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The Federal Law Enforcement -Informer-

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

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The Informer – February 2017

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Law Enforcement Case Granted Certiorari by the United States Supreme Court:

Fourth Amemdment: Probable Cause to Arrest / Civil Liablity: Qualifed Immunity

District of Columbia v. Wesby
Decision Below: **765 F.3d 13 (D.C. Cir. 2014)**

Police officers responded to a noise disturbance call at a vacant house. When the officers arrived, they discovered twenty-one men and women having a party. One of the women told the officers a woman, named Peaches, who was renting the house had given her permission to be in the house, while others said they had been invited to the party by another guest. Peaches was not present, but when one of the officers spoke to her on the phone, Peaches told the officer she had permission to be at the house. The officer eventually contacted the homeowner who denied Peaches was renting the house and denied the partygoers had his permission to be inside his house. A sergeant who had arrived on the scene during the investigation directed the officers to arrest everyone in the house for unlawful entry, a violation of District of Columbia law. Subsequently, the charges against the arrestees were dismissed.

Sixteen of the arrestees sued five police officers for false arrest. The arrestees argued that the officers lacked probable cause to arrest them because they had told the officers they had been invited to the house; therefore, they did not have the intent to trespass.

The district court and the District of Columbia Circuit Court of Appeals denied the officers qualified immunity. The officers appealed and the United States Supreme Court agreed to hear the case.

The issues before the Supreme Court are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment. Specifically, when the owner of a vacant home tells the police that he has not authorized entry, can an officer who is trying to determine if he has probable cause to arrest those inside for trespassing discredit the suspects' questionable claims that they did not intend to trespass because they were invited inside.

2. Even if the officers did not have probable cause to arrest the trespassers, were the officers entitled to qualified immunity because the law was not clearly established in this regard.

The Court has not yet scheduled oral arguments in this case.

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CASE SUMMARIES

Circuit Courts of Appeal

Fourth Circuit

United States v. Robinson, 2017 U.S. App. LEXIS 1134 (4th Cir. W. Va. Jan. 23, 2017)

Police officers received a tip that a man located in a parking lot known for drug activity had just loaded a firearm, concealed it in his pocket, and got into a car driven by a woman. An officer located the car and conducted a traffic stop after he saw that its occupants were not wearing seatbelts. The officer ordered Robinson, the passenger, to exit the car, and when he did, another officer frisked Robinson for weapons. The officer seized a loaded gun from the front pocket of Robinson's pants. Robinson was arrested for being a felon in possession of a firearm.

Robinson filed a motion to suppress the firearm, claiming the officer's frisk violated the Fourth Amendment. Robinson argued that to support a Terry frisk for weapons, an officer must reasonably suspect the person being frisked is both armed and dangerous. Here, while the officer might have suspected that he was carrying a loaded firearm, Robinson claimed the officer had no facts to support a belief that he was dangerous. At the time of the frisk, West Virginia residents could lawfully carry a concealed firearm if they had received a concealed carry license from the state. According to Robinson, as far as the officer knew, the state could have issued him a permit to lawfully carry a concealed firearm.

The court disagreed, noting the Supreme Court has repeatedly recognized that whenever police officers conduct a traditional Terry stop or a traffic stop, they subject themselves to a risk of harm. Consequently, established Supreme Court case law imposes two requirements before an officer may conduct a frisk. First, the stop must be lawful. Second, that during the valid but forced encounter, or stop, the officer must reasonably suspect that the person is armed. As the Supreme Court found in **Terry v. Ohio**, the officer reasonably suspected Terry was armed "and thus presented a threat to the officer's safety" while the officer was conducting his investigation. The Supreme Court deliberately linked "armed" and "dangerous," recognizing that frisks in subsequent cases were lawful where the stops were valid and the officer reasonably believed that the person stopped "was armed and thus" dangerous. The use of "and thus" recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed.

