Law Enforcement Digest

May 2016

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

****

MAY 2016 LED TABLE OF CONTENTS

****

NINTH CIRCUIT COURT OF APPEALS

****

CIVIL RIGHTS LAWSUIT: DOMESTIC VIOLENCE CALL, ALONE, IS INSUFFICIENT TO ESTABLISH REASONABLE SUSPICION THAT SUSPECT IS ARMED AND DANGEROUS; AND OFFICER USED EXCESSIVE FORCE BY TASING SUSPECT WHO REFUSED WEAPONS FRISK. Thomas v. Dillard, __ F.3d __, 2016 WL 1319765 (May 5, 2016).

A college campus police officer responded to a potential domestic violence call on the campus. The officer believed that the call involved an African-American male, but had no other information about the details of the alleged domestic violence. The officer then received a call that "[a] male wearing a purple shirt [was] pushing a female near some storage containers on the south side of" the college's campus. This call did not mention domestic violence or the extent of the pushing.

The officer went to that area and observed "a male with a purple shirt and a female come out from behind the storage containers." The male was Correll "Thomas, who is African-American, and his girlfriend, Husky." The officer did not observe any facts indicating possible domestic violence such as injury, crying, or distress. While Thomas and Husky "appeared startled or fidgety," the officer considered that a normal behavior.

The following then occurred:

> [The officer] asked Thomas whether he had any weapons on him. When Thomas responded that he did not, [the officer] asked Thomas whether he would mind being searched for weapons. This was approximately 15 seconds into the encounter. Thomas responded that he did mind.
>
> [The officer] approached Thomas and asked again whether he would consent to a search for weapons. When Thomas declined, [the officer] told Thomas he had received a call about a guy in a purple shirt pushing around a girl. Thomas and Husky both denied they had seen anything or had done anything wrong. They both denied they were fighting, or that Thomas was pushing Husky.
> . . .
> [The officer] asked Thomas again for consent to search for weapons, and Thomas again refused. [The officer] moved toward Thomas, attempting to grab and place him [in] a controlled hold for the purpose of conducting a frisk. When Thomas stepped away to avoid being grabbed, [the officer] backed off, pulled out his Taser, pointed it at Thomas and told Thomas he was going to search him. This occurred approximately 30 to 40 seconds into the encounter.
> . . .
> [When another police officer arrived to provide assistance, the first officer on the scene] told Thomas that if he did not get down on his knees by the count of three, [the officer] would tase him. [The officer] counted to three, and, when Thomas did not comply, tased Thomas. . . . This occurred approximately six minutes into the encounter.

Thomas was arrested and searched incident to arrest. No weapons were found on his person. Six months later, the criminal charges against Thomas were dismissed.

Thomas filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the officer and alleged the officer exercised excessive force in violation of his Fourth Amendment rights. Before trial, the district court denied the officer's motion for summary judgment by reasoning the officer did not have reasonable suspicion to believe Thomas was armed and dangerous, and the officer used excessive force by tasing Thomas. The officer appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit agreed that the officer did not have reasonable suspicion to conduct a weapons frisk and he exercised excessive force. But, since the law was not clearly established that a domestic violence call, alone, does not establish reasonable suspicion for a weapons frisk, the Ninth Circuit found that officer was entitled to qualified immunity.

Under Section 1983, a plaintiff may sue a police officer for violations of the plaintiff's constitutional or statutory rights. A police officer has qualified immunity in Section 1983 lawsuits when: (1) the officer did not violate a statutory or constitutional right; or (2) the right was not clearly established at the time of the incident.

The Ninth Circuit found that the officer violated Thomas' constitutional right by conducting a weapons frisk without reasonable suspicion that he was armed and dangerous. Under the Fourth Amendment, a person has a right "to be secure in their person . . . against unreasonable searches and seizures." However, under *Terry v. Ohio*, an officer may conduct a brief investigative detention based on reasonable suspicion that "the person apprehended is committing or has committed a criminal offense." Here, the officer had reasonable suspicion to conduct a brief investigatory detention of Thomas, because Thomas was in the location where the alleged domestic violence happened and was wearing a purple shirt.

