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Trib investigation: Cops often let off hook for civil rights complaints

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Federal prosecutors declined to pursue civil rights allegations against law enforcement officers 96 percent of the time since 1995, a Tribune-Review investigation found.

The Trib spent six months analyzing nearly 3 million federal records on how the Justice Department and its 94 U.S. Attorney offices handled criminal complaints against law enforcement officers from 1995 through 2015. The records include matters referred to Justice by the FBI and other agencies and those it opened on its own.

For all other crimes, prosecutors rejected only about 23 percent of complaints.

The most frequent reasons cited for declining civil rights complaints involving officers: weak or insufficient evidence, lack of criminal intent required under a 1945 Supreme Court ruling standard, and orders from the Justice Department.

“This is an area, quite honestly, where the feds need to be bolder and put greater resources in,” said Craig Futterman, a law professor who founded the Civil Rights and Police Accountability Project at the University of Chicago. “... Indeed, the failure to aggressively bring those cases has allowed too many abusive officers to believe that they can operate without fear of punishment.”

The Justice Department takes “any allegation of law enforcement misconduct seriously and will review those allegations when they are brought to our attention,” spokeswoman Dena Iverson said in response to the Trib's findings.

The 12,703 potential civil rights violations turned down nationwide out of 13,233 total complaints from 1995-2015 include high-profile incidents in Ferguson, Mo., Chicago and New York City — but also thousands of incidents the public knows little about. The case data does not identify defendants or victims.

“It is a difficult situation for the legal system in general,” Mel Johnson, assistant U.S. attorney for civil rights cases in the Eastern District of Wisconsin, told a Trib reporter in Milwaukee. “Federal and state governments have not succeeded in deterring police misconduct. I would say the legal system has a way to go.”

The U.S. Attorney's office for Western Pennsylvania opens files for even minor accusations that the FBI investigates against a police officer, said Steve Kaufman, chief of the office's criminal division.

“We don't hesitate to open a file on a civil rights case, yet it's one of the most difficult cases to gather sufficient evidence to prove it beyond a reasonable doubt at trial,” Kaufman said.

“Obviously then you do have a relatively high percentage that don't end up being prosecuted.”

Convicting a police officer of a civil rights violation is one of the toughest challenges a prosecutor can face, numerous legal and civil rights experts told the Trib.

Police Accountability's Futterman agreed but said that doesn't excuse the lack of prosecutions.

“Just because they're challenging cases should not mean they should not be brought,” Futterman said.

Another explanation is that prosecutors are doing their jobs by rejecting bad evidence, said Jim Pasco, executive director of the national Fraternal Order of Police.

“Maybe they're not taking the cases because they're not good cases,” Pasco said. “It could be 96 percent of the time. Do you know how many false complaints are made against police officers?”

Milwaukee Mess

No one disputes that Milwaukee police officer Christopher Manney killed Dontre Hamilton with 14 gunshots on an overcast April afternoon in a park across from City Hall.

But after the incident, Milwaukee Police Chief Edward Flynn fired Manney for conducting an “incorrect and out-of-policy” frisk on Hamilton without reasonable suspicion.

Manney told investigators he started frisking Hamilton from behind, leading the man to drop his arms to pin the officer's hands. As they struggled, Hamilton struck the officer with his hand, then grabbed Manney's baton and swung at him, witnesses said. Manney drew his weapon and kept firing until he ran out of bullets.

Hamilton, a diagnosed schizophrenic, had not received his medication due to an issue with his insurance, his family said.

The shooting was in self-defense and justified, Flynn said. The frisk was not, the chief said, adding that there has to be a way of holding officers accountable short of sending them to prison.

“Going hands-on with a pat-down that was not justified by reasonable suspicion resulted in the confrontation,” Flynn said six months after the shooting. “The confrontation clearly escalated to a very dramatic, violent and dangerous end.”

Justice and the U.S. Attorney's office for Eastern Wisconsin reviewed the incident after Milwaukee's district attorney declined to press charges. Nearly a year later, in November 2015, the federal prosecutors declined to charge Manney.

“Even if there was reliable evidence that indicated that Manney's actions were unreasonable, there is insufficient evidence to prove beyond a reasonable doubt that he acted willfully — that is, with a bad purpose to violate the law” as established in a 1945 U.S. Supreme Court ruling, acting U.S. Attorney Greg Haanstad and a top Justice Department official said in a letter to the family. A copy of the letter was obtained by the Trib.

Manney has appealed to Milwaukee County Circuit Court to have his firing reversed. His lawyer, Jonathan Cermele, declined to comment but provided a legal brief that quotes Manney saying he conducted the pat-down because he noticed bulges in Hamilton's clothing and suspected he might have had a weapon.

