, excessive force and failure to intercede. The district court granted the off-duty officer summary judgment on all claims, both on the merits and based on qualified immunity. Bracken appealed the district court's dismissal of his Section 1983 failure to intercede claim to the Ninth Court of Appeals. The Ninth Circuit disagreed with the district court.

ISSUE: Whether an off-duty police officer, working for a private company and taking action on behalf of the private company, is entitled to qualified immunity.

ANALYSIS: (portions excerpted from the opinion):

An officer is entitled to qualified immunity from a Section 1983 lawsuit if: (1) the officer did not violate the plaintiff's constitutional right; or (2) the constitutional right was not clearly established at the time of the incident. However, officers may not be entitled to qualified immunity if they use their "the badge of their authority" in the service of a private non-governmental goal.

In this case, the Ninth Circuit found that the off-duty officer was not entitled to qualified immunity because he was working for a private company rather than acting in performance of public duties. The Court reasoned that the off-duty officer was not preventing Bracken from committing a crime. Rather, the off-duty officer was acting on behalf of the hotel, at the hotel's direction and while being paid by the hotel.

Additionally, the Ninth Circuit found that a reasonable jury could conclude that the off-duty officer failed to intercede in the alleged assault on Bracken. In general, law enforcement officers are not liable for failing to protect a person from harm. An exception to this general rule is the "danger creation" exception. This exception imposes a duty to intercede on an officer where the officer's affirmative conduct places the plaintiff in danger. When an officer's affirmative conduct creates a foreseeable risk of harm to the plaintiff, the officer will be liable for failing to intercede if the officer demonstrates a deliberate indifference to the danger.

In this case, the Ninth Circuit found that a reasonable jury could conclude that the off-duty officer engaged in affirmative conduct that exposed Bracken to foreseeable harm:

(1) The off-duty officer affirmatively prevented Bracken from leaving the party and ensured that Bracken remained under the control of the hotel's security guards.

(2) When the security guards surrounded and physically grabbed Bracken, the off-duty officer did not step away or intimate that the situation was now under the security guards' control. Instead, he again asserted his authority over Bracken, again telling Bracken he was being trespassed and needed to show identification.

(3) As a trained police officer, the off-duty officer should have known that the hotel guards were overreacting and exposing Bracken to injury.

(4) At no point during the alleged assault did the off-duty officer take any action to stop the assault.

RESULT: The Ninth Circuit reversed the district court's order granting the off-duty officer qualified immunity and dismissing Bracken's failure to intercede claim.

CIVIL RIGHTS LAWSUIT: A REASONABLE JURY COULD CONCLUDE THAT AN OFFICER USED EXCESSIVE FORCE; BUT, THE OFFICER IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE IT WAS NOT CLEARLY ESTABLISHED THAT AN OFFICER USING A LEG SWEEP (AFTER SUBJECT DID NOT COMPLY WITH VERBAL COMMANDS, THE OFFICER HAD PROBABLE CAUSE TO ARREST THE SUBJECT, AND THE SITUATION WAS VOLATILE) WAS EXCESSIVE FORCE.
Shafer v. County of Santa Barbara, 868 F.3d 1110 (August 29, 2017).

FACTS (portions excerpted from the opinion):

On October 4, 2009, hundreds to thousands of intoxicated college students congregated on Del Playa Drive. There was loud music playing, and students were yelling, screaming, and running around.

Deputy A and Deputy B were on patrol that night on Del Playa Drive. Shortly after midnight, four students approached the deputies and said that they had just been hit with water balloons. This complaint caused Deputy A concern, because water balloons had been a serious problem on Del Playa Drive and could cause injuries or start fights. Within one minute of hearing this report, Deputy A identified two males – Jay Shaffer and his friend Domenico Gianola – walking with water balloons in their hands. The deputies approached Shafer and Gianola, and Deputy A ordered them to drop the balloons. Gianola dropped his balloons, but Shafer did not. Instead, Shafer asked Deputy A three or four times why he could not hold the balloons. Deputy A continued to order Shafer to drop the balloons but did not answer Shafer's questions.

