



michigan municipal league

Law Enforcement Action Forum Newsletter

October 2014 Edition



Volume 21, Issue 3

Searching a Phone Incident to Arrest Requires a Warrant & Open Carry Cases Are Evaluated by Officers' Ability to Explain Why They Made The Stop!



By Gene King, Law Enforcement Action Forum Coordinator

This edition of the LEAF Newsletter discusses some cases that affect how officers conduct their business. The first, *Riley v. California* and *U.S. v. Wurie*, are cases combined for a single ruling by the United States Supreme Court that establishes what officers must do if they want to review the contents of a subject's cell phone at the time of arrest.

Then, *Combs v. City of Birmingham* and *Baker v. Schwarb* are United States District Court, Eastern District of Michigan, Southern Division cases that speak to the issue of the stopping of subjects who are openly carrying a firearm on a public street.

Case One: Search Incident To An Arrest

In the July 2013 LEAF Newsletter "*The Public Has the First Amendment Right To Record Police Activity. Can Police Seize Them As Evidence?*," Audrey Forbush, LEAF Legal Advisor, stated that the public could record the activities of the police and that in most circumstances the police could seize the device used to obtain the footage. One of the most important issues at the time of that Newsletter was the ability to search the device once it was seized. In that Newsletter, Forbush pointed to *Katz v. United States*, 389 US 347(1967), and opined that the Fourth Amendment permits "reasonable searches," and, in the absence of one of the judicially recognized exceptions to the warrant requirement, searches conducted without a warrant, per se, are unreasonable. She continued that the recognized exceptions are exigent circumstances. According to Forbush, exigent circumstances have been defined as a "specially pressing or urgent law enforcement need," *Illinois v. McArthur* 531 US ___, 148 L.Ed.2d 838, 847 (2001), and a "compelling need for official action and no time to secure a warrant." *Michigan v. Tyler* 436 US 499, 509 (1978).

In *Riley v. California*, police stopped Riley for a traffic offense that led to an arrest for a weapons charge. During a search of his cell phone incident to the arrest, the officers determined that Riley might be a gang

member. After a few hours, a gang specialist investigator reviewed the contents of the phone and found digital evidence linking Riley to a shooting. As a result of this evidence, Riley was prosecuted for the shooting as well as weapons charges and the State sought an enhanced sentence because of the gang membership. Riley filed a motion to suppress the evidence that the police obtained from the cell phone. The trial court denied the motion and Riley was ultimately convicted. Riley appealed and the California Court of Appeals affirmed the lower court's decision. Riley appealed.

In *U.S. v. Wurie*, police arrested Wurie for participating in a drug sale. At the police station, officers seized Wurie's phone and upon searching the data, noticed that he had received several calls. While looking at the information found in the call log, officers found a number labeled "My House" and identified it as belonging to Wurie's home. Officers used that information to secure a search warrant and raided the address. They found drugs, a firearm, ammunition, and cash. Wurie was charged and convicted of drug and weapons charges. During the trial, Wurie moved to suppress the search warrant and the District Court denied the motion. Upon appeal, the First Circuit reversed the denial of the motion and vacated the convictions. The prosecution appealed.

Forbush said that the *Riley* and *Wurie* cases center on the reasonableness of a warrantless search incident to a lawful arrest. On June 25, 2014, the U.S. Supreme Court ruled on the combined case now called *Riley v. California* 134 S.Ct. 2473 (2014) and established how officers must deal with digital information on cell phones seized from individuals upon their arrest. Not surprisingly, the court's analysis of the law is consistent with the conclusion that LEAF's Legal Advisor made in July of 2013, "If no exigent circumstance, searches conducted without a warrant, per se, are unreasonable". She went on to say that the Supreme Court's ruling is very important because law enforcement is now on notice that the earlier court decisions on privacy expectations extend to new personal technological items such as a cell phone.

Forbush said the court's discussion clarifies the rationale they followed to reach their decision and commented that Justice Roberts made the position of the majority very clear by beginning the decision with a quote from the Fourth Amendment and citations from the court's decisions in other cases:

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As the text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U. S. 398, 403 (2006). Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U. S. 10, 14 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky v. King*, 563 U. S. ___, ___ (2011) (slip op., at 5-6).