But, this information did not provide reasonable suspicion that Thomas was armed and dangerous, or provide authority for the officer to order Thomas to submit to a weapons frisk. A weapons frisk "is justified by the concern for the safety of the officer and others in proximity [and] requires reasonable suspicion that a suspect is armed and presently dangerous to the officer or to others." Facts that provide reasonable suspicion that a suspect is armed and dangerous include the suspect's sudden movements, evasive or deceptive responses to the officer's questions, and unnatural hand postures to potentially conceal a weapon. At the same time, the officer should consider factors that "dispel suspicions" that a suspect is armed and dangerous.

Under the facts of this case, the officer lacked reasonable suspicion that Thomas was armed and dangerous to justify the weapons frisk:

> There were no facts suggesting to a reasonable officer that any specific physical contact beyond pushing was occurring, and the couple strongly denied that even that had occurred, with the supposed victim professing she and her boyfriend had instead been kissing.
> . . .
> Thomas' appearance and behavior gave no suggestion he was armed. Thomas was in a location where he was entitled to be, answered [the officer's] questions forthrightly, faced [the officer] with his hands fully visible in the afternoon sunlight and made no overt movements suggesting he was arming himself. There were no suspicious bulges in the T-shirt or any other item of Thomas' clothing.
>
> Moreover, even if [the officer] reasonably could have feared at the time he received the call that the most toxic and volatile sort of domestic dispute might await him at the scene, these fears should have been dispelled by what he encountered at the scene.

> There were no signs Thomas had attacked Husky, she vehemently and repeatedly denied Thomas was fighting with her (much less abusing her), she insisted that she and Thomas had been kissing and Thomas was reasonably cooperative and nonthreatening.

However, the Ninth Circuit acknowledged that since the law was not clearly established at the time of the incident, the officer was entitled to qualified immunity. The Ninth Circuit took this opportunity to clearly establish the law in this area:

> [D]omestic violence is not a crime such as bank robbery or trafficking in large quantities of drugs that is, as a general matter, likely to involve the use of weapons. Thus, officers may not rely solely on the domestic violence nature of a call to establish reasonable suspicion for a [weapons] frisk.
> . . .
> Given the breadth of domestic violence [ranging from a bruise to sexual assault], the specific circumstances of a call must be factored into the reasonable suspicion analysis. Some domestic violence calls may pose serious threats to officers, such as those requiring an officer to enter a suspect's home and intervene in the middle of a heated fight or vicious attack.

The Ninth Circuit also found that while the officer used excessive force against Thomas, the law was not clearly established at the time of the incident. To determine whether an officer exercised excessive force, courts consider the *Graham* factors: (1) the severity of the crime at issue; (2) the danger the suspect poses to the officer or the public; and (3) whether the suspect is actively evading or resisting arrest.

In this case, the Ninth Circuit found that the officer used excessive force. First, the crime at issue - pushing a woman - was not severe and Husky showed no signs of physical abuse. Second, the officer had no reason to believe Thomas was a threat to him or others because he was cooperative, kept his hands at his sides, and was unbelligerent. Third, Thomas did not actively resist or evade arrest. But, since the law was not clearly established that an officer could not compel a domestic violence suspect to submit to a weapons frisk, the officer was entitled to qualified immunity.

Since the officer was entitled to qualified immunity for both the weapons frisk and use of force, the Ninth Circuit reversed the district court, and the lawsuit will be dismissed.

CIVIL RIGHTS LAWSUIT: POLICE LACKED REASONABLE SUSPICION OR PROBABLE CAUSE TO DETAIN, ARREST, OR SEARCH THE HOME OF A FAMILY THAT HAD NO CONNECTION TO THE REPORT OF PERSONS CARRYING FIREARMS IN THE VICINITY.
Sialoi v. City of San Diego, __ F.3d __, 2016 WL 2996381 (May 24, 2016).

