



**A NEWSLETTER
DEDICATED TO
LAW
ENFORCEMENT
OFFICERS AND
PROFESSIONALS
WHO DEFEND
LAW
ENFORCEMENT
OFFICERS AND
DEPARTMENTS**

*Keep these things
in mind:*

*If you are going to
charge someone
with a crime,
make sure all “the
elements of the
crime” are
present.*

*The crime either
occurred or it did
not. Be careful
with charging
someone because
“technically” their
acts constituted a
crime.*

THE PROBLEM WITH “OVERCHARGING”

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Every Peace Officer is taught early on in his/her career to charge someone with the highest possible crime upon arrest, and then let the District Attorney’s Office figure out the precise crime to prosecute. Generally, there is nothing wrong or unethical with such practice as long as there is probable cause to believe the suspect committed the crime that he was arrested and charged with.

An officer can “technically” arrest someone for “robbery” when in all practicality the suspect committed some other lesser form of “theft” or other related offense. This is the kind of overcharge that can get you sued for Malicious Prosecution in federal court. The following cases illustrate the problem of overcharging in actual cases that went to trial. The cases are fondly referred to as the “Pizza” case and the “Divorce from Hell” case.

The Pizza Case

A large woman, 300 lb + and her sister who is recovering from surgery and using an oxygen tank telephone their local pizza restaurant from her home and orders two pizzas as she has done many times before. This particular restaurant had a policy to refund the customer’s money if the customer was not satisfied with the pizza for any reason. Sometime later, the delivery person arrives at the woman’s home with the two pizzas she ordered whereupon he is paid for the delivery. She inspects the pizzas and she is not satisfied with one of them and the delivery driver says he will bring back another one. The delivery person later telephones her and advises she has to come to the restaurant if she wants another pizza. Upon arrival, they tell her she can have her old pizza back because it was the correct order. She decides that this isn’t acceptable and wants a refund. The manager refuses. The manager then tells the woman that she would not get a refund but they would make her a new pizza only.

Things get heated and a commotion starts and the two women decided to call 911. The 911 operator hangs up upon hearing what the problem is with the pizza. The women confront the smaller manager who stands his ground about no refund. The women decide that self help is the appropriate remedy. The woman, by now enraged, yelled, “Fine, then I’ll take this instead!” as she walked to the beverage cooler.

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4th Amendment controls stops, detentions, arrests and the use of force.

Remember: juries are human and they always put themselves in the shoes of the plaintiff first, not yours.

Juries want to think of law enforcement officers as professional and not vindictive – so don't provide the ammunition for them to think otherwise.

She then grabbed a six-pack of sodas and started to walk out of the restaurant. The manager tried to stop her as she was walking out with the sodas and tries to grab the sodas knocking a couple of them out of the plastic. One of the women grabs him and says “don't fuck with us”. The manager decides he isn't receiving combat pay and lets the women leave. The silent alarm is activated. The crime is investigated and the two women are later arrested for PC 211. The DA rejection indicates the pizza restaurant should have given the women a refund and that it was a civil dispute.

The Divorce from Hell

An ex-reserve deputy sheriff is in the middle of a bitter divorce case with his wife, by now entering its fifth year. One morning, as he is taking his illegitimate children to school, his wife passes him going to opposite way on a mountain road. As they pass each other, the woman realizes he soon to be ex-husband is driving a vehicle he claimed was inoperable during a previous divorce court hearing. Not wanting to be cheated out of any assets when the divorce became final in another five years, she starts to follow her husband; she pulls a camera from her glove box and starts to take pictures of her husband, who is now directly in front of her. Although to this day the husband maintains he never saw his wife through the rear view mirror, he nevertheless slammed on the brakes to avoid striking a sasquatch or Bigfoot type creature that darted in front of his car. After the collision, the husband hurried to his wife, snatched the camera away from her and started to walk towards his own car. At that point, the wife exited her vehicle, started to follow the husband and attempted to take the camera back. During this encounter, the husband punched the wife in the face (this fact was in dispute) and locked himself in his car. Of course, the husband later claimed the wife got the bloody nose from striking her nose with the camera during the collision. She claimed it was the punch. He claimed the camera in question was one he used for years in connection with his business. She claimed it was the camera her parents gifted to them during their happier times. The film was never found. One of the charges the husband was arrested for was PC 211 of the camera. The husband is acquitted in his criminal trial.

