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## **Public Protection: Intoxicated Persons**

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### ❖ **Introduction**

Police officers frequently encounter intoxicated persons on the streets, in motor vehicles or boats, in businesses and homes and in almost every other imaginable setting. When the intoxicated person is driving a car or truck or operating a boat, they are subject to arrest. In a variety of other contexts, they may also be subject to detention or arrest for public drunkenness, public urination, violations of open container restrictions, supplying alcohol to underage persons (or possessing it themselves while underage), disorderly conduct, or a host of other infractions.

This article focuses on cases in which courts have addressed the possible civil liability of police officers who encounter intoxicated persons and arguably fail to protect them from harm from themselves and others.

### ❖ **No General Duty to Protect**

Under the principles set down in [\*DeShaney v. Winnebago County Dep't of Social Services\*](#), #87-154, 489 U.S. 189 (1989), there is no general duty under federal civil rights law to

protect individuals against private violence or harm. Exceptions have been made in some instances where a special relationship--such as having a person in custody, or very specific promises of protection that are reasonably relied on--or the existence of a "state-created danger" is found. Based on this, courts have generally been reluctant to impose broad liability for failure to protect intoxicated persons in ordinary circumstances.

While police departments and individual officers strive to promote public safety, the courts have said that they are not the insurers of the public's safety, nor are they the public's parents or nannies. If they were literally charged with having to make sure that every intoxicated person walking around was alright, did not walk out into traffic, did not pass out in a vacant lot, and made it home safe and sound at night, it would be impossible for them to do anything else at all. Realizing this, the circumstances in which courts will impose civil liability for failure to protect intoxicated persons are the relatively rare exception, rather than the rule.

### ❖ Custody and Detention

A clear exception to *DeShaney's* general rule of no duty of protection are those circumstances when a person is in custody, and accordingly dependent on the officers to keep them safe from harm when they are restrained from acting to protect themselves. Yet that duty is not absolute or unlimited.

In [\*Hermann v. Cook\*](#), #3:01CV-524, 240 F. Supp. 2d 626 (W.D. Ky. 2003), a federal court found that the officers were not responsible for an intoxicated arrestee's death from drowning while trying to escape on the basis of their own failure to rescue him or their alleged prevention of bystanders' rescue efforts. The officers were entitled to qualified immunity, as no reasonable officer could believe that these actions violated the arrestee's clearly established rights.

Police officers in this case arrested a man during a free concert in the park for public intoxication and for "causing problems," including refusal to leave when asked to do so. He was handcuffed and remained standing while one of the officers filled out some paperwork. He suddenly "bolted" for a nearby river while the officers chased him, and jumped into the water, immediately disappearing into it and not resurfacing.

The water was approximately ten feet deep and muddy and dark, with debris present. There were also ropes, life preservers and boats nearby which allegedly could have been used in a rescue attempt. One of the officers radioed the police dispatcher to send EMS and Fire & Rescue's diving team.

Two of the officers present did not consider themselves good swimmers, and a third officer, who initially took off his jacket to prepare to jump into the water, reconsidered and decided that doing so would have been "foolish and dangerous." Another concert attendee allegedly volunteered to make a rescue attempt, telling the officers he had water rescue experience, but one of the officers allegedly prevented him from making the attempt. He later claimed that one of the officers said to another, "Don't bother, it's just another felon out of the way."

When the EMS and Fire & Rescue diving team arrived 15 to 20 minutes after the incident, they retrieved the arrestee's body from the river and he was pronounced dead. The arrestee's estate sued, claiming that the officers unconstitutionally interfered with private rescue activities in violation of his due process rights, and that the officers themselves should have attempted to rescue him.

Granting summary judgment in favor of the defendant officers, the trial court found that there is no clearly established constitutional due process right for an escaping arrestee to be rescued under these circumstances, although "this is one of those cases in which one could legitimately debate how the officers should have best responded to these emergency circumstances."

The court reasoned that the manner in which the officers had restrained the arrestee had not exposed him to any particular harm, so that could not be the basis for the finding of a "special relationship" imposing a duty of protection, nor did they do anything to place him in greater danger. It was the arrestee's own "unexpected attempted escape and dash into the Ohio River" which created the "circumstances of his death."

Most important, no existing legal authority would lead a reasonable officer to believe that by failing to attempt a rescue under these or similar circumstances, the officer violated a prisoner's substantive due process rights. Certainly no such right

is clearly established. Indeed, more than likely, it does not exist at all under these circumstances. As previously discussed, the general rule is that police officers are not affirmatively required to rescue one who is in danger, particularly where the rescue might be dangerous.

The court also found no violation of the arrestee's rights by the officers' alleged interference with private rescue attempts. "It is easy to think of sound public safety reasons for the officers to prevent even more tragedy by preventing rescues until trained personnel arrived. Moreover, the court finds some authority that police have a right to stop unqualified persons from attempting dangerous rescues," citing [\*Franklin v. City of Boise\*](#), #91-0218, 806 F. Supp. 879 (D. Idaho 1992) and [\*Andrews v. Wilkins\*](#), #90-5225, 934 F. 2d 1267 (D.C. Cir. 1991).

