Law Enforcement Digest

April 2016

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

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HONOR ROLL

730th Basic Law Enforcement Academy – January 20, 2016 to May 25, 2016

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	Shelly Hamel, Renton PD

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NINTH CIRCUIT COURT OF APPEALS

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SEARCH AND SEIZURE: OFFICER HAD REASONABLE SUSPICION THAT A VEHICLE WAS TRANSPORTING ILLEGAL DRUGS AND OFFICER'S RUSE TELLING DRIVER THAT HE WAS STOPPED FOR A TRAFFIC VIOLATION DID NOT VIOLATE THE FOURTH AMENDMENT. United States v. Magallon-Lopez, 817 F.3d 671 (March 31, 2016).

Officers with a Drug Enforcement Agency (DEA) task force learned through authorized wiretaps "that a shipment of methamphetamine would be traveling by car from Washington to Minnesota." Specifically, the wiretaps provided this information:

> (1) on September 27, 2012, a man named Juan Sanchez would be transporting methamphetamine from the Yakima Valley in Washington to Minneapolis, Minnesota; (2) Sanchez would be accompanied by another Hispanic male who had a tattoo on his arm of a ghost, skull, or something else related to death and went by the nickname "Chaparro" (meaning short); and (3) the two men would be traveling in a green, black, or white passenger car with Washington plates.

The officers also obtained the suspect's location from cell site information. Based on this information, the officers estimated that the suspect would be transporting methamphetamine "through Bozeman, Montana, sometime between 3:00 a.m. and 4:00 a.m. on September 28."

As a result, the officers arranged surveillance on Interstate 90 that runs through Bozeman, Montana. The following occurred:

> Around 3:00 a.m. on September 28, [the surveillance officers] spotted a green Volkswagen Passat with Washington plates traveling eastbound. An officer dispatched to follow the car confirmed that two men were inside and that both appeared to be Hispanic and short in stature. The officer relayed the car's license plate number to another officer, who determined that the car was registered to a man named Hector Lopez at an address in Toppenish, Washington, a town in the Yakima Valley associated with the investigation.
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> After obtaining this information, the officers decided to conduct an investigatory stop. The officer following the car pulled it over as if making a routine traffic stop. Although the officer had not observed any traffic violations, he told [the driver, Hector Magallon-Lopez] that the reason for the stop was Magallon-Lopez's failure to signal properly before changing lanes. The officer knew this was not the real reason for the stop, but he did not want to disclose at that point the true nature of the investigation.

During the stop, the officers confirmed that the vehicle's driver and registered owner was Magallon-Lopez. Magallon-Lopez had "a tattoo of a ghost or grim reaper on his right forearm." Both Magallon-Lopez and his passenger, Juan Sanchez, admitted that "they were travelling from the Yakima Valley to Minnesota to work in a restaurant."

A sheriff's officer with a drug detection canine arrived at the scene. The canine "positively alerted to the presence of drugs in the car." Based on all of this information, the officers had the

car impounded and applied for a search warrant. After obtaining the search warrant, the officers found approximately two pounds of methamphetamine in the car.

Magallon-Lopez was charged with drug-trafficking. Before trial, he moved to suppress the drugs found in his car. He argued that since the officer stated the reason for the stop was a traffic infraction (when Magallon-Lopez had not committed any traffic infraction), the officer lacked reasonable suspicion to stop the car. The trial court disagreed, denied the motion, and Magallon-Lopez was convicted. On appeal, Magallon-Lopez argued that the trial court erred by denying the suppression motion. The Ninth Circuit Court of Appeals disagreed.

First, the Ninth Circuit found that the officers had reasonable suspicion to stop the car. Under the Fourth Amendment to the U.S. Constitution, officers may conduct an investigatory stop when "the facts known to the officers established a reasonable suspicion to believe that criminal activity may be afoot." Here, the officers had reasonable suspicion that the car was transporting illegal drugs based on: (1) information from the wiretaps about the methamphetamine shipment was "presumptively reliable" because the it came "straight from" the suspects and there was no reason to believe they were lying; and (2) the officers verified these details before stopping the car: (i) the car matched the description from the wiretaps; (ii) the vehicle was traveling in the direction, on the road, and at the time discussed by the suspects in the wiretaps; (iii) the vehicle's occupants matched the description of the suspects; and (iv) the vehicle's registered owner lived in the town associated with the investigation.