In this case, the court held that an officer who makes a lawful traffic stop, and who has a reasonable suspicion that one of the vehicle's occupants is armed, may frisk that person for the officer's protection and the safety of everyone on the scene.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca4/14-4902/14-4902-2017-01-23.pdf?ts=1485201616

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Fifth Circuit

Hamilton v. Kindred, 2017 U.S. App. LEXIS 623 (5th Cir. Tex. Jan. 12, 2017)

Brandy Hamilton and Alexandria Randle were pulled over by Officer Turner for speeding. After Officer Turner smelled marijuana, he ordered the women to exit their vehicle. Hamilton was wearing a bikini bathing suit, and Randle was similarly dressed. Officer Turner handcuffed the women and searched their vehicle. During this time, Officers Ron Kinard and Amanda Bui arrived. After Officer Turner searched the vehicle, he asked Officer Bui to search Hamilton and Randle. Officer Bui conducted a body cavity search on both women while on the side of the road.

Hamilton and Randle subsequently filed a lawsuit against the three officers under *42 U.S.C. § 1983* claiming the invasive cavity searches violated their Fourth Amendment rights to be free from unreasonable searches and seizures. Officers Turner and Bui reached settlement agreements with Hamilton and Randle. Officer Kindred argued that Hamilton and Randle failed to adequately allege that an excessive use of force occurred. In addition, Officer Kindred argued that he could not be liable under *42 U.S.C. § 1983* as a bystander for not intervening to prevent the body cavity searches; therefore, he was entitled to qualified immunity.

The district court denied Officer Kindred qualified immunity. The court found that Hamilton and Randle had adequately alleged a claim of excessive force. The court also held it was clearly established at the time of the incident that bystander liability applied. In addition, the court concluded that there was a serious dispute as to material facts in the case regarding the objective reasonableness of Officer Kindred's actions. Officer Kindred appealed to the Fifth Circuit Court of Appeals.

First, to bring a *§ 1983* excessive force claim under the Fourth Amendment, a plaintiff must show that she was seized. Here, the court of appeals found that Hamilton and Randle clearly alleged in their complaint that they were seized during the traffic stop when they were handcuffed and placed in the officers' patrol cars. In addition, the women alleged that they were detained for over thirty-minutes and subjected to invasive body cavity searches in violation of the Fourth Amendment.

Second, the court held that Officer Bui's insertion of her fingers into the plaintiffs' body cavities constituted a use of force, which the plaintiffs allege occurred during their seizure. Third, at the time of the incident, it was clearly established that it was not reasonable to conduct a roadside body cavity search, unless there were exigent circumstances that required the search to be conducted on the roadside rather than at a medical facility. Consequently, the court found that Hamilton and Randle alleged facts showing that they were subjected to an unreasonable use of force "excessive to its need."

The court further held, at the time of the incident, it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and he had a reasonable opportunity to prevent the harm. However, because there were serious disputes as to material facts regarding Officer Kindred's potential liability as a bystander, the court of appeals lacked jurisdiction to hear this portion of the case and dismissed Officer Kindred's appeal.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-40611/16-40611-2017-01-12.pdf?ts=1484267434

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Eighth Circuit

United States v. Yorgensen, 845 F.3d 908 (8th Cir. Iowa 2017)

A police officer obtained a warrant to search Yorgensen's apartment for drugs and drug paraphernalia. In his affidavit, the officer stated that in an encounter with Yorgensen earlier that evening, he smelled a strong odor of marijuana coming from "inside the residence and off Mr. Yorgensen." Officers searched Yorgensen's apartment, discovered drugs, and arrested Yorgensen.

Two days later, a state narcotics agent, who was working on a federal drug investigation in which Yorgensen was a suspect, interviewed Yorgensen at the jail, at Yorgensen's request. After the agent advised Yorgensen of his Miranda rights, Yorgensen waived his rights and made incriminating statements concerning the federal investigation against him.

A federal grand jury indicted Yorgensen on several drug related charges.

Yorgensen filed a motion to suppress the physical evidence seized from his home as well as his statements to the agent two days later.

