Office of the State Attorney
Eighth Judicial Circuit

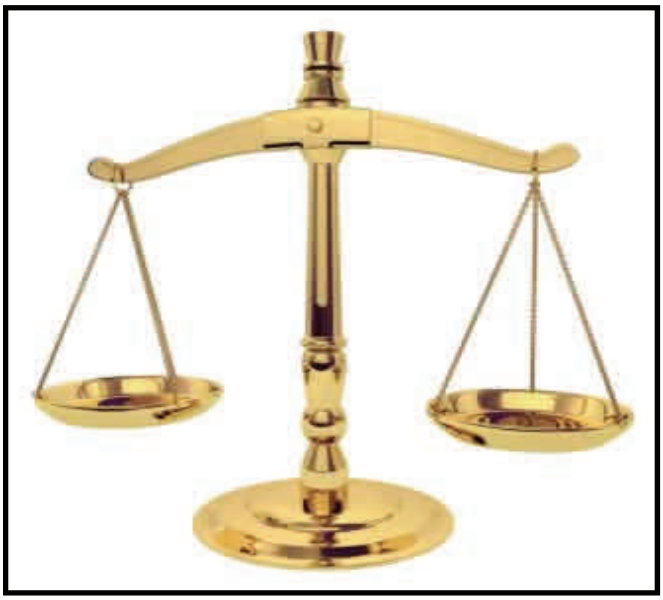
Law Enforcement Newsletter

JANUARY 2020

A Message from Bill Cervone State Attorney

As we start another new year I wish all of you the best for 2020, including safety in your work. All of us understand the risks and sacrifices involved in a law enforcement career, and each of you have my thanks and admiration for the job you continue to do.

The new year brings with it yet another legislative session, this year starting in January, and that means renewed "reform" efforts, especially in the Florida Senate. As I've said before in multiple forums, the concept of criminal justice reform, while not without merit, is one that calls from a cautious and prudent approach. Certainly, there are always improvements that can be made but any concept of simply changing things in pursuit of some social agenda in response to a supposedly broken criminal justice system is wrong and serves to provide no justice, especially to victims and probably to society as a whole. In particular, the positions taken by some reform minded prosecutors across the county who blatantly declare that they won't prosecute certain types of crimes flies in the face of what I believe a prosecutor's obligation to be and is something that is not going to happen here.



I say all of this to again suggest that the entire law enforcement community has an obligation to not just be aware of proposed legislation but to actively be involved in the legislative process. You can do this through

INSIDE THIS ISSUE

We're on the web:
Www.sao8.org

REMINDER:
LAW ENFORCEMENT NEWSLETTER NOW ON-LINE

The Law Enforcement Newsletter is now available on-line, including old issues beginning with calendar year 2000. To access the Law Enforcement Newsletter go to the SAO website at <www.sao8.org> and click on the "Law Enforcement Newsletter" box.

Any changes in agency email addresses should be reported to our office at clendeninp@sao8.org.

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Legal Bulletin, please call Chief Investigator Paul Clendenin at the SAO at 352-374-3670.

Continued: Message from State Attorney Bill Cervone

your professional associations. If legislators hear no voice of opposition then we all deserve whatever they do to us. If we stand up to unacceptable proposals, our voices may be heard. If we don't they certainly won't.

Elsewhere in this issue of the Legal Bulletin there is an article about one pending Senate bill, especially parts of it that would impact the entire law enforcement community. This bill is just one of many that everyone should study. In the coming months there will be more to address concerning this. You can help by sharing your position with your local senator and representative.

SAO STAFF CHANGES

ASA Carla Newman resigned from her position in the Baker County office in November in order to take a private practice job in Jacksonville. Carla's replacement is Jason Caldow, who most recently has been in private practice, also in Jacksonville, but who has previously worked as an Assistant State Attorney in Ocala and Palatka. Jason starts on January 6th.

ASA David Byron has accepted a position with the United States Attorney's Office in Gainesville with an anticipated start date in January or February. David's position in the Alachua County sex crimes division will be filled by ASA Ryan Nagel. In turn, Ryan's felony position will be taken by ASA Chris Gage, and Chris's position in the Bradford County Office will be taken by Austin Cox, who joined the office in November. Austin has been working as an Assistant State Attorney in Pinellas County for the last several years

Congratulations To...

ASA Taylor McQuaide, who welcomed her second child, son Granger James, on September 13th.

ASA Ashley Chin, who welcomed her second child, daughter Autumn Julia, on December 13th.

ASAs Andrew Fairbanks and Jared Ciccarello, both of whom passed the Florida Bar exam in September and have been sworn in as Bar members.

