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City Attorney Law Letter

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The Constitutionality of the Arkansas Disorderly Conduct Statute

This case stems from an arrest during a demonstration in Little Rock. The subjects were charged with violations of city ordinances and the disorderly conduct statute, A.C.A. section 5-71-207. This article will be limited to the portion of the case dealing with that statute and its constitutionality.

Facts

> In September 2012, Holick organized a [**4] multi-day outreach in Little Rock, which involved demonstrations against abortion in front of a Little Rock high school and the Clinic.
> …
> One of the complainants was Gayle Teague, an employee of a vision center located near the Clinic. Teague testified that she could hear the demonstration in her clinic and told officers the noise was disrupting her business. [**5] She noted that protests were common in front of the Clinic, but this was the only time she could recall hearing sound from a demonstration [*862] in her office. Lori Williams, the Clinic's Clinical Director, complained to officers the sound was too loud for the Clinic to function. She testified that she could hear sound from the demonstration in a private counseling room while she was attempting to speak with a patient. She said that some patients canceled appointments in response to the demonstration, and that she saw demonstrators blocking the Clinic's driveway.

Duhe v. City of Little Rock, 902 F.3d 858, 860 (8th Cir. 2018)

Law

(a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she:

* * * *

(2) Makes unreasonable or excessive noise . . . [or]

(5) Obstructs vehicular or pedestrian traffic . . . .

Ark. Code Ann. § 5-71-207(a)(2), (5).

Analysis

The plaintiffs had alleged that the Arkansas statute was both vague and overbroad. They claimed that it did not give adequate notice as to what conduct is prohibited. Additionally, they claimed that this lack of notice would have a chilling effect on protected First Amendment activities, such as public gatherings and free speech.

A law is considered constitutionally infirmed by vagueness if it fails to give "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or it "encourages arbitrary and discriminatory enforcement." *Duhe v. City of Little Rock*, 902 F.3d 858, 863 (8th Cir. 2018). Some degree of vagueness will accompany any codified law. But the ordinary degree of vagueness inherent in any statute is overcome by requirement of proof beyond a reasonable doubt for conviction. Where there is disagreement as to what fact is being proven, excessive vagueness is possible.

In this case, plaintiffs singled out the terms "inconvenience, annoyance and alarm" as lacking specificity. But the Court noted that the Arkansas statute, unlike those of other jurisdictions, had a "*mens rea*" requirement. The Arkansas statute

requires proof of some degree of intent. In this case, a purposeful act must be proven. Arkansas Code Annotated, section 5-2-202 further defines just what a purposeful act is. The Court held that this distinction put the public on notice as to what conduct is being prohibited.

In reviewing the phrases "unreasonable or excessive noise" and "obstructs pedestrian or vehicular traffic," the Court held that the terms are "widely understood restrictions that "require no guess[ing] at [their] meaning." *Id.* They stated that the extraordinary act of declaring a statute overbroad was not warranted in this instance. As an aside, the Court noted that attempting to proscribe behavior involving loud noise by setting decibel levels is unduly complicated.

The disorderly conduct statute is a constitutional means of achieving legitimate state interests of regulating traffic and limiting noise in populated areas of the state and as such, serves a substantial public purpose. As such, the doctrine of "narrowly tailored/least restrictive" does not apply. Even so, the statute was found to be content neutral and sufficiently narrowly tailored so as to allow the exercise of constitutionally protected rights.

The convictions were affirmed and Ark. Code Ann. § 5-71-207, disorderly conduct, was held to be neither impermissibly vague nor substantially overbroad.

Presented by
David Phillips
Deputy City Attorney

Arkansas Court of Appeals Holds that Officer Lacked Reasonable Suspicion to Make Seizure Due to Insufficient Detail Provided by Caller

FACTS TAKEN FROM THE CASE

On April 4, 2017, Chad Davis with the Montgomery County Sheriff's Office received a message from dispatch that Ricky Lee from the Joplin Store had called about a man, later identified as Jamie Taff, wearing a white shirt with a pistol stuck in his waistband, acting suspiciously, and going in and out of the store several times. Officer Davis and Deputy Willie Bartell responded to the call and headed west on Highway 270 toward the Joplin Store. Approximately halfway en route to the store, Officer Davis received another call from dispatch indicating that the man with the pistol was walking east on Highway 270. Two miles from the Joplin Store, the officers saw a man fitting the description walking east on Highway 270.

Officer Davis activated his blue lights and made a U-turn toward the same side of the highway as Taff

pursuant to standard procedure when talking to someone on the side of the road to avoid being hit by oncoming traffic. As Officer Davis pulled up behind Taff, he observed what appeared to be the outline of a pistol in Taff's right pants pocket with his shirt covering the gun handle. When Officer Davis stopped behind Taff, Taff looked back, shook his head, took a couple additional steps, and turned toward the officers. As Taff squared up to the officers' vehicle, he reached into his left pants pocket and started to reach around to the right side. At that point, Officer Davis drew his service weapon and ordered Taff to put his hands in the air. Following the initial stop, officers searched Taff and located contraband for which he was charged.

Taff was charged with one count of simultaneous possession and one count of possession of controlled substance schedules I, II with intent to deliver. He filed a motion to suppress physical evidence, arguing that officers had illegally detained him. During the suppression hearing, Officer Davis testified that he had known the caller, Lee, for fifteen years and that Lee was reliable and not easily alarmed. Officer Davis testified that he pulled over to make contact with Taff to investigate suspicious behavior and to see what was going on in order to protect the community. Officer Davis acknowledged that Davis did not see Taff commit any traffic violations or criminal acts before initiating his blue lights.

Regarding the stop, Officer Davis explained that when he pulled in behind Taff, Taff didn't act like he wanted to be talked to or anything to that matter. Officer Davis acknowledged that the mere possession of a gun is not a crime, but he also testified that he was concerned that after seeing the outline of the pistol he felt that Taff could possibly pull his weapon and do harm to him or another deputy. On cross examination, Officer Davis specifically denied that he was investigating a crime when he initiated his blue lights, but he was just investigating a suspicious person. Officer Davis confirmed that the information he received about Taff's behavior in the store did not involve the commission of any crime, any threats made by Taff, any theft of property by Taff, any brandishing of a weapon by Taff, any mention that Taff had any unlawful intent with the pistol, or any mention that Taff was getting physical with anyone. Officer Davis also confirmed that he later heard on the second call from dispatch that Taff had left the vicinity of the store and was walking along Highway 270 away from the store and toward the county line. Officer Davis acknowledged that Taff had walked about two miles by the time he first encountered him about twelve minutes after the initial dispatch message.