The manager of an apartment building reported to 911 that "two black or Samoan adult males had been ducking around the apartment complex, as if waiting for someone." The manager also said the men were carrying a handgun and shotgun. The manager then told 911 that "the men were black" (not Samoan). The manager further described one man as having "bushy hair and was wearing a brown T-shirt," and the other man wore "a long-sleeved shirt with a hood."

At the same time (and at the same apartment complex), the Sialoi family hosted a birthday party for a seven-year-old girl, T.R.S.

Within minutes after the manager's second 911 call, approximately six officers arrived at the apartment complex. The officers found the Sialoi family engaged in the birthday party. The

officers went around the apartment building's corner and found three teenagers, G.S., T.O.S., and B.F., playing in a parking lot. One of the teenagers appeared to hold a handgun.

The teenagers complied with the police commands to lie down on the ground. The police searched the teenagers for weapons, but found none. The officers approached another teenager who was standing nearby. The teenager was holding a paintball gun and placed it on the ground when the offices approached. The teenager complied with the officers' commands, and the officers confirmed that he was holding a paintball gun. The officers placed all of the teenagers into a police car.

The officers searched and handcuffed other family members attending the birthday party. One family member, Siaoli Sialoi, refused to put his hands in the air and asked the officers to not point weapons at the children. He was then placed in the police car with the teenagers. The officers searched the family's apartment without a warrant or consent. The officers did not find evidence of a crime, and did not submit written reports about the incident.

Siaoli family members filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the officers alleging violations of their constitutional rights. The officers moved for summary judgment and claimed they were entitled to qualified immunity. The district court denied the motion because of disputed factual issues. The officers appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed with the district court.

Under Section 1983, a plaintiff may sue a police officer for violations of the plaintiff's constitutional or statutory rights. A police officer has qualified immunity in Section 1983 lawsuits when: (1) the officer did not violate a statutory or constitutional right; or (2) the right was not clearly established at the time of the incident.

In this case, the Ninth Circuit considered whether the officers were entitled to qualified immunity for: (1) seizing the three teenage boys by ordering them to the ground, frisking them for weapons, and placing them in the police car; (2) seizing Sialoi Sialoi based on his initial refusal to raise his hands and request that the officers stop pointing their weapons at the children; (3) seizing the other family members at the birthday party by placing them in handcuffs; and (4) conducting a warrantless search of the family's apartment.

First, the officers did not have probable cause to arrest the three teenage boys in the parking lot. The officers had reasonable suspicion to conduct an investigatory stop of the teenagers when they saw one of the teenagers carrying what appeared to be a gun. But, that reasonable suspicion dissipated once the officers confirmed the gun was a toy paintball gun. Apart from the teenagers lacking weapons, they did not match the apartment manager's description of the persons carrying guns. As such, the officers violated the teenagers' Fourth Amendment rights "by continuing the seizure beyond the point at which they determined that [the teenager] had not in fact had a weapon in his hand," and this right was clearly established at the time of the incident.

Second, a reasonable jury could find that Sialoi Sialoi's refusal to raise his hands and request that the officers stop pointing weapons at the children did not provide probable cause to arrest him. "An individual's temporary refusal to comply with an officer's commands is not in itself a valid basis for an arrest." "Nor is an individual's peaceful, verbal challenge to police action a valid basis." A reasonable jury could find that the officers arrested Sialoi without probable cause and violated his clearly established rights. As such, the officers were not entitled to qualified immunity for arresting Sialoi.

Third, since there were no facts suggesting that the other family members were involved with the men carrying guns, the officers lacked reasonable suspicion to search them, and lacked probable cause to arrest them. The family members did not match the suspects' description. The family members "were not ducking around the apartment complex suspiciously but instead barbecuing, singing songs, and eating cake at a young child's birthday party." The Ninth Circuit rejected the officers' argument that the family's proximity to the teenage boys and the location of the alleged activity provided reasonable suspicion to detain them. Specifically, when the officers searched and detained the other family members, the officers knew the teenagers did not have any weapons, and the "family's presence in a high-crime area cannot serve as a basis for detaining them." Accordingly, the officers violated the family members' clearly established constitutional rights by handcuffing and searching them.

