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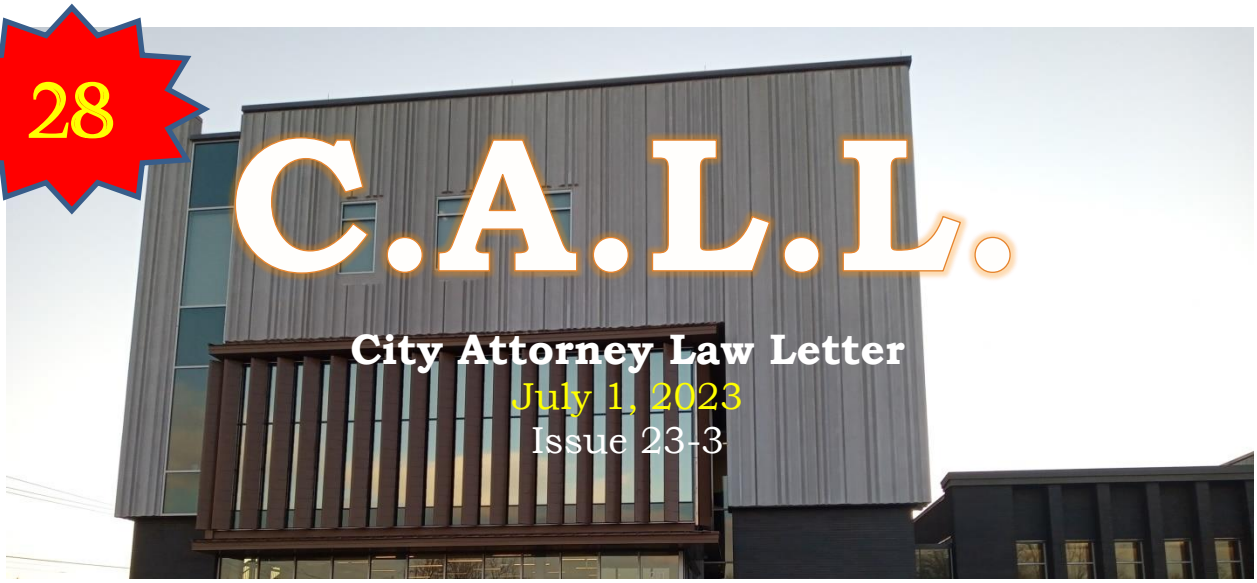

C.A.L.L.

City Attorney Law Letter

July 1, 2023
Issue 23-3

Dogs! Lethal Force! Search & Seizure!

In This Issue:

City Attorney Law Letter
Springdale City Attorney's Office
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Use of Force – K-9 Employment; Adequacy of Warning
Adams v. City of Cedar Rapids, 74 F.4th 935 (8th Cir. 2023)

A canine trained to "bite and hold" seized a juvenile suspect as part of a convenience store burglary investigation and subsequent car chase. The suspect was located under a metal trailer in the backyard of a residence near where the abandoned fleeing car was located. A K-9 had seized the juvenile suspect by biting and holding his arm.

A law suit was filed alleging excessive force, specifically that the K-9 warning was not adequate to give the juvenile time to peacefully surrender prior to releasing the dog. Settled law requires officers "to provide an adequate warning" when searching with a police dog trained to bite and hold. Adams v. City of Cedar Rapids, 74 F.4th 935 (8th Cir. 2023) quoting from Kuha v. City of Minnetonka, 365 F.3d 590 (8th Cir. 2003) and Szabla v. City of Brooklyn Park, 486 F.3d 385 (8th Cir. 2007) (en banc). In Szabla, the court held "a jury could properly find it objectively unreasonable to use a police dog trained in the bite and hold method without first giving the suspect a warning and opportunity for peaceful surrender." Szabla at 598.

In this case, Officer Trimble, the handler, did not issue any warnings. Other responding officers made announcements over their automobile public address systems. Officers Bergen and Carton each issued two warnings during their search:

> • At 1:03 a.m., Officer Bergen, over the squad car's PA system, announced: "Cedar Rapids Police K-9, subjects in the area surrender yourself now, you will be found and bit by the dog. Cedar Rapids Police K-9, subjects in the area surrender yourself now, you will be found and bit by the dog. This is your last and final warning to surrender yourself." [Issued from about 1124 Ellis Blvd. NW]
>
> • At 1:03 a.m., Officer Carton gave a similar K-9 warning over his squad car's PA system. [Issued from about the intersection of I Ave. and 4th Street NW]
>
> • At 1:12 a.m., Officer Carton gave a similar K-9 warning over his squad car's PA system. [Issued from about I Ave. and 9th St. NW]
>
> • At 1:12 a.m., Officer Bergen saw an identified suspect under a car in the driveway of a residence at 1117 9th St. NW. Officer Bergen shouted a K-9 warning at the suspect. The suspect surrendered and was arrested.
>
> Adams v. City of Cedar Rapids, 74 F.4th 935 (8th Cir. 2023)

A juvenile witness testified that he could hear the waring even further away than the suspect and the suspect testified at trial that he did not hear the warning. Of course. The trial court concluded that, given conflicting testimony as to whether the warning could be heard, the matter should be submitted to a jury. The Court also stated that the handler must issue a warning *personally*. Thus, qualified immunity was denied to the officers.

