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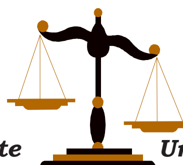

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CIVIL LIABILITY: Failure to Train

Young v. City of Providence, CA1, No. 04-1374, 4/11/05

While responding to a call in January 2000, Providence, Rhode Island police officers Michael Solitro and Carlos Saraiva shot and killed an off-duty Providence police officer, Cornel Young, who was attempting to respond to the same incident under a city policy (the "always armed/always on-duty" policy) that required him to act despite being off-duty and out of uniform. The two on-duty officers, who are white, apparently mistook Cornel, an African-American officer, for a threat. The case is as follows:

On the early morning of January 28, 2000, on-duty officers Solitro and Saraiva, who were on patrol in a police cruiser together, responded to a dispatch call reporting a disturbance at Fidas Restaurant in Providence. The dispatch was for "females fighting at Fidas" and was designated a Code 2 call. Code 2 meant an "urgent" call and represented the middle range of urgency in the police department's dispatch system, between a Code 1 call, which represented an "emergency" call and Code 3, which represented a "routine" call. Solitro was an eight-day rookie on the force; Saraiva was a three-year veteran and was informally acting as Solitro's training officer.

As the officers drove up to the restaurant in their patrol car, they saw a man (later identified as Aldrin Diaz) running towards the

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door of a Chevrolet Camaro, which he then entered. After the police had pulled up about 8 to 12 feet from the Camaro and while they were still in the police cruiser, Solitro and Saraiva saw Diaz pointing a gun out the window of the Camaro; Solitro then said "gun" to Saraiva. That was the only word the two officers exchanged during the entire incident. Saraiva and Solitro got out of their car; Saraiva took cover behind some poles while Solitro took cover behind the engine block and front wheel of the police cruiser. Both officers yelled commands at Diaz simultaneously. They told him to drop the gun and to get out of the car. The officers could see that Diaz no longer had the gun in his hands and was starting to get out of the car by the time that the officers saw Cornel.

Saraiva never moved from his position until the end of the incident. Solitro, after a few seconds in a position of cover behind the cruiser, left this position of cover and walked into an open spot directly in front of the Camaro. He stated that he did this because his cover behind the patrol car was imperfect, because he wanted to get a better look at the Camaro, because he wanted to make a rapid arrest of Diaz, and because he wanted to keep Diaz guessing. Plaintiff's expert witness, Dr. James Fyfe, an expert on police tactics, testified that Solitro's leaving of cover was "inconsistent with accepted police practices" because it made Solitro far more vulnerable and therefore made it more likely that deadly force would have to be used by Solitro and Saraiva in order to defend Solitro.

Meanwhile, Cornel, an off-duty officer, had been inside the restaurant as a customer. Civilian witnesses located inside the restaurant testified that they saw Cornel run through the restaurant at around the time the police arrived, yelling "Police, Police" or "Police, Get out of the way" very loudly. They saw him run through the doors of the restaurant as he continued to yell "Police," and then heard him yell, "Freeze." Cornel left the restaurant within a few seconds of the arrival of Solitro and Saraiva. A jury could easily find that Cornel was acting pursuant to the always armed/ always on-duty policy of the Providence Police Department.

Diaz, the man who had dropped the gun at police command, was located outside the restaurant at the time. He testified that he saw Cornel walk out of the restaurant holding his gun and scream "Freeze." Diaz stated that he could tell that Cornel was a police officer, from his verbal command, his body language, and his demeanor. There was then some movement by someone at the scene. Diaz stated that Cornel made a quarter turn and faced Diaz, but Cornel's gun was pointing at an angle downwards in front of Cornel and not towards Diaz or anyone else. Diaz also stated that Cornel was screaming other verbal commands during and after the quarter turn, but Diaz was not paying attention and did not understand them.

Joseph Hayman, another civilian witness located outside the restaurant who was involved in the altercation that had prompted the initial dispatch call, testified as well that he heard Cornel yell, "Freeze." Hayman then turned to look at Cornel. Hayman testified that upon hearing this command, he assumed the speaker was a cop, given the tone of the voice, and he responded to the command by putting his hands up. He further testified that Cornel was holding his gun with two hands, as a police officer would, rather than sideways with one

hand (a technique called "gangster-style" by some of the witnesses). Hayman, like Diaz, testified that Cornel turned but never began to approach Diaz or the officers.

A witness inside Fidas testified that he heard the shots that killed Cornel being fired only "a second" after Cornel had left the restaurant; he referred to the timing of the shots after Cornel had left the restaurant as "instant." Diaz testified that Cornel was shot a "couple of seconds" after he made the quarter turn. Hayman agreed that Cornel was shot immediately after he began to turn.

Saraiva and Solitro both testified that they both yelled, simultaneously, "Drop the gun" or "Drop it" more than once. It is undisputed that they never prefaced their commands with the word "Police." Then, both officers shot Cornel multiple times, killing him. Saraiva and Solitro testified that Saraiva shot first and Solitro shot immediately thereafter. The jury found Solitro, but not Saraiva, to have violated Cornel's constitutional rights.

Cornel's mother, Leisa Young, filed suit in federal court as administratrix of her son's estate. The district court granted summary judgment to the City of Providence and certain police supervisors. Although the First Circuit Court of Appeals affirmed part of the district court's findings, it reversed the district court's grant of summary judgment for the City on the claim that it is responsible for inadequately training Solitro on how to avoid on-duty/off-duty misidentifications in light of the department's policy that officers are always armed and always on-duty.

Young argues that Solitro and Saraiva's excessive force against Cornel was caused by a lack of training provided by the City and certain supervisors. Specifically, Young argues that given the City's always armed/always on-duty policy, which was known to be a dangerous policy, the Providence Police Department was required to have protocols and give training on various aspects of the policy, particularly the issue of avoiding misidentification of off-duty officers.

The defendants in this case, as evidence that the Providence Police Department did provide training on off-duty/on-duty interaction issues relevant to the always armed/always on-duty policy, relied heavily on the deposition testimony of Steven Melaragno and Robert Boehm to the effect that some form of training was provided, even if not necessarily directly on the hazards of the policy. Melaragno was in charge of firearms training at the training academy's firing range for new recruits and for current officers who go through periodic "in service" training; Boehm worked under Melaragno at the range. Melaragno stated that both in-service and new recruit training would include paintball "simulation" scenarios, and the goal of the training was to gauge the training officer's response whether to shoot or hold fire. Training would include multiple scenarios, at least one of which would be a no-shoot situation. This no-shoot situation might, but need not, involve an off-duty officer as the potential target. It could also include an innocent bystander, like a store owner.

Melaragno also stated that training included a Range 2000 video simulator, which would confront officers with virtual scenarios. Officers injected into a troublesome situation (say a vehicle stop or an injured officer) would determine which commands to give and which tactics to use. If they made certain

choices, shooting might be required. Melaragno was uncertain if any of the five or six Range 2000 scenarios specifically dealt with situations involving off-duty officers, although they certainly did deal with other types of no-shoot situations. Partington, the Commissioner of the Providence Police Department during the relevant period, testified that in his view, Range 2000 did not specifically deal with the problem of "friendly fire" due to off-duty misidentifications.

Melaragno testified more generally that new recruits are taught that when taking action off-duty, they always need to identify themselves by displaying their badge and firearm, and calling out that they are "on the job." He testified that some of this training occurred at the firing range, but some occurred in classroom training that was provided in conjunction with firing range training. Melaragno testified initially in his deposition that this off-duty classroom training was integrated into a series of seven lectures on officer survival. (The lectures were on issues like "taking cover"). However, he testified later in the same deposition that there was a separate, eighth lecture on off-duty issues. Boehm told a grand jury investigating the Cornel shooting that officers were never "directly" taught that they needed to display their badge with their gun when taking action off-duty. This is something they would pick up "inferentially" from other training, such as the paper cutout training described below.

Boehm stated at his deposition that there were several hours of training at the academy for new recruits at a live firing range involving paper cutouts—the officers once again had to decide whether to shoot or not. Some of these cutouts were dressed up like plainclothes officers with badges. Further, all recruits went to Camp Varnum, a training facility that was set up like a small city. Recruits, who played on-duty officers, responded to fake dispatch calls where scenarios played out. Five or six of these scenarios involved off-duty officers who were jumping out of cars quickly, moving quickly to get their badges, or running into situations where police were investigating suspicious persons. The recruits' reactions to the unexpected emergence of off-duty officers were critiqued with an instructor after each scenario had been completed.

Still, the testimony of Melaragno and Boehm was disputed. There were two themes to the factual disputes. First, the testimony of Melaragno and Boehm as to off-duty training was not documented in any form, as might be expected had it occurred. Second, other witnesses testified that no pertinent training took place.

Both Melaragno and defendant John Ryan, head of the Providence Police Department training academy for several years, agreed that it was essential to document training, and both stated that there was, in fact, substantial documentation of other aspects of training. Melaragno stated that the training scenarios described were not documented because of an "oversight." He admitted that this violated the basic pro-documentation policy of the academy. He also testified that documentation of classroom training on on-duty/off-duty interactions, along with other material from that piece of the curriculum (officer survival week), had simply been lost.

Further, Ryan testified at deposition inconsistently with the testimony of Melaragno and Boehm, as did other witnesses. Ryan

testified that the only kind of academy training on on-duty/off-duty interactions that he knew about was his own class on civil liability training. He taught officers that because of possible exposure to liability, it was better if they did not take police action off-duty (in express contravention of the department's written policy). He emphasized that this training focused on liability concerns and did not discuss safety. He stated that he would know about any other training on off-duty issues that occurred at the academy, except for training on internal affairs by a Sergeant Bennett (on avoiding misconduct by drinking too much off-duty, etc.) and training on firearms by Melaragno. He stated further that he would know about any "substantial training" by Melaragno on on-duty/off-duty interactions and misidentifications, and he did not know of any.

Defendant Kenneth Cohen, who was head of the academy when Solitro attended, testified that he did not know one way or the other whether training on on-duty/off-duty interactions existed.

One Providence Police Department police officer, Shane Romano, recalled that there was no training on officers identifying themselves while off-duty. Another officer, Greg Small, mentioned Range 2000 training regarding off-duty altercations. Solitro, when asked whether he had any training on on-duty/off-duty identification issues, also cited some Range 2000 training that he had while at the academy. He recalled no other specific training on off-duty issues, although he agreed that there may have been some off-duty issues raised here and there in terms of questions and answers but no specific course on it. Saraiva recalled some training involving paper cutouts that represented off-duty officers at the range; he noted that this involved no interaction with off-duty officers.

