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Office of Chief Counsel
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The Federal Law Enforcement -Informer-

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. You can join *The Informer* Mailing List, and have *The Informer* delivered directly to you via e-mail by clicking on the link below.

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The Informer – June 2024

Circuit Courts of Appeals

Fourth Circuit

Nazario v. Gutierrez: Whether alleged threats and conduct by Law Enforcement Officers towards an "uncooperative" suspect supported a finding of Qualified Immunity. The Graham factors were reviewed along with an additional factor of "Extent of Injury," recognized in the Fourth Circuit. **Interesting Quote**: "*A large portion of Nazario's 'noncompliance,' therefore, was in reaction to the Policemen's actions and inconsistent commands*." Pg. 3

Sixth Circuit

United States v. Kirtdoll: Whether errors in a search warrant were sufficient to violate the particularity requirement of the Fourth Amendment.
Interesting Quote: "*Other accurate descriptors were particular enough*"
Another Interesting Quote: "*The Fourth Amendment does not require perfection*." Pg. 8

Eighth Circuit

United States v. Hoeft: Whether police officers had sufficient reasonable suspicion to detain a suspect asleep in a car with a loaded crossbow on the passenger seat and search his vehicle. Pg. 10

Tenth Circuit

Flores v. Henderson: Whether a lower court's denial of Qualified Immunity for Officers who shot and killed a suspect, in a hoax hostage situation, who was armed with a machete, was appropriate. Specifically, did the Officers recklessly create the need to use deadly force. **Interesting Quote**: "*Danger Creation Theory"* Pg. 12

United States v. Daniels: Whether an anonymous tip and the defendant's observed actions were sufficient to establish Reasonable Suspicion. The lower court suppressed the evidence and the appellate court affirmed. **Interesting**

Quote: "*Overly generic tips, even if made in good faith, could give police excessive discretion to stop and search large numbers of citizens.*" Pg. 15

♦

FLETC Informer Webinar Schedule: July 2024

July 31, 2024, 2:30 EST – FLETC OCC Informer Webcast Series "Inspections" presented by James Stack, Attorney Advisor/Senior Instructor, Federal Law Enforcement Training Center, Charleston, South Carolina. The class will examine the distinction between Statutory Authority and Regulatory Authority and the basis to conduct inspections at Federal sites, courthouses, and regulated businesses.

Link

CASE SUMMARIES

Circuit Courts of Appeals

Fourth Circuit

Nazario v. Gutierrez, No. 23-1620 (4th Cir.2024)

This case involves an appeal by Caron Nazario, a US Army officer, who claimed he was mistreated by police officers Joe Gutierrez and Daniel Crocker during a traffic stop. The district court ruled that the officers had probable cause to arrest Nazario for three Virginia misdemeanor offenses, which Nazario contends was an error. This error, according to Nazario, resulted in the court incorrectly awarding the officers qualified immunity on his constitutional claims.

The United States Court of Appeals for the Fourth Circuit *reversed* the court's award of qualified immunity to defendant Gutierrez on Nazario's Fourth Amendment claim for an unreasonable seizure. The court found that the officers had probable cause for a traffic infraction and a misdemeanor obstruction of justice, but not for the misdemeanor offenses of "eluding" or "failure to obey a conservator of the peace." The court also ruled that *Gutierrez's threats against Nazario* were a clear violation of the Fourth Amendment, and thus, he was not entitled to qualified immunity on the unreasonable seizure claim.

Background: Lt. Nazario was driving on U.S. Route 460, through the Town of Windsor, Virginia. The Windsor Police Department is an unaccredited police agency. Early that evening, after dark, Nazario was driving a black 2020 Chevrolet Tahoe, which he had begun leasing approximately three months earlier. The dealership that was leasing the vehicle to Nazario had affixed a temporary license plate inside the vehicle's tinted rear window, in its upper right corner. As Lt. Nazario drove through Windsor, defendant Crocker of the Windsor Police Department was sitting beside Route 460 in his patrol car. At the time, Crocker was finishing a period of field training, under the supervision of defendant Gutierrez. As Nazario drove by, Crocker could not see a rear license plate being displayed, due not only to the tinted windows

