AELE Seminars:

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

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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.

COVID-19

In response to the COVID-19 virus, the Kentucky governor prohibited all mass gatherings including faith-based events such as church services. The order provided exceptions for "normal operations at airports, bus and train stations, . . . shopping malls," and "typical office environments, factories, or retail or grocery stores where large numbers of people are present," but maintain appropriate social distancing. A subsequent order from the governor required organizations that are not "life-sustaining" to close. Among the "life-sustaining" exempt entities were laundromats, accounting services, law firms, hardware stores, airlines, mining operations, funeral homes, landscaping businesses, and grocery stores. Religious organizations, however, were not classified as "life-sustaining," except when they provide "food, shelter, and social services." A Baptist church in the state held an Easter service during which some congregants went into the church, while others parked in the church's parking lot and listened to the service over a loudspeaker. State police issued notices that their attendance, whether in the church or outdoors, amounted to a criminal act, recorded congregants' license plate numbers, and sent letters requiring self-quarantine for 14 days to those identified.

Attendees at the service sued, arguing that the orders and their enforcement violated their free-exercise First Amendment and interstate-travel rights. A federal

appeals court granted an injunction pending appeal, Despite the lack of anti-religious animus and the legitimate health concerns involved, orders prohibiting religious gatherings, enforced by police officers telling congregants they violated a criminal law and taking down license plate numbers, would chill worship gatherings. Applying strict scrutiny, the court found that there are many less restrictive ways to address these public health issues. The Governor offered no good reason for refusing to trust the religious congregants who promised to use care and social distancing in worship in just the same way he trusted accountants, lawyers, and laundromat workers to do the same. *Roberts v. Neace*, #20-5465, 958 F.3d 409 (6th Cir. 2020).

Failure to Disclose Evidence, & Loss of Evidence/Preservation of Evidence

Officers tracked the source of a child pornography video to an Internet Protocol (IP) address. A deputy obtained a subpoena and identified a suspect as the subscriber associated with the IP address. He obtained a search warrant for the man's address, noting that he was not yet a "suspect" and did not necessarily have "possession" of devices connected to child pornography. The deputy and others executed the warrant and seized devices. The resident was home alone and after completing the search, he was taken to the sheriff's office. A number of the officers subsequently acknowledged that they knew that a person's IP address could be hacked by a third party. After the man was indicted, the deputy received forensic testing results that failed to yield a copy of the pornographic video. It was unclear whether the prosecutors or the man's public defender were informed. The prosecution continued, and the defense commissioned a forensic analysis of the man's phone and tablet that also found no evidence of child pornography. Unlike the first report, it reported no evidence that he ever used a peer-to-peer file-sharing program. After posting a reduced bond, he was released from jail 14 months after his arrest, and later the charges were dropped.

He sued, seeking damages. A federal appeals court overturned summary judgment for the deputy who had been granted qualified immunity by the trial court. While there was probable cause for the initial arrest. The deputy knew by a certain date that there was no evidence of child pornography on the plaintiff's devices. Because there was a factual dispute as to whether the deputy informed the prosecutors of these results as he was obligated to do, a genuine issue existed as to whether he "knowingly or recklessly" withheld exculpatory evidence. *Jones v. Clark County*, #19-5143, 2020 U.S. App. Lexis 15855 (6th Cir.).

False Arrest/Imprisonment: Unlawful Detention

A police sergeant assigned to a Fugitive Apprehension Team, tasked with arresting "Marvin Seales a/k/a Roderick Siner," met an officer at a food processing plant. A manager led them to an employee with the last name Seales. He protested, "You got the wrong guy." The sergeant handcuffed him and drove him to the precinct, and the other officer drafted a report. Other officers handled the rest of the process. The arrestee repeatedly told the second officer that he was innocent and asked him to check his identification. He spent two nights in the precinct, followed by two weeks in the county jail. At his preliminary examination, the crime victim stated that he was not the man who shot at him, so the case was dismissed. In the arrestee's federal civil rights lawsuit, claims against the city and county were dismissed. A federal appeals court rejected unlawful arrest claims as a matter of law based on similarities between the plaintiff and the true suspect, but allowed an unlawful detention claim to proceed against the second officer. A jury awarded the plaintiff $3.5 million in damages. A federal appeals court reversed the award, noting its prior decision that there was probable cause to arrest the plaintiff and the fact that the second officer handled the case for fewer than three hours, and could not be held liable for the continued detention. *Seales v. City of Detroit*, #19-1555, 959 F.3d 235 (6th Cir. 2020).

