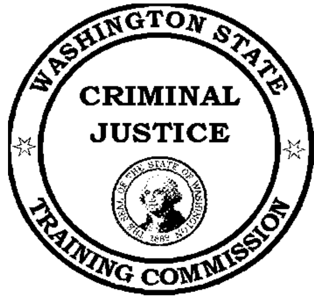

Law Enforcement Digest

November 2016

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: OFFICER NOT ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER THE OFFICER USED EXCESSIVE FORCE IN SHOOTING A WOMAN WHO CARRIED A KNIFE AND DID NOT RESPOND TO OFFICERS' COMMANDS TO DROP THE KNIFE. Hughes v. Kisela, __ F.3d __, 2016 WL 6936593 (November 28, 2016).

Officers responded to a report that a woman was hacking a tree with a knife. When the officers arrived on scene, they observed Amy Hughes "carrying a large kitchen knife" and walking towards Sharon Chadwick. From Ms. Chadwick's perspective, Ms. Hughes' "demeanor at the time [was] composed and non-threatening." Other witnesses at the scene stated that Ms. Hughes never raised the knife.

The officers were separated from the women by a chain link fence. The officers commanded Ms. Hughes to drop the knife. Ms. Hughes did not drop the knife. An officer shot Ms. Hughes. These events "occurred in less than one minute." During the incident, Ms. Chadwick "was never in fear, and did not feel that Ms. Hughes was a threat." Ms. Chadwick later informed investigators that Ms. Hughes had a mental illness, and Ms. Chadwick believed that Ms. Hughes "did not understand what was happening when the police yelled for her to drop the knife." Ms. Hughes survived her injuries.

Ms. Hughes sued the officers under 42 U.S.C. § 1983 (Section 1983) and claimed that the officer used excessive force in violation of her Fourth Amendment rights. The trial court granted the officer's motion for summary judgment based on qualified immunity. Ms. Hughes appealed that order to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals disagreed with the trial court and found that genuine issues of material fact existed as to whether the officer used excessive force.

In a Section 1983 lawsuit, an officer is entitled to qualified immunity if: (1) the officer's actions did not violate the plaintiff's constitutional rights; or (2) if the constitutional right was not clearly established at the time of the incident. An officer may move for summary judgment where there are no genuine issues of material fact and the officer is entitled to qualified immunity as a matter of law. When considering a motion for summary judgment, courts view the facts in the light most favorable to the nonmoving party. Under this standard, the Ninth Circuit Court of Appeals found that there were genuine issues of material fact and that a jury should decide whether the officer used excessive force.

When evaluating whether an officer used excessive force in violation of the Fourth Amendment, courts turn to the *Graham* factors: (1) the severity of 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. The most important *Graham* factor is whether the suspect posed an immediate threat to the safety of officers or third parties. Additionally, courts may consider other factors such as "the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed."

In this case, the Ninth Circuit (viewing the facts in the light most favorable to Ms. Hughes) found that there were several issues of genuine material fact that did not support the officer's perception that Ms. Hughes posed an immediate threat: (1) witnesses stated that Ms. Hughes did not raise the knife; (2) the officers were responding to a welfare check call rather than responding to a reported crime; (3) the officers did not give Ms. Hughes enough time to drop the knife because Ms. Chadwick stated she "heard only two warnings in quick succession, and perceived that Ms. Hughes did not understand what was happening"; (4) the officers were aware that Ms. Hughes may have had mental health issues because they responded to a welfare check of a woman hacking a tree with a knife, a person informed the officers that Ms. Hughes was acting erratically, and Ms. Hughes appeared to stumble; and (5) the plaintiff's expert "concluded that [the officer] should have used his Taser, and that shooting through the fence was both dangerous and excessive." As such, the Ninth Circuit found that the officer was not entitled to qualified immunity as a matter of law and a jury should decide the case.

As a result, the Ninth Circuit reversed the trial court's order granting the officer's motion for summary judgment, and remanded the case to the trial court for further proceedings.

