AELE Seminars:

Public Safety Discipline and Internal Investigations
Sept. 28-Oct. 1, 2020– Orleans Hotel, Las Vegas

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Return to the monthly publications menu
Report non-working links here
Some links are to PDF files - Adobe Reader™ must be used to view content

CONTENTS

Digest Topics

Resources

Cross References

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MONTHLY CASE DIGEST

- Some of the case digests do not have a link to the full opinion.
- Most Federal District Court opinions can be accessed via PACER. Registration required. Opinions are usually free; other documents are 10¢ per page.
- Access to cases linked to www.findlaw.com may require registration, which is free.

Assault and Battery: Pepper Spray

An arresting officer was not entitled to qualified immunity on a man's false arrest claim because words alone could not provide probable cause for an arrest for disorderly conduct. The officer was entitled to qualified immunity for the initial force he used to remove the arrestee from a vehicle because a reasonable officer could believe that he was intentionally resisting and falsely claiming that his foot was stuck in the vehicle in order not to cooperate with the arrest, but he was improperly granted qualified immunity on a claim that he used excessive force in allegedly engaging in the prolonged pepper spraying of the arrestee while he was helplessly laying on the ground for three to five minutes. *Alston v. Swarbrick*, #18-10791, 954 F.3d 1312 (11th Cir. 2020).

False Arrest/Imprisonment: No Warrant

A female motorist was arrested on suspicion of DUI. Once in custody, tests established that she was not intoxicated, but she was nevertheless kept in custody because of the sheriff's mandatory eight-hour hold policy after her two breathalyzer test results showed blood-alcohol readings of 0.000 and after she

posted bond. A federal appeals court overturned a trial court's summary judgment in favor of the sheriff on municipal liability claims. The only remaining question was whether a reasonable jury could find that the hold policy, as applied to the plaintiff, violated her Fourth Amendment rights. The 11th Circuit Court of Appeals agreed with the Fifth Circuit that, following a warrantless DUI arrest based on probable cause, officers do not have an affirmative Fourth Amendment duty to further investigate or continually reassess whether the arrestee is or remains intoxicated while in custody. However, where, as here, the officers seek and obtain information which shows beyond a reasonable doubt that the arrestee is not intoxicated—in other words, that probable cause to detain no longer exists—the Fourth Amendment requires that the arrestee be released. In this case, a reasonable jury viewing the evidence in the light most favorable to the plaintiff could find that her continued detention pursuant to the Sheriff's eight-hour hold policy violated the Fourth Amendment. The fact that the sheriff's hold policy purportedly was consistent with state law did not show that it did not violate the plaintiff's Fourth Amendment rights. *Barnett v. MacArthur*, #18-12238, 956 F.3d 1291 (11th Cir. 2020).

Federal Tort Claims Act

A security guard at an art exhibit was shot in the leg while on duty by a pair of Islamic terrorists. Both of the terrorists had been under FBI investigation because of their terrorist sympathies and one of them purchased a handgun from a firearms store that was part of the Bureau of Alcohol, Tobacco and Firearms' "Fast and Furious" gun operation, where federal agents would sell firearms to unauthorized buyers in hopes of tracing them back to the Mexican drug cartel. The injured security guard sued the federal government for his injuries, seeking recovery under the Federal Tort Claims Act (FTCA) and the Anti-Terrorism Act (ATA), Upholding the dismissal of these claims, a federal appeals court ruled that the plaintiff failed to establish that the discretionary function exception does not apply under the FTCA, and therefore sovereign immunity has not been waived. While the trial court erroneously stated the standard for construing exceptions to the FTCA, the error was harmless because the plaintiff's contentions failed either way. The court held that the trial court correctly declined jurisdiction under a two-step framework. First, the plaintiff failed to identify a nondiscretionary duty violated by an agency or employee of the United States. Additionally, the U.S. government did not violate any directives prohibiting agents from engaging in acts of violence. Second, the court found that the discretion at issue here was exactly the kind that the exception was designed to protect. The court declined to forge new precedent and adopt the state-created danger doctrine in this context. It also found that the

trial court properly dismissed the ATA claims for lack of subject matter jurisdiction. *Joiner v. United States*, #19-10202, 955 F.3d 399 (5th Cir. 2020).