Finally, the officers had no reason to search the family's apartment based on a protective sweep or exigency. In general, officers may conduct a protective sweep of a residence when there is reason to believe a hidden person may pose a danger to the officers. However, the protective sweep applies when an officer is already in the residence pursuant to a warrant or an exception to the warrant requirement. A protective sweep does not provide "independent justification for entry of a residence." As such, a protective sweep did not provide authority for the officers to enter the apartment.

Additionally, the exigency exception to the warrant requirement did not apply to this situation. The exigency exception authorizes "warrantless entry where officers have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." Since there were no facts to suggest that the family had engaged in unlawful activity, the officers lacked probable cause that any crime had been committed. As such, the exigency exception did not apply to this situation, and the officers' warrantless search of the apartment violated the family's clearly established constitutional rights.

As a result, the Ninth Circuit found that the officers did not have qualified immunity, and affirmed the district court's denial of summary judgment to the officers.

CIVIL RIGHTS LAWSUIT: BASED ON CONFLICTING OFFICER STATEMENTS, REASONABLE JURY COULD FIND THAT OFFICER EXERCISED EXCESSIVE FORCE BY SHOOTING SUSPECT HOLDING GUN. C.V. v. City of Anaheim, __ F.3d __, 2016 WL 3007106 (May 25, 2016).

At approximately 11:00 p.m., police officers responded to a 911 call. The 911 call reported that a suspected drug dealer was armed with a shotgun and loitering in an apartment building's parking lot. When the officers arrived on the scene, they saw two men in the parking lot. At this point, the officers' account on what happened differs.

Officer A "saw what he believed to be a shotgun leaning against the wall next to Bernie Villegas (it turned out that it was a BB gun lacking any markings to distinguish it from a full-power long gun)." Officer A then saw Villegas move "quickly to grab the gun near the end of its barrel with one hand and lift it about a foot off the ground." Officer A observed that Villegas' hand was not near the trigger and Villegas did not point the gun at the officers. The officers issued multiple warnings to Villegas to drop the gun. He did not do so. "About one second after Villegas lifted the gun from the ground, without providing any warning to Villegas that he was going to shoot, [Officer A] fired five times and struck Villegas."

According to Officer B, Villegas had the gun in his hands when the officers arrived on the scene. The officers gave Villegas commands to drop the gun. Officer B "saw Villegas slightly raise the gun about eight to ten inches off the ground, though it was at all times pointed upward and not in the officers' direction." Officer B "thought there was an immediate threat that Villegas would fire his weapon, and he was milliseconds from shooting Villegas when [Officer A] fired his gun."

Officer C "did not have a clear view of the shooting, but saw a gun barrel pointed upward toward the sky." Officer C heard other officers giving commands to drop the gun and then "saw the barrel of the gun move either upward or backward." Officer C heard shots. Officer C was concerned that the gun could have been used against the other officers.

Officer D "did not have a clear view of the shooting, but heard an officer yell something like 'put it down,' 'drop it,' or 'get on the ground.'" Within a second after the warnings, Officer D heard gunshots.

Villegas died from the gunshot wounds. His estate sued the officers under 42 U.S.C. Section 1983 (Section 1983) for exercising excessive force. The district court granted summary judgment to the officers by reasoning that the officers did not exercise excessive force given that Villegas held a weapon that posed an immediate danger to the officers, and, even if the force was excessive, the officer was entitled to qualified immunity because the law was not clearly established that circumstances violated Villegas' Fourth Amendment rights.

