
CASES

Tasers under Scrutiny

By: IMLA Editorial Board

Excessive Force: Summary Judgment Reversed where Officer Repeatedly Applied Taser without Allowing Plaintiff Time to Comply

***Smith v. City of Troy*, No. 16-4719 (6th Cir. Nov. 1, 2017).**

Reversing the lower court in part, the Sixth Circuit has found that knocking an epileptic man to the ground and tasing him for 48 seconds without allowing him an opportunity to comply is not protected by qualified immunity.

Victor Smith (Smith), an epileptic, began experiencing a seizure in February 2014 while driving in Troy, Ohio (City). He steered his car into a yard, exited, and walked a few houses away. A neighbor called the police. Deputy Sheriff Phillip Osting (Osting) arrived to find Smith grasping a waist-high chain-link fence, swaying back and forth; his pants were down around his knees, revealing his white longjohns, and he was yelling out, "Baby." Smith did not respond when Osting asked him to return to his car, and Osting thought Smith was under the influence of drugs or intoxicants. Osting tried to peel Smith's fingers from the fence, but Smith pulled his arm away. Osting then delivered a leg sweep, knocking Smith to the ground, face down.

As Osting was wrestling to secure Osting's arms behind his back, Officer Scott Gates (Gates) arrived on the scene. Gates drew his taser and ordered Smith to comply, but Smith merely looked blankly and did cooperate. Gates applied his taser to Smith's upper-back and lower-neck area. By then, two other officers arrived and succeeded in controlling Smith. The data recorder on Gates's taser showed that he had deployed it eight times, for a total of 48 seconds, during an encounter with Smith that lasted less than two minutes. None of the officers informed Smith that he was under arrest.

Smith filed a complaint under the ADA and § 1983 against the City, Miami County, Osting, Gates and the other officers. He claimed that the individuals violated his Fourth Amendment rights by using excessive force against him and by failing to intervene to protect him against the excessive force employed by the other officers. Smith claimed that the City and Miami County were responsible for their respective officers' allegedly unconstitutional conduct under theories of ratification, negligent hiring and retention, and failure to train, and that they failed to educate their officers properly on confronting and attending to persons with disabilities, in violation of Title II of the ADA. Finally, Smith asserted state-law claims against the defendants for assault and battery and for intentional infliction of emotional distress.

The district court granted summary judgment to the defendants on Smith's federal civil rights claims, concluding that the officers used measured force in response to Smith's defiance of their orders and reaching where the officers could not see his hands. The court concluded further that even if the individual officers did use excessive force, they were entitled to qualified immunity under the facts of the case. The court also held that the municipal defendants could not be liable under § 1983 because Smith did not produce evidence of a pattern of constitutional violations by their law enforcement officers, and it granted the defendants summary judgment on Smith's ADA claim because officers had acted due to his disability. Smith's state-law claims were dismissed without prejudice.

The Sixth Circuit viewed the case differently. It concluded that Osting violated Smith's right to be free from excessive force when he took Smith to the ground with a leg sweep and landed on top of him; there was little in the record to suggest that Smith had committed even a minor crime. In his incident report, Osting conceded that Smith was holding the fence to maintain his balance; Osting did not state, either in his report or in his deposition testimony, that he believed Smith presented a safety threat. Viewing the record in the light most favorable to Smith, a reasonable officer in Osting's position would have known that he would violate Smith's right to be free from excessive force by using a leg sweep to force him to the ground. Osting was not entitled to qualified immunity for this use of force.

Osting was also not entitled to qualified immunity for his actions in attempting to handcuff Smith, given the absence of an offense.

However, Osting was not liable for failing to intervene in the tasing. A plaintiff making such a claim must prove that the officer observed or had reason to know that excessive force was being used by another and that the officer had the opportunity and the means to prevent the harm from occurring. Here, Osting was occupied trying to gain control of Smith's arms while Gates deployed the taser; therefore, no reasonable juror could find that Osting had the opportunity and the means to prevent Gates from tasing Smith excessively.

