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THE LOCAL GOVERNMENT
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BEAT

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Eighth Circuit Denies Qualified Immunity for Arrest on Alleged School Threat

By Brian S. Batterton, J.D., Legal & Liability Risk Management Institute

On July 26, 2018, the Eighth Circuit Court of Appeals decided *Ross v. City of Jackson, et al.,*[i] in which the court examined whether officers violated the Fourth Amendment when they arrested a man who posted a comment on social media that was construed as a threat to a school. The relevant facts of Ross are as follows:

> On January 25, 2015, James Ross was a 20-year-old resident of Cape Girardeau, Missouri, and an active user of the social media website, Facebook. Facebook allows users to connect with each other by establishing "friend" relationships and posting items to a personal feed that can be viewed by the user's friends. That evening, one of Ross's Facebook friends posted an image (or meme) that showed a number of different firearms below the title "Why I need a gun." Above each type of gun was an explanation of what the gun could be used for—e.g., above a shotgun: "This one for burglars & home invasions"; above a rifle with a scope: "This one for putting food on the table"; and above an assault rifle: "This one for self-defense against enemies foreign & domestic, for preservation of freedom & liberty, and to prevent government atrocities." Ross interpreted this post as advocating against gun control

measures. Ross, an advocate in favor of gun control measures, commented on the post: "Which one do I need to shoot up a kindergarten?" Ross then logged off Facebook and went to bed.

The post (including Ross's comment) was soon deleted, but not before a cousin of the person who originally posted the meme took a screenshot of it. The cousin then forwarded the screenshot to a yet another person, a mutual cousin, without any annotation or additional commentary. That individual, in turn, shared it with her husband—Ryan Medlin, a member of the City of Jackson Police Department. Around 5:30 p.m. on January 26, 2015, Medlin, who was off duty at the time, forwarded the screenshot to two other members of the Jackson Police Department, Anthony Henson and Toby Freeman. Henson and Freeman were off duty as well, but they followed up on the post when they arrived at work. Freeman, a member of the investigation division, determined that James Ross had authored the comment and that he worked at the Casey's gas station in Fruitland, Missouri. None of the officers conducted any additional investigation into either Ross or the post before Henson and Freeman drove to Casey's.

Meanwhile, Ross had started his shift at Casey's at 2 p.m. on January 26. Henson and Freeman arrived between 7 and 8 p.m. Ross was in the kitchen with three other employees when one of the officers asked to speak with him. Ross did not know the person was a police officer (he was not in uniform) and assumed he was a customer. When Ross walked out of the kitchen, the officers immediately arrested him. One of the officers told him they were there because of a post on the internet, but neither officer asked Ross any questions about the post or his comment. Nor did they ask Ross any questions about his interest in, or ownership of, firearms. Unprompted, however, Ross told the officers that his comment on Facebook was not serious, that it was meant to be a joke, and that he was willing "to clear this up right here."

Ross was placed in handcuffs and escorted out of the store to a police car in full view of his co-workers. Once Ross was in the car, the officers read him his Miranda rights and took him to the police station. At the station, Ross was questioned by Medlin. Ross wrote out a statement explaining what he meant by his comment on the post. He was then interviewed—wherein Ross was able to further explain what happened. According to Ross, several officers at the station told him they did not think the case was likely to go any further than the prosecuting attorney's office. However, Ross was not allowed to leave. He was held at the Jackson Police Station until the next day, during which time he was served with

> a warrant for "Peace Disturbance." The next day, he was transferred to the Cape Girardeau County Jail where he was held for another two to three days, until he bonded out by paying $1000 in cash. At some point during that period, Ross was formally charged with the class B misdemeanor of "Peace Disturbance" under Mo. Rev. Stat. § 574.010(1)(c) (2015). On April 7, 2015, the charges against Ross were formally dismissed." [ii]

Ross later filed suit in federal district court and alleged that the officers violated his rights under the First and Fourth Amendment when they arrested him. The officers filed a motion for summary judgment and qualified immunity and the district court granted the motion for qualified immunity. Ross appealed the grant of qualified immunity to the Eighth Circuit Court of Appeals.

The court of appeals first noted that the officers are entitled to qualified immunity unless Ross can show that (1) the officers violated his constitutional rights, and (2) the law was "clearly established" at the time of the violation. [iii] The court then explained what constituted "clearly established" law and stated:

> Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. While th[e] Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. [iv] [emphasis added]

The court then set out to determine whether the officers violated the Fourth Amendment when they arrested Ross and if so, whether the law was "clearly established" such that another reasonable officer would have known the arrest was unlawful.

