

LEGAL BULLETIN 99-5

SUBJECT: Force Reasonable to Prevent a Suspect From Swallowing Drugs

The purpose of this Legal Bulletin is to provide officers with information and guidance concerning the force reasonable to prevent a suspect from swallowing drugs. Annex C, page C-2 of Kansas City, Missouri Police Department Procedural Instruction 96-11 briefly addresses this issue, noting only "exigent circumstances, such as the suspect placing illegal narcotics or contraband into their mouth, do not require obtaining a search warrant due to the probability of the subject swallowing the evidence requires the need for immediate action."

Neither the United States Supreme Court nor Missouri courts have specifically addressed this issue. Several other jurisdictions, however, have addressed the issue and a majority opinion seems to have emerged.

Under the Fourth Amendment to the United States Constitution, the test of reasonableness "is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). Its proper application requires special attention to the facts and circumstances of each particular case, including the threat the suspect poses to the officer or others, the seriousness of the crime at issue, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Tennessee v. Garner, 471 U.S. 1, 8-9 (1985). The "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations. Scott v. United States, 436 U.S. 128, 137-39 (1978).

Federal, as well as state courts, have upheld a rule which permits police to use minimal force around the neck to prevent a defendant from destroying evidence. The courts usually cite the fact that there is not a constitutional right to conceal or destroy evidence of criminal conduct. People v. Bracamonte, 540 P.2d 624, 631 (Ca. App. 1975). In judging the reasonableness of officers' actions, courts have focused on factors such as the amount of force used by the police as compared to that used by the suspect, the exigency of the situation, the existence of probable cause, the authority of the officers, the threat to the health and safety of the suspect, the existence of less intrusive means and the length of the struggle.

In State v. Williams, the Washington Court of Appeals held "it is constitutionally reasonable for the police to place their hands on a suspects throat to prevent the swallowing of evidence, as long as they do not choke him, i.e. prevent him from breathing or obstruct the blood supply to his head." Williams, 560 P.2d 1160, 1163 (Wash. App. 1977). The California Court of Appeals agreed, holding police only used the force necessary to prevent a defendant from swallowing drugs and did not use constitutionally impermissible force in preventing the defendant from swallowing heroin bindles. Officers saw the defendant place the bindles in his mouth and proceeded to place their hands around his throat, preventing his Adam's apple from moving up and down. The officers did not choke him, impair his breathing, or cause him to cry out in pain. The Court noted, however, that police may not use brutal or excessive force to recover evidence. People v. Cappellia, 256 Cal. Rptr. 695, 699 (Ca. App. 1989).

Several state courts have also addressed the issue. Louisiana has held that law enforcement officials may adopt reasonable measures to retrieve contraband and prevent its destruction. Officers may use reasonable force to prevent swallowing of evidence, but officers may not beat and choke a suspect in order to gain that evidence. State v. Desmond, 593 So.2d 965, 969 (La. App. 1992)

The State of Florida based its decision in Locke v. State on safety issues. The court held that it would not ordinarily be proper for a police officer to forcibly choke a person in order to prevent the swallowing of a small amount of drugs, however, it may be permissible where an officer is trying to save someone's life by preventing the oral ingestion of drugs. Locke, 588 So.2d 1082, 1084 (Fla. App. 1991)

Courts have also upheld the use of the Heimlich maneuver, emetic solution and pepper spray or Capstun as reasonable under the Fourth Amendment. See Singleton v. City of Newburgh, 1 F. Supp.2d 306, 315 (S.D.N.Y. 1998). U.S. v. Holloway, 906 F. Supp. 1437, 1442 (D. Kan. 1995).

In an Illinois case, the focus of the court's analysis was not whether the force used was excessive, but rather whether there were grounds to even approach the defendant in the first place. In People v. Rainey, 706 N.E.2d 1062 (Ill. App. 1999), the defendant was standing in a group of people in a gas station parking lot when a marked police car pulled into the lot. The defendant stepped away from the group and took his right hand and placed something inside his mouth. The defendant then wiped his mouth and acted like he was stretching or yawning. The officer who observed this activity testified at the defendant's trial that from his experience as a police officer, it was common for persons to attempt to hide narcotics in their mouths. When the officer called the defendant over to his car, the defendant dropped his head. Another officer placed "one hand on the back of defendant's head and the other on his throat," ordering the defendant to open his mouth. The officers were unable to get the defendant's mouth open. Finally, the defendant spit the items into his hand and dropped them on the ground. The items turned out to be packages of cocaine.

The testimony from the officers was that when a person is concealing drugs in their mouth, they try to keep the suspect's head forward to prevent swallowing. The objective, according to the officers, is to prevent losing evidence and avoiding risk to the suspect's life.

The court nevertheless held that in this case there was no probable cause for arrest, stating that a police officer is not entitled to seize and search every person whom he sees on the street. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. The defendant's conviction for possession of a controlled substance was reversed.

Although not dealing with drugs, the Fourth Circuit Court of Appeals held in Taylor v. McDuffie, 155 F.3d 479 (4th Cir. 1998), that the use of force to retrieve a driver's license from a detainee's mouth did not rise to the level of unnecessary and wanton pain and suffering. According to the officers, one officer used a device known as a kubaton to apply

pressure under the arrestee's nose while another officer applied pressure with his fingers to the area behind the subject's ears. The license was eventually removed from the subject's mouth. The court found that the subject's injuries, slight swelling of the jaw and irritation of the mucous membranes of the mouth, were minimal and not sufficient to support his claim of excessive force. The court specifically stated that the officers were entitled to use force to remove the driver's license from the defendant's mouth.

A few cases specifically discuss the lateral vascular neck restraint (LVNR). In the Nebraska case of State v. Thompson, 505 N.W.2d 673, 675 (Neb. 1993) the Supreme Court of Nebraska found the use of the LVNR reasonable to retrieve cocaine from a suspect's mouth. Although the record before the court did not give a description of the LVNR except to be told that it was a "choking maneuver," the court approved of its use in removing the drugs from the suspect's mouth during the ten (10) second period in which he was rendered unconscious from the hold. See also State v. Lomack, 545 N.W.2d 455 (Neb. 1996) holding that although suspect sustained minor injuries to his mouth, LVNR was reasonable use of force to extract plastic baggie containing crack cocaine. Thus although the LVNR has been approved by some courts as a reasonable technique, care should be taken in testifying about the hold so that a court does not find that it falls into the category of an improper choke hold.

In summary, though Missouri has not addressed the issue of how much force is reasonable to prevent a suspect from swallowing drugs, a majority opinion seems to have emerged throughout other jurisdictions. Most courts deem reasonable an officer placing their hands on a suspects neck or placing their hands around the throat to prevent his Adam's apple from moving up and down. The majority of courts hold that officers may not beat, choke or impair breathing under the reasonableness standard of the Fourth Amendment. Officers should be aware, though, that they need probable cause to undertake such action or in the alternative, be able to show that the ingestion of drugs constitutes a true emergency situation requiring immediate action to avoid death or serious physical injury to a person.

Additional questions concerning this subject may be directed to the Legal Advisor's Office.

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