The Ninth Circuit Court of Appeals disagreed that the officers' conduct did not constitute excessive force, and held: (1) that a reasonable jury could find that the officers' actions constituted excessive force; (2) but, the law was not clearly established at the time of the incident, and the officer was entitled to qualified immunity.

Under Section 1983, a plaintiff may sue a police officer for violations of the plaintiff's constitutional or statutory rights. A police officer has qualified immunity in Section 1983 lawsuits when: (1) the officer did not violate a statutory or constitutional right; or (2) the right was not clearly established at the time of the incident.

Courts use the *Graham* factors to determine whether an officer exercised unreasonable force that violated the Fourth Amendment: "(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resisted arrest or attempted to escape." In this case, since the officers had conflicting accounts of what happened, the Ninth Circuit held that a reasonable jury could find that the officers exercised excessive force by shooting Villegas:

> A reasonable jury could draw the following factual conclusions: (1) the officers, responding to a call about a suspected drug dealer armed with a shotgun and loitering in the visitor parking area of an apartment complex, came upon Villegas already holding a long gun; (2) Villegas was ordered to put his hands up, and as he was complying, the officers ordered him to drop his gun; (3) without providing a warning or sufficient time to comply, or observing Villegas pointing the long gun toward the officers or making any move toward the trigger, [Officer A] resorted to deadly force. Viewing the facts in this light, deadly force was not objectively reasonable.

But, the Ninth Circuit found that the law was not clearly established at the time of the incident that an officer "using deadly force in this situation" constituted excessive force.

As a result, the Ninth Circuit affirmed the district court granting the officers qualified immunity.

****

WASHINGTON STATE SUPREME COURT

****

CONFESSIONS: ADMISSION INTO EVIDENCE OF SUSPECT'S ANSWERS ON JAIL BOOKING FORMS ABOUT GANG AFFILIATIONS VIOLATED THE FIFTH AMENDMENT. State v. DeLeon, __ Wn.2d __, __ P.3d __, 2016 WL 2586679 (May 5, 2016).

Three defendants were booked into jail on charges involving a drive-by shooting. After they arrived at the jail, correctional staff went through a "Gang Documentation Form" with each defendant. The form's purposes include determining an inmate's gang affiliations so that an inmate is not placed in the same cell as a rival gang member. When filling out the form, the defendants indicated that they were affiliated with the Norteno gang, and should not be housed with Sureno gang members. The trial court allowed this information to be admitted at trial. On appeal, the defendants' argued that admitting their statements to correctional staff about gang affiliations violated their Fifth Amendment rights against self-incrimination. The Washington State Supreme Court agreed.

Under the Fifth Amendment, a person "shall not be compelled in any criminal case to be a witness against himself." The Fifth Amendment prohibits the admission of a defendant's compelled statements in a criminal trial. "When determining whether a self-incriminating statement was compelled or made voluntarily, courts look to the totality of the circumstances." Compelled statements may involve a defendant making self-incriminating statements "in exchange for protection from credible threats of violence while incarcerated."

Here, the Supreme Court found that the trial court admitting the defendants' answers to gang affiliation questions during booking violated their Fifth Amendment rights:

> The totality of the circumstances would lead an inmate being booked into the … jail to believe that in order to avoid a real risk of danger posed by being housed with rival gang members, he would need to answer yes when asked if there were certain individuals or groups he could not be housed with, and then provide the information for the Gang Documentation Form.

However, the Supreme Court recognized that jail staff must ask these questions to ensure the inmate's safety, and the Fifth Amendment violation happens when the statements are used in trial:

> We wish to emphasize that *asking* these questions was not a constitutional violation. Indeed, jail staff may be required to ask these questions in order to meet their constitutional duty to protect prisoners from violence at the hands of other prisoners. The constitutional violation occurred when the State then used the statements gathered under these circumstances against the defendants at their trial.

Since the admission into evidence of the defendants' gang affiliations from the Gang Documentation Form violated their Fifth Amendment rights, the Supreme Court reversed the convictions.