but the fact that it was dark outside. And under Virginia law, a license plate "shall be attached to the front and the rear of the vehicle" and be in a position to be clearly visible." A violation of these statutory requirements, however, only constitutes a "traffic infraction," and it is not criminal in nature. Crocker turned in behind Lt. Nazario, illuminated his overhead blue lights, and initiated a traffic stop. Promptly after Crocker activated his blue lights, Nazario slowed his vehicle down to approximately 22 miles per hour, well below the posted speed limit of 35 miles per hour. Nazario continued to slow to 18 miles per hour. Officer Gutierrez was nearby and joined Crocker in following Nazario. While there were other places to pull over, Lt. Nazario identified the "most well-lighted space that [he] could see" as the location to pull over and stop. He did so because it was dark and a well-lit area would not only further police officer safety, but also his own. The first well-lit area was a BP gas station, located on the south side of Route 460, and when Nazario reached the BP station, he turned into its parking lot and parked his vehicle. From the time Crocker initiated the stop until Nazario had parked his vehicle in the BP station, approximately a minute and 40 seconds elapsed, and Nazario had travelled about a mile.

Crocker stepped out of his patrol vehicle, and *for reasons unclear*, decided to conduct a "felony" or "high-risk" traffic stop. Crocker immediately drew his service pistol and pointed it at Lt. Nazario's vehicle. Crocker admits that he had not witnessed a felony offense, but only "had suspicions" that a felony was occurring because an apparently new vehicle without a rear plate may be a stolen vehicle. Crocker also believed he had to prepare for the possibility that there were other people in the vehicle, or that the driver was preparing an attempt to "assassinate" him. Gutierrez also parked and stepped out of his patrol car. Gutierrez, like Crocker, raised his service weapon and pointed it at Lt. Nazario. In camera footage, Nazario's temporary rear license plate can be seen taped to the inside of his vehicle. Crocker also admitted that he saw the temporary license plate when he approached Nazario's vehicle. When Crocker drew his pistol, he yelled "Driver, roll the window down!" This was the first of a string of commands — some contradictory with one another — given by the Policemen and it was the beginning of an extended verbal exchange. Crocker commanded Lt. Nazario to place his hands outside the window, and after approximately 10 seconds, Nazario's clasped hands can be seen out of the window. Nazario then asks a question he oft-repeats during the

exchange — "What is going on?" Instead of answering the question, Crocker yelled for Lt. Nazario to both turn off the vehicle and put his hands outside the window. Within fifteen seconds, Nazario has complied with both those commands. Crocker then asks Nazario how many people are in the vehicle, and Nazario responds that it is just him. Nazario again asks Crocker and Gutierrez "What is going on?" and "Why are your weapons drawn?" Neither of the Policemen responded. Rather, Crocker begins commanding Nazario to open the car door and exit the vehicle. To exit the vehicle, Lt. Nazario first needed to bring his hands back inside the vehicle because he was wearing his seatbelt and his driver-side door was locked. Nazario kept his hands raised, sticking them outside the driver-side window, while continuing to calmly ask "What is going on?" Again, no answer is provided by the Policemen. At this point, Gutierrez joined in with Crocker's shouting. First, Gutierrez commands Nazario to get out of the vehicle, only to yell a few seconds later that Nazario is to keep his hands outside the window. Crocker offers similarly inconsistent commands. Both Policemen are still aiming their semiautomatic service pistols at Nazario. At this point, the Policemen have stepped aside from their patrol vehicles and are now walking toward Lt. Nazario's vehicle. Nazario continued to keep his hands outside of his window, and asks "I am serving this country, and this is how you are treating me?" At this distance, the Policemen could see that Nazario was in his camouflage battledress Army uniform. Gutierrez continued to order Lt. Nazario to get out of the vehicle. Nazario kept his hands raised and is still asking "What is going on?" Gutierrez then replied "What is going on is you are fixing to ride the lightning, son." Both of the Policemen continue to walk closer to Nazario's vehicle, getting closer to the driver-side window. Crocker keeps his gun drawn. Gutierrez switches to a taser. The Policemen continued to command Lt. Nazario to get out of the vehicle, while also ignoring Nazario's question about the purpose of the traffic stop. With his hands raised, Nazario tells the Policemen that he is "*honestly afraid to get out*." Before Nazario can explain why he is afraid, Gutierrez interrupts him by stating, "*Yeah, you should be*." Gutierrez then gets close enough to Nazario's vehicle to try and open the door, but it is locked. The Policemen continue yelling for Lt. Nazario to get out of the vehicle, and Nazario continues to ask about the purpose of the stop. Nazario also states that he does not need to step out of the vehicle because this is only a traffic stop. Gutierrez then grabs Nazario's arm. Nazario's response is to calmly state "Get your hands off me." Gutierrez releases Nazario's left arm and says that is "not a

