



## MAY POLICE DETAIN A PERSON FOR VIDEOING ROUTINE ACTIVITY AT POLICE STATION

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On February 16, 2017, the Fifth Circuit Court of Appeals decided *Turner v. Driver et al.*, in which the court examined whether it was reasonable to detain a male for videoing the routine activity outside of a police station and arrest him for failing to provide his identification. The relevant facts of *Turner*, taken directly from the case, are as follows:

In September 2015, Turner videotaped the Fort Worth Police Station from a public sidewalk across the street from the station. He was unarmed. While videotaping, Turner observed Fort Worth Police Officers Grinalds and Dyess pull up in a patrol car in front of the station, get out, and approach him.

Grinalds asked Turner, "How's it going, man? Got your ID with you?" Turner continued videotaping, and Grinalds repeatedly asked Turner if he had any identification. Turner asked the officers whether he was being detained, and Grinalds responded that Turner was being detained for investigation and that the officers were concerned about who was walking around with a video camera. Turner asked for which crime he was being detained, and Grinalds replied, "I didn't say you committed a crime." Grinalds elaborated, "We have the right and authority to know who's walking around our facilities."

Grinalds again asked for Turner's identification, and Turner asked Grinalds, "What happens if I don't ID myself?" Grinalds replied, "We'll cross that bridge when we come to it." Grinalds continued to request Turner's identification, which Turner refused to provide. Grinalds and Dyess then "suddenly and without warning" handcuffed Turner and took his video camera from him, and Grinalds said, "This is what happens when you don't ID yourself."

Turner requested to see a supervisor. Grinalds continued to ask for Turner's ID and told him that he would be fingerprinted so the officers could learn his identity. The officers placed the handcuffed Turner in the back of their patrol car and "left him there to sweat for a while with the windows rolled up." Turner alleges that no air was getting to the back seat and that he banged on the door so the officers would roll down the windows.

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Lieutenant Driver approached Grinalds and Dyess, and they "seemingly ignored Mr. Turner." The three officers then rolled down the windows of the patrol car and found Turner lying down in the back seat. Lieutenant Driver identified himself as the commander. Driver asked Turner what he was doing, and Turner explained that he was taking pictures from the sidewalk across the street. Driver asked Turner for his ID, and Turner told the lieutenant that he did not have to identify himself because he had not been lawfully arrested and that he chose not to provide his identification. Driver responded, "You're right."

Driver walked away and talked with the officers, then returned to the patrol car and talked with Turner. Turner said, "You guys need to let me go because I haven't done anything wrong." Driver again walked away from the car, talked on the phone, and spoke further with the officers. They returned to the car and took Turner out of the back seat. Driver "lectur[ed]" Turner, and the officers finally released him and returned his camera to him.<sup>ii</sup>

Turner filed suit in district court and alleged that Grinalds, Dyess and Driver violated his rights under the First and Fourth Amendments. The district court granted the defendant officer's motion to dismiss and Turner appealed to the Fifth Circuit Court of Appeals.

The first issue on appeals was whether Officers Grinalds and Dyess are entitled to qualified immunity on the First Amendment claim. The court of appeals noted that the district court granted qualified immunity to the officers by holding that the law was not clearly established such that a reasonable officer in the same situation would have known he was violating the First Amendment.

In examining the law related to qualified immunity, the court stated

**For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Thus, the right must already be clearly established "at the time of the challenged conduct." When considering whether a defendant is entitled to qualified immunity, the court "must ask whether the law so clearly and unambiguously prohibited his conduct that 'every reasonable official would understand that what he is doing violates [the law].'" "To answer that question in the affirmative, we must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." "Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established. **This is true even when the circuit split developed *after* the events in question.**" **As the Supreme Court has explained, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."**<sup>iii</sup> [emphasis added]**

The court then noted that, although Turner is correct that the general right to film the police is protected by the First Amendment, the court explained that the specific conduct or facts of related to the filming must be clearly established such that a reasonable officer would know if his conduct was illegal. The court then held that existing precedent was not clear enough to place the officer's conduct beyond

debate such that every reasonable officer would have known that this conduct violated the law. As such, Grinalds and Dyess are entitled to qualified immunity on the First Amendment claim.