The trial court held that once Officer Davis activated his blue lights, it would not have been unreasonable for Taff to feel that he was not free to leave. The trial court found that under such circumstances, Officer Davis would have needed reasonable suspicion under Rule 3.1 to detain Taff, but that based on the totality of the circumstances, it was certainly not unreasonable for the officer to detain Taff for the purpose of verifying his identification and to determine the lawfulness of his conduct. The trial court denied Taff's motion to suppress, and Taff entered a conditional plea to both charges, preserving his right to appeal.

ARGUMENT AND DECISION BY THE COURT OF APPEALS

On appeal to the Arkansas Court of Appeals, Taff argued that Officer Davis lacked reasonable suspicion under Rule 3.1 that he was committing or had committed a crime to justify the seizure. In setting forth the applicable law, the Court said that both the federal and Arkansas constitutions prohibit unreasonable searches or seizures not supported by probable cause or reasonable suspicion. The Court stated that a person is seized for Fourth Amendment purposes when law enforcement effectuates a stop by using their blue lights. Arkansas Rule of Criminal Procedure 3.1 authorizes an officer to stop and detain any person whom he reasonably suspects is committing, has committed, or is about to commit a felony or a misdemeanor involving danger of forcible injury to people or property. A police officer may make a traffic stop if the officer has probable cause to believe that the vehicle has violated a traffic law. Before an officer can use blue lights to stop someone, the officer must have reasonable suspicion that the person committed a felony or dangerous misdemeanor, or probable cause to believe the person committed a traffic violation.

Taff argued that police lacked the reasonable suspicion necessary to conduct the initial seizure

by initiating blue lights. He asked the Court to determine whether the mere possession of a pistol in his waistband constituted reasonable suspicion sufficient to seize him pursuant to Rule 3.1. Taff submitted that he was seized by law enforcement while simply walking along a public road, obeying the law, and committing neither traffic nor other criminal violations, and that these bare allegations that an individual acted suspiciously or funny are not proper bases to seize someone under the Fourth Amendment, which requires articulable facts.

The Court held that under the totality of the circumstances, the officers' effectuation of a stop with blue lights without reasonable suspicion constituted an illegal seizure, and the trial court's denial of Taff's motion to suppress evidence was against the preponderance of the evidence. Because the seizure was illegal and unconstitutional, all evidence seized as a result of the initial illegality should have been suppressed. The case was reversed and remanded for new trial.

In its reasoning, the Arkansas Court of Appeals said that it found no merit in the State's claim that Taff was not seized when Officer Davis initiated his blue lights; the court noted that Taff stopped and faced the officers in an affirmative showing of submission to the blue lights, and the trial court was correct in finding that it was reasonable Taff would not have felt free to leave once officers initiated the blue lights. Additionally, the Court noted that by Officer's Davis own testimony, he was not investigating a crime at the time he engaged the blue lights, and Taff was not suspected of having committed either a crime or a traffic violation. There was no conduct by Taff that the officers needed to determine the lawfulness of because the officers lacked any reasonable suspicion of the commission of a crime. Merely "acting suspicious" does not equate to reasonable suspicion under either the Fourth Amendment or Arkansas law.

Additionally, in response to the State argument that Officer Davis seized Taff because he had to determine the lawfulness of Taff's conduct going in and out of the store, carrying a weapon, and acting suspiciously, the Court stated that merely possessing a weapon is not a crime in the State of Arkansas. The Court said that under the clear language of Arkansas Code Annotated Section 5-73-120(a), the possessor of a handgun must have an unlawful intent to employ it as a weapon against a person in order to make the possession of the gun a criminal act. The Court continued that there is nothing in the record before of us to indicate that Taff demonstrated any sort of unlawful intent with the weapon prior to the engagement of the blue lights (such as threatening someone at the store or brandishing the weapon) that would have given officers reasonable suspicion of a crime sufficient to effectuate the stop with the blue lights. Conversely, Officer Davis' testimony was clear that there were no indicators of unlawful activity or intent and that he had no information that would have indicated Taff's possession of a gun was unlawful. Moreover, the fact that Taff had walked two miles away from the store and was on his way out of the county at the time of his encounter with officers is evidence that supports his intent to leave Montgomery County rather than to commit a crime within its borders.

Case: This case was decided by the Arkansas Court of Appeals on October 17, 2018, and was an appeal from the Montgomery County Circuit Court. The case citation is *Taff v. State*, 2018 Ark. App. 488.

Note From Prosecutor: There are a few points that can be gleaned from this case.

First, the Arkansas Court of Appeals concluded that a seizure was made when the officer turned on his blue lights, and under the totality of the circumstances the officer did not have enough information to constitute reasonable suspicion under Rule 3.1 to make the seizure. Throughout its opinion, the Court repeatedly referenced the officer's own testimony where he admitted that he was not investigating a crime, only a suspicious person. Ultimately, the Court concluded that this factual scenario was more in line with the factual scenario presented in the United States Supreme Court case of *Florida v. J.L.*, 529 U.S. 266 (2000), where the United States Supreme Court suppressed evidence because the bare bones anonymous tip lacked sufficient indicia of reliability to justify either a stop or a pat down because the suspect was observed doing nothing illegal, the gun that was seized was not readily apparent, and there was no other information for

police to act on other than a call from an anonymous source. In the facts above, Lee was a known caller, but he did not present any information that would lead the officer to believe a crime was being or was about to be committed.

Second, Officer Davis had other means to effectuate contact. In particular, Officer Davis could have not turned on his blue lights and could have instead initiated a consensual encounter under Arkansas Rule of Criminal Procedure 2.2. Under Rule 2.2, the officer cannot seize the individual, but the officer can approach the individual and ask to speak with him, so long as he does not make the person feel compelled to stay and talk.

Third, Officer Davis conceded on the stand that he was not investigating any alleged criminal activity. There are fourteen factors the Court will consider in deciding whether reasonable suspicion exists, and those are listed in the commentary to Arkansas Rule of Criminal Procedure 2.1. As a police officer, when you decide to seize someone thinking you have reasonable suspicion to do so, remember those fourteen factors, and be sure to articulate them in your report and while you are testifying to the best of your ability and recollection.

