Law Enforcement Digest

November 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: OFFICERS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE IT IS CLEARLY ESTABLISHED THAT REPEATEDLY TASING A PRONE SUSPECT, SURROUNDED BY OFFICERS, IS UNREASONABLE FORCE.
Jones v. Las Vegas Metropolitan Police Department, __ F.3d __, 2017 WL 4700317 (October 20, 2017).

FACTS: (portions excerpted from the opinion):

In the early morning, Officer A pulled over Anthony Jones for a routine traffic stop. Officer A ordered Jones out of the car so that he could pat him down for weapons. Jones obeyed at first but then started to turn towards Officer A. Scared of the much larger Jones, Officer A drew his firearm, pointed it at Jones and ordered him to turn back around. Instead, Jones sprinted away.

Officer A called for backup and pursued Jones. Officer A didn't believe deadly force was necessary because Jones hadn't threatened him and didn't appear to have a weapon. As he waited for other officers to arrive, Officer A used his taser to subdue Jones. Officer A fired his taser twice, causing Jones' body to "lock up" and fall to the ground face down with his hands underneath him. Officer A proceeded to knell on Jones' back in an attempt to handcuff Jones, keeping his taser pressed to Jones' thigh and repeatedly pulling the trigger.

Officer A continued to tase Jones even after four officers arrived on the scene. One officer helped handcuff Jones. Another Officer controlled Jones legs and feet. Officer B, at Jones' head, applied a taser to Jones' upper back. In all, Jones was subjected to taser shocks for over 90 seconds: Officer A tased Jones nonstop that whole time – with some applications lasting as long as 19 seconds – and for ten of those seconds, Officer B simultaneously applied his taser.

Officer C, the last officer to arrive on the scene, ordered the tasing to stop. Officer C wanted his officers "to back off on the tasers so that Jones' muscles would relax." According to Officer C, Jones "didn't look like he was physically resisting" and there were "enough officers" to take Jones into custody.

Once the officers stopped tasing Jones, his body went limp. Jones was pronounced dead at the scene.

PROCEDURAL HISTORY:

Jones' family filed a 42 U.S.C. § 1983 (Section 1983) lawsuit claiming that the officers used unreasonable force. The District Court dismissed the lawsuit. The Ninth Circuit Court of Appeals disagreed with the District Court.

ANALYSIS: (portions excerpted from the opinion):

In a Section 1983 lawsuit, an officer is entitled to qualified immunity 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.

Unreasonable force violates the Fourth Amendment. Courts consider the *Graham* factors to determine whether an officer used reasonable force: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officer or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The most important factor is whether the suspect posed an immediate threat. A simple statement by an officer that he fears for his safety or the safety of others is not enough. The officer must point to objective factors to justify the concern. A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury.

In this case, the Ninth Circuit found that the officers' use of force violated Jones' clearly established constitutional rights. The Court reasoned:

(1) The officers' initial use of force was appropriate: Despite Jones' large size and the fact that he had run away from a traffic stop, he had neither threatened Officer A nor committed a serious offense, and he didn't appear to have a weapon. Based on these facts, Officer A believed that something less than deadly force was justified, so he used his taser to subdue Jones. Using a taser to stop Jones and place him under arrest was reasonable under the circumstances.

(2) As the situation evolved, however, the justification for the use of force waned. Officer A continued to apply his taser to Jones and Officer B also applied his taser twice, even as Jones was being handcuffed. By the time Jones was prone and surrounded by multiple officers, there would have been no continuing justification for using intermediate force: Jones was on the ground after his body "locked up" as a result of repeated taser shocks; he had no weapon; and was making no threatening sounds or gestures.

(3) Taser International provided users with product warnings that the risk of "serious injury or death" from tasers increases with multiple and simultaneous applications. Consistent with Taser's product warnings, the officers were instructed that repeated taser applications could contribute to serious injury or death, particularly when the target is subject to certain risk factors, like struggling, being overweight, or using drugs or alcohol. The officers knew that Jones had two of these risk factors: He was overweight and struggled.

(4) Any reasonable officer would have known that continuous, repeated, and simultaneous tasing can only be justified by an intermediate or significant risk of serious injury or death to officers or the public. Such force generally can't be used on a prone suspect who exhibits no ressitance, carries no weapon, is surrounded by sufficient officers to restrain him, and is not suspected of a violent crime.

RESULT: The Ninth Circuit found that the officers violated Jones' clearly established Fourth Amendment rights by using unreasonable force and were not entitled to qualified immunity. As a result, the Ninth Circuit reversed the District Court's dismissal of this lawsuit.