Firearms Related: Intentional Use

****Editor's Case Alert****

A police officer on patrol received a call requesting help in catching a man wanted on a warrant for strangulation and suffocation, who had taken a vehicle without consent, and was known to have violent tendencies. The man did not actually have a warrant for strangulation and suffocation. Instead, he was wanted for violating probation. When the officer saw the suspect he activated his lights and siren. The suspect did not stop, resulting in a three-minute chase. The pursued suspect crashed his car and fled on foot. The officer followed him to an auto body shop. Bystanders present indicated that the suspect was in the back room. When he again attempted to flee, the officer blocked the exit. Within seconds, they were on opposite sides of an SUV and began to move in "cat and mouse" fashion. The officer then pointed his handgun at the suspect, ordering him to the ground. He responded, "fuck you" and "shoot me." The suspect then bent over and, when he stood up, the officer saw a black cylindrical object pressed against his forearm. The officer shouted "drop it." The suspect responded, "fuck you," "no," and "shoot me." The officer still could not see the suspect's hands, and fired his gun seven times, killing the suspect.

In an excessive force lawsuit, a federal appeals court upheld summary judgment in favor of the officer, granting him qualified immunity because his actions conformed to constitutional standards. It was undisputed that the deceased, ignoring the possibility of escape through the open garage door just past the rear of the SUV, belligerently defied the officer's command to get on the ground by daring the officer to shoot him, he stepped toward the officer with something in his hand, and from the officer's perspective, he was a significantly larger and younger man who had a reputation for physical violence. He had refused every opportunity to surrender during the chase, and, critically, had decided to change the status quo of a standoff, so to the officer, the possibility of being overcome, or at the very least disarmed, was a real one. *Siler v. City of Kenosha*, #19-1855, 2020 U.S. App. Lexis 13750 (7th Cir.).

After a man was shot and killed by an officer, his parents sued for excessive use of force. A federal appeals court upheld summary judgment for the officer on the basis of qualified immunity. While the officer may have violated the decedent's right to be free from deadly force, the law was not clearly established at the time as it was undisputed that the suspect was aware of the officer's presence and that the officer ordered him to put down his weapon, but he refused to do so. Those facts took the case beyond the contours of clearly established law at the time of the shooting. *Garcia v. Blevins*, #19-20494, 2020 U.S. App. Lexis 13926 (5th Cir.).

Firearms Related: Second Amendment Issues

The plaintiffs challenged a New York City rule regarding the transport of firearms, citing the Second Amendment, and seeking declaratory relief against enforcement of the rule insofar as it prevented their transport of firearms to a second home or shooting range outside of the city. A federal appeals court rejected their claim. After the U.S. Supreme Court granted review of that decision, the State of New York amended its firearm licensing statute and the city amended the rule so that the plaintiffs are now allowed to transport firearms to a second home or shooting range outside of the city. The plaintiffs' claim for declaratory relief with respect to the old rule was moot but they claimed that the new rule might still infringe their rights, and that they may not be allowed to stop for coffee, gas, food, or restroom breaks on the way to their second homes or shooting ranges outside of the city. The Supreme Court declined to address the argument, citing its practice of vacating and remanding where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously. On remand, the lower courts may consider the new arguments and whether the plaintiffs still might add a claim for damages with respect to the old rule.

In a strong dissent, Justice Alito, joined by Justices Gorsuch and Thomas, "By incorrectly dismissing this case as moot, the Court permits our docket to be manipulated in a way that should not be countenanced. Twelve years ago in *District of Columbia v. Heller*, 554 U. S. 570 (2008), we held that the Second Amendment protects the right of ordinary Americans to keep and bear arms. Two years later, our decision in *McDonald v. Chicago*, 561 U. S. 742 (2010), established that this right is fully applicable to the States. Since then, the lower

courts have decided numerous cases involving Second Amendment challenges to a variety of federal, state, and local laws. Most have failed. We have been asked to review many of these decisions, but until this case, we denied all such requests." The dissenters both stated that the case was not truly moot, and also, that they believed, on the merits, that the original city rule was unconstitutional in violation of the Second Amendment, and that some lower federal and state courts had not been adequately enforcing individual Second Amendment rights. "This case is not moot. The city violated petitioners' Second Amendment right, and we should so hold." In a separate concurrence, Justice Kavanaugh agreed that, procedurally, it was proper to hold the immediate case before the court as moot, but further stated that "I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court." *N.Y. State Rifle and Pistol Association Inc. v. City of New York*, #18-280, 140 S. Ct. 1525, 206 L. Ed. 2d 798, 2020 U.S. Lexis 2528.

