International Municipal Lawyers Association
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IMLA NEWS
Issue 8 – August 8, 2024

FEATURED CASE:

Ninth Circuit: Police Use of Bodyweight Alone Can Be Deadly Force
Scott v. Smith, No. 23-15480 (9th Cir. July 30, 2024)

The Ninth Circuit's decision establishes that police officers' use of bodyweight alone can constitute deadly force, making it easier to prove excessive force under the Fourth Amendment. The court held that officers violated the Plaintiff's constitutional rights by applying bodyweight to his back and neck for 1-2 minutes while he was prone and complying, causing his death. This extends the precedent set in *Drummond v. City of Anaheim*, clarifying that even a short duration of bodyweight compression can be unreasonable deadly force when combined with factors like prone positioning and signs of asphyxia.

Background: In the early morning of March 3, 2019, Roy Scott ("Scott") called 911 to report that there were assailants outside his apartment with a saw. Las Vegas Metropolitan Police Department Officers Kyle Smith and Theodore Huntsman responded to the call and were notified by dispatch that Scott was mentally ill. When the officers arrived, Scott was distressed and hallucinating. He yelled for the officers to break down his door, but they did not do so. The officers noted Scott appeared to be mentally ill. When Scott eventually opened the door, he held a metal pipe which he dropped when the officers asked him to do so. He also produced a knife from his pocket and handed it to the officers handle-side out.

The officers ordered Scott to face a wall and shined a flashlight at him. Scott told them the light bothered him and that he had paranoid schizophrenia. Although Scott was complying with commands and not acting threateningly, the officers grabbed his arms and pulled him to the ground. Officer Huntsman put his bodyweight on Scott's back and neck for 1-2 minutes while Scott's pleas became increasingly incoherent and breathless. Shortly after, Scott lost consciousness and was later pronounced dead.

Scott's daughter Rochelle and the administrator of his estate sued Officers Smith and Huntsman and the Las Vegas Police Department under 42 U.S.C. § 1983. They alleged the officers violated Scott's Fourth Amendment right to be free from excessive force and Rochelle's Fourteenth Amendment right

to familial association. The district court denied the officers' motion for summary judgment on the basis of qualified immunity for both claims. The officers appealed.

Questions of Law:

1. Viewing the facts in the light most favorable to the plaintiffs, did Officers Smith and Huntsman violate Scott's Fourth Amendment right to be free from excessive force?
2. If so, was that constitutional right clearly established at the time of the violation?
3. Viewing the facts in the light most favorable to the plaintiffs, did the officers violate Rochelle Scott's Fourteenth Amendment right to familial association?
4. If so, was that right clearly established at the time of the violation?

Holdings:

1. Yes, viewing the facts favorably to the plaintiffs, the officers violated Scott's Fourth Amendment rights by using deadly force that was not justified under the circumstances.
2. Yes, Scott's Fourth Amendment right to be free from the deadly force used in this case was clearly established under Ninth Circuit precedent as of March 2019.
3. Yes, viewing the facts favorably to the plaintiffs, the officers acted with deliberate indifference in violation of Rochelle Scott's Fourteenth Amendment right to familial association.
4. No, while the officers violated Rochelle's Fourteenth Amendment rights, that specific right was not clearly established in the Ninth Circuit as of March 2019.

Analysis: Addressing the Fourth Amendment claim first, the court considered the type and amount of force used, the government interests at stake, and the balance between the two. The bodyweight force used by Officer Huntsman, which allegedly caused Scott's death by asphyxia, constituted deadly force. The government's interest in using force was limited because Scott was not suspected of a crime, was complying with commands, and did not pose an apparent threat. Viewing the facts favorably to the plaintiffs, the deadly force used was not justified by the government interests.

This right was clearly established under the 2003 Ninth Circuit case *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), which held it was excessive to use bodyweight force on the back and neck of a prone, mentally ill individual who was not suspected of a crime. Though there were some factual differences between the cases, *Drummond* gave fair notice that the officers' alleged conduct would be unconstitutional.

On the Fourteenth Amendment claim, the court found that, construing the facts favorably to the plaintiffs, the officers had time to deliberate and acted with deliberate indifference, which shocks the conscience and violates the right to familial association. However, this right was not clearly established with sufficient specificity as of March 2019, so the officers were entitled to qualified immunity on this claim only.

In sum, the Ninth Circuit affirmed the denial of qualified immunity on the Fourth Amendment claim but reversed on the Fourteenth Amendment claim based on the clearly established prong. The case was remanded for further proceedings.

