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Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court and Circuit Court 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 Center. *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) 267-2179 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 the Legal Division web page at: http://www.fletc.gov/legal.

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In This Issue

Mistaken Use of Firearm instead of Electronic Control Weapon

By Carl Milazzo
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Click HERE

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Supreme Court and Circuit Courts of Appeals Case Summaries

Click HERE

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Mistaken Use of Firearm instead of Electronic Control Weapon

By Carl Milazzo
Division Chief
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Originally published in the December 2008 edition of *The Police Chief*

What are the legal implications when an officer reaches for an electronic control weapon (ECW), such as a Taser, intending to subdue a suspect, but mistakenly grabs a firearm instead and unintentionally shoots the suspect? Although this unfortunate event is uncommon, courts have now had the opportunity to address officers' mistaken use of a firearm when they intended to use an ECW.

Objective Reasonableness

The use of force by law enforcement officers is constitutional when it is objectively reasonable. Since "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,"[1] the U.S. Supreme Court has recognized that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[2] The Supreme Court has recently stated that although an attempt to craft an easy-to-apply legal test is admirable, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'"[3]

Recent Cases

In *Henry* v. *Purnell*[4] a deputy sheriff attempted to arrest a suspect during a traffic stop on an outstanding warrant for failure to pay child support. The suspect pushed the deputy and began to flee. Within 10 seconds, the deputy reached for what he thought was his ECW (located just below his holstered handgun) but instead drew his Glock .40-caliber handgun and shot the suspect in the elbow. The deputy immediately told the suspect and a witness that he had not meant to shoot and grabbed the wrong weapon. The court of appeals ruled that a "seizure" occurred but remanded the decision to the district court for a determination of reasonableness after further discovery on the training provided to the officer. On remand, the district court granted summary judgment for the deputy, finding that his mistake was reasonable.[5] The court commented:

> During the course of the training, [the deputy] handled a Taser a single time, and he only fired it once. Moreover, although the record reveals that prior to the training the Taser manufacturer knew of three accidents in which an officer had unholstered and fired the wrong weapon, during the course of the training there was no discussion about the possibility of erroneous weapon usage. Perhaps it

> might be contended that Somerset County ([the deputy's] employer) and/or the Taser manufacturer were negligent in not providing greater training. They, however, are not defendants in this action, and nothing in the training that [the deputy] did receive demonstrates that the mistake he made when he shot Henry with his Glock was anything other than an honest one.[6]

In *Torres* v. *City of Madera*[7] an officer was attempting to subdue a handcuffed arrestee who was kicking the rear window from inside a patrol car. The officer had a Glock pistol in her holster and an ECW immediately below in a thigh holster. She removed what she thought was her ECW, pointed the laser sight at the arrestee's center of body mass, and fired once. Unfortunately, the weapon she drew instead was her firearm. The court of appeals cited *Henry* v. *Purnell* in holding that the officer would be liable only if her mistake was unreasonable. The court also agreed with *Henry* that five factors should be considered in determining the reasonableness of the officer's mistake:

> (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.[8]

Like in *Henry*, this case was remanded for further proceedings to determine whether the officer's mistake was objectively reasonable.

In *Yount* v. *City of Sacramento*[9] an officer attempted to subdue a handcuffed suspect who was kicking, biting, and spitting at officers. Mistakenly drawing his firearm instead of his ECW, the officer shot the suspect in the buttocks. The court ruled that the conviction for obstructing an officer did not bar the arrestee from pursuing a federal civil rights claim against the officer for excessive force.

Conclusion

The small number of reported cases does not establish a widespread trend, but these cases are enough to put users on notice that mistakes can happen. Therefore, the potential for mistakes should now certainly be addressed in both training and policy.[10] Even if an officer is entitled to qualified immunity, an agency may still be liable for inadequate training or supervision.[11] In addition, even if the mistaken use of a firearm is objectively reasonable under the Fourth Amendment, the officer may still be liable under a state negligence or battery claim.

Notes:

[1] *Graham* v. *Connor*, 490 U.S. 386, 396 (1989).
[2] *Id*. at 396–97.
[3] *Scott* v. *Harris*, 127 S. Ct. 1769, 1778 (2007).
[4] *Henry* v. *Purnell*, 501 F.3d 374 (4th Cir. 2007).
[5] *Henry* v. *Purnell*, 559 F. Supp. 2d 648 (D.Md. 2008).

