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TRAINING BULLETIN

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"Taser found excessive for bizarre behavior in traffic stop"

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Firing a taser can result in liability for excessive force unless the officer faces an immediate threat to himself or the public. This was the holding of the Ninth Circuit Court of Appeals on December 28, 2009 in the case of *Bryan v. McPherson*, 2009 WL 5064477.

The result was not surprising, as Officer Brian McPherson of the Coronado Police. Department fired his taser at a seat-belt violator who engaged in bizarre but non-threatening behavior. In reaching that predictable outcome, the Court provided useful insight into the examination of factors bearing on excessive force claims that are gradually becoming more clearly defined as the judicial system encounters opportunities to apply the legal test to a series of ever-varying fact patterns. The Court's reasoning in the new case appears legally sound, but it is perhaps regrettable that the defendants brought an appeal under facts that gave the Court an easy opportunity to strike a blow against officer safety.

Twenty years after the landmark United States Supreme Court ruling in *Graham v. Connor*, 490 U.S. 386 (1989), appellate courts appear to be evolving from the broad, diffuse totality-of-the-circumstances formula decreed in that case, toward a more systematic balancing test that measures the degree of force used, then examines the justification in terms of immediacy of the threat, the seriousness of the offense, and the resistance of the suspect. This evolution exemplifies the ideal functioning of the judicial system, as the more fact patterns

the courts are able to test against the controlling legal rules, the more predictable becomes the outcome in any particular case.

Facts of the case

The opinion portrays a colorful factual history. The plaintiff in a federal civil rights suit, Carl Bryan, was a 21-year-old driver who was stopped at 7:30 on a Sunday morning on Coronado Island, for not having his seat belt fastened. Slip Opn. at 1. When Officer McPherson approached the passenger side window and asked Bryan if he knew why he had been stopped, Bryan only stared straight ahead. Officer McPherson asked Bryan to turn down his radio and pull over to the curb.

As Bryan pulled over, he hit the steering wheel and yelled expletives. After putting the car in park, Bryan stepped out of the car. Officer McPherson saw Bryan was wearing only boxer shorts and tennis shoes, and was "yelling gibberish and hitting his thighs." Id.

Unknown to Officer McPherson, the probable source of Bryan's anger at himself was that he had already received a speeding ticket earlier on his drive from Camarillo to Coronado. Id. The opinion does not explain why Bryan was only wearing boxer shorts, nor does it discuss any indecent exposure or public nuisance issue connected to that fact. It is noted that before starting on his trip from Camarillo, Bryan had to ride to Los Angeles to get his keys, because his cousin's girlfriend had accidently taken them there the previous day. The opinion does not say that the loss of his keys was the reason Bryan was only wearing boxer shorts. But if it was, then once he recovered his keys, he should have been able to find some respectable clothes to wear. Nevertheless, as all modern law enforcement officers learn in training, under the totality-of-the-circumstances test of *Graham v. Connor*, the only strictly relevant facts are those perceived by the officer in the field at the time of the use of force. *Graham*, 490 U.S. at 396.

From Officer McPherson's perspective, it was undisputed that Bryan appeared agitated, but he did not verbally threaten the officer, he was standing 20 feet away, and he was not attempting to flee. Officer McPherson claimed he had told Bryan to remain in the car, but Bryan claimed he did not hear that instruction. Slip Opn. at 1.

At most, Officer McPherson claimed Bryan took one step toward him. Bryan denied taking any step at all, and the evidence tended to show he was facing away from Officer McPherson, when, without warning, Officer McPherson fired his taser at Bryan. Id. A taser probe became embedded in Bryan's upper left arm, immobilizing him so he fell face forward into the asphalt pavement, and fractured four front teeth. Id. at 1-2. Bryan was arrested and tried for resisting an officer

in violation of *Penal Code*, section 148, but the jury deadlocked and the charge was dismissed. Id. at 1 and fn. 1.

Procedural history of the case

In Bryan's civil rights suit for excessive force, the trial court granted summary judgment in favor of the City, but denied the motion as against Officer McPherson, finding he was not entitled to qualified immunity because "a reasonable jury could find that Bryan 'presented no immediate danger" to the officer and that "no use of force was necessary." Slip Opn. at 2 (quoting the trial court decision). The trial court found that from the facts that Bryan was located at least 15 feet away from Officer McPherson, was not facing or advancing toward him, and that the taser could foreseeably cause injury by causing Bryan to fall to the asphalt, it would be clear to a reasonable officer that using the taser under these circumstances was unlawful. Id. at 2. The Ninth Circuit panel unanimously affirmed these conclusions.

