



# Contempt of Cop is Not a Legal Charge and Neither is Trumping Up Other Charges to Support an Arrest!



By Matthew Heins, Law Enforcement Action Forum Coordinator

LEAF felt an issue that has caused problems for police departments and officers in Michigan, and across the country, should be the focus of this edition of the Newsletter. What follows is a discussion of officers arresting subjects because, among other reasons, the subject either insulted the officer, refused to or failed to follow instructions to the officer’s satisfaction under circumstances in which the subject had no legal obligation to comply, challenged the authority of the officer or humiliated or demeaned the officer. We are discussing “Contempt of Cop” arrests and how they damage an officer’s reputation and integrity, the department’s reputation, relationships with the public and the creditability of both the officer and department within the criminal justice system. The primary takeaway: officers cannot arrest a subject just because they said something.

## What Are We Talking About?

These encounters often start when an officer confronts a subject who becomes defiant or uncooperative, makes profane and disrespectful remarks to the officer and either is slow to or does not submit to the officer’s requests, directions or orders. They challenge the officer’s authority and proclaim they have rights or know the law and basically defy the officer to do anything about it. Officers are programmed to take control. Once there is a perceived, for the lack of a better descriptive term, threat to their power or machismo, the officer becomes angry and escalates the encounter by exerting their authority and control without any regard for the actual circumstances of the encounter.

Once this path is taken, the behavior of the officer often spirals downward by applying force (control techniques) in some form to the subject and aggressively handcuffing under the guise of officer safety. If the subject reacts to the sudden physical onslaught, struggles or tries to defend themselves, the officer escalates the force used and compounds the arrest charges they figure can be applied to the disrespectful or insolent suspect. This behavior is an officer who is reckless and does not care about the law or believes their behavior is supported by the culture of the department and the failure of command to act when this behavior occurs.

In many of the cases reviewed, the officers were denied qualified immunity because there were material questions of fact concerning their actions and whether the officers violated the plaintiff's Constitutional Rights. In some cases, the facts were blatantly obvious that the officer lacked any reasonable suspicion or probable cause to support their decisions to take custody or arrest the subject, so any action taken after the initial contact was deemed to be a violation of the plaintiff's civil rights. It bears noting that most insurance policies exclude coverage for intentional violations of the law. This exclusion could be significant if there is a final adjudication that an officer committed a criminal act as damage awards may be completely at the officer's own expense. This is in addition to any criminal actions taken because of an officer's actions.

In most of the cases reviewed, supervisors prevailed because the plaintiff could not meet the court standard showing the supervisor at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. The employing entity often prevailed on failure to train allegations due to the plaintiff not meeting the court standard that officer training is inadequate to the tasks the officer must perform, that the inadequacy is a result of the municipality's deliberate indifference, and the inadequacy is closely related to or actually caused the plaintiff's injury.

### Standards of Law

LEAF turned to their Legal Advisor, Audrey Forbush, Plunkett Cooney PC and asked how the courts respond to cases where the allegations fit the Contempt of Cop scenario. Forbush said the courts have applied stringent standards to evaluating these types of cases. She commented that it is important to remember the initial contact with a subject often sets the tone for the rest of the encounter. For that reason, Forbush suggests officers be coached on the Terry Stop requirements and what an officer must articulate to support the stop. She also said the courts will also evaluate the officer's conduct during the encounter to determine the reasonableness of the actions taken.

In *Terry v. Ohio*, 392 U.S. 1; 88 S.Ct. 1868; 20 L.Ed.2d 889, 899 (1968) the U.S. Supreme Court established that an officer must be able to articulate that their actions were driven by more than a "hunch." The action must be based upon specific, articulable facts that when put together with the officer's experience or other knowledge justifies an investigatory stop. The court evaluated the officer's conduct by an objective standard: "Would the facts that the officer had at the moment of the seizure warrant a man of reasonable caution to believe the action was appropriate."

Additionally, Forbush pointed to *Smoak v. Hall*, 460 F.3d 768, 778 (6th Cir. 2006) where the Sixth Circuit said the reasonableness of a stop is determined by two factors: "(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 . . ." "[T]he 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." She went on to say that in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) the United States Supreme Court ruled a seizure occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."

Past issues of the LEAF Newsletters have discussed these requirements at length. Forbush said that the scenario presented in the March, 2008 edition entitled *Yes, Cops Can Practice "Catch and Release" with a Subject They Have Taken Into Custody* is relevant to this discussion. The high frequency cause of conflict that leads to the Contempt of Cop arrest is the verbal insults and disparaging remarks about an officer's lineage, intellect, physical attributes, sexual proclivities and prejudices. Though Forbush acknowledged that having to be the recipient of a verbal assault such as that described is maddening, the U.S. Supreme Court in *City of Houston v. Hill*, 482 U.S. 451, 462-63, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), stated "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one

of the principal characteristics by which we distinguish a free nation from a police state. Bottom-line is that an officer cannot rely solely on protected speech to establish probable cause to make an arrest.”