Urbano Prignano, the Providence Police Department Police Chief during the relevant period, stated that in his view, off-duty officers are taught at the academy to identify themselves by showing their badge, but at any rate, this identification protocol is "common sense," and "you can't teach common sense." Chief Prignano's testimony could be understood to mean that there was no pertinent training because no training was needed, as identification issues were simply a matter of common sense.

The First Circuit Court of Appeals held there is enough evidence that the City was deliberately indifferent in its training and lack of protocols in this area and that the training deficiencies and absence of protocols were causally linked to Solitro's use of excessive force against Young that a reasonable jury could find in Young's favor on this training and lack of protocol claim. A jury could also rationally conclude in the Defendants' favor, but that is not the test on summary judgment. The error by the district court lay in taking the case away from the jury.

CIVIL LIABILITY:
First Amendment; Internal Affairs

Cooper v. Dillon, CA11,
No. 04-11150, 3/22/05

In *Cooper v. Dillon*, the Eleventh Circuit Court of Appeals was required to determine the constitutionality under the First Amendment of a Florida statutory provision

which makes it a misdemeanor for a participant in an internal investigation of a law enforcement officer to disclose any information obtained pursuant to the investigation before it becomes public record. The case is as follows:

Dennis Reeves Cooper is the publisher and editor of *Key West: The Newspaper*, a free weekly newspaper that is distributed to several hundred locations in Key West, Florida. In a series of articles published by the newspaper in May and June of 2001, Cooper reported that Robert Christensen, an internal affairs investigator with the Key West Police Department, failed to investigate a complaint filed with the Florida Department of Law Enforcement (FDLE). Based on information he collected while writing these articles, Cooper, in his capacities as a citizen and as the publisher of a newspaper, filed a formal complaint against Christensen with the FDLE for Christensen's alleged failure to investigate and falsification of information in his report.

Cooper subsequently received two letters from the FDLE. The first letter, which was addressed to Cooper, indicated that the FDLE had received his complaint and had instructed Gordon A. Dillon to investigate the matter. The second letter was a courtesy copy of a letter sent by the FDLE to Dillon requesting that he investigate Cooper's complaint and report back to the FDLE within forty-five days. Following his receipt of these letters, Cooper published an article on June 15, 2001, reporting that he had lodged a complaint against Christensen and that the FDLE had instructed Dillon to investigate the matter within forty-five days. In a "Commentary" printed on June 22, Cooper recounted the allegations set forth in the previous week's article and implored Dillon to tell the truth about the result of his investigation and let the chips fall where they may.

The same day that Cooper's "Commentary" was published, Dillon swore an affidavit and obtained a warrant for Cooper's arrest. The affidavit alleged that Cooper violated FLA. STAT. ch. 112.533(3) by disclosing in his articles two items of information he obtained as a participant in an internal investigation—that Christensen was the subject of an official investigation and that Dillon had forty-five days to respond to the FDLE. Following his arrest, Cooper was held in the county jail for approximately three hours and then released on his own recognizance. The State Attorney subsequently declined to pursue the charges against Cooper.

On December 21, 2001, Cooper filed suit for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983 for Dillon's enforcement of the Florida statute in violation of his First, Fourth, and Fourteenth Amendment rights. Cooper sued Dillon both as an individual and in his official capacity as Chief of Police of Key West.

The Eleventh Circuit Court of Appeals rejected the proposition that the maintenance of the integrity of an investigative process constitutes a sufficiently compelling justification for a content-based restriction on speech as imposed by the Florida statute. The Court also stated that the interest in protecting wrongfully accused officers from defamation is insufficient to sustain the statute. While the privacy interests of targets, witnesses, and complainants in an investigation is a compelling state interest, Supreme Court precedent has confirmed that interests in

privacy are insufficient to support criminal sanctions for the publication of lawfully obtained information.

"Our system of representative democracy depends upon an informed citizenry which can hold government officials accountable and can seek redress for grievances. This is especially important where, as in this case, a citizen alleges a local official acted inappropriately."

Our system of representative democracy depends upon an informed citizenry that can hold government officials accountable and can seek redress for grievances. This is especially important where, as in this case, a citizen alleges a local official acted inappropriately. The Court stated that they did not lightly invalidate an act of a state legislature, but by proscribing speech critical of government officials, the Florida statute purports to regulate speech which lies near the core of the First Amendment without a compelling justification for doing so.

The Court determined Dillon was eligible for qualified immunity because he was acting under his discretionary authority in enforcement of the Florida statute which had, at the time of Cooper's arrest, not been declared unconstitutional. In this case, however, Dillon was clothed with final policymaking authority for law enforcement matters in Key West and in this capacity he chose to enforce the statute against Cooper. While the unconstitutional statute authorized Dillon to act, it was his deliberate decision to enforce the statute that ultimately deprived Cooper of constitutional rights and therefore triggered municipal liability. Thus, Dillon's decision to enforce an unconstitutional statute against Cooper constituted a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy. Accordingly, the Court found that the City of Key West, through the actions of Dillon, adopted a policy that caused the deprivation of Cooper's constitutional rights which rendered the municipality liable under § 1983.

CIVIL RIGHTS: Police Pursuits; Ramming of Vehicle

Harris v. Coweta County, Georgia,
CA11, No. 03-15094, 4/20/05

Between 10:30 and 11:00 p.m. on March 29, 2001, a Coweta County deputy clocked Victor Harris' vehicle at 73 miles per hour in a 55 mile-per-hour zone. The vehicle that Harris was driving was registered in Harris' name and at his proper address. Although the deputy flashed his blue lights, Harris continued driving. The deputy pursued, and in attempting to flee, Harris drove in excess of the speed limit, at speeds between 70 and 90 miles per hour, passed vehicles on double yellow traffic control lanes, and ran through two red lights. Harris stayed in control of his vehicle, utilizing his blinkers while passing or making turning movements.

After Harris refused to stop, the deputy radioed dispatch, reported that he was pursuing a fleeing vehicle, and broadcast the license plate number. He did not relay that the underlying charge was speeding. Deputy Timothy Scott heard the radio communication and joined the pursuit as it proceeded toward the county line into Fayette County, Georgia. After crossing into Peachtree City in Fayette County, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex, where two Peachtree City police vehicles were already stationed. Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74, driving his vehicle directly into Harris' path. Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles came in contact with each other, causing minor damage to Scott's cruiser. Harris then entered Highway 74 and continued to flee southward at a high speed.

Through Peachtree City, Scott took over as the lead vehicle in the chase. After getting on Highway 74, Scott radioed a general request for "Permission to PIT him." A "PIT" (Precision Intervention Technique) maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop. Harris' expert's report attests that national law enforcement standards require that an officer be trained in all deadly force applications before being permitted to use those applications. Scott had not been trained in executing this maneuver. He and the other Coweta officers did not undergo a training on PITs until after the incident.

Sergeant Mark Fenninger was the supervisor who responded to Scott's radio call and granted Scott permission to employ the PIT, telling him to: "Go ahead and take him out. Take him out." Fenninger—who tuned into the transmissions about the pursuit late—did not know how the pursuit originated, the speeds of the vehicles, the numbers of motorists or pedestrians on the roadways, or how dangerously Harris was driving. Fenninger also did not request further details about the pursuit prior to authorizing the PIT.

After receiving approval, Scott determined that he could not perform the PIT maneuver because he was going too fast. Instead, however, he rammed his cruiser directly into Harris' vehicle, causing Harris to lose control, leave the roadway, run down an embankment, and crash. As a result, Harris was rendered a quadriplegic.

One of the first issues discussed by the Eleventh Circuit Court of Appeals was whether Harris was "seized" within the meaning of the Fourth Amendment to the United States Constitution. Their finding is as follows:

"Harris was seized by Scott when the latter rammed his vehicle, causing him to lose control and crash. Pursuant to *Brower v. County of Inyo*, 489 U.S. 593, 596-99 (1989), using a vehicle to stop and apprehend a suspect is a seizure. In *Brower*, the Supreme Court held that a fleeing suspect who fatally crashed into a so-called 'deadman' or 'blind' roadblock (an obstacle usually a police car or truck placed on the road in a manner that prevents an oncoming driver who is being pursued by the police from knowing the road is blocked) has been seized.

"The Court defined a seizure as 'a governmental termination of freedom of movement through means intentionally applied.' *Brower*, 489 U.S. at 597. The Court reasoned that it is enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. In *Brower,* the United States Supreme Court noted that if the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure."

Having determined that Harris was seized, the Eleventh Circuit Court of Appeals turned to the question of whether the force used by Scott to effectuate the seizure was reasonable, finding as follows:

"In *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), the United States Supreme Court made clear that the reasonableness of a seizure depends on not only when a seizure is made, but also how it is carried out. The Eleventh Circuit noted that while an automobile has been held to constitute a deadly weapon when used to run down a law enforcement officer, none of the limited circumstances identified in *Garner* that might render this use of deadly force constitutional are present here. Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others.

"None of the antecedent conditions for the use of deadly force existed in this case. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite crime involving the infliction or threatened infliction of serious physical harm. *Garner*, 471 U.S. at 11-12. Indeed, neither Scott nor Fenninger had any idea why Harris was being pursued. The use of deadly force is not 'reasonable' in a high-speed chase based only on speeding and evading arrest. A high-speed chase of a suspect fleeing after a traffic infraction does not amount to the 'substantial threat' of imminent physical harm that *Garner* requires before deadly force can be used. *Garner* made clear that it is not better that all suspects die than that they escape."

The Court concluded that ramming Harris' vehicle under the facts alleged here, if believed by a jury, would violate Harris' constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated Harris' Fourth Amendment rights.

Having determined that a jury could have reasonably found the violation of a constitutional right by Scott, the Court next asked whether the law as it existed on March 29, 2001, was sufficiently clear to give reasonable law enforcement officers "fair notice" that ramming a vehicle under these circumstances was unlawful. The Court found as follows:

"The *Garner* rule applies with 'obvious clarity' whenever a police officer contemplates the use of deadly force against an unarmed and nondangerous fleeing suspect. Here, under the facts alleged by Harris, and as interpreted from the perspective of an objectively reasonable officer, it was clear that none of the three *Garner* requirements for the use of deadly force were present when Scott rammed Harris. A

reasonable officer would have known that a police vehicle could be used to apply deadly force, could be used to effect a seizure, and that deadly force could not be used to apprehend a fleeing suspect unless the conditions set forth in *Garner* had been met. Reasonable officers would also know that it was well-established that 'deadly force' means force that creates a substantial risk of causing death or serious bodily injury."

