
THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer)*. The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting <https://www.fletc.gov/legal-resources>.

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The Informer – November 2018

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FLETC Informer Webinar Schedule

1. Understanding the Inventory Search (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia. (John.Besselman@fletc.dhs.gov)

The inventory search is an effective means for government agencies to protect themselves from dangers, real or imagined. This little corner of the Fourth Amendment search warrant exception arena includes some straightforward and simple rules. This webcast is designed to make sure agencies that seize personal items know what those rules are and why they exist. A training certificate will be available at the conclusion of the presentation.

Tuesday December 4, 2018: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific

To participate in this webinar: https://share.dhs.gov/occ_inventories/



2. History of Indian Law (1-hour)

Presented by Robert Duncan, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico. (robert.duncan@fletc.dhs.gov)

There are three sovereign entities in the United States – federal, state, and tribal. Tribal governments are unique among the three as they possess a separate sovereignty that has never been formally incorporated into the American constitutional framework. The discussion of “Indian” and “non-Indian” concepts as matters of political recognition distinguishable from racial, genetic, cultural, or ethnic identity and are especially important in light of public interest as well as upcoming Supreme Court cases involving Indian Country Criminal Jurisdiction. This webinar will discuss the history behind recognition through political status—especially in criminal jurisdiction—and why concepts unique to Indian law exist in a historical context.

Wednesday December 5, 2018: 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



3. Eyewitness Identification (1-hour)

Presented by Patrick Walsh and Paul Sullivan, Attorney-Advisors/Branch Chiefs, Federal Law Enforcement Training Centers, Glynco, Georgia. (patrick.walsh@fletc.dhs.gov)

Line-ups, Show-ups and Photo Arrays: Learn all about the law on when and how to do a photo identification, an in person line-up, or even a show up. This webinar will discuss the basics and intricacies of eye witness identification. How do you do it right? And, what

happens if a court determines you did it wrong? Listen in for everything you ever wanted to know about eye witness identification at the precinct, on the street, and in the courtroom.

Wednesday December 5, 2018: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific

and

Monday December 17, 2018: 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar on either date: <https://share.dhs.gov/walsh/>



4. The Law of Drones in the United States (2-hours)

Presented by Robert H. Cauthen, Senior Attorney-Advisor, Federal Law Enforcement Training Centers, Glynco, Georgia. (robert.cauthen@fletc.dhs.gov)

This webinar will cover current federal and state laws governing the use of drones by law enforcement and public safety agencies.

Thursday December 6, 2018: 2:30 pm Eastern / 1:30 pm Central / 12:30 pm Mountain / 11:30 am Pacific

To participate in this webinar: <https://share.dhs.gov/drones/>



5. The United States Constitution – Part 1 (1-hour)

Presented by Henry McGowen, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico. (henry.mcgowen@fletc.dhs.gov)

There is a lot of discussion in criminal law about what is constitutional and what is not. Both criminal prosecutions and civil cases of officer liability rest on whether an officer acted in accordance with the Constitution. But how well do we understand these legal principles and where they came from? If we know *why* we have the laws we do then we can better understand *what* we are to do. Law enforcement officers are the guardians of the republic at home, which is not an easy job. If we don't understand why we have a republic and the vital role of law enforcement in balancing the interests of society with privacy of the individual, then that job will be a lot harder to do well. In Part 1 of this new series we will look at what gave birth to the kind of country we have and what kind of legal framework was needed for it; i.e. the U.S. Constitution.

Wednesday December 12, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



6. Legal Issues in Drone Countermeasures (1 ½ -hours)

Presented by Robert H. Cauthen, Senior Attorney-Advisor, Federal Law Enforcement Training Centers, Glynco, Georgia. (robert.cauthen@fletc.dhs.gov)

This webinar will cover the broad array of legal issues implicated by the detection, tracking and interdiction of drones by law enforcement, including jurisdiction, the Fourth Amendment, use of force, wiretapping and other digital interception statutes, potential civil liability, and the FAA Reauthorization Act of 2018 and Preventing Emerging Threats Act of 2018.