[6]*Id*. at 652.
[7]*Torres* v. *City of Madera*, 524 F.3d 1053 (9th Cir.2008).
[8]*Id*. at 1057.
[9]*Yount* v. *City of Sacramento*, 43 Cal. 4th 885 (2008).
[10]For a comprehensive site of legal resources, see www.ecdlaw.info.
[11]See *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) and *City of Canton* v. *Harris*, 489 U.S.378 (1989).

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CASE SUMMARIES

SUPREME COURT

U.S. v. Hayes, 2009 U.S. LEXIS 1634, February 24, 2009

Persons who have been earlier convicted of a "misdemeanor crime of domestic violence" as defined in 18 U.S.C. § 921(a)(33)(A) are banned from possessing firearms by 18 U.S.C. § 922(g)(9). If the statute on which the earlier conviction (the "predicate-offense") was based contained as a necessary element of proof the domestic relationship between the assailant and the victim, it qualifies as a "misdemeanor crime of domestic violence." The definition does not require that the predicate-offense statute include, as an element, the existence of the domestic relationship. If it does not, in the § 922(g)(9) prosecution the government can and must prove the domestic relationship.

Click **HERE** for the court's opinion.

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CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Lewis, 554 F.3d 208, February 02, 2009

Title 18 U.S.C. § 2252(a)(2) requires that the government prove actual interstate transmission or shipment of the child pornography images. Proof of transmission of

pornography over the Internet or over telephone lines satisfies the interstate commerce element of the offense. The government proved the images traveled interstate when it introduced evidence that defendant received images that were transmitted over the Internet.

The 3rd and 5th circuits agree (cites omitted).

Editor's note: This case was prosecuted under the child pornography statute as it was written at the time of the offenses. Congress recently amended the statutes to expand the jurisdictional coverage by replacing all instances of "in interstate" with "in or affecting interstate" commerce. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103.

Click **HERE** for the court's opinion.

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4th CIRCUIT

Waller v. City of Danville, VA, 2009 U.S. App. LEXIS 2853, February 12, 2009

In the context of arrests, courts have recognized two types of claims under Title II of the Americans with Disabilities Act (ADA): (1) wrongful arrest, where police arrest a suspect based on his disability, not for any criminal activity; and (2) reasonable accommodation, where police properly arrest a suspect but fail to reasonably accommodate his disability during the investigation or arrest, causing him to suffer greater injury or indignity than other arrestees (8th and 10th circuits, cites omitted)**.**

Reasonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA. Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence. "Exigency" is not confined to split-second circumstances.

Plaintiff suggests several possible courses of action that she argues would have constituted "reasonable accommodation" under the ADA during the hostage standoff. Assuming for purposes of argument that a duty of reasonable accommodation existed, given the circumstances presented to the officers, it was unreasonable to expect the sorts of accommodations that plaintiff proposes. Any duty of reasonable accommodation that might have existed was satisfied by the officers in several ways. Plaintiff has not indicated what the officers reasonably might be expected to do that they in fact did not do.

Click **HERE** for the court's opinion.

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5th CIRCUIT

U.S. v. Ward, 2009 U.S. App. LEXIS 4806, February 26, 2009

An escapee has no right of privacy in his motel room (or his home) entitling him to the protection of the Fourth Amendment against unreasonable searches. Recognizing a privacy right in the motel room of an escapee who legally belongs in a cell would offer judicial encouragement to the act of escape. Rewarding successful escapees by restoring previously ceded rights would embolden the escape plots that prison administrators already must work vigilantly to deter. The loss of significant rights is an incident of imprisonment; the deprivation of privacy is a component of society's punishment. A prisoner cannot by escape rewrite his sentence such that his punishment no longer includes a loss of Fourth Amendment protected privacy. Allowing an escapee to invoke the privacy right would be inconsistent with protecting society from a demonstrably dangerous person who is fleeing from law enforcement outside of the structured environment that the criminal justice system determined was necessary for him. In this game of hide and seek the sheriff need not count to ten.

The 2nd and 8th circuits agree (cites omitted).

However, in recapturing escaped prisoners, law enforcement may well encounter the hurdles of the Fourth Amendment rights of third parties.

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6th CIRCUIT

Fleming v. Metrish, 2009 U.S. App. LEXIS 3761, February 25, 2009

The admissibility of statements obtained after the person in custody has decided to remain silent depends on whether his right to cut off questioning was "scrupulously honored." Michigan v. Mosley, 423 U.S. 96 (1975).

