Obstruction or Contempt of Cop?

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

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CML 2023 Municipal Prosecutors Workshop
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OBSTRUCTING AN OFFICER[1]

C.R.S. § 18-8-104. Obstructing a peace officer, firefighter, emergency medical service provider, rescue specialist, or volunteer

(1)(a) A person commits obstructing a peace officer, firefighter, emergency medical service provider, rescue specialist, or volunteer when, 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**; knowingly obstructs, impairs, or hinders the prevention, control, or abatement of fire by a firefighter, acting under color of his or her official authority; knowingly obstructs, impairs, or hinders the administration of medical treatment or emergency assistance by an emergency medical service provider or rescue specialist, acting under color of his or her official authority; or knowingly obstructs, impairs, or hinders the administration of emergency care or emergency assistance by a volunteer, acting in good faith to render such care or assistance without compensation at the place of an emergency or accident.

(b) To assure that animals used in law enforcement or fire prevention activities are protected from harm, a person commits obstructing a peace officer or firefighter when, by using or threatening to use violence, force, physical interference, or an obstacle, he or she knowingly obstructs, impairs, or hinders any such animal.

(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.

(2) It is not a defense to a prosecution under this section that the peace officer was acting in an illegal manner, if he or she was acting under color of his or her official authority. A peace officer acts "under color of his or her official authority" if, in the regular course of assigned duties, he or she makes a judgment in good faith based on surrounding facts and circumstances that he or she must act to enforce the law or preserve the peace.

(2.5) If a person is alleged to have committed the offense described in subsection (1)(a) or (1)(b) of this section by using or threatening to use an unmanned aircraft system as an obstacle, the offense does not apply if the person who operates the unmanned aircraft system:

> (a) Obtains permission to operate the unmanned aircraft system from a law enforcement agency or other entity that is coordinating the response of peace officers, firefighters, emergency medical service providers, rescue specialists, or volunteers to an emergency or accident;
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> (b) Continues to communicate with such entity during the operation of the unmanned aircraft system; and

[1] What's not obstructing? Refusing to give name or walking away when officer doesn't have PC or *Terry* RS.

(c) Complies immediately with any instructions from the entity concerning the operation of the unmanned aircraft system.

(3) Repealed by Laws 1983, H.B.1340, § 23.

(4) Obstructing a peace officer, firefighter, emergency medical service provider, rescue specialist, or volunteer is a class 2 misdemeanor.

(5) For purposes of this section, unless the context otherwise requires:

(a) "Emergency medical service provider" means a member of a public or private emergency medical service agency, whether that person is a volunteer or receives compensation for services rendered as such emergency medical service provider.

(b) "Obstacle" includes an unmanned aircraft system.

(c) "Rescue specialist" means a member of a public or private rescue agency, whether that person is a volunteer or receives compensation for services rendered as such rescue specialist.

***Outlaw v. People*, 17 P.3d 150 (Colo. 2001)** -The Colorado Supreme Court holds that 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.

On the evening of April 30, 1997, two Denver Police officers (the officers) were patrolling Denver's Five Points neighborhood. The officers were driving a marked patrol car and were wearing Denver Police uniforms. At approximately 6:20 p.m., the officer driving the patrol car stopped at a red light on northbound Welton Street at the Five Points intersection.2 It was still daylight. While stopped, the officers in the patrol car observed four individuals—two men and two women—standing outside the 715 Club, a bar on 26th Avenue. The officers did not recognize any of the individuals, nor did they know how long the group had been standing outside the bar. They did not see the individuals exchange anything. The officers were approximately thirty-five to forty-five yards away from the individuals when they saw them.

The individuals noticed the patrol car and began walking east on 26th Avenue. The officers turned the patrol car east onto 26th Avenue to follow them. Crossing the westbound lane of 26th Avenue, the officer operating the patrol car drove it onto the sidewalk behind the four individuals. They continued to walk, with the patrol car following directly behind them.

The patrol car slowly followed five feet behind the group for a distance of twenty or thirty feet. Outlaw was closest to the patrol car. The officer driving the patrol car noticed that Outlaw's right hand was open but his left hand was closed in a fist. This officer concluded that Outlaw was holding something in his left hand. He navigated the patrol car back onto the street, into the westbound lane of traffic. He drove slowly eastbound in this lane, following alongside Outlaw for another ten to fifteen feet as Outlaw walked down the sidewalk. **The officer then stopped the car and summoned Outlaw, by saying either "Can you come over to the vehicle" or "Come over to the vehicle." He used a conversational tone of voice. Outlaw complied. He turned and walked to the patrol car.**

As Outlaw approached the car on the driver's side, his left hand remained closed. The officer saw what appeared to be a small piece of clear plastic protruding from that hand. Outlaw then made a sweeping motion with his closed hand, dropping it out of view for a moment. This hand was open and empty when it came back into the officer's view.

The police exited and secured Outlaw near the rear of the patrol car. They recovered two baggies of what they suspected to be crack cocaine on the ground near the patrol car.

Outlaw was charged with possession of cocaine. The trial court denied the defendant's motion to suppress the drug evidence and he appealed to the Colorado Supreme Court, which reversed the trial court and suppressed the evidence.