Interrogation: Juveniles

Two parents and their five children claimed that social workers employed by the state of Kentucky violated their Fourth Amendment rights by subjecting the children to warrantless in-school interrogations without reasonable suspicion of child abuse. They also claimed violations of their Fourteenth Amendment rights by requiring adherence to a "Prevention Plan," which limited the mother's ability to be alone with her children for approximately two months without any question as to her parental fitness and without any procedural protections. A federal appeals court overturned the denial of qualified immunity on the Fourth Amendment claims. The law governing in-school interviews by social workers was not clearly established at the time of the relevant conduct. The Fourth Amendment does govern a social worker's in-school interview of a child as part of a child abuse investigation. At a minimum, a social worker or other investigator must have a reasonable suspicion of child abuse before conducting an in-school interview when no other exception to the warrant requirement applies. The court upheld the denial of qualified immunity on the procedural and substantive due process claims. The complaint asserted that the supervision restrictions were imposed for approximately two months after there was no longer any question as to parental fitness without any procedural protections. This, if true, abridged the parents' clearly established right to the companionship and care of their children without arbitrary government interference. *Schulkers v. Kammer*, #19-5208, 955 F.3d 520 (6th Cir. 2020).

Immigrants and Immigration Issues

The U.S. Attorney General imposed conditions on the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG), 34 U.S.C.10151, which is the primary source of federal criminal justice enforcement funding for state and local governments. The trial court granted a preliminary injunction as to conditions that required that state or local officials honor requests to provide federal agents advance notice of the scheduled release of aliens in custody and that state or local correctional facilities give federal agents access to aliens in their custody. A federal appeals court upheld a nationwide injunction. The trial court granted a permanent injunction and invalidated a condition requiring that state or local governments certify their compliance with 8 U.S.C. 1373, which prohibits them from restricting their officials from communicating information regarding the citizenship or immigration status of any individual to the INS, was unconstitutional but stayed the injunction to the extent that it applied beyond Chicago. The federal appeals court again held that the Attorney General cannot pursue the executive branch's policy objectives against "sanctuary cities" through the power of the purse or the arm of local law enforcement, rejecting the Attorney General's assertion that Congress itself provided that authority in the language of the statutes. The city of Chicago has determined that effective law enforcement requires the cooperation of its undocumented residents and that such cooperation cannot be accomplished if those residents fear immigration consequences should they communicate with the police; and, local law enforcement must remain independent from federal immigration enforcement. The Byrne JAG grant was enacted to support the needs of local law enforcement to help fight crime, but "is being used as a hammer to further a completely different policy of the executive branch." States do not forfeit all autonomy over their own police power merely by accepting federal grants. There was no reason to stay the application of the injunction, the appeals court concluded. *City of Chicago v. Barr*, #19-3290, 2020 U.S. App. Lexis 13882 (7th Cir.).

Search and Seizure: Home/Business

Cincinnati police officers responded to a reported incident of menacing. Two people claimed that a male offender had driven by their home that evening, threatened to kill them, and carried guns. One of the officers identified a vehicle fitting the description. Four officers standing where the vehicle was parked heard a voice they thought came from a nearby residence. Thinking that it was likely to be

the suspect, they knocked on the exterior door, which swung open. Three officers entered without a warrant or exigent circumstances. One officer remained outside. Two of the entering officers did not recall announcing their presence or identifying themselves. Inside and upstairs, an officer knocked on a closed door. As it opened, she "saw the barrel of a rifle pointed at [her] face." The two other officers also saw the suspect "nonchalantly" panning the rifle from left to right. One of them reached for its barrel as the first officer fired her weapon. No officer ordered the suspect to drop his rifle before he was shot and injured. Paramedics were summoned. Before the officers applied handcuffs or provided first aid, they heard another voice and conducted a sweep. The suspect died at the scene without receiving medical attention.