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WASHINGTON STATE SUPREME COURT

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STATUTORY INTERPRETATION: A RIDING LAWN MOWER IS NOT A "MOTOR VEHICLE" UNDER RCW 9A.56.065 (THEFT OF A MOTOR VEHICLE).
State v. Barnes, __ Wn.2d __, 403 P.3d 72 (October 12, 2017).

FACTS: (portions excerpted from the opinion):

Joshua Barnes tried to steal a riding lawn mower from a property outside of Leavenworth, Washington. After seeing a pickup truck drive past her home, the property owner heard her riding lawn mower starting up. Looking out a window, she saw Barnes attempting to ride her lawn mower up a ramp and onto the bed of his pickup truck. The owner confronted Barnes, who returned the lawn mower. The property owner called the police.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

The prosecution charged Barnes with theft of a motor vehicle under RCW 9A.56.065 and 9A.56.020. Before trial, the defense moved to dismiss the charge and argued that the definition of "motor vehicle" does not include riding lawn mowers. The trial court agreed and dismissed the charge. The prosecution appealed to the Court of Appeals, Division Three. The Court of Appeals agreed with the trial court. The prosecution sought review by the Washington Supreme Court. The Supreme Court agreed with the Court of Appeals and trial court.

ANALYSIS: (portions excerpted from the opinion):

Under RCW 9A.56.065, "[a] person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." The statute does not define the term "motor vehicle." The Supreme Court reviewed the dictionary definition of "motor vehicle" and legislative history. While the dictionary definition could include riding law mowers, the Supreme Court reasoned that the legislature was primarily concerned with auto theft, not lawn mower theft. The Supreme Court reasoned:

(1) Barnes did not attempt to steal a family car, nor is the riding lawn mower he attempted to take a comparable investment to a family car. He did not attempt to steal anything that could reasonably be used for a later robbery, burglary, or assault. There is nothing to indicate a connection between the theft of lawn mowers and drug possession or gang activity.

(2) The plain meaning of "motor vehicle" is clear. The legislature has explicitly indicated it intended to focus this statute on cars and other automobiles. It was responding to increased auto theft, not increased riding lawn mower theft. Though the definition of "motor vehicle" could be more expansive in other statutes, the only statute at issue here is the theft of a motor vehicle statute. According, a riding law mower is not a "motor vehicle" under RCW 9A.56.065.

RESULT: The Supreme Court affirmed the trial court's dismissal of the theft of a motor vehicle charge.

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WASHINGTON STATE COURT OF APPEALS

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SEARCH AND SEIZURE: A TENT AND ITS CONTENTS ARE ENTITLED TO CONSTITUTIONAL PRIVACY PROTECTION UNDER THE WASHINGTON CONSTITUTION ARTICLE I, SECTION 7.
State v. Pippin, __ Wn. App. __, __ P.3d __, 2017 WL 4510194 (October 10, 2017).

FACTS: (portions excerpted from the opinion):

A community of approximately 100 homeless individuals living in 80 or so different campsites had arisen in downtown Vancouver. A new ordinance went into effect, which permitted camping only between 9:30 p.m. and 6:30 p.m. Officers began notifying people in the downtown area of the new ordinance, either making contact at each campsite or leaving a written notice posted on the outside of the campsite if no one was present. The written notices stated that individuals needed to comply with the new ordinance by removing their camps after 6:00 a.m. by the middle of the next week. A notice, inside plastic, was affixed to William Pippin's tent with a safety pin.

A few days later, officers were briefed at a safety meeting that people in the downtown area could be wanted for violent crimes, and the area had experience prior service calls for assault and robbery. The officers also had personal knowledge that some homeless individuals in the area armed themselves with homemade weapons, such as bike parts, chains, and machetes.

Later that day, officers arrived at Pippin's camp. Pippin's tent-like structure was covered with a tarp. The officers could not see inside his tent.

Officer A rapped on Pippin's tent, announced that police were present, and asked if anyone was there. Pippin, in a groggy voice replied, "Hello, yeah here, just waking up." The officers then asked Pippin if he was alone, and Pippin said that he was. The officer told Pippin that he needed to exit his tent so that they could give him a document and to talk to him about the ordinance. Pippin slowly and lethargically responded that he would come out in a moment.

The officers told Pippin "several times" that they needed to see him. As some point, the officers "heard movement under the tarp" and started to become concerned with the amount of time Pippin was taking to come out of his tent and that he could have a weapon. Officer B attempted to use a flashlight to see inside the tent, but could not do so. Officer A told Pippin that he was going to lift the tarp to see inside, and Pippin said that was okay. Officer A lifted the tarp and observed Pippin sitting up in his bed and turning toward him. Officer B noticed a bag of methamphetamine in the tent.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

The prosecution charged Pippin with possession of a controlled substance. Before trial, the defense moved to suppress the evidence and argued that the officer lifting the tarp to see inside the tent was an unconstitutional search. The trial court agreed and granted the motion. The prosecution appealed to the Court of Appeals, Division Two. The Court of Appeals agreed with the trial court.