Analysis of the Ninth Circuit's Opinion

The Ninth Circuit began its analysis by framing the *Graham v. Connor* inquiry in terms of balancing "the amount of force applied against the need for that force." Slip Opn. at 2, quoting from *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003).

Examining the "amount of force" side of the scale, the Ninth Circuit surveyed the physical effects produced by a taser shot. While acknowledging that a taser shot can result in accidental death (Slip Opn. at 3, fn. 7), concluded the weapon is "non-lethal," but represents "an intermediate, significant level of force that must be justified by a strong government interest that compels the employment of such force." Slip Opn. at 4 (omitting citations and internal punctuation). This holding illustrates that the higher degrees of force require correspondingly greater showings of justification. In placing the taser at the intermediate degree of the scale, the Court observed that the taser could, and did, cause "non-minor physical injuries" when fired at "a shirtless individual standing on asphalt." Slip Opn. at 3. The Court quantified the taser as a degree of force greater than pepper spray or baton strokes, because its use "may result in serous injuries when intense pain and loss of muscle control cause a sudden and uncontrolled fall." Id. at 4.

However, the Court also recognized the social utility of the taser, on the basis that its "ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike." Id. Having placed the taser at a level where its use must be justified by a "strong government interest" the Court then examined the governmental interest in using the taser under the facts of the case.

For the purpose of examining the governmental interest in the use of the taser, the Court distilled from *Graham v. Connor* "three core factors, '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.'" Id. at 5, quoting from *Graham*, 490 U.S. at 396.

The Court observed that the immediacy of the threat is the most important factor in the *Graham* test. Slip opn. at 5. The Ninth Circuit in *Deorle v. Rutherford*, 272 F.3d1272, 1281 (9th Cir. 2001) held that the immediacy of a threat must be justified by objective factors beyond the officer's statement of fear for his own safety or the safety of others. Slip Opn. at 5. That case also held that "A desire to resolve quickly a potentially dangerous situation is not the type of government interest that, standing alone, justifies the use of force that may cause serious injury." Id.

Applying this standard, the Ninth Circuit agreed with the trial court that while an officer would properly be wary of Bryan's "volatile, erratic conduct" this "unusual situation" by itself did not justify a use of significant force. The Court held that to justify the use of the taser, "the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public." Slip Opn. at 5.

Agreeing with the trial court, the Ninth Circuit found "Bryan did not pose an immediate threat" because he was unarmed. It should have been apparent from his lack of clothing that there was nowhere to conceal a weapon. And Bryan's use of expletives and gibberish did not include any verbal or physical threat to the officer. Id.

The Court rejected Officer McPherson's argument that Bryan manifested a threat by taking a step in his direction from roughly twenty feet away. Even resolving this disputed evidence in favor of the officer, Bryan remained nineteen feet away "by the officer's own estimate" and was facing away from the officer. Id. at 5-6. The Court also observed that by unholstering and charging his taser, Officer McPherson placed himself "in a position to respond immediately to any change in the circumstances." Id. at 6. It appears that from the distance shown by the evidence, Officer McPherson would still have had plenty of time to use his taser if Bryan had started to manifest more threatening behavior.

The Court proceeded to distinguish the case of *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), which was cited by the defense for the proposition that a taser could properly be used against "an aggressive, argumentative individual." Slip opn. at 6. In that case, after the officer had asked Draper to retrieve some paperwork from his truck, Draper had engaged in "increasingly heated argument" and displayed "a growing belligerence" to the

officer. In walking back to his truck to get the papers, Draper had turned back toward the officer four times to accuse the officer of harassing and disrespecting him. Draper was not tased until the fifth time he turned back, when he yelled at the officer and paced toward him in agitation. The Court in *Draper* had also recognized that an attempt to physically handcuff the suspect at that point would have escalated the situation and itself risked serious injury. Id.

While the Ninth Circuit expressly declined to adopt the holding of *Draper* as the law of this circuit, the contrast drawn between the two fact patterns gives useful guidance on the quantity and quality of evidence of immediacy that would justify using a taser. For one example, it is quite significant that Officer McPherson gave no warning or indication that force might be used if Bryan persisted in his bizarre behavior. Another important lesson from the comparison of these cases is that where the act of drawing and charging the taser gives the officer enough protection for the time being, that act will be all that is permitted unless the situation continues to escalate.