The Eleventh Circuit Court of Appeals was satisfied that common sense would inform any reasonable officer that there would be substantial risks of death or bodily harm if he used his vehicle to ram another vehicle at high speeds in the manner employed in this case.

CIVIL LIABILITY: Qualified Immunity; Less than Deadly Force

Meracdo v. City of Orlando,
CA11, No. 04-13477, 4/29/05

In *Meracdo v. City of Orlando*, the Eleventh Circuit Court of Appeals denied qualified immunity to officers on a claim of excessive force in the prevention of suicide by Ramon Meracdo. The case is as follows:

In response to a call for assistance, officers found Ramon Mercado sitting on the kitchen floor, crying. He was holding a knife in both hands and pointing it toward his heart and a telephone cord was wrapped around his neck. The officers ordered Mercado to drop his knife at least two times (once in English and once in Spanish), but he refused without making any threatening moves. At no time did the officers warn Mercado that force would be used if he did not drop his weapon.

Fifteen to thirty seconds after giving that order, Ramfis Padilla followed Christana Rouse's orders to hit Mercado with the Sage SL6 Launcher and subdue him. The Sage Launcher is a "less lethal" munition that fires a polyurethane baton that is 1.5 inches wide, travels approximately 240 feet per second, and delivers a force of 154 foot/pounds of energy—approximately the energy of a professionally thrown baseball. The Sage Launcher was designed to be used to protect persons from self-inflicted injury, especially when using a night stick or baton would be unsafe or impractical. The projectile is not designed to penetrate the body, but only to leave bruises.

From a distance of roughly six feet, Padilla had a clear view and fired the Sage Launcher twice, hitting Mercado once in the head. Padilla claims that he was aiming at Mercado's shoulder. The impact fractured Mercado's skull, resulting in brain injuries. He now takes medication to prevent seizures, and he suffers from a host of ailments including headaches, loss of memory, loss of balance, insomnia, dizziness, stuttering, loss of sensation and movement, loss of strength, and sensitivity to light. He is disabled and cannot work.

Padilla was trained on the acceptable uses of the Sage Launcher. He was also aware of Orlando Police Department policies concerning the weapon, specifically, that targeting the head or neck with the baton or Sage SL6 projectile is acceptable in deadly force situations only. Furthermore, the policy defines deadly force as "force that is likely to cause death or great bodily harm." The policies also provide that a crisis negotiation team should be dispatched when a subject threatens to commit suicide, has the apparent ability to do so, and refuses to surrender.

Shortly after the incident, another officer tested Padilla's Sage Launcher for accuracy. The weapon was in proper working order and was accurate up to a distance of five yards. Rouse testified that the incident did not require deadly force; however, Padilla stated that the situation might have required such force. The defendants' expert testified that deadly force would not be appropriate under these facts and that he would not have purposely aimed the Sage Launcher at Mercado's head.

The Eleventh Circuit Court of Appeals stated that Officer Padilla should not have needed case law to know that by intentionally shooting Mercado in the head, he was violating Mercado's Fourth Amendment rights. The officers found Mercado crying on the floor of his kitchen with a loose cord around his neck and a kitchen knife placed up to, but not poking into, his chest. From a distance of six feet away, Padilla twice shouted for Mercado to drop his knife, and then discharged the Sage Launcher, hitting Mercado in the head from short range. Assuming that Padilla was aiming at Mercado's head intentionally, his use of force was clearly excessive.

There is sufficient evidence in the record to support a finding that Padilla intentionally aimed for Mercado's head. First Padilla had been trained in the use of the Sage Launcher. Second, the defendants' witness testified that the Sage Launcher fired accurately from a distance of up to five yards. Third, Padilla fired from a distance of six feet. Finally, the only shot that made contact with Mercado hit him in the head. Since such circumstantial evidence could lead a reasonable jury to find that Padilla intended to hit Mercado in the head, and find that he should not be afforded the protection of qualified immunity.

DISCRIMINATION: Age

Smith v. City of Jackson,
No. 03-1160, 3/30/05

In *Smith v. City of Jackson*, the United States Supreme Court dealt with the issue of age discrimination. The Court ruled that workers over 40 years old could sue when an employer's action has a disparate impact on their age group and need not meet the standard of proving the employer actually intended to discriminate. The opinion, however, gives employers a line of defense in these cases. The Court stated that employers can take actions that disadvantage older workers if the difference is based on reasonable factors other than age. The case is as follows:

The City of Jackson, Mississippi, adopted a pay plan granting raises to all City employees. The stated purpose of the plan was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies, and ensure equitable compensation to all employees regardless of age, sex, race, and/or disability." On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City's desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

The Petitioners in this case are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the "disparate-treatment" claim) and that they were "adversely affected" by the plan because of their age (the "disparate-impact" claim). The District Court granted summary judgment to the City on both claims. The Court of Appeals held that the ruling on the former claim was premature because petitioners were entitled to further discovery on the issue of intent, but it affirmed the dismissal of the disparate-impact claim. Over one judge's dissent, the majority concluded that disparate-impact claims are categorically unavailable under the ADEA.

The United States Supreme Court granted the officers' petition for certiorari and held that the ADEA does authorize recovery in "disparate-impact" cases but that the officers had not set forth a valid disparate impact claim. The City's plan was based on reasonable factors other than age. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

The Court held that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable factor other than age" that responded to the City's legitimate goal of retaining police officers.

While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

DISCRIMINATION: Sex

Jackson v. Birmingham Board of Education,
No. 02-1672, 3/29/05

In *Jackson v. Birmingham Board of Education*, the United States Supreme Court dealt with sexual discrimination in the content of Title IX, 20 U.S.C. § 1681(a), the law that requires equity between the sexes in educational institutions that receive federal funding. After Roderick Jackson, a girls basketball coach at a public high school, discovered that his team was not receiving equal funding and equal access to athletic equipment and facilities, he complained unsuccessfully to his supervisors. He then received negative work evaluations and ultimately was removed as the girls' coach. The United States Supreme Court held that Title IX encompasses claims of retaliation where the funding recipient retaliates against an individual because he has complained about sex discrimination.

DWI ENFORCEMENT: Adequate Evidence to Support Conviction

United States v. Atkinson,
CA10, No. 04-8093, 4/12/05

In *United States v. Atkinson*, CA10, No. 04-8093, 4/12/05, Christopher Atkinson was found guilty of operating a motor vehicle in

Yellowstone National Park while under the influence of alcohol. Atkinson uses a rather novel claim that the magistrate court judge erred in failing to consider the effect of the alcohol he consumed after he stopped driving on his breath alcohol level. The case is as follows:

Employed as a trail work leader by the Park Service, Atkinson awoke at 4:30 a.m. on the morning of August 6, 2003, and hiked for approximately twenty-one miles, then completed paperwork and conversed with his supervisor before finishing his work day at 9:30 p.m. At around 10 p.m., Atkinson joined other trail workers at the Two Bit Saloon where, by his own admission, he consumed two pints of beer. In addition to the two pints of beer, Atkinson's friend Erik Brewster also recalled buying Atkinson a shot. At around 12:30 a.m., Atkinson and Brewster walked to another bar, the Blue Goose. Atkinson testified that at the Blue Goose, he had a shot, probably of "Hot Damn," a fiery drink similar to cinnamon schnapps. Atkinson testified that, after finishing his drink, he waited about an hour, drinking only water, playing a few games of pool, before he drove Brewster back to the residential trailers in Mammoth.

On the way to the residential trailers, Atkinson saw an elk in front of the Mammoth Post Office. In attempting to see the elk again, Atkinson made a "roundabout," which caused his tires to squeal. The squealing tires alerted Yellowstone Park Ranger Joseph Bueter, who was working in his office. Bueter then watched as the car went around the island in front of the Post Office, directly across from the courthouse. Bueter ran to his vehicle and followed Atkinson's car. According to Bueter, Atkinson's car appeared to be going more than sixty miles per hour in an area with a speed limit of twenty-five. Atkinson's vehicle headed towards the residential trailer area. When Bueter approached the trailer area, where the road became a gravel or deteriorated path, he encountered a dense cloud of dust, which was caused by Atkinson's vehicle hitting the surface at a high rate of speed.

Because Bueter was unsure if Atkinson's vehicle had lost control or spun out, he slowed down and drove into the dust cloud, taking the first left down a row of trailers. Driving about two hundred yards along a row of trailers, he did not see any movement. Reaching the lower end of the trailer court, he turned and drove back up, but still did not see any movement. Bueter parked his car, got out, and listened. He heard voices, so he walked between the trailer houses towards the voices and into the next row of trailers, which is where he encountered Atkinson. Bueter testified the total time between his initial encounter with the dust cloud and encountering Atkinson was "sixty to 90 seconds, probably."

Bueter conducted a three-part standardized field sobriety test and a preliminary breath test (PBT). On the first part of the field sobriety test—the walk and turn—Atkinson scored three out of eight, with three clues showing impairment out of eight possible points. The three clues of impairment were his inability to maintain his balance during the instructional phase, using his arms for balance, and stepping off the line. On the second part of the test—the one-leg stand—Atkinson scored two out of a possible four points. The two clues of impairment were using his arms for balance and putting his foot down. On the third part of the test—the Horizontal Gaze Nystagmus—Atkinson exhibited all six clues, each of the

three clues in each eye, for a total of six points. As for the PBT, the initial sample showed a level of .072. However, Bueter testified the sample was insufficient to insure an accurate result because Atkinson either did not blow hard enough or long enough to deliver a sufficient sample. Asked what effect this insufficient sample would have, Bueter testified that "the insufficient sample would indicate that the blood alcohol was at least and probably in excess of its display value. So that would mean the .072 was the lowest value for his blood alcohol, but with a sufficient sample it would be at least that, if not higher." Bueter then took Atkinson to the jail for an additional test using the more precise Intoxilizer 5000. The results of this test showed Atkinson's actual breath alcohol level to be 0.146.

Atkinson insisted, however, that his breath alcohol level was higher when measured on the Intoxilizer because he had several drinks of whiskey after he returned to the trailer and before he encountered Bueter. Thus, Atkinson insisted, his blood alcohol level was lower while driving, as reflected in the PBT.

The Eleventh Circuit Court of Appeals concluded there was sufficient evidence to support the magistrate judge's determination that Atkinson was driving while intoxicated to such a degree as to render him incapable of safely operating a vehicle.

DWI ENFORCEMENT:
Direct Wine Sales

Granholm v. Heald, No. 03-1116, 5/16/05

In *Granholm v. Heald*, the United States Supreme Court was faced with the issue of whether a State can ban direct out-of-state wine shipments if they allow local wineries to sell directly to consumers. Influenced by an increasing number of small wineries and a decreasing number of wine wholesalers, direct sales have grown because small wineries may not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. The Court stated that a State may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.