ASA Arielle Claude, who was married on December 14th to Matthew Screws. Arielle will be changing her last name.

GPD Capt. Jorge Campos, who has been promoted to the position of Chief Inspector. Also recently promoted by GPD are new Sgts. Herb Priester and Charles Dale, Lt. Charles Ward, and Capt. Paris Owens.

The SAO Is Now On Twitter

The **SAO** has established a Twitter feed to better disseminate information to the media and others such as law enforcement agencies. Like us at #8THCIRCUITSAO. For more information contact Deputy Chief Investigator Darry Lloyd at 352-374-3670.

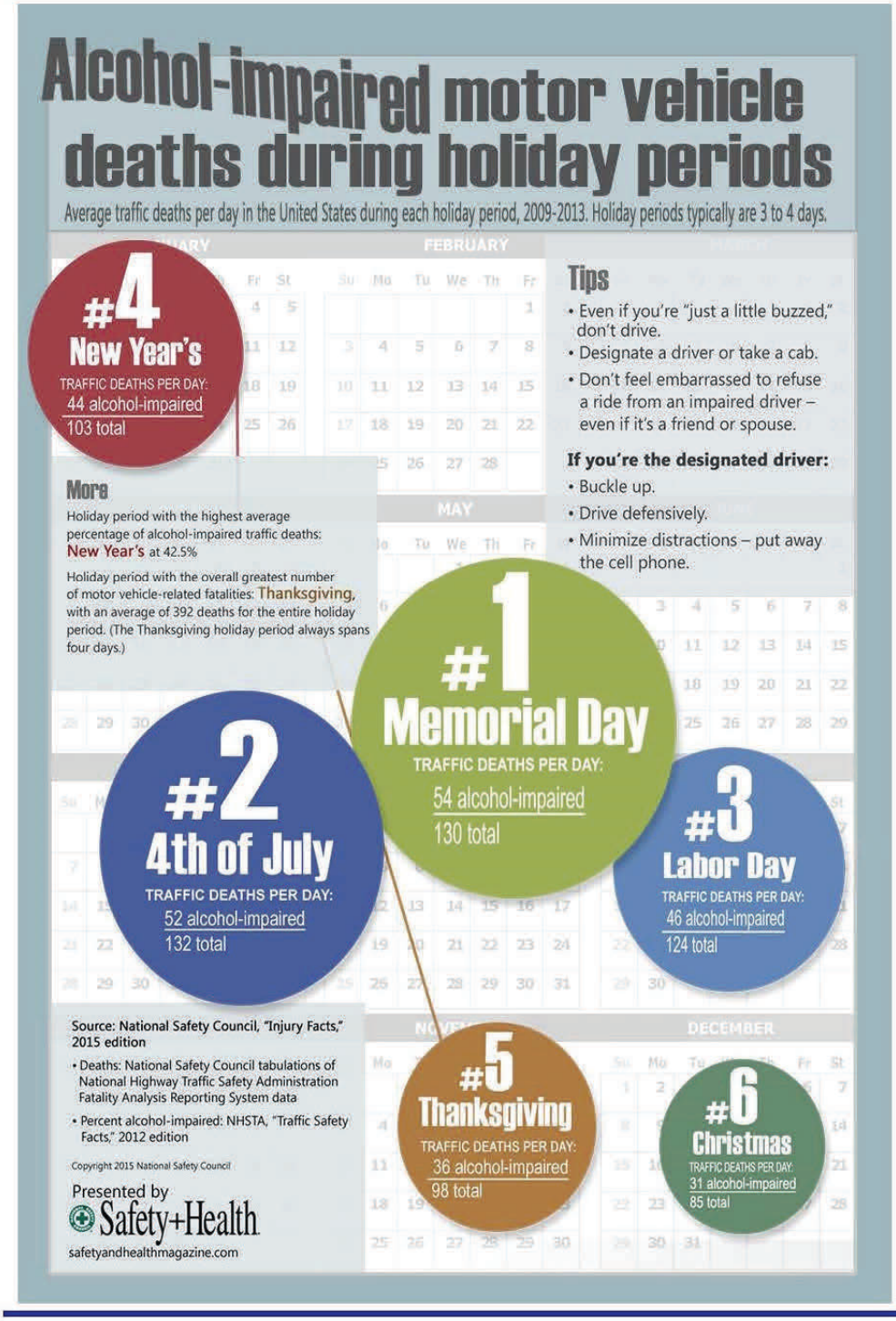
Proposed Legislation May Affect Interrogations

Among many criminal justice related bills introduced for the 2020 legislative session is Senate Bill 346, sponsored by Sen. Rob Bradley, whose district includes much of the 8th Circuit. This bill is broad ranging and covers many topics, one of which is the recording of interrogations.