The Court in *Bryan* proceeded to rule that a mere traffic infraction "generally will not support the use of a significant level of force." Slip Opn. at 7. While Officer McPherson argued that he suspected Bryan of being mentally ill and therefore possibly subject to detention, the Court found that fact diminishes rather than increases the justification for using force, as it noted that "the purpose of detaining a mentally ill individual is not to punish him, but to help him." Id.

Officers working dangerous assignments are likely to find this aspect of the Court's ruling somewhat disturbing, as it can often be difficult to tell the difference in an encounter with a suspect in the field, especially when taking into account the well-known quality of superhuman strength, resistance and imperviousness to pain sometimes experienced from individuals under the influence of hard drugs such as PCP or methedrine. While it is hoped that the Court's holding on this subject does not cause a future officer to hesitate in a situation of genuine danger, it is the defendants who gave the Court the occasion to voice this sentiment, by choosing to assert this justification in a perhaps overzealous strategy for avoiding civil liability.

The Court next examined the degree of resistance posed by Bryan, guided by the general rule that "the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance." Slip Opn. at 8. Discussing a body of precedent that distinguishes between active and passive force, the Court placed Bryan's resistance closer to the passive end of the scale, as he complied with all the officer's demands except the instruction to remain inside

his car, which he claimed he never heard. Id. The defendants' justification was also undermined by the fact that there was adequate time to give a warning that force was imminent, and no reason not to give such a warning. Id.

The Court concluded that while officers need not employ the least intrusive means of force available in any given situation, they must at least consider less intrusive means and feasible alternatives to the use of force in effecting an arrest. Id. at 9 and fn. 15. In making this assessment, the Court stated that Officer McPherson should have considered the fact that he had called for backup, and that the arrival of additional officers would have changed the tactical calculations and created additional alternatives if necessary. Id. at 9.

On balance, the Court found there was only a "minimal interest in the use of force" in this situation which was "insufficient to justify the use of an intermediate level of force against an individual." Id. It was a tense but static situation in which there was "no immediate need to subdue" the suspect before the arrival of backup. Id.

Finally, because an officer is entitled to qualified immunity if he had a reasonable belief that the particular use of force was lawful under the circumstances, the Court was constrained to examine whether Bryan's right to be free from the use of the taser was clearly established under current precedent. This analysis does not require the plaintiff to show direct precedent controlling the precise factual situation, if existing precedent gives the officer "fair notice" that the particular use of force would violate the suspect's rights to be free of unreasonable seizure under the Fourth Amendment. Id.

In this case, the Court held that a reasonable officer "would have known that it was unreasonable to deploy intermediate force" against an unarmed suspect, stopped for a minor traffic offense, standing twenty feet away, not physically confronting the officer, not attempting to flee, and posing no serious treat to the officer or the public. Id. While the officer's desire to put a quick and decisive end to "an unusual and tense situation" was "understandable" the use of significant force to do so did not amount to a reasonable mistake of fact or law. Id. Accordingly, the Court ruled that Officer McPherson was not entitled to qualified immunity, and consequently would properly be required to stand trial for the injuries inflicted.

This decision has given rise to considerable press and media reaction, largely because there have been hundreds of deaths nationwide resulting from use of tasers, and the officer here seemingly used this dangerous device for his own convenience in bringing a quick and decisive end to a situation that in reality demanded more patience. The case furnishes an object lesson, to remember the ladder of escalation and not use significant force as a short cut for

systematic thought and action in the field.

The case provides a somewhat disconcerting example of the readiness of courts to expect officers to incur physical risks for the sake of protecting criminal suspects from injury. While these facts do not add up to a shining example of law enforcement excellence, it requires only a few slight variations to see that situations of this type may not be as innocuous as their superficial appearance may suggest. Officers cannot easily be faulted for not wanting to grapple at close quarters with a suspect who may have HIV or another contagious disease, or may suddenly burst into a drug-induced rampage. But a case where the suspect did no more than display a foul temper after being stopped for failing to wear his seat belt was an unfortunate set of facts to highlight that concern, and resulted in enabling the judicial system to further erode the safety of law enforcement officers and of the law-abiding public in the service of an abstract social ideal that is arguably not compelled by the Constitution.

STAY SAFE!

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