Monday December 17, 2018: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific

To participate in this webinar: <https://share.dhs.gov/dronecountermeasures/>



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CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

Conlogue v. Hamilton, 2018 U.S. App. LEXIS 28673 (1st Cir. ME Oct. 11, 2018)

On August 3, 2014, Dana Rae Conlogue called 911 and reported that her husband, Lewis Conlogue, had gotten out of their parked vehicle, put a gun to his head, and threatened to commit suicide. Police officers responded to the scene, positioning themselves approximately two hundred feet away from Conlogue. Sgt. Hamilton, a member of the state police's tactical team who had been trained in the use of deadly force in high-risk situations, arrived a short time later. From his vantage point, Sgt. Hamilton could not see the other officers but he learned of their positions from communications broadcast over a police radio. Sgt. Hamilton knew that Conlogue was brandishing a semi-automatic handgun.

Despite continued warnings to put down his weapon, Conlogue refused to comply. Instead, Conlogue displayed a fully loaded magazine, placed the magazine into his gun, and pointed it at a forty-five-degree angle over the heads of the police officers. Although the officers continued to order Conlogue to drop the weapon, he alternated between pointing the gun at his own head and pointing it in the direction of the officers at an angle of forty-five degrees. Sgt. Hamilton fired a single shot that struck and killed Conlogue, ending a three-and-a-half-hour standoff.

Conlogue's wife sued Sgt. Hamilton under 42 U.S.C. § 1983 claiming that he used excessive force in violation of the Fourth Amendment by shooting her husband. After the district court held that Sgt. Hamilton was entitled to qualified immunity, Conlogue appealed.

The First Circuit Court of Appeals noted that case law requires that two requirements be met before a police officer can lawfully use deadly force. First, the suspect must pose an immediate threat to police officers or others. Second, a police officer must warn the suspect, if feasible, that deadly force will be used against him.

In this case, the court concluded the undisputed facts made it clear that it was reasonable for Sgt. Hamilton to believe that Conlogue was an imminent threat to others and that Conlogue was repeatedly warned to drop his weapon. Consequently, the court held that Sgt. Hamilton was entitled to qualified immunity because under these circumstances Sgt. Hamilton reasonably perceived Conlogue to be an immediate threat, and no less drastic means could end the stand-off without further endangering the officer or others.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/17-2210/17-2210-2018-10-11.pdf?ts=1539291605>

Second Circuit

United States v. Fiseku, U. S. App. LEXIS 28102 (2d Cir. N.Y. Oct. 4, 2018)

At approximately 1:15 a.m., a police officer in a marked patrol car saw a white Nissan Pathfinder stopped on a dirt pull-off in a remote, wooded area. The officer spoke to the driver, later identified as Sefedin Jajaga, who told the officer that his vehicle was having transmission trouble and he was waiting for a friend to arrive with a tow truck. Jajaga appeared to be the only person in the vehicle.

Less than five minutes later, the officer saw the Pathfinder driving on a nearby street, so he followed it. The officer saw the vehicle enter a parking lot and drive to the far corner of the lot. The officer parked nearby and saw Jajaga sitting in the driver's seat, a second person, later identified as Hughes, sitting in the passenger seat, and a third person, later identified as Bekim Fiseku, walking around the rear of the vehicle. At 1:25 a.m., the officer radioed for back-up, got out of his patrol car, and approached the Pathfinder.

The officer frisked Fiseku for weapons and then placed him in handcuffs. By this time, two other officers had arrived. The three officers ordered Jajaga and Hughes out of the Pathfinder, frisked them for weapons, and handcuffed them. The officers separated the three men, who gave conflicting stories as to why they were at the parking lot. At some point, Jajaga gave the officers consent to search the Pathfinder where the officers found items of clothing bearing New York Police Department insignia, a stun gun, walkie talkies, duct tape, and other items that led the officer to suspect that the three men were planning a robbery or home invasion. The officers' search was complete by 1:35 a.m., approximately ten-minutes after the first officer entered the parking lot.

The government charged Fiseku and Jajaga with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951.

Fiseku pled guilty and admitted that he had conspired with the other men to rob a local narcotics trafficker. However, on appeal, Fiseku argued that the officer's use of handcuffs turned a valid Terry stop into a de facto arrest without probable cause, in violation of the Fourth Amendment.

