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A 2012 Year End Review of Significant Developments in the Field of Police Liability

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By Bruce Kilday and Carrie Frederickson

The following is a summary of the significant cases involving police liability decided in 2012.

Judges Admonished About Second Guessing Officer's Assessments Made at the Scene

Ryburn v. Huff, 132 S. Ct. 987 (Jan. 23, 2012), is significant in that the U.S. Supreme Court admonished the Ninth Circuit for second guessing officers' decisions made under pressure at the scene of an incident. Officers received information that a student threatened to "shoot up" a school. When they went to the student's home, his parents initially did not answer the door or the telephone. His mother hung up her phone on the officer, did not ask why the officers were there or express concern for her son, and she ran inside her home when asked whether there were guns inside. Believing there may be weapons inside, they entered the home without a warrant.

The parents sued for unlawful entry. The Ninth Circuit found that the officers could not enter the home without a warrant because it was objectively unreasonable to believe that immediate entry was necessary due to a safety threat.

The U.S. Supreme Court reversed and criticized the Ninth Circuit's assessment in several ways and determined that: (1) even lawful conduct, such as terminating a consensual encounter with an officer, may nevertheless signify imminent violence; (2) events viewed in combination, even if mundane when looked at in isolation, can "paint an alarming picture" and (3) in light of *Graham's* prohibition against using the 20/20 vision of hindsight in assessing the reasonableness of an officer's conduct, "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Although Ryburn was decided several months before the tragic shooting in Connecticut, the Court's admonition not to second guess decisions made by officers at the scene even more appropriate.*

Ninth Circuit Takes a Narrow View of Exceptions to the Warrant Requirement

In *Sims v. Stanton*, 2012 U.S. App. LEXIS 24803 (9th Cir. 2012), defendant-officers responded to a call in a neighborhood known for gang activity at 1 a.m. for an unknown disturbance involving a baseball bat. When they arrived, they observed Sims cross the street in front of them and walk quickly towards a home. The officers ordered Sims to stop multiple times but he entered the gate to the front yard and shut the gate behind him. The officers entered the yard believing that Sims disobeyed a lawful order in violation of PC section 148[1], a misdemeanor.

The court rejected the officers' contentions that the exigency and emergency exceptions to the warrant requirement permitted their entry. The exigency exception generally applies only to a fleeing *felon*; a fleeing misdemeanant is not a serious enough consequence to justify warrantless entry. Similarly, a suspected misdemeanant will likely not support the emergency exception due to an officer safety threat, as a person suspected of committing only a minor offense would not likely resort to desperate measures to avoid arrest. The court also reasoned that the only suspicious behavior by Sims was walking across the street and entering a residence despite orders to stop. He did not signal that he would engage with the officer, return with a weapon, or threaten the officer with violence. The fact that the area was known for gang activity, without any additional facts indicating that Sims was engaged in gang activity, is insufficient.

Thus, it is imperative that officers continue to document facts in his/her report that led the officer to believe the suspect posed a safety threat (e.g. specific furtive movements, repeatedly reaching hand into pockets, etc.), particularly in cases where the underlying offense is only a misdemeanor. Generalized statements that the suspect was in an area known for gang activity will likely be insufficient. Officers should also consider whether there is probable cause to support a violation of Penal Code section 69.[2]

<u>Ninth Circuit Finds Multiple Tasings of Man Suspected of Domestic Violence Was Reasonable</u>

In *Marquez v. City of Phoenix,* 693 F.3d 1167 (9th Cir. 2012), the court found that multiple tasings on an actively resisting subject during a domestic violence call, even when one of the two victims was at a safe distance, was reasonable use of force. In July 2007 officers were dispatched to an apparent exorcism on a child. Inside a small bedroom they found blood everywhere, a man holding a motionless child in a chokehold, and a naked adult woman with signs of physical trauma. The man was warned to release the child or he would be tased but he refused. A taser was deployed twice in "probe mode", which had no apparent effect. An officer was then able to remove the child from the room. The man kicked an officer in thigh/groin area, prompting the officers to attempt to use his taser in the drive-stun mode seven times while the man was flailing around and they wrestled him into submission. Several minutes later they found that he had a weak pulse. Despite resuscitation efforts, the man went into cardiac arrest and died.