Police-citizen encounters are of three different types: (1) arrests; (2) investigatory stops; and (3) consensual encounters. Each of these categories requires "varying levels of justification and protection.". While arrests and investigatory stops are seizures implicating the protections of the Fourth Amendment consensual encounters are not. The record in this case does not support the existence of a consensual encounter. According to the uncontested evidence, the police drove the patrol car onto the sidewalk and followed only five feet behind Outlaw and the other individuals for a distance of twenty to thirty feet. The police then pulled the car off of the sidewalk, into the wrong lane of traffic, and alongside Outlaw for another ten to fifteen feet. In all, the officers followed Outlaw at extremely close range for a distance of thirty to forty-five feet; during the entire period, the patrol car was not in a usual lane of traffic. The officers' close pursuit of a pedestrian while in an automobile on a sidewalk is a "show of authority." Under *Terry*.

In this case, the trial court based its conclusion on the following facts and circumstances known to the officers at the time of the stop and presented through testimony at the suppression hearing: (1) the police had made drug arrests in the area in the past, and considered it to be a high crime area; (2) the police observed four people standing close together on the sidewalk; (3) these four people began walking away, apparently after seeing the patrol car; (4) Outlaw had his left hand closed in a fist; and (5) as Outlaw approached the patrol car, the officer driving the patrol car saw a piece of clear plastic protruding from Outlaw's closed hand.

Taking these facts as true, the Colorado Supreme Court held that the trial court erred as a matter of law in finding that the police had an articulable and specific basis to believe that Outlaw was committing, had committed, or was about to commit a crime.

The **Colorado Supreme Court has rejected the proposition that a history of past criminal activity in an area is itself sufficient to create a reasonable suspicion that a crime is being, has been, or will be committed.** See *People v. Greer*, 860 P.2d 528, 531 (Colo.1993); *People v. Rahming*, 795 P.2d 1338, 1343 (Colo.1990). The fact that Outlaw and his companions were standing in a neighborhood frequented by crime is not in itself a basis for concluding that Outlaw was engaged in criminal conduct. See *United States v. Davis*, 94 F.3d 1465, 1468 (10th Cir.1996).

Nor is a gathering of individuals on a public sidewalk sufficient to justify an investigatory stop. Peaceable gatherings are a hallmark of our democracy, explicitly protected in both the United States and Colorado Bill of Rights. See U.S. Const. amend. I (guaranteeing "the right of the people to peaceably assemble"); Colo. Const. art II, § 24**. Furthermore, 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.** See *Davis*, 94 F.3d at 1468**. Accordingly, the fact that Outlaw and his companions began walking away from the patrol car after one of them apparently noticed the car fails to provide reasonable suspicion**.

Nor was Outlaw's closed hand enough to support reasonable suspicion. An individual might tighten his or her hand into a fist for a number of reasons, including fear or anger at being followed by police at extremely close range. **We have previously held that a so-called "furtive gesture," standing alone, is too ambiguous to constitute the basis for an investigatory stop**. *People v. Thomas*, 660 P.2d 1272, 1275 (Colo.1983). We further noted that: From the viewpoint of the observing police officer, an innocent move may often be mistaken for a guilty reaction. From the perspective of the person observed, the "furtive gesture" might be impelled by a variety of motives, from an unsettling feeling of being watched to an avoidance of what might be perceived as a form of harassment. Then again, a person's movement may not be a reaction to the police at all.

***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. This case stems from a traffic stop in Albuquerque, New Mexico. One night in October 2018, Bartram was on patrol in his squad car when he saw Hodge fail to stop at a stop sign and cross the yellow line on the left side of the road. Based on these observations, Bartram activated his emergency lights to initiate a traffic stop. Hodge pulled over in a parking lot, and Bartram approached her car on the passenger side.

Bartram began the encounter by greeting Hodge and *asking* if she had her driver's license. Hodge said that she did but wanted to know if Bartram was "asking or demanding for it." After Bartram *asked to see* Hodge's license again, Hodge asked what the basis for the stop was. Bartram *repeated* his request for identification, prompting Hodge to repeat her request for an explanation of why he had stopped her. When Bartram *relayed his reasons*, Hodge accused him of lying. In response, Bartram *again asked* to see her license; Hodge again refused, this time adding that she was "calling 911." Id. Faced with Hodge's repeated refusals, Bartram radioed for backup and walked to the other side of the car.

After arriving at the driver's-side door, Bartram *asked for Hodge's license twice more*, and *then demanded* that she present it. Hodge—who claims not to have heard Bartram because she was calling 911 on her cellphone—did not respond until after the third time, stating that the demand was "an unlawful order." Bartram disagreed, explained that he was a deputy with the Bernalillo County Sheriff's Department, and *made three more demands* for Hodge to produce her license. As he was doing so, Bartram peered inside the vehicle with his flashlight, and Hodge told the 911 dispatcher that "an officer [was] being hostile with [her]." Id. As Hodge started to provide her location to dispatch, Bartram opened the driver's-side door and told Hodge to "step out of the vehicle." Id. Adamant that "this [was] unlawful," Hodge remained seated and continued talking to dispatch. Id. Over the next 30 seconds or so, *Bartram gave seven more unanswered commands* for Hodge to exit her vehicle, as well as *one more unanswered demand* for Hodge's license.