MIRANDA: THE BOOKING EXCEPTION AND PUBLIC SAFETY EXCEPTION TO THE *MIRANDA* RULE DID NOT APPLY TO A JAIL OFFICER ASKING AN INMATE BOOKING QUESTIONS ABOUT GANG AFFILIATION. United States v. Williams, 842 F.3d 1143 (December 5, 2016).

Police officers arrested Antonio Gilton for murder. After his arrest, officers took Gilton to an interrogation room. An officer read Gilton *Miranda* warnings and Gilton "unequivocally invoked his right to an attorney."

Officers transported Gilton to jail. At the jail, Gilton was placed in a holding cell. Several hours later, a jail officer "removed Gilton from the cell and asked whether he was a gang member." The officer "did not advise Gilton that he was free to return to his cell without answering or to have a lawyer present; nor was Gilton informed that his answers could be used to incriminate him." Gilton told the officer "Yeah, I hang out [with a specific gang], put me where I'm from."

The officer noted Gilton's answers "on two forms used by jail officials in determining where to house inmates - an 'Information Report,' which designates any gang affiliation, and a 'Class Interview,' which reflects whether the prisoner presents any 'High Risks,' including being a gang member." Apart from Gilton's statement, the officer relied on Gilton's "arrest record and police intelligence" to designate gang affiliation.

Gilton was charged with federal racketeering crimes. The charged crimes required the prosecution to prove, among other elements, that Gilton was part of a racketeering enterprise (i.e., a gang). Before trial, Gilton moved to suppress his statements to the jail officer about his gang affiliation. The trial court granted the motion to suppress.

The prosecution appealed that decision to the Ninth Circuit Court of Appeals. On appeal, the prosecution argued that these exceptions to *Miranda* applied to Gilton's statements about gang affiliation: (1) booking questions exception; or (2) public safety exception. The Ninth Circuit disagreed.

Before an in-custody interrogation, *Miranda* requires officers to inform the suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." If the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." For the purposes of *Miranda*, "interrogation" means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

An exception to the *Miranda* rule is the "booking questions exception." This exception involves "questions to secure the biographical data necessary to complete booking or pretrial services." Examples of booking questions include the suspect's "name, address, height, weight, eye color, date of birth, and current age[.]" Courts have found that these questions are not an interrogation under *Miranda* because "such questions rarely elicit an incriminating response, [and] routine gathering of biographical data does not constitute interrogation sufficient to trigger constitutional protections."

However, the booking exception does not apply "[w]hen a police officer has reason to know that a suspect's answer may incriminate him[.]" The standard to determine if booking questions constitute an interrogation (that requires *Miranda* warnings) is "whether, in light of all the circumstances, the police should have known that a question was reasonably likely to elicit an

incriminating response." In this case, the Ninth Circuit found that the jail officer should have known that asking Gilton about his gang membership was reasonably likely to elicit an incriminating response.

The Ninth Circuit reasoned:

> The risk that information about gang affiliation will prove incriminating is even greater when a defendant is charged in California with murder, a crime that the state's Supreme Court has acknowledged is "frequently committed for the benefit of criminal street gangs." . . . When the [jail officer] asked Gilton about his gang membership, he had already been arrested on charges of murder, conspiracy to commit murder, discharge of a firearm at an occupied motor vehicle, and possession of a firearm by a felon. Questions about Gilton's gang affiliation were thus reasonably likely to elicit an incriminating response, even if the federal [racketeering charges that included membership in an enterprise (e.g., gang membership) as an element] had not yet been filed.

However, the Ninth Circuit noted that this holding does not prevent jail officers from asking gang affiliation questions to protect inmate safety. Rather, the holding prevents the prosecution from admitting such evidence in a criminal trial against the defendant:

> We do not hold that prison officials may not inquire into a prisoner's gang membership in the interests of inmate safety. . . . Nor do we hold that the responses cannot be used for purposes of inmate housing. Rather, we hold only that when a defendant charged with murder invokes his *Miranda* rights, the government may not in its case-in-chief admit evidence of the prisoner's unadmonished response to questions about his gang affiliation.