The court recognized that during a Terry stop, officers are permitted to handcuff suspects when they have a reasonable basis to believe that the suspect poses a physical threat to the officer and handcuffing is the least intrusive means to protect against that threat. In this case, the court held that it was reasonable for the officer to handcuff Fiseku so he could safely turn his attention to the other two suspects in the vehicle and to the two arriving back-up officers. The court concluded that under the circumstances, handcuffing was a less intimidating and less dangerous means of ensuring officer safety than holding Fiseku at gunpoint. The court further held that the continued use of handcuffs during the ten-minute span before the officers established probable cause to arrest the men was reasonable.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca2/17-1222/17-1222-2018-10-04.pdf?ts=1538663411>

Third Circuit

United States v. De Castro, 2018 U.S. App. LEXIS 27988 (3d Cir. PA Oct. 3, 2018)

An anonymous person called 911 and reported that a Hispanic male was pointing a gun at juveniles outside a vacant flower shop. The suspect was reportedly wearing a gray shirt, gray pants, and a bucket hat. A police officer, who had been assigned to that area for approximately 13 years and knew about drug and firearm activity prevalent there, was dispatched a few minutes later. The officer stopped his cruiser approximately fifteen to twenty feet from De Castro and another person who were speaking outside of the vacant flower shop. De Castro was wearing a light gray bucket hat, a gray striped shirt, and gray camouflage pants.

As the officer exited his car and approached the men, De Castro turned toward the officer. At a distance of approximately five to ten feet, the officer used a polite, conversational, and non-threatening tone to ask De Castro if he would remove his hands from his pockets. When De Castro removed his hands from his pockets, the officer saw a green pistol grip protruding from his pants pocket. The officer then removed a loaded firearm from De Castro's pocket. When asked if he had identification or a permit to carry the firearm, De Castro replied that he had neither, but that he had a passport from the Dominican Republic. The officer handcuffed De Castro, frisked him, and found a loaded magazine in De Castro's pocket that matched the firearm. The officer arrested De Castro.

The government charged De Castro with being an alien in possession of a firearm.

De Castro filed a motion to suppress the evidence seized by the officer. De Castro argued that the officer seized him in violation of the Fourth Amendment when he asked De Castro to remove his hands from his pockets.

Police officers do not violate the Fourth Amendment by simply approaching a person in a public place and asking questions if the person is willing to listen. Police conduct rises to the level of a Fourth Amendment seizure only when an officer restrains a person's freedom of movement by physical force or a show of authority.

Here, the court held that the officer's request to De Castro to take his hands out of his pockets did not constitute a Fourth Amendment seizure. The court found that the officer made a polite and conversational request for De Castro to remove his hands from pockets, rather than an order for him to show his hands. In addition, the officer did not draw any weapons, threaten De Castro, or otherwise communicate to De Castro that he was not free to leave. The court concluded that it was reasonable for the officer to request that De Castro remove his hands from his pockets for the safety of himself and others. Finally, the court held that a reasonable person in De Castro's position would have felt free to ignore the officer's request and end the encounter.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca3/17-1901/17-1901-2018-10-03.pdf?ts=1538586005>

Fifth Circuit

United States v. Contreras, 2018 U.S. App. LEXIS 27795 (5th Cir. TX Oct. 1, 2018)

In April 2016, a federal agent discovered that a person identified via username as “alex2smith13” had uploaded sexually graphic images of young children to a group chat on Kik, a mobile messaging application. The investigation then revealed that “alex2smith13” had accessed Kik from an IP address assigned by Frontier Communications. In response to a grand jury subpoena, Frontier provided information to the government that indicated the IP address was registered to Saul Contreras, the defendant’s father, at a residential address in Brownwood, Texas.

Federal agents obtained a warrant to search the Contreras home and seized the defendant’s personal computer and external hard drive. The government subsequently charged Contreras with several child-pornography related offenses.

Contreras filed a motion to suppress the evidence seized by the agents. Contreras argued that he had a reasonable expectation of privacy in the family address as contained in Frontier’s records; therefore, the government needed a search warrant to obtain Frontier’s records which connected the suspect’s IP address with the Contreras family residence.

In a series of cases dating back to 1976, the Supreme Court has held that “a person has no legitimate expectation of privacy in information . . . voluntarily turn[ed] over to third parties.” In [Carpenter v. United States](#), decided by the Supreme Court in 2018, the Court limited the “third-party” doctrine by refusing to extend the rule to cell-site records maintained by third-party service providers, as these records convey “a detailed and comprehensive record of a person’s movements.” However, the Court commented that the third-party doctrine continued to apply to “business records that might incidentally reveal location information,” including telephone numbers and bank records.

