On Law

November 2014

A Monthly Publication
from CMDA

Cummings•McClorey Davis & Acho, P.L.C.
Attorneys and Counselors At Law

Officer and Public Safety Justify Force Against Recklessly Fleeing Motorists

Douglas J. Curlew

Recent decisions issued by the U.S. Supreme Court and the U.S. Sixth Circuit Court of Appeals have clarified the law regarding the force police officers may use to stop a person attempting to flee from police by driving away in a motor vehicle. The Supreme Court had previously established in *Tennessee v. Garner* (1985) that officers can apply potentially deadly force to stop a fleeing suspect if the officer has probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others. In *Garner*, however, the suspect was on foot. Subsequently, the Supreme Court approved an officer's use of injurious force in the form of colliding his police vehicle against the car of a fleeing suspect to end a high-speed chase. Now the Court has addressed the applicability of these principles to the shooting of a suspect fleeing in a car.

In *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014), addressed an "excessive force" claim arising from the death of a suspect who drove recklessly away from a traffic stop, rather than comply with directions to exit his vehicle. The suspect swerved through traffic at speeds exceeding 100 miles per hour, with the original officer and others in pursuit. When finally cornered after spinning his car into a parking lot, the suspect collided with two police vehicles and attempted to escape by driving away in reverse, forcing officers who had exited their vehicles to jump out of his way. Before the suspect could exit the parking lot, three officers fired a total of fifteen gun shots into the vehicle, fatally wounding the suspect.

The Supreme Court held that a police officer's act of shooting in an attempt "to terminate a dangerous high-speed car chase that threatens the lives of officers or innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing suspect at risk of serious injury or death." Moreover, once an officer begins shooting "at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." Because the suspect in *Plumhoff* had continued trying to drive away during the entire "10-second span when all the shots were fired," the suspect had "never abandoned his attempt to flee," and the officers were justified in firing all fifteen shots.

Subsequently, in *Cass v. City of Dayton* (decided October 16, 2014), the U.S. Sixth Circuit applied the *Plumhoff* ruling in the circumstance where a suspected drug dealer attempted to drive away from a police drug sting. In doing so, the suspect struck two officers, knocking one officer on the ground and striking the hand of the other such that the officer's gun inadvertently fired. Hearing the gunshot and assuming other officers to be in peril, the officer on the ground fired a single shot that missed the suspect driver and killed the vehicle passenger. Although the officers were disciplined for violating departmental policy, the Sixth Circuit found no constitutional violation. Relying on *Plumhoff* and earlier Sixth Circuit precedents, the Court held that the officers "were not required to step aside and let the [suspect vehicle] escape, particularly after it had struck two of their fellow officers." Although the officers who had already been struck were not in danger of being struck again, "no reasonable officer would say that the night's peril had ended at that point," because there were other officers on the scene, and the suspect had shown "a willingness to injure officers trying to prevent him from fleeing."

These cases establish that officers may properly use deadly force in the form of shooting a suspect if the suspect's attempt to flee police threatens the safety of officers or the general public. It can be expected that the *Plumhoff* decision will have a significant impact upon future cases involving the fatal shooting of suspects by police. The shooting of a suspect whose flight in a motor vehicle jeopardizes the safety of officers or the public can be reasonable under constitutional standards.

Douglas J. Curlew

Douglas Curlew is an attorney in our Livonia office where he concentrates his practice on appeals, premises liability and insurance law. He may be reached at (734) 261-2400 or dcurlew@cmda-law.com.

in this **issue**

Officer and Public Safety Justify Force 1
Supreme Court Decides on Fourth Amendment Cases 2
Open Carry Update: Weapon-Free School Zone 2
#Socialmedia #Police 3
Attorneys Successfully Defend Municipality and Officers ... 3
Office Locations 4

Supreme Court Decides Fourth Amendment Cases

Allan C. Vander Laan

The search-and-seizure provisions of the Fourth Amendment are all about privacy. To honor this freedom, the Fourth Amendment protects against "unreasonable" searches and seizures by state or federal law enforcement authorities. However, law enforcement may override your privacy concerns and conduct a search of you, your home, office, personal or business documents, bank account records, etc. if they have probable cause to believe they can find evidence that you committed a crime and a judge issues a warrant or the particular circumstances justify the search without a warrant first being issued. In 2014 the United States Supreme Court addressed several issues surrounding the Fourth Amendment.

