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Police Interaction with Homeless Persons – Part II – Panhandling and Use of Force

Contents

Introduction

In the first article in this series, the focus was on issues arising out of police encounters with homeless persons sleeping in public places or homeless shelters, and issues concerning the seizure or disposal of possessions of homeless persons found in public places.

This article's focus is on issues arising out of aggressive panhandling or begging by homeless persons, and the use of force against homeless persons. On the last page of this article, there is a brief section with some on-line resources, as there was at the end of the first article in this series.

Panhandling

Homeless persons frequently congregate on downtown sidewalks, near transit stations, near bank branches or ATMs, or near the entrances or exits to businesses or apartment buildings, or even on streets and highways, and accost pedestrians or motorists, seeking to panhandle for cash, or, in some instances, seeking to vend various items. Some may merely sit on the ground or stand holding a cup or other receptacle, while others may repetitively repeat a request for "spare change," or in some instances more aggressively demand or even insist on "donations."

A good number of municipalities have attempted to address complaints about such panhandling from pedestrians and business owners by enacting a wide

variety of ordinances that seek to prohibit or regulate such behavior, particularly "aggressive" panhandling that rises to the level of harassment.

In an important decision, the highest court in the State of New York, the New York Court of Appeals, in People v. Barton, No. 176, 8 N.Y.3d 70, 861 N.E.2d 75, 828 N.Y.S.2d 260 (N.Y. 2006), upheld one such city ordinance prohibiting "aggressive" panhandling alongside roads or on sidewalks as constitutional. The court found that the ordinance in question was narrowly drawn to focus on specific conduct that the city legitimately could attempt to control, and was content-neutral.

The defendant in the case, Michael Barton, received a ticket for violating a section of the City of Rochester, New York municipal Code when he allegedly waded right into traffic on a highway exit ramp in the downtown area, soliciting money from motorists. That section of the ordinance provides that "no person on a sidewalk or alongside a roadway shall solicit from any occupant of a motor vehicle that is on a street or other public place." Soliciting is defined as "the spoken, written, or printed word or such other acts or bodily gestures as are conducted in furtherance of the purposes of immediately obtaining money or any other thing of value," with violations punished by a fine ranging from $25 to $250, and a second conviction within a year authorizing a sentence of up to 15 days incarceration.

The ordinance was passed following nearly a decade of controversy, and was motivated by an increasing incidence of panhandling in the city's downtown area, and increasing citizen complaints. The ordinance's section on "legislative intent" indicates that it was passed for the purpose of protecting persons from "threatening, intimidating or harassing behavior," and to keep public places "safe and attractive" for members of the community so that all of the community can interact in a peaceful manner in public places, as well as providing for the free flow of pedestrian and vehicular traffic, and preserving the "quality of urban life."

The ordinance was modeled after similar ordinances adopted in cities that include Atlanta, Baltimore, Cincinnati, New Haven, New York City, Philadelphia, Portland, San Francisco, Seattle, and Washington, D.C.

In the discussion accompanying the adoption of the ordinance, proponents of its adoption stated that the section barring solicitation of motorists was aimed at "specific conduct," and not at speech or expression of any kind, based on the manner in which the conduct itself interferes with the free flow of traffic and raises traffic safety and traffic congestion concerns. The ordinance treated all solicitation the same, whether conducted by an individual or on behalf of a charity.

Barton sought to have the case against him dismissed, claiming that the ordinance was overbroad in violation of the free speech guarantees of the U.S. and New York State constitutions. A New York trial court agreed, declaring the section of the ordinance that Barton was charged under unconstitutional. It reasoned that, while the ordinance was "content-neutral," it was not sufficiently "narrowly tailored" to serve a significant governmental interest, because it allowed the prosecution of persons "guilty of nothing more than peacefully asking for assistance." An intermediate court disagreed.

Ultimately, in upholding the ordinance as constitutional, the New York Court of Appeals assumed, for purposes of the appeal, that panhandling "is speech or expressive conduct safeguarded by the First Amendment," and entitled to as much protection as that given to charitable appeals by organized charities. The court noted that the city did not contest that. In Schaumburg v Citizens for a Better Environment, # 78-1335, 444 US 620 (1980), the U.S. Supreme Court held that there was a sufficient connection between solicitation of funds by organized charities and a variety of speech interests to "implicate" the First Amendment.

The test for whether a law regulating speech is "overbroad" on its face is whether it prohibits a substantial amount of constitutionally protected conduct. Barton argued that because the ordinance by its language concededly reaches "passive" panhandling targeting motorists—such as someone standing mute on the sidewalk, facing traffic in the street and holding a sign requesting immediate money or food—it is unconstitutionally overboard and violates the First Amendment.

Barton, in essence, argued that the ordinance violates the First Amendment because it is not limited to panhandlers who act "aggressively" or solicit motorists successfully or actually walk into a lane of stopped or moving traffic.

