Law Enforcement Digest

September 2016

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

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HONOR ROLL

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CIVIL RIGHTS LAWSUIT: OFFICER NOT ENTITLED TO QUALIFIED IMMUNITY FOR USING DEADLY FORCE AGAINST UNARMED SUSPECT WHO ALLEGEDLY STOLE HIS GIRLFRIEND'S CELLULAR PHONE. A.K.H. v. City of Tustin, __ F.3d __, 2016 WL 4932330 (September 16, 2016).

A woman called 911 and reported that her ex-boyfriend, Benny Herrera, had stolen her cellular phone. The woman first reported that she was not injured, her children were not injured, and Herrera stole the phone by "grabbing it from her hand." The woman then changed her report and said that Herrera hit her in the head. The woman told 911 that Herrera did not use a weapon, did not carry weapons, and had not hit her before.

The dispatcher reported to the responding officers: (1) Herrera had stolen his ex-girlfriend's cell phone; (2) "originally the [woman] claimed that there was no physical violence, now she's claiming that [Herrera] hit her in the head"; (3) Herrera was not known to carry weapons; (4) Herrera was a known member of a gang; (4) Herrera was possibly subject to a $35,000 traffic warrant for arrest; and (5) Herrera was on parole for a drug possession crime.

Officer A found Herrera walking on the road's right shoulder. Officer A activated his patrol vehicle's red lights. In response, "Herrera put his right hand in his sweatshirt pocket and started alternatively to skip, walk, and run backwards [while] facing" Officer A. Herrera "moved away from the right shoulder toward the middle of the road." Officer A "told Herrera three times to 'get down.'" Herrera did not follow Officer A's orders.

Officer B then arrived on the scene in another patrol car. Officer B "drove his patrol car up beside Herrera, and slightly forward of" Officer A's patrol car. Herrera moved towards Officer B's patrol car. When Officer B's patrol car was beside Herrera, Officer B yelled, "Get your hand out of your pocket." As Herrera moved his hand out of his pocket, Officer B fired two shots. Officer B "did not give any warning that he would shoot." Based on Officer B's dashboard camera, the time between his command and the shots was less than a second. The time between Officer A contacting Herrera and Officer B shooting him was less than a minute.

The officers later testified that they thought Herrera had a weapon because there appeared to be something heavy in his sweatshirt pocket. The heavy object in Herrera's pocket was a cell phone.

Herrera's family sued Officer B under 42 U.S.C. Section 1983 (Section 1983) and alleged that Officer B used excessive force. The trial court denied the officer's motion for summary judgment, and found that the officer was not entitled to qualified immunity. The Ninth Circuit Court of Appeals agreed with the trial court.

In Section 1983 lawsuits, an officer is entitled to qualified immunity when: (1) the officer's conduct did not violate a constitutional right; or (2) the constitutional right was not clearly established at the time. In Section 1983 lawsuits alleging that an officer used excessive force (and violated the plaintiff's Fourth Amendment rights), courts evaluate: (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." In this case, the Ninth Circuit found that the officer used excessive force by shooting Herrera.

First, the crime at issue was not severe. Herrera was allegedly involved in "a domestic dispute that had ended before the police became involved." While domestic violence incidents "can pose a serious danger to police officers," the officers found Herrera after he had left his ex-girlfriend's "apartment and was walking down a road at some distance from the apartment."

Second, Herrera did not threaten officer or public safety because: (1) the domestic incident was over and he "posed no current threat to the safety of" his ex-girlfriend; (2) there was "little, if any reason to believe that Herrera was armed"; and (3) the traffic warrant and drug possession conviction did not involve "violence or gun possession[.]"

Third, while Herrera did not follow Officer A's "commands to get down", he "never attempted to cross the road and flee[.]" Most importantly, Officer B "escalated to deadly force quickly." Specifically, the Ninth Circuit noted:

> Less than a second elapsed between [Officer B] commanding Herrera to take his hand from his pocket and [Officer B] shooting him. [Officer B] neither warned Herrera that he was going to shoot him, nor waited to see if there was anything in Herrera's hand. In total, less than a minute had elapsed between when [Officer A] first came upon Herrera and when [Officer B] shot him.