problem," and takes out pepper spray and begins shaking up the container. Nazario flinches and tucks his head down, while keeping his hands outside the window. Gutierrez then returns to commanding Nazario to exit his vehicle. Crocker then comes up to the window, reaches into Lt. Nazario's vehicle, and begins attempting to unlock the vehicle's driver-side door. Right after this occurs, Gutierrez tells Crocker to back up, and Gutierrez sprays Nazario with pepper spray. Nazario blocks some of the pepper spray with his hands, but Gutierrez then sprays three more times, hitting Nazario directly in his face. Gutierrez continues with his commands to get out of the car, and Nazario continues to keep both of his hands visible. *Nazario explains that he does not want to reach into his car and unlock his seatbelt.* Eventually, Gutierrez opens the vehicle's driver-side door while Lt. Nazario keeps his hands raised. Nazario continues to express concern about reaching for his seatbelt while he is also being commanded to keep his hands raised. Gutierrez continues with his commands, and eventually Nazario explains that he is going to reach for his seatbelt. He does so, unbuckles, and starts to pivot out of the vehicle, with his eyes closed due to the pepper spray. Gutierrez orders Lt. Nazario to go "straight onto the ground," and before Nazario has his feet on the ground, Gutierrez grabs Nazario's arm. After Nazario stands outside the vehicle for approximately ten seconds — and after additional commands to get onto the ground — Gutierrez strikes his knee into Nazario's leg, while Crocker began to pull on Nazario's other arm. Lt. Nazario is then pushed to the ground, with his eyes still closed. The Policemen order Nazario — who is now on his hands and knees — to lie on his stomach. After approximately 40 seconds, Nazario lies on the ground and is handcuffed. At that point, approximately six minutes had elapsed since Nazario had parked his vehicle. Shortly after being handcuffed, the Policemen get Lt. Nazario standing again. They also cease their shouting and begin talking with Nazario. They ask Nazario if there are any guns in the vehicle, and he says yes. Gutierrez then asks why Nazario was not complying, and Nazario says that he complied by keeping his hands out of the vehicle. Gutierrez accused Nazario of refusing to pull over, and Nazario replied that he pulled over in a well-lit area for the safety of everyone, and that he respects police officers. Gutierrez says this is the "wrong answer." Gutierrez again asks Lt. Nazario why he did not pull over. In reply, Nazario acknowledges that there were earlier areas to pull over, but those areas were dark. Nazario did not think it was safe to stop earlier. Gutierrez replies that

pulling over at the BP station "was not the problem . . . the problem was when you refused to get out of the car."

The lower court awarded the Policemen qualified immunity on Lt. Nazario's claims for Unreasonable Seizure, Excessive Force.

Court's Analysis: Using the factors derived from Graham v. Connor, the court looked at the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight. Further, the court also considered a fourth factor — "the extent of the plaintiff's injuries."

(1) The first Graham factor addresses the severity of the crime at issue, and weighs in Lt. Nazario's favor. The Policemen had probable cause for a non-criminal, traffic infraction and a misdemeanor obstruction of justice. The traffic infraction created no public danger, and its severity was extremely minimal. Accordingly, the first Graham factor weighed in favor of Nazario.

(2) The second Graham factor addresses whether the suspect posed an immediate threat to the safety of the police officers or others. Until Gutierrez pepper sprayed Lt. Nazario, he had remained calm and was repeatedly asking simple questions about the purpose of being pulled over. Nazario never gesticulated wildly or reached into his vehicle. In fact, Nazario kept his hands in the universal position of surrender, offering no threat — verbal or otherwise — to the safety of the Policemen. The second Graham factor strongly weighed in favor of Nazario.