[1] Penal Code section 148 makes willful resisting, delaying, or obstructing an officer in the performance of his/her duty a misdemeanor.

[2] Penal Code section 69 makes it a felony for a person to attempt by threats or violence to deter/prevent an officer from performing his/her duties or resisting the officer by force or violence.

The man's heirs sued the officers and their employer alleging that the use of the taser *after* the child was removed was excessive force. The Ninth Circuit upheld the district's court's decision that the officers use of force was reasonable under the circumstances. The court reasoned that the significant use of force was justified by a strong government interest because: (1) the man was warned that force would be used but he still did not comply; (2) the man was suspected of committing serious crimes involving injury to an adult and child; (3) he actively resisted arrest; and (4) he posed an immediate safety risk to the adult female and the officers. Significantly, the court also rejected the plaintiffs' suggestion that officers should have simply left as "unrealistic" because that would expose the officers and the adult female to injury.

In light of the Ninth Circuit's decisions in 2010 and 2011 that were critical of officers' use of tasers,[3] *this case present some hope that the Ninth Circuit will recognize that the use of a taser can be justified by the government's interest in certain circumstances. The facts weighing in support of the government's interest, including that the man was physically fighting the officers and the victims serious visible injuries, differentiates this case from the court's prior decisions involving tasers and seemed to play a significant role in the court's analysis.*

Qualified Immunity for the Use of Tasers

The Ninth Circuit in *Marquez*, 693 F.3d at 1176 fn 8, held that by July 2007, there was no case law that clearly established that the use of a taser on an individual suspected of domestic violence who was actively physically resisting arrest violated the Constitution.

In *Sanchez v. Kimmins*, 468 Fed. Appx. 760 (9th Cir. 2012) (unpublished), the court found that the law was not clearly established in May 2006 that using a taser to induce compliance from a person who appeared to pose an immediate threat and who was not under the officer's control was excessive force. The defendant-officers responded to a domestic violence call. The officers tased the man as he: (1) ran back towards his house with the officers in pursuit; (2) tried to shut the door on the officers; and (3) lay motionless on the floor after the second tase and failed to follow the officers' orders to show his hands.

The man posed an immediate safety threat because: the man had twelve guns in the house; he threatened an officer with use of a shotgun; he had an outburst of anger; and domestic violence calls are "inherently volatile and dangerous". The first two tasings were reasonable because, had the man entered the house, he would have gained access to his weapons; the third was reasonable because the officers reasonably believed that he had a weapon under his body.

In *Wade v. Fresno Police Dep't*, 2012 U.S. Dist. LEXIS 8712 (E.D. Cal. 2012), the Eastern District granted qualified immunity to officers who used a taser in drive stun mode on a

[3] *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010) and *City of Seattle v. Brooks and Mattos v. Aragano*, 661 F.3d 433 (9th Cir. 2011). See www.akk-law.com/articles for additional information.

resisting handcuffed subject in April 2008 because the law on the use of tasers (in either mode) was not clearly established. Plaintiff, who was arrested for minor crimes, was handcuffed in the back seat of a patrol car when he began kicking the interior while screaming for his girlfriend. An officer tried to place plaintiff in a control hold and then used a taser in drive stun mode. Plaintiff exited the car and began running away. An officer kicked plaintiff in the back but he continued to run. Officers went hands-on and then used the taser in dart mode three times. The court found that a reasonable officer could believe that plaintiff's conduct presented some threat to the officers' safety. *Thus, these cases illustrate the importance of showing the knowledge the officer had of possible dangers before deciding to use force.*

Refusing to Exit Vehicle During Traffic Stop is Not "Active" Resistance

In *Coles v. Eagle*, 2012 U.S. App. LEXIS 24923 (9th Cir. Dec. 5, 2012), the Ninth Circuit reversed judgment entered in favor of officers who used force to remove a non-compliant plaintiff from his vehicle during a traffic stop. The officer initiated a traffic stop of plaintiff for weaving between lanes and driving in a car that was reported stolen.[4] It was undisputed that plaintiff did not immediately pull over in response to the officer's signal or exit his car despite the officer's order to do so.