As a result, the Ninth Circuit found that the officer violated Herrera's clearly established Fourth Amendment constitutional right, and was not entitled to qualified immunity.

SEARCH AND SEIZURE: OFFICERS HAD REASONABLE SUSPICION TO DETAIN SUSPECT BASED ON CITIZEN-INFORMANT'S TIP. United States v. Williams, __ F.3d __, 2016 WL 5030343 (September 20, 2016).

In the early morning, a citizen called the police "to report an adult, black male sleeping inside a grey Ford Five Hundred car." The citizen further "reported that the man was known to sell drugs in the area, did not live in the adjacent apartment complex, and [the citizen] expressed that he just wanted the person moved out of the area." The citizen gave his phone number and address to the police.

Two officers responded to the call in a marked patrol car. When they arrived on the scene, they spotted a grey Ford Five Hundred in the apartment complex's parking lot. The officers shined lights into the car's windows. "After the officers turned on their lights, a black male, later identified as defendant Tony Williams, sat up in the driver's seat inside the Ford." "Williams looked to his left and right" and "placed the car in reverse and then quickly shifted the car back into park."

An officer commanded Williams to "turn off the engine and exit the vehicle." Williams obeyed the commands and exited the vehicle. After Williams exited the vehicle, he ran away from the officers. The officers followed Williams. Williams fell to the ground. The officers then performed a protective frisk and handcuffed Williams. Later investigation found drugs and large sums of money on Williams' person and a firearm in his vehicle. Williams was charged in federal court with drug and firearms offenses.

Before trial, Williams moved to suppress the evidence by arguing (among other things) that the citizen-informant's tip did not provide reasonable suspicion for the officers to perform an investigatory stop. The trial court agreed and suppressed the evidence. The Ninth Circuit Court of Appeals disagreed.

An officer may conduct a brief investigatory detention of a suspect based upon reasonable suspicion. A citizen-informant's telephone call to police reporting suspected criminal activity may provide reasonable suspicion. The test is whether the citizen-informant's tip has "sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop."

In this case, the Ninth Circuit found that the citizen-informant's tip was reliable and provided reasonable suspicion for the officers to conduct an investigative stop: (1) the citizen-informant "telephoned a police hotline and provided his name, address, and phone number"; (2) "the officers verified the information [the citizen-informant] relayed through independent observation"; (3) the citizen-informant "reported that Williams was sleeping in a car in an adjacent apartment complex, even though Williams did not live there [and] reported that Williams was known to sell drugs in the area"; (4) "the officers' suspicion was increased when they witnessed Williams' behavior upon arriving at the parking lot [that was] consistent with someone who intended to flee the scene"; and (5) "the incident occurred in a high-crime area around 5:00 a.m."

As a result, the Ninth Circuit reversed the trial court's suppression order.

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WASHINGTON STATE SUPREME COURT

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SEARCH AND SEIZURE: OBJECTIVE RATIONAL FOR OFFICER SAFETY SUPPORTED OFFICERS TEMPORARILY SEIZING AN ARRESTEE'S COMPANION TO CONTROL THE SCENE. State v. Flores, __ Wn.2d __, __ P.3d __, 2016 WL 4940036 (September 15, 2016).

On a November afternoon, police received a tip from an anonymous source that Giovanni Powell "pointed a gun at someone's head." Officer A responded to the scene. Officer A "was familiar with Powell, had seen pictures of him holding firearms, knew he was in a gang, and knew he was a material witness to a Spokane homicide." Dispatch informed the responding officers about an arrest warrant for Powell.

Officer A "arrived at the reported address less than five minutes from the time of the call, around 4:40 p.m." Officer A saw Powell and Cody Ray Flores walking on the street. Officer A "did not recognize Flores and did not have an individualized, articulable reason to suspect Flores of criminal activity." However, the responding officers "were concerned that Flores posed a threat to their safety because of his association and close proximity to Powell within a few minutes of a report of Powell pointing a gun at someone's head."

