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Four Recent Court Cases

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By Gene King, LEAF Coordinator

This edition of the LEAF Newsletter outlines four recent court decisions that should be of interest to every law enforcement officer. Two of the cases address qualified immunity granted because the officers painted a vivid picture. The third is significant because the court said the Legislature failed to use “no uncertain terms” to abrogate the common-law right to resist unlawful arrests or other unlawful invasions of private rights. The fourth case affects any department that has a detention facility or jail. This case limited civil liability for performing a strip search on a prisoner booked in to a detention facility or jail but in Michigan, not the criminal one.

Catch and Release

In March of 2008, LEAF published a Newsletter entitled “**Yes, Cops Can Practice “Catch and Release” With A Subject They Have Taken Into Custody**” in which an incident was analyzed involving officers dispatched to a suspicious situation. The Newsletter describes a number of scenarios that officers are likely to encounter in these types of incidents. It also provides information on court rulings that affect an officers’

decision making and the actions they can take in response to behavior they encounter. The Newsletter is located at mml.org under Insurance, Pool or Fund and then Law Enforcement Newsletters on the left side of the page under Risk Resources.

The 2008 Newsletter was modeled after a real life incident in which officers were asked to check on a suspicious situation involving a person walking down the street. During that incident, the officers made decisions based on their situational awareness, experience, training and while taking in to consideration the evolving situation. The case is *Gupta v. Crane*, 2012 WL 1449160 (Mich. App.). Of particular importance in this case is the court’s evaluation of the information about the incident that the officers articulated. Their account of the incident detailed the subject’s behavior and how they responded to each action the subject took. Because the officers were specific in their detail of the incident, they were prepared to answer the questions that followed and provided their attorney with the ammunition needed for their defense.

Gupta began when a woman called dispatch to report that an unidentified man was walking in her neighborhood. The woman told the police dispatcher that the man was stumbling and walking slowly. She thought something might be wrong with him or that he might be intoxicated and asked that someone check on him. The responding officers drove his marked police vehicle to the neighborhood and saw the subject standing on a public sidewalk. According to officers, the subject had trouble balancing, he was staggering, he smelled of intoxicants, and his speech was slurred. The second officer on the scene reported that the subject appeared to be intoxicated and both officers stated that they were trying to learn who he was, where he lived, or if he needed help. Neither officer knew the subject or what he was doing in the neighborhood.

As the officers tried to obtain information from the subject, he said “good-bye” and began to walk away. When one of the officers tapped the subject on the shoulder and told him to stop, he ran into the street away from the officers. The officers gave chase, went to the ground on top of the subject, cuffed him, and arrested the subject for disturbing the peace. It turned out that the place of arrest was the subject’s front lawn. The prosecutor ultimately dropped the disturbing the peace charge and, instead, charged the subject with obstructing or opposing law enforcement officers. The criminal complaint was dismissed after an evidentiary hearing. The subject sued for many things including 42 USC 1983 civil rights violations.

The officers removed the case to United States District Court for the Western District of Michigan where the officers’ motion for summary judgment was granted. However, the case was remanded to state court for consideration of the state claims. In granting the motion, the federal district court ruled there was sufficient probable cause to arrest and charge the plaintiff. The officers moved for summary disposition in the State court and the motion was denied, so they appealed.

The Michigan Court of Appeals, using the test found in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich. 567; 363 NW2d 641 (1984). The court found that the officer’s acts took place in the course of employment; that he was acting, or reasonably believed that he was acting, within the scope of his authority; that the acts were performed in good faith with no malice, and that the acts were discretionary, as opposed to ministerial.

The court ruling reflected that the officers were acting within the scope of their authority as police officers in their questioning and arrest of the subject. In Michigan, police officers have the authority to detain and arrest persons suspected of committing a crime, and it is undisputed that the officers had probable cause to arrest the subject in this case. See MCL 117.34; *People v. Oliver*, 464 Mich. 184, 192; 627 NW2d 297 (2001). The court further said that police officers clearly have duties as community caretakers to determine whether an obviously intoxicated person is in need of assistance. See *People v. Slaughter*, 489 Mich. 302, 313; 803 NW2d 171 (2011). Accordingly, the officers were clearly acting within the scope of their authority.

