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“I Can’t Breathe!” Is Failing To Do Something A Deliberate Indifference To A Serious Medical Need?

By Gene King, Law Enforcement Action Forum Coordinator



If a person taken into custody is observed displaying symptoms or complaining of the following, the officer is required to take action to provide for medical assistance for the person, or, if not an immediate need, the officer must notify those that custody is transferred to of the person’s medical/mental status and concerns. Symptoms include but are not limited to:

- + difficulty breathing;
- + excited delirium;
- + seizure;
- + cardiac symptoms;
- + alcohol or drug detoxing symptoms;
- + symptoms of sugar imbalance;
- + profuse bleeding;
- + unconsciousness or unresponsiveness;
- + obvious or anecdotal information of a serious mental illness or threats of suicide;
- + broken bones;
- + or being given notice of doctor diagnosed conditions that need prescribed treatment.

Officers must know their responsibility if a person taken into custody demonstrates a serious medical need. A serious medical need could be a condition that the officer has been told is being treated by a physician, which could worsen if treatment is not continued or a condition that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention. Ignoring or not acting upon this information or obvious indicators can lead to claims of deliberate indifference to a person’s serious medical need.

Just the Facts

Audrey Forbush, MML’s Law Enforcement Action Forum Legal Advisor from Plunkett Cooney PC, opined that claims concerning the medical needs of persons in custody are going to continue to be a challenge for law enforcement. She continued that the percentage of the population with medical conditions that must be treated continues to rise. She pointed to recent data showing that roughly 18% of the population suffers from mental illness; it is reported that approximately 9% of the population need treatment for substance abuse; about 9% of the population has diabetes and 1 in 26 people have some form of epilepsy. In 2012, the Center for Disease Control reported that roughly half the population had one or more chronic health conditions (i.e.,

hypertension, coronary heart disease, stroke, diabetes, cancer, arthritis, hepatitis, weak or failing kidneys, asthma, and COPD). Based on the data, Forbush predicted there is a reasonably foreseeable consequence that a police officer can expect to encounter a person that has some type of serious medical need.

Forbush said that the U.S. Supreme Court has held that, under the Eighth Amendment's prohibition on cruel and unusual punishment, prisoners have a constitutional right to medical care. *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). She said that pre-trial detainees are granted the same right as affirmed in *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) stating the Due Process Clause of the Fourteenth Amendment requires government officials to provide adequate medical care to individuals injured while being apprehended by police. The Sixth Circuit Court of Appeals also ruled in *Napier v. Madison County*, 238 F.3d 739, 742 (6th Cir. 2001), the Due Process Clause of the Fourteenth Amendment guarantees that pretrial detainees are not unnecessarily and wantonly subjected to pain by jail guards, tantamount to the Eighth Amendment guarantee for convicted prisoners.

A pretrial detainee is any person held in custody prior to adjudication. To help police officers understand what "custody prior to adjudication" means, Forbush drew a parallel to custody from a Fourth Amendment Seizure or even a traffic or Terry stop. She pointed to the Sixth Circuit Court of Appeals ruling in *U.S. v Campbell*, 486 F.3d 949 (2007) "A seizure of an individual occurs when 'under the totality of the circumstances', a reasonable person would have believed that he or she was not free to walk away."

Once You Seize A Person, Pay Attention To Their Wellbeing

The concept of being responsible for the overall wellbeing of people taken into custody is not new or daunting. Forbush suggests that police officers evaluate this issue in the context of the big picture. There are times when officers must restrain the free movement of subjects for purposes of investigation, safety or arrest. The key to minimizing the risk, Forbush said, is for officers to understand that they must take reasonable measures to protect the subjects from harm or injury. Part of those reasonable measures is for officers to be alert to unusual behavior that may indicate a potential medical or mental crisis and take action, should the need arise.

It is important, Forbush said, that officers understand what constitutes a serious medical need. She points to *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 570 (6th Cir. 2013) where the court defined a serious medical need as either one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. A person who has been shot or stabbed or is bleeding profusely should be considered to have a serious medical need Forbush said. She went on to say, by the *Villegas* definition, a number of the conditions previously discussed could be considered to present a serious medical need.

Forbush suggests that if the person being taken into custody says, or a third party tells, an officer the person requires prescribed medication or that a dietary regimen is required due to a condition or illness, that information can be considered notice of a potential serious medical need. Additionally, the officer is on notice when told by a reliable party that a person is being treated for a mental illness or is suicidal. Officer observations of erratic or unusual behavior are also important. In all these situations, Forbush said, officers must consider the information as they handle the prisoner. They are obligated to notify whomever they hand the person off to or the jail/lockup facility. All these situations should cue an officer they need to take some type of action to either further investigate the information or get medical attention.

In the bellwether case about serious medical risks of people in custody, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), the U.S. Supreme Court ruled, "deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." Forbush said that the Sixth Circuit, quoting

Farmer ruled in *Watkins v. City of Battle Creek*, 273 F.3d 682, 685-86 (6th Cir. 2001) that deliberate indifference is not mere negligence. Deliberate indifference requires that the defendants knew of and disregarded a substantial risk of serious harm to the detainee's health and safety. The standard is subjective. It is not enough that there was a danger of which an officer should objectively have been aware. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Alternatively, the court also ruled that if an officer fails to act in the face of an obvious risk of which he should have known but did not, the officer has not violated the Eighth or Fourteenth Amendments.