Officer A commanded Powell and Flores to stop and knell down with their hands up. Officer A then commanded Powell to move away from Flores and "walk backwards towards him with his hands up." Powell complied with Officer A's commands.

Officer B had arrived at the scene with approximately three other officers. Officer B "ordered Flores to walk backwards towards him with his hands up." Flores then told Officer B that he had a gun. Officer B secured Flores' gun. Flores was charged "with first degree unlawful possession of a firearm."

Before trial, Flores moved to suppress the gun and argued that Officer B lacked reasonable suspicion to order him to walk backwards. Both the trial court and Court of Appeals agreed. The Washington State Supreme Court disagreed.

Under the Washington State Constitution article I, section 7, an officer may not seize a person without a warrant or an exception to the warrant requirement. In this case, the Supreme Court held that under article I, section 7:

> [When officers are] executing an arrest, officers may seize nonarrested companions to control the scene of the arrest if they can articulate an objective rationale predicated specifically on safety concerns for the officers, the arrestee, his or her companions, or other citizens.

The factors that may support an objective rationale based on officer safety concerns include:

> [T]he arrest, the number of officers, the number of people present at the scene of the arrest, the time of day, the behavior of those present at the scene, the location of the arrest, the presence or suspected presence of a weapon, officer knowledge of the arrestee of the companions, and potentially affected citizens. . . . **[N]o one factor by itself justifies an officer's seizure of nonarrested companions.**

In this case, the Supreme Court found that the officers had an objective rational to temporarily seize Flores based on officer safety concerns to control the scene:

> [1] [Officer A and Officer B] could . . . consider the fact that there may have been a gun present when assessing what they needed to do to control the scene of Powell's arrest.
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> [2] Although dispatch did not indicate whether Powell was alone (the tip appears to have mentioned only Powell), when Officer A arrived at the scene, Powell and Flores were walking down the street together in close proximity.
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> [3] [Officer A] arrived at the scene less than five minutes after dispatch received the tip. He was the only officer on the scene at that point.

> [4] [Officer A] recognized Powell. [Officer A] had seen pictures of Powell or his friends holding firearms, and had information that he was at the scene of a fight in which one of his best friends was shot and killed.
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> [5] The stop occurred after 4:30 p.m. in November.
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> [6] When [Officer A] ordered Powell to stop, both he and Flores halted, and they remained together.
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> [7] [Officer B] testified that he told Flores to walk back because he did not know what [Officer A] had observed when he got there, and because he was concerned there was a firearm.
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> [8] While Flores was walking back toward [Officer B], he volunteered that he had a gun. This admission was not made in response to any questioning or prompting by [Officer B]. Once Flores volunteered that he had a gun, Officer B had reasonable suspicion to further detain Flores and seize the gun.

As a result, the Supreme Court reversed the trial court's order suppressing the gun.

TORT LAWSUIT: COUNTY JAIL DOES NOT HAVE A DUTY TO MONITOR OR CONTROL AN INMATE AFTER HE IS LAWFULLY RELEASED FROM THE JAIL'S CUSTODY. Binschus v. State, __ Wn.2d __, __ P.3d __, 2016 WL 5344251(September 22, 2016).

Isaac Zamora was incarcerated in a county jail for several weeks in 2008. Several months after his release from the county jail, Zamora killed six people in a shooting spree. The Plaintiffs (victims and victims' family members) sued the county for failing "to exercise ordinary and reasonable care while Zamora was incarcerated in" the jail. The Washington State Supreme Court disagreed.

In general, "people and institutions are not responsible for preventing a person from physically harming others." An exception to this rule is a special relationship "that gives rise to a duty to control a third person's conduct[.]" "[T]he relationship between a jail and an inmate" is a special relationship. This special relationship is called "a take charge relationship."