According to Shafer, Deputy A aggressively grabbed him by the arm and pulled him toward the curb. Shafer attempted to maintain his footing, but Deputy A swung him toward the sidewalk. Shafer never tried to break free of Deputy A's hold and never resisted Deputy A. Once Deputy A and Shafer reached the sidewalk, Deputy B grabbed Shafer's other arm. Deputy A kicked Shafer's feet out from under him, and Shafer fell face first onto the pavement. The officers piled on top of him.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Shafer filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the officers. The district court denied Deputy A's motion for qualified immunity. The case proceeded to a jury trial. The jury found that Deputy A had probable cause to arrest Shafer for resisting, obstructing, or delaying a peace officer. The jury found that Deputy A used excessive force against Shafer. Deputy A filed a motion for judgment as a matter law based on qualified immunity. The district court denied that motion. Deputy A appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the district court.

ISSUE: Whether the law was clearly established that Deputy A using a leg sweep, under the specific facts of this case, was excessive force that violated the Fourth Amendment.

ANALYSIS: (portions excerpted from the opinion):

An officer violates a person's Fourth Amendment rights by using excessive force against that person. To determine whether an officer used excessive force, courts weigh the *Graham* factors: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

An officer is entitled to qualified immunity in a Section 1983 lawsuit if: (1) the officer did not violate the plaintiff's constitutional rights; or (2) the constitutional right was not clearly established at the time of the incident.

In this case, the Ninth Circuit found that a reasonable jury could conclude that Deputy A used excessive force because:

(1) *Severity of the crime*: Deputy A initiated contact with Shafer based on a report that someone had thrown water balloons at four individuals. Approximately one minute later, Deputy A saw Shafer walking with balloons in his hands. Deputy A arrested Shafer for resisting, obstructing, or delaying a peace officer. Although Deputy A was entitled to use some degree of force in executing Shafer's arrest, the jury could conclude, based on the fact that Shafer was suspected of committing only a misdemeanor, that Deputy A's leg sweep maneuver was excessive under the circumstances.

(2) *Threat posed by Shafer*: Shafer never made any verbal threats toward Deputy A. Shafer was noncompliant in following Deputy A's orders and he did not resist, obstruct, or delay Deputy A when Deputy A lawfully arrested Shafer. In light of the surrounding circumstances, Shafer's actions presented some threat to Deputy A. However, the jury could conclude (based on Shafer's testimony) that Shafer did not say anything threatening to Deputy A, and that any threat perceived by Deputy A was not "immediate" or significant enough to justify a leg sweep maneuver.

(3) *Actively resisting or attempting to evade arrest*: The jury's verdict that Deputy A had probable cause to arrest Shafer for resisting, delaying or obstructing a policy officer,

makes clear that Shafer willfully resisted, obstructed, or delayed Deputy A during his execution of Shafer's arrest.

However, the Ninth Circuit found that Deputy A was entitled to qualified immunity because the law was not clearly established at the time of the incident. Specifically, the law was not clearly established that an officer uses excessive force: (1) when the officer progressively increases his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver; (2) when a misdemeanant refuses to comply with the officer's orders and resists, obstructs, or delays the officer in his lawful performance of duties such that the officer has probable cause to arrest him; and (3) the incident occurs in a challenging environment (i.e., hundreds to thousands of intoxicated college students screaming and running around).

RESULT: Since Deputy A was entitled to qualified immunity because the law was not clearly established at the time of the incident, the Ninth Circuit reversed the district court's orders and vacated the jury verdict.

CIVIL RIGHTS LAWSUIT: OFFICERS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED THAT USING DEADLY FORCE (AGAINST A SUBJECT WHO ADVANCED TOWARDS OFFICERS, IN A CONFINED SPACE, WITH A TWO FOOT LENGTH OF A BROKEN HOCKEY STICK WHILE GROWLING AND YELLING) WAS EXCESSIVE FORCE.
Woodward v. City of Tucson, 870 F.3d 1154 (September 15, 2017).

