# LEGAL EAGLE

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## Free Speech on Private Property

Christine Scott desired to run for office. She attempted to qualify by collecting the required number of signed petitions from registered Florida voters. The evidence forming the basis of Scott's conviction arose while she attempted to collect signatures from customers waiting in line to enter a gun show. The gun show was held on a property owned by South Florida Fair and Palm Beach County Expositions, Inc. No recorded evidence suggested the property was owned or operated by the State or a government agency. Entry into the gun show required a ticket. Eventually, a law enforcement officer asked Scott to leave after being informed by security that Scott was "harassing patrons in line waiting to enter the Gun Show." Scott refused to leave and was arrested and charged with Trespass After Warning.

Scott was convicted as charged. On appeal, she argued she should not have been charged with—much less convicted of—trespassing at the gun show because her actions were an exercise of her right to petition the government on private property held open to the public. Specifically, she argued "Florida's choice to create a specific section in the state constitution to protect the right to petition and other political rights, rather than lump all rights recognized by the First Amendment together," demonstrated that political speech is granted *expanded protection* in Florida. Scott concluded Florida Constitution allowed an individual to engage in political activity on private property. On appeal, the D.C.A. disagreed.

### Issue:

Does Article I, section 5, of the Florida Constitution confer upon its citizens a broader right to free speech on another's private property than the First Amendment to the United States Constitution? **No**.

### First Amendment and Private Property:

The United States Supreme Court addressed this issue in *Llyod Corp. Ltd. V. Tanner,* (S.Ct.1972). In that case, a shopping center prohibited the distribution of handbills, (flyers) on its property. The owners cited the need to prevent persons from bothering their shoppers, as well as limiting the litter in the mall area. The case examined the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the action is unrelated to the shopping center's operations.

The Court noted that the answer would be clear 'if the shopping center premises were not pri-

vately owned but instead constituted the business area of a municipality.' In the latter situation, the Court has often held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely. *Lovell v. Griffin*, (1938); *Hague v. CIO*, (1939); *Schneider v. State*, (1939); *Jamison v. Texas*, (1943).

The Court held, **"**The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on **state action**, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case."

"The assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in ... *Cox v. Louisiana*, (1965). We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."

"Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.

"We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. Reversed."

## Court's Ruling:

"We do not quarrel with Scott's contention that State constitutions may provide broader protections than those conferred by the United States Constitution. However, we find nothing in Article's text which leads us to conclude that the Florida Constitution confers political speech rights greater than those provided by the First Amendment to the United States Constitution. Like the First Amendment, Florida's Constitution only protects individuals' freedom of political activity and speech ***against government infringement***. See, *Attwood v. Clemons*, (N.D. Fla. 2021) ('The expressive political activities protected in Article I are identical to those protected by the First Amendment.') *Publix Super Mkts., Inc. v. Tallahasseans for Prac. L. Enf't*, (Fla. 2d Cir. Ct. Dec. 13, 2005) ('Defendants are not entitled under the First Amendment or the Florida Constitution to solicit signatures or engage in political speech on Publix's privately owned or leased property without Publix's permission.')."

"As recognized by other states with constitutional schema akin to ours, *state action is required to trigger the political speech protections provided by state constitutions*:

'The firmly established doctrine that constitutionally guaranteed individual rights are drawn to restrict governmental conduct and to provide protection from governmental infringement and excesses is not unique to the federal Bill of Rights. This has generally been the view with respect to State bills of rights as well. This fundamental concept concerning the reach of constitutionally guaranteed individual rights is deeply rooted in constitutional tradition and is consistent with the very nature of our constitutional democracy. The Michigan Constitution's Declaration of Rights provisions have never been interpreted as extending to purely private conduct; these provisions have consistently been interpreted as limited to protection against state action.' *Woodland v. Mich. Citizens Lobby*, (Mich.1985); see also *SHAD All. v. Smith Haven Mall*, (N.Y. 1985) ('State constitutional provisions ... protect individual liberty by limiting the plenary power of the State over its citizens. Thus, ***State action is a crucial foundation for both private autonomy and separation of powers***.' *State v. Wicklund*, (Minn. 1999) (cautioning that 'if the 'state action' requirement is discarded, it is difficult to formulate a principled line between those privately-owned locations in which constitutional free speech guarantees should apply and those where they should not,' and noting that 'the majority of

*(Continued on page 8)*

# 10 FACTS ABOUT LABOR DAY

1. We are celebrating the contributions and achievements of the 155 million men and women who are in the U.S. workforce.

2. In the late 19th century, the average working day consisted of 12 hours. In the late 1800s the average American worked 12-hour days and seven-day weeks. Children as young as 5-6 years old worked in factories and mines.