The court of appeals also set out to determine if the right, from this time forward, is clearly established regarding a person's First Amendment right to film in a situation such as Turners. The court stated

**We conclude that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions...**<sup>iv</sup> [emphasis added]

**"[T]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [basic First Amendment] principles." This right, however, "is not without limitations." Like all speech, filming the police "may be subject to reasonable time, place, and manner restrictions." In this case, however, we need not decide which specific time, place, and manner restrictions would be reasonable. Nonetheless, we note that when police departments or officers adopt time, place, and manner restrictions, those restrictions must be "narrowly tailored to serve a significant governmental interest." That said, to be constitutionally permissible, a time, place, and manner restriction "need not be the least restrictive or least intrusive means of serving the government's interests."**<sup>v</sup> [emphasis added]

However, the court *did not* address whether the officers in this case were exercising a reasonable "time, place, manner" restriction because they already determined that the officers were entitled to qualified immunity.

The second issue before the court was whether Officers Grinalds' and Dyess' initial detention or stop of Turner was reasonable under the Fourth Amendment. The court stated

**[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' . . . ." The Supreme Court has "said repeatedly that [when determining whether officers had reasonable suspicion, courts] must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." Courts "consider only the 'information available to the officer[s] at the time of the decision to stop a person.'...**

But this general claim—that a seizure under the Fourth Amendment must be based on reasonable suspicion—is precisely the type of 'general proposition' that the Supreme Court has rejected." **Whether a right was clearly established at the time the defendant acted "requires an assessment of whether the official's conduct would have been objectively reasonable at the time of the incident." Courts "must ask whether the law so clearly and unambiguously prohibited his conduct that 'every reasonable official would understand that what he is doing violates [the law]."**<sup>vi</sup> [emphasis added]

The court noted that it is legal to video officers performing duties such as making a traffic stop or effecting an arrest. However, that is not the facts of Turner's case. Rather, Turner was filming police engaged in routine activity at the police station. This actually heightens the level of suspicion that is warranted in this case, when one considers, as the officer referenced in their briefs, various attacks on officers and police stations, such as in Dallas and Austin, and the resulting increased security needs at police stations. The court stated

**[I]t [is] appropriate for the police to take into account the location of the suspicious conduct and the degree of the potential danger being investigated. What is not suspicious in one location may be highly suspicious in another." Turner's filming in front of the police station "potentially threatened security procedures at a location where order was paramount." An objectively reasonable person in Grinalds's or Dyess's position could have suspected that Turner was casing the station for an attack, stalking an officer, or otherwise preparing for criminal activity, and thus could have found Turner's filming of the "routine activities" of the station sufficiently suspicious to warrant questioning and a brief detention. The officers' detention of Turner under these circumstances was not "plainly incompetent" or a knowing violation of the law.<sup>vii</sup> [emphasis added]**

Thus, the court held that Turner's filming the routine activity of officers at the police station provided Officers Grinalds and Dyess with sufficient reasonable suspicion to justify a brief detention of Turner to determine if criminal activity was afoot. Additionally, the law was not clearly established to show that the officers acted illegally. As such, Grinalds and Dyess are entitled to qualified immunity regarding the initial stop and detention.

The third issue before the court was whether Turner was "under arrest" for Fourth Amendment purposes when he was handcuffed and placed in the back seat of the patrol car, and if so, whether the officers had probable cause to support that arrest.