In *Riley v California*, 134 S Ct 2473, the court unanimously held a warrantless search and seizure of the digital contents of a cell phone during an arrest is unconstitutional. Mr. Riley was arrested after a traffic stop revealed loaded firearms in his car. The officers took Mr. Riley's cell phone and searched through it. Based on the data stored on the phone, he was charged and convicted of a shooting that had taken place several weeks earlier. The California Supreme Court held the seizure of Riley's cell phone was lawful because it occurred during a "search incident to arrest." The U.S. Supreme Court reversed and held a warrant is required to search a cell phone. Chief Justice Roberts stated that digital data stored on a cell phone cannot by itself be used as a weapon to harm an arresting officer or to effectuate the arrestees escape. Police remain free to examine the physical aspects of the phone to ensure that it will not be used as a weapon. The court held out the possibility that although the search incident to an arrest exception does not apply to cell phones, the exigent circumstances exception may give law enforcement justification for a warrantless search in particular cases.

Prado Navanette v. California, 134 S Ct 1683, involved a traffic stop based on an anonymous 911 call. The caller reported a vehicle had run him off the road. The caller gave a specific description of the vehicle including the license plate number. Police officers found and stopped the vehicle in spite of the fact that the driver had not committed a traffic violation. After the vehicle was stopped the officers smelled the odor of marijuana. Thirty pounds of marijuana was discovered in the vehicle. The driver was arrested. The validity of the arrest depended on the legality of the stop. The issue presented was whether the Fourth Amendment required an officer who received information regarding drunken or reckless driving to observe the behavior before stopping the vehicle. The Supreme Court said no. The Supreme Court found the information from the 911 caller had sufficient specificity that provided an indicia of reliability to justify the stop. A stop based on an anonymous tip does not violate the Fourth Amendment if the officer has reason to believe the information is reliable. The court held that because the anonymous tip had indicators of reliability the officer had sufficient reasonable suspicion and did not need observe the alleged behavior at length before the stop.

Fernandez v California, 134 S Ct 1126, involved a call regarding domestic abuse. Previously in *United States v. Matlock*, the Supreme Court laid out the "Co-Occupant Consent Rule." That rule meant that anyone who has "common authority" over the home can consent to the search of the home without a warrant. In *Georgia v. Randolph*, the court limited this holding, deciding the police cannot conduct a search if a physically present co-occupant objects to the search. In *Fernandez* the court held that when one occupant is legitimately arrested and taken from the scene the remaining occupant can consent to the search.

The recent Supreme Court decisions surrounding the Fourth Amendment can be expected to have a significant impact upon future cases involving searches and seizures by state or federal law enforcement authorities.

Allan C. Vander Laan

Allan Vander Laan is a partner in our Grand Rapids office where he concentrates his practice on municipal law, premises liability and insurance law. He may be reached at (616) 975-7470 or avanderlaan@cmda-law.com.

Open Carry Update: Weapon-Free School Zone

Question: Schools are not listed as one of the prohibited areas under MCL 750.234d(1) of the Michigan Penal Code, so does this mean that an 18-year-old may openly carry a side-arm into his high school?

Answer: No. For non-law enforcement individuals, firearms may only be carried into a school by those who hold valid CPLs, and so long as they are carrying openly. Concealed firearms are prohibited in schools, absent specific legal authority.

Schools are not listed under the firearms section of the Penal Code because they have their own statutory section: MCL 750.237a. MCL 750.237a(6)(b) defines "school" as meaning a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. MCL 750.237a(6)(d) defines "weapon-free school zone" as meaning school property and the vehicle used by a school to transport students to and from school property. So weapons cannot be carried on school buses either.

A special thank you to Officer Jim Wampler of North Branch, in Lapeer County, for recognizing the misconception and requesting this clarification.

Linda Davis Friedland

#Socialmedia #Police

Sara E. Lowry

Whether you use it or not, we all know the impact that social media has had on today's society. What you may not know is how police have been using social media to perform their job. Police departments across the country have been turning to social media, including Twitter, Facebook, and Instagram, to improve their reputation within communities, apprehend fugitives, and even investigate criminal acts. However, some use of social media may have legal consequences for law enforcement.

In a recent case that has garnered some publicity, a Drug Enforcement Administration (DEA) agent used the contents of a woman's cellphone who had been arrested in a cocaine case. The contents were then used to set-up a fake Facebook account for the woman to trick her friends and associates into revealing incriminating drug secrets. The Justice Department stated that the woman implicitly consented by granting access to the information stored in her cellphone and by consenting to the use of that information to aid in ongoing criminal investigations. The woman then filed a lawsuit against the DEA agent claiming she suffered fear and emotional distress because the fake account made her appear that she was a "snitch" cooperating with the investigation, which put her life in danger.

Law enforcement agencies have often used social media to conduct investigations, particularly in the realm of child pornography; however, using another person's real identity is less common. A person whose identity is used in this manner may have a Constitutional privacy claim against law enforcement. While the "right to privacy" is not specifically enumerated in the Constitution, a person does maintain a subjective expectation of privacy when that person has sought to preserve something as private. However, once that information is displayed to a third party, that expectation of privacy is generally washed away. In the lawsuit against the DEA above, the claim of privacy will turn on the scope of the woman's consent and whether that information was already displayed to a third party.