Under the bill, a custodial interrogation related to specified offenses (for the most part serious or violent felonies) conducted at a place of detention such as a jail or police station must be electronically recorded in its entirety. If it is not, the interrogating office must prepare a report explaining why it was not recorded. While there are some exceptions to the recording requirement, if there is no recording and no exception the court must consider the lack of a recording as a factor in deciding the admissibility of the statement. The court may also give a jury instruction advising the jury that it can consider the lack of a recording in assessing the reliability of any statement or confession. While the proposed legislation would provide that there is no civil liability against an officer who fails to record a statement, it is possible that an agency could be liable for that failure if the agency has not adopted rules designed to ensure compliance with the recording requirement.

The reality of this proposal, which is likely to make it into law, is no more than a recognition of what prosecutors already have to face whenever an unrecorded statement or confession is at issue. Defense attorneys already argue that in today's society there is no excuse for any statement not being recorded. Recording equipment is cheap and readily available, including if necessary the always present cell phone that everyone is carrying. The "you can't trust the cops" mentality that seems so pervasive, combined with "what are they hiding" arguments, make it all too easy on the defense to attack the word of an officer when a statement has not been recorded. That there might be statutory authority requiring recording, not to mention that juries might be told by the judge to consider why an officer didn't record something, make this all the worse. Even the authorized exceptions (that there was an equipment malfunction, that the defendant agreed to talk but not to be recorded talking, that the statement was spontaneous and there was no opportunity to record it, and the like) will sound hollow and be all too easy for the defense to claim are false.

The bottom line is that it is increasingly difficult to explain not recording, and all agencies and officers should adopt an across the board practice of recording anything a defendant says any time he says it. There is no point in waiting to be ordered to do so by the legislature, and no reason not to take this simple preventative action so as to minimize the risks of not having done so once the case reaches the courtroom.


Alcohol-impaired motor vehicle deaths during holiday periods
Average traffic deaths per day in the United States during each holiday period, 2009-2013. Holiday periods typically are 3 to 4 days.
#4
New Year's
TRAFFIC DEATHS PER DAY:
44 alcohol-impaired
103 total
More
Holiday period with the highest average percentage of alcohol-impaired traffic deaths: New Year's at 42.5%
Holiday period with the overall greatest number of motor vehicle-related fatalities: Thanksgiving, with an average of 392 deaths for the entire holiday period. (The Thanksgiving holiday period always spans four days.)
Tips
• Even if you're "just a little buzzed," don't drive.
• Designate a driver or take a cab.
• Don't feel embarrassed to refuse a ride from an impaired driver – even if it's a friend or spouse.
If you're the designated driver:
• Buckle up.
• Drive defensively.
• Minimize distractions – put away the cell phone.
#1
Memorial Day
TRAFFIC DEATHS PER DAY:
54 alcohol-impaired
130 total
#2
4th of July
TRAFFIC DEATHS PER DAY:
52 alcohol-impaired
132 total
#3
Labor Day
TRAFFIC DEATHS PER DAY:
46 alcohol-impaired
124 total
#5
Thanksgiving
TRAFFIC DEATHS PER DAY:
36 alcohol-impaired
98 total
#6
Christmas
TRAFFIC DEATHS PER DAY:
31 alcohol-impaired
85 total
Source: National Safety Council, "Injury Facts," 2015 edition
• Deaths: National Safety Council tabulations of National Highway Traffic Safety Administration Fatality Analysis Reporting System data
• Percent alcohol-impaired: NHSTA, "Traffic Safety Facts," 2012 edition
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Recent Case Law

Deadly Force and Uncooperative Knife Wielding Individual

Officer was advised that an individual walking down the street had slit wrists and needed attention. Officer approached Edmond Studdard, who displayed a knife. Officer noted his bloody wrists. Officer sent out a call for backup, noting that Studdard had a knife and had slit his wrists. Three officers responded. The three newly arrived officers pulled out their firearms. Studdard faced the officers about 34 feet away.

All four officers directed Studdard to drop the knife. Studdard stood still, knife in hand. One of the officers said that they would shoot if Studdard did not drop the weapon. Studdard raised the knife up to his throat and began moving forward in a "swaying" motion. Two deputies opened fire. Five shots were fired. Studdard fell. Officer kicked the knife out of Studdard's hand, and all four officers began administering aid. Studdard died in the hospital.