In this case, the court held that the address information provided by Frontier fell within the scope of the third-party doctrine. Frontier’s records revealed only that the suspect’s IP address was associated with the Contreras’ Brownwood residence. The court concluded that because these records had no bearing on any person’s day-to-day movement, unlike the Carpenter case, Contreras lacked a reasonable expectation of privacy in that information.

Contreras also argued that the magistrate judge issued the search warrant without probable cause. Without deciding whether probable cause existed to issue the warrant, the court held that the warrant was valid under the good-faith exception to the exclusionary rule. The court found there were sufficient facts contained in the search warrant affidavit that made it objectively reasonable for the agents to believe that the warrant was valid.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-11271/17-11271-2018-10-01.pdf?ts=1538415031>

Sixth Circuit

Wilkerson v. City of Akron, 2018 U.S. App. LEXIS 28934 (6th Cir. OH Oct. 15, 2018)

An off-duty police officer saw two men standing in his driveway and then a few minutes later, saw the men standing in his neighbor's driveway. The officer suspected the men might be casing houses to burglarize, as there had been several recent break-ins in the neighborhood. The officer called Akron police dispatch and requested that an officer check on the two men.

Officer Danzy responded and pulled up beside the men, later identified as Raupheal Thomas and Jesse Gray, who were standing on the grassy strip between the street and the sidewalk. As Officer Danzy exited his cruiser, the men said something about their vehicle having a flat tire and pointed in the general direction of a gas station. Thomas then turned and took two steps away from the police car before Officer Danzy's ordered him to stop. During this brief exchange, Officer Danzy thought Thomas appeared to be nervous and agitated. In addition, Thomas bladed his body which caused Officer Danzy believe Thomas might be concealing a sidearm.

Officer Stewart arrived as Officer Danzy ordered Thomas back to the cruiser, where Officer Danzy planned to frisk Thomas. Thomas, who was 6'3" tall, struggled with Officer Danzy, who was smaller in stature. Officers Danzy and Stewart tried to control Thomas' arms, but Thomas pulled away from the officers and ran away. After Officer Danzy unsuccessfully deployed his taser, Officer Stewart ran after Thomas and tackled him. Officer Stewart and Thomas were fighting for approximately forty seconds when Thomas' Astra .25 caliber pistol discharged. Officer Stewart did not see the weapon, but Officer Danzy stated that Thomas pointed the gun at him with both hands and it discharged into the air as the two struggled for it.

After the shot, Thomas got to his feet and began to run away from the officers. Officer Danzy chased Thomas and fired two shots which struck Thomas. After the second shot, Thomas fell to the ground. Officer Danzy handcuffed Thomas, radioed for an ambulance, and found the Astra pistol next to Thomas. When Officer Stewart noticed that Thomas' breathing was labored, he radioed again to tell the ambulance to "step it up." Thomas died at the hospital thirty-minutes later.

Sherry Wilkerson, the administrator of Thomas' estate sued Officers Danzy and Stewart alleging several Constitutional violations.

First, Wilkerson claimed that Officer Danzy violated the Fourth Amendment by conducting a Terry stop and a Terry frisk without reasonable suspicion.

The court agreed. Police officers are allowed to conduct an investigative detention or Terry stop if they establish reasonable suspicion to believe that a person is involved in criminal activity. To conduct a valid Terry frisk for weapons, officers must further establish that the person is presently armed and dangerous. Here, Officer Danzy admitted that he did not see Thomas or Gray doing anything suspicious and the court found that a reasonable jury could disagree with Officer Danzy's conclusion that Thomas' demeanor and behavior established reasonable suspicion to stop and then frisk him. Consequently, the court denied Officer Danzy qualified immunity regarding the stop and frisk of Thomas.

Second, Wilkerson claimed that Officer Danzy violated the Fourth Amendment by using deadly force against Thomas.

The court disagreed. It was undisputed that in the minute before Officer Danzy fired, he and Officer Stewart were wrestling a large and resistant suspect, who had managed to fight off both officers at the same time. In addition, while the three men struggled on the ground, it was undisputed that Thomas' firearm discharged and that Thomas freed himself and began to run away. Finally, there was no evidence that Thomas had left the gun behind when he fled and that nothing prevented Thomas from turning to fire upon the pursuing officers. Based on these facts, the court held that in the moments preceding the decision to fire, a reasonable officer in Officer Danzy's position would have probable cause to believe that Thomas posed an immediate threat to both officers. The court recognized that once an officer reasonably believes a suspect poses a threat of danger to himself or others, the officer may use deadly force even if the suspect attempts to flee. The court also noted that the situation developed so quickly that it was not feasible for Officer Danzy to warn Thomas before he shot him. As a result, the court held that Officer Danzy was entitled to qualified immunity regarding Wilkerson's excessive use of force claim.