While social media has played an important role in law enforcement's abilities and effectiveness, the consequences of its use are not to be taken lightly. Coming off the heels of the recent Supreme Court case, *Riley v. California*, where a unanimous Court held that generally, the police may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested, social media will no doubt have a larger role to play in future civil lawsuits.

Sara E. Lowry

Sara Lowry is an attorney in our Livonia office where she concentrates her practice on municipal law, litigation, and immigration law. She may be reached at (734) 261-2400 or slowry@cmda-law.com.

Attorneys Successfully Defend Municipality and Police Officers

Attorneys Jim Acho and Karen Daley were recently successful in assisting a municipal client with a case that had garnered local media attention a few years ago. The case involved a senior citizen who was allegedly robbing elderly people in their home. The suspect would approach an elderly person at a supermarket, strike up a conversation and explain that he was a lonely widower who was in need of companionship. Inevitably, an invitation by a senior to come over for a cup of coffee would be extended to the suspect. Once arriving at the victim's home, the suspect would excuse himself to use the restroom and quickly rifle through the victim's bedroom jewelry boxes stealing jewelry and cash. This routine was repeated multiple times and in many cities and in multiple counties and resulted in numerous senior citizens being victimized.

A man who matched the physical description of the suspect and had a vending route in all of the same cities where the thefts occurred was eventually arrested by multiple municipal police departments. The suspect, however, was not prosecuted for the crimes after passing polygraph examinations.

The man who had been identified as the suspect brought suit against multiple municipalities for wrongful arrest and multiple constitutional violations, but his chief target was one specific municipality, the one represented by Jim Acho. The Plaintiff alleged two police officers deliberately and maliciously manufactured a witness identification lineup and manipulated it in such a way that witnesses would identify the Plaintiff as the perpetrator of the crimes. The Plaintiff had been identified in open court by an elderly woman, but Plaintiff's counsel argued it was due to being misled by the improperly suggestive lineup and photo array. Mr. Acho argued that any mistake in identity was the result of a happenstance and not any deliberate or willful act on the part of the police officers, and that the photo array used was only being portrayed as suggestive due to circumstances beyond the control of the officers and not through any malice. As a result, Mr. Acho argued that the police officers were entitled to qualified immunity.

The Judge who presided over the case dismissed the municipal entity represented by Mr. Acho upon his Motion for Summary Judgment. However, the Judge did not dismiss the individual police officers, stating that an issue of fact for a jury existed. Ms. Daley, the head of our Firm's appellate department, filed an appeal to the Sixth Circuit Court of Appeals. She successfully persuaded the Sixth Circuit to reverse the trial court. The Sixth Circuit held that not only were the officers entitled to qualified immunity from the unlawful arrest claim, the officers could not be subjected to liability for malicious prosecution because there was no evidence they influenced the decision to prosecute the Plaintiff. As a result, the Sixth Circuit dismissed the case against the officers.

Office Locations

MICHIGAN

Livonia
33900 Schoolcraft Road
Livonia, MI 48150
Telephone: 734.261.2400
Facsimile: 734.261.4510

Clinton Township
19176 Hall Road
Suite 220
Clinton Township, MI 48038
Telephone: 586.228.5600
Facsimile: 586.228.5601

Traverse City
400 West Front Street
Suite 200
Traverse City, MI 49684
Telephone: 231.922.1888
Facsimile: 231.922.9888

Grand Rapids
2851 Charlevoix Drive, S.E.
Suite 327
Grand Rapids, MI 49546
Telephone: 616.975.7470
Facsimile: 616.975.7471

CALIFORNIA

Riverside
3801 University Avenue
Suite 560
Riverside, CA 92501
Telephone: 951.276.4420
Facsimile: 951.276.4405

MISSOURI

Kansas City
1600 Baltimore Avenue
Suite 200B
Kansas City, MO 64108
Telephone: 816.842.1880
Facsimile: 816.221.0353

CUMMINGS▪MCCLOREY

DAVIS & ACHO, P.L.C.
ATTORNEYS AND COUNSELORS AT LAW

On Law is a monthly publication from the law firm of
Cummings, McClorey, Davis & Acho, P.L.C.

On Law is intended for informational purposes only and should not be used as a substitute for individual legal advice. Please consult an attorney regarding your particular situation.

Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features or to be removed from the mailing list, please contact Jennifer Sherman.

To reference previous issues of On Law, please visit www.cmda-law.com.

CMDA: On Law
33900 Schoolcraft Road
Livonia, Michigan 48150
(734) 261-2400
E-Mail: jsherman@cmda-law.com

Our Vision
To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

PRSRT STD
US POSTAGE
PAID
PERMIT NO. 63
SOUTHFIELD, MI

33900 Schoolcraft Road
Livonia, Michigan 48150