Gates was also found susceptible to suit. Although he arrived after Osting had already taken Smith down, so could not have prevented Osting's initial use of force against Smith--and was justified in initially tasing Smith because Smith appeared to be resisting being handcuffed--Gates did not allow Smith time to comply with his requests before tasing him for a total of 48 seconds in less than two minutes. Viewing the record in the light most favorable to Smith, the Circuit found that such repeated deployment of the taser on Smith was unreasonable, and Gates was not entitled to qualified immunity on that issue.

Because the remaining officers arrived late in the action and were occupied trying to control Smith's legs, they had no reasonable opportunity to stop Gates from deploying his taser; therefore the district court correctly granted them summary judgment.

The Circuit upheld the lower court's denial of municipal liability. Smith's failure-to-

train theory failed because he did not show that the municipal defendants "ignored a history of abuse and [were] clearly on notice that [their] training [in the deployment of tasers and the proper use of force] was deficient and likely to cause injury." He could not identify a pattern of inadequately investigating excessive force claims or toleration of excessive force by municipal officers, nor could he demonstrate negligence in the hiring and retaining of those officers.

Smith's ADA claims failed because he had not shown that the defendants intentionally discriminated against him *because of* his disability. However, the court left open the possibility that pendent state law claims might require further examination, given the Circuit's reinstatement of a number of federal claims raised in Smith's complaint.

In sum, the Sixth Circuit reversed the grant of summary judgment to Osting on Smith's claims of excessive force regarding the leg sweep and forcible handcuffing and reversed summary judgment for Gates on Smith's claim that the officer excessively deployed his taser.

http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0247p-06.pdf

Pleadings: Parents of Unarmed, Non-resisting Decedent Tased for 90 Seconds May Substitute Proper Party and Proceed with Excessive Force Claim

***Jones v. Las Vegas Metropolitan Police Department,* No. 14-17388 (9th Cir. Oct. 20, 2017).**

Reversing the lower court, Judge Kozinski and a Ninth Circuit panel have held that parents of a Las Vegas driver who died after being tased for 90 seconds should be allowed to substitute a correct party plaintiff and to assert Fourth Amendment claims, given that such action toward an unarmed, non-resistant arrestee was clearly improper under then-existing precedent.

In December 2010, a lone Las Vegas Metropolitan Police Department (LVMPD) officer pulled over Anthony Jones (Jones) for a routine traffic stop. Jones exited his vehicle as ordered but when the officer drew his weapon due to Jones' much larger size, Jones ran away.

The officer called for backup and caught up with Jones. Believing that Jones did not have a weapon, the officer avoided use of deadly force, instead using his taser to subdue the larger man, who fell to the ground. The officer knelt on Jones' back, keeping his taser pressed to Jones's thigh and repeatedly pulling the trigger. The officer continued to tase Jones for 90 seconds, even after four backup officers arrived and handcuffed Jones. For ten seconds, another officer simultaneously applied a taser to Jones' upper back.

Once the officers stopped tasing Jones, his body went limp and he was nonresponsive. The officers tried and failed to resuscitate him but he was pronounced dead shortly thereafter. The coroner's report concluded that "police restraining procedures"—including the tasings—contributed to his death.

Jones's parents sued the LVMPD and the officers involved, alleging Fourth and Fourteenth Amendment violations as well as various state law torts. The district court granted summary judgment for defendants on all claims, determining that plaintiffs failed to assert their Fourth Amendment claims as executor or administrator of Jones's estate, as required by the Nevada survival statute, and thus lacked standing. On appeal, the plaintiffs dropped their *Monnell* claims and proceeded solely against the two officers who had applied their tasers.

The Ninth Circuit panel affirmed in part and reversed in part. It held that under the wording of Fed. R. Civ. P. 17 and Circuit precedent, the lower court had abused its discretion by failing to give plaintiffs a reasonable opportunity cure their defective complaint by substituting a proper party. Although Fourth Amendment claims are "personal" and may not be "vicariously asserted," Section 1983 actions may be brought by "the survivors of an individual killed as a result of an officer's excessive use of force," provided state law authorizes a survival action. Nevada law authorized such action by the "executor or administrator" of a decedent's estate. Admittedly, Plaintiffs had not made such an assertion; however, courts "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."

