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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

By Don Hays

Month of March – 2020

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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Month of March – 2020- Premiere- Case #1

Elston v. County of Kane, 2020 WL 428940, January 28, 2020

An off-duty Deputy battered a juvenile. The juvenile sued both the Deputy and the County that employed him.

FACTS: The plaintiff and his friends were playing basketball at a park while the defendant, an off-duty sheriff's deputy for a neighboring County, was watching his child's soccer game on an adjacent field. When the plaintiff and his friends started heckling one another with salty language, the defendant confronted them and demanded that they stop using expletives. Flashing both his badge and gun from under his plainclothes, the defendant also warned the group to "watch who you're messing with."

When the boys refused to clean up their language, the defendant grabbed the plaintiff by the neck, threw him to the ground, and climbed on top of him. At some point during the struggle, the defendant tried to pull the plaintiff's arms behind his back, as though attempting to arrest him. Bystanders separated the defendant and the plaintiff, but not before the defendant could rip the plaintiff's shirt in an attempt to keep hold of him.

After the fight broke up, the defendant called 911 from his personal cell phone, identifying himself as a police officer in need of assistance. When the plaintiff's father, whom the plaintiff had called for help, arrived at the park, the defendant explained the incident by saying something along the lines of "I just lost it" or "I snapped." He then told the plaintiff's father that he was a police officer attempting to take the plaintiff into custody for disorderly conduct and that he intended to turn the plaintiff over to the local Police Department. The plaintiff was never charged with any offense, but the defendant pleaded guilty to violating the City's ordinance against battery.

The plaintiff then sued the defendant under both 42 U.S.C. § 1983 and Illinois state law, winning a default judgment and an award of $110,000 in compensatory damages. The plaintiff also sued the County that employed the defendant under Illinois's Tort Immunity Act, which provides that "[a] local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages ... for which it or an employee while acting within the scope of his employment is liable ... ." 745 ILCS 10/9-102.

The plaintiff maintained that the County was obligated to pay the judgment that he had obtained against the defendant because the defendant was acting within the scope of his employment during the assault. The

County moved for summary judgment, the district court granted the motion, and the plaintiff appealed that determination.

ISSUE: Did the District Court properly find in favor of the County?

ARGUMENT: The plaintiff argued on appeal that the District Court erred in rejecting his argument that the County was obligated to pay the judgment that he had obtained against the defendant because the defendant was acting within the scope of his employment during the assault.

THE LAW: The Illinois Tort Immunity Act provides that "[a] local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages ... for which it or an employee while acting within the scope of his employment is liable ... ." There are three necessary criteria for an employee's action to be within the scope of his employment.

First, the relevant conduct must be of the kind that the employee was employed to perform.

Second, the conduct must have occurred substantially within the time and space limits authorized by the employment.

And third, the conduct must have been motivated, at least in part, by a purpose to serve the employer.

Because "all three criteria ... must be met," failure to establish any one of them is sufficient to place conduct outside the scope of employment. Thus, to survive the County's motion for summary judgment, the plaintiff must show that a reasonable jury could find in his favor on all three criteria.

FINDINGS: On appeal, the parties disputed whether the Deputy's action satisfied the first criterion—i.e., whether the conduct was of the kind that Deputy would perform as a sheriff's deputy.

The Court of Appeals concluded that, for the sake of argument, it was willing to assume that it was. It determined that even so, the plaintiff's argument would still fail because the plaintiff failed to meet his burden on the second and third criteria.

Concerning the second criteria, the Court held that the plaintiff must show that there is a genuine dispute of material fact with respect to whether the Deputy's conduct occurred substantially within the time and space limits authorized by his employment.

In general, the Court noted that the fact that an employee is engaged in conduct outside of work hours, standing alone, is not dispositive. The determination is a matter of degree: it is dependent on the interaction between both the time and the place, in light of all the facts.

Here, according to the Court, that interaction led to only one conclusion: that the Deputy was not acting substantially within the time and space limits authorized by his employment. The Deputy was not on duty during his altercation with the plaintiff; he was spending his day off with his family, watching his child's soccer game. The Deputy was not in uniform when he attacked the plaintiff; he was dressed in a t-shirt and shorts. And the assault took place in one County, while the Deputy was authorized to act as a sheriff's deputy only in another County. Thus, the Deputy was neither on the clock nor within his jurisdiction when he attacked the plaintiff.

According to the Court, that, combined with the facts that the Deputy was in casual dress and on a family outing, dictated a finding against the plaintiff on this element.

Concerning the third criteria, the Court held that no reasonable jury could find for the plaintiff on the third criterion—that the Deputy's conduct was caused, at least in part, by a purpose to serve his Sheriff's Office.

The Court noted that it has characterized this inquiry as whether "the employee's motive, or at least *a* motive, in committing the tort was to serve his employer."

