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**Sent:** Wednesday, May 21, 2014 9:43 AM

**To:** Jason Glantz

**Subject:** PATC/LLRMI Legal Update:Police Sued for Failing to Aid Gunshot Victim

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## **POLICE SUED FOR FAILING TO AID GUNSHOT VICTIM**

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On April 11, 2014, the Sixth Circuit Court of Appeals decided *Pierce et al. v. Springfield Township, Ohio* [i] which serves as an excellent explanation of the law as it pertains to a police officer's duty to provide medical aid and/or allow others to provide aid. The facts of *Pierce* are as follows:

In the late evening of December 5, 2010, and early morning of December 6, Cordell Drummond fired several handgun rounds into the ground. Officers Marc Downs and Joseph Powers were parked in their patrol cars chatting with the windows down at the car wash at Seven Hills Plaza. At around 1:12 a.m., both officers responded to calls from the neighbors about the gunshots and drove-only 400 yards away-to the 10900 block of Birchridge Drive to investigate. At around 1:15 a.m., the officers arrived at the scene.

Powers and Downs saw Drummond in front of 10929 Birchridge Drive. Downs got out of his car and approached Drummond to inquire about the reported gunshots. Downs made eye contact with Drummond, but Drummond ran from Downs before Downs could ask any questions. Downs immediately saw Drummond put his hands in his front waistband. After Drummond took about four steps, Downs heard a gunshot. He saw Drummond stop momentarily, jump several times, and then continue running. Downs saw that Drummond held a black 9-mm Glock in his right hand. Downs pursued Drummond and yelled to Powers, "Joe, he's got a gun. He's got a gun." Drummond collapsed in the snow in the front yard of 10904 Birchridge Drive, where his grandmother Gail Lewis lived in an apartment building.

The officers approached Drummond with guns drawn and pointed, unsure of whether Drummond was still armed. Powers heard Drummond yell "I'm going to die!" The officers observed that Drummond was conscious but bleeding; they also observed that for the entire five minutes until the EMT squad arrived, Drummond was holding his right upper thigh with both hands. They radioed to Sergeant Burton Roberts that Drummond had a self-inflicted gunshot wound to his abdomen area. At 1:16 a.m., an EMT squad was dispatched. By 1:17 a.m., it was en route to the scene. At 1:22 a.m., an ambulance arrived. By 1:27 a.m., the EMT squad was transporting Drummond to the University of Cincinnati Medical Center. Tragically, Drummond died from his wound at the hospital.

In the five minutes intervening, Powers and Downs did not touch Drummond, handcuff him, or restrain him in any way. They observed that Drummond was bleeding and had blood on his hands and pants, but they could not observe the severity of Drummond's injury or the extent of his blood loss. Downs told Drummond: "No, you're not [going to die]. Just hang on a minute. Life squad is on the way." Powers's main concern was to keep Drummond talking and to try to keep Drummond calm while the EMT squad was en route. Powers told Drummond: "You're not going to die. You're okay. The squad is on the way. The EMS is en route. They'll be here shortly."

Powers asked Drummond if he was still armed, and Drummond said he was not. Powers felt he could not

believe Drummond until Drummond's weapon was found. Downs, similarly, considered Drummond a threat until the gun was found. Powers's objective was to make the scene safe and secure.

After the officers radioed dispatch, Jason Drummond, Cordell's uncle and a resident of Birchridge Drive, approached the scene. Jason Drummond did not speak, and the officers did not know his identity, intentions, or whether he was armed. Downs held Jason Drummond at gunpoint momentarily and ordered him not to walk closer. Sergeant Roberts arrived at the scene, and Roberts handcuffed Jason Drummond and placed him in a police cruiser. At this point, Downs still did not know if Drummond was armed or where his gun was located. Downs instructed Powers to stay with Drummond with his gun drawn. During this time, Downs could hear two women yelling out the window from a nearby residence.

Powers kept his gun trained on Drummond while Downs left to retrace Drummond's path in search of the weapon. Powers consoled Drummond, reassuring him that paramedics were coming and that he would not die. Downs located the gun in a nearby yard.