Plaintiffs' mistake was "reasonable" and "honest" under the circumstances and the public interest in having cases heard on their merits required reversal of the lower court on this issue.

The panel held that whether the officers were reasonable in the degree of force used was a triable question of fact; evidence presented at summary judgment would support a finding that the officers' continuous and overlapping use of tasers for more than 90 seconds was unreasonable, and a jury could reasonably conclude that the officers knew or should have known that they were creating a substantial risk of serious injury or death. The Circuit found that any reasonable officer would have known that such lengthy and simultaneous tasings could only be justified by an immediate risk of serious injury or death to officers or the public. Such force generally cannot be used on a prone suspect who is not suspected of a violent crime, has no weapon, is not resisting and is surrounded by officers. Because there was clearly established Fourth Amendment precedent on the issue, and a jury could reasonably conclude that the officers used excessive force, the question of qualified immunity must proceed to trial.

Summary judgment denying plaintiffs' Fourteenth Amendment claims was affirmed.

DISSENT: Concurring in part and dissenting in part, Judge N.R. Smith would have affirmed the district court's decision to dismiss the Fourth Amendment claims pursuant to Fed. R. Civ. P. 17. He did not find that the district court abused its discretion in dismissing plaintiffs' Fourth Amendment claims because they failed to name the proper party in interest.

http://cdn.ca9.uscourts.gov/datastore/opinions/2017/10/20/14-17388.pdf

Qualified Immunity: Tasing is Justified Against Knife-Wielder in Close Quarters and is Not "Provocation"

***Frederick v. Motsinger,* No. 16-3523 (8th Cir. Oct. 17, 2017).**

Where officers initially attempted tasing a woman who was brandishing a knife–after which the woman tried attacking the officers, who then shot and killed her–the tasing could not be characterized as a provocation which improperly amplified the confrontation, particularly given the Court's recent *Mendez* ruling.

Officers from the Rogers, Arkansas Police Department were called to a local convenience store in August 2011. They confronted Fallon Frederick (Frederick) holding a four-inch knife, acting erratically, speaking incoherently, and pacing by the restroom. After Frederick failed to comply with repeated

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felonious assault and attempted assault weren't supported by sufficient evidence. The court disagreed, affirming the trial court's ruling and holding that Price had been properly convicted given that he was afflicted with HIV and Hepatitis C and had spit on and bit an officer, knowing that his saliva was a deadly weapon capable of inflicting physical harm to another. His expectorant thus fulfilled the provisions of R.C. 2903.11(A)(2), "[n]o person shall knowingly cause or attempt to cause physical harm to another. . . by means of a deadly weapon. . . ."

The Body Parts: *State v. Kuperus*, 241 Ore. App. 605, 251 P.3d 235, 2011 Ore. App. LEXIS 396 (2011).

Note that in Oregon, teeth do not qualify as a deadly or dangerous weapon. Why? Because you can't "arm" yourself with your teeth... they are already in your mouth of course! The big question now is whether this analysis would also apply to dentures.

Conclusion

If it is not already apparent, courts often resist being bound by a concrete list of objects that may qualify as a "deadly weapon." As an example, California courts recognize that "[a]n instrumentality is a deadly weapon if it is capable of being used to inflict death or great bodily injury, and if its possessor intends to use it as a weapon should the circumstances require it," however, whether an object is a threat to others remains a question of fact that must be decided by a jury on a case-by-case basis.[9]

As this brief essay demonstrates, the consideration of what constitutes a deadly weapon, and under what circumstances, would seem to be excellent subject matter for presentation to enterprising law students around the country in their law school examinations.