In this case, however, the county did not have a take charge relationship with Zamora at the time of the shootings. The Supreme Court reasoned:

> [The duty to control Zamora to prevent him from harming third parties] was owed during the time when [the county jail] had a take charge relationship with Zamora. [The county jail] owed this duty to anyone who might foreseeably suffer bodily harm resulting *from the failure to control* Zamora. [In this case,] the crimes Zamora committed after his lawful release were not a foreseeable consequence of any failure to control Zamora during incarceration.

As a result, the Supreme Court found that the county jail did not owe a duty to the Plaintiffs, and the civil lawsuit against the county should be dismissed.

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WASHINGTON STATE COURT OF APPEALS

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STATUTORY INTERPRETATION: SECOND DEGREE CRIMINAL TRESPASS STATUTE APPLIES TO A PERSON SLEEPING IN A VEHICLE (WITHOUT THE VEHICLE OWNER'S PERMISSION). State v. Joseph, __ Wn. App. __, __ P.3d __, 2016 WL 4572351 (September 1, 2016).

A police officer found Anthony Joseph sleeping in an unlocked car parked on a public street. At the time, the officer was responding to a car prowling report. The officer knew that Joseph "was homeless and did not own a vehicle." Joseph admitted to the officer that he did not have the owner's permission to sleep in the car. Joseph was charged with second degree vehicle prowling. The case was presented to a jury.

The prosecutor proposed jury instructions on first and second degree criminal trespass. The defense objected to these jury instructions, but the trial court instructed the jury on second degree criminal trespass. The jury convicted Joseph of second degree trespass. Joseph appealed to the Court of Appeals, Division Three, and argued that second degree criminal trespass does not apply to vehicles. The Court of Appeals disagreed.

RCW 9A.52.080(1) defines second degree criminal trespass as:

> A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon the premises of another under circumstances not constituting criminal trespass in the first degree.

Under RCW 9A.52.010(6), premises "includes any building, dwelling, structure used for commercial aquaculture, or any real property." RCW 9A.04.110(5)'s definition of building includes "any . . . vehicle."

Since second degree criminal trespass' term "premises" means "building," and "building" means "vehicle," the statute applies to a person remaining unlawfully in a vehicle. Based on the statute's plain language, and legislative history, the Court of Appeals held "that a vehicle is a premises for the second degree criminal trespass statute."

As a result, the Court of Appeals affirmed Joseph's conviction for second degree criminal trespass.

SEARCH AND SEIZURE: OFFICER LACKED REASONABLE SUSPICION TO SECURE FIREARMS FROM AN ARRESTEE'S VEHICLE BECAUSE THERE WAS NO INDICATION THAT THE ARRESTEE OR HIS COMPANION WERE DANGEROUS.
State v. Cruz, __ Wn. App. __, __ P.3d __, 2016 WL 5342412 (September 22, 2016).

A Washington Department of Fish and Wildlife (DFW) officer "was alone on patrol near the Similkameen River." From a cliff overlooking the river, the officer observed Eric Cruz and his companion fishing on the river. The officer saw Mr. Cruz commit the gross misdemeanor of snagging a Chinook salmon. The officer then arrested and placed Mr. Cruz in handcuffs for the criminal fishing violation.

The officer searched Mr. Cruz's person incident to arrest. The officer "asked Mr. Cruz if he had any firearms on him." Mr. Cruz told the officer "that he had firearms in his truck."

The officer "placed Mr. Cruz in his patrol vehicle." At that point, "Mr. Cruz's companion appeared, curious about what was happening." The officer instructed the companion "to stay away from the truck," and the companion did so.

The officer then secured the firearms from the truck. The officer secured the firearms because he planned to release Mr. Cruz with a citation. The officer learned from dispatch that "Mr. Cruz had a prior felony conviction and was ineligible to possess firearms."

Mr. Cruz was charged with unlawful possession of a firearm in the second degree. Before trial, the defense moved to suppress the firearm. The trial court granted the motion. The Court of Appeals agreed with the trial court.

Under the Washington State constitution, article I, section 7 an officer must have a warrant or a recognized exception to the warrant requirement to search a vehicle. In this case, the prosecution argued that the *Terry* or exigency exceptions to the warrant requirement authorized the search. The Court of Appeals disagreed.