Third, Wilkerson claimed that Officers Danzy and Stewart violated Thomas' Fourteenth Amendment rights by showing deliberate indifference to Thomas' serious medical needs after Officer Danzy shot him.

Again, the court disagreed. When police officers injure a suspect while apprehending him, they generally satisfy the Fourteenth Amendment by requesting medical care and by not intentionally or recklessly delaying the suspect's access to such care. After shooting Thomas, Officer Danzy called for medical assistance immediately and Officer Stewart called again a few minutes later to urge the ambulance to "step it up." While the medics experienced some delay in parking and with Thomas' handcuffs, there was no evidence that Officers Danzy or Stewart had anything to do with the delay; therefore, they were entitled to qualified immunity on Wilkerson's deliberate indifference claim.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/17-4157/17-4157-2018-10-15.pdf?ts=1539637220>

United States v. Cleveland, 2018 U.S. App. LEXIS 29505 (6th Cir. OH Oct. 19, 2018)

Police officers lawfully seized Dockery Cleveland's cell phone during the execution of a search warrant. On November 6, 2015, officers obtained a warrant to conduct a physical and forensic search to identify electronically stored information contained in Cleveland's cell phone. The warrant directed officers to execute the warrant on or before November 27, 2015. On November 9, 2015, an officer removed Cleveland's cell phone from an evidence vault and shipped it to a laboratory for extraction of its digital data. The laboratory extracted the digital data from Cleveland's cell phone on December 21, 2015. The government introduced evidence extracted from Cleveland's cell phone at his trial on drug-related charges.

After being convicted, Cleveland argued that the district court erroneously denied his motion to suppress the data extracted from his cell phone. Cleveland claimed the data extraction was unlawful because the search warrant required the government to execute the warrant on or before November 27, 2015, a deadline by which the extraction needed to be completed. The government disagreed, arguing that the warrant's execution deadline established only the date by when the cell phone needed to be shipped to the data extraction laboratory to initiate the analysis of the cell phone's data, not when the extraction itself had to occur.

The Sixth Circuit Court of Appeals agreed with the government. Under Rule 41 of the Federal Rules of Criminal Procedure, the execution period specified in a search warrant applies to the time the government has to seize a digital device or to conduct on-site copying of information from the device. This deadline does not apply to the time required to analyze and investigate the contents of the device off-site. Applying Rule 41 to the facts of this case, the court held that the November 6 warrant's execution date set a deadline of November 27, that is, the date by which the government had to seize the physical cell phone itself. Consequently, the court held that execution of the warrant occurred on November 9, 2015, when Cleveland's cell phone was removed from the evidence vault and shipped to the data extraction laboratory, which occurred before the warrant's deadline.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/17-3993/17-3993-2018-10-19.pdf?ts=1539966619>

Seventh Circuit

United States v. Lopez, 2018 U.S. App. LEXIS 29401 (7th Cir. IL Oct. 18, 2018)

Police officers received information from an informant that Lopez was involved in trafficking narcotics. After providing this tip, the informant stopped communicating with the officers and refused to provide further cooperation. The next day, acting on this tip, eight police officers went to Lopez's home and conducted surveillance.

Later that day, the officers saw a van pull into the alley and park next to Lopez's garage. The officers saw two men exit the van carrying paper shopping bags and enter the garage. An officer recognized Lopez and had a "hunch" that the bags contained contraband. The officers then saw Lopez exit the garage, get back inside the van, and drive down the alley. The other man, later identified as Lopez's brother, stayed in the garage. As Lopez drove down the alley, the officers stopped him, ordered him out of the van, and frisked him. The officers found no weapons and obtained Lopez's consent to search van. Despite finding no contraband or weapons on Lopez's person or in the van, the officers took possession of Lopez's van, keys, and cell phone. Two officers escorted Lopez back to the garage, where other officers had already detained his brother for questioning.

The officers obtained Lopez's consent to search the garage, including the paper shopping bags, but they did not find any contraband. Afterward, the officers assured Lopez that he was not under arrest and that he was free to go although the officers still retained possession of Lopez's van, keys, and cell phone. At this point, the officers requested Lopez's consent to search his house, which Lopez granted. Inside the house, the officers discovered a large amount of cash, heroin, and a firearm.