Second, the Ninth Circuit found that the officer's ruse in telling Magallon-Lopez that he was stopped for a traffic infraction did not render a valid stop, based on reasonable suspicion of transporting illegal drugs, unconstitutional. The Ninth Circuit reasoned:

> So long as the facts known to the officer establish reasonable suspicion to justify an investigatory stop, the stop is lawful even if the officer falsely cites as the basis for the stop a ground that is not supported by reasonable suspicion. We emphasize, however, that although our focus is on the objectively reasonable basis for the stop, not the officers' subjective intentions or beliefs, the facts justifying the stop must be known to officers at the time of the stop.

As a result, the Ninth Circuit affirmed the trial court's denial of the suppression motion, and the convictions stand.

CIVIL RIGHTS LAWSUIT: RELEASING A CANINE TRAINED IN "BITE AND HOLD" INTO AN OFFICE BUILDING CONSTITUTED A SEVERE USE OF FORCE; AND OFFICERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE A REASONABLE JURY COULD FIND THAT THE USE OF SUCH SEVERE FORCE WAS UNREASONABLE IN THIS SITUATION.
Lowry v. City of San Diego, __ F.3d __, 2016 WL 1273183 (April 1, 2016).

One evening, Sara Lowry went out for drinks after work. Rather than return home, she decided to sleep on a couch in her office building. At one point during the night, she inadvertently set off the office building's security alarm when going to the restroom. The security company called the police about the security alarm.

San Diego police officers responded to the security company's call. The officers had a police canine named Bak. The officers walked around the office building. The officers did not observe any entry points or signs of forced entry. The officers did see "that the door leading to Suite 201

was propped open," but "could not see inside the suite, and therefore did not know whether anyone was inside."

The following then happened:

> Before entering Suite 201, [the canine officer] yelled loudly, "This is the San Diego Police Department! Come out now or I'm sending in a police dog! You may be bitten!" [The officer] waited between 30 and 60 seconds, but received no response. He repeated the same warning once or twice more; again, there was no response. Lowry did not hear these warnings. [The officer] then released Bak "off lead" (that is off of her leash) into the suite, and followed Bak in. [The officer] did not keep track of Bak's precise location once he let her off lead, and gave no further warnings after entering the suite.
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> Eventually, [the officer] made his way into the office where Lowry was sleeping. Once there, he saw a purse whose contents had been spilled across the floor. He then shone his flashlight against the office wall and spotted a person under a blanket on the couch. At that moment, Bak jumped on top of Lowry. The two struggled momentarily before [the officer] called Bak off. Bak responded immediately, returning to [the officer's] side.
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> Lowry emerged from her skirmish with Bak with a large gash on her lip that was bleeding profusely. . . . Bak had almost completely bitten through her lip. Shortly after the incident, [the canine officer] told Lowry, "I just can't believe that's the only damage. You're very lucky. She could have ripped your face off."

Lowry later sued the City of San Diego under 42 U.S.C. § 1983 (Section 1983) and alleged that the officers releasing Bak into the office building was an unreasonable use of force and violated her Fourth Amendment rights. During the litigation's discovery phase, Lowry learned that the San Diego Police Department:

> [T]rains its police dogs to enter a building, find a person, bite them, and hold that bite until a police officer arrives and removes the dog. [The canine officer testified during his deposition that] police dogs are not trained to differentiate between "a young child asleep or . . . a burglar standing in the kitchen with a butcher knife," and will simply bite the first person they find. Generally, the decision of whether to conduct a canine search on or off lead is left to the officer's discretion. However, the [San Diego Police Department's] Canine Unit Operations Manual provides that residential searches "should normally be conducted on-lead unless the handler can reasonably determine there are no residents or animals in the home.

Before trial, the City of San Diego moved for summary judgment. The trial court granted the motion and dismissed the lawsuit. Lowry appealed. The Ninth Circuit Court of Appeals disagreed with the trial court.

First, based on the facts of this case, the Ninth Circuit found that releasing Bak into the office building constituted a severe use of force. The Ninth Circuit reasoned:

> Bak "could have ripped [Lowry's] face off." . . . Bak was trained to bite the first person she saw and maintain the bite until ordered by an officer to release. Moreover, the particular facts of this case magnified the threat that Bak posed to Lowry: as [the officer] admitted, Bak was not trained to differentiate between "a young child asleep or . . . a burglar standing in the kitchen with a butcher knife," and would simply bite the first person she found. Furthermore, a reasonable juror could find that by allowing Bak to

> enter Suite 201 before him off lead, and by failing to keep track of Bak's precise location while searching the suite, [the officer] increased the likelihood that Bak would bite and seriously injure Lowry before being called off.