3. No one knows who started it. There is still some doubt as to who is actually the first person to propose the holiday for workers.

4. First US Labor Day observance was in the form of a parade

5. One of the reasons for choosing to celebrate this on the first Monday in September was to add a holiday in the long gap between Independence Day and Thanksgiving.

6. There's usually some congestion on highways and at airports. Public transit systems do not usually operate on their regular timetables.

7. Some retailers claim it is one of the largest sale dates of the year, second only to the Christmas season's Black Friday.

8. Some of those who are employed in the retail sector not only work on Labor Day, but work longer hours.

9. In high society, Labor Day is considered the last day of the year when it is fashionable to wear white.

10. Held on a Tuesday, the first Labor Day rally was held in order to gain support for the 8 hour workday.

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# Recent Case Law

## Backup Liability

Ricky Giddens was driving home "on a lonely highway," (his words). He drove past Officer Frye, who was traveling in the opposite direction. Shortly after the cars passed each other, Officer Frye made a U-turn, activated his blue lights, and followed Giddens. Giddens stopped his vehicle in front of his driveway. Officer Frye asked Giddens "in a hostile manner" (his words) for his license and registration. Giddens asked why he had been stopped. Officer Frye first told him that his taillight was broken. Giddens accused Officer Frye of lying, and the two men argued "back and forth" about the tag light and about Officer Frye's real reason for the stop.

During this exchange, Officer Frye said that Giddens had been speeding. Giddens then argued with Officer Frye about whether he had been speeding and about why Officer Frye had failed initially to mention a speeding violation. Officer Frye took Plaintiff's license and registration and returned to his patrol vehicle, which was a K-9 Unit: a police dog was present. Between ten and fifteen minutes later, backup Officer Brown arrived at the scene. Officer Frye then walked his dog around the outside of Giddens' car. Officer Frye said that the dog had alerted to possible contraband and instructed Giddens to step out of his car. Both Officers Frye and Brown conducted a pat-down search of Giddens' person. Officer Frye then searched the car and found no contraband. Officer Frye issued Giddens two traffic tickets: one for a tag-light violation and one for speeding. The tag-light violation was later dismissed.

Giddens sued everyone in sight, listing twelve counts against defendants for violations of the Fourth Amendment and Georgia law, including unreasonable search and seizure, unlawful detention, false imprisonment, and failure to intervene.

### Issue:

While there are a number of issues, the court focused on the failure to intervene. Assuming there was a constitutional violation by Officer Frye, was Officer Brown equally liable for failing to intervene in the unlawful stop and arrest? **No**.

### Duty to Intercede:

"A police officer is under a duty to intercede and prevent fellow officers from subjecting a citizen to excessive force and may be held liable for his failure to do so if he observes the use of force and has sufficient time to act to prevent it." *Figueroa v. Mazza*, (2nd Cir. 2016).

The duty to intercede does not lie without these underlying factors: 1. Excessive force. 2. Backup officer had a realistic opportunity to do something to prevent the harm from occurring. 3. Backup officer failed to take reasonable steps to prevent harm from occurring. 4. Backup officer's failure to act caused Plaintiff to suffer harm.

While the backup officer is being held to account for the actions of another officer, the case law is clear that the court must evaluate the facts with an eye for the individual officer's liability. "To start, each [officer's] liability must be assessed individually based on his own actions. To hold an officer liable for the use of excessive force, a plaintiff must prove that the officer: 1. actively participated in the use of excessive force, 2. supervised the officer who used excessive force, or 3. owed the victim a duty of protection against the use of excessive force." *Pollard v. City Columbus Ohio*, (6th Cir. 2015).