Further, the Court held that while a mixed motive may be enough to create liability, an employee who acts purely in his own personal interest cannot create liability for his employer.

According to the Court, the Deputy had no authority to make an arrest or take other actions to "keep the peace" during the incident. In fact, the Sheriff Office's policy prohibits off-duty deputies from making arrests or performing other enforcement actions outside the jurisdictional limits of their County.

The Court held that while it is true that an employee's actions do not automatically fall outside the scope of his employment simply because they are prohibited by his employer, a plaintiff must still show that the conduct, despite being nominally prohibited by the employer, was nonetheless undertaken to serve the employer's interests.

Here the Deputy's conduct did not advance any valid goal of his employer. His County Sheriff's Office had no interest in "maintaining the peace" in a *neighboring* county. And, according to the Court, it was not as though the Deputy was responding to an emergency—no one would characterize the use of expletives as a crisis.

The Court held that no reasonable jury could conclude that the Deputy's actions were motivated, even in part, by an intent to serve his employer's interests.

Instead, on his day off with his family, the Deputy acted out of personal animus to accost, threaten, and physically assault a teenager for using foul language within earshot of spectators and players at his child's soccer game.

The Court concluded by noting that the fact that the Deputy used his badge, gun, and training in an unauthorized manner in pursuit of that purely personal goal did not bring his conduct within the scope of his employment.

CONCLUSION: The Court declared that the District Court in this case properly entered judgement in favor of the County that employed the Deputy.

QUIZ QUESTIONS FOR THE Month of March – 2020- Premiere- Case #1

Elston v. County of Kane, 2020 WL 428940, January 28, 2020

1. As a general rule, does Illinois law require a public employer pay a tort judgment for compensatory damages obtained against an employee of that employer?
   a. Yes.
   b. No

2. Pursuant to Illinois law, a public employee must be acting within the scope of his employment before a public employer is obligated to pay a tort judgment for compensatory damages obtained against that employee.
   a. True.
   b. False.

3. The Court of Appeals in this case ruled that as a law enforcement officer, the deputy had the authority to arrest the juvenile or take other actions to "keep the peace" when he attacked the juvenile.
   a. True.
   b. False.

4. In this case, the deputy argued that he was acting within the scope of his employment as a Deputy Sheriff when he attacked the juvenile. Did the Court of Appeals agree with this argument?
   a. Yes.
   b. No.

QUIZ ANSWERS AND DISCUSSION FOR THE Month of March – 2020- Premiere- Case #1

Elston v. County of Kane, 2020 WL 428940, January 28, 2020

1. As a general rule, does Illinois law require a public employer pay a tort judgment for compensatory damages obtained against an employee of that employer?

   a. Yes. Illinois Tort Immunity Act provides: "[a] local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages ... for which it or an employee while acting within the scope of his employment is liable ... ." 745 ILCS 10/9-102.

2. Pursuant to Illinois law, a public employee must be acting within the scope of his employment before a public employer is obligated to pay a tort judgment for compensatory damages obtained against that employee.

   a. True. Illinois Tort Immunity Act provides: "[a] local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages ... for which it or an employee *while acting within the scope of his employment* is liable ... ." 745 ILCS 10/9-102.

3. The Court of Appeals in this case ruled that as a law enforcement officer, the deputy had the authority to arrest the juvenile or take other actions to "keep the peace" when he attacked the juvenile.

   b. False. According to the Court in this case: "(the deputy) had no authority to make an arrest or take other actions to "keep the peace" during the incident. The Court noted that the policy of the Office that employed the Deputy prohibits off-duty deputies from making arrests or performing other enforcement actions outside the jurisdictional limits of their County.

4. In this case, the deputy argued that he was acting within the scope of his employment as a Deputy Sheriff when he attacked the juvenile. Did the Court of Appeals agree with this argument?

   b. No. The Court held: "The fact that the Deputy used his badge, gun, and training in an unauthorized manner in pursuit of that purely personal goal does not bring his conduct within the scope of his employment."

LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Month of March - 2020 - Premiere – Case #2

People v. Telly Flunder, 2019 IL App (1st) 171635, December 26, 2019

Two Officers speak with a person who is stopped at a gas station. The Officers frisk the person and find a gun.

FACTS: Two Officers were in plain clothes and driving an unmarked vehicle when they saw Flunder standing next to a vehicle at a gas station. The vehicle was by a gas pump, and Flunder was standing by the driver's side, which was the side away from the pump. The officers "pulled up and asked him his business" at the gas station and asked if the vehicle belonged to him. Flunder replied that the vehicle belonged to his cousin, and an Officer asked if he had a driver's license.