The Ninth Circuit's decision establishes the precedent in the circuit regarding when police use of bodyweight alone can constitute deadly force for purposes of analyzing whether such force is excessive under the Fourth Amendment.
Prior to *Scott*, the Ninth Circuit had held in *Drummond*, that officers used unconstitutionally excessive force when they pressed their weight on the back and neck of a prone, handcuffed, mentally ill individual who was not suspected of a crime for a prolonged period. *Drummond*

established that bodyweight force in those circumstances could violate the Fourth Amendment, but it did not explicitly hold that bodyweight alone, apart from other types of force, constitutes deadly force.

In *Scott*, the court clarified and extended *Drummond* by expressly recognizing that use of bodyweight, without more, can be deadly force. The court explained that deadly force is "force that creates a substantial risk of causing death or serious bodily injury," citing *Smith v. City of Hemet*, 394 F.3d 689, 706 (9th Cir. 2005). Applying this definition, the court held that Officer Huntsman's alleged conduct of putting his bodyweight on Scott's back and neck for one to two minutes while Scott's pleas became increasingly incoherent and breathless could be found by a jury to constitute deadly force.

This holding is significant because it establishes that bodyweight alone may be objectively unreasonable where it creates a substantial risk of death or serious injury, even absent other forceful conduct like strikes or baton use. By classifying extended bodyweight force as potentially deadly, the decision raises the bar for when such force can be justified, limiting it to situations where deadly force is warranted under *Tennessee v. Garner*, 471 U.S. 1 (1985), such as when the suspect poses an immediate danger to officers or others.

The court's holding is an extension of *Drummond*, but also a clarification of that prior precedent. Whereas Drummond focused on the quantum of force applied (the officers' entire bodyweight) and the prolonged duration, Scott emphasizes that even a shorter duration (one to two minutes) of uninterrupted bodyweight compression can be deadly force when combined with risk factors like prone positioning and evidence the suspect is having trouble breathing.

Scott v. Smith

SHORT SUMMARIES:

3rd Circuit – Covid – Vaccine Mandates – Religious Exemption – First Amendment

The District Attorney for Philadelphia decided to implement a Covid policy that differed from that of the city (of course the city can get stuck with liability for that decision). A new hire at will employee sought a religious exemption. The DA's policy morphed during the course of this process from one allowing religious exemptions to one denying all religious exemptions. The lower court found for the DA, but the panel on appeal found some factual disputes that it believes requires a jury's review; those were statements made by the DA that might reflect anti-religious bias and on which basis did the DA evaluate the exemption request (either the no exemption policy or the individualized review policy).

Spivack v. Philadelphia

4th Circuit – Videos at Motion to Dismiss stage

The case arose when an officer stopped a stolen car with several occupants inside. Once stopped, the car again pulled away. The officer attempted to block the path of the car with his patrol car. The driver of the car attempted to flee and the officer fired one shot through the windshield then three

through the passenger side window striking the driver and killing him. Lower court dismisses the excessive force claim based on the officer's video evidence. Panel determines that the Circuit had not previously considered use of video evidence to defend a claim via a motion to dismiss but only on summary judgment. Then the court found that to award judgment the video must "blatantly contradict" the Plaintiff's evidence. The panel concludes that a similar standard should apply to motions to dismiss and finds that the video in this case did not blatantly contradict the Plaintiff's claims. As noted in an earlier enews – this is not the old Fourth Circuit.

Doriety v. Sletten

6th Circuit – Traffic Tickets – First Amendment Retaliation – Etc.

Somewhat reminiscent of the infamous confrontation between Scottie Sheffler and a police officer at the US Open, this case arose when a man seeing a police car with lights on parked diagonally across a highway proceeded to go around the police car in the other lane. Stopped almost immediately by a patrol officer on foot, the man was ticketed for entering an area of a fatal accident and not yielding. The man vehemently argued with he officer that the police should have blocked both lanes if that's what they intended. Things get a little more weird when the notice for court shows up with a different charge from that on the ticket. The man emails the prosecuting attorney and explains. The prosecuting attorney does two things, he dismisses the ticket and advises the officers to issue another ticket which they do. The lower court refuses to dismiss that ticket and the man appeals. The prosecuting attorney does not respond to the appeal and the appeal is therefor successful and now, he files suit. The lower court dismisses the claims and the panel affirms. Issuing a traffic citation under the circumstances "a police officer does not commit extreme and outrageous conduct by issuing a traffic ticket." This quote is in context of the case as I'm sure there are circumstances when issuing a traffic ticket could be pretty outrageous.

Susselman v. Washentaw Sheriff's Department

6th Circuit – Jail Suicide

As Oscar Wilde penned, and I paraphrase, jails are not nice places. Jail suicides are really tough cases. In this case the facts reflected that the ultimate perpetrator of her own death told jail staff numerous times that she was not suicidal and little evidence pointed to contradictory facts. Ultimately, she killed herself. As with most of these cases they are very fact dependent and you'll need to read the case for more, but clearly no deliberate indifference to the inmate's well being by staff.