Many states had justified the bans as necessary to protect minors from alcohol and to collect taxes on the sales. The Court felt that the States provided little evidence for their claim that purchasing wine over the Internet by minors is a problem. The 26 States now permitting direct shipments reported no such problem and the States can minimize any risk with less restrictive steps, such as requiring an adult signature on delivery. The Court also felt that the States' tax evasion justification was insufficient.

While the case dealt only with current laws in New York and Michigan, it will have a major impact on laws in Connecticut, Florida, Indiana, Massachusetts, Ohio, and Vermont, which give some preference to local wineries. While 15 States do not allow any direct wine shipping, other States allow for some form of it. This ruling will not open the door to unlimited Internet wine sales and shipping. A State remains free to prohibit such sales—or for that matter—sales of liquor altogether. The ruling merely says that States cannot adopt rules that favor in-state producers.

EVIDENCE: Expert Opinion by Law Enforcement Officer

United States v. Parra,
CA7, No. 35-2056, 3/29/05

On June 20, 2002, Murillo Luna, a confidential source, purchased 55.18 grams of cocaine from Nazario Varela at Varela's home in Janesville, Wisconsin. Five days later, on June 25, Luna and Drug Enforcement Administration (DEA) Special Agent Bill Chamulak, acting in an undercover capacity, returned to Varela's home to purchase a quarter kilogram of cocaine. Varela asked Luna and Agent Chamulak to return in about half an hour. Shortly thereafter, officers observed Varela removing a white cooler from a brown Cadillac in front of his house. When Luna and Agent Chamulak returned to the house, they noticed a white cooler with the lid removed. They purchased 248.3 grams of cocaine from Varela and then departed. Thirty-five minutes later, the brown Cadillac returned to Varela's house and officers saw a Hispanic man enter the house and then leave after approximately one minute. They also saw an unidentified passenger in the vehicle. Surveillance officers followed the brown Cadillac and observed a Hispanic man and woman exit and then re-enter the vehicle, which was later located at 1503 Porter Avenue in Beloit, Wisconsin. This address was the residence of Magdalena Correa, Arturo Garcia Parra, and Luis Garcia Parra.

On July 10, 2002 at 11:30 a.m., Agent Chamulak and Luna returned to Varela's house to negotiate the purchase of one more kilogram of cocaine. Varela made a phone call and instructed Agent Chamulak and Luna to return at 3:00 p.m., because his source had to go to Chicago to obtain the cocaine. At 12:03 p.m., an officer with the Rock County State Line Area Narcotics Task Force (SLANT) observed Luis and Arturo drive away from 1503 Porter Avenue in a white Cadillac. Six SLANT vehicles and a C-26 military aircraft followed the white Cadillac from Beloit to Chicago. Remarkably, the passengers in the Cadillac never noticed their extensive entourage. Upon arriving in Chicago, they parked their car and interacted with someone in a silver car. Luis walked between some buildings with the occupant of the silver car, while Arturo returned to the white Cadillac and opened the hood and trunk. Luis then walked around the car, including the trunk area, and Arturo closed the hood and trunk. Nineteen minutes after arriving in Chicago, they departed.

At about 4:30 p.m., the white Cadillac arrived in Janesville and parked on Main Street. Arturo and Luis checked something in the trunk and then walked to the parking lot of a Quick Stop gas station, with Arturo trailing behind Luis. Officers observed Arturo standing on the corner of Racine and Main Streets, repeatedly looking up and down the street and toward the location of the white Cadillac. Shortly thereafter, Varela, Luna, and Agent Chamulak arrived at the parking lot of the Mexican supermarket located across the street from the Quick Stop. Varela got out of the vehicle and entered the surrounding neighborhood. Nine minutes later, the same brown Cadillac that was present at the June 25 cocaine sale drove into the Quick Stop parking lot. Luis approached the brown Cadillac and spoke with someone inside, later identified as Correa. The brown Cadillac then

drove into the parking lot of the Mexican supermarket. Agent Chamulak observed Correa seated in the brown Cadillac, with her attention focused on Luna and Varela and on Agent Chamulak's vehicle. Surveillance personnel observed Varela approach the passenger side of the brown Cadillac and engage in a conversation with Correa. Varela later testified that Correa asked him if he had received the money from the buyer, and when he answered in the negative she commented, "This is not the way you do the deals."

As Varela and Luna walked to the white Cadillac, Correa pulled out of the parking lot and parked on the same side of Main Street as the white Cadillac. According to Special Agent Jerry Becka, this position would have allowed Correa to monitor the white Cadillac through her rear view mirror. Varela and Luna opened the trunk of the white Cadillac and found approximately one kilogram of cocaine there. Officers promptly arrested Varela, Luis, and Arturo. A minute later, Special Agent Jeanne Hehr and several other officers arrested Correa.

All four were indicted for conspiring to distribute and possess with intent to distribute in excess of 500 grams of cocaine, in violation of 21 U.S.C. § 846, and for possessing with intent to distribute in excess of 500 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1). Varela and Luis pleaded guilty, but Arturo and Correa went to trial and were convicted on both counts. On appeal, Arturo raised challenges to the admission of expert testimony regarding drug trafficking counter-surveillance techniques.

During the initial trial, the district court had permitted the government to call Agent Becka to testify about the modus operandi of drug dealers, especially the use of counter-surveillance techniques. Agent Becka opined that Arturo and Correa provided counter-surveillance during the July 10 sale.

The government established that Agent Becka had been a DEA special agent for over 19 years; that he had completed training at both basic and advanced agent schools and attended yearly meetings where he learned about the latest tricks of the drug trade; that he had personally purchased drugs in an undercover capacity over 125 times and provided surveillance in over 1,000 undercover operations; and that he had interviewed drug dealers at least 500 times to learn how they operate. On this basis, the court found Agent Becka qualified to testify as an expert.

The Seventh Circuit Court of Appeals stated the question is not whether Agent Becka was a professional witness; it is whether he was an expert on the topic of the *modus operandi* of narcotics dealers. The district court was amply justified in concluding that he was. Officer Becka had the kind of experience, education, and training that has been recognized in the past as supporting a finding of expertise. On several occasions, this Court has found that an agent's experience qualifies him or her to testify as an expert regarding drug trafficking.

EVIDENCE: Expert Opinion on Pseudoephedrine in Meth Production

United States v. Galvan,
CA8, No. 04-1331, 5/17/05

In *United States v. Galvan*, the Eighth Circuit Court of Appeals stated there was

no error in allowing an expert to testify about the role of pseudoephedrine in manufacturing methamphetamine and the telltale signs that pseudoephedrine is being purchased for that illicit purpose. Also, the expert helped the jury understand why Louis Galvan's possession of a large quantity of pseudoephedrine, especially pseudoephedrine pills that had been removed from their packaging, suggests that Galvan knew or had reasonable cause to believe that the pseudoephedrine would be used to manufacture methamphetamine.

Police officers conducting surveillance of a Wal-Mart store watched Galvan as he purchased three boxes of pseudoephedrine pills, the maximum quantity that Wal-Mart allowed a person to buy at one time. The officers, who were not in uniform, followed Galvan in an unmarked vehicle as he drove to six other stores in the vicinity, at one of which the officers saw Galvan leave with a bag. Eventually the officers' pursuit led to a residential neighborhood, where Galvan abruptly made a U-turn and came to a stop with his car facing the front of the officers' vehicle. At that point, the officers exited their vehicle, approached Galvan's car, and verbally identified themselves as they waved their badges. Galvan, however, backed up his vehicle and drove away. The officers followed him into a cul-de-sac, where Galvan attempted to flee on foot before being caught. Following his arrest, Galvan was given Miranda warnings and declined to provide a written statement, although he told the officers that he would show them some methamphetamine labs if he could avoid prison. In Galvan's vehicle, the officers found two boxes of pseudoephedrine pills on the passenger's seat and a bag containing more pills, which was stashed inside a heating duct near the floorboard.

EVIDENCE: Sensing and Diagnostic Module Used to Establish Speed

Matos v. State of Florida,
DCA-4th District, No. 4D03-2043, 3/30/05

In *Matos v. State of Florida*, Edwin Matos appealed his conviction and sentence for manslaughter resulting from a tragic automobile accident which resulted in the death of two sixteen-year-old teenage girls. The Florida Court of Appeals, Fourth District, held that data from Matos automobiles Sensing and Diagnostic Module (Black Box), seized by a warrant, was properly allowed into evidence to help establish that the defendant's vehicle recorded a speed of 114 mph just four seconds before the crash and a speed of 103 mph within one second of the crash.

FIRST AMENDMENT: News Media Publication of Juvenile Arrest

Bowley v. City of Uniontown Police Department, CA3, No. 04-2352, 4/26/05

In *Bowley v. City of Uniontown Police Department*, James Bowley sued the Uniontown, Pennsylvania Police Department, the *Uniontown Herald Standard*, a local newspaper, and Officer Fred Balsley, individually and in his capacity as a police officer. Bowley, a 15-year-old minor, was arrested for allegedly raping a 7-year-old girl whom he was babysitting. The information was allegedly provided to the *Uniontown Herald Standard* by Officer Fred Balsley. As a result of the publication, Bowley sued the Herald Standard for a violation of the Pennsylvania statute prohibiting the disclosure

of juvenile law enforcement records and for the tort of invasion of privacy.

"...when the government is ultimately responsible for the disclosure of information, imposing civil liability upon a newspaper for the subsequent publication of that information is not the most narrowly tailored means of serving any purported interest."

The Third Circuit Court of Appeals had to decide whether imposition of civil liability upon the *Herald Standard* for its actions with regard to Bowley would be consistent with the First Amendment. The Third Circuit stated that the First Amendment shields the newspaper from civil liability for publishing the article, which contained truthful information received from the police. There no doubt exists a tension between the First Amendment right to a free press and an individual's statutory and common law right to privacy, complicated here because the individual in question is a juvenile. It is a tension the United States Supreme Court has addressed on several occasions, making it clear that State action to punish the publication of truthful information seldom can satisfy constitutional standards. The Third Circuit Court of Appeals found as follows:

"The Supreme Court has held that when the government inappropriately releases otherwise confidential information 'the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity.' *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

"Indeed, when the government has stewardship over confidential information, not releasing the information to the media in the first place will more narrowly serve the interest of preserving confidentiality than will punishing the publication of the information once inappropriately released. Because it is alleged in the Complaint, we assume that Balsley provided the Herald Standard with the information in the article, in violation of section 6308's nondisclosure requirement. Accordingly, imposing civil liability upon the *Herald Standard* is not the most narrowly tailored way to protect Bowley's anonymity. Rather, it would have been far less drastic for Balsley to have simply not disclosed the information.