“Based on ‘the totality of the circumstances,' (Manney) believed Hamilton ‘posed a signficant danger to [his] safety,” the brief states.

Manney did not mention seeing the bulges until three months after the incident, according to a separate city investigation.

Jonathan Safran, a Milwaukee attorney who represents Hamilton's family, said he had hoped Justice would take the case based on Manney's initial contact.

In 2004, Safran represented a man who was beaten, slashed and tortured by off-duty police officers. After a local jury acquitted the officers, federal prosecutors won four guilty pleas and three convictions.

“We always believed the feds were a last resort but that they would come through,” Safran said. “I'm not feeling that way anymore.”

Police On A Pedestal?

Motive is the main legal stumbling block for prosecutors in charging law enforcement officers with a civil rights violation, legal experts said.

A 1945 U.S. Supreme Court ruling, upholding the ability of federal prosecutors to charge local police for depriving someone of their civil rights, said that prosecutors must prove that the police acted “willfully.”

“The standard is high and challenging,” said Alan Vinegrad, a former federal prosecutor from the Eastern District of New York who oversaw criminal civil rights cases.

“It's got to be a willful deprivation of rights, meaning the police officer intended and wanted to either kill or injure the person,” said Vinegrad, now a partner at the law firm of Covington & Burling LLP in New York. “Not just ‘it was reckless or negligent' or anything like that.”

U.S. attorneys nationwide generally have the authority to decline referrals on their own. In civil rights cases when an officer has killed someone, when the case has been tried in a local court or has gained national notoriety, U.S. attorneys must coordinate with the assistant attorney general for civil rights in Washington, who has the final decision.

During the Obama administration, federal prosecutors have declined referrals for civil rights prosecution of officers 93 percent of the time.

The “willful” standard is too high, former Attorney General Eric Holder said last year. He talked about recommending changes before leaving office but did not.

Now in private practice at Covington & Burling's Washington office, Holder declined a Trib request for an interview.

Specific Intent

Even when investigators determine a police officer was not justified in shooting someone, federal prosecutors must prove the officer's intent under the Supreme Court's ruling.

Seattle police officer Ian Birk shot and killed Native American woodcarver John T. Williams after seeing him walk through a crosswalk, looking down at his hands. Williams held a piece of wood in his left hand as he worked at it with a knife in his right, dashcam video shows.

Birk stopped at a red light. He pulled his patrol car to the curb, flipped on its emergency lights and jumped out with his service weapon in his right hand as he walked after Williams.

"Hey!" Birk shouted, without identifying himself as a police officer. "Hey! Hey! Put the knife down!" He repeated the command two more times quickly.

Within ten seconds of first calling out, Birk opened fire, hitting Williams four times as he collapsed to the sidewalk, according to a Seattle police firearms review board memorandum.

The board determined the shooting was "unjustified and outside of policy, tactics and training." Birk lacked probable cause to believe Williams posed a threat, he had other reasonable alternatives, and would have done better to let Williams get away than to kill him, the board ruled.

Yet when federal prosecutors investigated, they found insufficient evidence to prove that Birk "acted willfully and with the deliberate and specific intent to do something the law forbids."

Prosecutors declined to charge him with a crime.

Birk resigned from the police force.

"There was enough conflict between the civilian witnesses as to what was actually happening on the street corner that there was simply no way that a prosecution was going to be successful on a beyond-a-reasonable-doubt standard," Ted Buck, Birk's lawyer, told the Trib.

Police officers need more latitude than ordinary citizens because of the jobs they are asked to do, he added.

"They're asked to respond to situations that are rapidly evolving, that require split-second decision making," Buck said.

"If we don't give them protections along the lines of a showing of malice or something like that, then who in their right mind would go out there and do the job?"

Beyond proving intent, prosecutors have practical reasons for not charging officers, legal experts said.

"There's first of all the general reluctance on the part of prosecutors to go after people in law enforcement because they consider themselves all working on the same team," said Tim Lynch, director of the Project on Criminal Justice at Cato Institute, a think-tank in Washington that advocates for smaller government.

Prosecutors also know that juries tend to look favorably on police officers and might be reluctant to convict, Futterman, at the University of Chicago, said.

Even with video or other strong evidence, the defense can argue the officer believed the dead person was armed or was a threat, or that the officer had only a split-second to make a decision. Actions based on fear, panic, misperception or even poor judgment do not equate to willful conduct, the Justice Department commonly says in declining to charge officers.