ANALYSIS: (portions excerpted from the opinion):

The Washington constitution's article I, section 7 mandates: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." In this case, the Court of Appeals considered whether the officer raising the tarp to look inside the tent disturbed Pippin's "private affairs."

The Court of Appeals concluded that the officer lifting the tarp to look inside the tent unreasonably violated Pippins' private affairs. The Court reasoned:

(1) The home is the type of property that secures an individual's most personal possessions and conduct.

(2) The more Pippin's tent served as a refuge or retreat from the outside world, the more it could be the repository of objects or information showing his familial, political, religious, or sexual associations or beliefs, and the more it could contain objects intimately connected with his person, then the more his tent and the belongings within should be considered part of his private affairs under article I, section 7.

(3) Pippin's tent allowed him one of the most fundamental activities, which most individuals enjoy in private – sleeping under the comfort of a roof and enclosure. The tent also gave him a modicum of separation and refuge from the eyes of the world: a shred of space to exercise autonomy over the personal.

(4) The temporary nature of Pippin's tent does not undermine any privacy interest. Nor does the flimsy and vulnerable nature of an improvised structure leave it less worthy of privacy protections. For the homeless, tents may often be the only refuge for privacy.

Since Pippin's tent had constitutional privacy protection, the officers needed a search warrant or a recognized exception to the warrant requirement to look inside the tent.

RESULT: The Court of Appeals affirmed the trial court's order suppressing the evidence based on the officer unreasonably disturbing Pippins' private affairs without a search warrant or a recognized exception to the warrant requirement. However, the Court of Appeals remanded the case to the trial court to decide whether the recognized exception of "exigent circumstances" justified the officer lifting the tarp to look inside the tent.

LED EDITORIAL NOTE: In the unpublished part of this opinion, the Court of Appeals analyzed whether a protective sweep, a recognized exception to the warrant requirement, justified the officer lifting the tarp to look inside the tent. The Court of Appeals found that the protective sweep exception was inapplicable because Pippin was not under arrest and a protective sweep is limited to a cursory visual inspection of places in which a person might be hiding when an officer arrests a subject.

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SUFFICENCY OF EVIDENCE: EVIDENCE THAT DEFENDANT ATTEMPTED TO USE STOLEN DEBIT CARD (BUT THE BANK DECLINED THE CHARGE) TO PURCHASE ITEMS IS SUFFICIENT EVIDENCE THAT THE DEFENDANT COMMITTED IDENTITY THEFT (RCW 9.35.020(1)).
State v. Christian, __ Wn. App. __, __ P.3d __, 2017 WL 4585778 (October 16, 2017).

FACTS: (portions excerpted from opinion):

Thomas Christian went to a Burlington Coat Factory retail store with a stolen debit card issued by U.S. Bank. Christian presented the stolen debit card to the store three times. The bank authorized the first transaction for a $109.06 purchase. A second purchase for $213.39, which Christian attempted six minutes later, was declined by the bank. The bank also declined a third purchase for $113.39, which Christian attempted one minute later. The debit card's owner did not authorize Christian to have it.

PROCEDURAL HISTORY: (portions excerpted from opinion):

The prosecution charged Christian with three counts of identity theft based on the transactions. After a bench trial, the trial court convicted Christian on all counts. Christian appealed to the Court of Appeals, Division One, and argued that the evidence was insufficient for two counts because (for those counts) the transactions were not completed – the bank declined both. The Court of Appeals disagreed.

ANALYSIS: (portions excerpted from the opinion):

Under RCW 9.35.020(1), an identity theft conviction requires proof that the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime. The question in this case is whether Christian "used" the debit card by attempting to make two purchases with it. Since "used" is not defined in the statute, courts turn to the dictionary definition. One dictionary defines "use" as "to put into service or apply for a purpose." Another dictionary defines "use" as "to employ for the accomplishment of a purpose; to avail oneself of."

The Court of Appeals found that Christian "used" the stolen debit card when he twice "swiped" it through the terminal at the Burlington Coat Factory retail story. The Court reasoned:

> The prosecution was required to prove that Christian either "put into service" or "employed for the accomplishment of a purpose" a "means of identification or financial information of another person" – the stolen debit card in this case. Completion of a transaction in which a stolen debit card is used is not an element of the crime of identity theft.

RESULT: The Court of Appeals affirmed Christian's convictions.

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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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