The dissent took issue with this. “Where the court errs, in my view, is in concluding the repeated amplified warnings in the search area were legally inadequate and that "Officer Trimble had fair notice from this court's precedent that the failure to give a warning and an opportunity to surrender violated clearly established law." Ante, at 7.” Adams v. City of Cedar Rapids, 74 F.4th 935 (8th Cir. 2023). However, the dissent is not the law. Handlers, be on notice.

The trial court ruling was affirmed. Qualified Immunity was denied.

Review by
David D. Phillips
Deputy City Attorney

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Search and Seizure - Home Entry and Exigent Circumstances
Cotten v. Miller, 74 F.4th 932 (8th Cir. 2023)

Minneapolis police received a call from a neighbor that stated the neighbor heard "yelling, screaming, and noise indicating that someone was being thrown around in the upstairs apartment." When police arrived at the duplex, they confirmed the story with the caller. On approaching the apartment, the two responding officers could hear a voice, but could not determine the exact nature of the utterances other than theycame from a child. Upon knocking on the door, the resident did not open the door but talked to officers through the door. The officer repeatedly told the resident to open the door, stating he would force entry if the door was not opened. Once inside, officers quickly saw that no one was injured and there were no signs of a struggle. The resident, Cotten, was patted down and arrested for possession of one bullet under Minnesota law. The charge was later dropped.

Cotten later filed a law suit under 42 U.S.C. §1983, the Civil Rights Act, alleging a Fourth Amendment violation involving warrantless entry into his home. At trial-court level, qualified immunity was denied. That ruling was appealed.

Settled law holds that warrantless searches of a home are presumptively unreasonable under the Fourth Amendment of the U.S. Constitution. However, warrantless searches may still be performed where exigent circumstances exist. "One exception permits police officers to enter a home without a warrant if the officers act with probable cause to believe that a crime has been committed and an objectively reasonable basis to believe that exigent circumstances exist." Cotten v. Miller, 74 F.4th 932 (8th Cir. 2023).

Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. The example of an exigent circumstance in this case was "the need to assist persons who are seriously injured or threatened with such injury." Id. In reviewing the sufficiency of justification, the court examines the totality of circumstances.

In this case, the court of appeals noted that the story, an allegation of domestic violence and confirmed at the scene by the caller, suggested the possibility of injury. The alleged acts took place less than ten minutes prior to police arrival. The allegation potentially involved a child. The Court held that "the information presented to the officers established probable cause to believe that domestic violence recently had occurred in the apartment of Cotten and Davis. Id. Further, "officers also reasonably could have believed that exigent circumstances existed because the putative suspect remained in the residence with a potential victim."

The District Court ruling was reversed. Qualified Immunity was granted.

Review by David D. Phillips, Deputy City Attorney

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TITLE: 8th Circuit Finds Warrantless Search of Property Justified Based on Third Party's Demonstration of Apparent Authority

FACTS TAKEN FROM THE CASE

On May 19, 2021, Michael Richards called 911 to report that the front door of the family-owned house across the street- where his stepson Melchizedek Hayes lived- was open and that no one was inside. Richards reported that Hayes had recently exhibited paranoid behavior and had left two mental health facilities against medical advice. Richards also reported that the day prior, in a conversation with Hayes, Hayes voiced having suicidal thoughts and stated to Richards that "I may as well just blow myself up." Richards reported that out of concern for Hayes well-being, he and his biological son decided to enter the house. Richards further reported that upon entering the house, he and his son found three Molotov cocktails, glass bottles, gasoline, and rags under a bathroom sink.

In response to Richard's 911 call, police officers arrived on scene and Richards told them that "our family lives across the road." Richards then led the officers into the house. Once inside, Richards directed the officers toward the bathroom where he had discovered three Molotov cocktails, gasoline, bottles, and rags. The officers then asked Richards how he had access to the house. Richards explained that he owned the property through his family business and had entered the house to perform a "safety inspection" after Hayes made threats to burn down the house and to kill family members. Officers continued to look through the house, and an officer found another Molotov cocktail in the kitchen. The officers seized the Molotov cocktails found in the bathroom and kitchen. Investigators determined that all four items were explosive devices and Hayes was charged with unlawful possession of a firearm under federal law. Hayes was ultimately convicted in U.S. District Court.