Fourth, the Court was clear in this case that merely possessing a weapon is not a crime in the State of Arkansas and will not constitute reasonable suspicion for a police officer to make a seizure. The officer will need further articulable facts to support the seizure under the theory of reasonable suspicion.

Presented by
Taylor Samples
Senior Deputy City Attorney

Arkansas Court of Appeals Discusses Three Types of Police Encounter (Rule 2.2, Rule 3.1, and Probable Cause Arrest), and Upholds Constructive Possession Conviction

FACTS TAKEN FROM THE CASE:

At around midnight on January 14, 2017, Van Buren Police Officer Andy Jones was patrolling in an area of extra patrol on Industrial Park Road in response to complaints of trespassing on private property where a gas well was located. While on patrol, Officer Jones observed two vehicles parked next to each other at the gate entrance to the gas well. There were two occupants in a truck and a single occupant in a car. Due to the previous reports of trespassing and because it was late at night, Officer Jones pulled in behind the vehicles to identify the occupants and investigate why they were there.

As Officer Jones pulled in, a man named Mr. Watkins exited the truck from the driver's side. Michael Dye remained seated in the passenger seat of the truck. Dye had cash in his hand and told Officer Jones that Watkins was giving him a ride to the store to buy cigarettes. Officer Jones observed a black pouch containing loose baggies in between the driver's seat and the passenger's seat of the truck. Officer Jones asked for identification from Watkins and Dye, which they each provided. Officers Hammer and Bradford had pulled up to the scene. While Officer Jones was in his patrol car running the identification cards, Watkins fled the scene on foot. Officers Hammer and Bradford unsuccessfully searched for Watkins for about ten minutes. Officer Jones learned from the identification check that appellant Dye had prior methamphetamine convictions.

Officer Jones asked Dye if he knew where Watkins would have gone. Dye replied that Watkins was staying with him at his residence, which was on property adjacent to the gas well about fifty feet from where the truck was parked. Officer Jones asked Dye if they could check his home for Watkins, and Dye replied "yes." In addition to giving verbal consent to search his house, Dye signed a consent-to-search form provided to him by Officer Hammer.

Officer Jones acknowledged that during his conversation with Dye, Dye's speech was slurred, his eyes were glassy, and he was unsteady on his feet. Although Officer Jones did not smell alcohol on appellant Dye's breath, he believed Dye was under the influence of a narcotic. However, Officer Jones testified that Dye appeared to understand what they were asking him and appeared to know what was going on. Officer Jones stated that, although he did not ask Dye about a dog, Dye volunteered to him that there was a dog in the house and warned that it was potentially violent toward officers. Dye also volunteered to Officer Jones that there was an unloaded shotgun in the first bedroom on the right propped up next to his bed. Dye gave the officers the key to his house.

Based on the consent the police obtained from Dye, Officer Bradford entered the residence using the key provided by Dye. Officer Bradford observed a pit bull mix dog lying on the couch in the living room. He also found a glass pipe, which he assumed was used to smoke methamphetamine, on the living-room table. Officer Bradford entered the bedroom where Dye said the gun was located and found an unloaded shotgun in the bedroom closet. There were shotgun shells directly above the gun. On the top of the headboard of the bed was a spoon containing a crystal-like substance, which subsequently tested positive for methamphetamine at the crime lab. Officer Bradford also found some straws that contained a powdery substance.

Dye was convicted in a bench trial of possession of methamphetamine, possession of drug paraphernalia, and being a felon in possession of a firearm. He was sentenced to ten years in prison, followed by a total suspended imposition of sentence of twenty years.

ARGUMENT AND DECISION BY THE ARKANSAS COURT OF APPEALS

Constructive Possession

On appeal to the Arkansas Court of Appeals, Dye first claimed that there was insufficient evidence to support his convictions. The Court held that there was substantial evidence to support the trial court's finding that Dye was in possession of the methamphetamine, the drug paraphernalia, and the firearm found in his residence. The Court said that constructive possession can be inferred when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. Constructive possession can also be inferred when the contraband is in the joint control of the accused and another. However, joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. In such cases, the State must prove that the accused exercised care, control, and management over the contraband and that the accused knew the matter possessed was contraband. Control over the contraband can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found.

In its reasoning, the Court noted that contrary to Dye's argument, there was evidence that he

occupied the house and that it was his residence. Upon inquiry by the police, Dye stated that Watkins was staying with him at his residence. Dye orally consented to the search of his residence and provided the police with the key that opened the front door. Dye also signed the written consent form, which stated that the house to be searched, 4616 Industrial Park Road, was "my house." Finally, Dye voluntarily informed the police about a potentially dangerous dog in the house and a shotgun in his bedroom, both of which were found by the police after they entered the house. Therefore, the State sufficiently established that this was appellant Dye's house.

After the police entered the house, they found the contraband in Dye's bedroom. Dye had told the police they would find a shotgun in a bedroom near his bed. The shotgun was located in the bedroom closet. In plain view in the headboard area of the bed the police found a spoon, which was later confirmed to contain methamphetamine, and some straws with white residue. The Court concluded that this evidence was sufficient to prove that Dye constructively possessed the contraband. The contraband was found in his house and in his bedroom, which were factors linking him to possession of the items. Thus, there was substantial evidence to support Dye's convictions for possession of methamphetamine, possession of drug paraphernalia, and being a felon in possession of a firearm.

Initial Encounter and Continued Detention

Next, the Court addressed Dye's argument that the contraband seized from his house should have been suppressed because it was illegally obtained. First, Dye claimed that the initial encounter by law enforcement was not authorized by Rule 2.2 of the Arkansas Rules of Criminal Procedure. Next, he argued that, even if the initial encounter had been lawful, his subsequent and continued detention was not authorized under Rule 3.1. Finally, Dye argued that even if the encounter and continued detention had been lawful, the consent obtained by the officers to search his house was invalid because it was obtained without *Miranda* warnings and was not given freely and voluntarily because he was under the influence of drugs at the time of his consent.

In setting forth the applicable law, the Court stated that in *Lewis v. State*, 2017 Ark. 211, the Arkansas Supreme Court articulated three types of encounters with law-enforcement officers:

> Police-citizen encounters have been classified into three categories. The first category is contemplated by Rule 2.2 of the Arkansas Rules of Criminal Procedure. The authority for a police officer to act in a nonseizure encounter is recognized in Rule 2.2(a) which provides,
>
> A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

The Court said that this type of nonseizure encounter occurs when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. This encounter is consensual and does not constitute a seizure, and is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. A seizure of a person occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The second category is contemplated by Rule 3.1 of the Arkansas Rules of Criminal Procedure. This second type of encounter occurs when the officer justifiably restrains an individual for a short period of time because the officer has a reasonable, articulable suspicion that the person has committed or is about to commit a crime. The final category is the full-scale arrest, which must be based on probable cause.