When a cover officer arrived, he drew his gun and both officers gave simultaneous but conflicting orders to exit the car and keep his hands on the wheel. Plaintiff gripped the steering wheel and stared straight ahead. Without warning, an officer smashed the driver's side window and both officers began pulling plaintiff out of the car. The officers said the plaintiff resisted by locking his legs around the steering column, which plaintiff denied. An officer kicked plaintiff twice in the upper torso as a diversionary tactic. Plaintiff claimed that after he was removed from the car, the officers threw him to the ground, beat him, fell on his back with a knee, struck him in the head with a baton, and tore off his clothes before handcuffing him.

The court determined that a jury could find that the officers did not face "such an immediate threat to their safety as to justify the extreme measure of smashing a car window and dragging [plaintiff] through it." Plaintiff was suspected of committing a non-violent felony (car theft) and did not appear to be armed. Failing to comply with an order to exit the car was not active resistance. The officers' belief that plaintiff's "furtive" hand movements constituted an exigency was rejected due to the conflicting orders given to him. A reasonable, less-intrusive alternative course of conduct was to give plaintiff specific non-contradictory instructions. *In sum, this case is another example of the Ninth Circuit's distinction between "active" and "passive" resistance and its belief that the safety threat posed to officers by non-compliant drivers during traffic stops is minimal. This case also highlights the importance of officers coordinating their investigation.*

Ninth Circuit Holds That Use of Pepperballs Aimed to Disperse a Crowd Constitutes a Seizure

[4] The plaintiff was later convicted of stealing the car.

In *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), 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 who engaged in only passive resistance, was unreasonable. In April 2004, approximately 1,000 college students attended "the biggest party in history" at an apartment complex. Officers arrived and observed underage drinking, vandalism, and bottles breaking. The property owner asked the officers to disperse the party. Officers issued verbal orders to the partygoers to disperse and formed a skirmish line to move through the crowd to give the orders. Their orders went unheeded.

Some officers gathered by a breezeway where a group of fifteen to twenty people, including the plaintiff, were standing. Although some partygoers were throwing bottles towards officers, none of the members of this group were seen doing so. After the group did not disperse, two officers shot pepperballs towards the area where the group was located from a distance of 45 to 150 feet away. One of the pepperballs struck plaintiff in the eye, causing temporary blindness and a permanent loss of visual acuity. Plaintiff was not charged with any crime.

The court found that plaintiff was seized under the Fourth Amendment because the officers took aim and intentionally fired in the direction of his group and struck him in the eye, which rendered him immobile on the ground for a period of time. The court rejected the officers' contentions that plaintiff was not seized because (1) he was not individually targeted and (2) because their intent was to disperse the crowd rather than prevent them from leaving. The court reasoned that whether the officers intended to hit the wall near the group or the students themselves is irrelevant because they intentionally fired the pepperball guns towards the group.

The court went on to find that the seizure was unreasonable because plaintiff was not suspected of any crime, he did not pose a safety threat since he did not engage in any violent conduct (i.e. he was not seen throwing any bottles at the officers), and at most he engaged in passive resistance by failing to immediately disperse, if and when such an order was given. The officers' failure to inform the group how they should comply with the dispersal orders or that force would be used if they did not comply weighed against the officers' decision to fire the pepperball guns. The court opined that the partygoers "could most likely be dispersed by less forceful means" although it did not specifically identify alternate methods. *Thus, intentionally deploying a pepperball gun towards a group of people to disperse them can constitute a seizure.*

Significantly, although the officers had an interest in clearing the complex, the desire to do so quickly, absent an "actual exigency", cannot by itself legitimize using force. Furthermore, although the large crowd of partygoers were consuming alcohol, throwing bottles at officers, vandalizing property, and refusing to disperse, such "general disorder" cannot be used to justify the use of pepperballs against non-threatening individuals. *In other words, in a near riot situation such as this large party, an officer must have information that a particular individual is engaging in violent and/or threatening behavior before using force against that person.*

Closing Remarks

For further information regarding these cases and other developments in the field of police liability cases, we welcome you to contact us or attend our lunchtime seminar on February 20, 2013, at our office. We look forward to hearing from you and answering any questions that you might have.

Sincerely,

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