SEARCH AND SEIZURE: OFFICERS MUST GIVE RESIDENT *FERRIER* WARNINGS BEFORE MAKING A CONSENT-BASED ENTRY INTO THE RESIDENCE TO SEIZE CONTRABAND. State v. Budd, __ Wn.2d __, __ P.3d __, (May 19, 2016).

The National Center for Missing and Exploited Children issued a tip that Michael Budd "possessed child pornography on his computer, used Internet messaging services to communicate with minors, and bragged about molesting his nine-and-a-half-year-old daughter." Based on this information, a detective obtained search warrants for Budd's internet records from Google and Yahoo. The search warrants did not yield any evidence.

A detective then went to Budd's residence. The detective did not have a search warrant, and planned to ask Budd for permission to search his computer. Budd met the detective and other officers on his driveway. While speaking with the officers on his driveway, Budd "admitted to possessing hundreds of images depicting minors involved in sexually explicit conduct." The detective explained to Budd that she did not have a warrant, but would seek a warrant if he did not consent to the officers entering the home and searching his computer.

Because Budd did not want the officers searching the computer in his girlfriend's presence, and the officers agreed not to search the computer in front of his girlfriend, he consented to the search. Once the officers entered Budd's residence (but, before searching the computer), they went over a consent form with *Ferrier* warnings. Budd signed the form to acknowledge he understood his rights and gave his consent to the search. The officers seized the computer and had it forensically analyzed. The forensic analysis yielded images of child pornography. Based on this evidence, the officers obtained a search warrant for Budd's residence and found additional evidence of child pornography.

The prosecution charged Budd with possession of depictions of a minor engaged in sexually explicit conduct. Before trial, the defense moved to suppress the evidence from his computer because the officers did not read Budd *Ferrier* warnings before entering the residence. The trial court denied the motion, and Budd was convicted. Budd appealed to the Court of Appeals. The Court of Appeals found that the officers violated *Ferrier* and the trial court should have suppressed the evidence found on the computer. The prosecution appealed to the Washington State Supreme Court. The Supreme Court agreed with the Court of Appeals.

Under both the federal and state constitutions, a law enforcement officer must have a warrant to search a person's home, or rely on a recognized exception to the warrant requirement. Consent is an exception to the warrant requirement. But, the prosecution must prove "voluntary consent when [a law enforcement officer] obtains consent" during a knock and talk.

A knock and talk involves officers (without a warrant) arriving at a home and asking the resident's consent to search the home. Under the Washington constitution, Article I, section 7, the officers "must give the resident a prescribed set of warnings, informing the resident of his or her constitutional rights." These warnings are known as *Ferrier* warnings that admonish a resident "that he or she may lawfully refuse consent to search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home."

A law enforcement officer must provide "these warnings before entering the home because the resident's knowledge of the privilege is a threshold requirement for an intelligent decision as to its exercise." A law enforcement officer's failure to give these warnings to the resident before "entering the home, vitiates any consent given thereafter."

In this case, since the officers did not read Budd *Ferrier* warning before entering the home, Budd's consent was not voluntary. As a result, the consent exception to the warrant requirement did not authorize the subsequent entry into Budd's home and seizure of his computer. The Supreme Court rejected the argument that Budd's consent was voluntary because he signed the *Ferrier* form inside his home and before the officers seized the computer:

> The *Ferrer* warnings are intended to ensure that residents have a fair chance to reject the officers' requests and protect their privacy interests in their homes in the face of the inherently coercive nature of knock and talks. Officers must give the *Ferrier* warnings before entering the home because once they are inside the home, the resident is much less likely to withdraw consent, even if the officers do subsequently give the *Ferrier* warnings. Further, once the officers are inside the home, the officers may seize any contraband within their plain view and may be able to use information gathered from inside the home to support a search warrant that they would not otherwise be able to obtain.

Consequently, the Supreme Court affirmed the Court of Appeals, and remanded the case back to the trial court with instructions to dismiss Budd's criminal charge.

****

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]

****