Dye claimed that the initial encounter by law enforcement was unjustified under Rule 2.2 because Officer Jones was not investigating any crime but was merely trying to find out what Dye and the others were doing on the property. The Court disagreed with Dye's claim that the initial encounter was unlawful. In its reasoning, the Court noted that Officer Jones testified that he

was on “extra patrol” late at night in an area where there had been complaints of trespassing on private property. Officer Jones encountered two vehicles parked next to each other on the private gas-well property. This was the same gas-well property where the prior trespassing had been reported. Under these circumstances, the Court concluded that the initial encounter was lawful under Rule 2.2 because Dye was on private property where there had been complaints of trespassing. Because Officer Jones was investigating the potential crime of trespass, he was authorized under Rule 2.2 to stop and request that Dye cooperate in the investigation or prevention of crime.

Next, the Court addressed Dye's argument that the encounter was transformed into the second category—one of a seizure where he was being restrained by the officer—without the officer having the requisite reasonable suspicion under Rule 3.1 and for a longer time period than is authorized under this rule. The Court quoted Arkansas Rule of Criminal Procedure 3.1 as follows:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer’s presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity. The Court continued by saying a consensual encounter with law enforcement is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave.

The Court noted that within minutes of the consensual police-citizen encounter, Watkins fled the scene. During the next ten minutes officers searched for Watkins, during which time Officer Jones remained with Dye at the truck and ultimately asked Dye for permission to search for Watkins in Dye’s residence. The Court concluded that a reasonable person in Dye’s position would not believe he was free to leave during this time frame, as demonstrated by the officers’ reaction when Watkins left the scene. The police search for Watkins, coupled with one officer remaining with Dye and requesting to search Dye’s residence, amounted to a show of authority that prevented Dye from leaving the scene. Therefore, the Court held that Dye was being detained as contemplated by Rule 3.1.

Having concluded that Dye was being detained, the next inquiry under Rule 3.1 is whether the police had reasonable suspicion that appellant was committing, had committed, or was about to commit a felony or misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property. The Court concluded that Officer Jones had reasonable suspicion to detain Dye pursuant to Rule 3.1.

Arkansas Code Annotated section 16-81-203 provides that the following are among the factors to be considered in determining if the officer has grounds to reasonably suspect:

(1) The demeanor of the suspect;
(2) The gait and manner of the suspect;
(3) Any knowledge the officer may have of the suspect’s background or character;
(4) Whether the suspect is carrying anything, and what he or she is carrying;
(5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all the other factors;
(6) The time of day or night the suspect is observed;
(7) Any overheard conversation of the suspect;
(8) The particular streets and areas involved;
(9) Any information received from third persons, whether they are known or unknown;
(10) Whether the suspect is consorting with others whose conduct is reasonably suspect;
(11) The suspect’s proximity to known criminal conduct;

(12)The incidence of crime in the immediate neighborhood;
(13)The suspect's apparent effort to conceal an article; and
(14)The apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

The Supreme Court has stated that this section is merely illustrative, and not exhaustive, of the types of factors that may be considered in forming reasonable suspicion.

The Court concluded factors that combined to give Officer Jones reasonable suspicion that Dye was engaged in criminal activity were (a) there had been reports of trespassing on the private gas-well property where Dye was located, resulting in extra police patrol in the area; (b) it was approximately midnight; (c) the truck occupied by Dye was parked side-by-side with another vehicle; (d) Dye was holding cash in his hand; (e) there was a black pouch containing plastic baggies in plain sight between the front seats of the truck; (f) Officer Jones determined that Dye had prior methamphetamine convictions; and (g) Dye's co-occupant fled the scene shortly after the officers' arrival. The Court held that on these facts, Officer Jones had specific, particularized, and articulable reasons that Dye may be involved in criminal activity. Although any one of these factors, standing alone, may not have been enough to lead to reasonable suspicion, viewing the totality of these circumstances, the Court could not say the trial court clearly erred in determining that the police had reasonable suspicion to detain appellant.

The Court's remaining inquiry under Rule 3.1 is whether the duration of the police detention was within the time constraint allowed by the rule. Dye argued that because the detention exceeded fifteen minutes, it was excessive and he should have been permitted to leave. The Court disagreed. According to the plain language of the rule, the alternative time period allowed the officer to detain Dye for "such time as was reasonable under the circumstances" and was not restricted to a specific number of minutes. The Court referenced the case of *Omar v. State*, 99 Ark. App. 436 (2007), where it held that a thirty-seven minute detention was not unreasonable. The Court noted that in Dye's case, he was detained for about twenty minutes from the time of the initial stop until the time the police began searching his house. In light of the suspicious information known to the officers and the fact that they were still actively searching for Dye's companion, the Court held that this time period was not unreasonable.

Search of House

Dye's final point in support of his motion to suppress is that (1) the police obtained his consent to search without *Miranda* warnings, and (2) his consent was not voluntarily and willingly given because he was under the influence of drugs at the time it was given. The Court disagreed with Dye and was not persuaded by either assertion.

The Court reasoned that police obtained Dye's consent to search his house both verbally and in writing. The written consent form specifically advised Dye of his constitutional right to refuse consent, and with this information, Dye chose to sign the form consenting to the search. This consent was validly obtained by the officers, and Dye offered no authority that *Miranda* warnings were required to obtain his consent. Dye also argued that any incriminating statements he made should have been suppressed. However, the Court noted that the only incriminating statement Dye gave to police was that there was a gun in his bedroom, and this statement was not the result of a police interrogation. Rather, it was a spontaneous, voluntary statement. A *Miranda* warning is not required for spontaneous, voluntary statements.

Regarding Dye's argument that his consent was involuntary, the Court recognized that under Aransas Rule of Criminal Procedure 11.1, it is the State's burden to prove by clear and positive evidence that consent to search was freely and voluntarily given and that there was no duress or coercion. The Court concluded that there was no evidence of any duress or coercion in obtaining Dye's consent, and Officer Jones testified that Dye appeared to understand what was going on and what was being asked of him. Dye also gave officers the key to his house and voluntarily advised the police of some of its contents. Based on Officer Jones's testimony, the Court held that there was no error in the trial court's finding that appellant's consent was freely and voluntarily given. Having concluded that there was sufficient

evidence to support Dye's convictions and that the trial court's denial of Dye's motion to suppress was not clearly erroneous, Dye's convictions were affirmed.