A seventh grade student met with the school principal and stated that she had been thinking about suicide for a month, and that "things at home like guns and knives" made her "want to hurt herself." A police officer assigned to the school was summoned and the officer called the student's father at work, who objected to the officer taking the minor to a hospital. While the father asked that the student be kept at school until he could get there, the officer instead took her to the hospital, where an emergency-room nurse conducted a mental-health assessment and concluded that she needed treatment. While the student did not appear intoxicated or disoriented, a doctor ordered a blood draw as part of the standard procedure for a mental evaluation. She resisted the blood draw, which tested negative for drugs. The doctor and other medical personnel talked to her about her suicidal thoughts. Her father later sued for unlawful detention. A federal appeals court ruled that the officer was entitled to qualified immunity. There was probable cause to fear that the student might hurt herself, so that a reasonable officer did not need the father's consent to take her to the hospital. He did not violate the Fourth Amendment by taking her to the hospital and authorizing the blood draw. *Machan v. Olney*, #18-1691, 958 F.3d 1212 (6th Cir. 2020).

Federal Tort Claims Act

A federal Alcohol Tobacco and Firearms (ATF) agent shot and killed a man during an undercover operation. His estate and mother sued the U.S. government under the Federal Tort Claims Act (FTCA) and the agent under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, #301, 403 U.S. 388 (1971). The trial court held in favor of the United States and the jury returned a verdict in favor of the agent. A federal appeals court upheld the judgment on the FTCA claim, ruling that the trial court did not abuse its discretion in deciding not to draw a negative inference from deleted data against the United States. In this case, the trial court's finding that the ATF did not act in bad faith in destroying the original records of the shooting was supported by evidence, and plaintiff presented no evidence to support an inference that the original recordings were intentionally destroyed to suppress the truth or to contradict any of the government's evidence. The court also ruled that, in light of the facts, the trial court properly found that the agent reasonably believed deadly force was necessary to protect himself and the other agents from the vehicle and that he had acted reasonably by firing his service weapon at the occupants, resulting in the death of the decedent, an occupant who was not a suspect in the investigation. The appeals court further ruled that the FTCA judgment barred the plaintiff's *Bivens* action. *White v. U.S.*, #19-1878, 2020 U.S. App. Lexis 15270 (8th Cir.).

Firearms Related: Intentional Use

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

A motorist sued a deputy sheriff who shot him in his vehicle while stopped on the highway. A jury returned a verdict for the deputy, finding the use of deadly force justified. A federal appeals court upheld that result, rejecting an argument that the trial judge improperly failed to instruct the jury to consider whether the deputy unreasonably created the need for the use of force by his own reckless conduct. While the trial court incorrectly stated that the U.S. Supreme Court had recently overturned the Tenth Circuit's precedents requiring such an instruction in appropriate cases, the evidence in this case did not support the instruction. "No law, certainly no law clearly established at the time of the incident, suggests that

Wilson [the deputy] acted unreasonably up to and including the time that he exited his vehicle and approached Cox's [the plaintiff's] vehicle." *Cox v. Wilson*, #18-1353, 2020 U.S. App. Lexis 16436 (10th Cir.).

Officers from a city police department and two different county sheriff's departments pulled over a motorist for suspected vehicular burglary after a traffic chase. After he stopped and exited the car, the officers wrestled him to the ground. A county sheriff's deputy shot him in the back during the struggle. He subsequently died from the gunshot wound. His estate sued, claiming constitutional violations. The trial court denied each sheriff's motion to dismiss based on Eleventh Amendment immunity because, "with respect to local law enforcement activities, sheriffs are not arms of the state but rather of the county that they serve" in Kansas. A federal appeals court upheld this result, ruling that a county sheriff, acting in his law enforcement capacity, was a county actor under Kansas law, not a state actor, and thus not entitled to Eleventh Amendment immunity; In particular, they were county actors because Kansas law listed sheriffs under county officer provisions, Kansas sheriffs had substantial autonomy from the state in their law enforcement functions, the county controlled the sheriffs salary and books, and the sheriff was primarily concerned with local affairs. *Couser v. Gay*, #19-3088, 2020 U.S. App. Lexis 16386 (10th Cir.).