"A newspaper may not be held liable for its publication of lawfully obtained, truthful information on a matter of public significance unless imposing liability would be the most narrowly tailored means of serving a state interest of the highest order. The information contained in the article published by the *Herald Standard* was truthful, lawfully obtained, and concerned a matter of public significance. We need not decide whether protecting the anonymity of juvenile offenders is a state interest of the highest order, because when the government is ultimately responsible for the disclosure of information, imposing civil liability upon a newspaper for the subsequent publication of that information is not the most narrowly tailored means of serving any purported interest.

"Bowley, therefore, cannot seek civil damages against the *Herald Standard* consistent with the First Amendment. He must instead rest his hopes for restitution upon the willingness of the government to compensate victims for their loss of privacy stemming from the government's inappropriate release of confidential information."

FEDERAL STATUTE: Computer Fraud and Abuse Act

United States v. Mitra,
CA7, No. 04-2328, 4/18/05

The city of Madison, Wisconsin, uses a computer-based radio system for police, fire, ambulance, and other emergency communications. The Smartnet II, made by Motorola, spreads traffic across 20 frequencies. One is designated for control. A radio unit (mobile or base) uses the control channel to initiate a conversation. Computer hardware and software assigns the conversation to an open channel, and it can link multiple roaming units into "talk groups" so that officers in the field can hold joint conversations. This is known as a "trunking system" and makes efficient use of radio spectrum, so that 20 channels can support hundreds of users. If the control channel is interfered with, however, remote units will show the message "no system" and communication will be impossible.

Between January and August 2003, mobile units in Madison encountered occasional puzzling "no signal" conditions. On Halloween of that year, the "no system" condition spread citywide; a powerful signal had blanketed all of the City's communications towers and prevented the computer from receiving, on the control channel, data essential to parcel traffic among the other 19 channels. Madison was hosting between 50,000 and 100,000 visitors that day. When disturbances erupted, public safety departments were unable to coordinate their activities because the radio system was down. Although the City repeatedly switched the control channel for the Smartnet system, a step that temporarily restored service, the interfering signal changed channels too and again blocked the system's use. On November 11, the attacker changed tactics. Instead of blocking the system's use, he sent signals directing the Smartnet base station to keep channels open, and at the end of each communication the attacker appended a sound, such as a woman's sexual moan.

By then the City had used radio direction finders to pinpoint the source of the intruding signals. Police arrested Rajib Mitra, a student in the University of Wisconsin's graduate business school. They found the radio hardware and computer gear that he had used to monitor communications over the Smartnet system, analyze how it operated, and send the signals that took control of the system. Mitra, who in 2000 had received a B.S. in computer science from the University, possessed two other credentials for this kind of work: criminal convictions in 1996 and 1998 for hacking into computers in order to perform malicious mischief. A jury convicted Mitra of two counts of intentional interference with computer-related systems used in interstate in violation of Title 18 U.S.C. §1030(a)(5), the Computer Fraud and Abuse Act. He has been sentenced to 96 months' imprisonment. On appeal, he says that his conduct does not violate §1030—and that, if it does, the statute exceeds Congress's commerce power.

Section 1030(a)(5) provides that whoever:

(A) (i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and

(B) by such conduct causes:

(iv) a threat to public health or safety…shall be punished as provided in subsection (c) of this section.

The prosecutor's theory is that Smartnet II is a "computer" because it contains a chip that performs high speed processing in response to signals received on the control channel, and as a whole is a "communications facility directly related to or operating in conjunction" with that computer chip. It is a "protected computer" because it is used in "interstate communication;" the frequencies it uses have been allocated by the Federal Communications Commission for police, fire, and other public-health services.

Mitra's transmissions on Halloween included information that was received by the Smartnet. Data that Mitra sent interfered with the way the computer allocated communications to the other 19 channels and stopped the flow of information among public-safety officers. This led to damage by causing a "no system" condition citywide, impairing the "availability of…a system, or information" and creating "a threat to public health or safety" by knocking out police, fire, and emergency communications.

The Seventh Circuit Court of Appeals agreed with the government that Rajib Mitra's conduct fit within the meaning of the statute. The Court stated that devices not normally thought of as "computers" are within the statute's reach provided they are computer controlled. The court further stated that within this context, "interstate commerce" means only that the device is used in interstate commerce and not that Mitra crossed a state line or otherwise affected interstate commerce.

The Seventh Circuit Court of Appeals stated that the Computer Fraud and Abuse Act is a broad statute that has been applied exactly as written, while Mitra wishes that it had not been. There is no constitutional obstacle to enforcing broad but clear statutes.

SEARCH AND SEIZURE: Domestic Violence; Emergency Search

United States v. Martinez,
CA9, No. 04-30098, 5/16/05

In the summer of 2002 in Nampa, Idaho, police officer Mike Phillips was dispatched to the residence of Lisa and Monroe Martinez in response to a domestic violence call. The initial radio transmission received by Phillips indicated that there was an "out of control" male and that the 911 call was

disconnected. Phillips recognized the address as a residence he had been called to on a previous occasion for a domestic violence incident. Phillips recalled that on the previous occasion the female had a "fat lip" because "the male subject had hit her."

Upon arriving on the scene Phillips saw Lisa Martinez in the front yard. Lisa was "very upset, crying, she had her face in her hands." Lisa did not say anything that indicated she had been physically injured, and Phillips did not observe evidence of physical injuries.

While attempting to speak with Lisa, Phillips could hear yelling coming from inside the house. Phillips "could not make out" precisely what was being said but he described it as "angry, hostile yelling." Phillips entered the house in order to make sure that the person yelling was not injured, that someone else in the house was not being injured, and to make sure the individual yelling was not going to come out of the house with weapons. One of the possible scenarios that occurred to Phillips was that "Mr. Martinez had a knife stuck in his chest and he was yelling because he was mad [that] he had been stabbed."

As Phillips entered the house he saw a young boy standing in the doorway. He asked the boy if the doorway would lead him to the yelling man, and the boy responded affirmatively. Phillips followed the yelling through a laundry room and hallway to a bedroom where he observed Martinez kneeling on the floor and reaching under the bed. Martinez was yelling "he was going down for this."

Phillips was afraid that Martinez was searching for a weapon under the bed. Phillips told Martinez to move into the living room "where we could figure out what was going on." At this point, Phillips did not regard Martinez as a criminal suspect. Upon entering the living room, Phillips noticed two rifles and a shortened barrel shotgun resting on the couch. Phillips "immediately" asked Martinez, "What are those doing there?" Martinez responded that he knew the police were coming and he was trying to get rid of the weapons before they arrived. Martinez, as it turned out, had been previously convicted in state court of felony possession of a controlled substance, and was on state probation at the time of the domestic disturbance.

Lisa and Monroe Martinez were both arrested for domestic battery. Later, the United States charged Monroe Martinez with unlawful possession of firearms under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Following an evidentiary hearing, the district court denied Martinez's motion to suppress evidence of the discovered firearms and the statements made by Martinez while Officer Phillips was inside the house. Subsequently, Martinez entered a conditional plea, reserving the right to appeal the court's denial of his motion to suppress. Martinez was sentenced to serve a term of 37 months imprisonment, followed by three years of supervised release, and ordered to pay $1,100 in criminal penalties. A timely appeal followed.

In *United States v. Martinez*, the issue before the court was whether a domestic disturbance constitutes an emergency sufficient to justify a warrantless entry into a home. Under the circumstances, the Ninth Circuit Court of Appeals concluded that it did.

The Ninth Circuit Court of Appeals stated that the emergency exception to the warrant

requirement contains three requirements: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. The Court additionally found as follows:

"The volatility of situations involving domestic violence make them particularly well-suited for an application of the emergency doctrine. When officers respond to a domestic abuse call, they understand that 'violence may be lurking and explode with little warning.' *Fletcher v. Clinton*, 196 F.3d 41, (1st Cir. 1999). Indeed, 'more officers are killed or injured on domestic violence calls than on any other type of call.' *Hearings before Senate Judiciary Committee,* 1994 WL 530624 (F.D.C.H.) (Sept. 13, 1994).

"As a result of these factors, other circuits have recognized the need for law enforcement officers to enter a home without a warrant when it appears that the occupant may injure himself or others. *Fletcher*, 196 F.3d at 49; *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998). As the Second Circuit observed in *Tierney*: 'Courts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer's belief that warrantless entry was justified by exigent circumstances when the officer had substantial reason to believe that one of the parties to the dispute was in danger.'

"Here, the officer responded to an interrupted 911 call concerning domestic violence at a residence known to the officer as the source of prior episodes of domestic violence. On arrival, he observed a crying woman in the front yard and heard continued angry yelling from the interior of the house. He reasonably believed there was an emergency at hand and an immediate need for his assistance for the protection of life or property. He entered the house and proceeded to the bedroom where the defendant was located. In moving the defendant out of the bedroom, the officer saw the firearms. His observation was not motivated by an intent to arrest and seize evidence, but rather was incidental to the officer's management of the situation. The living room where the weapons were discovered was the part of the premises in which the emergency situation had arisen and was logically used by the officer as a place to defuse the situation. As such, there was a sufficient nexus between it and the emergency for the doctrine to apply."

SEARCH AND SEIZURE: Force Used in a "Terry" Stop

United States v. Dykes,
DCC, No. 03-3122, 5/6/05

On the evening of July 30, 2002, three unmarked cars of the Metropolitan Police Department (MPD) pulled into a parking lot in response to complaints of illegal drug trafficking in the area. Several people were standing nearby, among them Antwain Dykes and Theodore Duncan, who were next to each other. When the police entered the parking lot, Duncan threw an object—later determined to be narcotics—to the ground and ran away. As Duncan fled, Dykes began to walk away from the police cars.

The police then got out of their cars. Each officer wore multiple items of identification—either MPD raid jackets and medallions, or badges and orange MPD emblems. Upon looking back and seeing the officers leave their vehicles, Dykes began to run away at a fast pace. After Dykes had run twenty to thirty feet, Investigator Jeff Folts forced him to the ground.

Once on the ground, Dykes immediately lay on his stomach with his hands positioned underneath him, near his waistband. Concerned that Dykes might have a weapon, Officer Eric Schuler repeatedly ordered him to show his hands, but he did not comply. Officers pulled on Dykes' arms to remove his hands from beneath his body. After thirty to forty seconds, the officers succeeded in extracting Dykes' hands, at which point they handcuffed him. When the officers rolled Dykes over and sat him up, they immediately saw a pistol in his waistband. They seized the pistol, placed Dykes under arrest, and searched his person. In his pockets were a ziplock bag of marijuana and thirteen ziplock bags of cocaine base. Dykes admitted to the police that he had been smoking marijuana when they arrived, and that he had had the gun for years.

