



LEGAL DEFENSE TRUST TRAINING BULLETIN

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NO QUALIFIED IMMUNITY FOR POLICE USE OF PEPPERBALL GUN

Nelson v. City of Davis, et al., filed July 11, 2012

Ninth Circuit, United States Court of Appeals

by

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Timothy Nelson, a UC Davis student, was shot in the eye by a pepperball fired by a UC Davis officer's gun, when UC Davis and City of Davis police attempted to clear an apartment complex of partying students in 2004. The officers didn't properly warn the students prior to shooting, nor did they explain to Nelson's group how to exit the complex prior to the police use of force. Nelson suffered "a permanent loss of visual acuity," and had "multiple surgeries to repair the ocular injury he sustained." Nelson sued, alleging that his Fourth Amendment rights had been violated. The defendants moved for summary judgment based on qualified immunity. The District Court denied the motion.

The Ninth Circuit Court of Appeals

affirmed the District Court, finding that the officers' actions amounted to an unconstitutional seizure. The Court held that the law at the time of the incident should have placed the officers on notice that shooting pepperballs under the circumstances in this case, was an act of excessive force.¹ The Court stated, "A reasonable officer would have known that firing projectiles, including pepperballs, in the direction of individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and

¹ It was just last year that the Ninth Circuit, in a highly criticized decision, ruled that officers would not have known, at the time of the incident, that the use of a taser on a pregnant woman when she refused to get out of her car, was excessive force.

who engaged in only passive resistance, was unreasonable.”

There are several passages within the decision that should be of interest to officers who might be engaged in the dispersal of large groups of individuals. It was argued that Nelson and his companions were trespassing, based on a willful refusal to leave. *The Court stated that trespassing, while an offense, is a minor infraction that justifies, at most, only a minimal use of force.* Although the officers had an interest in clearing the apartment complex, the “desire to do so quickly, in the absence of any actual exigency, cannot legitimize the application of force when it is not otherwise justified.”

While officers encountered individuals at various points during their sweeps of the complex who threw bottles or other debris at them, they did not see anyone in Nelson’s group engaging in such threatening or dangerous behavior. “[T]he individuals causing the problems were not so numerous that the two categories of partygoers were indistinguishable.” “Under these circumstances, the general disorder of the complex cannot be used to legitimize the use of pepperball projectiles against non-threatening individuals.”

Passive resistance may support the use of some degree of governmental force if necessary to attain compliance. Even if the Court accepted the officers’ version of the events - that they issued orders to disperse without sound amplification at a distance of 45 to 150 feet from the group, Nelson’s failure to comply immediately could only rise to the level of passive resistance. Without “active” resistance, only a trivial amount of force can be justified. Where an individual’s “resistance was [not] particularly bellicose,” the Court has held that various applications of force, including the use of pepper spray and bean bag projectiles, were not reasonable.

Comment: This ruling could be a setback for police agencies defending themselves against lawsuits arising out of the Occupy movement. Students from UC Davis have sued police for dousing them with pepper spray, UC Berkeley students have sued campus police for using batons during a protest and Oakland police have been sued by Occupy protesters for using “flash-bang” grenades. If not protected by qualified immunity, police tactics may need to be reconsidered in response to situations that involve large groups of mostly peaceful protesting individuals.

Stay Safe!
Muna Busailah and Robert Rabe