According to the Officers, during this conversation, Flunder "began to move around, fidget with his clothes; and at one point he bent out of sight" of the officers. (Unfortunately, the Officers admitted that, in both their arrest reports and the case incident reports that they prepared, they did not state either that Flunder was moving around a lot or that he appeared nervous. The Officers also admitted that they had no information that Flunder or his vehicle was involved in any recent criminal activity.)

Flunder 's vehicle was located between him and the officers, such that they could not observe him when he bent down. An Officer explained that, "[d]ue to the safety issue," he walked around to Flunder's side of the vehicle and performed a protective pat-down of Flunder. During the pat-down, the Officer felt what he believed to be a gun in Flunder's pants pocket and asked him what it was. Flunder replied that it was "a little pea shooter."

The Officer understood from that statement that the object was a gun. He then reached into Flunder's pocket and retrieved a gun that was 2 inches by 4 inches in size. The .38 caliber gun held two bullets.

Flunder was charged with a weapons violation and moved to suppress. The trial court denied his motion and, following his conviction, Flunder brought this appeal.

ISSUE: Did the trial court err in denying Flunder's motion to suppress?

ARGUMENT: On appeal, Flunder argued that the trial court erred by failing to grant his motion to quash his arrest and suppress the gun seized from him.

THE LAW: Both the Illinois Constitution and the fourth amendment of the United States Constitution protect citizens from unreasonable searches and seizures by police officers.

"[T]he 'essential purpose' of the fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials," such as police officers. Encounters between police officers and citizens have been divided by the courts into three tiers:
(1) arrests, which must be supported by probable cause;]

(2) brief investigative detentions, commonly referred to as "*Terry* stops," which must be supported by a police officer's reasonable, articulable suspicion of criminal activity; and

(3) consensual encounters that involve no coercion by the police and, thus, do not implicate the fourth amendment.

Pursuant to the landmark case of *Terry v. Ohio*, 392 U.S. 1, (1968), a police officer may conduct a brief, investigatory detention when he or she has a reasonable suspicion that a person is committing, is about to commit, or has committed a criminal offense. The officer's reasonable suspicion must be more than a hunch and must be supported by specific and articulable facts.

When reviewing the officer's action, a court will apply an objective standard, rather than a subjective standard.

Thus, the question on review is whether the facts known to the officer at the time would lead a reasonably prudent person in the same circumstances to believe that the action was appropriate.

After making a lawful stop, a police officer may perform a frisk or protective pat-down search if he or she has a reasonable articulable suspicion that the person stopped is presently armed and dangerous. "[P]resently armed" is not enough, particularly since one now has the right to carry concealed arms, if one has a concealed carry card.

The officer must also reasonably believe that the person is presently dangerous. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."

FINDINGS: The appellate court held that this case presents two competing concerns. On the one hand, police officers cannot approach any African American male who is pumping gas and ask for his driver's license simply because there were shootings in the area during the prior two weeks, when the officers do not have any particularized suspicion about him. Otherwise, the Court concluded, in addition to "Driving While Black," it would also have "pumping gas while black."

On the other hand, the People argued that the police are allowed to engage in voluntary, consensual encounters, and if they become reasonably fearful for their safety during such an encounter, they should be able to do a protective pat-down.

The appellate court disagreed with the argument of the People. In explanation, the Court noted that an Illinois Supreme Court justice observed, that it is "actually a hotly contested issue in the federal courts," whether the police may engage in a protective weapons search for their own safety during a voluntary encounter and without reasonable suspicion.

This Court then noted that it had previously rejected the People's position in a case that was factually similar to this. *People v. F.J.*, 315 Ill. App. 3d 1053, (2000) (a frisk presupposes the right to make a stop).

In that case, the court found that an officer may conduct a protective search only if he has reason to believe that the suspect is armed and dangerous "*and*" if he is entitled to make a stop.

It explained: "The reason a frisk presupposes the right to make a stop is that, as Justice Harlan pointed out in his *Terry* concurrence, if 'a policeman has a right * * * to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence.' "

Further, the Court explained, "[I]f an officer, lacking the quantum of suspicion required by *Terry* to make a forcible stop, instead conducts a non-seizure field interrogation, he may not frisk the person interrogated upon suspicion that he is armed; in such a case the officer may protect himself by not engaging in the confrontation."

Consequently, the Court held that the officer in this case could have protected himself simply by not walking around the vehicle to engage in a confrontation.

Second, the Court discussed whether the Officers' fear for their safety (their justification for the frisk) was reasonable. Not too surprisingly, it concluded that it was not, based on the facts known to the officer at the time. The officer stated that he had just asked Flunder for his driver's license.

The Court held that it was stating the obvious to observe that a lot of men keep their driver's license in their pants pocket. As one would expect, Flunder was reaching toward his pants pocket. The officer also stated that Flunder appeared nervous.

However, according to the Court, the average person would be surprised to be parked at a gas station in the middle of the afternoon and be asked what their "business" was at a gas pump.