The government charged Lopez with drug and firearm-related offenses.

Lopez file a motion to suppress the evidence found during the search of his house. The district court denied Lopez's motion and he appealed to the Eighth Circuit Court of Appeals.

Under [Terry v. Ohio](#), police officers may lawfully detain individuals without a warrant or probable cause if they have reasonable suspicion that a person is engaged in criminal activity. The court added that reasonable suspicion must be based on "specific and articulable facts." In this case,

because the informant refused to cooperate with the officers, the court considered him an unreliable source. As such, the court found that the reasonable suspicion standard required the officers to verify at least some facts supporting the informant's tip before seizing Lopez. The court concluded that the officers did not do such verification before they detained Lopez.

First, the officers' observations of Lopez and his brother did not corroborate any of the informant's information. The officer who decided to stop Lopez could only guess as to what was in the bags Lopez carried, which constituted no more than a "hunch." The court noted that the officers "failed to undertake even a modicum of additional investigation" to see if Lopez's actions corroborated the information provided by the informant or if Lopez's actions might create an independent basis to establish reasonable suspicion. Second, neither the informant's information nor the officers' observations established exigent circumstances that would have justified Lopez's immediate seizure. Consequently, the court held that the officers violated the Fourth Amendment when the officers seized Lopez because they did not have reasonable suspicion that he was involved in criminal activity.

Next, the court held that the officers violated the Fourth Amendment by frisking Lopez during the stop. The court stated that the authority to conduct a Terry frisk is not automatic in a drug investigation. Although frisks of suspected drug dealers have been held to be lawful because "guns are known tools of the drug trade," the court emphasized that for a frisk to be lawful, it must be based on reasonable suspicion that the suspect is presently armed and dangerous. The court found that those conditions were not present in this case, as the officers observed nothing indicating a potentially dangerous drug transaction, nor that the suspect was presently armed and dangerous.

The court further held that even if the original stop had been justified, the officers continued to detain Lopez beyond the time necessary to complete any investigation based on their claimed reasonable suspicion. Specifically, the court concluded that after the officers looked inside the paper bags and searched the garage, any suspicion that Lopez was involved in drug trafficking should have been dispelled.

Finally, the court held that because the officers detained Lopez in violation of the Fourth Amendment, his consent to search the house was involuntary. The government argued that when the officers obtained Lopez's consent to search he was no longer being detained and was free to leave. However, the court found that while an officer told Lopez that he was free to go, another officer still had Lopez's keys, van, and cell phone and that another six officers remained in his garage. Under these circumstances, the court held that no reasonable person would believe that he was free to leave.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/17-2517/17-2517-2018-10-18.pdf?ts=1539900018>

Eighth Circuit

Karels v. Storz, 2018 U.S. App. LEXIS 28917 (8th Cir. MN Oct. 15, 2018)

Brittany Karels rented a room in the basement of Jennifer and Robert Owens' home. After Karels and Jennifer became engaged in an argument, Robert called 911 and reported that Karels was drunk. Officers Storz and Norlin were dispatched to the Owens' home and when they arrived

Karen and Jennifer were still arguing inside the house. The Owenses told the officers they did not feel threatened by Karels, but they wanted her to go to her room because she had been drinking and was being argumentative.

After conducting a brief investigation, Officer Storz told Karels that she was under arrest and told her to place her hands behind her back. Officer Storz then grabbed Karels' left wrist and brought it behind her back as she told him that she was going to put the cigarette she was smoking in a coffee can that was being used as an ashtray. At this point, Officer Norlin grabbed Karels' right wrist, guiding it toward the coffee can, and away from Officer Storz, so she could dispose of the cigarette. As Officer Storz felt Karels pull away from him, he ordered her to stop resisting arrest, to which Karels replied, "I've got a lit cigarette in my hand." Officer Storz twisted Karels' left arm behind her and slammed her onto the concrete steps. At the time of the incident, Karels was five feet five inches tall and weighed 185 pounds, while Officer Storz was more than six feet tall and physically fit. After her arrest, Karels complained of pain in her left arm and was eventually treated for a fractured arm.

Karels was charged with disorderly conduct, obstruction without force, possession of marijuana and possession of drug paraphernalia, all misdemeanors. Karels pleaded guilty to disorderly conduct and the remaining charges were dismissed.

