



Deadly Force and Resisting a Public Officer

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The N&O series: *Deadly Force*. Today the News and Observer published the last article of its four part investigative series [Deadly Force](#), a series that chronicles numerous physical confrontations between Harnett County sheriff's deputies and citizens and the deaths and injuries that resulted.

The [first article](#) in the series recounted the events leading to John Livingston's death. Sheriff's deputies investigating a minor assault knocked on the door of Livingston's home at 3:40 a.m. Livingston opened the door and one of the deputies, Nicholas Kehagias, leaned into the door frame and put his foot on the threshold. Kehagias told Livingston who he was looking for. Livingston told the deputy neither person was there. Kehagias reportedly said he wanted to look inside. Livingston asked if he had a search warrant. He did not. Livingston said he was going to bed and tried to slam the door closed. The door hit Kehagias's foot and arm. Believing that he had been unlawfully assaulted, the deputy rushed inside and tried to arrest Livingston. Livingston resisted. Kehagias used his Taser on Livingston. A scuffle ensued. Livingston picked up the Taser and pushed it into Kehagias's chest. Kehagias shot Livingston three times. He died before paramedics arrived.

The [second article](#) in series described a physical encounter between another Harnett County resident and Deputy Kehagias. That encounter began when 66-year-old Michael Cardwell called 911 because he was having suicidal thoughts. Three deputies, Kehagias among them, drove to Caldwell's home in three separate patrol cars. Caldwell said he became nervous about the number of deputies on the scene and asked them to turn on a dash camera. He also asked for their names and asked if any of them were veterans. Cardwell said Kehagias pushed him to the ground and handcuffed him. When he resisted, Cardwell says Kehagias pushed his knee into his back and sprayed his face with pepper spray. Cardwell was eventually taken by ambulance to the hospital where he was treated for a fractured femur and a broken hip. Kehagias said Cardwell was drunk and cursing and had pushed him before Kehagias took him to the ground.

A warning sign. The *Deadly Force* series points to a "warning sign" that a certain Harnett County deputies were too often getting physical with suspects: the number of times the deputies charged suspects with unlawfully resisting a public officer. The N&O reports that in 2014-2015, one squad of Harnett County deputies (of which Kehagias was a member) issued 63 charges of resisting a public officer. The next closest squad issued 39 charges. Five of those were after Kehagias joined its ranks.

What exactly is the crime of resisting a public officer?

[G.S. 14-223](#) makes it a Class 2 misdemeanor to

- (1) willfully and unlawfully
- (2) resist, delay, or obstruct
- (3) a public officer

(4) knowing or having reasonable grounds to believe the person is a public officer

(5) while the public officer is discharging or attempting to discharge a duty of his or her office.

State v. Dammons, 152 N.C. App. 284 (2003).

This crime often is referred to in short-hand as “RDO,” or “resist, delay, obstruct,” or as “resisting arrest” even though its scope is not limited to resisting an arrest but also includes any resistance, delay, or obstruction of an officer who is performing his or her duties. *State v. Lynch*, 94 N.C. App. 330, 332 (1989).

What it is. Thus, a person who through loud, raucous, and abusive language delays an officer’s attempt to continue an investigation by preventing him from interviewing a suspect or witness may properly be charged with violating G.S. 14-223. *State v. Leigh*, 278 N.C. 243 (1971). The same is true for a person who makes statements or engages in behavior that reflects a determination that he intends to prevent an officer from making a lawful arrest. *State v. Singletary*, 73 N.C. App. 612, 616 (1985). Obviously, physically struggling against an officer who is attempting to carry out a lawful seizure constitutes resisting a public officer, see *State v. Lynch*, 94 N.C. App. 330, 334 (1989), as does running away or hiding from such an officer, see *State v. Ferebee*, 177 N.C. App. 785 (2006); *State v. Swift*, 105 N.C. App. 550 (1992). In certain circumstances, refusing to provide information about one’s identity also can constitute resisting a public officer in violation of G.S. 14-223. See *State v. Friend*, ___ N.C. App. ___, 768 S.E.2d 146, 148 (2014) (holding that the defendant’s refusal to provide his identifying information hindered the officer from completing a seatbelt citation and thus violated G.S. 14-223).

What it isn’t. On the other hand, merely “remonstrating with an officer” or “criticizing and questioning” him “in an orderly manner,” does not amount to obstructing or delaying an officer in the performance of his duties. *Leigh*, 278 N.C. at 251. A person likewise does not criminally obstruct or delay an officer if he advises another of her constitutional rights, such as the right not to respond to questions posed by the officer. *Id.*; *Burton v. City of Durham*, 118 N.C. App. 676, 680-81 (noting that “[c]ommunications simply intended to assert rights, seek clarification or obtain information in a peaceful way are not chilled by section 14-223”). Making a statement to an officer in good faith that later turns out to be false also is not a violation of G.S. 14-223, which requires **willful** resistance, delay or obstruction.

Moreover, every person has the right to terminate a consensual encounter with a law enforcement officer and to resist an unlawful arrest by using the force reasonably necessary to prevent it from occurring. *Roberts v. Swain*, 126 N.C. App. 712 (1997). A person likewise may resist an officer’s unlawful entry into a person’s home. *State v. Sparrow*, 276 N.C. 499, 512 (1970).

Gray areas. Not surprisingly, suspects and officers don’t always agree about whether an arrest or other investigative conduct by an officer—and the ensuing resistance to that activity—is lawful. For instance, was it lawful for Detective Kehagias to lean into Livingston’s door frame and put his foot on the threshold? Case law on that issue is mixed. Compare *Dalcour v. City of Lakewood*, 492 F. App’x 924, 934 (10th Cir. 2012) (unpublished) (“[B]ased on the extensive Supreme Court . . . precedent emphasizing the significance of any physical intrusion into a home, a reasonable officer should have known that placing a foot into the doorway amount to an entry of the home for Fourth Amendment purposes.”) with *Smith v. City of Wyoming*, ___ F.3d ___, 2016 WL 1533998 (6th Cir. 2016) (officer’s placing of his foot in the door during a knock and talk to briefly prevent the door from closing followed by his removal of the foot and the closing of the door did not violate clearly established law). It is clear, however, that a person is free to avoid altogether or to terminate at will a voluntary doorway encounter. *Kentucky v. King*, 563 U.S. 452, 470 (2011). Thus, it is difficult to conceive of how a person’s attempt to close the door of his or her residence in order to end the encounter could be construed as violating G.S. 14-223. Whether slamming the door in a manner that hit the officer constitutes an assault is less clear. Cf. *Rodeman v. Foster*, 767 F. Supp. 2d 1176, 1183 (D. Colo. 2011) (concluding that slamming the door on an officer after he crossed the threshold could not justify officer’s warrantless entry).

In Caldwell's case, if he pushed Kehagias when he arrived, such behavior certainly could be deemed willful resistance to lawful investigation by a public officer. Caldwell's reported request that a dash camera be activated and his questions about the officers' names and veteran status, on the other hand, are the type of "peaceable and orderly" information-seeking that is not prohibited by G.S. 14-223. *Singleton*, 73 N.C. App. at 615.

Best practices. A former district attorney quoted in the *Deadly Force* news series, Branny Vickory, indicated that good, experienced officers will charge violations of G.S. 14-223 and [assault on a government employee](#) less frequently than other officers.

Statewide, there were nearly 25,000 charges of resisting a public officer in 2015. What's the practice in your district? Are resisting public officer charges levied sparingly or liberally? Do you view them as a barometer for a law enforcement officer's performance?