



LAW ENFORCEMENT NEWSLETTER

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THE ANGRY MOTORIST AND DISORDERLY CONDUCT

By Michael S. Cerrone and
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There is a video posted on YouTube™ called the "Angry Motorist." It shows a simple, ordinary highway traffic stop by a state trooper from somewhere in accent-heavy New England. The trooper's dashboard camera reveals one of the greatest temper tantrums by an adult in human history. The approximate four minute video consists almost entirely of the motorist spewing a string of obscenities and spittle in the face of the trooper who remains calm throughout. The trooper gives the motorist a speeding ticket.



If this incident occurred in New York, should the trooper also have given the motorist a citation for disorderly conduct, under New York Penal Law Section 240.20, in light of his tantrum? If the officer improperly charges the motorist with disorderly conduct, can the motorist sue the arresting officer? These hypothetical questions are offered because improper disorderly conduct charges have lately become a fruitful ground for civil claims against arresting officers.

Let's start with the statute. New York Penal Law Section 240.20 provides, in pertinent part, that "[a] person is guilty of disorderly conduct when, with intent to cause **public inconvenience, annoyance or alarm**, or recklessly creating a risk thereof: (1) He engages in fighting or in violent, tumultuous or threatening behavior; or (2) He makes unreasonable noise; or (3) In a public place, he uses abusive or obscene language, or makes an obscene gesture...."

How about the angry motorist: he made an unreasonable noise and used abusive and obscene language, so certainly he could safely be charged with disorderly conduct, right? Maybe not.

Let's consider the case of *People v. Munafo*, 50 N.Y.2d 326, 428 N.Y.S.2d 924 (1980). In *Munafo*, the defendant protested an attempt by the State Power Authority to erect a large transmission line on an appropriated right of way which cut a wide swath across a section of the defendant's farm. As a construction crew advanced over a private road located on the defendant's property, the defendant fired a rifle

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HIGH VISIBILITY VESTS

In November 2008, a change took place concerning the type of high visibility vests that must be worn on Federal Aid Highways. This requirement was further defined in a revision to 23 CFR 634 which defines the interpretation of this new standard:

Workers means people on foot whose duties place them within the right-of-way of a Federal-aid highway, such as highway construction and maintenance forces; survey crews; utility crews; responders to incidents within the highway right-of-way; firefighters and other emergency responders when they are not directly exposed to flame, fire, heat, and/or hazardous materials; and law enforcement personnel when directing traffic, investigating crashes, and handling lane closures, within the right-of-way of a Federal-aid highway.

Most law enforcement agencies have purchased high visibility vests that met the requirements of ANSI 207. These vests are fine for continued use for the time being on roadways that are not "Federal Aid Highways". If involved in an accident investigation, traffic control, etc. on Federal Aid highways, however, a high visibility vest meeting the requirements of ANSI/ISEA 107-2004 must be worn. The biggest difference between the two vests is the amount of high visibility, fluorescent background material. ANSI 207 requires only 450 square inches of fluorescent material, while ANSI 107 requires 775 square inches of fluorescent material. Both standards require the same amount of reflective material.

This may change later in 2009 when further changes are made to the *Manual on Uniform Traffic Control Devices* (23 CFR Part 655). The requirements of 23 CFR 634 have been incorporated into the proposed changes to this standard which will be effective in either the second or third quarter of 2009. The *Manual on Uniform Traffic Control Devices* applies to "all roads open to public travel".

If you have "Federal Aid Highways" in your law enforcement jurisdiction, the move to the ANSI/ISEA 107 compliant vests applies now. If not, these requirements will take effect later in 2009. When considering the purchase of these vests, several manufacturers are offering vests with "breakaway seams". I believe this is an extremely important feature that increases officer safety. Breakaway construction minimizes the potential for "catch and drag" incidents, as well as the potential for the vests to be used for leverage by suspects in an altercation. The photo below highlights "breakaway seams" on one manufacturer's vest.

Should you have further questions, please contact Brett Carruthers at 716.282.4890 or via email at bcarruthers@wrightrisk.com



5 Point Breakaway

THE ANGRY MOTORIST, CONTINUED FROM THE COVER

across their path. No one was apparently endangered by the shot. Thereafter, he positioned himself in the path of a backhoe, and refused to move when asked to do so by a police officer. The officer charged the defendant with disorderly conduct. In dismissing the charge, the New York Court of Appeals held that

The clear aim was to reserve the disorderly conduct statute for situations that carried beyond the concern of individual disputants to a point where they had become a potential or immediate public problem. In deciding whether an act carries public ramifications, courts are constrained to assess the nature and number of those attracted, taking into account the surrounding circumstances, including, of course, the time and the place of the episode under scrutiny.