The district court found that the officer's statement concerning the odor of marijuana coming from inside Yorgensen's apartment was untrue and made with reckless disregard for the truth, in violation of the Fourth Amendment. As a result, the court suppressed the physical evidence seized from Yorgensen's apartment as well as the statements he made to the narcotics agent two days later. On appeal, the government challenged the district court's suppression of Yorgensen's statements to the narcotics agent.

The Supreme Court created an exception to the exclusionary rule called the attenuation doctrine. The attenuation doctrine provides that evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or had been interrupted by some intervening circumstance. To determine whether the connection between incriminating statements and a Fourth Amendment violation has been broken a court must consider four factors: (1) whether Miranda warnings were provided; (2) the amount of time that passed between the Fourth Amendment violation and the incriminating statements; (3) any intervening circumstances; and (4) the purpose and flagrancy of the officer's misconduct.

In this case, the Eighth Circuit Court of Appeals held that all four factors weighted in favor of not suppressing Yorgensen's statements made to the narcotics agent.

First, at the beginning of the interview, the agent advised Yorgensen of his Miranda rights and Yorgensen provided a written waiver of those rights. Second, more than two days passed between Yorgensen's arrest and the interview by the narcotics agent. The fact that Yorgensen was in custody was not especially relevant, as Yorgensen knew that he was a suspect in a pre-existing federal investigation and Yorgensen requested the interview with the agent. Third, the narcotics agent was from a different agency than the officer that drafted the search warrant affidavit, and neither the agent nor his agency were involved in the initial Fourth Amendment violation. In addition, the video of the interview clearly showed that Yorgensen understood the difference between the federal investigation and the warrant search of his home. Finally, the only untrue statement in the affidavit was when the officer stated that he had smelled the odor of marijuana coming directly from Yorgensen's apartment. Instead, the officer should have stated that he smelled the dissipating odor of marijuana on or around Yorgensen, which the officer believed

came from Yorgensen's apartment. The court concluded that the officer's error was unintentional, and did not rise to the level of purposeful or flagrant misconduct.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1109/16-1109-2017-01-12.pdf?ts=1484238652

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United States v. McCoy, 2017 U.S. App. LEXIS 1695 (8th Cir. Minn. Jan. 31, 2017)

McCoy was convicted of transporting obscene matters, in violation of *18 U.S.C. § 1462*, and sentenced to 18 months' imprisonment and two years' supervised release. By conditions of release, U.S. Probation Officers inspected McCoy's house. One of the officers, who was a specialist in computer-related cases, observed a suspicious amount of computer equipment, including multiple hard drives and at least two custom-built computers. In addition, one of the computers had five hard drives, three configured in a Redundant Array of Independent Disks (RAID). According to the officer, it was unusual for a personal computer user to have a computer with multiple hard drives and especially to use a RAID system. Due to the large amount of equipment, the officers did not examine the computers. However, based on her suspicions, the officer received permission from the district court to seize and review any computer equipment in plain sight or voluntarily provided by McCoy.

The officers seized McCoy's computers and USB drives. A preliminary examination of McCoy's computers revealed child pornography. Officers then obtained a warrant for a complete forensic examination of the hard drives and discovered child pornography videos that had been downloaded after McCoy's date of conviction.

The government charged McCoy with possession of child pornography. At trial, the government introduced recorded calls McCoy made in prison in which he claimed to have removed "everything" from his computer. The jury convicted McCoy, and he appealed, arguing that the warrantless search and seizure of his computers and USB drives was unreasonable under the Fourth Amendment.

The court disagreed. First, the court held that McCoy's conditions of release expressly authorized random inspections of his computer's internet and email usage history by the Pre-Trial Services officers. Second, the search of McCoy's computers did not exceed the scope of the search authorized by the conditions of his release. The officer testified that it was not possible to evaluate McCoy's Internet activity based solely on web-browser activity; therefore, a more thorough examination was necessary. Finally, the court concluded the officers had reasonable suspicion to believe McCoy was engaged in criminal activity. When an officer has reasonable suspicion that a probationer subject to a search condition is involved in criminal activity, an intrusion on the probationer's already diminished privacy interest is reasonable. Here, the court concluded that the officers had reasonable suspicion to seize and search McCoy's computer equipment based on his: (1) prior criminal history; (2) computer sophistication; (3) unusually large number of electronic storage devices; (4) sophisticated RAID array; and (5) statements about erasing pornography from his computers.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1853/16-1853-2017-01-31.pdf?ts=1485880251