— Both of the above cases went to trial in United States District Court. Both the 300 lb woman and the husband from hell alleged Malicious Prosecution in their lawsuits against law enforcement. Both cases settled half way through the trial. The Pizza case was a bench trial, meaning there was no jury and the judge alone would have decided if there was liability. The divorce case was a jury trial. In both instances the judge and the jury felt offended by the fact that robbery charges were brought against these suspects. In their minds, although they recognized that “technically” the robbery elements might have been present, the police should have used common sense and not follow the letter of the law. Both cases if they had been decided would have gone against law enforcement.

Malicious prosecution suits can be brought against a law enforcement officer.

Make sure the dispute is a crime and not a civil dispute.

A civil dispute is not a crime and your attempt to make it one can lead to a civil rights violation.

Remember, malicious prosecution actions are not limited to suits against the prosecutor but may be brought against other persons who have wrongfully caused the charges to be filed (i.e. police). Galbraith v. County of Santa Clara, 207 F.3d. 1119, 1126-27 (9th Cir. 2002).

Therefore, make sure that the charges you do arrest somebody for are based on not only the law, but also common sense and your good training and experience. Do not get caught holding the bag for a D.A. who decides to drop completely or reduce the charges you originally arrested somebody for and leave you explaining your actions in federal court.

Also, remember that some situations aren't really criminal at all but are instead a civil dispute between two parties. Officers are taught not to take sides in a civil dispute and the pizza case is really just that. The pizza restaurant was also a defendant at trial and contributed heavily to the ultimate settlement after their attorney realized that the pizza box stated a guarantee of the right to a refund if you weren't completely satisfied.

CIVIL DISPUTES

An example of the problem with a civil dispute is the case of Allen v. City of Portland 73 F3d. 232 (9th Cir. 1995). The case involved a dispute over the use of an entertainment card to play for a meal. The card provided for a free meal with the purchase of another meal if the restaurant is advised at the time of ordering. The patrons forgot to mention the card until the bill arrived. A dispute ensued and the patrons left \$15.00 for a \$25.00 meal (the discount wasn't allowed by the restaurant). The patrons left and the restaurant called the police about a theft. The patrons had left and gone to another restaurant where the wife had entered the bathroom. The officer went in and advised she had committed a theft and needed to leave with him. The officer ended up grabbing her arm and in a struggle breaks her arm. The woman is cited at the scene and taken to the hospital by her husband. The Ninth Circuit held there was no probable cause for the arrest in the first place and that at best it was a contractual dispute between the restaurant and the patrons. Without probable cause for the arrest there was a civil rights violation of the patron's fourth amendment right to be free from an unlawful seizure.

Similarly, in Kennedy v. Los Angeles Police Dept., 901 F.2d 702, 716 (9th Cir. 1990), (overruled in part on other grounds), two women Kennedy and Houghton were roommates in a small apartment. The women had entered into a two-year lease. Thereafter Houghton, without warning, left Kennedy a note indicating that she would be vacating the apartment the following morning. Kennedy claimed Houghton owed her a total of \$694 for her portion of rent, utilities and bounced checks. The following morning Houghton, with her parents and grandparents, arrived at the apartment with a car trailer to retrieve her belongings. Houghton refused to pay the debt before departing. Houghton made several trips to complete her move and during one of the trips, Kennedy

A civil dispute cannot give rise to probable cause.

moved two of Houghton's wicker chairs into Kennedy's bedroom and Houghton's television into the living room behind some drapes. Kennedy retained these items as "security" for the debt she claimed Houghton owed her. When Houghton returned, she noticed that some of her belongings were missing and called the police.

Officers responded to the call and demanded entry into the apartment after Kennedy had changed the locks. The officers then spoke with Kennedy, who explained that she intended to hold the property as security. The officers ordered Kennedy to remain on the sofa while they searched the apartment for the missing items which was unsuccessful. The officers then arrested Kennedy for grand theft and escorted her to jail where Kennedy was forced to submit to a humiliating body-cavity search. A jury subsequently determined that the officers were not entitled to qualified immunity and had violated Kennedy's constitutional rights when they arrested her.

The Ninth Circuit Court of Appeals concluded that there was sufficient evidence to support the determination that probable cause for an arrest was lacking. The officers did not contend that they believed Kennedy was holding Houghton's property for any purpose other than as security for a debt. There was no reasonable basis from which anyone could believe that Kennedy had the specific intent to permanently deprive Houghton of her property.

Avoid being caught in a civil dispute. Is it really a crime or a dispute between parties that is better left to the courts to decide as opposed to you in the field? A civil dispute is a sure way to land in federal court as a defendant.

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