Liability will be imposed only if the bystander officer or supervisor has sufficient time to prevent the unlawful act. "In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring." "We do not know of any clearly established law that would require [backup officer] to abandon his crowd control duties and intervene to stop Officer Clarke's use of force." *Lennox v. Miller*, (2nd Cir. 2020).

### Court's Ruling:

"[Giddens] contends that Officer Brown failed to intervene in the purportedly unlawful traffic stop and dog sniff: violations [Giddens] says Officer Brown could have prevented by informing Officer Frye that [Giddens'] tag lights were operational.

"We have recognized a cause of action for failure-to-intervene in cases involving claims

of excessive force and false arrest. We have said 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.' See, *Alston v. Swarbrick*, (11th Cir. 2020). We have also determined that a non-arresting officer may be liable for failing to intervene in an unlawful arrest '*if he knew* the arrest lacked any constitutional basis and yet participated in some way.' *See Wilkerson v. Seymour*, (11th Cir. 2013).

"Even assuming (without deciding) that our failure-to-intervene precedent would extend to an unlawful traffic stop, [Giddens] has failed to allege facts sufficient to show that Officer Brown would be liable for failing to intervene under the circumstances of this case. *By the time Officer Brown arrived, [Giddens] had already been stopped for more than 10 or 15 minutes. [Giddens] has alleged no facts from which we can infer plausibly that Officer Brown participated in -- or was in a position to intervene in -- Officer Frye's decision to initiate the traffic stop.*

"Nor can we infer that Officer Brown was on sufficient notice that the ongoing traffic stop was unlawful. Although [Giddens'] tag lights were working when Officer Brown arrived, [Giddens] never alleged that Officer Brown knew or had reason to know that Officer Frye's second stated reason for pulling [Giddens] over (speeding) was untrue. See, *Wilkerson*, (concluding an officer was not liable for failing to intervene in a false arrest when the officer arrived after plaintiff was under arrest, relied reasonably upon the arresting officer's account of events, and when plaintiff voiced no challenge to a basis of her arrest).

"[Giddens] also alleged no facts showing that Officer Brown had 'the requisite information to put him on notice' that the duration of the traffic stop had been or was being unduly prolonged. [Giddens] never alleged that Officer Brown knew when [Giddens] was stopped. Nor has [Giddens] alleged facts from which we might infer that Officer Brown knew -- when Officer Frye conducted the dog sniff -- that the 'ordinary inquiries incident' to the traffic stop had already been completed. See, *Rodriguez v. United States*, (S.Ct.2015) ('Ordinary inquiries incident to' a traffic stop often include 'checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.'). A dog sniff is permissible under the Fourth Amendment as long as it is conducted within 'the time reasonably required to complete the mission of issuing a ticket for the [traffic] violation.' Because a dog sniff does not inherently and unlawfully prolong a traffic stop, just seeing the dog sniff in this case would not have been sufficient to put Officer Brown on notice that the duration of the traffic stop was at the time unlawful. By the way, [Giddens] never alleges the total duration of the stop and the complaint never alleges how long Officer Brown was on the scene altogether."

"The circumstances within the collective knowledge of the officers – [Giddens] immediate argumentativeness, the officers' detection of the odor of possible contraband emanating from [Giddens'] car, that the traffic stop occurred at night in an isolated location, and that [Giddens] was on his home ground -- are objectively dangerous circumstances the totality of which would give rise to reasonable suspicion that [Giddens] might be armed and dangerous. Under these circumstances, an officer in Officer Brown's place could have believed reasonably that his safety or that of others was in danger and that a pat-down search was warranted. Given the facts alleged in [Giddens'] complaint we cannot draw a reasonable inference that the pat-down search in this case violated a constitutional right. [Giddens'] claim was thus dismissed properly for failure to state a claim. AFFIRMED."

## Lessons Learned:

"There is a thin legal line between misdemeanor charges for an officer's failure to intervene and a more serious felony charge of aiding and abetting an assault or worse.

"Even though there is not a lot of case law on the issue, and some states have excluded omissions from accomplice liability legislation, there have been cases resulting in criminal accomplice liability where there was a failure to act based on a status relationship creating a duty. Silence and non-action can lead to criminal charges when an officer fails to intervene in an unlawful use of force by another officer."