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Tenth Circuit

United States v. Juszczyk, 844 F.3d 1213 (10th Cir. Kan. 2017)

Tina Giger gave Juszczyk permission to repair his motorcycle in her backyard. A concerned neighbor contacted the police who went to investigate. When officers responded, Juszczyk threw his backpack onto the roof of Giger's house. Officers retrieved the backpack and searched it. The backpack contained methamphetamine, a firearm, and documents bearing Juszczyk's name. Officers arrested Juszczyk.

Juszczyk argued that the warrantless search of his backpack violated the Fourth Amendment.

The court disagreed, holding that Juszczyk lost any reasonable expectation of property he had in the backpack when he threw it on the roof of Giger's house. As a result, the court found that the backpack was abandoned property; therefore, the officers did not violate the Fourth Amendment when they searched it.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-3323/15-3323-2017-01-03.pdf?ts=1483466500

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Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. Kan. 2017)

Vogt was employed as a police officer with the City of Hays. Vogt applied for a position with the City of Haysville's police department. During Haysville's hiring process, Vogt disclosed that he had kept a knife obtained in the course of his work as a Hays police officer.

Haysville offered Vogt a job on the condition that Vogt report his acquisition of the knife to the Hays police Department. Vogt complied with this request and submitted a brief report concerning his possession of the knife. Vogt then provided the City of Hays with a two-week notice of resignation, planning to accept the new job with Haysville.

In the meantime, the Hays police chief began an internal investigation into Vogt's possession of the knife. In addition, Vogt was required by the Hays Police Department to give a more detailed statement concerning the knife in order to keep his job. Vogt complied, and the Hays police department used Vogt's statement to obtain additional evidence.

Based on Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. The criminal investigation caused the Haysville Police Department to withdraw its job offer to Vogt.

Vogt was later charged in Kansas state court with two felony counts related to his possession of the knife. Following a probable cause hearing, the state district court determined that probable cause was lacking and dismissed the charges.

Vogt filed a lawsuit under *42 U.S.C. § 1983* against the City of Hays, the City of Haysville and four police officers. Vogt claimed that the use of his compelled statements: (1) to start an investigation leading to the discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing violated his Fifth Amendment right against self-incrimination.

The Fifth Amendment, which applies to the states through incorporation of the Fourteenth Amendment, protects individuals from being compelled to incriminate themselves in any criminal case. This amendment prohibits the government from compelling law enforcement officers to make incriminating statements in the course of their employment. As a law enforcement officer, Vogt was protected under the Fifth Amendment against the use of his compelled statements in a criminal case.

First, the district court held that Vogt had not stated a valid claim under the Fifth Amendment because the incriminating statements were never used against him at trial. While the United States Supreme Court has not conclusively defined the scope of a "criminal case" under the Fifth Amendment, the Tenth Circuit Court of Appeals disagreed and held that the phrase "criminal case" includes probable cause hearings as well as trials.[1] As a result, the court concluded that Vogt had adequately alleged a Fifth Amendment violation consisting of the use of his compelled statements in a criminal case.

Second, the court held that the four police officers were entitled to qualified immunity. Until its holding in this case, the court noted that it was not clearly established in the Tenth Circuit if the term "criminal case" included pre-trial proceedings such as probable cause hearings. Consequently, when the police officers acted, they could not have known that the Fifth Amendment would be violated by the eventual use of Vogt's compelled statements to develop investigatory leads, initiate a criminal investigation, bring charges, or support the prosecution in a probable cause hearing.

Third, the court affirmed the district court's dismissal of Vogt's claim against Haysville. Vogt claimed that Haysville offered him a job, but only if he told the Hays police department about the acquisition of the knife. Vogt argued that this condition compelled him to make incriminating statements to the City of Hays.

