

Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

July 16, 2009

Chief Luke Hecker Loveland Police Department 10 East 10th Street Loveland, CO 80537 SENT VIA FACSIMILE: 970-962-2917

Elliot Phelps Chief Investigator Office of the District Attorney 8th Judicial Office LaPorte Avenue Suite 200 Ft. Collins, Colorado 80521 SENT VIA FACSIMILE: 970-498-7250

> Re: Seizure of Bill Miller by Loveland police officers in violation of the Fourth Amendment; CCJRA request

Dear Chief Hecker and Mr. Phelps:

I write regarding a complaint received from Mr. Bill Miller describing his encounter with three Loveland Police Department officers on October 7, 2008. During that encounter, Mr. Miller was detained based solely on the fact that he had an unconcealed handgun, the possession of which undisputedly did not violate any Colorado or Loveland laws. Pursuant to the Colorado Criminal Justice Records Act ("CCJRA"), the ACLU requests all records related to any internal review or investigation of the search and seizure of Mr. Miller and his firearm. I also write to ask for your assurance that the actions of your officers were not acceptable to the Loveland Police Department and will not be repeated.

Mr. Miller alleges that he was sitting on a park bench overlooking Lake Loveland, eating an apple and enjoying the view, in the early evening hours of October 7, 2008. At the time of the incident, Mr. Miller was 71 years old. Mr. Miller states he was unexpectedly approached by Loveland Police Department ("LPD") officers, who told Mr. Miller they had received a "tip" that Mr. Miller had a gun on his person. Mr. Miller did, in fact, have an unconcealed, holstered handgun attached to his waistband. Mr. Miller alleges that LPD officers seized his handgun without his consent, and emptied it of ammunition. Mr. Miller states that LPD officers also ordered him to produce his driver's license over his objections. LPD officers detained Mr. Miller for some time before finally returning Mr. Miller's handgun and license. Mr. Miller states that LPD officers told him he could expect the same treatment should similar encounters occur in the future.

LPD records corroborate Mr. Miller's recollection of events. LPD incident reports (attached) indicate that three LPD officers contacted Mr. Miller on October 7, 2008, around 6:20 p.m. The incident report records that officers seized Mr. Miller's handgun, "cleared" the serial number on the handgun, and then concluded: "Carry weapon in view, not concealed, no violation, explained our and citizens [sic] initial concern over the weapon."

Subsequent to a complaint made by Mr. Miller to the office of the 8th Judicial District Attorney, Chief Investigator Elliot Phelps informed Mr. Miller that his complaint would be reviewed by the Loveland Police Department (see letter attached). In that letter, Mr. Phelps also stated:

While citizens have many constitutional rights, the right to possess and carry a firearm is a right which, in the hands of the wrong person, in the wrong circumstances, may cause harm to an officer. There is a fine balance between the protection of an individual's right and the protection of a law enforcement officer.

The ACLU of Colorado certainly agrees with Mr. Phelps that in some circumstances there can be a "fine balance between the protection of an individual's right and the protection of a law enforcement officer." In this case, however, LPD officers did not confront a situation which called for striking a "fine balance" between individual constitutional rights and officer safety. Instead, the facts as presented clearly and unambiguously required that LPD officers respect Mr. Miller's constitutional rights, which they failed to do.

Mr. Miller's right to be free from unreasonable searches and seizures is protected by the Fourth Amendment to the federal constitutional and by Article II Section 7 of the Colorado constitution. Those constitutional protections clearly prohibit officers from seizing an unconcealed, legally-possessed firearm, and prohibit officers from detaining and investigating the individual carrying that firearm, in the absence of any suspicion of criminal activity. While it is true that in some cases an officer may be entitled to search and remove firearms during a legitimate investigative detention if officers reasonably fear for their safety, the facts of this case are totally devoid of any such justification.

Numerous courts that have examined similar situations have consistently held that police officers are not entitled to stop or search an individual merely because that person is reported to be, or is seen, carrying a firearm. The U.S. Supreme Court weighed in on a similar question in 2000, when it held that police officers were not justified in stopping and searching an individual based only upon a tip from a caller who claimed the individual was carrying a firearm. *Florida v. J.L.*, 529 U.S. 266 (2000).

The Tenth Circuit has also held police officers' acts unconstitutional in cases with similar facts. In *United States v. King*, 990 F.2d 1552 (10th Cir. 1993), the Tenth Circuit rejected arguments made by police officers that the Fourth Amendment permitted them to detain individuals who presented "any articulable" threat to their safety in the form of a legally-possessed, loaded firearm. The court noted as follows:

In a state . . . which permits persons to lawfully carry firearms, the government's argument would effectively eliminate Fourth Amendment protections for lawfully armed persons . . . if a police officer's safety could justify the detention of an otherwise lawfully armed person, the detention could last indefinitely because a lawfully armed person would perpetually present a threat to the safety of the officer.

Id. at 1563.

Other courts have reached similar conclusions. In *United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000), the Third Circuit held that police officers' decision to stop and search an individual during a local carnival, based only upon a tip that that person had a firearm, violated that person's Fourth Amendment rights. The court explained its reasoning by use of a hypothetical:

[T]he Government adduced no evidence suggesting that ... the gun [plaintiff] possessed was defaced or unlicensed, that [plaintiff] posed a safety risk to the authorities or the ... celebrants, or that [plaintiff] was acting in a manner indicating that he was involved in a different crime. For all the officers knew, even assuming the reliability of the tip that [plaintiff] possessed a gun, [plaintiff] was another celebrant lawfully exercising his right under Virgin Islands law to possess a gun in public ... This situation is no different than if ... officers [received a tip] that [plaintiff] possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills--the possession of which is a crime under United States law--the officers would have had no justification to stop [plaintiff] based merely on information that he possessed a wallet.