Karels sued Officer Storz under 42 U.S.C. § 1983 claiming that Storz violated the Fourth Amendment by using excessive force while arresting her.

After the district court denied Officer Storz qualified immunity, he appealed. The Eighth Circuit Court of Appeals agreed with the district court that Officer Storz was not entitled to qualified immunity, as his use of force against Karels was not objectively reasonable.

First, the officers responded to a report of a person who was drunk and argumentative in a home where she was living at the time, which is not necessarily a crime. Second, Karels did not attempt to physically harm the officers or the Owenses, who told the officers that they did not feel threatened by Karels. Third, the officers charged Karels with four non-violent, non-severe misdemeanor offenses. Fourth, although Karels conceded that it might have felt like she was pulling away from Officer Storz as Officer Norlin pulled her right arm towards the coffee can, the court found that a reasonable officer in Officer Storz's position would have realized that Karels was extinguishing her cigarette with the other officer's help. As a result, the court held a jury could find that a reasonable officer in Officer Storz's position would not have perceived Karels' actions as resistance.

The court further held that case law clearly established that a reasonable officer would have understood that he could not forcefully take down Karels, a non-violent, non-threatening misdemeanor suspect, who was not actively resisting arrest or attempting to flee, in the manner in which Officer Storz did.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-2527/17-2527-2018-10-15.pdf?ts=1539617422>

Zubrod v. Hoch, 2018 U.S. App. LEXIS 29625 (8th Cir. IA Oct. 22, 2018)

A police officer responded to a residence where witnesses reported hearing a woman screaming. The officer entered the residence and went to an upstairs bedroom where he saw Michael Zubrod standing over Rhonda Schukei. The officer saw Zubrod hit the Schukei in the face with a hammer while yelling, “Die bitch, you’re gonna die!” The officer drew his firearm and ordered Zubrod to drop the hammer and to step away from Schukei, which he did. When the officer holstered his handgun and took out his taser, Zubrod grabbed a pair of scissors from underneath the bed and stabbed Schukei in the neck. The officer fired his taser at Zubrod, but it had no effect on Zubrod. The officer fought with Zubrod and was eventually able to force Zubrod onto his back and apply a handcuff to Zubrod’s left wrist. Zubrod continued to resist, which prevented the officer from securing the handcuff to Zubrod’s right wrist. Nonetheless, the officer was able to keep Zubrod controlled until Deputy Hoch arrived a few minutes later.

While the officers tried to handcuff Zubrod’s right wrist, Zubrod broke free and got to his feet. Deputy Hoch deployed his taser, but as before, it was not effective against Zubrod. The two officers were fighting Zubrod when a third officer arrived. The third officer attempted to deploy his taser against Zubrod, but the taser malfunctioned. At this point, Deputy Hoch loaded another cartridge into his taser and shot Zubrod with it. Again, the taser had no effect on Zubrod and the three officers continued to fight with him. During this time, Deputy Hoch continued to deploy his taser against Zubrod. After the officers subdued Zubrod and had both of his wrists handcuffed, the officers noticed that Zubrod was not breathing. Zubrod was transported to the hospital where he later died. Zubrod’s cause of death was listed as “cardiac arrhythmia followed by an altercation with police in the setting of acute methamphetamine intoxication.”

Zubrod’s parents sued Deputy Hoch alleging the multiple taser deployments against their son constituted excessive use of force in violation of the Fourth Amendment. The Zubrods also claimed the other two officers violated their son’s Fourth Amendment rights by failing to intervene when Deputy Hoch used excessive force against Zubrod.

The court held that Deputy Hoch was entitled to qualified immunity. The court found that the officers’ statements, the statement of a paramedic, and Deputy Hoch’s taser video demonstrated that Zubrod posed a threat to the officers and Schukei for the entire encounter and was only brought under control after Deputy Hoch’s final deployment of his taser when Zubrod was fully handcuffed. The court concluded that Zubrod was a violent suspect who failed to comply with reasonable orders issued by the officers and that he continued to resist after multiple tasings. As a result, the court concluded that Deputy Hoch was entitled to qualified immunity. The court further held that because Deputy Hoch’s use of force against Zubrod was objectively reasonable, the failure to intervene claim against the other two officers was properly dismissed by the district court.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-1202/17-1202-2018-10-22.pdf?ts=1540222223>