Case: This case was decided by the Arkansas Court of Appeals on November 7, 2018, and was an appeal from the Crawford County Circuit Court. The case citation is *Dye v. State*, 2018 Ark. App. 545.

Note From Prosecutor: The facts and sequence of events presented above pose an illustrative juxtaposition to those presented in the *Taff v. State* opinion, which is also discussed in this issue of C.A.L.L. Note how the officers above begin the encounter as consensual under Rule 2.2, then build to a seizure under Rule 3.1, and ultimately end the encounter with a probable cause arrest. Read this case in comparison to how the officer handled the situation as discussed in the *Taff* opinion.

Presented by
Taylor Samples
Senior Deputy City Attorney

Qualified Immunity and Deprivation of Rights the "Conscience-Shocking" Element

Dwayne Andrews fired two shots from a rifle toward police officers during what he claimed was a PTSD episode in 2003. A psychologist opined that he was fit to proceed, but that he was not criminally responsible for his acts under Missouri law. The prosecution and defense stipulated to his condition and he was acquitted on mental grounds and placed into a residential treatment program.

In 2010 the Department of Mental Health petitioned the Court for release. That petition was opposed by the prosecutor and he was not released. In 2012 he was released and filed suit in 2013 alleging his rights under 42 U.S.C. §1982 were violated by members of the Department of Mental Health.

A defense to the allegation of civil rights violation is the doctrine of qualified immunity. "Qualified immunity protects a government official from liability in a section 1983 action unless the official's conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." *Andrews v. Schafer*, 888 F.3d 981, 983 (8th Cir. 2018). While this aspect of qualified immunity is well known, the standard to overcome qualified immunity was the focus of this case.

As a preliminary matter, the Court agreed with Andrews that he was entitled to be released once he was found to be either "no longer dangerous or no longer mentally ill," *Id* at, 984, which the Department had found as early as 2010. The Court also noted that the law suit was not for release, which had already been granted, but an action against officials at the department.

To prove that the plaintiff, Andrews, was entitle to relief, he had to show that "the [state defendants'] conduct was conscience-shocking, and that the [state defendants] violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*. The Court further noted that "[t]o shock the conscience the defendants' conduct must be "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."" *Id*.

Andrews could show no evidence of false reports or any action "inspired by malice." The dismissal based on a grant of qualified immunity was affirmed.

In the case of *De La Rosa v. White*, No. 15-3399, 2017 U.S. App. LEXIS 5273, at *1-2 (8th Cir. Mar. 27, 2017), the US Eighth Circuit Court of Appeals noted that to be "beyond debate" an act must be clearly on point as prohibited. This means that a case involving the precise circumstances must have been before the Court on a previous occasion with the results being adverse to law enforcement. (*CALL*, 2nd Qtr. 2017).

The second prong of analysis has to do with shocking the conscience. In the context of criminal investigations, examples of conscience-shocking behavior include falsifying evidence and coercing testimony. "Defendants may be held liable if they recklessly ignored evidence suggesting the Plaintiffs' innocence or systematically pressured witnesses to manufacture false testimony to fill gaps in an investigation." *Winslow v. Smith*, 696 F.3d 716, 734 (8th Cir. 2012). In Winslow, officers repeatedly threatened the suspect with execution if he did not cooperate. The Court quoted *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) Which stated "[t]o hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice." *Id*.

Andrews could show no such malicious behavior. The underlying dismissal was affirmed.

Presented by
David Phillips
Deputy City Attorney

Use of Force: Proportionality, Part I

Brittany Karels was arrested for the charge of, *inter alia*, Disorderly Conduct under Minnesota law. During the arrest, Karels sustained numerous injuries. Karels sue the arresting officers and the City of Big Lake under 42 U.S.C. § 1983 alleging Civil Rights violations in the conduct of the arrest. Qualified immunity was denied to the arresting officers.

Facts

Karels rented a room in the basement of Jennifer and Robert Owens' multilevel home in Big Lake, Minnesota. The house has an attached garage with two [**2] steps leading from the garage into the

house. Karels is five feet, five inches tall and has described herself as being out of shape. At the time of her arrest, she weighed approximately 185 pounds and smoked cigarettes regularly.

On Friday, March 27, 2015, Karels drank a six-pack of beer after putting her five-year-old son to bed. Later that night, Jennifer reluctantly agreed to watch Karels's son while Karels went to purchase cigarettes.

Karels left the house around 1:30 a.m. on March 28. After she purchased cigarettes, Karels stopped at a bar in a nearby town, where she had two shots of liquor and smoked marijuana in the parking lot. Karels took a taxi home sometime after 2:30 a.m. and discovered that Jennifer had gone out to look for her. Karels called Jennifer, who soon returned to the house. The two women began arguing loudly outside the house. When the still-arguing women entered the house, Robert told Karels to go to her room. As the women continued to argue, he called 911 to report Karels as "a drunk that's being ignorant." He gave the dispatcher the address to his home and described Karels as "a friend living here."

Officers Storz and Norlin were dispatched to the scene. At that [**3] time, Storz had been a police officer for approximately ten months. He was thirty-three years old, more than six feet tall, and physically fit. Norlin also was tall and fit.

Karels and Jennifer were still arguing in the house when Storz and Norlin arrived. The Owenses told the officers that they did not feel threatened by Karels, but that they wanted her to go to her room because she had been drinking and was being argumentative. Storz spoke to Karels outside as she smoked a cigarette. Karels cursed loudly, but then lowered her voice upon being instructed by Storz to do so. After Karels told Storz her side of the story, they returned to the house.

Storz then asked Karels for her identification. Karels did not remember whether she complied with his first request, but she testified that when she handed her driver's [*743] license to Storz, he poked her in the collarbone repeatedly and yelled, "calm down" or "back off." Karels then demanded to speak to the supervising officer. When the officers informed her that there was no supervisor on duty, Karels went into the garage to smoke another cigarette. Norlin followed her, while Storz remained in the house.

While in the garage, Karels called 911 twice [**4] to request a police sergeant or a deputy sheriff. According to the call transcripts, Karels told the dispatcher that two Big Lake police officers would not leave her alone and had assaulted her. The dispatcher told Karels that there was nothing she could do and that Karels could file a complaint with the police chief on Monday morning. It is undisputed that Karels was yelling and cursing at the dispatcher during the 911 calls.