ARGUMENT, APPLICABLE LAW, AND DECISION BY THE ARKANSAS COURT OF APPEALS

On appeal, Hayes again argued that the evidence obtained from his house was done so in violation of his Fourth Amendment rights because the police failed to obtain a warrant prior to their search.

In making its ruling, the U.S. 8th Circuit revisited the general rules regarding warrantless searches of home. Warrantless searches of a person's home are generally prohibited under the

Fourth Amendment unless an exception to the warrant requirement applies. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). One exception allows police officers to search a home without a warrant if a third party who has common authority over the premises consents to the search. United States v. Matlock, 415 U.S. 164, 171 (1974). Common authority rests on mutual use of the property or joint access or control of the premises. Whether or not a third party actually possessed common authority, a warrantless search is justified "when an officer reasonably relies on a third party's demonstration of apparent authority." United States v. Amratiel, 622 F.3d 914, 915(8th Cir. 2010). Apparent authority exists if "the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." Rodriguez, 497 U.S. at 188 (internal quotations omitted).

Here, in this case, the Court concluded that the officers reasonably believed that Richards had authority to consent to the search of Haye's home. When officers arrived at Hayes residence, they knew Richards was the father and that he had entered the home and found "bomb-making material." Richards was also waiting outside when they arrived, told him he lived across the street, and then led them into the house without knocking or asking permission from anyone inside. That information alone, according to the Court, was sufficient to create a reasonable belief that Richards had authority to consent to a search of the home. Based off of that 'apparent authority', the officers were deemed lawfully present in the home when they seized the evidence under the plain view doctrine. Thus, the 8th Circuit rejected Hayes argument and his conviction was upheld.

Case: This case was decided by the U.S. Court of Appeals for the 8th Circuit on April 12, 2023. The case citation is United States v. Melchizedek Hayes, No. 22-3247 (8th Cir. 2023).

Case Review by
Deputy City Attorney
Garrett Harlan

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Lethal Force – Excessive Force and State-Created Danger
Estate of Brown v. West, 76 F.4th 1078 (8th Cir. 2023)

De'Angelo Brown was shot and killed by police officers as he sat with his hands up in the passenger seat of a car driven by a man who had led police on a long, high-speed chase in which a police car was rammed and an officer was run over. The car rammed a police vehicle head-on and as an officer attempted to open the door, the driver drove backward toward other officers while dragging the first officer. Fourteen rounds fired by police hit the car killing both occupants. The family of Brown sued in federal court on civil rights claims of excessive force and state-created danger.

It was undisputed that Brown was neither resisting nor driving during this incident.

In reviewing any excessive force claim, the court looks to "whether the amount of force used was objectively reasonable under the particular circumstances." Estate of Brown v. West, 76 F.4th 1078 (8th Cir. 2023). In this case, the vehicle had already inflicted substantial harm on one officer and was immanently threatening numerous others after displaying a reckless disregard for others throughout the chase. The court found employment of lethal force to be reasonable under these circumstances.

The issue of state-created danger was not appropriate in this case. State actors have a duty "to protect or care for citizens . . . when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." Id. This standard is normally associated with a person placed in custody. The trial court held that Brown was never in custody. Here, it was the driver that created the dangerous situation, not the police.

Summary judgment was granted to the defendant officers on the excessive force claim and qualified immunity was granted on the state-created danger claim. The case was dismissed.

Review by David D. Phillips, Deputy City Attorney

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Search and Seizure – Shooting Animals
Buschmann v. Kan. City Bd. of Police Comm'rs, 76 F.4th 1081 (8th Cir. 2023)

Two Kansas City police officers are dispatched to a possible domestic disturbance at a residence. The officers encountered a dog as the door to the home opened. The dog ran toward one of the officers. One officer fired two shots, killing the dog as the owner watched. The officers later determined that the disturbance was elsewhere and left.

The Fourth Amendment of the U.S. Constitution prohibits unreasonable seizures. Shooting an animal is a seizure under the Fourth Amendment. In analyzing such a seizure, the constitutional standard is reasonableness.

The Court had previously ruled that shooting "a passive dog in an enclosed area without warning" is unreasonable. Andrews v. City of West Branch, 454 F.3d 914, 918 (8th Cir. 2006). "[A]n officer may not "destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody."" Id.

Here, the court held that Andrews did not apply. "Given the behavior of the dog, and the failure of the owner to control the animal at the doorway, a reasonable officer could have perceived the dog as an imminent threat." Buschmann v. Kan. City Bd. of Police Comm'rs, 76 F.4th 1081 (8th Cir. 2023).

The Court noted that the decision in LeMay v. Mays, 18 F.4th 283 (8th Cir. 2021) is now the governing law, but was not in place at the time of this case. Also, the animals in Lemay were arguably non-threatening. In Lemay, the officers were denied qualified immunity. In this case, qualified immunity was granted.

Review by David D. Phillips, Deputy City Attorney

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City Attorney Law Letter

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