First, "a *Terry* frisk extends to a car if there is a reasonable suspicion that the suspect is dangerous *and* may gain access to a weapon in the vehicle." The Court of Appeals reasoned that the officer lacked reasonable suspicion to conduct a *Terry* frisk of Mr. Cruz's vehicle for weapons because:

> [1] If either the suspect cannot access a weapon or there is no suspicion of dangerousness, a warrantless vehicle search violates *Terry*.
>
> [2] Standing alone, the mere fact an individual possesses firearms does not make him dangerous or justify intrusion into his private space. Context matters. Unless the circumstances suggest a suspect may use firearms to harm himself or others, a vehicle *Terry* frisk is not warranted based simply on the presence of firearms.
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> [3] There was no indication here of dangerousness. At the time of the search, Mr. Cruz and his companion had just spent the morning fishing. The fact that there were firearms present in this recreational setting was neither surprising nor alarming. Mr. Cruz's law violation did not create any specific safety concerns. He was not under investigation for a crime of violence of other felonious conduct. He was in the process of being cited for a misdemeanor fishing violation. Nothing about these general circumstances suggested a risk to officer safety.
>
> [4] Other less intrusive options were available. [The officer] could have asked Mr. Cruz for consent to retrieve and secure the firearms. Alternatively, he may have been able to access Mr. Cruz's keys and lock the vehicle during the citation process. Had [the officer] believed Mr. Cruz's companion was too close to the truck, he could have instructed him to stand further away and keep his hands visible. If, during any of these interactions, [the officer] developed a suspicion that Mr. Cruz and his companion were being evasive or non-compliant, then he would have had grounds to go further and conduct a protective search.

Second, the exigency "exception applies where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit destruction of evidence." In this case, the Court of Appeals found there was no emergency.

As a result, the Court of Appeals affirmed the trial court granting the motion to suppress the firearms.

SUFFICIENCY OF THE EVIDENCE: MAGNET GROUP USED TO OPEN MAGNETIC LOCK ON VIDEO GAME'S SECURITY CASE WAS AN "ITEM, IMPLEMENT, OR DEVICE DESIGNED TO OVERCOME SECURITY SYSTEMS." State v. Wade, __ Wn. App. __, __ P.3d __, 2016 WL 5396613 (September 27, 2016).

Wal-Mart store security guards stopped Casey Wade. The security guards found nine video games in Mr. Wade's backpack, and 35 powerful small magnets, a thin key, and a tumbler key in his pocket. "The magnets were arranged in three columns along the key, a configuration that allowed a person to open the magnetic lock on the security cases used to protect the video games by sliding the magnet group along the top of the case."

Mr. Wade was charged with third degree retail theft with the special circumstances of "the crime was committed with an item, article, implement, or device designed to overcome security systems." The prosecution presented evidence "that a device containing a magnet was used by store employees to open the security cases that held the video games." After the prosecution presented its case, "the defense moved to dismiss the charge, arguing that magnets were a common item and not specifically manufactured to defeat security devices." The trial court disagreed and denied the motion. The jury found Mr. Wade guilty. Mr. Wade appealed to the Court of Appeals, Division Three. The Court of Appeals agreed with the trial court.

Third degree theft with special circumstances (RCW 9A.56.360(1)(b), (4)) required the prosecutor to prove that the defendant "committed third degree theft while in possession of an item article, implement, or device designed to overcome security systems included, but not limited to, lined bags or tag removers." In this case, the Court of Appeals found that "the magnet group constituted an article, implement or device." The Court of Appeals reasoned:

> Mr. Wade was not prosecuted for possessing a single magnet strong enough on its own to open the security box. Instead, he possessed 35 magnets, arranged in three columns roughly the length of the metal in the security box, and joined to a key, making it easy to use the magnets in concert to slide open the security box.
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> [As such, the Court of Appeals found that] the evidence supported the jury's determination that this homemade device was created for the purpose of overcoming a security device.

As a result, the Court of Appeals affirmed Mr. Wade's conviction for third degree retail theft with special circumstances.

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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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