FACTS (portions excerpted from the opinion):

At 8:58 p.m., the police department received a call from "Zee." Zee reported she was employed by an apartment complex landlord, and former tenants were inside an apartment that was supposed to be empty.

Officer A responded and arrived at the apartment at 11:22 p.m. According to Officer A, the metal security door was closed when he arrived. He turned the doorknob of the security door and learned that it was unlocked. He opened the security door, turned the doorknob of the front door and opened it enough to learn that it was also unlocked, and then closed the front door. Officer A left the security door open. He then radioed for backup because he had an apartment with an open door. Officer B responded and arrived on the scene at 11:32 p.m. The officers did not see any sign of forced entry, although Officer B noted that the security door was swung wide open when he arrived.

At this point, both officers drew their guns, knocked on the door, and announced that they were police. When no one answered the officers' call, they opened the door and entered the apartment.

Once in the apartment, the officers realized that space in the room was limited because there were numerous belongings stacked against the wall and taking up approximately half of the room. The officers cleared the front living room and determined that no one else was present. They saw a closed door to what is the apartment's only bedroom and could hear a radio playing inside the enclosed room. The officers approached the closed door and arranged themselves such that Officer B was to the left of the door and Officer A was to the right. Officer A then knocked on the door and announced their presence, at a volume he believed was loud enough to be heard over the radio playing in the room. No one responded.

Officer B then opened the door. Because of his position he could not see into the bedroom. Officer A stated that he saw Michael Duncklee holding "a large stick," with a woman behind him. Officer A stated that Duncklee was holding the stick in a way that would allow him to strike at Officer A's head.

At this point, the officers' accounts differ. According to Officer A:

> As soon as the door swung open enough to see Duncklee, he started charging at me with the stick raised where it could strike at my head, chest or arms. As Duncklee charged he was also yelling something like "aaahh". From the instant I first saw Duncklee, I perceived that he was a serious and potentially deadly threat to me. He came at me in an aggressive manner with a scream and the stick raised over his shoulder. He was initially about five to six feet from me. Duncklee came through the door frame holding the stick in a swinging position with the end above his shoulder. I immediately started backing up, but knew that I couldn't back up very far because of the small size of the room and the clutter in it. I yelled "Police, stop" at Duncklee, Duncklee kept coming at me. I fired at Duncklee's chest.

According to Officer B, when he first opened the door to the closed room:

> I heard a growling noise as if it were an animal. Immediately after that, Duncklee burst through the door into the front room where we were. He was charging at me in a very aggressive manner holding a big, huge stick that appeared to be a hockey stick which he was starting to bring towards my head in a downward motion. Duncklee had the hockey stick up and I remember seeing about 2 feet of the stick raised and coming down to hit my head. I heard a gunshot. There wasn't room to back up because of the clutter and because Duncklee was charging so fast. I tried taking a step or two backwards and hit something behind me which made me start leaning backwards as I shot at Duncklee. I believe that my shot hit Duncklee's head because I was starting to lean backwards at that point from whatever was behind me. Duncklee was only about the distance I could reach if I stretched my arms straight out when I shot him. He was close enough at that point where he could hit me with the hockey stick.

Duncklee died from his gunshot wounds.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Duncklee's mother filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the officers. The lawsuit claimed that the officers used excessive force and violated Duncklee's Fourth Amendment rights. The officers filed a motion for summary judgment based on qualified immunity. The district court denied that motion. The officers appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the district court.

ISSUE: Whether the law was clearly established that the officers using deadly force, under the specific facts of this case, was excessive force and violated the Fourth Amendment.

ANALYSIS: (portions excerpted from the opinion):

An officer is entitled to qualified immunity in a Section 1983 lawsuit if: (1) the officer did not violate the plaintiff's constitutional rights; or (2) the constitutional right was not clearly established at the time of the incident.