During the second call, dispatch relayed to the officers that Karels kept calling 911 and making demands. After dispatch asked whether the officers planned to arrest Karels, Storz exited the house, went down the concrete steps, and entered the garage, where Karels was holding a lit cigarette in her right hand. An empty coffee can that served as an ashtray was located near the steps. Storz informed Karels that she was under arrest and instructed her to put her hands behind her back.

According to Karels, Storz quickly grabbed her left wrist and brought it behind her back. Karels tried to tell the officers that she was going to put the cigarette in the coffee can. She testified that Norlin had grabbed her right wrist, guiding it toward the coffee can, and away from [**5] Storz, so that she could dispose of the cigarette. As Storz felt Karels pull away from him, he commanded her to stop resisting arrest, to which Karels responded, "I've got a lit cigarette in my hand." Immediately after

Norlin extinguished the cigarette and as she was reaching toward the coffee can, Storz twisted her left arm behind her and body-slammed her onto the concrete steps, causing Norlin to lose his grip on her wrist. She felt her left arm "twisted up almost where the bra strap line would be." Karels landed on her left side and felt searing pain in her left arm. Her glasses flew off her face. The back of her head hit the door, which slammed open and then shut, hitting Karels a second time. Storz landed on the ground next to her. Karels testified that mere seconds passed between the time Storz entered the garage to the time he slammed Karels onto the ground.

Storz disputes Karels's account of events leading up to his use of force, citing evidence that Karels was loud, aggressive, argumentative, and resistant. According to Storz, upon being informed that she was being arrested for disorderly conduct, Karels retorted that she would not do anything until she finished smoking her [**6] cigarette. Norlin then extinguished the cigarette and the officers grabbed hold of Karels's wrists. Storz was able to place Karels's left wrist in handcuffs. When Karels began swinging her shoulders, trying to pull her arms away from the officers, she lunged forward and broke Norlin's grip from her right arm. By that time, Storz held only the handcuffs that were secured to Karels's left wrist and had no hold of her left arm. Storz's incident report states that he and Karels tripped over a concrete step as Karels pulled away from him, and that they then fell to the ground.

The officers placed Karels in handcuffs, pulled her to a standing position, and escorted her to the squad car. When they searched Karels, they found a marijuana pipe and a small amount of marijuana.

Karels complained repeatedly about her left arm. She later described the pain as [*744] feeling "like a very strong vise clamping down on my upper left arm." She thought that she was being restrained in a new style of handcuffs that secured the upper arm, so she repeatedly asked the officers to move or loosen the handcuffs. Karels requested medical attention, but refused to allow the paramedics to examine her when an ambulance [**7] arrived.

Norlin transported Karels to the county jail, where she continued to complain about left arm pain and numbness. During booking, a sergeant examined Karels and felt a grinding in her left arm, which is indicative of a broken bone. He refused to accept custody of Karels because she needed medical attention. The sergeant placed her arm in a splint, and Norlin transported her to a nearby hospital, where an X-ray revealed that Karels had a fracture of the left humerus bone. Karels was then transported to a hospital in St. Cloud, Minnesota, for emergency surgery on what was found to be a spiral, comminuted shaft fracture, with the radial nerve interposed at the fracture site and wrapped around a fracture fragment.

Karels v. Storz, 906 F.3d 740, 742-44 (8th Cir. 2018) *Karels v. Storz*, 906 F.3d 740, 742 (8th Cir. 2018)

Law

Reasonable force may be used to place a suspect under arrest. Among the factors considered, the Court will specifically look at "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" in determining whether the amount of force used was reasonable. *Karels v. Storz*, 906 F.3d 740, 745 (8th Cir. 2018).

Analysis

In the case at bar, the suspect, now plaintiff, was engaged in arguably illegal conduct within her home. The location of the home does create a legal distinction in that there is no public exigency to quell the disturbance. The complainants were characterized as enduring annoyance, but not fear or danger. No weapons were involved. The

conduct at issue was characterized as drunk and argumentative, but not as resisting. A pro forma filled out by arresting officers classified the employed force as to "effect an arrest."

At issue was the conduct that took place as Officer Storz tried to handcuff Karels. Storz grabbed Karels by the arm and moved her hand, which was holding a cigarette, to an ash can. In doing so, Karels tried to pull away. One cuff was applied, but Karels pulled away before the other cuff was secured. In the subsequent struggle, Karels' arm was twisted, bent upward and injured. Karels wound up on the ground, thrown there, according to Karels' version of events.

The arrest, itself, was not contested. The only issue dealt with the amount of force used to effect the arrest. Specifically, Karels argues she was not given time to comply with officer instructions. The officer responded with the argument presented in the case of *Blazek v. City of Iowa City*, 761 F.3d 920 (8th Cir. 2014) (Reviewed in the 3rd QTR CALL). But the Court recognized that "*Blazek* and *Wertish* [*v. Krueger*, 433 F.3d 1062 (8th Cir. 2006)] do not establish that the slightest resistance justifies any subsequent use of force by an officer… They instead establish that an officer may use "somewhat more force" on a "passively resistant" suspect." *Karels v. Storz*, 906 F.3d 740, 746 (8th Cir. 2018).

Please note that the initial use of force by law enforcement was directed not at placing the suspect in had cuffs, but to moving her hand to an ash can to extinguish a cigarette. This is an important distinction and likely compelled the result. Had officers in that case simply taken the cigarette away from the suspect then placed her in cuffs, the result may have been different. However, that is only speculation, given the amount of injury the subject received.

The concept of proportionality appears to be taking hold in this case. It will be even more notable in the case of *Kelsay v. Ernst*, a case cited and distinguished here.

Use of Force; Proportionality, Part II

Presented by
David Phillips
Deputy City Attorney

A small in stature, non-violent suspect was tackled to the ground and sustained injury while being arrested for a misdemeanor violation. Law enforcement gave no warning of the act. The arresting deputies, their department and the city were sued under 42 U.S.C. § 1983 alleging Civil Rights violations in the conduct of the arrest.

Facts

On May 29, 2014, Kelsay, her three children, and her friend Patrick Caslin went [**2] swimming at a public pool in Wymore, Nebraska. Caslin engaged Kelsay in what she described as "horseplay," but some onlookers thought he was assaulting her, and a pool employee contacted the police.