The U.S. Supreme Court in *City of Houston* held that the ‘fighting words’ doctrine may be limited in the case of communications addressed to properly trained police officers because police officers are expected to exercise greater restraint in their response than the average citizen. She continued that the Sixth Circuit in *Greene v Barber*, 310 F.3d 899 (2002), said “Government officials in general, and officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity.” The court went on to say, the law is well established that “[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.”

People can say foul, stupid and offensive things to police officers and in front of other people and cannot be legally arrested for doing so! Forbush said officers should not forget the “Cussing Canoeist” case of *People v. Boomer*, 655 N.W.2d 255 (Mich. Ct. App. 2002) in which the Michigan Court of Appeals repealed Michigan Compiled Laws § 750.337: *Indecent, Etc., Language In The Presence Of Women Or Children—Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor* as it was found to be unconstitutional. With the invalidation of the state law, any ordinances that contained the same language were also invalidated.

Forbush commented that municipal entities should review their ordinances for other language that fits within the scope of the decision from the Boomer court, which also explained that “in order to pass constitutional muster, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” She continued that the Sixth Circuit Court of Appeals in *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997) held that protected speech cannot serve as the basis for a violation of city ordinances at issue.

In addition, Forbush added that in *McCurdy v. Montgomery County, Ohio*, 240 F.3d 512 (6th Cir. 2001), the Sixth Circuit held that when an officer literally has no idea whether a presumptively law-abiding citizen has violated the law, the Fourth Amendment clearly commands that government let the individual be. Indeed, if anything is clear about the Fourth Amendment, it is this: government may deprive its citizens of liberty when, and only when, it has a viable claim that an individual has committed a crime, and that claim is supported empirically by concrete and identifiable facts. She also said officers must remember *Crawford v. Geiger*, 996 F.Supp.2d 603, 615 (N.D. Ohio 2014) where the court said “there is a First Amendment right to openly film police officers carrying out their duties.”

### Contempt of Cop Is Not A Crime!

Arrests must be within the parameters of law and within the discretion allowed by the department. Nothing in law enforcement is black and white. Officers must interpret, evaluate and reevaluate information constantly, then decide on what they should do. That is why it is important for officers to be trained to department policy, procedures and expectations for their actions, behavior, decisions they make and discretion they use in performing their job tasks. Not all activities and encounters of a police officer can be scripted by policy or orders, officers need to be able to operate outside the box when incidents are ever evolving. Officers must know they can take reasonable action to bring incidents to a successful conclusion given the circumstances they faced.

Probably most critical is that officers must be required to clearly report, in plain English with no jargon, buzz words, catch phrases or legalese, just what they saw; the actions of others; any active aggression observed and resistance encountered; the conclusions and decisions the officer made as a result of what he observed;

the facts that created probable cause to seize a subject or to search; the specific action taken to control a subject; and how the officers used de-escalation techniques to bring the incident under control.

### Action Points

Forbush said commanding officers must be proactive in preparing officers for confrontations that may make them angry, challenge their authority, bravery, fearlessness, intellect, physical abilities and sometimes even the core of their being as a police officer. Subjects under stress, the influence of alcohol, drugs or suffering from diminished mental capacity or illness will say almost anything and posture by making imposing and challenging gestures. She went on to say that it is the officer's responsibility to remain in control of themselves and use the tools they have learned through knowledge, experience and training to manage an incident and if action is necessary, all aspects of the action must meet the standard of law.

Forbush recommends the following:

1. Train officers in the law and policy of the department for Fair and Impartial Policing, Terry Stops, Law of Arrest, Search and Seizure and Use Force.
2. Officers must be trained to the expectations of command for their behavior, the amount of discretion allowed for taking action and the importance of de-escalating situations when they can.
3. When completing reports officers must be required to fully account for their actions, in plain English, during encounters and when taking subjects into custody.
4. Supervisors must be required to document their evaluation of the incident by initialing reports to ensure the officer has met the standard of law for taking the person into custody and then arresting them.
5. Command officers need to evaluate arrests and the corresponding report to ensure they meet the standard of law and the language used clearly describes behavior of the subject and the action taken by the officer in response to that behavior. It is also important to ensure subjects are properly arraigned, bonded or released pending further proceedings.
6. Command and supervision should document a 15 to 30-minute audit of random recordings made during arrests or citizen contacts for each officer to ensure they are complying with expectations and performing as required.
7. Officers found to be deficient in performing their job need to be remediated, disciplined or terminated depending on the seriousness of the deficiency. Officers who are untruthful, use unjustified force, falsely arrest and maliciously prosecute a person have committed a gross injustice and the behavior, at the least, is a mandatory exculpatory information disclosure issue as required by *Brady v. Maryland*, and its progeny and could also be a crime.

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.

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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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