On August 8, 2002, MPD officers executed a search warrant at Dykes' apartment, close to the parking lot that had been the site of his arrest. Dykes' mother and several of his brothers were present, but Dykes was not. The police later testified that Dykes' mother told them that the first bedroom was Dykes' and that no one else lived in it. According to the police, she further said that "he doesn't like anyone in his room when he's not there, so nobody else stays in the room but him," and that "if anything was in there…it was his." At trial, however, Dykes' mother testified that Dykes shared the bedroom with two of his brothers, and that she had told this to the police at the time of the search. Dykes' girlfriend likewise testified that Dykes shared the bedroom with his brothers.

On the floor of the bedroom, the police found a shoe box containing cocaine base and a digital scale with cocaine residue. In the bedroom closet was a tin can containing marijuana. Also in the bedroom were a shotgun shell and small-caliber ammunition. Inside a bedroom cabinet, the police found personal papers bearing Dykes' name and address, including court papers dated July 31, 2002.

Dykes was indicted on four counts of violating federal law. For the drugs and pistol found on his person on July 30, 2002, Dykes was charged with unlawful possession with intent to distribute cocaine base and possession of a firearm during a drug trafficking offense. For the drugs found in the bedroom on August 8, 2002, Dykes was charged with unlawful possession with intent to distribute fifty grams or more of cocaine base and possession of marijuana.

In *United States v. Dykes*, the United States Court of Appeals for the District of Columbia Circuit deal with Dykes' protests that the nature of the seizure—in which he was forced to the ground and ultimately handcuffed—went beyond the permissible scope of a *Terry* stop. The Court found as follows:

"The Supreme Court has 'recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.' *Graham v. Connor*, 490 U.S. 386,

396 (1989). In deciding what degree of force is permissible, courts must look to the facts and circumstances of each particular case, including 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. The test is one of reasonableness.

"Here, the officers used force in two ways, each of which was reasonable. First, because Dykes was in full flight from officers who were justified in stopping him, tackling him was a reasonable method of effectuating the stop. *See United States v. Laing*, 889 F.2d 281, 283, 286 (D.C. Cir. 1989) (holding that it was reasonable for police to force to the floor a suspect who began running upon seeing them). Second, once they had brought him to the ground, it was also reasonable for the officers to remove Dykes' hands from underneath his body and to place him in handcuffs. Dykes had kept his hands near his waistband, resisting both the officers' commands and their physical efforts to move his hands into plain view. Under these circumstances, it was reasonable for the officers to fear that Dykes had a weapon in his waistband, and to take the necessary steps to ensure that he could not use it. As the Supreme Court said in *Terry:*

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

And as this court said in *Laing*, the "amount of force used to carry out the stop and search must be reasonable, but may include using handcuffs or forcing the detainee to lie down to prevent flight."

SEARCH AND SEIZURE: No Expectation of Privacy in Stolen Goods

United States v. Caymen,
CA9, No. 03-30365, 4/21/05

In *United States v. Caymen*, CA9, No. 03-30365, 4/21/05, a laptop computer was obtained through the use of a fraudulent credit card. Law enforcement officers executed a search warrant at Nicolai Caymen's rented room and seized the fraudulently obtained computer. Without Caymen's consent or another search warrant, they examined the computer's hard drive which revealed sexually implicit images of children. Caymen was convicted and appealed, alleging an illegal search of his computer's hard drive. The Ninth Circuit Court of Appeals found as follows:

"The Fourth Amendment does not protect a defendant from a warrantless search of property that he stole, because regardless of whether he expects to maintain privacy in the contents of the stolen property, such an expectation is not one that society is prepared to accept as reasonable. A legitimate expectation of privacy means more than a subjective expectation of not being discovered. We held in *United States v. Wong,* 343 F. 3d 831 (9th Cir. 2003) that a person lacks a reasonable expectation of privacy in the contents of a laptop computer he stole.

"Similarly, several of our sister circuits have held that a person who steals a car does not have a reasonable expectation of privacy that entitles him to suppress what is found in a search of the stolen car. Whatever possessory interest a thief may have, that interest is subordinate to the rights of the owner, and in this case, the business supply store, from which Caymen fraudulently obtained the computer. The business not only consented to the police examination of the laptop's hard drive, but also specifically requested that the police examine it before returning it, to protect the store from accidentally coming into possession of material the store did not want—like child pornography.

"...one who takes property by theft or fraud cannot reasonably expect to retain possession and exclude others from it once he is caught. Whatever expectation of privacy he might assert is not a legitimate expectation that society is prepared to honor."

"We see no ground on which to distinguish property obtained by fraud from property that was stolen by robbery or trespass, and counsel have offered no authorities suggesting a distinction. An essential element of individual property is the legal right to exclude others from enjoying it, and it cannot be said that a thief has the right to exclude the true owner from the contents of property obtained by fraud. Obtaining the computer by fraud did not entitle Caymen to exclude the store from the hard drive. The common law long recognized larceny by trick or false token where the thief induced the rightful owner to deliver the property by trickery. A fake credit card is but a plastic and electronic false token.

"Of course, what matters is not the details of the common law of larceny. What matters is a reasonable expectation of privacy that society is prepared to accept as reasonable, and one who takes property by theft or fraud cannot reasonably expect to retain possession and exclude others from it once he is caught. Whatever expectation of privacy he might assert is not a legitimate expectation that society is prepared to honor. Because, as the district court found, Caymen obtained the laptop computer by fraud, he had no legitimate expectation of privacy in the contents of the hard drive."

SEARCH AND SEIZURE: No Knock Entries

United States v. Musa,
CA10, No. 03-3343, 3/21/05

On December 3, 2002, Officer Bruce Voigt, a narcotics officer with the Topeka Police Department, obtained from the district court of Shawnee County, Kansas, a warrant to search James Donald Musa's home for methamphetamine and items associated with the sale or use of methamphetamine, including weapons. The affidavit in support of the warrant stated that a reliable informant had reported seeing Musa sell methamphetamine at least 15 times in the past month. According to the informant, Musa's customers would

contact him on his cell phone and Musa would then deliver the methamphetamine to either the customer's residence or another location. The informant also said that Musa commonly left the methamphetamine in the glove compartment of his car, even when he was at home. The informant explained that Musa was on parole and did not want to get caught with the methamphetamine in his house during an in-home visit by his parole officer.

Included in the affidavit was a summary of Musa's criminal record, which Officer Voigt had gathered from a national computer database. Musa had a 1990 conviction for felony auto theft and a 1997 conviction for marijuana possession. In 1998 and 1999, Musa had five other arrests: (1) for domestic battery, obstruction, and terroristic threat; (2) for domestic battery, obstruction, possession of drug paraphernalia, and battery on a law-enforcement officer; (3) for domestic battery and unlawful restraint; (4) for domestic battery; and (5) for possession of methamphetamine, possession of marijuana, possession of drug paraphernalia, and traffic violations. In 2001, Musa was convicted on a federal charge of felon in possession of a firearm; he was sentenced to 18 months' imprisonment and two years' supervised release. At the time this search warrant was issued, Musa had been on supervised release for a little over two months.

As Musa points out, Voigt did not investigate any of the facts surrounding these offenses, nor did he contact Musa's parole officer for additional information. Also, at the time of the search the police had no specific information that Musa possessed a firearm or booby trapped his residence. Nor did they have any information about what was inside the house. At 1:22 a.m. on December 5, 2002, an eight-member search team led by Officer Voigt executed the search warrant. As the team approached Musa's residence, they noticed a light on inside but did not attempt to determine what was going on in the house. Without knocking, they executed the search warrant by forcing the front door with a battering ram. Once inside, they announced their presence and ordered everyone to the ground.

In the house the officers found 18 grams of methamphetamine but no firearms or other weapons. Musa was indicted for possession with intent to distribute 18 grams of methamphetamine and conspiracy to possess methamphetamine with intent to distribute it.

At the suppression hearing, Voigt testified that he preferred to "do a knock and announce entry on every search warrant we possibly can." Here, however, there were several reasons for the tactical decision not to knock and announce. First, there was Musa's criminal history. Voigt testified:

> Going back over his past arrest record and convictions, he shows the potential for violence. And not only that, but his last arrest was for the federal gun charge. We also took in consideration during the raid briefing that he had just been released in September of this year, and less than two and a half months later we're doing a search warrant at his residence for selling meth-amphetamine and marijuana. To us, that shows a complete disregard for laws, or a person who possibly has the potential of having violence still.

In addition, Voigt knew, based on his 10 years of experience as a narcotics officer, that firearms were tools of the drug trade. Moreover, he was concerned because of the lack of police knowledge of the inside of the residence. He testified that this lack of intelligence "itself is a dangerous situation because you don't know what to expect."

The search team was also concerned about Musa's destroying evidence. Voigt explained this was based on the informant's statement that Musa was on federal parole and did not want to be caught with methamphetamine in his house during a visit by his parole officer.

The district court held that police officers lacked adequate grounds to conduct a no-knock entry of Musa's home to execute a search warrant, and suppressed all evidence obtained during the search. The Government appealed and the Tenth Circuit Court of Appeals reversed the opinion of the district court, finding as follows:

"The United States Supreme Court has held that the "Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry." *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997). But the flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. The knock-and-announce requirement can give way under circumstances presenting a threat of physical violence, or where police officers have reason to believe that evidence would likely be destroyed if advance notice were given. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995).

"On occasion, a suspect's significant criminal history of violence may provide the necessary additional specific information justifying a no-knock entry. In *United States v. Colonna,* we upheld the no-knock execution of a search warrant of the defendant's home for drugs. The affidavit supporting the warrant catalogued the defendant's criminal history. He had been arrested 24 times and been convicted of two felonies. Among the arrests were ones for 'strong arm robbery, aggravated assault, assault on a police officer, resisting arrest, aggravated robbery with a firearm, failure to stop for a police officer, and terroristic threats.' In addition, the affidavit stated that the defendant 'had been very aggressive with police officers in the past, and has even hit, punched, or otherwise attacked certain officers.' Thus, the only justification for the no-knock entry, beyond the usual concerns in drug investigations, was the criminal history.