As Kelsay and her party left the pool complex, they encountered Wymore Police Chief Russell

Kirkpatrick and Officer Matthew [*1083] Bornmeier. Kirkpatrick informed Caslin that he was under arrest for domestic assault and escorted him to a patrol car. Kelsay was "mad" that Caslin was arrested. She tried to explain to the officers that Caslin had not assaulted her, but she thought that the officers could not hear her.

According to Kirkpatrick, Caslin became enraged once they reached the patrol car and resisted going inside. Kirkpatrick says that after he secured Caslin in handcuffs, Kelsay approached the patrol car and stood in front of the door. Kirkpatrick claims that he told her to move three times before Bornmeier escorted her away so that Kirkpatrick could place Caslin into the patrol car.

Kelsay denies approaching the patrol car until after Caslin was inside the vehicle. At that point, while Kirkpatrick interviewed witnesses, she walked over to the car to talk to Caslin. Bornmeier told her to [**3] back away from the vehicle, and Kelsay complied. Two more officers—Deputy Matt Ernst and Sergeant Jay Welch from the Gage County Sheriff's Office—then arrived on the scene. When they appeared, Kelsay was standing about fifteen feet from the patrol car where Caslin was detained, and twenty to thirty feet from the pool's exit doors. Kelsay's younger daughter was standing next to her; her older daughter and son were standing by the exit doors. Kelsay stood approximately five feet tall and weighed about 130 pounds.

Kirkpatrick told Ernst and Welch that Kelsay had interfered with Caslin's arrest. According to Welch, Kirkpatrick explained that Kelsay tried to prevent Caslin's arrest by "trying to pull the officers off and getting in the way of the patrol vehicle door." Kirkpatrick thus decided that Kelsay should be arrested.

In the meantime, Kelsay's older daughter was near the pool exit doors yelling at a patron who the daughter assumed had contacted the police. Kelsay started to walk toward her daughter, but Ernst ran up behind Kelsay, grabbed her arm, and told her to "get back here." Kelsay stopped walking and turned around to face Ernst, at which point Ernst let go of Kelsay's arm. Kelsay [**4] told Ernst that "some bitch is talking shit to my kid and I want to know what she's saying," and she continued walking away from Ernst and toward her daughter.

After Kelsay moved a few feet away from Ernst, the deputy placed Kelsay in a bear hug, took her to the ground, and placed her in handcuffs. Kelsay momentarily lost consciousness after she hit the ground. When she regained her senses, she was already handcuffed, and she began screaming about pain in her shoulder.

Ernst drove her to the Gage County jail, but corrections officers recommended that Kelsay be examined by a doctor. Kirkpatrick took Kelsay to a hospital, where she was diagnosed with a fractured collarbone. Kelsay ultimately was found guilty of two misdemeanor offenses after pleading no contest to attempted obstruction of government operations and disturbing the peace.

Kelsay v. Ernst, 905 F.3d 1081, 1082-83 (8th Cir. 2018)

Law

"The dispositive question is whether the violative nature of particular conduct is clearly established." *Kelsay v. Ernst*, 905 F.3d 1081, 1084 (8th Cir. 2018).

It was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to "get back here" and continued to walk away from the officer. *Id.*, (quoting *Ehlers v. City of Rapid City*, 846 F.3d 1002 (8th Cir. 2017)). *Ehlers v. City of Rapid City* was reviewed in 3rd QTR 2017 CALL.

Analysis

In this case, a law enforcement officer gave a command, which was ignored, then came up

behind the non-complying suspect and tackled her. The suspect was substantially smaller than the law enforcement officer. After the initial command was given and ignored, no subsequent warning about use of force was given.

The majority compared the case to *Ehlers v. City of Rapid City* and concluded that the non-compliance could be interpreted by law enforcement officers as resistance and that force could then be justifiable used. Qualified immunity was granted under this limited analysis.

The notable issue in this case is not the majority opinion. It is the dissent. Chief Judge Lavensky Smith had a different opinion about the outcome. While Chief Judge Smith acknowledged the analysis and settled law, he brought out two key points. First, he noted that no verbal warning preceded the use of force. Secondly, he compared the physical abilities of the law enforcement officer to those of the subject and observed a striking disparity.

Generally speaking, warnings about the use of force are not specifically required under current law. A recent case involving warning and use of deadly force was *Rogers v. King*, No. 16-4209, 2018 U.S. App. LEXIS 7314, (8th Cir. Mar. 23, 2018), reviewed in 2nd QTR 2018 CALL. In that case, a woman was fatally shot by deputies seeking her arrest. The decedent in that case was wielding a knife and some awkwardness in the apprehension plan led to her death. The Court there held that "[w]hen feasible an officer should first give a warning that he will use deadly force." *Id* at *8.

The holding dealt with deadly force. Additionally, the "when feasible" clause would seem to virtually nullify the requirement. This would appear to suggest that the law favored the action of the deputy in the manner of arresting Kelsay.

The dissenting Chief Judge's recitation began with the observation "[b]ut, "in an obvious case," the clearly-established prong can be met "even without a body of relevant case law."" *Kelsay v. Ernst*, 905 F.3d 1081, 1086 (8th Cir. 2018). Under this view, the officer should have known that such an act would not be justifiable. In other words, some factual situations are so obvious that no prior warning of case law to the law enforcement community is necessary. This perspective presents some rather interesting implications.

Until now, law enforcement officers have only been held to account where case law established a standard "beyond debate." By applying the standard of review suggested by the Chief Judge, not only would the "beyond debate" standard of warning become less controlling, but a far more difficult standard of proportionality starts to take hold.

In *Karels v. Storz*, a female subject was forced to extinguish a cigarette and as a result, her arm was broken. Qualified immunity was denied based on existing law. The act of applying force to a non-resisting, non-violent subject was acknowledged in, *inter alia*, *Blazek v. City of Iowa City*, 761 F.3d 920 (8th Cir. 2014) (Reviewed in the 3rd QTR CALL). In the case at bar, the officers were given qualified immunity, again based on existing law.

Dissenting opinions are not law. But, given the source of the dissent, look for more to come from this if some members of law enforcement continue to engage in the reviewed conduct. Should a doctrine of proportionality supplant the existing standard of reasonableness, the legal battlefield geometry of law enforcement will be greatly complicated.