The court disagreed, holding that the condition on the job offer to Vogt was not coercive and did not compel Vogt to make incriminating statement to the City of Hays. Vogt was never an employee of Haysville, and his conditional job offer did not threaten the loss of livelihood or an existing job. If Vogt had not wanted to incriminate himself, the court reasoned that Vogt could have declined the job offer and continued working for the Hays police department.

Fourth, the court disagreed with the district court and held that Vogt had adequately alleged in his complaint the City of Hays used his compelled statements to cause a criminal investigation to be launched against him.

Finally, the court held that Vogt adequately alleged in his complaint that the Hays chief of police was the final policy making authority for the city concerning employee discipline within the police department. As a result, the court concluded that the City of Hays could be found liable for the actions of the police chief in this case.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-3266/15-3266-2017-01-04.pdf?ts=1483556466

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[1] With this decision, the Tenth Circuit joins the Second, Seventh, and Ninth Circuits, concluding that the right against self-incrimination is more than a trial right.

Eleventh Circuit

Dukes v. Deaton, 2017 U.S. App. LEXIS 1367 (11th Cir. Ga. Jan. 26, 2017)

During the execution of a search warrant for drugs, Officer Deaton threw a noise/flash diversionary device, or flashbang, through a window into the bedroom where Jason Ward and Treneshia Dukes were sleeping. The flashbang landed on Dukes' right leg and exploded. As a result, Dukes suffered severe burns across both of her legs and her right arm.

Dukes filed suit against Officer Deaton under *42 U.S.C. § 1983* for using excessive force in violation of the Fourth Amendment and for the state law tort of assault and battery. Dukes also brought a claim against Commander Branham in his capacity as Officer Deaton's supervisor for failing to train Officer Deaton in the proper use of flashbangs.

Officer Deaton and Commander Branham filed a motion for summary judgment based on qualified immunity.

The court held that Officer Deaton's deployment of the flashbang constituted excessive force in violation of the Fourth Amendment. First, Officer Deaton's conduct posed a significant risk of harm, as flashbangs can generate heat in excess of 2,000 degrees Celsius, and Officer Deaton threw a flashbang into a dark room in which the occupants were asleep. Second, Officer Deaton failed to inspect the room, as he was trained to do, to determine whether bystanders, such as Dukes, occupied the room or if other hazards existed. Third, there was a minimal need for Officer Deaton to deploy a flashbang under the circumstances. Among other things, the court found that the earlier deployment of two flashbangs by other officers pursuant to the operational plan, sufficiently diverted the attention of Ward and Dukes before Officer Deaton deployed his flashbang. The court commented that the use of the first two flashbangs made Officer Deaton's use of his flashbang appear gratuitous. Finally, the court recognized that the Sixth, Seventh, and Ninth Circuits have held that an officer's failure to perform a visual inspection before throwing a flashbang into an area "weighs against reasonableness."

However, the court concluded that it was not clearly established that Officer Deaton's conduct was unconstitutional in the Eleventh Circuit when he threw the flashbang through the window. First, the operational plan contemplated the use of flashbangs to disorient the residents and there was no evidence that Officer Deaton intended to use his flashbang for any other purpose. Second, the application in support of the search warrant stated, "drug dealers," such as Ward, "commonly utilize weapons, dogs, and barricades to hinder law enforcement in the execution of their duties." The application also stated that an informant had told law enforcement that Ward carried a handgun "on his person." While Officer Deaton should have followed his training and checked the bedroom before he threw the flashbang, the court held that his conduct was not so lacking in justification that a reasonable officer would know that what he did constituted excessive force. As a result, the court found that Officer Deaton was entitled to qualified immunity.

The court further held that Officer Deaton was entitled to official immunity for the state law tort of assault and battery because Dukes offered no proof that Officer Deaton intended to injure her.

Finally, the court held that Commander Branham was entitled to qualified immunity because Officer Deaton's conduct was not a clearly established violation of the Fourth Amendment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/15-14373/15-14373-2017-01-26.pdf?ts=1485442862

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