Campbell v. Riahi

As an aside, the jail suicide case somewhat buttresses the ADA case by reflecting the importance of staffing and awareness at all times.

6th Circuit – Facebook Search –Limitations- First Amendment retaliation – Child Protection – Lawyers on the edge

In this case an attorney in private practice developed a practice representing families and children in child protective services actions. She was hired to represent a mother and child in a matter under investigation by CPS. An order was issued placing custody of the child in the custody of the department. The attorney assisted the mother and child in hiding from the authorities. An officer who had seen posts by the attorney previously sought a warrant to search her Facebook records. Ultimately, the attorney and mother were indicted and tried for their conduct and found guilty, but on appeal due to a technicality, those convictions were reversed. The attorney sued for various claims, among them she claimed the search of her Facebook account came from the officer's knowledge of and retaliation for her speech therein. Long story short, the suit came over a year after the search of which she had knowledge under the Tennessee statute of limitations. The court concluded that the limitations period began to run once the Plaintiff knew of the search not one year from when she learned of the motivation for the search.

Reguli v. Russ, et al.

As an aside, I handled a number of CPS cases personally and supervised two offices that represented the department in all of these cases over a period of close to 30 years. These cases are highly charged and the attorneys often become personally invested in their cases. Recognizing the limits of representation and acting ethically can enter a murky area without constant introspection.

7th Circuit – Jails – ADA – Reasonable Accommodation

An employee of a local jail suffers from a number of disabling illnesses. She had these disabilities when hired and was assigned to handling duties less strenuous than those required of other correctional officers. Due to budget cuts and reduction in staffing all officers on light duty or otherwise being accommodated where offered the opportunity to submit medical documentation that they no longer needed accommodation or to submit a request for continued accommodation. The department concluded that it could no longer accommodate the individual due to its staffing situation. Suit followed and ultimately the lower court dismissed the action. On appeal the court concluded that under the unique circumstances of a jail that the requested accommodations were not reasonable. Of note in deciding the case the employee noted that her IBS required frequent and unplanned bathroom breaks for which she needed accommodation. On appeal she argued that if she would never leave her post without someone covering it. The court noted that the need for the accommodation and the argument conflict: a person who needs a bathroom break unplanned and frequent can hardly assure the employer that they will not need to leave their post unplanned and uncovered should a bout of the illness occur. Nice discussion of reasonableness in the jail context.

Leibas v. Dart

8th Circuit – Excessive Force – Police Chase – Knuckleheads

Often when a police officer shoots a person, the bullet is something of a lottery ticket. When is that bullet a losing ticket? This case offers that answer. The Plaintiff during a traffic stop was tased twice to no avail. He fled. "He attempted to steal a police cruiser, attempted to steal a truck, broke into a

nearby home, assaulted a resident, and stole a utility vehicle." The officer fired at the wheel of the vehicle but that did not stop the man. "During an ensuing chase, Mr. LeFever stole a pick-up truck and recklessly evaded officers from multiple jurisdictions for two hours, driving at speeds approaching 100 miles per hour, driving off-road, and driving the wrong direction on Interstate 80. An officer eventually rammed the truck as Mr. LeFever attempted to exit a field onto a gravel road. The truck then reversed toward other officers, and officers began shooting at the truck. The truck began to drive forward, and officers continued shooting. In total, officers fired 60 to 70 rounds toward the truck, with some shots fired as the truck eventually stopped moving. Mr. LeFever was hit and suffered permanent serious injuries." After being convicted of various crimes and apparently with time on his hands in prison, the man (LeFever) sued. He was pro se. The court dismissed his claims and also denied him appointed counsel. The panel affirmed.

LeFever v. Dawson County Sheriffs Department

8th Circuit – Jails – deliberate indifference to medical needs

A spider bit an inmate in a local jail. The inmate's hand and forearm swelled to the size of a small watermelon and was oozing pus. According to his suit, correctional officers saw his arm and did not respond to his request for medical care over a three day period. The lower court denied qualified immunity. The panel affirmed concluding any defense the officers could raise would be based on factual differences and that the law was clearly established that a person claiming medical stress similar to the Plaintiff would be entitled to medical attention.