Suddard's wife filed a §1983 action alleging that Officers used excessive force in violation of the Fourth Amendment. The trial court denied the officers' motion to dismiss based on qualified immunity. On appeal the U.S. Court of Appeals affirmed that ruling.

Issue:

May police officers shoot an uncooperative individual when he presents an immediate risk of harm only to himself and not to others? **No.**

Fourth Amendment Limitations:

Qualified immunity shields officers from personal liability unless they violate a person's clearly established constitutional rights. A seizure becomes unreasonable under the Fourth Amendment if the officer uses excessive force. *Graham v. Connor*, (S.Ct.1989). To justify lethal force, an officer must have probable cause to believe the suspect presents an immediate threat of serious physical harm to the officer or others. *Tennessee v. Garner*, (S.Ct.1985).

A claim that a police officer used excessive force "is governed by the Fourth Amendment's 'reasonableness' standard." *Plumhoff v. Rickard*, (S.Ct.2014). To determine whether an officer's actions were objectively reasonable, the court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." In so doing, the court will analyze the totality of the circumstances, taking the "perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight."

Even if it is not clear that the use of force was reasonable, under the doctrine of qualified immunity, a police officer is protected from liability for civil damages under § 1983 "unless it is shown that the [officer] violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." (quoting *Plumhoff*). "An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate." *City and Cnty. of San Francisco, California v. Sheehan*, (S.Ct.2015).

In the present case, the Court of Appeals looked to *Sova v. City of Mt. Pleasant*, (6th Cir. 1998). Officers faced a knife-wielding man who had gashed his arms and chest. From inside his parents' home, he told the police to go away. The officers entered a screened porch off the kitchen of the house and asked the man what he wanted. He replied that he wanted the police to shoot him. When the man moved toward the door to the porch, the officers yelled at him to drop the knife. He did not comply and instead stepped out on the porch. He pushed the screen door open, but while he still stood in the doorframe, the officers fired. On those facts, the Court of Appeals held that the officers used excessive force.

Court's Ruling:

"As a general matter, the officers' actions violated clearly established requirements in this area. When Officers Reed and Shepherd confronted Studdard, it's true, they had good reason to believe he was dangerous and uncooperative. They knew or reasonably believed that Studdard

had a knife and that he had slit his wrists. And he refused to comply with their commands to put the knife down. *But Studdard at this point did not pose a serious risk to anyone in the area.* No bystander was remotely near him. And Officers Reed and Shepherd stood about 34 feet from Studdard. He made no verbal threats to them or anyone else at the time. What he did do was raise the knife to his throat when the officers warned that they would use force if he did not put the knife down. And when he raised the knife to his throat, he moved forward in a swaying motion. These actions did not justify lethal force."

The Court of Appeals relied on the *Sova* ruling in reaching its conclusion. "The two cases warrant the same outcome. Both cases involved men with knives who had cut themselves—and threatened worse to themselves. In each case, the suspects ignored commands to drop their knives. And in each case, the suspects made similar movements toward the officers just before being shot—one swaying forward from 34 feet away, one opening the screen door onto the porch where the officers stood. *Sova* indeed seems to be the harder case, as the officers were closer to the suspect and more at risk. That means Studdard's claim deserves resolution by a jury too."

"The officers try to separate *Sova* from this case. They note that the interaction there lasted much longer than the interaction in this case. That's true. But it doesn't change matters. The man in *Sova*, who had clearly heard and responded to the officers, ignored their commands once by coming onto the porch. And, despite being sprayed with mace the first time, he began to approach again. The history here, while not as long, provided no more cause for concern. The officers add that the man in *Sova* never walked forward through the door. True again. But Studdard also did not walk forward. The man in *Sova* moved his arm forward to open the door; Studdard swayed forward. Any distinction between the two cases is not a meaningful one. If anything, the man's action of pushing the screen door open in *Sova* seems like a more purposeful move toward the officers, making this the easier case. We affirm."

Lessons Learned:

Prior case law, "specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." *Walker v. City of Orem*, (10th Cir. 2006).

In evaluating an officer's use of deadly force the court will examine: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands;
(2) whether any hostile motions were made with the weapon towards the officers;
(3) the distance separating the officers and the suspect; and
(4) the manifest intentions of the suspect." *Estate of Larsen v. Murr, (10th Cir.2008)*

Reliance on the "21 foot rule" is of limited usefulness as a result of the ruling in *Tenorio v. Pitzer*, (10th Cir. 2015). There the trial court denied qualified immunity because Tenorio did not 'refuse' to drop the knife in that he was not given sufficient time to comply with Officer's order; that Tenorio made no hostile motions toward the officers but was merely holding a small kitchen knife loosely by his thigh and ... made no threatening gestures toward anyone; that Tenorio was shot before he was within striking distance of Officer; and that, the only information that Officer had was that Tenorio had *threatened only himself and was not acting or speaking hostilely* at the time of the shooting. While the "21-foot rule" is common police knowledge the *Tenorio* decision makes clear that a knife and distance, in and of itself, without more, will not support the use of deadly force.