(3) The third Graham factor — whether Lt. Nazario was actively resisting arrest or attempting to evade — came down slightly in Nazario's favor. Again, in the light most favorable to Nazario, he was not eluding the Policemen and was merely pulling over at the first safe place to stop, the BP station. Additionally, Nazario was calm and did not indicate that he was going to flee, nor was he engaged in furtive movements. He had also parked and turned off his vehicle at the request of the Policemen. Even Nazario's failure to exit the vehicle upon request can be explained by the weighty safety concerns of having to lower his hands inside the vehicle in the presence of armed and excited police officers. Those facts strongly suggest that Nazario was not resisting arrest or attempting to evade the Policemen. Lt. Nazario, however, also engaged in behavior that is indicative of resistance. Early on, he argued with the Policemen that he did not have to exit the vehicle for a traffic stop.

Additionally, after stepping out of the vehicle, Nazario did not readily comply with the Policemen's commands to get on the ground, refusing to lie down on his stomach. Such conduct diminished the extent to which the third Graham factor weighs in favor of Nazario.

(4) Finally, the Court of Appeals assessed a fourth factor, as created by the 4th Circuit, the extent of Lt. Nazario's injuries. For starters, Nazario was subjected to four blasts of pepper spray, three of which were directly to his face. The record reveals very clearly that pepper spray is a potent chemical agent, the effects of which are immediate and intense — causing pain; inflammation of the eyes, nose, and throat; and loss of breath. Pepper spray will naturally produce psychological effects such as disorientation and fear. And Lt. Nazario experienced the full brunt of the pepper spray, experiencing a large swath of its adverse effects for well over a half hour. Those effects, however, were not permanent or particularly grievous, and therefore their injurious extent was found to be "slight." Nevertheless, Nazario's injuries were temporarily debilitating and painful. Thus, the fourth factor was somewhat in Nazario's favor. Looking at the four factors cumulatively, the Policemen's use of force — including their pepper spraying of a calm person who had his hands visible in a prolonged sign of surrender and compliance — was very excessive. On these facts, evaluated in the light most favorable to him, Lt. Nazario had a triable claim for a violation of the Fourth Amendment.

The district court's grant of Qualified Immunity was reversed.

For the Court's Opinion: Nazario v. Gutierrez, No. 23-1620 (4th Cir. 2024) :: Justia

Sixth Circuit

United States v. Kirtdoll, No.23-1585 (6th Cir. 2024)

This case regards Tommy Kirtdoll, who was under investigation by a multijurisdictional task force in Michigan for leading a drug-trafficking organization. After several undercover drug deals, the task force obtained a search warrant for Kirtdoll's house, which was described in detail in the warrant application. Upon executing the warrant, officers found drugs and

distribution equipment, leading to Kirtdoll's arrest and indictment on multiple drug offenses.

Kirtdoll challenged the validity of the search warrant, citing three errors: the address listed was not his, the tax identification number was incorrect, and the property owner's name was not his. He argued that these mistakes rendered the warrant unconstitutional due to *lack of particularity*, as required by the Fourth Amendment. The district court denied Kirtdoll's motion, ruling that the warrant's other accurate descriptors were *particular enough* to satisfy the Fourth Amendment.

Court's Analysis: The appeals court held that the Fourth Amendment does not require perfection in search warrants, but rather enough detail for the executing officer to *identify the intended place with reasonable effort*. The court found that despite the errors, the warrant contained three descriptors that indisputably applied *only* to Kirtdoll's house and clearly identified it as the premises to be searched. These included the house's geographic location, a detailed description of the house, and a unique identifier - a red star affixed to its west side. The court concluded that the warrant for Kirtdoll's house was *specific enough* to meet the Fourth Amendment's particularity requirement, and thus, the district court properly denied Kirtdoll's motion to suppress.

Specifically, the Fourth Amendment requires search warrants to particularly describe the place to be searched. That means they need enough detail for the executing officer to "ascertain and identify the place intended" with "reasonable effort." Steele v. United States. This requirement doesn't mandate perfection. Instead, the court asked whether the warrant was so flawed that it created a "reasonable probability" officers would search the wrong premises. That will almost never be the case when the warrant contains some information that "indisputably applies" only to the target premises, even if other descriptors in the warrant are inaccurate. This warrant sufficed because it contained three descriptors that indisputably applied *only* to Kirtdoll's house and clearly identified it as the premises to be searched.