The Court noted that there was no evidence that the officers identified themselves as police officers; and the officer stated that they were neither in uniform nor in a marked police vehicle; and that alone, concluded the Court, would make any responsible person nervous.

The Court also noted that when the police initially questioned him, Flunder's vehicle was between them, who were on one side of it, and Flunder who was on the other side. Although the officer stated that he feared for his safety when Flunder bent down, the officer walked around Flunder's vehicle, in order to move closer to him.

After walking around the vehicle, the officer was standing directly in front of Flunder; however, he did not state that he drew his weapon, and he did not recall whether he even asked Flunder to place his hands in the air or on the vehicle.

The Court held that there was no evidence that Flunder continued to fidget or reach toward his pocket once the officer had walked around the vehicle and toward him. Finally, Flunder did not run or attempt to flee, but simply stood there.

The Court concluded that it could not find that the officer's fear was reasonable on the facts of this case, where, as far as the officer knew, this was a random person at a gas pump on a weekday afternoon, where he answered the officer's questions, where he did not try to flee, where he reached for his pocket as the officer

asked for his driver's license, where there was no evidence that he reached for his pocket after the officer walked toward him, where the entire conversation prior to the pat-down lasted only 15 seconds, where Flunder honestly admitted possession of a gun, and where the officer did not ask him if he possessed a FOID or concealed carry card prior to the frisk.

CONCLUSION: The Court concluded by declaring that while the suppression of the gun in this case may seem like a drastic remedy where a gun was actually found in Flunder.

However, the Court held that it did not know how many men, if any, were stopped before one was found with a gun because only the ones who are charged move to suppress.

The Court declared that the Fourth Amendment was a blunt-edged sword, but it protects the privacy of us all, both the ones with contraband and the ones without it.

QUIZ QUESTIONS FOR THE Month of March - 2020 - Premiere – Case #2

People v. Telly Flunder, 2019 IL App (1st) 171635, December 26, 2019

1. Illinois law provides that a police officer may conduct a brief, investigatory detention when he or she has a reasonable suspicion that a person is committing, is about to commit, or has committed a criminal offense.
   a. True.
   b. False.

2. After making a lawful stop, can a police officer ever legally perform a frisk or protective pat-down search of the suspect.
   a. Yes.
   b. No

3. In this case, the People argued that during his encounter with Flunder, an Officer developed a fear that Flunder might be armed and dangerous. Did the appellate court find that the fear that the Officer developed in this case was reasonable under these circumstances?
   a. Yes.
   b. No

4. The People argued that the police may properly engage in voluntary, consensual encounters, and if they become reasonably fearful for their safety during such an encounter, they are legally authorized to conduct a protective pat-down. The appellate court disagreed with this argument.
   a. True.
   b. False.

QUIZ QUESTIONS FOR THE Month of March - 2020 - Premiere – Case #2

People v. Telly Flunder, 2019 IL App (1st) 171635, December 26, 2019

1. Illinois law provides that a police officer may conduct a brief, investigatory detention when he or she has a reasonable suspicion that a person is committing, is about to commit, or has committed a criminal offense.

   a. True. The Court held: "Pursuant to the landmark case of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), a police officer may conduct a brief, investigatory detention when he or she has a reasonable suspicion that a person is committing, is about to commit, or has committed a criminal offense. *Williams*, 2016 IL App (1st) 132615, ¶ 44, 407 Ill. Dec. 73, 62 N.E.3d 318; *Ciborowski*, 2016 IL App (1st) 143352, ¶ 77, 404 Ill. Dec. 163, 55 N.E.3d 259.

2. After making a lawful stop, can a police officer ever legally perform a frisk or protective pat-down search of the suspect.

   a. Yes. The Court held: "After making a lawful stop, a police officer may perform a frisk or protective pat-down search if he or she has a reasonable articulable suspicion that the person stopped is presently armed and dangerous. *People v. Surles*, 2011 IL App (1st) 100068, ¶ 35, 357 Ill. Dec. 559, 963 N.E.2d 957.

3. In this case, the People argued that during his encounter with Flunder, an Officer developed a fear that Flunder might be armed and dangerous. Did the appellate court find that the fear that the Officer developed in this case was reasonable under these circumstances?

   b. No. The Court held that the Officer did not have a reasonable fear for his safety to justify protective pat-down search of Flunder, who was merely standing next to a motor vehicle at a gas pump in the middle of the afternoon.

4. The People argued that the police may properly engage in voluntary, consensual encounters, and if they become reasonably fearful for their safety during such an encounter, they are legally authorized to conduct a protective pat-down. The appellate court disagreed with this argument.

   a. True. The Court held that an officer may conduct a protective search only if he has reason to believe that the suspect is armed and dangerous "*and*" if he is entitled to make a stop.