Studdard v. Shelby County
U.S. Court of Appeals – 6th Circuit
(Aug. 12, 2019)

False Report Concerning the Use of a Firearm

Preface:

The 2nd D.C.A. and the 3rd D.C.A. decided two cases independently, on the same day, interpreting the same statute, and reaching the same result. In both cases a juvenile was charged with violating F.S. 790.163(1), making a false report concerning the violent use of firearms. In both cases the juvenile defendant was convicted, and in both cases the D.C.A. reversed the adjudication of guilt; because the clear meaning of the statute criminalized false reports about **live** threats, and did not apply to threats of **future** action.

Facts I:

L.C. and three other students sat at a table at their middle school discussing a gun threat that had occurred at another middle school. L.C. stated that he hated the school, did not like his teachers, and "wanted to kill them and shoot the school." He then pointed out four students sitting at a table nearby that he wanted to kill.

Two of the students reported the incident to the school administration. A deputy sheriff resource officer interviewed L.C. after reading him his *Miranda* rights. L.C. admitted to pointing at other students that he had said he would kill, but he said he was only joking. L.C. denied saying that he hated his teachers. He only said that he disliked them and did not say anything about harming them.

L.C. was charged with committing the delinquent act of making a false report concerning the use of firearms in a violent manner, which is prohibited by § 790.163(1). The trial court found him guilty and he was placed on probation.

Facts II:

Students at J.A.W.'s school were swapping April Fools' jokes in the classroom. J.A.W., a student with an almost perfect attendance record and a 3.1 G.P.A., chimed in with an ill-considered joke: "I'm going to shoot up the classroom, April Fools." Upon hearing J.A.W.'s joke, the teacher escorted him out of the classroom and to the dean's office. He received a multi-day suspension.

The State's view of J.A.W.'s joke was that it constituted a "false report" concerning the violent use of firearms, intended to deceive, mislead, or otherwise misinform a person, which is prohibited by § 790.163(1). The trial court found him guilty and he was placed on probation.

F.S. 790.163:

The full title of this statute is "False report concerning planting a bomb, an explosive, or a weapon of mass destruction, or *concerning the use of firearms in a violent manner*." The section provides in part the following:

"It is unlawful for any person to make a false report, with intent to deceive, mislead, or otherwise misinform any person, concerning the placing or planting of any bomb, dynamite, or other deadly explosive, or weapon of mass destruction . . . *or concerning the use of firearms in a violent manner against a person or persons*."

"Proof that a person accused of violating this section knowingly made a false report is *prima facie* evidence of the accused person's intent to deceive, mislead, or otherwise misinform any person."

The courts have interpreted this section, "A reasonable reader would understand making a report to mean providing information about something that is occurring or has already occurred, *not expressing a desire or an intention to do something in the future*."

The statute with which L.C. and J.A.W. were charged, is "violated when a person knowingly makes a false report," but not when a person "threatens to take some action in the future." As a matter of plain English, there is a distinction between a statement that "there is a bomb in the building" and a statement . . . that "I'm going to blow up the building." An individual may truthfully threaten to explode a bomb in a building without making a false statement. Similarly, one may make a false statement that there is a bomb in a building without ever threatening, or communicating an intent, to explode a bomb. A false report concerning the violent use of a firearm would violate section 790.163, but ***a threat to inflict such violence in the future would not***. Both statements here, even if understood to communicate a design as well as a desire to shoot students and teachers, merely communicated a plan to inflict *future* harm.

Court's Ruling:

Both D.C.A.s reached the same ruling, that the juveniles were erroneously convicted as their actions did not violate the statute charged.

"L.C.'s statements do not fall within the plain and ordinary meaning of 'report.' It is not possible to infer from L.C.'s statements anything more than the expression of a desire to shoot people and an inchoate intention to fulfill that desire. At most, L.C.'s statements amount to a threat. The American Heritage Dictionary defines 'threat' as 'an expression of an intention to inflict pain, harm, or punishment' or 'an indication of impending danger or harm.' As troubling as such a threat may be, it is not proscribed by the statute. See, *J.L. v. State*, (5DCA 2008) ('Section 790.163(1) . . . is therefore violated when a person knowingly makes a false report that a bomb or other deadly explosive has been placed or planted. By contrast, a threat to plant a bomb in the distant future does not violate this statute.' (citing *D.B. v. State*, (1DCA 2002)))."