Notes

1. Ohio R.C. 2923.11(A).
2. *Id.*
3. Fortney, 832 N.E. at 1268.
4. Faircloth, 2013 Tex. App. LEXIS 6513 *4.
5. *Id.*
6. 1996 N.Y. App. Div. LEXIS 13764 (N.Y. App. Div. 4th Dep't 1996).
7. 187 A.D.2d 761, 589 N.Y.S.2d 942, 1992 N.Y. App. Div. LEXIS 12678 (N.Y. App. Div. 3d Dep't 1992).
8. State v. Roullier, 1999 Mont. LEXIS 37, *1.
9. *Legal Censure of Unconventional Expressions of Love and Sexuality; Finding a Place in the Law for BDSM*, 28 Hastings Women's L.J. 25, 27 (2017). ML

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commands to drop the knife, an officer discharged a taser at Frederick, which she blocked with her purse and then followed up with charging the officers. At that point an officer shot and killed Frederick, prompting her estate to file suit alleging, among other things, excessive force Fourth Amendment claims under § 1983. The district court performed an analysis with the *Graham* factors and granted summary judgment to the police and associated municipality, leading the estate to appeal the dismissal. In focusing on the excessive force claim the estate argued the district court erred under the Ninth Circuit's "provocation rule," which holds that "[w]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The Eighth Circuit noted first that during the pendency of this appeal the Supreme Court rejected the provocation rule in *Mendez*, deeming it fundamentally flawed because it "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." The Supreme Court further clarified in *Mendez* that the "objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Applying these clarifications to the facts at hand, the Eighth Circuit found that it was objectively reasonable for an officer to use deadly force against an individual wielding a knife and charging another police officer.

The estate did not contest this, but instead argued the tasing was a distinct Fourth Amendment violation (from the latter deadly force applied), thus requiring the Circuit to follow Supreme Court guidance and assess this alleged violation of Frederick's Fourth Amendment rights independently. In doing so the Circuit found this non-lethal application of force was objectively reasonable as well because when it was applied the officers faced Frederick in a "small commercial space, in front of restrooms that might have been occupied, and brandishing a weapon that posed a danger to the officers and store customers." It affirmed the lower court.

http://media.ca8.uscourts.gov/opndir/17/10/163523P.pdf ML

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by choosing to wear running shoes despite observing the icy sidewalk conditions.

HELD: City is grossly negligent, and the Plaintiff is contributorily negligent.

DISCUSSION: The Court began by laying out the City's responsibility under section 44 to keep highways (which includes sidewalks) in a state of reasonable repair and highlighted section 44(9) which indicates that a City will not be liable for personal injury caused by snow or ice on the sidewalk unless the City is grossly negligent. To clarify the definition of grossly negligent, the Court looked to *Crinson v. City of Toronto* 2010 ONCA 44 that found that it does not require proof of misconduct that is willful, wanton or flagrant. The weather reports that were available to the City confirmed a significant wind chill which would contribute to the freezing of the precipitation in an overnight thaw-freeze cycle. In addition, upon further evidence it became clear that the City did not have a minimum winter maintenance standards policy which means there was no indicator which would determine when it was necessary for the snow removal operator to remove snow or ice from high pedestrian areas on sidewalks. Lastly, the Court accepted the evidence of the Plaintiff that there was significant ice and snow on the sidewalk.

The Court held that the plaintiff had established on a balance of probabilities that the City was grossly negligent in its failure to maintain its sidewalks at the time of the fall. The Court concluded that the City must have been aware of the weather reports and conditions and should have responded accordingly. Relying on past case law, the Court found this to be unreasonable; the Ontario Court of Appeal in *Dorschell v. Cambridge (City)* (1980) 1980 CanLII 1743 (ONCA) confirmed that the lack of a policy by a municipality or a policy of not taking any systematic or regular action to remedy snow or ice conditions was evidence of serious negligence. The Court further held that the Plaintiff's actions for choosing to wear running shoes, instead of winter boots despite observing the sidewalk conditions before she left her residence, constitute negligence and contributed to her injuries. The Court assessed the contributory negligence at 50%. ML