In a lawsuit for unlawful entry, excessive force, and deliberate indifference to a serious medical need, plus state claims, the trial court granted the defendants summary judgment, citing qualified immunity. A federal appeals court reversed in part. The trial judge erred by granting qualified immunity to the three officers on the unlawful entry claim by finding that the suspect lacked an objectively reasonable expectation of privacy in the foyer, stairwell, and second-floor landing of his apartment; there was evidence that the exterior door was the entry to the apartment and that the officers should have realized they had entered the victim's unit rather than a common area. The court affirmed qualified immunity as to the excessive force, deliberate indifference, and state-law battery claims, and remanded for further evaluation of municipal liability and wrongful death claims. The officer who shot the suspect was justified in using deadly force because the victim answered the officers' knocks by pushing a rifle barrel through the door, about five feet from the officer's face. Further, as the officers immediately called for medical aid and did not act with deliberate indifference to the suspect's serious medical need. *Hicks v. Scott*, #19-3410, 2020 U.S. App. Lexis 14054, 2020 Fed.

App. 0131P (6th Cir.).

Search and Seizure: Person

Based on a report from a burglary victim, a police officer attempted to arrest a man on charges of burglary and stealing handguns, bullets, and prescription pain medication. Prior to the arrest, several witnesses told the officer that the suspect was armed, possibly intoxicated, and dangerous. When the suspect broke free from arrest, fled toward a group of bystanders, and moved as though he was reaching

into his waistband, the officer shot him once in the back. He claimed (and the officer disputed) that he was patted down by another officer just before he fled. The pat-down removed nothing from the suspect as the officer failed to discover that he was carrying a loaded magazine and extra bullets. The other officer claimed that the suspect fled before he completed the pat-down. Stolen guns were discovered within reach of where the suspect had been sitting in a car, but he did not have a weapon on him. In the suspect's federal civil rights lawsuit, a federal appeals court upheld summary judgment for the defendant officers. The firing officer was entitled to qualified immunity because it was not clearly established at the time of the shooting that a pat-down that removes nothing from a suspect eliminates an officer's probable cause that the suspect poses a threat of serious physical harm, so her actions were objectively reasonable as a matter of law. She had probable cause to believe the suspect posed a threat of serious physical harm and her conduct did not violate clearly established statutory or constitutional rights where the pat down of the arrestee prior to his flight did not reasonably prevent her from thinking him to be armed and dangerous, then fleeing and moving as though reaching for a weapon. *Goffin v. Ashcraft*, #18-1430, 2020 U.S. App. Lexis 13198 (8th Cir.).

•**Return to the Contents menu.**
•**Report non-working links here**

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Public Safety Discipline and Internal Investigations
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Click here for further information about all AELE Seminars.

Resources

COVID-19: Police Departments, Sheriffs' Offices Across the U.S. Grapple With COVID-19's Impact on Public Safety—and Their Own, by Josiah Bates, Time Magazine (April 2, 2020).

Sex Offenders: Identifying Serial Sexual Offenders Through Cold Cases, by Rachel E. Lovell, Angela Williams, Thomas J. Dover, Timothy G. Keel, and Daniel J. Flannery, FBI Law Enforcement Bulletin (May 7, 2020).

Training: Perspective--Need for Critical Thinking in Police Training, by Michelle Ridlehoover, FBI Law Enforcement Bulletin (May 7, 2020).

Reference:

- Abbreviations of Law Reports, laws and agencies used in our publications
- AELE's list of recently-noted civil liability law resources.

Cross References

False Arrest/Imprisonment: No Warrant – See also, False Arrest/Imprisonment: Unlawful Detention
Firearms Related: Intentional Use – See also, Federal Tort Claims Act
Firearms Related: Intentional Use – See also, Search and Seizure: Home/Business
Firearms Related: Intentional Use – See also, Search and Seizure: Person
Governmental Liability: Policy/Custom – See also, Assault and Battery: Pepper Spray
Interrogation – See also, Interrogation: Juveniles
U.S. Supreme Court Actions – See also, Firearms Related: Second Amendment Issues

Report non-working links here
Return to the Contents menu.
Return to the monthly publications menu
Access the multiyear Civil Liability Law Case Digest
List of links to court websites
Report non-working links here.