Humes v. Jones

8th Circuit – Excessive Force – Probable Cause – Illegal Seizure

No good deed goes unpunished. Officers stopped a man for DUI but told him that he could call someone to pick him up and he'd be released. He called his father a 68 year old man. When the father arrived, something went wrong according to the pleadings. Briefly, the father arrived and got into an argument with one of the officers that escalated. Eventually, the police beat the father and arrested him for interfering with them and for resisting arrest. Once those matters were resolved, the man sued. The lower court denied qualified immunity and the panel affirmed recognizing that the issues were primarily fact based disputes. As to qualified immunity regarding the arrest, the court concluded that the law was clearly established directing that the officers should have known that they lacked probable cause. Bear in mind the stage of the case, as the court relies on the Plaintiff's allegations despite many variations in his deposition from the claim and other statements he made.

Setchfield v. St. Charles County

9th Circuit – Jails – Minimum Wage – Overtime

In response to a certified question, the panel concludes that inmates of a jail are not protected by the California labor laws requiring minimum wage and overtime. Something to bear in mind in every

state if you represent a jail. The case was a bit complicated by virtue of the fact that the inmates were working for a third party.

Ruelasv. County of Alameda

10th Circuit – Public Policy – Marijuana

Interesting case only from the standpoint of the conflict between federal law regarding the illegality of marijuana and state law allowing it. Can a federal court enforce a judgment regarding a marijuana business by ordering divestment (i.e., selling the stock). Maybe, maybe not, but let's let the lower court spend more of our precious tax dollars on it.

The Tenth Circuit addressed two consolidated appeals arising from a breach of contract dispute between partners in a marijuana business called Culta, LLC, licensed under Maryland law. In appeal No. 24-1049, the court affirmed the district court's denial of the defendants' motion for relief from the original judgment under Federal Rule of Civil Procedure 60(b)(4). The defendants had argued the judgment was void because the plaintiff lacked standing, as the requested relief would violate the Controlled Substances Act (CSA). The Tenth Circuit held that Rule 60(b)(4) did not provide relief on the basis that the contract was illegal, and the plaintiff had standing because he properly alleged injury, causation, and redressability.

In appeal No. 23-1211, the court vacated the district court's post-judgment order requiring the defendants to sell their interest in Culta and turn over the proceeds to satisfy the judgment. The Tenth Circuit rejected the defendants' arguments that the plaintiff lacked standing and that the district court exceeded its authority under Colorado Rule of Civil Procedure 69(g). However, the court remanded for the district court to consider whether its order would require the defendants to violate federal public policy by facilitating the marijuana business, and if so, whether the order should be modified or vacated on that basis.

Judge Baldock dissented, arguing the court should have dismissed the entire case because the underlying contract to establish the marijuana business was illegal under federal law. He contended Supreme Court precedent required federal courts to refuse to enforce illegal contracts sua sponte, without regard to waiver by the parties.

As an aside when the issue came up while I was on the Maryland Ethics Committee of whether federal law precluded attorneys under the model rules as adopted in Maryland from advising a marijuana business, the committee concluded that if state law allowed the business attorneys could counsel clients regarding the conduct of the business in Maryland with some limitations. It's a sticky wicket.

Bartch vs. Barch

11th Circuit – class actions – jails – converting traffic fines into jail

Several inmates in and former inmates of the Montgomery jail sued asserted class action claims regarding a program that deferred traffic fines to a third party probation monitor who after the folks failed to pay converted the fines into jail time. The District Court concluded that the inmates had

such differing circumstances that class certification requirements could not be met. The panel affirmed. The opinion starts: “Warning: This is going to get messy.”

Carter v. City of Montgomery

11th Circuit – Racial Discrimination - Employment

This case involves reverse discrimination in city employment. In an election campaign in a diverse community in Georgia, a person campaigning to be chair of the city council campaigned on platform seeking to rid the city of its white employees, including the city manager. Once the election was over, immediately upon taking office, the new commission voted on racial lines to terminate the city manager (the chair did not vote as there was not a tie to break) and the commissioners also told him that he could not return to his former position with the city because he “did not look like” them. The manager sued. The lower court dismissed the claim, but the panel reversed noting that there were sufficient facts alleged for the case to move forward.

McCarthy v. City of Cordele

Michigan Supreme Court – Tax Sales – Takings – Limitations – Retroactivity

With the Supreme Court concluding that withholding surplusage from a tax debtor violates the Takings Clause and with the Michigan Supreme Court having held the same a few years ago, this case arises to test the retroactivity of those decisions and the application of statutes of limitation. This case dealt with a statute that was passed to address the state supreme court decision holding that its tax sale procedures violated the state and federal constitutions. The statute provided that the issue of retroactivity would await the state supreme court’s decision and this was that decision. So, retroactive as to some claims, but not all and limitations also dependent on the timing of some claims. I’ve always found it a bit ironic that the government can impose a period of limitations on claims for takings, but that’s probably why I wasn’t fist in my class.

Shafer v. Kent County