First, the warrant unambiguously described the house's geographic location. It explained that the house was "the first structure on the north side of Lizzi Street" and was on the "east side of Carberry Road." The warrant also noted that Kirtdoll's front door faced south, and his driveway ran the same direction from the house to Lizzi Street. Thus, the warrant contained

"detailed directions" to Kirtdoll's house that couldn't have led officers anywhere else.

Second, the warrant gave a detailed description of Kirtdoll's house. It described the house as a "one-story, single-family dwelling" painted light blue with white trim. Courts have repeatedly pointed to layout and color when upholding otherwise faulty search warrants. As in those cases, the warrant's inclusion of layout and color gave officers on the ground a clear picture of the target house. Thus, the warrant's description of Kirtdoll's house rendered the likelihood that officers would mistakenly search (the wrong address) "practically nil."

Finally, the warrant included a unique, unmistakable identifier. It stated that Kirtdoll's house had a red star affixed to its west side. Unique identifiers like decorations are especially informative; geographic directions can be unclear, and multiple houses in a neighborhood might look similar. But a unique decoration or lawn feature sets otherwise similar houses apart. The red star identified Kirtdoll's house with pinpoint precision.

The appeals court affirmed the district court's decision denying the motion to suppress.

For the Court's Opinion: United States v. Kirtdoll, No. 23-1585 (6th Cir. 2024) :: Justia

Eighth Circuit

United States v. Hoeft, No.23-2835 (8th Cir. 2024)

Around 9:45 one morning, three police officers responded to a call from the manager of a gated storage facility. The manager had reported that someone who "didn't belong there" was "passed out behind the wheel" of a small white pickup. Inside the gate, the officers saw a truck matching that description halfway down an alley of storage units and noticed that its lights were on. They parked their squad cars in a way that arguably blocked the alley, and they approached on foot. As the officers got closer, they saw Hoeft asleep in the driver's seat with a key in the ignition and a loaded crossbow on the passenger seat. One officer reached inside the open driver's-side window to make sure the truck was off, waking Hoeft up in the process. In what started as a friendly exchange, Hoeft told her that he was doing "better than average" and had just

stopped there to "take some crap out of the back." But things then escalated. The officer told Hoeft to step out of the truck because the crossbow made her nervous, but Hoeft refused, insisting that he had a storage unit there. So the officers tased him, dragged him out, and arrested him. Searching Hoeft and his truck, the officers found 4 baggies containing a total of about 70 grams of methamphetamine, some syringes, a scale, a .22 caliber handgun, and—of course—the crossbow.

While, Hoeft asserted four bases of appeal, this synopsis will only address the constitutionality of the detention and search. We start with Hoeft's argument that the district court should have suppressed the evidence found by the police because it was the fruit of an unconstitutional seizure. The Fourth Amendment does not forbid all searches and seizures; it only forbids unreasonable ones. Further, brief investigatory stops are reasonable if supported by "reasonable, articulable suspicion that a specific person is committing or is about to commit a crime." Terry v. Ohio. Hoeft claimed that the officers seized him by blocking the alley. Assuming, without deciding, that Hoeft was correct, the court still found the seizure to be reasonable. When the officers arrived, they knew about the manager's report that a trespasser was passed out behind the wheel of a small white truck, and they saw a truck that matched the description and appeared to be running. Based on these articulable facts, the officers had reasonable suspicion that Hoeft was trespassing and had ***physical control of a vehicle while intoxicated***. Even so, Hoeft argued that the stop became unreasonable when the officer ordered him out of the truck because his answers dispelled any earlier suspicion.

The court disagreed. The officers were not required to believe Hoeft's claim that he rented a unit there, and his self-assessment that he was doing better than average did not show that he was sober. Plus, the officers had a valid concern for their safety because Hoeft had a loaded crossbow at the ready. Under these circumstances, it was reasonable to order Hoeft out of the truck as they finished a brief investigation.