The Court went on to say, as Michigan’s Supreme Court explained in *Odom v. Wayne Cty*, 482 Mich. 459, 480; 760 NW2d 217 (2008), that the acts of an officer must be undertaken in good faith.

... Described [as] a lack of good faith as “malicious intent, capricious action or corrupt conduct” or “willful and corrupt misconduct...” In *Firestone v. Rice* [71 Mich. 377, 384; 38 NW 885 (1888) (emphasis added)], in which the plaintiff brought an action for false imprisonment and assault and battery against a police officer for handcuffing him, the Court held:

There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such

apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through *malice or wantonness or a reckless indifference to the common dictates of humanity*.

The Court said that the officers proved that their actions were undertaken in good faith, that the subject was evasive and uncooperative in his responses, that he was clearly intoxicated, and they were trying to ascertain whether he was a danger to himself or others. And, as the federal district court found, once the subject fled into the public roadway, it was plainly reasonable for the officers to give chase, to seize him, and to place him in handcuffs. As a result, the Appeals Court ruled that the trial court should have granted the motion of summary disposition on all charges.

Audrey Forbush, LEAF Legal Advisor and Partner at Plunkett Cooney PC said that all department administrators and officers should take note that, even though the criminal charges were dismissed, the department and officers got a summary disposition because they could articulate the issues in this case. The department and officers involved in this case clearly documented the behavior they observed and resistance they encountered. They articulated the decisions they made and actions they took to take control of the situation as reasonably and safely as they could.

Officers Arrest Drunk In Running Car, Found Not Guilty, Files Suit

The facts of *Nettles - Nickerson v Free*, 2012 WL 1958888 (C.A.6 (Mich.) issued June 1, 2012, are that a patron of a bar watched an obviously intoxicated subject leave the establishment and stumble toward her vehicle. On the way, she fell to the ground, got up, got in on the driver's side, and started the vehicle. The lights and brake lights came on. The patron thought it was best if the person did not drive, so he called dispatch to report what he had observed. When the officers arrived, the patron pointed out the vehicle that was still running with the lights on. Officers approached

and saw the vehicle was in park and the operator was in the driver's seat appeared to be asleep. The officers announced themselves and the subject immediately opened her eyes and made eye contact with the officer. The officer described the person as having bloodshot and bleary eyes. The officers got the subject out of the vehicle and administered sobriety tests, which the subject failed. On the third attempt at a PBT test, the subject registered 0.165. The subject was arrested for operating a vehicle while intoxicated.

The state trial court, however, dismissed the charge, finding that the subject was not "operating" her vehicle as Michigan law defines the term. The Michigan Department of State made a similar finding in the subject's license restoration proceedings. As a result, the criminal case was closed and subject's license was not suspended.

Evidently, now being intoxicated by luck, the subject sued the officers for civil rights violations. The federal district court granted the officers' motion for summary judgment, holding that they were entitled to qualified immunity because the subject did not have "a clearly established constitutional right to be free from detention and eventual arrest while sitting, intoxicated, in the driver's seat of a running vehicle that is legally parked." The district court went on to say that a reasonable officer could have concluded that the subject was "operating" her vehicle as that term is statutorily defined. The district court also reasoned that while Michigan case law could be read to reach a different conclusion, the case law was sufficiently unclear to allow a reasonable officer to believe that the subject was "operating" her vehicle. The subject appealed the district court ruling.

The Sixth Circuit Court of Appeals ruled that there was no dispute that the subject was drunk, so the only question was whether she was "operating" her vehicle. MCL 257.35a defines "operating" as "being in actual physical control of a vehicle." Since the subject was the sole individual in the vehicle and she was in the driver's seat behind the steering wheel, with the engine running, taillights

on, and the brake pedal pressed, nothing impeded the subject's ability to move the car. Since a reasonable officer relying on the plain language of the relevant statute could have concluded the subject was operating the vehicle while intoxicated, the district court properly determined the officers were entitled to qualified immunity. The court went on to say; "In this case, moreover, the police officers commendably consulted with each other before executing the arrest. This is a paradigm case for qualified official immunity."