Id. at 218. See also Brown v. City of Milwaukee, 288 F. Supp. 2d 962, 971 (E.D. Wis. 2003) (rejecting officers' claims that they were immune from civil suit arising from officers' search and seizure of a woman based only upon information that she might possess a firearm) ("the dispatch report stated only that the individual possessed a gun, which is not necessarily a crime."); *United States v. Dudley*, 854 F. Supp. 570, 580 (S.D. Ind. 1994) (holding that a search of a vehicle based upon a report that there were guns inside was unconstitutional) ("A telephone report of citizens possessing guns . . . standing alone, cannot amount to reasonable suspicion of crime").

Based upon Mr. Miller's account and LPD's own reports, no reasonable officer could have believed Mr. Miller was doing anything more on October 7, 2008, than "lawfully exercising his right under . . . [the] law to possess a gun in public." *Ubiles*, 224 F.3d at 218. LPD officers were not justified in seizing Mr. Miller's personal property, nor did they have a right to detain Mr. Miller in order to investigate him or his firearm based only on the fact that Mr. Miller possessed an unconcealed weapon. The actions of LPD officers are especially troubling in light of the officers' alleged promise that Mr. Miller would receive similar treatment each and every time he carried a legal, unconcealed firearm in the future. The threat raises a question regarding whether LPD officers believe they have the right to stop, detain and investigate anyone in Loveland merely because that person possesses, or is alleged to possess, an unconcealed firearm.

Pursuant to the Colorado Criminal Justice Records Act, please produce all criminal justice records connected with the October 7, 2009, search and seizure of Mr. Miller. This request includes, but is not limited to, any internal affairs records or other internal review records generated in response to the complaint forwarded to the Chief of Police by the District Attorney, such as officer statements, internal correspondence, and the discipline or additional training, if any, imposed on the involved officers.

In addition, I request the assurance of the Loveland Police Department that the actions of its officers on October 7, 2008, were not appropriate under department policies and procedures, and will not be repeated. I look forward to hearing from you at your earliest convenience.

Very truly yours,

Taylor Pendergrass Staff Attorney, ACLU of Colorado

Enc. LPD Incident Report (10/7/08); Phelps letter (5/6/09)

cc. Miller

Larry R. Abrahamson District Attorney

201 LaPorte Avenue, Suite 200 Fort Collins, Colorado 80521-2763

Phone: (970) 498-7200 Fax: (970) 498-7250



ASSISTANT DISTRICT ATTORNEY Clifford E. Riedel

CHIEF DEPUTY DISTRICT ATTORNEYS Mitchell T. Murray C. Michelle Brinegar Andrew J. Lewis Emily A. Humphrey

SENIOR DEPUTY DISTRICT ATTORNEY Loren B. Schall

Bill Miller 2176 Westbourne Drive Loveland, CO 80538 May 6, 2009

Dear Mr. Miller;

I have reviewed your correspondence with Mr. Abrahamson regarding your encounter with Loveland Police Officers in early October 2008. Based on his legal opinion and my law enforcement opinion, we concluded that this issue is an internal matter for the Loveland Police Department to review. Therefore; I have referred your complaint to the Loveland Chief of Police for his review.

While citizens have many constitutional rights, the right to posses and carry a firearm is a right which, in the hands of the wrong person, in the wrong circumstances, may cause harm to an officer. There is a fine balance between the protection of an individual's rights and the protection of a law enforcement officer.

I am confident your complaint will be reviewed fairly and professionally by the Loveland Police Department.

Thank you:

Elliott Phelps Chief Investigator Office of the District Attorney 8th Judicial District (970 498-7265)

Incident Detail Report Data Source: Data Warehouse Incident Status: Closed

Data Source: Data Warehouse Incident Status: Closed Incident number: 2008-00059098 Incident Date: 10/07/2008 18:21:29 Last Updated: 05/11/2009 11:31:26

Incident Information Incident Type: Priority: Determinant: Base Response#: Confirmation#: Taken By: Response Area: Disposition: Cancel Reason: Incident Status: Certification: Longitude:			Double Officer Emergent P2 Urgent 10072008-0012439 Kuehl, Amanda S District 3 No Criminal Violation Closed 105087411				Alarm Level: Problem: Agency: Jurisdiction: Division: Battalion: Response Plan: Command Ch: Primary TAC: Secondary TAC: Delay Reason (if any): Latitude:			0 ⁻ La D D	Weapons 01 Police Loveland Police District 3 District 3 Dist 3 double		
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Comments

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10/07/2008	18:22:33	ASK	Response
10/07/2008	18:22:50	ASK	Response
10/07/2008	18:23:20	ASK	Response

Comments

male got out of veh and put a handgun into his pants is walking around now sitting now over on the bench old male white beard white hat striped and plaid checkered shirt got out of tan and red truck truck parked by the statue parking lot sitting on bench east of the plot

VisiNet Browser 4.4 - Reports - Incident Report

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Address Changes No Address Changes								

Priority Changes

No Priority Changes

Alarm Level Changes No Alarm Level Changes

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B114 cl ser # pf1445 tj7246 handgun -

comp is in a blue pontiac vibe parked in same plot

our and citizens initial concern over the weapon

comp is in a blue portiac vibe....parked in same port B95 male walking around now - officer sees male B95 male has food in hand - sees officer and is walking towards him B95 in contact Code Four 1 coop male

code 4, carry weapon in view, not concealed, no violation, explained

Backed up S10 with B95 large handgun silver and black

B114 cl miller, bill | 070238

gun is clear B114 Clear and Valid

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Custom Time Stamps No Custom Time Stamps

Custom Data Fields No Custom Data Fields

Attachments No Attachment