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Use of Force Failure to Intervene – Eleventh Circuit

By **Daigle Law Group**

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Today we head to the 11th Circuit which covers the states of Alabama, Georgia and Florida to talk about issues that are currently faced by police departments across the country. These issues include appropriate applications of force, Qualified Immunity and Bystander Liability, also known as the Failure to Intervene.

Before we look at the facts and the court decision in this case let me just make a point concerning a police officer's responsibility to intervene when he or she sees another officer going astray; simply put each of us is duty bound by case law and, hopefully, agency directives to intervene and prevent another officer from committing or continuing an improper police action. More importantly, this responsibility is not based on rank. The duty to intervene should not be questioned just because you do not have supervisory authority over the violating officer. We all have a duty to assure that we practice constitutional policing practices. It may not be easy, but it is what the law requires and what the public expects from each of us.

FACTS

In Marion County, Florida, deputies were dispatched to a domestic dispute involving the plaintiff, Allston, and several minors in his custody. Deputies learned that one of the juveniles went to a neighbor's house and asked for the neighbor to give him a knife so that he could kill Allston. Based on this information the officers handcuffed the offending minor and secured him in the back of a patrol car. The deputies then attempted to speak with Allston, however Allston refused to speak with the deputies, swore at them and then started walking away.

Deputy Swarbick tackled Allston, handcuffed him and advised Allston he was under arrest for Disorderly Conduct. The deputy then secured Allston in the back of the police cruiser while Deputy Trammel remained with the rest of the family. At this point the deputies' facts of the incident and Allston's diverge. Allston claims he was trying to call his aunt on the phone while the deputies claim Allston was able to move his handcuffs hands to the front and threatened to urinate on the officer. Deputy Swarbrick opened the rear door and began pulling Allston out of the vehicle while Deputy Trammel pulled Allston's foot out from under the barrier where it appeared to be stuck. Allston claims Deputy Swarbrick then sprayed him with OC spray for three to five minutes while Allston laid on the ground handcuffed.

All charges against Allston were later dropped and he filed suit in federal court alleging claims of Excessive Force, False Arrest against Deputy Swarbick and a claim of Failing to Intervene against Deputy Trammel. The District Court granted Summary Judgment in favor of the officers finding that Deputy Swarbick did not use excessive force and granted Qualified Immunity on the False Arrest charge. The trial court dismissed the claims against Deputy Trammel finding that there was no duty to intervene since Deputy Swarbick did not use excessive force. This appeal followed.

ELEVENTH CIRCUIT FINDINGS

The appellate court first looked at the false arrest claim. The trial court determined that Allston's obscenities alone could form the basis for a Disorderly Conduct arrest. The appellate court disagreed noting that it was clearly established at the time of the incident that words alone could not form the basis for a criminal charge of Disorderly Conduct. Allston claimed that the arrest was the result of his obscenities alone, while Deputy Swarbick claimed Allston was attempting to rile the onlookers. Under the circumstances there was a factual dispute that required a jury review. Additionally, the court determined that the Deputy lacked probable cause to arrest Allston for the "Resisting Arrest" charge.

The court then turned to the question of excessive force and reviewed the Deputy's actions in two parts: the initial removal of Allston from the back of the cruiser and the subsequent administration of OC spray. Employing the Graham standards, the court concluded that Swarbick was entitled to Qualified Immunity with respect to the force used to remove Allston from the cruiser. However, with respect to Allston's claims that he was sprayed with OC for "three to five minutes" the court concluded that if the jury determined that the Deputy had, in fact, provided a "prolonged use of pepper spray on a handcuffed, non-resisting individual" then the Deputy's actions would violate 4th Amendment principles.

Finally, the court reviewed the Bystander Liability claim brought against Deputy Trammel. Citing a 2008 11th Circuit case the court noted that, "*An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be liable for failing to intervene, so long as he "was in a position to intervene yet failed to do so."* Looking at the facts of this case, the court concluded, Deputy Trammel was not in a position to intervene during the time when the other officer was allegedly using excessive force.

The court affirmed the dismissal on summary judgment against the Sheriff and Deputy Trammel but reversed the dismissal against Deputy Swarbick and remanded the case back to the trial court.

TAKEAWAYS

It is certainly a difficult time for police officers across the country, but whether you utilize the Daigle Law Group policies or your own agency directives I want to leave you with three important principles: REASONABLENESS, DE-ESCALATION and DUTY to INTERVENE.

Be reasonable and professional in your interactions with the citizens you serve. Discretion is an important tool in the police tool belt. Not every incident needs to end with a custodial arrest. Use your discretion reasonably and understand when a warning or deferral to some other social service agency might be a better solution.

When we show up at the scene, we are the trained professionals. That said, our training and experience should allow us to DE-ESCALATE the situation. We all know officers who show up at the scene and everything seems to simmer down, and we also know those officers who show up at a relatively calm scene and all hell breaks loose. We all need to work on the techniques that slow things down and calm the scene; don't be the officer that is known for "throwing gas on the fire".

Finally, as I said earlier, we all have a duty to intervene when we see things going badly. Every one of us will use speed lights and siren to an "officer needs assistance" call. But when we see an officer that is about to do something that could affect him for the rest of his life, we are slow to respond. When you see that officer going down a bad road or ready to "lose it", have the courage to step in, tell the officer you will handle it and take the suspect or citizen out of the situation. You may be saving your partner and yourself from a very bad ending.

Alston v. Swarbrick, No. 18-10791 (11th Cir. 2020)

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