Bartram then attempted to remove Hodge from the vehicle. His first attempt failed: He leaned inside the vehicle and tried to grab Hodge's wrists, but Hodge shouted and pulled away. Before trying again, Bartram made two final demands that Hodge exit the vehicle, reiterated that his demands were lawful, and reached inside the driver's-side window to turn off the engine and take the keys. Hodge stayed put, so Bartram tried again to remove her. This time, Hodge "restrained herself" by briefly grabbing the steering wheel "to prevent [Bartram] from" removing her. Within about ten seconds, Bartram pulled Hodge out of the car by her left arm and onto the ground, where she curled up and "squirm[ed]" around while Bartram

tried to handcuff her. Unable to secure one of Hodge's hands, Bartram spun her on her side, sat on top of her to push her legs straight, and applied a pain hold to push her hands together and lock the handcuffs into place. As a result of Bartram's conduct, Hodge sustained injuries to her neck, shoulders, and right knee and elbow.

[By our count, it appears 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*, 211 L. Ed. 2d 170, 142 S. Ct. 9, 11 (2021).**

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.

According to the [now reversed] Tenth Circuit decision, an officer may be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force. Applying that rule, the Tenth Circuit concluded that a jury could find that Officer Girdner'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, such that their ultimate use of deadly force was unconstitutional.

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)**

In this case, the Tenth Circuit formally recognized **the First Amendment right to record police officers performing their official duties** in public as "squarely within the First Amendment's core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power." In Irizarry v. Yehia, a bystander was filming a traffic stop when a Lakewood police officer arrived on scene and physically blocked his view and shined a flashlight into his camera. The district court found the officer was entitled to immunity, notwithstanding the constitutional violation, because the right had not been clearly established. The Tenth Circuit reversed and held that the right was clearly established under weight of authority from other circuits and Tenth Circuit precedent regarding the right to film public officials.

According to the decision, Plaintiff Irizarry is a "YouTube journalist and blogger" who regularly publishes stories about police brutality and conduct or misconduct." On May 26, 2019, he and three other "YouTube journalists/bloggers" were filming a DUI traffic stop with their cell phones and cameras "for later broadcast, live-streaming, premiers, and archiving for their respective social medial channel[s]." Officers on the scene contacted Officer Yehia to report that four males were filming the traffic stop. Officer Yehia

drove to the scene "in full regalia in a Marked cruiser, with every single light ... turned on." He exited his vehicle and "intentionally positioned himself directly in front of [Mr. Irizarry] ... to make sure he intentionally obstructed the camera view of the D.U.I. Roadside sobriety test." Mr. Irizarry and another journalist, Eric Brandt, "voiced their disapproval of the intentional obstruction" and "began to loudly criticize" Officer Yehia. Officer Yehia shined an "extremely bright flashlight" in Mr. Irizarry's and Mr. Brandt's cameras, " saturating" the camera sensors. Officer Yehia continued "harassing" Mr. Irizarry and Mr. Brandt until another officer told him to stop. 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".

The court ultimately found that to state a First Amendment retaliation claim, a plaintiff must allege facts showing "(1) that [he] was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct". Here, the physical and verbal intimidation of flashing flashlight right into the camera and "gunning" police cruiser "at him" and near his colleague chilled the plaintiff's constitutionally protected speech.

***Bustillos v. City of Carlsbad, New Mexico,* No. 21-2129, 2022 WL 1447709, at *1 (10th Cir. May 9, 2022)**

Pro se plaintiff-appellant Albert Jerome Bustillos—also known as "Stray Dog the Exposer"—is a YouTuber who films and posts police encounters online. In this case, officers called to mental health issue with woman running in traffic. She is clearly triggered by Defendant who is filming officers. 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."**

Officer Vasquez eventually was able to explain that he "let [Bustillos] record as long as [he] wanted to record", but by engaging with the woman's mental status, Bustillos was interfering with a police investigation and refusing to comply with Officer Vasquez's order to leave the scene and then provide his identification. After Officer Vasquez confirmed that Bustillos would indeed go to jail if he continued to refuse to provide his I.D., Bustillos provided his identification.

Tenth Circuit held no Fourth Amendment violation: **The issue was not that Bustillos was recording the encounter—it was that he refused to comply with the officers' lawful commands to leave the scene and provide his identification.**

As to retaliation claim for First Amendment recording: Officer Vasquez had probable cause for Bustillos's arrest, which defeats Bustillos's retaliatory arrest claim. Although Bustillos professes a desire to serve the public by filming police encounters, his desire to film from a particular location does not authorize him to break the law. Bustillos correctly observes that the Constitution gives him the rights to free speech and protection from unreasonable seizures. But this same Constitution also empowers a state—without violating these rights—to (1) criminalize Bustillos's refusal to obey lawful police commands, (2) criminalize

his subsequent concealment of his identity, and (3) arrest him upon probable cause that he committed either or both crimes.