The court first noted that an arrest without probable cause violates the Fourth Amendment. [v] The court also noted that even if an officer arrests someone without probable cause, the officer may still be entitled to qualified immunity if "arguable probable cause" existed. The court explained as follows:

> An officer . . . is entitled to qualified immunity for a warrantless arrest if the arrest was supported at the time by at least "arguable probable cause." Probable cause exists when the totality of the circumstances at the time of the arrest is sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense. Arguable probable cause exists even where an officer mistakenly arrests a suspect believing [the arrest] is based on probable cause if the mistake is "objectively reasonable."
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> Joseph, 712 F.3d at 1226 (cleaned up) (quoting *Borgman v. Kedley,* 646 F.3d 518, 522-23 (8th Cir. 2011)); see also *Baribeau,* 596 F.3d at 478. Our determination of whether arguable probable cause exists is informed by our assessment of what information the officer knew at the time that he made the probable cause determination, and what "a reasonably thorough investigation" would have uncovered about the likelihood that a crime had been committed. *Kuehl v. Burtis,* 173 F.3d 646, 650 (8th Cir. 1999). "An officer need not conduct a mini-trial before making an arrest," but it cannot be said that even arguable probable cause is present where "a minimal further investigation would have exonerated the suspect." Id. [vi] [emphasis added]

The court then applied facts of Ross' case to the rules above. They first stated that the officers were clearly justified in investigating Ross for the comment he posted, especially in light of current events. However, the court also noted that the Missouri statute under which Ross was charged has previously been interpreted to apply only to "true threats." [vii] Thus, if the threat was not a "true threat," which is one intended to be a declaratory statement, or express an intent to cause danger to life, or cause a fear the threat would be carried out, it does not violate the Missouri statute. [viii]

The court then held that it was clearly established, such that a reasonable officer would have understood that there was no probable cause to arrest Ross for violating the statute for which

he was arrested. The court's reasoning is worth quoting so that officers can understand the complete framework the court applied to reach this conclusion. The court stated

> [O]fficers have a duty to conduct a reasonably thorough investigation" only when there is an "absence of exigent circumstances" and they would not be "unduly hampered" by "wait[ing] to obtain more facts before seeking to arrest." 173 F.3d at 650 (quoting *United States v. Woolbright,* 831 F.2d 1390, 1394 (8th Cir. 1987)). And if any further investigation had led the officers to believe there was an immediate or imminent danger, they would have been justified in acting on that information. Here, however, no exigent circumstances prevented the officers from gathering additional information before making an arrest.
>
> In this case, even a "minimal further investigation" would have revealed that Ross's post was not a true threat. The officers conducted no investigation into the context of the statement, Ross's history of violence, or Ross's political beliefs about gun ownership or gun control measures. Viewing the evidence in the light most favorable to Ross, the officers saw the comment, discovered where Ross worked, and then went to his job site with the sole intent of placing him under arrest. Ross tried to explain what was meant by his comment and provide the officers with more context about the post, but the officers did not give him that opportunity until after he was booked at the police station. See *Kuehl,* 173 F.3d at 650 ("An officer contemplating an arrest is not free to disregard plainly exculpatory evidence . . ."); cf. *Duffie v. City of Lincoln,* 834 F.3d 877, 883 (8th Cir. 2016). And, after interviewing Ross, officers indicated that they did not think the charges would stick, i.e., they did not believe he had truly made a "terrorist threat." Ross was nonetheless charged and held in custody for several days until he was able to post bail. In sum, it is beyond debate that—had the officers engaged in minimal further investigation—the only reasonable conclusion was that Ross had not violated § 574.115.1(3). [ix]

Therefore, the court of appeals reversed the district court's grant of qualified immunity for the officers.

Citations

i. No. 17-1390 (8th Cir. Decided July 26, 2018).
ii. Id. at 2-4.
iii. Id. at 5.
iv. Id.
v. Id. at 5-6.
vi. Id. at 7-8.
vii. Id. at 6.
viii. Id. at 7.
ix. Id. at 8-10.

Changing a Culture Utilizing Below 100

By Mike Earl, LGRMS Public Safety Risk Consultant

The month of January 2019 began a devastating trend in the law enforcement community, resulting in the line of duty deaths of TEN law enforcement officers nationwide.

The command staff and troops of the Acworth Police Department are taking measures to ensure the City of Acworth is not affected by this trend. Local Government Risk Management Services – specifically Public Safety Risk Consultant Michael Earl – was brought in to present a program developed by Below100.org.

The presentation focuses on five core tenets of officer safety, in the hope of getting the number of law officer's in the line of duty deaths to Below 100 in any given year. The last time this occurred was in the year 1943, with 94 officer's deaths. Those tenets specifically are:

- Wear your seatbelt.
- Wear your body armor.
- Watch your speed.
- WIN: What's Important Now.
- REMEMBER, Complacency kills.

Simple, straightforward and doable. In virtually every preventable line-of-duty death, one or more of these tenets played a role. During a two-week period, forty-two Acworth Police Department personnel, including Chief Dennard, sat through this three-plus hour presentation. The result of this training? Accolades from nearly each attendee, but much more importantly, an expressed intent for change of policy, training, and behavior.

The Acworth Police Department and command staff are to be commended, not only for recognizing a need for change to occur, but actually taking measures to insure all is being done to create as safe an environment as possible for their officers as they endeavor to maintain order and safety within the City of Acworth. This is a noble endeavor in a noble profession.

Too often departments maintain a "Status Quo" mentality. Such mentality often results in tragedy. No chief or sheriff ever wants to present a death notification to the family of one of their own troops. No city or county ever wants to experience the loss of one of their peacekeepers.

Through training, policy, proper management, and mindset, it is hopeful now that the City of Acworth will now continue to thrive in their endeavors to maintain quality of life, not only for the city residents, but for the law enforcement officers that serve the community as well.

Good job, Acworth PD! May we at LGRMS and GMA always have your back, in hopes of providing the very best in service to you, so you in turn may provide the very best to your community. Working together may we make this happen.

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This Issue . . .

Qualified Immunity for ‘School Threat’ Arrest DENIED

Changing Culture with Below 100

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