The Ninth Circuit also found that the public safety exception to *Miranda* did not apply to Gilton's statements to the jail officer. The public safety exception applies to situations where "there was an objectively reasonable need to protect police or the public from immediate danger." In this case, the Court found there was no immediate danger to officers or the public when the jail officer asked the booking questions. The Ninth Circuit reasoned:

> The [jail officer] retrieved Gilton from a locked holding cell . . . hours after Gilton arrived at the jail. [In this situation, the jail officer did not have to decide] within seconds whether society was best served by asking the questions without a *Miranda* warning or giving such a warning and damaging his ability to neutralize a "volatile situation." . . . That the questions may have been asked in the general interests of inmate safety does not mean that there was an urgent need to protect either the deputy or others against immediate danger; the narrow "public safety exception" therefore does not apply.

As a result, the Ninth Circuit affirmed the trial court's suppression of Gilton's statements to the jail officer.

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WASHINGTON STATE COURT OF APPEALS

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SEARCH AND SEIZURE: REGISTERED OWNER'S CONSENT OVERRIDES SUSPECT'S REFUSAL TO CONSENT TO SEARCH OF A VEHICLE.
State v. Vanhollebeke, __ Wn. App. __, __ P.3d __, 2016 WL 7222860 (December 13, 2016).

A patrol officer observed a truck "facing the wrong-way on a one-way street." The officer stopped the truck and reported the truck's license plate number to dispatch. The truck's occupant, Justin Vanhollebeke, exited the vehicle. At this point, the officer instructed Vanhollebeke to return to the truck. Vanhollebeke complied with the command. The officer requested backup.

The officer exited his patrol car. Vanhollebeke again exited the truck and approached the officer. The officer commanded Vanhollebeke to return to the truck, but Vanhollebeke stated that he was locked out of the truck.

While the officer spoke with Vanhollebeke, two other officers arrived on the scene. Vanhollebeke provided the officers his name and date of birth. The officer ran Vanhollebeke's information through dispatch. Dispatch reported that Vanhollebeke's driver's license was suspended, and the truck was registered to Bill Casteel.

At this point, the officer intended to cite Vanhollebeke for driving while license suspended. While the officer prepared the citation, another officer looked into the truck for safety reasons. The officer observed "a glass pipe with a white crystal substance on it sitting in plain view near the dashboard, which he believed was drug paraphernalia." The officer also observed "the truck's steering column was 'punched,' which indicated the truck was stolen."

The officers asked Vanhollebeke for consent to search the truck. Vanhollebeke refused consent. An officer then went to the registered owner's resdience. The registered owner informed the officer that Vanhollebeke had permission to use the truck. The registered owner consented to a search of the truck and gave the officer the truck's key. The officers searched the truck and found a firearm.

The prosecution charged Vanhollebeke with unlawful possession of a firearm. Before trial, Vanhollebeke moved to suppress the firearm by arguing that he refused to consent to the search. The trial court denied the motion. Vanhollebeke was convicted. Vanhollebeke appealed to the Court of Appeals, Division Three. The Court of Appeals agreed with the trial court.

Under the Fourth Amendment to the U.S. constitution, a person has the "right to be free from unreasonable searches and seizures." "Warrantless searches are generally illegal unless they fall within one of the exceptions to the warrant requirement." Consent is an exception to the warrant requirement. "This exception includes consent given by a third person, other than a defendant." "To grant valid consent, the third party must have common authority over the place or thing to be searched." A person has common authority to consent to the search when: (1) the "consenting party [is] able to permit the search in his own right"; and (2) it is "reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search."

In this case, the Court of Appeals found that the registered owner had common authority over the truck to consent to the search, and the registered owner's consent overrides Vanhollebeke's refusal to consent. The Court of Appeals reasoned:

> Mr. Vanhollebeke's right to use the truck was dependent on the owner's unrevoked permission. This . . . limits Mr. Vanhollebeke's reasonable expectation of privacy.
> . . .
> Mr. Vanhollebeke had the actual right to exclude all others from the truck except for [the registered owner]. For this reason, Mr. Vanhollebeke did not have areasonable expectation of privacy if [the registered owner] wanted to search his own truck or allow another person to do so.

As a result, the Court of Appeals affirmed the conviction.

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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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