"Content-neutral regulations of time, place, and manner of expression," the court noted, "are enforceable if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

The court found that the ordinance section concerning solicitation of motorists supported a significant governmental interest in eliminating a source of distraction for motorists. The court also found that the section was not a "blanket ban," and did not prohibit requests "seeking something other than a handout," and also did not prohibit "non-aggressive soliciting directed at pedestrians on the sidewalk." It therefore left open "ample alternative avenues to communicate any message of indigency or need through begging."

The court also found that the ordinance was "content neutral," applying impartially to all persons or organizations, whether charitable or commercial, and

did not try to silence one particular message or "frown on any particular viewpoint."

In summary, the court concluded, the section of the ordinance in question was designed to address a specific problem concerning "individuals seeking handouts from occupants of motor vehicles on a public thoroughfare or place, thereby creating a hazard and slowing or snarling traffic." Because it focused on "specific conduct that the city has an interest in controlling in order to further a significant content-neutral government interest, it is narrowly tailored."

Courts have, in some instances, been divided about whether or not panhandling constitutes First Amendment protected free speech or expression. In Young v. New York City Transit Authority, #90-7115, 903 F.2d 146 (2nd Cir. 1990), cert. denied 498 U.S. 984 (1990), for instance, a panel of a federal appeals court upheld a prohibition on begging in city subways. The court held that panhandling is not constitutionally speech or expressive conduct similar to solicitation by organized charities. It should be noted that the prohibition in question did not target "aggressive" or harassing forms of panhandling in particular, but simply prohibited all begging in the subways.

"Whether with or without words," the court stated, "the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act, it is of the essence of the conduct." The court further commented that "The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost," which is hardly a "means indispensable to the discovery and spread of political truth," or the communication of "inexpressible emotions" falling "under the protection of free speech as fully as do Keats' poems or Donne's sermons."

The court conceded that it might be possible to find "some kernel of expression" in almost everything that a person does, but such mere "kernels" are not sufficient to bring every activity within the protection of the First Amendment.

[The court also commented, however, that even if it assumed that there was some degree of protected "speech" involved in begging, the prohibition on begging in the subway was constitutional because it was based on legitimate governmental interests that were unrelated to the suppression of expression, and because the subway system was not a "public forum." Accordingly, the law met the test for constitutional general laws which may have the incidental effect of suppressing some speech or expression, but which are not aimed at doing so, as stated by the U.S. Supreme Court in United States v. O'Brien, #232, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).]

Another panel of the same federal appeals court, in Loper v. New York City Police Dept., #92-9127, 999 F.2d 699 (2nd Cir. 1993), however, enjoined

enforcement of a law prohibiting public loitering for purposes of begging. The court concluded that there was "little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed." The court also found that "the distinction is not a significant one for First Amendment purposes."

Part of the reason for the difference in analysis between Young (involving the New York subways) and Loper (involving New York City sidewalks) is that the sidewalks were held to be a traditional public forum by the court. The court also found that the regulation at issue was not truly "content neutral" and was not narrowly tailored as a permissible time, place, or manner restriction, but was instead aimed at suppressing protected speech.

The court in Loper also noted that a number of elements of the conduct that the city of New York sought to prohibit in the anti-panhandling law were already covered by other New York laws, including prohibitions on harassment through acts placing another person in reasonable fear of a physical injury, menacing, disorderly conduct through actions creating public inconvenience, annoyance or alarm, the use of obscene or abusive language, or the obstruction of pedestrian or vehicular traffic.

The distinction between these laws, which the court had no doubt were constitutional, and the anti-panhandling law, which its struck down, as the first were clearly targeted at conduct alone, while the court found that the latter aimed squarely at the content of communication.

Also of interest is Los Angeles Alliance for Survival v. City of Los Angeles, No. SO73451, 993 P.2d 334 (Cal. 2000), in which the California Supreme Court held that a Los Angeles ordinance banning all "aggressive" solicitation for the immediate exchange of funds, and all solicitations for immediate donations in specified areas in which the people present could be considered a "captive" audience was "content neutral" for purposes of the free speech guarantees of the California constitution.

The U.S. Supreme Court has never directly addressed the issue of whether panhandling is expressive conduct protected by the First Amendment. See, however, International Society for Krishna Consciousness, Inc. v. Lee, #91-155, 505 U.S. 672 (1992), in which the U.S. Supreme Court upheld a regulation prohibiting solicitation of funds in airline terminals operated by a public authority as permissible under the First Amendment, based on a finding that the terminals were not public forums, and that the regulation reasonably limited such solicitation.

Courts in different jurisdictions, and even different courts in the same jurisdictions may reach different results on laws intended to limit panhandling.