"In the case before us, the suspect's criminal history likewise constitutes sufficient additional information to justify the no-knock entry. Musa's four arrests for domestic battery and terroristic threat indicated a volatile, violent disposition; and the arrest for battery on a law-enforcement officer further indicated that he did not have substantially greater self-control when confronting police officers. He was a hardened criminal; he had two felony convictions and apparently started committing new felonies almost immediately upon his release from prison two months before the search at issue. And he was sufficiently attracted to guns that he had possessed one after his first felony conviction, despite the severe consequences faced by a felon found in possession of a firearm…In our view, the information about Defendant was a sufficient showing to permit the no-knock entry."

SEARCH AND SEIZURE:
Stop and Frisk; Flight
United States v. Baskin,
CA7, No. 04-2698, 3/17/05

Glen Hills County Park is a hilly and heavily wooded area in rural eastern St. Croix County, Wisconsin, pocketed with caves. On September 22, 2003, hikers in the park contacted the County Sheriff's Department to report suspicious equipment in one of the caves. Deputies who responded identified the equipment as paraphernalia associated with methamphetamine production. Since such sites can be toxic and volatile, the area was cordoned off and monitored until a specialist could arrive to inspect and dismantle the equipment. Deputies watched the site in two-hour shifts on the evening of September 22 and the morning of September 23.

Deputy Sheriff Brandie Uhan, a five-year veteran of the force with expertise in drug investigation, took the 2:00 a.m. to 4:00 a.m. shift. Uhan parked her marked squad car along a dark and isolated stretch of Rural Route 4 ("RR4"), a narrow, dirt road that provides access to the park. She waited there, within close proximity to the cave, with her engine and car lights turned off.

At 3:17 a.m., vehicle lights approached. This was the first car to come by in over five hours; none had passed since the start of Uhan's shift, and she had learned from the officer on the prior shift that no vehicles had driven by since 10:00 p.m. The car approached at 10 to 15 miles per hour, a speed which Uhan considered to be suspiciously slow. Because it was so dark out and the road so narrow, Uhan feared the approaching vehicle might run into her squad car. Uhan turned on her lights, whereupon the approaching car immediately accelerated and sped past Uhan and the cave.

This made Uhan even more suspicious, so she performed a U-turn and pursued the accelerating vehicle down the dirt road. She had to travel at 40 to 50 miles per hour to catch up. She followed the car for half a mile to a paved and wider road and signaled for the driver to pull over. The car came to a stop, and Uhan approached. Justin Johnson was in the driver's seat of the car, and Dustin Baskin was riding in the passenger's seat. Johnson explained to Uhan that they had come from "The Farm" in Emerald, Wisconsin, and were on their way out to the 128 Restaurant. Being familiar with both locations, Uhan recognized that the two had taken a very indirect route between those points. Uhan noticed immediately that Johnson appeared intoxicated, as his eyes were bloodshot and speech slurred. She also observed that Baskin appeared nervous, at one point pulling out a cigarette, placing it behind his ear, forgetting it was there, and pulling out a second one to smoke. Uhan shined a flashlight into the backseat, where she noticed two hose clamps and a broken light bulb, which she knew were evidence of methamphetamine production and use.

Uhan left both men in their car and returned with their driver's licenses to her vehicle to run past dispatch. As she walked to her squad car, Uhan glanced back and observed both men reaching beneath their seats and into the back seat, and saw Baskin fumbling with the handle of his door. Concerned, Uhan re-approached the driver's side of the car and saw a baseball

bat next to Johnson that had not been there before. When asked about the bat, Johnson replied that it was "no big deal" and set it in the back seat. Uhan also noticed that Baskin had his fists clenched near his stomach. Uhan ordered Baskin to open his hands, which he did, revealing eight small, plastic packets containing a white residue. Uhan knew that such packets were commonly used for storing methamphetamine.

At that point, several deputies arrived, and the two men were removed from the car and detained for investigation. Uhan then searched the car, finding more small, plastic packets and a glass plate with a dusting of white residue. Uhan also noticed that attached to the key ring in the car's ignition was a red cap similar to those used to cap tanks of anhydrous ammonia, which she knew was used for methamphetamine production. The two men were thereupon arrested for possession of drug paraphernalia.

A federal grand jury returned an indictment charging Baskin and Johnson with one count of possessing equipment, chemicals, and materials with reasonable cause to believe they would be used to manufacture methamphetamine, and one count of manufacturing methamphetamine. Baskin moved to suppress the evidence that was seized in connection with his arrest. Following an evidentiary hearing, the magistrate judge recommended that the district court deny the motion. In its recommendation, the magistrate judge acknowledged that while "timing and location of a slow-moving car probably do not rise above the level of a hunch... adding evidence of flight tips the balance in favor of the stop." The district court adopted the magistrate judge's recommendation and denied Baskin's motion, explaining that its decision was based upon timing, location, and the fact that "when Deputy Uhan turned on her headlights, the car accelerated quickly." Baskin appealed the court's decision. The Seventh Circuit Court of Appeals found as follows:

"…A defendant's mere presence in an area of expected criminal activity does not in and of itself justify an investigatory stop. *Illinois v. Wardlow*, 528 U.S. 19 (2000). However, location remains relevant to our analysis, especially when combined with unprovoked flight from the police. In *Wardlow*, the defendant was standing against a building in an area known for drug trafficking when a police squad car pulled up as it patrolled the area. The defendant fled upon spotting the police, but they caught up with him. The police conducted a brief pat-down of the defendant, which revealed a handgun. The defendant claimed that the investigatory stop violated his Fourth Amendment rights; the Supreme Court disagreed, finding instead that the defendant's evasive behavior in a high-crime area had aroused a reasonable suspicion that criminal activity was afoot. Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.

"In cases involving a defendant's unprovoked flight from the police, the inference of criminality is commonly derived from the fact that the person has fled an area of expected criminality. However, it is highly relevant to the reasonable suspicion analysis in this case that Baskin's approaching vehicle's acceleration occurred in close proximity to a newly

discovered methamphetamine lab in an otherwise remote county park at a time when most people are asleep.

"It was also reasonable for Uhan to interpret the vehicle's sudden acceleration as evidence of unprovoked flight. Baskin argues that the speed at which he was traveling could not have been suspicious because when Uhan observed him traveling at a speed of 10 to 15 miles per hour he was in the process of negotiating a curve in a 15 miles per-hour zone, and his acceleration coincided with the straightening of the road into a 35 miles-per-hour zone. Baskin also offers that he continued to proceed toward Uhan's squad car rather than perform a U-turn, which he submits would have been more indicative of evasion.

"We keep in mind, however, that behavior which is susceptible to an innocent explanation when isolated from its context may still give rise to reasonable suspicion when considered in light of all of the factors at play. Here, the approaching car's acceleration coincided not just with the straightening of the road, but also with Uhan turning on the lights of her squad car, which revealed her presence near the cave that housed the suspected methamphetamine lab. Baskin plays down the acceleration issue, but Uhan described it as a relatively rapid increase from 10-15 miles per hour to 40-50 miles per hour. That is a substantial acceleration, especially when it occurred on an unlit, dirt road in the middle of the night. As Uhan noted, a reasonable driver might also have proceeded more carefully upon spotting another vehicle parked on the same, narrow road, especially when that vehicle was a squad car. Uhan's suspicions about the car's sudden acceleration were reasonable. That the car continued toward Uhan does not change our analysis, especially given the uncertain feasibility of performing an abrupt U-turn on that narrow, dirt road."

SEARCH AND SEIZURE: Traffic Stop; Consensual Encounters; "Free to Go"

United States v. Meikle,
CA4, No. 04-4357, 5/13/05

On the afternoon of September 24, 2003, Lance Corporal Brown observed Neville Meikle driving north on Interstate 95, crossing the white fog line and drifting onto the shoulder of the highway several times. Corporal Brown initiated a traffic stop of Meikle's vehicle for the weaving violation. When Brown approached Meikle's vehicle and asked for a copy of Meikle's driver's license and registration, Corporal Brown observed that Meikle was extremely nervous; Meikle's arm was shaking and he stuttered in his speech.

In response to a question about Meikle's nervousness, Meikle told Corporal Brown that he was driving from Miami to Baltimore, Maryland for a job interview with Thrift Trucking. Brown then asked Meikle to step out of the vehicle while he continued to question Meikle about the job interview. Corporal Brown asked Meikle if Thrift Trucking had offices in Florida and Meikle replied "Yes, not really." Meikle went on to state that if you lived north of Interstate 4 you had to interview in Baltimore. Brown was somewhat familiar with Florida highways and found this to be inconsistent with the fact that Meikle said he lived in Miami, south of Interstate 4.

Corporal Brown then radioed the dispatcher to inquire as to the status of Meikle's driver's license. While Brown awaited the dispatcher's response, he again questioned Meikle about his job and interview and whether there were any illegal items in his vehicle. Corporal Brown noted that Meikle's overall nervousness was increasing and that Meikle laughed nervously when he said he had no illegal items. The officer found Meikle's nervousness to be extreme, especially considering that midway through the encounter Corporal Brown had told Meikle that he was only giving Meikle a warning for crossing the fog line.

After Corporal Brown completed the warning citation and Brown's dispatch advised Brown that Meikle's driver's license was clear, Corporal Brown returned Meikle's license and registration and shook his hand. At this point, 11 minutes had passed since the original stop and Corporal Brown testified that Meikle was free to leave.

As Meikle turned and walked back towards his vehicle, Corporal Brown asked Meikle if he could talk to him again and Meikle replied, "Yes." Corporal Brown then asked Meikle if there were any illegal drugs in the vehicle. Meikle nervously stuttered, "No." Corporal Brown next asked if he could search Meikle's vehicle, and Meikle consented. Corporal Brown called for another officer and with the assistance of a drug dog, they searched Meikle's vehicle and found several packages containing approximately three kilograms of heroin.

Meikle argues on appeal that the traffic stop had not become a consensual encounter at the time that he consented to the search of his vehicle because the traffic stop violated *Terry v. Ohio*, 392 U.S. 1 (1968) by going beyond the limits of proper law enforcement conduct in a routine traffic stop. The Fourth Circuit Court of Appeals found as follows:

"The Supreme Court's analysis in *Terry* governs routine traffic stops, such as the one at issue here. To determine the limits of police conduct, *Terry* employs a dual inquiry: whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

"However, if the traffic stop becomes a consensual encounter, the *Terry* inquiry would not be employed, and the stop would instead be governed by the Supreme Court's analysis in *Florida v. Bostick*, 501 U.S. 429 (1991), because a consensual encounter does not 'trigger Fourth Amendment scrutiny.' Under *Bostick*, the question is 'whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' This inquiry involves an objective analysis of the totality of circumstances. If a reasonable person would have felt free to decline the officer's request or otherwise terminate the encounter, and the suspect freely gives consent to search at this point, there is no need to reach the issue of whether the initial stop was permissible under *Terry*.