"Because L.C.'s expression of his desire to shoot people at his

(Continued from page 7)

school does not violate the false reporting prohibition in section 790.163, we reverse [finding of guilt]."

The 1st D.C.A. had previously decided *D.B. v. State*, and relying on that decision here ruled, "Applying *D.B.* here, the firearms-related prohibition in § 790.163(1) plainly prohibits knowingly false and misleading reports about active shooting-type situations. ... But the statute does not reach future oriented threats like the one uttered by J.A.W. Because J.A.W.'s April Fools' Day joke threatened future shooting, it was not a 'false report' made with intent to deceive, mislead, or otherwise misinform for purposes of § 790.163(1). Reversed."

Lessons Learned:

The 1st D.C.A. in *D.B. v. State*, ruled "Concluding that the [defendant's] threats to school officials that he would 'blow up' or 'burn down' his school at some time in the future did not amount to a violation of this statute, we reverse the [finding of guilt]."

"As has been observed by the Second District, this statute was designed to criminalize 'the type of hoax which has come to be known as a 'bomb scare'.' *Grizzard v. State*, (2DCA 1962). The statute is therefore violated when a person knowingly makes a false report that a bomb or other deadly explosive *has been* placed or planted. Consequently, threats to take some action *in the future*, such as occurred in the present case, are not violations of the statute."

L.C. v. State, 2nd D.C.A.
J.A.W. v. State, 3rd D.C.A.
November 6, 2019

RE-PRINTED WITH THANKS TO
THE 15TH CIRCUIT STATE ATTORNEY'S OFFICE

LEGAL EAGLE

January 2020

In this issue:

- **Pat-Down Search**
- **Pat-Down and a Single Live Round**

Published by:
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West Palm Beach, FL 33401
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Sovereign Citizen Detention

Charles Waters and his wife drove to a Menards store to exchange a saw he had purchased on-line. An employee inside the store directed Waters to the online pickup location inside the Menards lumberyard. Waters drove into the lumberyard with his wife in the passenger seat. While it is undisputed that Menards had posted signs at the yard's entrance and exit stating that vehicles leaving the lumberyard were subject to inspection, Waters claim they did not see any such signs upon entry.

A Menards employee loaded the saw into their vehicle's trunk. Waters then proceeded to the lumberyard exit, where a Menards employee requested that they open their vehicle's trunk for inspection as per the signs. Waters refused, stating that he had no legal obligation to do so. When the gate employee refused to open the exit gate and called for a manager, Waters called the police. The police arrived and explained the store policy to Waters and asked him to allow employees to verify his purchase. When Waters refused, Officer asked Waters for identification, which he refused to provide, stating that he was "not currently driving" and did not have to "provide ID until there [was] a reasonable suspicion of a crime." Officer informed Waters that she had reasonable suspicion he had committed a crime because he would not open the trunk.

Officer then asked Waters to step out of his vehicle. Backup Officer explained that because Waters was non-compliant with Menards policy the officers reasonably suspected he had something in his vehicle's trunk that he was not supposed to have. The officers again told Waters to step out of his vehicle. Waters was surreptitiously video recording his visit to Menards through a sunglass camera clipped to his shirt. He stated, "I'm being ordered out of my vehicle. I'm being placed under arrest," to which Officer calmly responded, "I didn't say you were under arrest; I said you need to step out of the vehicle." When Waters asked if he was free to go, Officer stated, "You are not free to go." Waters replied, "Then I'm being detained. Under what reasonable suspicion of what crime?" The officers again told Waters to get out of his car and he repeated his question, then repeatedly asked the officers for their names and badge numbers. Officer told Waters yet again to step out of his car and, when he failed to comply, he was told he could go to jail.

Waters eventually complied with orders to step out of his car. Officer searched him for weapons

Officers should consult with their agency advisors to confirm the interpretation provided in this publication and to what extent it will affect their actions. **Past issues of the Legal Eagle are available at //SA15.org under "Resources."**

and told him that the officers had "reasonable suspicion that [he] had something in the trunk," stating, "You came into a shipment yard which has a policy that you are not supposed to leave without showing the product that you have picked up, and you are not willing to do that." Officer then handcuffed Waters, who is significantly taller than either of the two female officers and placed him in the back seat of the police car. Officer then returned to Waters' vehicle and asked his wife if Mr. Waters was a sovereign citizen. Mrs. Waters replied that her husband "takes it all very seriously." Officer Smith asked Mrs. Waters to identify her husband, and Mrs. Waters did so. Officer then asked Mrs. Waters, "Would you be willing to open the trunk for these gentlemen? Because that's the only thing that's holding us up here." "It'd be doing us a huge favor if you could just bring that invoice and step out with these guys and pop the trunk for us. We'll chalk it up to [Mr. Waters] having a bad day." Mrs. Waters did as Officer requested. A Menards employee and one of the officers looked into the trunk and verified the purchase. The officers then released Waters, issuing a trespass warning that prevented him from re-entering the Menards store for a year. The entire encounter with the officers lasted less than twenty minutes.