Given the concerns raised in these cases about the possible First Amendment implications of panhandling, a statute, ordinance, or regulations prohibiting or regulating such solicitations is most likely to be upheld by a court if it:

- Clearly articulates a legitimate governmental interest unrelated to the suppression of expression, such as traffic safety or preventing the impeding of the flow of traffic, whether vehicular or pedestrian;
- Focuses, in a content-neutral way, on the conduct to be prohibited;
- Targets especially more aggressive or harassing forms of solicitation, such as persistent demands for money or "following" persons, as opposed to more passive activities, such as sitting or standing in a fixed location holding a receptacle for donations.

Additionally, courts will usually have far less trouble upholding restrictions on solicitation activity on property, whether public or private, which is not a traditional public forum, such as airport terminals, subway systems, etc., as well as those places in which persons may essentially constitute a "captive audience" for solicitations. Such locations may, however, become a public forum, or limited public forum if opened up for solicitation, such as allowing Salvation Army personnel or other representatives of charitable or other non-profit organizations to collect funds or distribute literature there.

Use of Force

The general rules concerning the use of force under the Fourth Amendment clearly apply to circumstances involving homeless persons. Those general rules are spelled out in some detail in prior articles in this publication on the use of deadly force, the use of police dogs, SWAT operations, and the use of Tasers, stunguns, and other electronic control devices, among other articles. They will not be repeated here in any detail, other than to note that in Graham v. Conner, #87-6571, 490 U.S. 386 (1989), the U.S. Supreme Court held that all claims that law enforcement officials have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free person are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. The right to make an arrest or investigatory stop, the Court stated, necessarily carries with it "the right to use some degree of physical coercion or threat thereof to effect it." All the law requires is that it be a reasonable amount of force.

It is worthwhile, however, to take a brief look at how some courts have applied these principles to circumstances arising out of police encounters with homeless persons.

In Ali v. City of Louisville, No. Civ. A. 3:03CV-427, 395 F. Supp. 2d 527 (W.D. Ky. 2005), the court ruled that police officers' shooting and killing of a homeless mentally ill man sitting in a car was not excessive force when they acted after he raised a gun and did not know, until later, that the weapon was a BB gun.

Under the circumstances, the court reasoned, it was reasonable for them to believe that their lives were at risk. The "objective reasonableness" analysis focuses on what the officers knew or believed that they knew at the time of the use of force, rather than on what the situation actually turned out to be with the assistance of hindsight.

The court also ruled that the officers did not engage in disability discrimination when they called on a SWAT team to extract the man from his car after the shooting, causing a delay in medical treatment. The officers could reasonably do this to ensure the safety of themselves and others at the scene. Certain claims against the officers for non-lethal use of excessive force were not dismissed by the court. See Ali v. City of Louisville, No. Civ. A. 3:03CV-427, 2006 U.S. Dist. Lexis 66426 (W.D. Ky.).

In Szabla v. City of Brooklyn Park, No. 04-2538, 429 F.3d 1168 (8th Cir. 2005), a federal court ruled that because city policy possibly allowed the use of dogs to catch and bite suspects without verbal warnings, summary judgment was improper in an excessive force lawsuit brought by homeless man bitten by dog while lying on the floor in a shelter for public toilets. The officer controlling the dog, however, was entitled to qualified immunity.

The case involved a homeless man who slept in a park in Crystal, Minnesota, lying on the floor of a shelter there for public toilets. Police officers from Crystal, Minnesota came to the park after finding a car rammed into a tree and abandoned, with an imprint where a head had hit the windshield, and hair sticking out of the lining of the car's roof. The registered owner of the car indicated that he had sold the vehicle. The officers wanted to locate the driver because they believed that the car might have been stolen, and that the driver might be drunk, ill, or injured.

Crystal officers, who did not have police dogs, utilized a cooperative arrangement with the City of Brooklyn Park, Minnesota, which agreed to send one of its dogs and the officer who handled the dog. When this officer arrived, it was noted that the car was full of "property," which suggested that the car might have been used in a burglary.

The officer put on the dog's tracking harness and took him to the wrecked car to try to get the scent of the driver, and then gave him the command to "track," which means to apprehend a person. This command instructs the dog to search for one specific person, and to bite and hold the person until the handler arrives. A

“search” command, the court noted, would have told the dog to range out over an area and following any scent that comes up, and a dog given this command should not bite. On a tracking command, the dog is kept on a tracking harness with a lead. The officer later stated that he did not know whether the driver was fleeing because he was involved in a crime or instead had a head injury or otherwise needed medical attention.

The officer reduced the fifteen-foot lead to less than six feet, and he and the dog ran through the park. The dog allegedly bit the homeless man as he was lying on the floor of the shelter for the public toilets, and the homeless man grabbed the dog's head. The dog lost his hold and bit him again. The officer ordered the man to show his hands, and called the dog off when he complied. The homeless man had bites on his legs. The number of actual bites was not clear, but he had twenty-three tooth punctures on his legs and hip.