Furthermore, she noted that the court ruled on these cases by analyzing the applicability of their past rulings in three cases that form the “search incident to arrest” doctrine. She said the cases are *Chimel v. California*, 395 U. S. 752 (1969) (Search of a person and area within their immediate control), *United States v. Robinson*, 414 U. S. 218 (1973) (Search to disarm and minor intrusion into personal property immediately associated with the person arrested) *Arizona v. Gant*, 556 U. S. 332, 350 (2009) (When arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search). In all the cases, the common theme is officer safety and the discovery and preservation of fruits or evidence of a crime. The scope of these cases all involve the reasonableness of the intrusion into the person’s privacy caused by the officer’s actions in performing a search after an arrest for probable cause.

The court went to great lengths in *Riley* to analyze the reasonableness of the degree a search intrudes into an individual’s privacy against a legitimate governmental interest. Today’s cell phone has an immense storage capacity for sensitive personal information and data that in the past was too voluminous to be carried about and was secured in a file drawer or secret place. Forbush remarked that prior cases revolved around a person’s physically limited capacity to carry personal data in a pocket, wallet or purse so the intrusion into their privacy was much less. Additionally, she opined, since most cases focus on the search being for officer safety, once seized and inspected, a cell phone poses no threat to an officer and is generally safe from destruction. She went on to say that the court did acknowledge that risk of harm to officers is still relevant and that officers should check the devices for weapons, like a razor blade, that can be used against them or aid in an arrestee’s escape.

Once the physical aspects of a phone are examined, said Forbush, the court ruled that the device is protected from search and that a warrant is generally required before a search. Forbush said the phrase ‘generally’ is an important one. She echoed her quotes from *Katz* and remarks from past LEAF Newsletters concerning exigent circumstances: “If a cell phone is seized incident to arrest and the officer can specifically articulate his belief that the phone contains information required to overcome the exigencies of the situation, which clearly indicates action must be taken, a warrantless search is objectively reasonable under the Fourth Amendment. Forbush recommends consulting the department’s legal advisor prior to searching any electronic device and if exigent circumstances precluded the ability to do so, the officer better be able to clearly and concisely articulate why the course of action was taken.”

Forbush felt it is very important to point out Justice Roberts’ statement in the final paragraph of the ruling for she felt it revealed the passion of the court on this issue: (Emphasis Added)

The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant.

Second Case: Open Carry Is the Law but that Doesn’t Mean You Can’t Be Arrested

Combs v City of Birmingham 2013 WL 4670699 (E.D. Mich) stems from a well-publicized 2012 event often referred to as an open carry incident. It began with a young man enthusiastically practicing the ability to open

carry on the city's streets. He soon drew an officer's interest resulting in a reasonable suspicion by the officer who made a Terry Stop. The stop ultimately led to the arrest of the young man.

The incident started when Combs openly carried a loaded assault weapon on the streets of the City of Birmingham, Michigan. Two officers on foot patrol encountered Combs and felt, by his youthful appearance, that there was doubt that he was old enough to carry the weapon legally without adult supervision. Michigan Compiled Law, 750.234f, states, "an individual less than 18 years of age shall not possess a firearm in public except under the direct supervision of an individual 18 years of age or older." The officers stopped Combs and asked him for identification to prove his age. He refused, telling the officers he was 18 and did not have to legally provide identification under Michigan law. A supervisor arrived and Combs refused the supervisor's request that he provide identification to prove his age. A photo of Combs clearly portrays his youthful appearance the day of the incident.

A crowd had gathered and Combs was alleged to have been argumentative, to have caused a disturbance, and to have resisted the police officers. The officers arrested Combs for breach of the peace and resisting a police officer. Because they could not confirm his age and legal right to carry the firearm, he was also charged with brandishing a firearm. While still at the scene, Combs' wallet was found which provided his Michigan Operators License as identification. He was transported to be booked and released on bond.

At the criminal trial, Combs was found not guilty on the resisting charge by a directed verdict from the judge and a jury found him not guilty of the breach of peace and brandishing charges. Combs brought suit against the City and the officers in Federal District Court claiming a 42 U.S.C. § 1983 Civil Rights claim that his Fourth Amendment right to be free from seizure without probable cause was violated through false arrest and false imprisonment.

