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CRIMINAL LAW AND PROCEDURE MANUAL

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SEARCH AND SEIZURE

Chalking tires pursuant to a parking enforcement policy is a search under the Fourth Amendment

In [Taylor v. City of Saginaw](#), Taylor received several citations for parking violations after chalk marks of the date and time were placed on her vehicle tires to gather evidence of a parking violation. Taylor filed a civil action in federal court under [42 USC 1983](#), alleging the City of Saginaw (City) and its parking enforcement officer violated her Fourth Amendment right against unreasonable searches by chalking her tires without consent or a search warrant.

The City moved to dismiss the action by arguing its chalking policy was not a "search" under the Fourth Amendment, and even if it was, the community-caretaker exception to the search warrant rule applied. The district court granted the motion on the grounds that a search occurred, but it was nevertheless reasonable because there is a reduced expectation of privacy in a vehicle and the community-caretaker exception applied. On appeal, the Sixth Circuit Court of Appeals disagreed, in part, and reversed.

Search – Trespass

The Court explained there are two distinct ways the government may conduct a search. Under the most prevalent analysis, a search occurs when the government invades an area in which a person has a reasonable expectation of privacy that society is prepared to recognize as reasonable. Additionally, a search based on common-law trespass occurs if the government physically intrudes on an area protected under the Fourth Amendment to obtain information.

The Court held that a search based on trespass occurred in this case because the City made intentional physical contact with the vehicle, an "effect" under the

Fourth Amendment, and despite the "low-tech nature" of the chalking procedure, it was conducted to identify vehicles parked in the same location for a certain period of time for the purposes of enforcing parking violations.

The Court explained a search based on trespass may occur even if the physical intrusion is slight or does not cause damage to the property. The Court cited a case where the officer collected DNA by swabbing the door of a vehicle parked in a public lot, and a federal district court found a search based on trespass had occurred. It was the physical touching of the vehicle to obtain information, not collection of DNA itself, that made it a search according to that district court, even though the vehicle was in a public lot and no damage occurred.

Community-caretaking exception

The Court explained that for the community-caretaking exception to the search warrant rule to apply, officers must be acting in furtherance of the public's safety under circumstances "totally divorced from the detection, investigation, or acquisition of evidence" relating to a criminal violation of law. The Court held that the community-caretaking exception did not apply in this case because when the search occurred, the vehicle was lawfully parked and imposed "no safety risk whatsoever."

Reduced expectation of privacy in a vehicle

The Court explained that even though there is a reduced expectation of privacy in vehicles, there must also be probable cause to believe a vehicle contains evidence of a crime in order for the automobile exception to the search warrant rule to apply. In this case, the Court held that the City was marking vehicles without any individualized suspicion of wrongdoing and probable cause did not exist.

VEHICLE CODE

The Michigan Vehicle Code (MVC) amended to prohibit taking security from a nonresident upon issuing a civil infraction

[Public Act 566 of 2018](#) amended [MCL 257.749](#) to require an officer who issues a nonresident a citation for a civil infraction under [MCL 257.727c](#) and [MCL 257.742](#) of the MVC to release the nonresident upon his or her personal recognizance without taking the nonresident's

operator's or chauffeur's license as security or accepting a cash bond in lieu of taking the license. However, if a magistrate is available for an immediate appearance, upon demand of the person stopped, the officer shall immediately take the nonresident driver before the magistrate. [MCL 257.749\(3\)](#).

Officers should know [Public Act 559 of 2018](#) similarly amended [MCL 480.24](#) of the Motor Carrier Safety Act of 1963 to eliminate the requirement that officers take security from nonresidents for state civil infractions issued under that act. Instead, the state civil infraction must be enforced as generally provided under [MCL 600.8801 to MCL 600.8835](#) of the Revised Judicature Act.

The MVC amended to regulate "electric skateboards" with handlebars

[Public Act 394 of 2018](#) amended [MCL 257.13f](#) to specify that "electric skateboards" may have handlebars. As discussed in [Legal Update No. 134](#), "electric skateboards" became regulated by the MVC under [Public Act 204 of 2018](#).

Under [MCL 257.660\(10\)](#), as amended by Public Act 394, all electric skateboards are prohibited from being operated at more than 25 mph. Unless crossing the highway or street, an electric skateboard without handlebars may not be operated on a highway or street with a speed limit of more than 25 mph, whereas an electric skateboard with handlebars may not be operated on a highway or street with a speed limit of more than 45 mph.

Public Act 394 also amended [MCL 257.660d](#) to require individuals parking an electric skateboard equipped with handlebars to follow the same rules that apply to parking bicycles under [MCL 257.660d](#).

A violation of [MCL 257.660](#) or [MCL 257.660d](#) is a civil infraction. [MCL 257.656](#).

BACK TO BASICS

A traffic stop based only on an insulting gesture is unlawful

In [Cruise-Gulyas v. Minard](#), Cruise-Gulyas was pulled over for speeding; however, the officer issued a citation for a lesser, non-moving violation. As the driver drove away, she raised her middle finger at the officer. The officer then pulled her over a second time 100 yards from the initial stop and amended the citation to a speeding violation.

The driver filed a civil action in federal court under [42 USC 1983](#), alleging the officer violated her First and

Fourth Amendment rights by stopping her a second time and amending the citation after she raised her middle finger at him. The officer moved to dismiss the action based on qualified immunity, which protects police officers from personal liability unless they violate a person's "clearly established constitutional or statutory rights."

The district court and Sixth Circuit Court of Appeals both denied the officer's claim of qualified immunity.

Fourth Amendment

The Court explained that the authority to seize the driver in connection with the speeding violation ended when the first stop concluded, and there was no dispute that the driver was again seized when the officer pulled her over the second time.

The Court held that the officer "clearly lacked authority" to make the second stop in the absence of a new violation of law. The gesture, while crude, did not violate any identified law or create probable cause or reasonable suspicion that the driver violated any law. Accordingly, the officer was not entitled to qualified immunity for the claim that he unreasonably seized the driver in violation of the Fourth Amendment.

First Amendment

The Court explained that to prove a claim of retaliation for engaging in an expressive gesture under the First Amendment's free-speech clause, the driver must show that she engaged in protected conduct, the officer took an adverse action against her that would deter an ordinary person from continuing the conduct, and the officer was motivated by the conduct, at least in part.

The Court held that any "reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment," and seizing the person, without proper justification, to issue a more severe citation would deter the same conduct in the future. The Court also held that sufficient facts were alleged to support the conclusion that the officer's second stop was initiated because of the crude gesture.

As a result, the officer was not entitled to qualified immunity for the claim that he retaliated against the driver because of her protected speech in violation of the First Amendment.