Officers handcuffed and talked to the homeless man, but released him after determining that he had no relationship to the car wreck, sending him to the hospital by ambulance. The homeless man's lawsuit claimed both violation of his Fourth Amendment rights against the use of excessive force and unreasonable search and seizure, and state law negligence claims and claims under a state dog-bite statute.

The appeals court found that its decision in Kuha v. City of Minnetonka, #02-1081,365 F.3d 590 (8th Cir. 2004), indicated that the use of a dog to track and bite a fleeing suspect without giving the suspect prior warning violated the Fourth Amendment's prohibition against the use of excessive force.

Since the incident at issue in the immediate case occurred before Kuha, however, the officer controlling the dog was entitled to qualified immunity, as it was Kuha that established the principal that it could be unconstitutional to use a police dog to bite and hold a suspect without giving a prior warning.

As for an unlawful detention claim, the appeals court found that upon first encountering the homeless man, the officers had ground to suspect that he could be involved in criminal activity, and could be armed and dangerous. They were investigating the scene of an accident in which the driver of the wrecked car had chosen to flee, even though there were indications that he had been injured. Further, leaving the scene of an accident is a criminal offense. The lateness of the hour and the fact that the park was closed added to the grounds for believing that the homeless man was involved in crime, and he was wearing a dark sweatshirt with a hood that came down over his face and dark gloves, which could be characterized as “typical of burglars' clothes.”

The detention, including placing the man in handcuffs for no more than two minutes, constituted an investigatory stop based on reasonable suspicion, and was objectively reasonable under the circumstances.

Other cases of interest involving the use of force against homeless persons:

- In Mitchell v. Los Angeles, U.S. Dist. Ct. Los Angeles, settlement, reported in Los Angeles Times, Metro Section, p. 1 (Dec. 16, 2000), Los Angeles reached $975,000 settlement with relatives of 55-year-old mentally ill homeless woman who was shot and killed by an officer as she allegedly lunged towards him with a 12-inch screwdriver.

- In Austin v. Neal, #95-3009, 933 F.Supp. 444 (E.D.Pa. 1996), an officer lost a challenge to his termination that was based on his argument that the Second Amendment gave him the right to shoot a homeless man who had struck him with a bottle.

- The court in Ludwig v. Anderson, #93-3157, 54 F.3d 465 (8th Cir. 1995), ruled that a homeless man's status as “emotionally disturbed” person was relevant to issue of whether officers acted objectively reasonably in shooting him without warning after he displayed a knife and ran away from them.

- In Scott Bennett-Nava v. City of Dublin, C931309CW, U.S. Dist. Ct. N.D. Cal Dec 2, 1994, reported in Vol. 107 (#242). L.A. Daily Journal p. 4 (Dec 16, 1994), the family of homeless man who died after officer applied a carotid choke hold on him awarded $470,000 in wrongful death/civil rights lawsuit.

- In Svendsen v. Port Auth, N.Y., N.Y. Co. Sup. Ct., No. 3925/90, Oct 8, 1992, reported in 36 ATLA L. Rep.8 (Feb 1993), a homeless man allegedly beaten by transit police officers during an arrest was awarded $475,000 for assault and battery.

Resources

The following are some useful resources on the general topic covered by this series of articles.

- Homelessness: Critical Solutions to a Dire Problem; Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation, 35 W. St. U. L. Rev. 407 (2008).

- "Civil Rights Won for Alaska Homeless," an article about the recent addition of homeless status to the protected categories in Alaska's hate crimes statute, effective September 2, 2008.
- Feeding Intolerance: Prohibitions on Sharing Food with People Experiencing Homelessness, a report by the National Center on Homelessness & Poverty, and the National Coalition for the Homeless. (November 2007).
- Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness, 13 Geo. J. Poverty Law & Pol'y 545 (2006).
- Punishment and Crime: Policing L.A.'s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles, 2005 U. Chi Legal Forum 325 (2005).
- Panhandling, by Michael S. Scott. Problem-Oriented Guides for Police No. 13
- Quality-of-Life Policing: Do Offenders Get the Message? by Bruce D. Johnson et al., NCJRS No. 196673 (2002).
- A Home of One's Own: The Fair Housing Amendments Act of 1988 And Housing Discrimination Against People With Mental Disabilities, 43 Am. U. L. Rev. 925 (1994).
- Quality of Life—At What Price? Constitutional Challenges to Laws Adversely Impacting the Homeless, by Christine L. Bella & David Lopez, 10 St. John's J. Legal Comment. 89 (1994).
- Note: The Beggar's Free Speech Claim, by Rose, Anthony J., 65 Ind. L.J. 191 (1989).

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