Historically, courts have found it reasonable to order driver out when an officer had reasonable suspicion the suspect was driving while intoxicated; Schoettle v. Jefferson Cnty. Additionally, courts have found it reasonable to order a driver

out of the vehicle when facts created a plausible concern for officer safety; United States v. Long

For the Court's Opinion: United States v. Hoeft, No. 23-2835 (8th Cir. 2024) :: Justia

Tenth Circuit

Flores v. Henderson, No. 23-1049 (10th Cir. 2024)

The case involves a lawsuit filed by the parents of Shamikle Jackson against four police officers for using unconstitutionally excessive force. Jackson had called 911, claiming that two people were dead inside an apartment and that he was holding others hostage. When the police arrived, they encountered Jackson's sister who informed them that Jackson was alone, unarmed, and might have mental health problems. However, as the officers proceeded to search the apartment, Jackson emerged from a bedroom with a machete and was shot and killed by the officers. The United States District Court for the District of Colorado denied the officers' motion for summary judgment based on qualified immunity. The court concluded that a reasonable jury could find that the officers *recklessly created the need to use deadly force*, thereby unreasonably violating Jackson's constitutional rights under clearly established law.

The United States Court of Appeals for the Tenth Circuit reversed the lower court's decision. The appellate court found that the officers had a split second to respond to a deadly threat posed by Jackson. Under these circumstances, it was not *clearly established* that the officers recklessly created a situation where the use of deadly force was necessary. Therefore, the officers were entitled to qualified immunity. The court also rejected the claim that the other officers failed to intervene to prevent the violation of Jackson's rights, as there was no underlying constitutional violation.

Court's Analysis: The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate *clearly established* statutory or *constitutional rights* of which a reasonable person would have known. It protects all but the plainly incompetent or those who knowingly violate the law.

Constitutional Violation: Here the Plaintiffs alleged Officer Henderson violated Mr. Jackson's Fourth Amendment rights by using excessive force against him. Specifically, they argue Officer Henderson's use of deadly force was excessive because he *recklessly created a situation* in which deadly force was necessary. But, the court's assessment of reasonableness must give allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

The Supreme Court provided three factors in Graham v. Connors to determine whether a use of force is reasonable. As such the court considered the severity of the crime at issue. Clearly, the situation self-reported by Mr. Jackson was a serious crime if true. While the officers developed some evidence from Mr. Jackson's sister, they had every reason to believe Mr. Jackson might pose a threat to himself or others.

The second Graham factor instructs the court to determine whether the suspect posed an immediate threat to the safety of the officers or others. This second factor weighs as the 'most important' and fact intensive factor in determining the objective reasonableness of an officer's use of force. This is particularly true in a deadly force case, because deadly force is justified only if a reasonable officer in the officer's position would have had cause to believe that there was a threat of serious physical harm to himself or others.

To determine the seriousness of a threat, the court must consider several non-exclusive factors, including: (1) whether the officers ordered the suspect to drop his weapon and whether the suspect complied with the order, (2) hostile motions made with the weapon toward the officer, (3) the distance separating the officer and the suspect, and (4) the manifest intentions of the suspect.

These factors all favor Officer Henderson at the time of the shooting: (1) Mr. Jackson refused to comply with police commands to come out and show his hands, (2) he charged at the officers with a machete, (3) he was within a few feet of the officers when he exited the room, and (4) his manifest intention was to cause harm.

However, while the plaintiffs concede the situation required deadly force when Mr. Jackson emerged from his room with a machete, the court's analysis was not

yet complete. Even though force was justified at the time it was deployed, several cases instructed the court in assessing the second Graham factor, **it must also consider whether an officer's "reckless or deliberate conduct during the seizure unreasonably created the need to use such force."**

The plaintiffs alleged Officer Henderson provoked the need to use deadly force. And the lower court determined plaintiffs "created a triable issue of fact as to whether the failure to employ de-escalation tactics to mitigate the risk of provoking a threat of deadly force against them was reckless under the second Graham prong." The lower court believed Officer Henderson should not have advanced rapidly down the hallway and into the back bedroom, but instead should have retreated or tried to talk with Mr. Jackson, after receiving the radio call that Mr. Jackson might have been alone, unarmed, and suffering from a mental illness.