In this case, the Ninth Circuit found that the law was not clearly established that the officers using deadly force in this situation violated Duncklee's Fourth Amendment rights. The Ninth Circuit reasoned:

(1) Officer A and Officer B encountered, upon opening the bedroom door with their guns drawn, Duncklee immediately advancing towards them, yelling or growling, with a two-foot length of broken hockey stick raised in a threatening manner.

(2) The apartment was small and cluttered, making it difficult for the officers to retreat. Before firing, Officer A yelled "police, stop" at Duncklee.

(3) Reasonable officers in this position would not have known that shooting Duncklee violated a clearly established right.

(4) Case law makes clear that the use of deadly force can be acceptable in such a situation.

RESULT: The Ninth Circuit reversed the district court's order that denied the officers qualified immunity.

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WASHINGTON STATE COURT OF APPEALS

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SUFFICENCY OF EVIDENCE: THREATS TO COMPEL PROPERTY OWNER TO SIGN A NOTARIZED LETTER PROMISING NOT TO BRING CRIMINAL CHARGES AGAINST THE DEFENDANT WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR FIRST DEGREE EXTORTION. State v. McClure, __ Wn. App. __, 402 P.3d 355 (August 22, 2017).

FACTS (portions excerpted from the opinion):

In late 2013, Robert Williams and Jason McClure entered into an agreement under which McClure would reside in a double wide trailer Williams owned. After a year, Williams contacted McClure and told him that if he did not pay rent, Williams would evict him. McClure responded by threatening to destroy the trailer if Williams evicted him.

McClure did not pay his rent and Williams began the eviction process. Williams visited the trailer on the day McClure was to be evicted and discovered that the sliding glass door, the front door, the kitchen cabinets, and the wood stove had been removed. In addition, pipes were ripped out of the ceiling and electrical lines had been cut. Williams contacted the sheriff. A deputy sheriff informed Williams that someone had taken out a Craigslist advertisement inviting people onto the property to take what they wanted.

Williams sent a text message to McClure asking him to remove the advertisement. McClure texted a response:

> I will pull the ads if you take a letter, signed and notarized by both you and your wife that will not allow any charges to be placed against me or my wife for anything related to the property. I don't need the hassle. I will also not have the signs placed that I made for the same purpose.

After Williams again asked McClure to remove the ad, McClure texted, “A simple letter will take you 15 minutes and it will be done.”

PROCEDURAL HISTORY (portions excerpted from the opinion):

The State charged McClure with first degree extortion. A jury convicted McClure. McClure appealed to the Washington State Court of Appeals and argued that the evidence was insufficient to support a conviction for first degree extortion. The Court of Appeals disagreed.

ISSUE: Whether the text message threatening to keep a Craigslist advertisement posted and posting other signs (which invited people to take property from the victim’s trailer) unless the victim signed a notarized letter promising not to pursue criminal charges against the defendant was sufficient evidence to support a conviction for first degree extortion.

ANALYSIS (portions excerpted from the opinion):

Under RCW 9A.56.120(1), a person is guilty of first degree extortion if that person commits “extortion” by means of specific types of threats. “Extortion” means “knowingly to obtain or attempt to obtain by threat property or services of the owner.” RCW 9A.04.110(22) defines “property” as “anything of value, whether tangible or intangible, real or personal.”

The Court of Appeals found that the text messages were sufficient evidence to support McClure’s first degree extortion conviction. The Court reasoned:

(1) RCW 9A.04.110(22) does not define “property” as a tangible thing. The definition includes something that is intangible, as long as it has value.

(2) McClure was trying to obtain a promise from Williams that he would not allow charges to be made against McClure for anything related to the damaged property.

(3) McClure clearly was seeking a promise to not pursue criminal charges for a crime that involved financial loss to Williams – the cost of repairing damaged property. As a victim of a crime, Williams would have the ability to receive restitution in a criminal proceeding for the property damage McClure caused. The ability to receive restitution for property damage had value to Williams.

RESULT: The Court of Appeals affirmed McClure’s conviction for first degree extortion.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General’s Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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