Firearms Related: Second Amendment Issues

A federal statute, 18 U.S.C. 922(g)(8), prohibits individuals subject to certain domestic violence protective orders from possessing firearms or ammunition for any purpose. A federal appeals court, rejecting a Second Amendment challenge, has ruled that the law is facially constitutional. Even assuming for purposes of argument that the conduct at issue -- the keeping and possessing of firearms by individuals subject to domestic protective orders -- falls within the Second Amendment right, the defendant's facial challenge failed. The court applied intermediate scrutiny and ruled that section 922(g)(8) is reasonably adapted to the government interest of reducing domestic gun abuse. The court also found that if the commonly understood definitions of terms in the protective order include acts involving "physical force," the protective order is sufficient to support a conviction under section 922(g)(8)(C)(ii). In this case, the jury plausibly found that the order satisfied the statute and the court declined to reverse the defendant's conviction on this basis. *U.S. v. McGinnis*, #19-10197, 956 F.3d 747 (5th Cir. 2020).

Medical Care

Parents of an 18-year-old son who died from self-inflicted head trauma while in police custody sued paramedics and police officers employed by the city for alleged deliberate indifference to their son's serious medical needs. He died after he violently bashed his head more than 40 times against the interior of a patrol car while being transported to jail. A federal appeals court ruled that the lawsuit complaint failed to allege facts that plausibly showed the paramedics' deliberate indifference. While the plaintiffs claimed that the paramedics failed to provide additional care, past precedent consistently recognized that deliberate indifference cannot be inferred merely from a negligent or even grossly negligent response to a substantial risk of serious harm. However, the appeals court found that there were genuine disputes of material fact as to whether officers acted with deliberate indifference to the decedent's serious medical needs. A reasonable jury, the court found, could conclude that the officers were either aware or should have been aware of these needs because it was so obvious, and did nothing to seek medical attention and even misstated the severity of his condition to jail personnel who could have sought help, only saying that he had been medically cleared. *Dyer v. Houston*, #19-10280, 955 F.3d 501 (5th Cir. 2020).

Search and Seizure: Home/Business

Repossession agent went to a couple's home to repossess a car, and a fight ensued. They summoned police. Three officers arrived and entered the home. One of them assisted the repossession agents in first trying to pry open the garage's electric door and subsequently in opening the garage's side door, after which the car was placed on a tow truck and driven away. In a lawsuit over the alleged unreasonable search and seizure of the car in the garage, the officer accused of assisting the repossession agents in retrieving the car stated that he "did not open Plaintiff's garage without consent, did not enter Plaintiff's garage without consent, and did not enter Plaintiff's vehicle or participate in its repossession." A federal appeals court overturned summary judgment for this officer, who was a police chief. The court found that there was evidence suggesting that he had assisted the agents in breaking into the garage, creating a genuine issue of material fact as to whether there had been an unconsented police entry into the garage. *Abu-Joudeh v. Schneider*, #19-1337, 954 F.3d 842 (6th Cir. 2020).

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Resources

Chemical Agents: Tear Gas: An Investigation, Amnesty International (2020).

COVID-19: Law in the Time of COVID-19, Columbia Law School (2020).

Electronic Control Weapons: Andreas Kuersten, Tasing the Constitution: Conducted Electrical Weapons, Other Forceful Arrest Means, and the Validity of Subsequent Constitutional Rights Waivers, 28 Wm. & Mary Bill Rts. J. 919 (2020).

Human Trafficking: Free and Low-Cost Strategies to Help Address Human Trafficking, by Margaret Henderson and Rick Hoffman, FBI Law Enforcement Bulletin (June 10, 2020).

Police Reform: President Donald Trump's Executive Order on Safe Policing for Safe Communities (June 16, 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

Defenses: Eleventh Amendment – See also, Firearms Related: Intentional Use (2nd case)
Firearms Related: Intentional Use – See also, Federal Tort Claims Act
First Amendment – See also, COVID-19

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