This court, however, disagreed and concluded Officer Henderson did not recklessly create the need to use deadly force. It is not reckless for an officer to perform a "protective sweep" of a residence if reasonable grounds exist to believe there is "a threat to a civilian's safety." Further, "we cannot conclude that Officer Henderson's decision to proceed down the hallway to Mr. Jackson's bedroom was reckless." Officer Henderson acted under exigent circumstances because he reasonably saw an "immediate need" to enter and search Mr. Jackson's apartment "to protect the lives or safety of . . . others." Mr. Jackson's 911 call described a life-threatening emergency occurring inside the apartment. He claimed two people were dead, that he had a machete, and that his hostages only had a few minutes left. And when the officers arrived at the apartment his sister was not sure if anyone inside was hurt. Officer Henderson began his search of the apartment with information Mr. Jackson may pose a threat to someone inside or at least that someone may be hurt. When the officers received the radio call that Mr. Jackson was alone, unarmed, and mentally ill, Officer Henderson had to make a split-second judgment call—whether to credit this new and inconsistent information or not. A reasonable police officer, whether the new information was accurate or not, could have wanted to visibly confirm Mr. Jackson was secure and nobody else was in the bedroom before retreating. The circumstances would not alert every police officer it would be "reckless" to complete the search.

Importantly, plaintiffs pointed to no precedent that a reasonable officer would forgo a search armed with some knowledge of a possible murder or hostage situation even with some conflicting information. Officer Henderson's decision to continue down the hallway was not reckless. The risk that Mr. Jackson would rush out of the bedroom with a machete was certainly not known or obvious. Officer Henderson faced many unknowns, and it was reasonable to continue the investigation to confirm whether anyone in the apartment was hurt or in danger.

Mr. Jackson was certainly resisting a reasonable investigative detention—he refused to come out, told the officers they would have to come and get him, blocked his bedroom door when the officer tried to open it, and advanced toward the officers with a machete in hand. Given the totality of the circumstances, Officer Henderson's decision to proceed down the hallway was reasonable.

Failure to Intervene: Finally, the plaintiffs asserted that Officers Matthews, Hannon, and Orchard failed to intervene to prevent Officer Henderson's violation of Mr. Jackson's Fourth Amendment rights. That it was clearly established at the time of Mr. Jackson's death that "[a]n officer who fails to intervene to prevent a fellow officer's excessive use of force may be liable under § 1983." However, as the court held Officer Henderson did not violate Mr. Jackson's clearly established rights, it concluded there was no failure to intervene by the other officers.

For the Court's Opinion: Flores v. Henderson, No. 23-1049 (10th Cir. 2024) :: Justia

United States v. Daniels, No. 22-1378 (10th Cir. 22-1378)

Lyndell Daniels was detained by law enforcement officers who linked him to a stolen Glock firearm based on his name and subsequently his DNA. Daniels was charged as a felon in possession of a firearm. He moved to suppress the evidence as the fruit of an unlawful investigative detention, arguing that the officers had no reasonable suspicion to detain him. The district court agreed with Daniels and granted his motion. On appeal, the Tenth Circuit affirmed the district court's decision. The court found that the totality of the circumstances known to the officer when he detained Daniels did not amount to reasonable suspicion.

Background: On February 7, 2021, the Aurora Police Department received an anonymous call. The caller expressed concern over something happening in her apartment complex's parking lot: Three Black men, wearing dark hoodies and jeans, were intermittently taking guns in and out of their pockets and getting in and out of a dark SUV. The caller believed they were "getting ready to do something," but conceded that it was not an emergency and reported no illegality. The call was logged as a non-emergency "area watch." Aurora Police Officers William Idler and Glenn Snow were dispatched to the caller's apartment, located in a high-crime neighborhood of Aurora, Colorado. Officer Idler arrived first and identified what he assumed to be the reported dark SUV. Standing five to ten feet away from the SUV was Daniels. He was wearing a bright orange jumpsuit with a reflective strip and an orange hood under a black jacket. Officer Idler testified that as he approached, Daniels appeared to say something (which he could not hear) to the SUV. At that point, the SUV left the parking lot at a normal rate of speed. Officer Idler identified himself and ordered Daniels to put his hands up. Daniels immediately complied and was detained. Officer Idler acquired Daniels' name, ran a criminal background check, and discovered he was a convicted felon. Police separately followed the dark SUV. The car drove lawfully, but eventually ran a red light and was stopped. Within the vehicle, officers found four firearms, one of which was a stolen 9mm Glock 17. Using Daniels' name, law enforcement obtained a warrant for his DNA. Subsequent forensic testing of the DNA tied Daniels to the stolen Glock. A grand jury indicted Daniels on the sole count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Court's Analysis: The Fourth Amendment establishes a right to be free from "unreasonable searches and seizures." However, it also permits temporary detentions of individuals—so long as "the facts available to the officer *at the moment of the seizure or the search* 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." That is, to be "reasonable" a police officer's investigatory stop must be "justified at its inception." What is found after the stop cannot be used to justify the actual stop.