Waters filed a multi count complaint against the officers claiming various civil rights and constitutional violations. The trial court dismissed them all. On appeal the U.S. Court of Appeals likewise found that Waters had not made out a colorable claim against the officers.

Issue:

Did the officers have reasonable suspicion to temporarily detain Waters in their patrol car? **Yes**.

Investigative Detention:

Waters claimed that the officers violated his Fourth Amendment rights by detaining or arresting him without probable cause. Police officers violate the Fourth Amendment when they conduct an arrest without a warrant or probable cause. However, in order to effect a temporary investigative detention, officers need only *reasonable suspicion* based on the totality of the circumstances. *Illinois v. Wardlow*, (S.Ct.2000). While "reasonable suspicion is a lower threshold than probable cause" it requires "at least some minimal level of objective justification." See, *Terry v. Ohio*, (S.Ct.1968) (defining reasonable suspicion as something more than an "inchoate and unparticularized suspicion or 'hunch' ").

In determining whether an officer possessed reasonable suspicion to conduct a temporary investigative detention, or "*Terry* stop," courts look only at the information the officer possessed at the time. "When evaluating whether reasonable suspicion for a *Terry* stop exists, 'we view the [officers'] observations as a whole, rather than as discrete and disconnected occurrences.' "

The Supreme Court has held "that a twenty-minute detention was reasonable when the police acted diligently, and defendant contributed to the delay." *United States v. Sharpe* (S.Ct.1985) The trial court found that the video evidence established that Waters "entire encounter with law enforcement lasted about 20 minutes," that the officers worked diligently to complete their investigation, and that the encounter only lasted as long as it did because Waters was argumentative and refused to cooperate with the police investigation by failing to obey legitimate requests to identify himself and step out of his vehicle. Thus, the trial court found no unreasonable delay.

"The use of handcuffs during a *Terry* stop ... requires some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose." In determining that an officer acted unreasonably, the 8th Circuit relied on five factors: (1) the officer had no indication that suspect was armed and dangerous; (2) the suspected crime, did not necessarily involve a weapon; (3) suspect exhibited no suspicious behavior and cooperated with officers throughout the incident; (4) the officer failed to conduct any investigation before handcuffing the suspect; and (5) no exigent circumstances existed. See, *El-Ghazzawy v. Berthiaume*, (8th Cir. 2011).

Court's Ruling:

In the present case the Court of Appeals found the totality of the circumstances supported the police response. "... The officers acted pursuant to reasonable suspicion in detaining Mr. Waters. The videos attached to the pleadings show that Mr. Waters refused to open his vehicle's trunk at the lumberyard exit, despite signs at the entrance and exit informing visitors that vehicles would be inspected as they left the lumberyard. The requirement was clearly part of Menards's customary protocol as customers exited the lumberyard after picking up merchandise in their vehicles. Officers Smith and Kirchner arrived at Menards in response to

Mr. Waters' 911 call and Mr. Waters refused to identify himself to the officers or to allow anyone to verify his purchase. At that point, Officer Smith and Officer Kirchner had 'a particularized and objective basis' to detain Mr. Waters. ... Because Officers Smith and Kirchner possessed specific, articulable facts that led them to suspect Mr. Waters might be engaged in criminal activity, see *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, (S.Ct.2004), we find that, under the totality of the circumstances, Officers Smith and Kirchner actually had reasonable suspicion to detain Mr. Waters."

"Having concluded that the officers possessed reasonable suspicion to detain Mr. Waters, we must next determine whether that detention became a *de facto* arrest. 'A Terry stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if officers use unreasonable force.' While officers must use 'the least intrusive means of detention and investigation ... reasonably necessary' to conduct the stop, they are permitted to 'take any measures that are 'reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.' ' Finding that no unreasonable delay or unreasonable force occurred in the course of Mr. Waters detention, we also find that the officers did not arrest Mr. Waters."