Whether additional efforts would have actually proved successful or would only have cost the lives of police officers or bystanders can never be known. What is absolutely clear is that the defendants did not violate Hermann's [the arrestee's] constitutional rights by making the reasonable judgment that neither they nor innocent bystanders should attempt a rescue before trained personnel arrived.

As with any decision to take someone into custody, officers have to have a legal basis for doing so. In [\*Qian v. Kautz\*](#), #97-3295, 168 F.3d 949 (Unpub. 7th Cir.1999), the court noted that a police officer might face possible liability for taking motorist into custody and charging him with driving while intoxicated a second time after tests for intoxication proved negative; officer may have intended to assist motorist by taking him to jail since he was unable to pay for a hotel room and might not have been able to care for himself, but the officer failed to follow state-mandated procedures for protective custody.

Similarly, while perhaps well intentioned, in [\*Anaya v. Crossroads Managed Care Systems, Inc.\*](#), #97-1358, 195 F.3d 584 (10th Cir. 1999), the court stated that an aggressive campaign of seizing allegedly intoxicated individuals and taking them to a detoxification facility for treatment evaluation without probable cause that they were dangerous to themselves or others violated the Fourth Amendment.

Sometimes, the particulars of state law regarding how officers are supposed to deal with intoxicated persons may impose a duty to do so carefully. In [\*Scovill v. City of Astoria\*](#), #90-2134, 324 Or 159, 921 P.2d 1312 (1996), the Oregon Supreme Court ruled that a state

statute mandating that officers provide help to intoxicated persons who appear to be a danger to themselves or others imposed a duty to do so. A lawsuit was reinstated on a claim that the officers allowed a visibly intoxicated woman who had threatened harm to herself and others to leave the police station, after which she wandered into traffic and was killed by a car.

### ❖ Failure to Detain

Some plaintiff's lawyers have tried to impose liability on officers for instances in which they fail to take an intoxicated person into custody, and they subsequently get injured. In [\*Wyatt v. Krzysiak\*](#), #98-177, 82 F.Supp. 2d 250 (D. Del. 1999), the court rejected that theory of liability. It concluded that an officer who stopped an intoxicated motorist was not liable for her injuries in subsequent accident she suffered after he failed to arrest her. The court commented that the officer's actions did not increase the danger to her, since she was already driving under the influence of alcohol when he first encountered her.

In [\*Morris v. Johnson\*](#), #A03A0111, 585 S.E.2d 375 (Ga. App. 2003), the court found that police officers were entitled to qualified immunity on a claim that they violated the due process rights of a motorcyclist by ordering him to ride his bike away from a restaurant premises despite his allegedly intoxicated condition at the time. The officers exercised their discretion in good faith in making a determination as to the degree of his impairment at the time, and therefore were not liable for his subsequent death.

Similarly, in [\*Stevens v. City of Green Bay\*](#), #96-2473, 105 F.3d 1169 (7th Cir. 1997), the court concluded that an officer was not liable for an intoxicated man's death from being struck by cab while walking in the street ninety minutes after officer dropped him off at a gas station to phone for a ride home. It was not foreseeable to the officer that the man would be unable to summon a ride home or that, once he did, he would decide to walk home close to traffic despite his inebriated condition.

### ❖ State Created Danger

Courts have been open to the concept of imposing liability on officers when some affirmative act of theirs arguably puts an intoxicated person in a more dangerous position than they otherwise would have been. In [\*Munger v. City of Glasgow Police Dept.\*](#), #98-36090, 227 F.3d 1082 (9th Cir. 2000), a federal appeals court reinstated claims against officers and a city based on the officers' ejection of an intoxicated bar patron into

subfreezing temperatures outside wearing only jeans and a tee shirt. The officers' actions placed the patron in a position of enhanced danger, the court found, so there might be liability for man's death from hypothermia.

One federal appeals court adopted the "state-created danger" doctrine as a basis for possible officer and municipal civil rights liability based on the argument that intoxicated woman, separated from her husband by officers, detained briefly and then let go to continue home alone would have reached home safely but for officers' actions, but instead collapsed in her drunken condition in the freezing weather [\*Kneipp v. Tedder\*](#), #95-2044, 95 F.3d 1199 (3rd Cir. 1996).

Similarly, in [\*Riordan v. City of Joliet\*](#), #96-C-8400, 3 F.Supp. 2d 889 (N.D. Ill. 1998), the court concluded that officers were not entitled to qualified immunity in a lawsuit by a highly intoxicated man who they released near a police station in freezing weather wearing inadequate clothing. The plaintiff's conduct may have indicated that he was in no condition to take care of himself.

Officers could face liability for injuries intoxicated man taken into custody suffered when they released him at night at side of busy highway, following which he was struck by car. It was arguably where they released him, knowing that he was intoxicated, that put him in danger. [\*Davis v. Brady\*](#), #96-275, 143 F.3d 1021 (6th Cir. 1998).

On the other hand, a court stated that a police officer was not liable for the failure to provide transportation to an intoxicated man found on the street who subsequently was attacked, robbed, beaten and thrown over the side of a bridge by several individuals. In that instance, it was the unforeseen actions of those private individuals, rather than anything that the officer did that caused the harm. [\*Lane v. City of Kinston\*](#), #COA00-265, 544 S.E.2d 810 (N.C. App. 2001).

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