

OBSTRUCTION OR CONTEMPT OF COP?

First Amendment, Internal Affairs, and Civil Liability Considerations
in Municipal Prosecutions

Colorado Municipal League

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C.R.S. § 18-8-104.

Obstructing a peace officer...

(1)(a) A person commits obstructing a peace officer...by using or threatening to use **violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders** the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority...

(1.5) A person shall not be charged with the offense described in subsection (1) of this section because the person remained silent or because the person stated a verbal opposition to an order by a government official.



Outlaw v. People, 17 P.3d 150 (Colo. 2001)

- When a police officer approaches an individual in a public place and seeks to ask him questions, the individual may ignore the officer and proceed on his way.
- An area with frequent past criminal behavior (i.e., a bad neighborhood, druggie bar, etc.) does not create reasonable suspicion that a crime has been or will be committed.
- A gathering of individuals on a public sidewalk is insufficient to justify an investigatory stop.
- A so-called “furtive gesture,” standing alone, is too ambiguous to constitute the basis for an investigatory stop.



NOT OBSTRUCTING:

Refusing to give name, or walking away when officer doesn't have probable cause to arrest or reasonable suspicion for Terry stop and frisk, is NOT Obstructing an Officer.

Obstructing an Officer occurs when there is probable cause or reasonable suspicion and the suspect runs away, lies about name or facts under investigation, pulls away from you during handcuffing, or other affirmative conduct making your job more difficult.



Hodge v. Bartram, No. 21-2125 (10th Cir. Feb. 2, 2023)

Tenth Circuit reversed District Court's denial of qualified immunity because officer's actions in removing non-compliant suspect from vehicle during traffic stop did not violate clearly established law. Deputy Bartram asked or demanded plaintiff Hodge do something **19 times** before he opened the door to forcibly remove her. It is unclear whether back up arrived or if someone else attempted contact with plaintiff prior to the application of force.



***City of Tahlequah, Oklahoma v. Bond*, 981 F.3d 808 (10th Cir. 2020)**

Officers called to a home because the former husband of the resident was in the garage drunk and refusing to leave. When the officers arrived, they engaged the man in conversation, and he eventually moved to the rear of the garage despite being told to stop. He picked up a hammer and based upon the officers' fear that he was going to use it against them, they shot him, causing death. Tenth Circuit concluded that a jury could find that officer's initial step toward suspect and the officers' subsequent "cornering" of him in the back of the garage recklessly created the situation that led to the fatal shooting.



***City of Tahlequah, Oklahoma v. Bond*, 211 L. Ed. 2d 170, 142 S. Ct. 9, 11 (2021).**

United States Supreme Court reverses Tenth Circuit: “We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law” [and thus are entitled to qualified immunity]. Lesson here: At least one circuit, ours, believes that officers may lose reasonableness of force based on police behavior, i.e., **officer-created jeopardy**.



***Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022)**

Tenth Circuit formally recognizes the First Amendment right to record police officers performing their official duties. Irizarry was filming a traffic stop when a Lakewood police officer arrived on scene and physically blocked his view with patrol car, shined a flashlight into his camera, “harassed” bystanders recording the stop and when told to stop by other police officer, Yehia got back into his cruiser, “drove right at [Mr. Irizarry] and Mr. Brandt, and sped away.” He made a U-turn, “gunned his cruiser directly at Mr. Brandt, swerved around him, stopped, then repeatedly began to blast his air horn at [the two men].” Eventually, Officer Yehia was instructed to leave the scene due to his “disruptive and uncontrolled behavior”.



Bustillos v. City of Carlsbad, New Mexico, No. 21-2129,
2022 WL 1447709 (10th Cir. May 9, 2022)

Tenth Circuit holds no Fourth Amendment violation: The issue was not that Bustillos was recording the encounter—it was to leave the scene and provide his identification. Bustillos was filming a police encounter with a woman in mental health crisis who was clearly triggered by Bustillos. Police Officer Vasquez tells plaintiff: “Okay you're scaring her. You need to go now. You're going to make her worse ... you need to go. I'm not going to ask you again—you need to go. You're going to make her mental state worse. You're going to make her status worse, now go, or you can go to jail—you decide.”



