



CIVIL LIABILITIES

The E-Mail Reporter

January 1, 2005

VOL. 1

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

Keep these things
in mind:

Detention and a
reasonable time
to effect law
enforcement
purpose

The longer the
detention the
more you need to
be able to
articulate why its
still reasonable to
have the
detention

INAUGURAL ISSUE:

The purpose of this newsletter is to offer a discussion of problems and solutions for the myriad of issues facing law enforcement officers today. The issues facing law enforcement are diverse and all too often result in civil litigation against the officer and the department. The authors of this newsletter are current and former law enforcement officers and attorneys who defend civil rights litigation involving these same issues. This newsletter and other information can also be found at our web site **CivilLiabilities.com**. Feel free to utilize the web site and provide feedback for the newsletter and future topics. The opinions and advice of this newsletter are those of the editorial staff and legal cases are current as of the time of the newsletter. Given the many changes that take place in the legal system with appellate decisions reliance upon your legal counsel is always the best advice. No attorney client relationship is created based upon this newsletter.

DELAY AND DE FACTO ARREST

There appears to be renewed interest in litigating civil rights violations based upon claims of a de facto arrest. This can be very subtle in terms of an investigation where there is a delay in speaking to witnesses versus a detention where the person is a suspect. Oftentimes it's not always clear that there is a distinction. The concerns arise when an investigation, which is lawful, has now become a liability issue due to the passage of time. An example involves a homicide investigation in a remote area. The homicide team takes awhile to arrive and witnesses to the shooting are transported to the station to await statements. The homicide team takes several hours to investigate the scene and during this time the witnesses want to leave and go home and are willing to give statements the following day. The witnesses aren't allowed to leave instead they are told they need to wait to be interviewed by homicide.

A lawsuit is filed contending that violations of the 4th amendment occurred for the holding of the witnesses, which is now claimed to be a de facto arrest. Is there a magic time that delay can turn into a defacto arrest? No. Each situation is different. The over riding issue is whether the delay is reasonable and whether witnesses who are not suspects are free to leave. The investigation must be reasonable as to time and inconvenience as to the non-suspect witnesses.

Supervisors need to be aware of time issues and the delayed hold of witnesses includes the right of witnesses to leave. The delay needs to be documented and this can be done through a statement in writing such as a consent form or a tape recording, which preserves the issue of consent. Supervisors need to think based not only on training but also for the potential of legal liability. In the homicide investigation example, the witnesses should have been interviewed

*4th amendment
controls stops or
detentions*

*Detention must be
reasonable as to
scope and as to
methods of
restraint*

*Scope of
detention – is it a
Terry stop based
upon reasonable
suspicion –must
terminate the
intrusion once the
basis for the
initial detention
has been resolved*

homicide investigation example, the witnesses should have been interviewed more promptly. If there is a delay that is becoming unreasonable then arrangements should have been made to transport the witnesses to their homes and statements taken the following day. Ask yourself what kind of investigation is on going? Is it a felony, misdemeanor or an infraction?

A seizure or a detention including an investigatory stop is governed by the 4th Amendment. A felony car stop detention of 45 minutes is reasonable. Alexander v. County of LA, 64 F. 3d. 1315 (9th Cir. 1995). Detaining an elderly person half clothed for 2 hours during a search was unreasonable. Franklin v. Foxworth, 31 F. 3d. 873 (9th Cir. 1994). The detention and how it is carried out must be justified, including the drawing of weapons and use of handcuffs. So if a search warrant is for bank records it probably isn't justified to handcuff a secretary during the execution of the warrant absent other factors. The same would be true for drawing weapons where it would appear unreasonable.

One way to determine whether a detention is unreasonable is did the officers pursue methods of investigation to confirm or dispel suspicions quickly. U.S. v. Sharpe, 470 U.S. 675 (1985). Is the detention a "Terry Stop" where the detention is temporary and based upon less than probable cause, or reasonable suspicion. Michigan v. Summers, 452 U.S. 692 (1981). Any detention that goes beyond the investigative detention needs probable cause. A 20-minute detention of a suspect in a patrol unit was not unreasonable when it was cold, no threats were used and the suspect was free to leave. U.S. v. Torres-Sanchez, 83 F. 3d. 1123 (9th Cir. 1996). A detention can be no longer than necessary to affect the purpose of the stop. Florida v. Royer, 460 U.S. 491 (1983).

If it is an infraction offense, once information exists to issue the citation no further detention can be justified without probable cause to arrest. Pierce v. Multnomah County, 76 F. 3d. 1032 (9th Cir. 1996). A jaywalker can be detained only for that time to establish identification and to execute a citation. U.S. v. Lockett, 484 F. 2d. 89 (9th Cir. 1973). The use of handcuffs does not necessarily make a detention a de facto arrest. People v. Bowen, (1987) 195 Cal. App. 3d. 269. For the use of any restraint during a detention the question to be asked is does the restraint used during the detention go beyond what is reasonably necessary. People v. Campbell, (1981) 118 Cal. App. 3d 588.

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The Emergency Aid
Exception to the 4th
Amendment

Reasonable belief, no
improper motive and
probable cause that
the area to be searched
is associated with the
emergency



FEDERAL CASE

9TH CIRCUIT:

In Martin v. City of Oceanside, 360 F. 3d. 1078 (9th. Cir. 2004) the court held that summary judgment was appropriate for a civil rights case based upon entry into a residence for a welfare check. The reporting party was the father who was concerned about his daughter's welfare. Officers arrived to check on her welfare and no one answered. Unbeknownst to the officers there were persons in the house. The officer finds an open door into the house and feared that something out of the ordinary might be in progress. The officer speaks to a neighbor who indicates the car at the residence belonged to the occupants who should be there. When backup arrives, the officers entered the house with guns drawn to check on the daughter's welfare.

The civil rights issues raised were that the entry violated the 4th amendment by entry without a warrant or consent; that officers failed to knock and announce their presence; and having drawn weapons pointed at the occupants was unreasonable. The court reaffirmed the **emergency aid exception** discussed in U.S. v. Cervantes, 219 F3d. 882 (9th Cir. 2000) which says you need (1) a reasonable belief of an emergency and immediate need to assist to protect life or property, (2) search is not motivated by intent to seize or arrest and (3) a reasonable basis comparable to probable cause to associate the emergency with the area to be searched. Police are permitted to enter a home without a warrant in an emergency situation under the community caretaking function. U.S. v. Bradley, 321 F.3d 1212 (9th Cir. 2003).

Since the facts justified the emergency aid exception, no liability existed and summary judgment was affirmed on appeal.