Presented by
David Phillips
Deputy City Attorney

Reckless Investigation as a Policy

Six individuals were investigated and subsequently charged in the 1985 rape and murder of a Beatrice, Nebraska woman. All but one of the suspects pled guilty to various charges and all were sentenced and served from five to twenty years before being exonerated by DNA evidence in 2009. The individuals sued the officers and Gage County under 42 U.S.C.§ 1983 and 42 U.S.C. §1985. Qualified immunity was denied and the suit went to trial. The plaintiffs were awarded over $28 million by a jury. This appeal was taken after the jury trial.

Facts

Four years after the local police and FBI concluded their unsuccessful investigation into the rape and murder, the County Sheriff opened his own investigation. One of his deputies, Deputy Price, was also a licensed psychologist.

Deputy Price used systematic pressure in his investigation to implicate the defendants in the face of contrary evidence." One example was the presence of blood, found at the crime scene, which did not match the type of any suspect. Price also encouraged subjects to use "unconscious recall" to remember facts, some of which were provided by Price. The suspects were of diminished capacity and susceptible to such abuses. Additionally, Price had a prior clinical relationship with two of the suspects.

Another tactic used to expand the pool of suspects was to conduct a line-up for the suspects to select possible accomplices. An affidavit for arrest was prepared by another deputy falsely claiming corroboration.

Testimony at trial showed that the Sheriff, now deceased, had participated in interviews during the investigation. However, the jury subsequently found that the Sheriff had not directed the fabrication of evidence.

Law

Manufacturing evidence, under color of law, is a constitutional tort and is actionable under 42 U.S.C.§ 1983.

A municipal entity "may not be found liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Dean v. Searcey*, 893 F.3d 504, 511 (8th Cir. 2018). For a municipality to be held liable for a constitutional violation, a policy-making official must have directed, authorized, or agreed to the act in question. Id.

Analysis

This appeal was brought by the County and not by individual officers who had also been found liable at trial. As such the appeal focused on separating the County from actions of individual officers. The Counties theory under appeal was that, where the one policy-maker involved in this case was cleared of wrong-doing, no liability could attach to the county.

The Court of Appeals disagreed. The evidence of falsification of evidence was overwhelming. The Court held that participation in or even awareness of the investigation itself could be interpreted by a jury as direction or authorization of the tactics used in that investigation.

The judgment against the county, in the amount of $28 million, was affirmed.

Presented by
David Phillips
Deputy City Attorney

Use of Arm-Bar Takedown Still Acceptable, If Force May Be Used—Neal v. Ficcadenti

Summary

The United States Court of Appeals for the Eight Circuit maintained its holding in *Blazek v. City of Iowa City* in this case by again holding that any use of force on a compliant subject is unreasonable. The decision, rendered on an interlocutory appeal, cleared the way for trial in that case. The Eighth Circuit reviewed each act in a series of actions and determined that one act, that of roughly lifting a subdued, hand-cuffed individual from the floor, could arguably be the basis for a jury verdict against the officers and the City. The dissent argued that each act should be viewed in connection as an unbroken sequence of events, thus removing qualified immunity from the totality of events.

Facts

In the late evening hours of June 6, 2012, police officers responded to a call that a witness had seen a man retrieve a gun from a black sedan parked outside of Born's Bar, a tavern located on Rice Street in Saint Paul, Minnesota. At the scene, the officers discovered a black sedan containing three occupants, none of whom perfectly matched the description of the suspect. After apprehending the driver, the officers commanded Appellee Robin Neal and another passenger to get out of the car with their hands up

The scene, which was captured on video, was chaotic. Music blared from Born's Bar. A police dog barked incessantly. Multiple officers, guns drawn, shouted multiple commands. Neal alighted from the sedan as directed with his hands up—but immediately began to act somewhat erratically. He spent a minute wandering [*2] around the sedan, dropped his hands at least five times, and failed to promptly follow a command that he walk towards the officers.

The appellant, Officer Daniel Ficcadenti, commanded Neal to come to him with his hands up. Neal finally complied. As Neal got within arm's reach, Officer Ficcadenti conducted an abrupt arm-bar takedown, injuring Neal. Neal brought this 42 U.S.C. § 1983 action alleging that Officer Ficcadenti applied excessive force when he brought Neal to the ground. The district court denied qualified immunity to Officer Ficcadenti, finding that the evidence when viewed in a light most favorable to Neal showed that in 2012 it was clearly established that the use of an arm-bar takedown technique on a suspect who was neither threatening nor resistant violated the Fourth Amendment's prohibition against unreasonable searches and seizures.

Neal v. Ficcadenti, No. 17-2633, 2018 U.S. App. LEXIS 18988, at *1-2 (8th Cir. July 12, 2018)

Law

Use of force by law enforcement personnel must be objectively reasonable in light of the facts and circumstances known to the officer at the time. Reasonableness is determined "by looking at the particular circumstances of each case, including "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officer or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight."" *Neal v. Ficcadenti*, No. 17-2633,

2018 U.S. App. LEXIS 18988, at *8 (8th Cir. July 12, 2018) (quoting, 433 F.3d 1062, 1066 (8th Cir. 2006).

Any use of force on a subject who is neither resisting nor threatening is unreasonable and law enforcement officers have been on notice of this precedent since 2012, if not before. *Neal v. Ficcadenti*, No. 17-2633, 2018 U.S. App. LEXIS 18988, at *12 (8th Cir. July 12, 2018) (citing *Montoya v. City of Flandreau*, 669 F.3d 867, 873 (8th Cir. 2012)).

Analysis

The Court reviewed agreed facts in comparison to the three elements of 1) severity of risk of the call itself, 2) immediate risk to the officers and 3) whether the subject was actively resisting arrest. These are the elements from *Wertish v. Krueger*.

The Court agreed with the officers that the call was a report of a man with a gun in a high crime area which implies a potentially dangerous situation. However, it was very significant that none of the three men from the black sedan matched the description of the subject of the call. This fact was immediately determined by officers at the scene. Additionally, none of the men constituted a threat to the officers, given the number of officers at the scene, their positions around the car, and the fact that most of them had weapons drawn and aimed at the sedan.

The Defendant officers suggested that Neal's walking around the car, despite instructions to walk toward the officers indicated that he was not complying with instructions and therefore resisting. The Court did not agree with this assessment. The Court noted that even the officers agree that, by the time the arm-bar takedown technique was applied, Neal was complying with instructions.

The Arm-bar takedown procedure was not itself addressed by the Court. So long as the need to use force is justifiable, the arm-bar takedown remains an available tool for law enforcement use in placing resisting subjects on the ground. No new law was created by this case.

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