The issue at hand was whether Daniels' detention by Officer Idler was justified at its *inception*. "An investigatory detention is justified at its inception if the specific and articulable facts and rational inferences drawn from those facts give rise to a reasonable suspicion a specific person has or is committing a crime," or "that criminal activity 'may be afoot." United States v. Sokolow. Police

officers must have reasonable suspicion that criminal activity is, has, or is about to occur. Officers cannot rely on "inchoate and unparticularized suspicions or hunches." Sokolow.

Using a Totality of the Circumstance analysis the court reviewed several issues.

The 911 Call. A tip to the police, like a 911 call, can justify an investigatory stop if under the totality of the circumstances the tip furnishes both sufficient indicia of reliability and sufficient information to provide reasonable suspicion that criminal conduct is, has, or is about to occur. It considered:

(1) whether the informant reported contemporaneous, firsthand knowledge;

(2) whether the informant provided detailed information about the events observed;

(3) the informant's stated motivation for reporting the information; and

(4) whether the police were able to corroborate information provided by the informant

However, a bare report of an unknown, unaccountable informant, unaccompanied by "specific indicia of reliability" is insufficient to establish reasonable suspicion. In the case at hand, the tip alleged no criminal activity or dangerous behaviors; the caller only reported that guns were being intermittently taken in and out of pockets, and that the three Black men "look like they are getting ready to do something." This may be odd, but it is not obviously illegal. The described activity was *too generic*. Further, that criminal activity might be afoot does not give police carte blanche to stop everyone who happens to be nearby.

The Presence and Actions of the SUV. The court next considered the weight that should be given to the presence and actions of the dark SUV that was idling in the parking lot and then drove away (ostensibly at the direction of Daniels) as Officer Idler approached. The court found that the SUV and its actions were insufficient alone to establish reasonable suspicion. The SUV at issue was idling in front of Daniels' apartment complex as Officer Idler approached. But it was far from the only vehicle present. Officer Idler's bodycam shows at least three other cars idling in front of the complex; at least three cars leaving or driving through the lot; one car parked in a no-parking zone; and no open parking spots to be seen. In other words, the parking lot was packed and busy. In that context,

the court did not find the dark SUV's mere presence in the lot to be odd, much less suspicious. The bodycam footage shows two "dark color" SUVs, one black, the other burgundy, idling in the complex's lot, one right behind the other. "*Overly generic tips, even if made in good faith, could give police excessive discretion to stop and search large numbers of citizens.*"

The Time and Location. The court finally considered the location and time of Officer Idler's encounter with Daniels. It observed that the stop occurred in a "high crime area" of Aurora, "in the middle of the night," and concluded that those facts, although insufficient alone, could be considered in the totality of the circumstances analysis. Here, Officer Idler detained Daniels near midnight. But the evening in question was February 7, 2021, the night of the Super Bowl LV. An officer should have expected football fans celebrating (or commiserating about) the game's outcome late into the night. The time of day Officer Idler encountered Daniels is militated by the events of that day. Moreover, the district court found the parking lot was "well-lit," "densely populated," and "heavily trafficked." This further militated against finding reasonable suspicion, because any actions taken by the SUV's occupants (or Daniels) would be easily seen and quickly reported, which Officer Idler would have known.

As such, the court found that the officers did not have a reasonable suspicion that a crime was afoot and that Daniels was involved in that crime at the time the stop was initiated. The court affirmed the suppression of the evidence.

For the Court's Opinion: United States v. Daniels, No. 22-1378 (10th Cir. 2024) :: Justia