First Amendment Audits

First Amendment audits can be unexpected stressors for officials and employees and understandably can make people uncomfortable—when is the last time you were videotaped at your desk by someone you have never met?

And they can raise legal issues that may not come up that often in day-to-day operations:

- Can they really say “#(@*#^%%”?
- Can they really videotape staff while they work?
- Can they really go anywhere in the building?



Auditors In Public Places

- Legal Context
 - And can be true where speech is profane or vulgar, as that can be considered protected speech. *Examples:* The use of “f*ck” in a courthouse, telling an officer “go f*ck yourself” in response to officer’s questions, and exclaiming “f*ck you” in crowded shopping center in the presence of children are all protected speech.
 - *Cohen v. California*, 403 U.S. 15 (1971); *U.S. v. McKinney*, 9 Fed. Appx. 887 (10th Cir. 2001) (unpublished); *Stone v. Juarez*, 2006 WL 1305039 (D.N.M. Apr. 23, 2006) (also noting that officers are trained in dealing with angry citizens, thus would be expected to “exercise a higher degree of restraint than the average citizen,” and be less likely to respond violently to “fighting words.”).



Auditors In Public Spaces

- Legal Context
 - **But**, Fighting words are not protected.
 - Narrow, limited to: “[E]pithets (1) directed at the person of the hearer, (2) inherently likely to cause a violent reaction, and (3) playing no role in the expression of ideas.” *Klen v. City of Loveland*, Colo., 661 F.3d 498 (10th Cir. 2011).
 - The key is the context in which words are delivered. *Id.* Words that are meant to incite violence or constitute “epithets” will NOT be protected. *Burns v. County Com'rs of Jackson Cnty.*, 330 F.3d 1275 (10th Cir. 2003) (calling manager a "no good Indian" during heated altercation was not protected speech).



Auditors In Public Spaces

- Legal Context
 - **And**, Obscene speech is not protected.
 - Three-part test (*Miller v. California*, 413 U.S. 15 (1973):
 - Contemporary community standard;
 - Depiction of sexual conduct as defined by state law;
 - As a whole is lacking in literary, artistic, political, or scientific value.
 - The Miller analysis applies *only* to depictions of sexual obscenity, not violence or other obscenity. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011).



Auditors In Public Spaces

Can they really videotape staff while they work?

- Well, generally, yes. The right of persons in public places to make video recordings is generally well-established.
- Colorado is a single-party consent state.
- Under C.R.S. §§ 16-3-311 and 13-21-128, persons have the express right to record peace officers, and officers and their employers can be liable for unlawful destruction, damage, or seizure of a recording, or for retaliating against a person making a recording.
- So in the public areas that are open and openly accessible, the response of “You can’t record here” is not an appropriate approach.



Auditors in the Building

Can they really go anywhere in City/Town Hall?

- The public areas of public buildings are public spaces open to the public (whew...that is a lot of public).
- For these areas, there is no basis for “trespassing” against a person in open areas during business hours and there is no requirement the visitor demonstrate they are there for “official business.”
- A First Amendment audit is not the first time to tell the visitor a publicly accessible area is “off limits”. Rather, non-public areas should be secured and marked in advance.
- Confidential information should be shielded from view/recording.



Tips for Dealing with Auditors

- Have appropriate personnel address any issues that come up. Dealing with auditors is not for everyone, so consider identifying a few key staff who can serve as a “vortex” to deal with auditor encounters.
- Coach staff that they can (and should) extricate themselves from stressful or uncomfortable situations.
- Consider whether any changes are warranted regarding publicly accessible areas.
- Clearly sign and designate areas within the building/facility that are not open to the public.



Tips for Dealing with Auditors

- Consider view corridor into non-public areas. Are measures needed to protect against viewing or recording of non-public information or activities?
- If you have a no recording order, maintain proper signage in appropriate locations.
- Use de-escalation techniques; e.g., deflect provocative questions and disengage.
- Kindness and patience may not be reciprocal, but it goes a long way toward a short and uneventful visit.



What information did the officer(s) have at the time?

What additional information would you want to know?

What crime did the suspect(s) commit?

What should the objective of the officer(s) be?

Did the officer(s) meet their objectives prior to use of force or arrest being made?

What legal standing did the officer(s) have?

How would you handle this same situation if presented to you?