Audrey Forbush, LEAF Legal Advisor, said this case is relatively complicated in analysis but does provide guidance to officers involved in legitimate Terry stops if the subjects refuse to identify themselves. She went on to say that the court's analysis did not focus on whether Combs could open carry a firearm on the streets of the City, since he did not challenge that the officers had a reasonable suspicion to stop him. Combs' point was that the officers lacked probable cause to arrest him because of his refusal to provide age identification.

Since the focus was on the probable cause to arrest and not on the initial investigative stop, Forbush said the court discussion revolves around whether the request of the officers for proof of Combs' age was a lawful command under Michigan law and City ordinance. Forbush also emphasized that the Terry stop legitimacy was not in dispute. Rather, the focus of the case was on the officers asking for age identification because Combs youthful appearance was the very specific articulable issue that formed their reasonable suspicion to stop him.

Michigan does not have a stop and identify law. She said the court focused on the 2002, Michigan Legislature amendment to the Resisting or Obstructing statute, MCL 750.479, to define "obstruct" to mean "the use of threatened use of physical interference or force or a knowing failure to comply with a lawful command." The Birmingham ordinance also contained similar language. Forbush said the "knowing failure to comply with a lawful command" language adds a component to the Resisting and Obstructing statute that does not require

force or physical threat to obstruct an officer. This is important to the court's decision in the officer's development of probable cause.

Since the case involved the refusal to provide identification as the probable cause for the arrest, Forbush said the court looked at the U.S. Supreme Court case *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177 (2004) for guidance. *Hiibel* involved a lawful Terry stop in a state that had a statute requiring a subject to give their name but did not require the citizen to provide identification. *Hiibel* refused to give his name to officers and was arrested. Even though Michigan is not a stop and identify state, Forbush said the court found *Hiibel* to be comparable to the instant circumstances:

Hiibel involved a person lawfully stopped under Terry who refused to give his name, in a state which legally required it. However, the law did not require the citizen to provide identification. See *id.* at 185. While there are important distinctions between *Hiibel* and this case--specifically, name versus age, and stop and identify law versus "must comply with a lawful command law"--the Terry principle reaffirmed in *Hiibel* and applicable here is this: demanding and obtaining certain identifying information from a suspect may be a critical and legitimate component to a Terry stop. In this instance, the discreet command to Mr. Combs to prove his age was reasonably related (Emphasis Added) to the investigation of a potential underage person carrying a gun in public, in violation of MCL 750.234f.

Forbush pointedly remarked that this case does not give officers a green light to demand identification of a person who is lawfully carrying a firearm openly. She said this case affirms that if an officer has a reasonable suspicion for a Terry Stop, which must be based upon specific, articulable facts that when put together with the officer's experience or other knowledge, justifies an investigatory stop, it is lawful for the officer to demand information from the subject. She said the court ruled that in this case the refusal to provide the identification requested to prove age provided probable cause to arrest for obstruction under MCL 750.479 without violating Combs' Fourth Amendment Rights. The court granted the defendants' summary judgment on all counts.

Third Case Reinforces Combs And The Importance Of Officer's Clearly Articulated Reasonable Suspicion

In a case reported on August 19, 2014, *Baker v Schwarb* 2014 WL 4111375 (E.D. Mich) two young men elected one early evening to walk the streets of the City while one was dressed all in black and both carried a handgun on their hips and a rifle slung over their shoulders. The route they chose to walk put them in close proximity to a public park and a medical center that attracts a large population each day. As one would imagine, the young men's activity attracted a lot of attention, and the City 911 got a number of calls by alarmed citizens reporting two heavily armed males walking down the street. When officers arrived, they approached the subjects, who looked to be very young, with weapons drawn but pointed at the ground. Over the subject's objections, the officers disarmed and handcuffed both subjects and secured their firearms. Two police recording devices and one of the subject's phones recorded the incident so the facts of the case are not in dispute.