Forbush believes that this case is another example of officers using their training and resources to come to a conclusion that the courts can accept. In reporting what they observed -- including the subject's behavior and the action they took during the incident -- the officers provided the court with a complete picture that it could evaluate before rendering an opinion.

The Court Says a Subject Can Resist an Unlawful Arrest and/or Entry by Police

As LEAF reported in *Michigan Police Chiefs* magazine (April 20, 2012), the Michigan Supreme Court in *People v Moreno*, 2012 WL 1381039 ruled that under common-law a person has a right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas. In so ruling, the Court specifically overruled *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004), to the extent that the Appeals Court held that the Legislature affirmatively changed the law, so that a person may not resist an unlawful arrest.

In *Moreno*, officers were searching the area for a subject who had several warrants for his arrest. The subject's vehicle was parked in the immediate vicinity of a house so the officers knocked on the door to try to locate him. While one officer announced they were the police and sought to identify who was in the house, the other officer walked around the house and looked in a window. The officer observed empty bottles of alcohol and people trying to hide. After some time, an underage female, who smelled of alcohol, answered the door.

The officers told her that they were only interested in the whereabouts of the subject who owned the vehicle. The female knew the subject and told them he was not in the house. She also told the officers they could not come in. The officers told the female they were coming in to "secure the house" until a warrant was issued. Moreno then came to the door and demanded the officers get a warrant before they came in. Moreno then tried to close the door and a struggle followed which resulted in an officer being injured and Moreno being under arrest. He was charged with assaulting, resisting, or obstructing a police officer and assaulting, resisting, or obstructing a police officer causing injury

The issue before the Supreme Court became whether a person present in his or her own home can resist a police officer who unlawfully and forcibly enters the home or whether MCL 750.81d prohibits resisting unlawful actions by a police officer. The Court said that, in Michigan, obstructing a police officer has been recognized as a common-law crime as well as an offense governed by statute. In addition, the right to resist *unlawful* arrests, and other *unlawful* invasions of private rights, is also well established in Michigan's common law. Audrey Forbush, Plunkett Cooney, LEAF Legal Advisor, remarked that the current state of the law places the responsibility squarely upon the officer to specifically define the circumstances as the officer knew them, the officer's knowledge at the time and the reasonableness of their decisions when they chose their course of action.

The Court concluded, "While the Legislature has the authority to modify the common law, it must do so by speaking in "no uncertain terms." Neither the language of MCL 750.81d nor the legislative history of this statute indicates with certainty that the Legislature intended to abrogate the common-law right to resist unlawful arrests or other unlawful invasions of private rights. We cannot presume that the Legislature intended to abrogate this right. Therefore, we overrule *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004) to the extent that it held that the Legislature affirmatively chose to

modify the traditional common-law rule that a person may resist an unlawful arrest.”

Forbush concluded that officers must be knowledgeable about when they can enter a dwelling lawfully. Forbush notes that the courts, as evidenced in *Moreno*, have remained absolute on the core of the Fourth Amendment, which is, that barring exigent circumstances or consent, a search warrant is mandatory before entering or searching a person’s home. Forbush strongly recommends Departments provide training in Entry, Search and Seizure to their officers. The entire article can be read in the Michigan Police Chiefs Magazine.

U.S. Supreme Court Said People Held In Detention Facilities Can Be Strip Searched. However, Those with Detention Facilities Better Pay Attention, Michigan Law Is Stricter Than the Decision!

The United States Supreme Court *in Florence v Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012) ruled that “Every detainee who will be admitted to the general jail population may be required to undergo a close visual inspection while undressed.” Albert W. Florence, who was mistakenly arrested for not paying a fine that had been paid, brought this case. After the arrest, he was lodged in the Burlington County New Jersey Jail and then transferred to the Essex County Jail in New Jersey. He was strip searched in each jail before being put in population.