According to Forbush, training is at the heart of recognizing serious medical needs. She points to the father of failure to train cases, the U.S. Supreme Court decision in *Canton v Harris*, 489 U.S. 378; 109 S.Ct. 1197 (1989). At issue in *Canton* was whether, under Section 1983, a municipality could be held liable for its failure to adequately train employees in those reoccurring job tasks they are regularly expected to perform. In this case, the City of Canton Police took the plaintiff into custody. During her incarceration, she exhibited abnormal behavior, was incoherent and unable to stand due to severe emotional ailments but the Canton officers did not provide medical attention. The Court ruled that inadequate police training may serve as a basis for Section 1983 liability where the failure to train amounts to a deliberate indifference to the constitutional rights of a person with whom the police have contact.

The *Canton* court said that liability could be imposed under the deliberate indifference standard. Forbush explained that the court reached the deliberate indifference standard conclusion by drawing a balance between the policy of the entity/department, the actual reoccurring and expected performance demands on the officers and the training the officers receive to handle the reoccurring and expected demands. To prevail, a plaintiff must show that a particular training program inadequately prepared the officer for the task they had to perform and must also prove that the deficiency in training was the actual cause of the plaintiff's injury.

Forbush cautions top management to be conscious of their officers need for training to recognize behaviors that may indicate a serious medical or mental condition and actions officers should take once those behaviors are identified. Officers do not need to diagnose actual conditions or injuries. Forbush commented that the training should reflect the reoccurring job tasks officers are regularly expected to perform for their given municipal entity. Job task differences are impacted by management priorities, community demographics and diverse populations, however; she added in this particular issue, law enforcement everywhere has many similar exposures because of the percentage of population with medical needs. Evidence of the similarities of reoccurring and expected performance demands for officers is in the requirements of infectious disease control protocols and the proliferation of the AED Defibrillator, EpiPen and Narcan programs around the country.

Thoughts To Avoid The Risk

The risk of encountering a serious medical need is present at every encounter and avoiding a bad outcome is very specific to officers recognizing and responding to the prompts during each encounter. Some of the prompts may be clear statements, while others may be subtle, still others may be graphic and scary. The sudden onset of bizarre behavior or a catastrophic medical event are the easy ones to recognize and generally will prompt officers to provide emergency medical care. Forbush cautioned that it is the cases where a subject is taken into custody and provides officers with cues or makes statements that the officer misses, does not believe or ignores, which can be problematic. Officers know "frequent flyers" of the court system play the medical condition or mental illness "card" to improve their chance of a low bond or release on their own recognizance. Officers may become skeptical of these claims and ignore or discount them and take no action. Cues and prompts can also be overlooked if a subject continues to make threatening remarks, is constantly

complaining about being wronged or rambles on about excuses why an event happened. The noise is eventually tuned out!

Officers need to be reminded they frequently have custody of a person for several hours before they are able to lodge them in a jail or otherwise to relinquish custody. The first few hours the person is in custody are the most critical time for an occurrence of a medical or mental crisis. The person is often anxious, scared, ashamed, humiliated or angry. Combined with a pre-existing medical or mental condition and/or alcohol/substance abuse, these feelings can build to a critical event, leading to an outburst or self-destructive behavior so officers must be aware whether the individual exhibits suicidal tendencies.

Recognizing an “at risk” individual is an awareness issue. However, though more prevalent today, Forbush remarked, officers still do not gather information about the person’s mental and physical condition until they have booked or lodged the individual. She suggests that officers need to ask a few questions to obtain enough information to identify if the person is at risk. Below are the kind of questions Forbush recommends asking every person, as soon as practical, after they are taken into custody:

1. Do you currently have a medical problem, illness or injury?
2. If yes, what?
3. Are you being treated by a physician for a medical condition?
4. Have you been drinking alcohol today?
5. If yes, when was your last drink and how much did you drink?
6. Are you currently a user of narcotics or illegal drugs?
7. If yes, what drugs do you use? How much of the drug did you take today and how long ago?
8. Are you under psychiatric care or treatment? Where are you being treated?
9. Are you prescribed medication? If yes, where is the medication? When was your last dose and how much did you take?

If asking these questions seems to indicate that the person is at risk, officers should monitor them or take action as indicated to hopefully avoid a medical or mental crisis. Forbush said, “Forewarned is forearmed!”

Documentation of asking the questions, the answers given, along with action taken is very important. Forbush opined that the preferred method is either recording on an in-car or body camera system with notation of the recording included in the officer’s incident report. Other options include a form added to the incident report or specifically documenting the questions, answers and any action taken in the officer’s incident report are also acceptable. She explained that documentation should include retrieving any prescription drugs, the date of the prescription and the number of pills contained in the bottles and whether they were transported with the person and turned over to anyone custody was transferred to. The key is, no documentation, it did not happen!

Forbush also remarked it is always a good idea to include, by recording or in reports, any notifications made to family or others who could procure documents or medicine for the person at the detention location, lockup or jail. All information and any medications the officer obtained needs to be provided to any person to which the officer transfers custody. Documenting the place and time of handoff and the person any meds are given to is as important as gathering the information. Supervisors should be accountable to ensure the procedure for gathering the information and documentation are followed for every incident.

The most important point, Forbush said, is that officers understand restricting a person's freedom of movement and choice imposes a duty on the officer to provide for the basic human needs and reasonable safety of that person. The time of detention is not significantly relevant to the duty, nor is the history of who originally arrested or detained the person. This duty includes taking action should they have reason to believe a person shows symptoms of a serious medical need or mental crisis or they receive information that a physician is treating the person for a serious medical need. Absent an immediate need, the action could be as simple as obtaining medication, food or passing the information and medications to the next person taking custody.

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.

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.

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1675 Green Road, Ann Arbor, MI 48105 ph - 800-653-2483*

Contact information: Gene King, leaf@mml.org ph - 800-482-2726 ext. 8040