Regarding whether the seizure of Turner amounted to an arrest, the court stated

**A seizure rises to the level of an arrest only if 'a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.'" The "reasonable person" is one who is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." When determining whether an investigative stop amounts to an arrest, "[t]he relevant inquiry is always one of reasonableness under the circumstances," which must be considered on a case-by-case basis. "[U]sing some force on a suspect, pointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect—whether singly or in combination—do not automatically convert an investigatory detention into an arrest requiring probable cause." But, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop..."**

**There is "no rigid time limitation" on investigative stops, but "[i]n assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."**<sup>viii</sup> [emphasis added]

The court then applied the law above to the facts of Turner's case. They noted that Turner was handcuffed after he refused to provide identification. In fact, he alleged that one of the officers told him "this is what happens when you don't ID yourself." The court also noted that the officers testified that Turner did not make any threatening movements or statements, and was not armed. Further, he did not try to escape. As such, the handcuffing Turner and placing him in the back of a police car, according to the court of appeals, was "disproportionate to any potential threat Turner posed or the investigative needs of the officers."<sup>ix</sup> The court also noted that once Turner was placed in the back seat of the police car, they took no further investigative regarding Turner's identity or his reason for filming the police station. The court then stated

We conclude that a reasonable person in Turner's position would have understood the officers' actions "to constitute a restraint on [Turner's] freedom of movement of the degree which the law associates with formal arrest."<sup>x</sup>

Having determined that the officer's actions amounted to an arrest, the court set out to determine if there was probable cause to support that arrest. Regarding this issue of probable cause, the court stated

Based on the allegations of Turner's amended complaint, the officers lacked probable cause to arrest him, and the officers do not dispute this. Turner "did not make any threats" against the officers, "did not [attempt] to leave or flee," and "did not take any aggressive actions." The only potential reason the officers gave Turner for arresting him that can be gleaned from the amended complaint is Turner's failure to identify himself: He alleges that, after he was handcuffed, Grinalds told him "[t]his is what happens when you don't ID yourself." But the police cannot arrest an individual solely for refusing to provide identification.<sup>xi</sup>

Thus, having determined that the officers arrested Turner without probable cause, the court also noted that the law was clearly established that probable cause must be present when a person is arrested. As such, Officers Grinalds and Dyess are not entitled to qualified immunity for this issue; therefore, the court of appeals reversed the district court regarding this claim.

The last issue before the court was whether Lieutenant Driver violated the Fourth Amendment by continuing Turner's unlawful seizure and keeping Turner locked in the back of a police car after his arrival on the scene.

The court first noted applicable law and stated

**Supervisory officials are not liable under § 1983 for the actions of subordinates on any theory of vicarious liability.** Accordingly, Driver is not liable for the actions of Grinalds and Dyess before he arrived on the scene...

**To be liable under § 1983, Driver must have been personally involved in the alleged constitutional deprivation or have engaged in wrongful conduct that is causally connected to the constitutional violation. Personal involvement of supervising personnel generally includes giving a "command, signal, or any other form of direction to the officers that prompted" the detention or arrest.<sup>xii</sup> [emphasis added]**

The evidence shows that when Lieutenant Driver arrived on scene he immediately pursued an investigation into the incident. He spoke to both officers and then spoke to Turner, in order to confirm or dispel suspicion. The court also noted that he did not delay or prolong this investigation. The court then held

Driver acted objectively reasonably in light of the circumstances—namely, by apprising himself of the situation and acting accordingly. Driver is therefore entitled to qualified immunity on Turner's Fourth Amendment claims.<sup>xiii</sup>

Therefore, the court affirmed the grant of qualified immunity for Driver.

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<sup>i</sup> No. 16-10312 (5<sup>th</sup> Cir. Decided February 16, 2017)

<sup>ii</sup> Id. at 2-3

<sup>iii</sup> Id. at 6-7

<sup>iv</sup> Id. at 10

<sup>v</sup> Id. at 13

<sup>vi</sup> Id. at 14-15

<sup>vii</sup> Id. at 16

<sup>viii</sup> Id. at 17-18

<sup>ix</sup> Id. at 18

<sup>x</sup> Id. at 19

<sup>xi</sup> Id. at 20

<sup>xii</sup> Id. at 22

<sup>xiii</sup> Id. at 23