Florence sued claiming that having a blanket policy to strip search every new detainee, regardless of the charge, violates the Fourth Amendment. The Third Circuit Court of Appeals held that it is reasonable to search everyone being jailed, even without suspicion that a person may be concealing a weapon or drugs. The Court of Appeals reversed a Federal District Court ruling that such a blanket policy was unconstitutional. The U.S. Supreme Court last looked at the issue because there were inconsistent opinions in the courts across the country.

The U.S. Supreme Court went on to say, “Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face. The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate’s constitutional rights must be upheld “if it is reasonably related to legitimate penological interests.” The Court continued, “Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. The admission of inmates creates numerous risks for facility staff, for the existing detainee population, and for a new detainee himself or herself. The danger of introducing lice or contagious infections, for example, is well documented.”

Mike Bogren, Governmental Law Practice Group Leader, and co-author of the Amicus brief written on behalf of the Defense Research Institute, which the majority opinion in *Florence* aligned, wrote in the Spring/Summer edition of the Plunkett Cooney P.C. ***Municipal Matters Newsletter***:

The Supreme Court’s decision is a return to the common-sense rules that the court has traditionally approved in the jail setting. The courts of appeal have eroded this common-sense approach over the years in favor of complicated and unworkable case-by-case determinations of the “need” to search a detainee. The Supreme Court has forcefully reiterated the deference that the federal courts must give to those charged by the states to maintain safety, order and discipline in jails. The Supreme Court’s decision should allow jail officials to protect the inmates and employees of jails without having to worry that their decisions will be subjected to after-the-fact scrutiny by the courts that intrude on their responsibility to preserve internal order and discipline.

LEAF Legal Advisor Audrey Forbush also commented that this decision affects all detention facilities no matter how small and clarifies the responsibilities of officials that operate detention facilities. She opined that *Florence* gives detention facility officials wide discretion in establishing common sense rules. Forbush went on to say the case reduces the potential for federal civil rights litigation due to the actions of jailers who are following the rules that have been established.

This means that any rules “must devise reasonable solutions to the problems they face.” The rules themselves are not enough. There must be associated policy that provides guidance in the discretion that jailers have in implementing the rules. To be successful, the rules and policy should have a documented annual review with regular random audits of the actual practices of the employees during the year.

Forbush also remarked that employees should have on-going, documented, training in the rules, procedures and management’s expectations of their application of the rules. This is essential to ensure the employees understand their responsibilities. Supervisors and mid-management also must receive training on their responsibility and accountability to ensure the rules are applied as intended and that the applications meet the expectations of top management. All employee behavior must also be within the discretion that management is granting them in the actions they take while applying the rules.

Forbush emphasized that although civil litigation protections may exist, in Michigan there are criminal penalties if a strip search does not meet established requirements that are stricter than those allowed by the U.S. Supreme Court. MCL 764.25a defines “strip search” as a search that requires a person to remove his or her clothing to expose underclothing, breasts, buttocks, or genitalia. She said that a thorough understanding of MCL 764.25a is essential but points to the following sections to illustrate who is affected:

(2) A person arrested or detained for a misdemeanor offense, or an offense which is punishable only by a civil fine shall not be strip searched unless both of the following occur:

(a) The person arrested is being lodged into a detention facility by order of a court or there is reasonable cause to believe that the person is concealing a weapon, a controlled substance, or evidence of a crime.

(b) The strip search is conducted by a person who has **obtained prior written authorization** (emphasis added) from the chief law enforcement officer of the law enforcement agency conducting the strip search, or from that officer's designee;...

Also:

(6) A law enforcement officer, any employee of the law enforcement agency, or a chief administrative officer or employee of a juvenile detention facility **who conducts or authorizes a strip search in violation of this section is guilty of a misdemeanor.** (emphasis added)

(7) **This section shall not apply to the strip search of a person lodged in a detention facility by an order of a court** (emphasis added) or in a state correctional facility housing prisoners under the jurisdiction of the department of corrections, including a youth correctional facility operated by the department of corrections or a private vendor under section 20g of 1953 PA 232, MCL 791.220g.

Forbush reiterated her earlier comments about the importance of established policy, regular training and management oversight. She emphasizes that even though *Florence* reduces the potential for civil rights litigation for strip searches, failure to comply with the specific requirements of the Michigan law can easily result in criminal charges.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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