"Employing the *Bostick* inquiry, the district court determined that Meikle's traffic stop had become a consensual encounter when Meikle freely granted consent for Corporal Brown to search his vehicle. Thus, the court concluded that it need not address whether the initial stop exceeded the permissible scope of a *Terry* stop.

We agree with the district court's reasoning and disposition of this case. We are of opinion that this encounter was consensual because under *Bostick*, Meikle, as a reasonable person, would have felt free to decline Corporal Brown's requests to continue the encounter.

"In this case, a total of eleven minutes passed between the initial stop and when Corporal Brown finished issuing the warning citation, returned Meikle's license and registration and shook Meikle's hand. Corporal Brown testified that at that point Meikle was free to go, and in fact, Meikle did turn and walk away. Several seconds passed before Corporal Brown said, 'Mr. Meikle, can I speak with you.' Meikle agreed to speak with Corporal Brown further, and during this conversation, Meikle also consented to the search of his vehicle.

"Since *Bostick*, we have held that circumstances where the citizen would feel free to go, but stays and has a dialogue with the officer, are considered consensual. Also, when a stop is over and its purpose served mere questioning by officers without some indicated restraint, does not amount to a seizure under the Fourth Amendment. *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998) (holding that a search was consensual even though an officer repeatedly asked questions about the presence of illegal items in the car, after returning a suspect's license at the conclusion of a traffic stop). Following the reasoning of these cases, in which we have repeatedly found to be consensual encounters similar to the one at hand, Meikle's traffic stop had become consensual by the time he consented to the search of his vehicle. The officer had returned Meikle's license and registration, had shaken Meikle's hand, and Meikle began walking back to his car. It was clear that Meikle was free to go. A reasonable person would have felt free to decline Corporal Brown's request to speak to Meikle further. Therefore, a consensual encounter commenced the moment the officer asked if he could speak to Meikle again and Meikle agreed.

"The traffic stop at issue is also remarkably similar to that in *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992). In *Rusher*, the defendant's vehicle was stopped for a seatbelt violation and improper license plate. The officer asked the defendant about his vehicle and trip before issuing a warning ticket and returning the defendant's driver's license. The officer then told the defendant that he was 'free to go.' *Rusher*, 966 F.2d at 872. As in the case at hand, only after the driver's papers had been returned and it was made clear that the driver could leave, did the officer ask if he could search the vehicle. And, as in the case at hand, the driver consented and illegal items were found in the vehicle.

"In *Rusher*, this court held that it did not need to determine whether the stop exceeded the proper scope of a *Terry* stop because the encounter in which the defendant consented to the search of his vehicle was a consensual encounter. The court said that the encounter became consensual once the officer told the defendant he was free to go, and this before asking permission to search the vehicle. Thus, the defendant did not need to answer any of the trooper's questions.

"Miekle's situation is indistinguishable from that in *Rusher*. As in *Rusher*, and pursuant to the inquiry laid out in *Bostick*, the encounter between the defendant and the officer was purely consensual. Meikle understood that he was free to leave, which is made obvious by

the fact that he shook hands with the officer and did in fact begin to leave. The officer had also returned all of Meikle's papers, which also signified that Meikle could go. The holding of the district court that
the search was consensual is thus affirmed."

STATE STATUTE: Sex Offenders Residing Near Schools

Doe v. Miller, CA8, No. 04-1568, 4/29/05

In *Doe v. Miller*, the Eighth Circuit Court of Appeals found constitutional an Iowa statute that prohibits a person convicted of certain sex offenses involving minors from residing within 2,000 feet of a school or a registered child care facility. A federal district court had declared the statute unconstitutional.

The Eighth Circuit Court of Appeals upheld Iowa Statute § 692A.2A against numerous constitutional and statutory challenges made by three sex offenders with convictions that predate the law's effective date who assert that the statute is unconstitutional. The Eighth Circuit Court of Appeals, in a lengthy opinion, concluded the Constitution of the United States does not prevent the State of Iowa from regulating the residency of sex offenders in this manner in order to protect the health and safety of the citizens of Iowa.

SUBSTANTIVE LAW: Rape

Sera v. Norris, CA8, No. 04-1532, 3/7/05

In *Sera v. Norris*, Steven Anthony Sera was convicted by an Arkansas jury on eight criminal counts related to his use of Rohypnol, a so-called "date rape drug," to perpetrate sex crimes against two women in Arkansas. The case is as follows:

Sera came under investigation in the summer of 1997 after his wife ("Mrs. Sera") found and turned over to police a videotape depicting three sexual encounters between Sera and three different women who appeared to be unconscious. One of the women was Mrs. Sera's younger sister, a college student in Missouri. Police eventually identified the other two women as a resident of Arkansas and a resident of Texas. Charges were brought against Sera in Arkansas, Texas, and Missouri for drugging, kidnapping, and sexually assaulting or raping the three women on the videotape, as well as a fourth woman in Arkansas. In this case, the Eighth Circuit Court of Appeals is only called upon to address Sera's conviction in Arkansas for the rape of the Arkansas resident ("Jane Doe"). The case is as follows:

In late summer of 1996, Sera lived with his wife and daughter in Dallas, Texas, where he owned and operated a lumber company. After hearing that a lumber mill was closing in Warren, Arkansas, Sera began visiting Warren to investigate, purchase, and set up operations at the mill. On one of these visits at the end of August or early September 1996, Sera met Doe in a Warren bar. The two spoke for several minutes, and Sera later arranged for flowers to be delivered to Doe the next day. The two eventually began dating.

The first occasion on which Doe spent any significant time alone with Sera occurred in October 1996. Doe's cousin invited Doe's two children to her house for the afternoon, and upon hearing this, Sera invited Doe to

accompany him on a drive. After taking the children to the cousin's house, Sera and Doe drove to nearby Monticello, Arkansas. During the drive to Monticello, Sera told Doe that he had a six-pack of beer in the trunk of the car and asked her if she would like one. Doe agreed, and Sera pulled the car over to the side of the road to get the drink from the trunk. Sera remained at the rear of the car for some time, prompting Doe to ask what was taking him so long. Sera replied that he was mixing himself a drink. When he returned to the car, Sera handed Doe a bottle of beer and continued driving. When Doe finished drinking the beer, Sera again pulled the car over and retrieved a second beer for her from the trunk of the car. Doe drank the second beer and the two drove around Monticello. Doe testified that from that point forward, she has no memory of most of the events of the afternoon. Without her knowledge, Sera drove her to the bed and breakfast at which he was staying in Warren. While Doe was unconscious and without her consent, Sera penetrated her vagina with his penis and ejaculated on her face. These actions were recorded on the videotape found by Mrs. Sera. After the episode, Sera drove Doe to her cousin's house to pick up her children. Her cousin testified that Doe "seemed confused" and was no longer wearing the socks and tee-shirt that she had been wearing when she left on the trip with Sera. Doe has no memory of picking up her children. Her next clear memory is of waking up the next morning for work. Upon awakening, nothing indicated to Doe that she had sexual intercourse the prior evening.

The couple's next trip was to a casino in Greenville, Mississippi. Again Sera packed beer in the trunk of his car. Sera gave Doe alcoholic drinks both on the drive to Greenville and at the casino. Doe testified that she cannot recall leaving the casino or the return trip to Warren. Her next memory is of waking up the following morning on the couch in the living room of the bed and breakfast. Sera insinuated that she had consumed too much alcohol the day before.

In late October or early November 1996, Doe accompanied Sera on a third out-of-town trip. The two drove to Little Rock, Arkansas, to dine at the Macaroni Grill restaurant. Along the way, Sera stopped and bought two individual cans of beer. Doe drank one of the beers and had a few drinks from the other. During dinner, Doe drank a glass of wine and a glass of water. Near the end of dinner, Doe went to the restroom. After she returned to the table and finished her water, she began to feel ill and have stomach cramps. Doe testified that her last recollection of the evening was walking to the car in the parking lot. She did not become aware again until the next morning when she awoke in Sera's bed at a bed and breakfast. She found herself wearing nothing but a tee-shirt, but does not recall how she got to that state of undress. Doe continued to have stomach cramps. She had diarrhea and vomiting the remainder of the day.

The couple's only consensual intimate encounter occurred in mid-November 1996 at a bed and breakfast. Doe testified that she was conscious throughout and that the encounter was not videotaped. Doe returned to her own home after the encounter; she did not stay overnight at the bed and breakfast. The two stopped dating soon thereafter. Doe's last encounter with Sera was on December 12, 1996, when she witnessed Sera holding an unconscious woman in his arms as he entered the bed and breakfast.

In March 1998, Sera was tried in the Circuit Court of Bradley County, Arkansas, on eight counts. The evidence introduced at trial indicated that Mrs. Sera found a bottle labeled "Rohypnol" in Sera's suitcase following one of his out-of-town trips. Two pharmacologists testified regarding the effects of Rohypnol on the human body. Dr. ElSohly testified that ingestion of Rohypnol can cause hypnosis, total muscle relaxation, and loss of memory. After viewing the videotape, Dr. ElSohly concluded that the behaviors of each alleged victim shown therein were consistent with ingestion of Rohypnol. Dr. Tolliver similarly testified that, when ingested, Rohypnol will cause hypnosis, relax muscles, and cause anterograde amnesia. He stated that a person under the influence of Rohypnol can be talking and functioning yet still not be able to remember what is happening during that time. Furthermore, Dr. Tolliver stated that combining Rohypnol with alcohol causes a magnification of the drug's effects, which can cause a deeper state of unconsciousness. The side-effects of the drug, including gastrointestinal problems and stomach cramping, may also become more severe when the drug is mixed with alcohol. Finally, after viewing the videotape, Dr. Tolliver agreed that the women's behaviors were consistent with the effects of Rohypnol.

Sera testified on his own behalf. He asserted that the women were simply drunk, not drugged, and that they consented to his sexual advances. Sera admitted to possessing Rohypnol, but claimed that a doctor in Mexico had prescribed it to treat his insomnia.

After the Arkansas Supreme Court affirmed his convictions on appeal, Sera filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2000) challenging only his conviction on one count of rape. The District Court granted Sera's petition on the ground that the evidence was insufficient to support a finding of rape. The victim in this case lacked memory about the events and there was no physical or forensic evidence of rape.

The Eighth Circuit Court of Appeals reversed the District Courts grant of habeas corpus, holding that there was sufficient circumstantial evidence to support a rape conviction. The Eighth Circuit Court of Appeals stated that the corpus delicti of the crime—sexual intercourse or deviate sexual activity—could be proved through circumstantial evidence.

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