Gail Lewis, Cordell's grandmother and another resident of Birchridge Drive, also approached the scene. Lewis was visibly upset and asked what happened. Powers did not know who Lewis was, but he responded that an individual had shot himself in the leg and ordered Lewis to stay back because he did not know if Drummond was still armed.

Also present at the scene was Eva Hunter, Drummond's girlfriend and another resident of Birchridge Drive. Hunter stood in her yard and observed the scene by "look[ing] down the street." From where Hunter was standing three to four houses away, she observed Drummond lying on the ground and holding his right upper thigh and saw the officers standing over Drummond. Hunter stated that she could not hear anything Drummond said and that she could "just barely see his lip movement."

Hunter stated in deposition that she heard the officers ordering Drummond to "get down," "lay [sic] back down," and "stay still." Hunter also stated that, prior to the EMT squad arriving, there were other officers at the crime scene in addition to Powers and Downs. Specifically, Hunter said that eight to twelve officers were at the scene. Hunter also stated that she saw officers in S.W.A.T. gear. Hunter said in her deposition that she observed one S.W.A.T. officer wearing a "big vest" and "Army boots"- "[n]ot the normal boots that police officers wear." Hunter also stated that she saw officers with rifles. Hunter also stated in her deposition that she did not see the EMT squad arrive, has no personal knowledge of how long it took the EMT squad to arrive, but that Drummond was on the ground for thirty to forty-five minutes before the squad arrived. Hunter observed Drummond trying to grab his leg, but she felt that compliance with officers' orders prevented him from "position[ing] himself [sic] to where he needed to get to." Hunter stated that while she was outside, she remained in her yard and did not approach Birchridge Drive. Hunter returned inside her home before the EMT squad arrived. She stated that she was outside observing the scene for "no more than two or three minutes."

Jason Drummond and Gail Lewis stated that they

attempted to approach Drummond. Jason Drummond said in his deposition that he had taken CPR classes at work. Lewis said in her deposition that she had taken a few first aid classes in high school and at a local hospital in 1991. Lewis said in her deposition that she would have tried to stop Drummond's bleeding by applying pressure to his wound with a head scarf. Neither Lewis nor Jason Drummond informed the officers of any qualifications or desire to render first aid. Jason Drummond stated that Cordell became weaker over time because of his blood loss and that his ability to hold his leg diminished.

The paramedic stated that Drummond was unconscious when the ambulance arrived at the scene. It took about twenty minutes to transport Drummond from the scene to the hospital. Plaintiffs' medical expert, Dr. Victor Garcia, felt that controlling external bleeding either with direct pressure or the application of a proximal tourniquet to Drummond's wound would have increased his "chance of survival by more than 50%."

Drummonds relatives filed suit against the responding officers and the Township and alleged that the officers violated Drummond's Fourteenth Amendment Due Process rights by not giving Drummond first aid, by preventing Drummond from treating his own wounds, and by preventing others from carrying out a private rescue. The district court granted summary judgment on behalf of the defendants and Drummond's relatives appealed to the Sixth Circuit Court of Appeals. The issues on appeal were as follows:

Whether there existed a special relationship between the officers and Drummond because they had placed him in custody;

Whether the officers exposed Drummond to a state created danger by preventing him from applying pressure to his own wounds; and

Whether the Township violated Drummond's liberty when the officers prevented others from effecting a private rescue of Drummond.

At the outset, the Sixth Circuit examined the lead United States Supreme Court case regarding the government's constitutional duty to protect, *Deshaney v. Winnebago County [iv] Dep't of Soc. Servs.* [ii] In *Deshaney*, child protection service workers, despite receiving credible complaints of abuse regarding a young boy's father, failed to protect the young boy from beatings which ultimately left the boy severely brain damaged. The boy, and relatives, sued the child protection workers and alleged that they violated the boy's Fourteenth Amendment rights by depriving him of his liberty without due process when they failed to protect him. The Supreme Court held:

That the substantive component of the Due Process Clause does not "require[] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. The Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* [iii]

Thus, the Sixth Circuit recognized that *Deshaney* stands for the legal principal that there is no general duty on the state to protect its citizens from private harm inflicted by third parties.