"The officers did not know Mr. Waters' background and witnessed his argumentative, evasive, and uncooperative behavior. See, *United States v. Bailey*, (8th Cir. 2005) (stating that evasiveness contributes to 'a reasonable and particularized suspicion that criminal activity may be afoot'). They could reasonably conclude that Mr. Waters' unpredictable behavior would continue to escalate and that handcuffing him and briefly placing him in the squad car was the least intrusive means of maintaining the status quo and protecting Mr. Waters, themselves, and bystanders while the officers investigated. See, *United States v. Smith*, (8th Cir. 2011) (holding that after a suspect, initially cooperative, became agitated and refused permission when an officer asked to search his car, the officer could maintain the status quo by handcuffing the suspect and placing him in the back of a patrol car until a drug-sniffing dog arrived)."

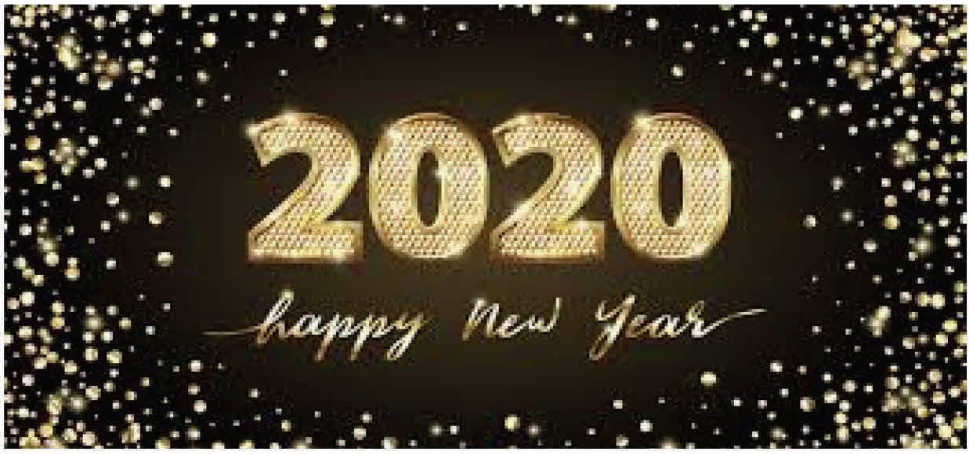
"...Because we view the officers' actions in the context of the totality of the circumstances, we find that it was reasonable for the officers to briefly handcuff Mr. Waters and detain him in the squad car. ... We affirm the dismissal of Mr. Waters' Fourth Amendment seizure claim."

Lessons Learned:

Clearly, the officers here were unaware that Waters was surreptitiously video recording their encounter. Yet, they failed to be entrapped by his obstreperous behavior by maintaining their patience and demeanor, and calmly and respectfully responding to his antics.

Good report writing detailing the police-citizen contact will assist the court in evaluating the totality of the circumstances that resulted in the police action taken. No comment upon, or response to. the suspect's political views are warranted and should be avoided.

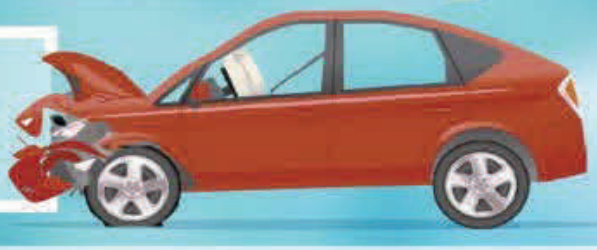
Waters v. Madson
U.S. Court of Appeals – 8th Circuit
(April 11, 2019)



1 in 2 Teens Consider Driving on New Year's Eve Very Dangerous

There are approximately 13 million licensed teenage drivers in the U.S.[1], and more than **1** in **10** report drinking and driving on New Year's Eve

Approximately **1,000** teens die in alcohol-related motor vehicle crashes each year[2]



According to Teens: Many Parents Consent to Underage Drinking

37% of parents allow their teens to drink alcohol with them

29% of parents allow their teens to drink alcohol when they are not with them

15% of parents allow their teens to host parties where alcohol is served

47% of parents allow their teens to attend parties where alcohol is served

Speak Up: Teens Can Influence Safe Decisions

87% of teens will ask a driver under the influence of alcohol to refrain from driving

92% of teen drivers would stop driving under the influence of alcohol if asked by a passenger

To create your Parent/Teen Safe Driving Contract, visit **www.LibertyMutual.com/TeenDriving**

Data from 2012 Liberty Mutual Insurance and SADD (Students Against Destructive Decisions) survey of more than 1,700 teens from across the country.

[1] National Highway Traffic Safety Administration, 2010
[2] Insurance Institute for Highway Safety, 2010