When the police asked what they were doing, one subject said, deceptively, "walking" and then expressed that he and his friend were "exercising their constitutional rights." The same subject asked the officer if he was being detained and the officer told him he was not under arrest. When subject one asked if they were committing a crime, the officers told him they were trying figure that out because the subjects' actions were "freaking out

half the City.” As the officers looked for identification in subject one’s wallet, the subject said he did not consent to any searches of his property, he was not breaking any laws, and he was just exercising his First and Second Amendment rights.

No corroborating identification was found on the second subject so his handgun was checked through Dispatch for the registration and subsequent verification of identity. Subject one had identification that verified he was old enough to legally open carry a firearm. It was discovered that the subjects were over the age of 18 and did not have any criminal convictions or outstanding personal protection orders against them. They were also licensed to carry their weapons. The officers removed the handcuffs, returned the firearms and the subjects were told they were free to go. The interaction took about twenty minutes.

The subjects sued the City and the officers in Federal District Court claiming a 42 U.S.C. § 1983 Civil Rights violation of their First, Second and Fourth Amendment by the City and the officers. After motions and responses were filed, the judge granted the Defendants’ motion for summary judgment.

Forbush said, as in *Combs*, the court focused on the officers’ reasonable suspicion and probable cause to stop and seize the two subjects involved in this case. As she has said many times, Forbush pointed to this courts recitation of Fourth Amendment Seizure standard of care officers must follow when they initiate a seizure of a person:

The Fourth Amendment protection against unreasonable searches and seizures generally requires a law enforcement officer to have probable cause to believe that a crime has been or is being committed before conducting a search. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009). Thus, “only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.” *United States v. Trujillo*, 376 F.3d 593, 603 (6th Cir. 2004) (quoting *United States v. Davidson*, 936 F.2d 856, 860 (6th Cir. 1991)). The existence of probable cause must be assessed “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Klein v. Long*, 275 F.3d 544, 550 (6th Cir. 2001).

The court determined that the officers had probable cause to search the subjects because they had reasonable grounds to suspect the subjects had committed, or were committing, several misdemeanors, including City ordinances prohibiting disturbing the peace and loitering. As in *Combs*, the subjects looked very young so it was reasonable for the officers to believe they were in violation of M.C.L. 750.234f, the 18 year age requirement for firearms. Additionally, the court addressed the reasonable grounds to suspect the violation of the City Disturbing The Peace ordinance with the following:

“By Plaintiffs’ own terms, they were “walking while open carrying their firearms in local communities . . . [to] desensitize the public to open carry, and to educate police officers with [sic] whom they may encounter on the legality of open carry.” It is reasonably clear that Plaintiffs knew that, in the face of their intended behavior, the public was likely to be highly sensitive (else why seek to “de-sensitize” people?). The single reasonable conclusion is that Plaintiffs were knowingly acting in a provocative manner, hoping to foment an interaction and cause a disturbance. As events show, they succeeded nicely.”

Forbush suggested that the officer's recognized and clearly articulated that the information they received from dispatch of the public's alarm, the time of day, location, subjects' appearance, clothing and demeanor all led to their decision to investigate further. They also explained why they took what the officers' believed were reasonable officer safety actions in disarming and handcuffing the subjects while they investigated. The court commented on the issue when it said, "Plaintiffs were plainly trolling for a confrontation, and displayed their firearms in a way that was extraordinary for the neighborhood. The Defendant officers' conduct was, at the very least, reasonable—they were investigating a fear-provoking scenario, and their actions were prudent given the unusual nature of the circumstances."

On the Terry Stop, Forbush said the court was clear that based on the totality of the circumstances, the officers' decision to stop and temporarily detain the subjects was objectively reasonable. The court cited *O'Malley v. City of Flint*, 652 F.3d 662, 670 (6th Cir. 2011) which said "Specifically, there are two factors that are considered: (1) whether there was a proper basis for the stop, . . . and, if there was a proper basis for the stop, (2) whether the degree of intrusion into the suspect's personal security was reasonably related in scope to the situation at hand." However, "the greater the degree of intrusion during a stop, the more solid must be the officer's suspicion that the stopped individual is guilty of wrongdoing." In this case, she said, the court ruled "Not only did the officers have reasonable suspicion to believe that Plaintiffs were engaging in criminal activity, but they also had reasonable suspicion to believe that Plaintiffs may have been about to commit a crime." In ruling on the search of the subjects the court said, "The scope of the search was "strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1 (1968)

Forbush remarked further that the court did an interesting analysis of the First and Second Amendment violation claims which she recommended reading. In brief, she said the court felt that the subjects' behavior gave no visual cues to support their contention that they simply conveying a message to the public about open carry of firearms, an activity that may be protected by the First Amendment. It is obvious the public did not understand the message based on the number of calls to 911 from people who were alarmed by what the subjects were doing. She said the court ruled their conduct does not constitute speech protected by the First Amendment.