With the above in mind, the Sixth Circuit then examined the first issue before them, specifically whether a special

relationship existed between the officers and Drummond because they had placed him in custody. When the state has placed a person in custody, often the courts will recognize a "duty to protect" that person on the part of the state. This is because the state has essentially removed that person's ability to care for themselves when they place them in custody. However, the distinction that the Sixth Circuit found relevant on this issue was the difference between custody in the Fourth Amendment context and custody in the Fourteenth Amendment context.

Under the Fourth Amendment, a person is "in custody" when a police officer restrains a person's liberty such that a reasonable person would not feel free to leave. However, this standard does not apply in Drummond's case, because the suit is alleging a violation of Drummond's Fourteenth Amendment rights. As such, the more rigorous standard under the Fourteenth Amendment applies. The court stated:

For purposes, however, of the Fourteenth Amendment and of *DeShaney's* custody exception, custody requires that the state restrain an individual "through incarceration, institutionalization, or other similar restraint." *DeShaney*, 498 U.S. at 200. *DeShaney's* custody exception requires, "at a minimum-actual, physical restraint of the suspect by the police." *Cutlip v. City of Toledo*, 488 F. App'x 107, 114 (6th Cir. 2012).[v]

The Sixth Circuit then held that in this case, since Drummond was merely being covered by officers with weapons drawn after he shot himself, but not "incarcerated, institutionalized or subject to a similar restraint," Drummond was not in custody for liability to attach under the Fourteenth Amendment and *Deshaney*.

Further, regarding the officers duty to provide medical aid to Drummond, the court also noted that the officers had no special training, beyond basic first aid, in treating gunshot wounds. The court then stated that, because of the officer's lack of training in this area, "any failure to treat would be, at most, negligent and thus not actionable under Section 1983." [vi] The Sixth Circuit did not speculate whether the officer's would have had a different duty if they had more advanced medical treatment.

The court then examined the second issue before them, which was whether the officers exposed Drummond to a state created danger when they prevented him from treating his own wounds. The court noted that the rule regarding a "state created danger" liability is as follows:

A state is not subject to liability under *DeShaney's* state-created danger exception unless it takes an "affirmative action that exposed decedent to [a] danger to which [he] was not already exposed." *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 913 (6th Cir. 1995). [vii]

In Drummond's case, the court noted that the officers did not increase his risk of harm by their actions or make him more vulnerable. In fact, eye-witness testimony indicated that Drummond was applying pressure to his wound while the officers covered him with their weapons. As such, since the officer's actions did not expose Drummond to a danger to which he was not already exposed, there was no liability under the "state created danger" theory.

The court then examined the final issue, which was whether the Township violated Drummond's liberty when the officers prevented others from effecting a private rescue of Drummond. Specifically, Jason Drummond and Lewis, two of Drummond's relatives attempted to approach him, allegedly to apply pressure to his wound, and the officers ordered them back. To this issue, the Sixth Circuit stated:

If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, . . . it would certainly be permissible to forbid such an attempt." *Id.* Even construing the facts in the light most favorable to Pierce, it is undisputed that neither Lewis nor Jason Drummond informed the officers of any ability on their part to render medical aid. And, far from the case in *Beck I*, the officers had no reason to believe Lewis and Drummond could provide aid. Powers and Downs, like the defendant police officers in *Tanner v. County of Lenawee*, were not "aware of the would-be rescuer's qualifications," if any. *Tanner v. Cnty. of Lenawee*, 452 F.3d 472, 481 (6th Cir. 2006).[viii]

The Sixth Circuit then held that, based on the above principals, the Township and officers are not liable under the Fourteenth Amendment for preventing Drummond's relatives from providing aid.

As such, the Sixth Circuit affirmed the decision of the district court.

**Note:** Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

**CITATIONS:**

- [i] No. 13-3720 (6th Cir. Decided April 11, 2014)
- [ii] 489 U.S. 189 (1989)
- [iii] Pierce at 8 (citing DeShaney, 489 U.S. at 193-195)
- [iv] *Id.* at 8
- [v] *Id.*
- [vi] *Id.* at 10
- [vii] *Id.* at 11
- [viii] *Id.* at 12

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