***See***: *Duty to Intervene*, by Terrence P. Dwyer, Esq., Police1, July 25, 2023.

**Giddens v. Brooks Cnty, GA**
**U.S. Court of Appeals – 11th Cir.**
**(March 21, 2022)**

## Reasonable Deadly Force

911 received a report of a man with a gun. Several police officers including Jonathan Fowler and Jose Hernandez, responded to the call. While en route to the scene, both officers heard the dispatcher say that the suspect had discharged a round from his firearm.

The officers found Adam Paul English, standing in a median outside a doctor's office. The median was in a high-traffic area, in front of a hospital, and adjacent to a Parkway, which was busy with rush-hour traffic. Fowler first saw English bent over at the waist with his right hand in a bag on the ground. Hernandez saw English holding a bag. *Neither officer saw English holding a gun or otherwise saw a gun on his person.*

The officers approached with guns drawn. Fowler activated his body camera, as did another officer. Hernandez's dash camera also recorded the encounter. The officers approached while shouting commands that English show and raise his hands. English's right hand was not visible to the officers. And English failed to comply with the officers' orders. Hernandez warned English that he might be shot if he did not comply. At some point during the approach, the dispatcher communicated that English put the gun into a bag. Fowler testified that he did not hear this communication because he was simultaneously shouting commands. The bag was on the ground at English's feet as the officers approached.

Fowler and Hernandez testified that shortly after initiating their approach, they saw English make a sudden movement. Fowler testified that he saw English make "a hurried movement towards us moving his hand and his right shoulder towards us." Fowler believed that English had a firearm in his hand or waistband and that "when he made that movement, he was drawing it out to fire it." Hernandez testified that he saw English make "a direct steady movement with his right hand towards the right side of his hip." Both officers fired shots. Fowler fired once and Hernandez fired eight times. English died from his wounds. Officers later recovered a gun from inside the bag.

### Issue:

Was the use of deadly force against the unarmed suspect reasonable under the totality of the circumstances? Maybe.

### Objective Reasonableness:

*Tennessee v. Garner*, (S.Ct.1985), established that "law enforcement officers may employ deadly force where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Thus, if the record shows the officer had probable cause to believe English posed a serious threat, his use of deadly force was constitutionally permissible. In making this assessment of probable cause, courts must consider "the totality of the circumstances from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

"While the ultimate determination of reasonableness must be based on the totality of the circumstances, this court has repeatedly found three factors to be helpful in excessive force cases: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Mitchell v. Schlabach*, (6th Cir.2017).

The court in *Mitchell* summarized the evidence in that case as: "To be clear, our decision, in this case, is largely driven by the available video evidence, which documents most of the relevant events from a helpful angle. If this case turned on Schlabach's after-the-fact testimony, summary judgment would likely have been inappropriate. Our holding today is based upon the factual context of a car chase involving a single officer, isolated from backup, who was charged by a suspect who had demonstrated a willingness to put lives at risk in order to evade arrest. *This decision does not stand for the proposition that deadly force is reasonable or proper whenever a suspect charges an officer or defies an order*."

As will be evident from the 11th Circuit findings in the present case, it was the lack of clear video evidence that undermined the officers' claim of reasonableness.

### Court's Ruling:

"The only issues in this appeal are issues of evidentiary sufficiency. In their motions for summary judgment, the officers argued that their use of force was reasonable under the circumstances because they encountered a suspect who had brandished a gun, discharged it at least once, and ignored their commands to show his hands. The officers argued that in the light of these facts, when they saw English move, they had actual and probable cause to use deadly force

on him. But the [trial] court determined that 'viewing the evidence and the videos in the light most favorable to Plaintiffs,' a reasonable jury could find that the officers' use of force was unreasonable. It reasoned that 'though the officers say that they saw [English] make a quick motion as if to reach for a gun ... the videos leave that conclusion up for interpretation.' In other words, the [trial] court ruled against the officers because of a genuine dispute of material fact. This is the type of ruling that we lack jurisdiction to review."

"The [trial] court also considered the officers' argument that English's constitutional right to be free from excessive force in these circumstances was not clearly established. The [trial] court explained that **deadly force is justified only where a reasonable officer would believe that the suspect 'posed an *immediate* threat of serious physical harm.'** The officers argued, as they do here, that English in fact posed an immediate threat."