Mosley permits the police to present new information to a suspect so that he is able to make informed and intelligent assessments of his interests. Three hours after the initial refusal to answer questions, the detective told the defendant that the police had discovered a weapon on the premises, permitting the defendant to reassess his situation. True, the alleged comments included a suggestion to "cooperate." But this suggestion was accompanied by a warning to the defendant "to be careful" about what he said, and a caution not to say anything about which he would be "sorry." No doubt a complete and fresh recitation of the Miranda warnings would have been preferable to these shorthand reminders. But in the context of this case, where there is no dispute that the defendant fully understood his Miranda rights, such cautionary language bolsters the view that those rights were scrupulously honored under Mosley.

The defendant was not subject to a measure of compulsion above and beyond that inherent in custody itself. Nor is this a case where the police carried on a lengthy harangue in the presence of the suspect. Lengthy harangues that are directed toward a suspect are more likely to elicit an incriminating response. There is no evidence, moreover, indicating that the defendant was peculiarly susceptible to an appeal to his conscience. Instead, the detective's comments involved a brief conversation that including nothing more than a few off hand remarks that were not particularly evocative.

Click **HERE** for the court's opinion.

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7th CIRCUIT

U.S. v. Montgomery, 2009 U.S. App. LEXIS 3267, February 13, 2009

There is no per se rule of suppression if investigators make any sort of promise at all to a suspect prior to a confession. A false promise of leniency may be sufficient to overcome a person's ability to make a rational decision about the courses open to him. An empty prosecutorial promise could prevent a suspect from making a rational choice by distorting the alternatives among which the person under interrogation is being asked to choose.

Telling the defendant that if he was sentenced to prison time on the federal charges he would not get ten years was, in fact, false because he qualified as an Armed Career Criminal and instead faced a mandatory minimum sentence of fifteen years. However, those proclamations were not tied to any confession or statement on defendant's part. The defendant was not promised that he would not receive a ten year sentence *if he confessed*. Although an illusive promise of leniency in exchange for a confession presents "a difficult case," the mere fact that the potential sentence in the federal system was misstated does not make the interrogation coercive, especially when the purported sentence was not linked to defendant's willingness to talk to the investigators.

After the defendant has invoked his right to silence, the constitutionality of a subsequent police interview depends not on its subject matter but rather on whether the police, in conducting the interview, sought to undermine the defendant's resolve to remain silent. Outlining the evidence against defendant before giving him renewed Miranda warnings, and discussing the same crime as in the first interview are missteps, but are insufficient to require suppression.

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9th CIRCUIT

U.S. v. Al Nasser, February 04, 2009

A driver who stops is not "seized" under the Fourth Amendment just because he thinks that the police want him to stop, even when such belief is objectively reasonable. To constitute a "seizure," it is necessary that law enforcement conduct cause the stop and that the conduct is "intentionally applied." But, not every stop that is caused by intentional law enforcement conduct is a "seizure." A driver stopped in traffic by officers at the scene of an accident or by officers pulling over another car is not "seized" even though the conduct of the police is intentional. A person is seized when he is meant to be stopped by a particular law enforcement action and is so stopped.

Click **HERE** for the court's opinion

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11th CIRCUIT

U.S. v. Farias-Gonzalez, 2009 U.S. App. LEXIS 2060, February 03, 2009

The Supreme Court case of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), addressed a jurisdictional challenge in a civil deportation case, not an evidentiary challenge in a criminal case. Any language in that decision suggesting that identity-related evidence is never suppressible is mere dictum and does not control admissibility in a criminal case.

The 4th, 8th, and 10th circuits agree (cites omitted).
The 3rd, 5th, and 6th circuits disagree (cites omitted).
There are seemingly contradictory rulings in the 9th Circuit (cites omitted).

The exclusionary rule is applicable only where its deterrence benefits outweigh its substantial social costs. See *Herring v. United States*, 129 S. Ct. 695 (2009) and *Hudson v. Michigan*, 547 U.S. 586 (2006). Because the social costs of excluding it outweigh the minimal deterrence benefits, identity related evidence obtained in violation of the Fourth Amendment is admissible in a criminal prosecution when offered solely to prove the identity of the defendant.

Click **HERE** for the court's opinion.