The Court dismissed the charge because "the differences between the authority and the defendant were confined to these two disputants rather than spread to the public." Thus, under *Munafò*, the important element is "public inconvenience, annoyance or alarm". In the absence of this element, a disorderly conduct charge cannot stand.

So how does the Court of Appeals' decision in *Munafò* affect the Angry Motorist? The motorist was certainly creating a fair amount of commotion and quite a scene. So, is this enough to meet the "public inconvenience" element? Probably not for the simple reason that there was no one else present when this amusing exchange occurred. Thus, it is possible that a disorderly conduct citation against the Angry Motorist would not stand. Once such a citation is dismissed, it opens up the possibility of a civil suit against the arresting officer for false arrest or malicious prosecution.

In order to minimize the risk of a civil suit, we recommend a conservative approach to charging individuals with disorderly conduct. Often, the best approach may be that of the accented trooper in the video: he stayed calm throughout the encounter, absorbed the abuse directed his way, and offered a polite "Bye!" as the Angry Motorist sped off.

ALTERNATIVE TO INCARCERATION PROGRAMS

With the ever shrinking economy and more difficult fiscal times, the topic of Alternative to Incarceration programs has been a frequent and popular topic of discussion lately. A number of questions from County Administrators, County Executives and Correctional Facility personnel have been fielded as these municipal entities look for means to be more cost effective and reduce incarceration costs.

The response to these questions has been these programs are reasonable alternatives. HOWEVER, the key for success in this area is the need for a charge to be lodged against the plaintiff in these cases as they are handled by the Court. If there is no charge, or if the plaintiff is given Adjudication in Contemplation of Dismissal (ACD), the door opens for potential false arrest and/or malicious prosecution claims. It is imperative the County District Attorney's Office is aware of the need for a charge and the potential ramifications for cases given alternative sentencing with no charge.

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SUPREME COURT WEIGHS BIAS IN FIREFIGHTER EXAM; CONSTRAINS POLICE AUTHORITY TO SEARCH VEHICLES

The Supreme Court has heard arguments over whether the City of New Haven, Conn. engaged in impermissible racial discrimination when it threw out the results of a civil service test in favor of a different test because no blacks had passed. The Court was clearly divided during oral argument with Justice David Souter saying the city faced a “damned if you do, damned if you don’t situation. A decision is due this summer.

In a 5-4 ruling just decided on April 21, 2009 (*Arizona v Gant*) with broad ramifications for policing policy and practice, the Court found that the search- incident-to-arrest exception to the Fourth Amendment’s warrant requirement does not permit a vehicle search incident to a vehicle occupant’s arrest unless demanded by safety or valid evidentiary concerns. There were neither in the arrest of Mr. Gant (and two others) for driving with a suspended license --by five officers who handcuffed and secured Gant and the two companions before the search began.

Police may search the passenger compartment of a vehicle incident to a recent occupant’s arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

MEMORY TEST *Law Enforcement Newsletter Quiz*

Here are some questions from “Memory” Lane. See how well you remember these “memories”!

1. What builds strong bodies 12 ways?
 - A. Flintstones Vitamins
 - B. Spaghetti
 - C. Wonder Bread
 - D. Tang
2. Pogo, the comic strip character said, “We have met the enemy and . . .”?
 - A. It’s You
 - B. He Surrendered
 - C. He wasn’t home
 - D. He is us
3. You’ll wonder where the yellow went . . . ?
 - A. When you use Tide
 - B. When you brush your teeth with Pepsodent
 - C. When you use Lady Clairol
 - D. When you use Clorox
4. Meanwhile, back in Metropolis, Superman fights a never ending battle for truth, justice and . . . ?
 - A. Lois Lane
 - B. Peace on Earch
 - C. The American Way
 - D. Equality
5. I’m strong to the finish . . . ?
 - A. Cause I eats me spinach
 - B. Cause I eats me broccoli
 - C. Cause I lift weights
 - D. Cause I’m Popeye the Sailor Man
6. What do M & M’s do?
 - A. Make your tummy happy
 - B. Melt your heart
 - C. Melt in your mouth, not in your pocket
 - D. Melt in your mouth, not in your hand
7. Name the Beatles:
 - A. John, Steve, George and Ringo
 - B. John, Paul, Stacey and Roscoe
 - C. John, Mark, George and Ringo
 - D. John, Paul, George and Ringo
8. Brylcream . . .
 - A. We’re your team
 - B. A little dab’ll do ya
 - C. It’s a dream
 - D. Tame that cowlick

Answers to Quiz
1. C: Wonder Bread
2. D: He is us
3. B: When you brush your teeth with Pepsodent
4. C: The American Way
5. A: Cause I eats me spinach
6. D: Melt in your mouth, not in your hand
7. D: John, Paul, George and Ringo
8. B: A little dab’ll do ya