Concerning the Second Amendment issue, in *McDonald v. Chicago*, 561 U.S. 742, (2010), the Court held the Second Amendment right recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008) is "fully applicable to the States." However, "[l]ike most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 570. Even after *McDonald*, the application of the Second Amendment (and specifically the right to bear arms for the purpose of self-defense) outside of the home, is unsettled. Forbush said several of the federal circuits disagree or do not see a clear line on the Second Amendment issue and this court felt that further guidance is needed. This court ruled that the right to bear arms for the purpose of self-defense outside the home—is not clearly established under the Second Amendment.

What Combs And Baker Mean

Forbush was adamant that officers understand that neither *Combs* nor *Baker* are about the ability to openly carry a firearm but are an analysis of the use of a legitimate Terry Stop, which developed the probable cause for the officers' action on the specific set of facts of each case. The *Combs* court also ruled on two issues

relating to their interruption of *Hiibel*, finding that :“(1) *Hiibel* stands for the proposition that identifying information can be required of suspects during a Terry stop; and (2) a police officer can require proof to dispel reasonable suspicions of underage violations of the law during a Terry stop.” The court in *Baker* cited *Combs* in its evaluation of the reasonableness of the seizing the subjects and demanding identification to determine their age.

Most importantly, Forbush reinforced her earlier remark that these cases do not create a new custom or authority that allows a police officer to stop a subject who is lawfully carrying a firearm openly and demand identification. She said the court in *Combs* zeroed in repeatedly on the officers’ requests for identification as being reasonably related to the circumstances justifying *Combs*’ legal Terry Stop. In *Baker*, the court cited *Combs* in saying the officers’ had probable cause to search the subjects for identification based on their youthful appearances. In Michigan, the law remains the same, lacking reasonable suspicion that a person is about to, is or did commit a crime, the demand for identification must be related to the circumstances for the stop. A refusal to provide identification is not an arrestable offense if the underlying request is not founded upon a reasonably articulable suspicion.

Forbush also said, in *Baker*, officers clearly explained that their justification for the stop and seizure was developed by the age issue coupled with their experience in how the location of the incident, the subjects’ appearance, behavior and factoring the alarming 911 calls led to their decision to stop, disarm, control and investigate the subjects. Based on the investigation, officers developed probable cause to inquire further and search the subjects. The officers, within a reasonable amount of time, correctly decided to *release* the subjects because there was no overt criminal violation. (See March 2008, LEAF Newsletter, *Catch and Release*) Forbush again stated the mere presence of the firearm, alone, does not establish reasonable suspicion or probable cause.

Forbush points to the July, 2012 LEAF Newsletter, *Four Recent Cases* in which one of the main reasons the Defense in those cases prevailed was the officers used their training and resources to come to a conclusion that the courts could accept. In reporting what they observed -- including the subject’s behavior and the action they took during the incident -- the officers provided the court with a complete picture that it could evaluate before rendering an opinion. She believes those same factors reported by officers in the instant cases aided the judges in reaching their court’s decision. She encourages all department administrators and officers to take note that, even though in *Combs*, the criminal charges were dismissed, the department and officers got a summary judgment because they could articulate the issues in the case.

Are you a MML Insurance Program Member?

Go to the League’s online Law Enforcement Risk Control Manual, [now compatible with any browser](#), to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click “Don’t Have an Account”. To add to the ease of use, the manual now contains a complete keyword search function.

*****Total Policy Update in Chapter 21: Sample Policy and Procedures for Audio/Visual Recording of Custodial Interrogations.*****

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund
1675 Green Road, Ann Arbor, MI 48106 ph - 800-653-2483
Contact information: Gene King, leaf@mml.org ph - 800-482-0626 ext. 8040*