



SEPT 2023

## Ninth Circuit Reverses Decision on Qualified Immunity Grants Qualified Immunity for use of lethal force in gym

*Smith v. Agdeppa*, Ninth Circuit Court of Appeals, No. 20-56254, Filed 08/30/23

### Background:

In 2022, the Ninth Circuit court decided a civil rights case entitled *Smith v. City of Los Angeles* where an individual, (later identified as Dorsey) was shot and killed in a Hollywood gym. Officers Agdeppa and Rodriguez encountered Dorsey in a gym locker room after receiving a call that he assaulted a security guard and refused to leave. The officers ordered him to get dressed and leave the gym. Dorsey ignored the officers' commands and continued to walk back and forth across the locker room and dancing to music on his phone. As the officers continued to give him commands, Dorsey who was approximately 6'1" and 280 lbs., began taunting them. The officers attempted to handcuff Dorsey using a variety of control

holds, but he resisted and was able to break the officers' grasp resulting in a violent struggle.

As a use of force ensued, both officers' Body Worn Video cameras were knocked from their uniforms; however, audio from the BWV footage confirms that both Officers continually shouted for Dorsey to stop resisting. Both Officers eventually deployed tasers, but neither were effective. Audio confirms that the struggle escalated after the taser deployments.

Officer Rodriguez can be heard repeatedly demanding that Dorsey turn around as her taser cycles multiple times. The Officers are heard shouting and groaning as the sounds of banging and thrashing increase. Officer Agdeppa recalled becoming disoriented after being struck in the face and knocked backward against a wall.

Once he recovered, Officer Agdeppa saw Dorsey straddling Officer Rodriguez pummeling her head and face as she laid on the floor. Officer Agdeppa feared Dorsey would kill his partner and resorted to lethal force by firing his service weapon killing Dorsey.

Although Agdeppa recalled giving warning prior to using lethal force, it was disputed at trial as no warning could be heard from the audio captured by either officers' BWV. As a result, the district court found that because Officer Agdeppa failed to warn Dorsey before using lethal force, he was not entitled to Qualified Immunity. Officer Agdeppa appealed.

### The Ninth Circuit 2022 Decision:

The Court concluded that a jury could find that



the officer's use of deadly force was unreasonable under the circumstances. The Court confirmed that to determine whether an officer's use of force is objectively reasonable, you must look to the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Additionally, the Court reiterated the deadly force is reasonable only if the officer has probable cause to believe the suspect poses an immediate and significant threat of death or serious physical injury to the officer or others.

Importantly, the Court found that, "whenever practicable" officers must give a warning that deadly force will be used prior to firing; specifically noting that a command to 'stop' is not sufficient.

Although the Court did not elaborate on when a use of force warning is 'practicable' under the circumstances, it did consider whether there was sufficient time and opportunity to give a deadly force warning based upon the danger posed. While the court agreed that Dorsey presented a significant risk to the officers' safety, because it was determined that Officer Agdeppa failed to give notice that he was escalating to lethal force, he was not granted Qualified Immunity.

### **The Ninth Circuit 2023 Reversal:**

Recently the Ninth Circuit revisited its 2022 decision that denied Officer Agdeppa Qualified Immunity and reversed. Without resolving factual disputes of the case, the court only

addressed the question of whether there was clearly established precedent at the time of the incident that governed whether failing to warn of lethal force under similar circumstances should result in a denial of Qualified Immunity.

The Ninth Circuit held that the rule that an officer must warn a suspect prior to using lethal force was not a "one-size-fits-all" rule that applies to any and all use of force encounters. Specifically, the court found that existing law at the time did not clearly establish when such a warning was practicable, what form the warning must take, or how specific it must be.

Officers Agdeppa and Rodriguez repeatedly gave verbal commands, engaged in a lengthy violent struggle, attempted non-lethal force, and were still overpowered by Dorsey's attacks. As such, the court stated Officer Agdeppa was not required, "to call a 'time out' in the middle of an increasingly violent altercation" to give warning that lethal force could be, or was about to be, used. The Court granted him Qualified Immunity.

### **Bottom Line:**

There still is no bright-line rule that states when a lethal force warning is practicable, what form the warning must take, or how specific it must be. The best recommendation is to **stay vocal by giving loud, clear commands and warnings as the encounter unfolds prior to the need for lethal force.**

**Stay Safe and Informed!**