Second, the Ninth Circuit found that the severe use of force was not objectively reasonable under the circumstances. Courts use a three-factor test (*Graham* factors) to evaluate whether an officer's use of force was objectively reasonable: (1) the severity of the crime; (2) the danger posed to the officer or others; and (3) whether the subject resisted or evaded arrest. Applying these factors, the Ninth Circuit found that a reasonable jury could find that the use of force was unreasonable, and the trial court erred by granting summary judgment:

> (1) There was "no reason to believe that Lowry was armed, dangerous, or intent on inflicting harm" and a security alarm (alone) does not provide a reason to believe that the person inside is armed, dangerous, or posing "an immediate threat" to anyone's safety;
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> (2) Lowry did not resist or evade arrest because she did not hear the officer's commands. "The mere failure to respond to an officer's orders, without more, generally does not support the use of serious force - especially if the [subject] has not heard the commands"; and
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> (3) The potential crime of "burglary is not an inherently dangerous crime." The Ninth Circuit noted that suspected burglaries can pose dangers to law enforcement officers. But, "the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean [s]he is physically dangerous."

The Ninth Circuit also considered other factors. It noted that the officers giving a warning before releasing Bak weighed in their favor, but gave the warning limited weight because Lowry did not hear it. Additionally, the Ninth Circuit noted that the officers could have used a less intrusive alternative by the officer keeping "Bak on lead, a tactic that would have allowed him to exercise greater control over Bak."

Since there were questions of fact on whether the officer releasing Bak into the office was a reasonable use of severe force, the Ninth Circuit reversed the trial court's grant of summary judgment and remanded the case for trial.

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WASHINGTON STATE SUPREME COURT

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SEARCH AND SEIZURE: OFFICERS MAY CONDUCT LIMITED SWEEP OF VEHICLE WHEN THERE IS REASONABLE SUSPICION THAT A FIREARM IS IN THE VEHICLE AND THE VEHICLE WILL SHORTLY BE TOWED OR IMPOUNDED. State v. Duncan, __ Wn.2d __, __ P.3d __, 2016 WL 1696698 (April 28, 2016).

Late one night, 911 dispatch received reports of a drive-by shooting at a residence. The following then occurred:

> Callers described the car as white and possible a Subaru or Impala. Officers were dispatched and stopped [Chad] Duncan's white Ford Taurus. Officers removed Duncan and his two passengers from the car at gunpoint, ordered them to the ground, handcuffed them, and put them in separate police cars. Without a warrant, officers opened the doors and found shell casings on the floor and a gun between the front

passenger seat and the door. [The officer's motivation to search the car was to ensure that the car was not towed with a gun that could fire during the tow]. One officer removed the gun and placed it into an evidence bag in his own patrol car.

The passengers told the police that Duncan had fired from the car and tossed the gun on the front floorboards. After the car was towed to a police annex, police obtained a warrant and made a more thorough search.

The prosecution charged Duncan with first degree assault and unlawful possession of a firearm. Before trial, Duncan moved to suppress the gun by arguing that the officer's warrantless search of the vehicle violated the Washington state constitution, Article I, section 7. The trial court denied the motion to suppress and Duncan was convicted. Duncan appealed and argued that the officer searching the vehicle for the gun violated his rights under the Washington state constitution. The Washington State Supreme Court disagreed.

Under the Washington state constitution, "warrantless searches and seizures are per se unreasonable." However, "there are a few jealously and carefully drawn exceptions to the warrant requirement." One such exception is the community caretaking the exception "when officers have reasonable grounds to believe that objects likely to burn, explode or otherwise cause harm need to be secured." Based on this exception, the Supreme Court held:

> [U]nder the community caretaking exception to the warrant requirement, officers may make a limited sweep of a vehicle when (1) there is reasonable suspicion that an unsecured weapon is in the vehicle and (2) the vehicle has or shortly will be impounded and will be towed from the scene.

The Supreme Court cautioned law enforcement officers that this is a limited exception to the warrant requirement, and officers should not use it as a pretext for an investigatory search. Based on the facts of this case and the officers' testimony, the Supreme Court was "confident that the desire to remove an unsecured gun from the vehicle was not here used as a pretext for an otherwise unlawful search."

Accordingly, the Supreme Court affirmed the trial court's denial of the suppression motion and convictions stand.

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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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