"Again, the [trial] court ruled against the officers because of a genuine dispute of material fact. It determined that 'under Plaintiffs' version of the facts, these circumstances did not exist: *the video evidence showed that Mr. English was not fleeing ... or resisting ... [or] threatening the officers, himself, or anyone else*." In other words, upon reviewing the evidence, 'a reasonable jury could view the sequence of events differently than [the officers] said they did.' The [trial] court acknowledged that the officers 'contest several of these points' and contend 'that they do not accurately depict the scene as they encountered it.' But the dispute is about what the evidence could prove at trial; it is not a dispute about principles of law." "To be sure, the officers try to cast their arguments as legal disputes. But this appeal does not raise questions about whether certain undisputed conduct violated the Fourth Amendment or whether the law was clearly established. **The parties agree that the use of deadly force against a non-resisting suspect who *poses no danger* violates a suspect's Fourth Amendment right to be free from excessive force.** The dispute is whether English—in fact—posed a danger when the shooting occurred. In other words, the only issues in this appeal concern what happened at the scene. Those are questions of fact, not law. **Dismissed**."

## Lessons Learned:

The 11th Circuit's ruling sends the case back to the trial court for a jury to resolve the factual issues.

This is another instance where the use of deadly force must be evaluated at the moment it is applied. "In evaluating whether the suspect poses an immediate threat when deadly force is employed, the court must consider the totality of the circumstances. That is, the question of whether there is no threat, an immediate deadly threat, *or that the threat has passed*, at the time deadly force is employed must be evaluated based on what a reasonable officer would have perceived under the totality of the circumstances." *Tennessee v. Garner*, (S.Ct. 1985).

"This rationale clearly places officers on notice that the use of deadly force is unreasonable when a reasonable officer would have perceived that the threat had passed. It also demonstrates that considering the **precise moment** the officer used force is important because 'circumstances may change within seconds, eliminating the justification for deadly force.' " *Reavis v. Frost*, (10th Cir. 2020).

*Garner* clearly established that when a 'suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.' In other words, it is clearly established that an officer cannot use deadly force once a threat has abated.

The court in *Torres v. Sheriff Rod Howell*, (11th Cir. 2022) in somewhat similar facts ruled to the contrary, "[Plaintiffs] have not identified any Supreme Court or Eleventh Circuit precedent finding a Fourth Amendment violation under similar circumstances. Indeed, case law supports the use of deadly force in comparable circumstances. See, *Hammett v. Paulding Cnty*., (11th Cir. 2017) (finding the use of deadly force was reasonable when Hammett disobeyed an officer's instruction to show his hands and moved aggressively towards the officer, despite finding out after the fact that Hammett did not have a deadly weapon); *Jean-Baptiste v. Gutierrez*, (11th Cir. 2010) (deadly force was reasonable when the officer was 'suddenly confronted' by the suspect and 'forced to decide in a matter of seconds whether to deploy deadly force')…"

**English v. City of Gainesville**
**U.S. Court of Appeals – 11th Cir.**
**(July 27, 2023)**

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## Free Speech

courts having virtually identical language have interpreted the free speech provisions of their constitutions as coextensive with that of the First Amendment.'"

"Accordingly, we affirm Scott's conviction and hold the political speech protections conferred under Article I, section 5 of the Florida Constitution are no broader than those guaranteed under the First Amendment of the United States Constitution. Stated differently, Article I, section 5 **does not provide an expanded right requiring private property owners to permit political speech on their property over their objection**. ***Affirmed.***"

### Lessons Learned:

While not directly on point, it should be noted that an arrest that is challenged as retaliatory on free speech grounds will fail if there was objective probable cause to support the arrest. However, the Supreme Court set out one exception.

"At many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's "retaliatory arrest" claim on the ground that there was undoubted probable cause for the arrest. In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying [the general] rule would come at the expense of [the rule's] logic.

"For those reasons, we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he *was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been*. ...And like a probable cause analysis, it provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant' at this stage. After making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause." See, *Nieves v. Bartlett*, (S.Ct. 2019).

**Scott v. State**
**4th D.C.A.**
**(Aug. 2, 2023)**