FORCE SCIENCE® NEWS

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New court decision: Must de-escalation be tried first before force?

I. New court decision: Must de-escalation be tried first before force?

After a half-naked man in the throes of excited delirium died following a struggle with sheriff's deputies, his widow alleged in a federal civil rights legal action that:

• the officers should not have used any force against him until they first attempted de-escalation techniques;

• their "excessive" force-first actions violated legal protections for the disabled and unnecessarily spiked the confrontation to spin bad; and

• their agency was liable for inadequate training on mental health challenges and further at fault for a shoddy investigation.

Initially, a District Court judge ruled against her claims, granting the defendant officers summary judgment because of qualified immunity.

Now the US Court of Appeals for the 6th circuit has weighed in on the plaintiff's appeal.

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In a split decision earlier this month, a three-judge appellate panel addressed issues of growing concern to street officers and their departments as the law enforcement community works to fully understand what's required and reasonable amid the current demands for de-escalation of force in complex encounters.

PSYCHIC EXPLOSION. The case arose from a middle-of-the-night explosion of destructive violence set loose in the summer of 2013 at a condominium building in Hamilton County, OH, by a 59-year-old man chronically ill with "schizoaffective disorder and paranoid delusions" who'd been off his meds for weeks.

Nude except for a skimpy T-shirt and "muttering unintelligibly," he first trashed the unit where he and his wife lived, then threw a flower pot through a neighbor's window. When the frightened occupant tried to calm him, he ripped off a window screen and threw that at her, "screaming something about 'water.' " He was "acting crazy," she later testified, "his face red and his eyes bulging."

When three deputies responded to a 911 "neighbor trouble" call, they encountered him pacing in a patio area, "holding a garden hose with a metal nozzle in one hand" and a hanging plant basket in the other. He "immediately turned and approached [us] in an aggressive manner," one of the deputies later testified.

He ignored commands to drop what was in his hands and "repeatedly shouted that he did not have a weapon." However, he advanced toward the deputies at a pace "between a walk and a sprint," swinging the hose "as if he was trying to hit somebody," according to eye witnesses from the building.

FINAL FIGHT. Two discharges of TASER CEW probes failed to incapacitate him, as did drive-stun efforts after the deputies swarmed him to the ground. Slippery from sweat or water, he continued to be "combative and thrashing around" as they fought to control his flailing limbs. He punched one deputy in the face, kicked another in the groin. It took all-out exertion to finally get him handcuffed and shackled. Even then he continued with spurts of struggling.

Soon after he was restrained, a deputy noticed the subject had stopped breathing and had no pulse. Efforts by officers and EMTs to revive him proved futile. He was pronounced dead at a hospital ER.

A deputy coroner ruled that excited delirium was the cause of his "natural" death. He had sustained various abrasions and contusions and four broken ribs during the fight with deputies, but neither those injuries nor the multiple CEW applications contributed to his demise, she determined.

Nevertheless, the subject's widow, as executrix of his estate, wanted the deputies and their employer held responsible. Her lawsuit put forth allegations of excessive force and of "failure to accommodate" her husband's mental illness under the terms of the Americans with Disabilities Act (ADA).

After she failed to persuade a district judge, who dismissed her suit last year, she reasserted her arguments in her appeal to the 6th Circuit Court in Cincinnati, which hears cases from Ohio, Michigan, Kentucky, and Tennessee.

In rendering a decision, the appellate panel divided two to one. Here are the plaintiff's salient assertions and how the majority addresses them in the opinion written by Sr. Judge Ronald Gilman:

DE-ESCALATION PRIMACY. A plaintiff's expert, a CJ professor from Columbia College in Missouri, testified in District Court that these days "de-escalation [is] the 'standard technique' recommended for crime-related encounters with excited-delirium subjects." Had the deputies employed "verbal de-escalation," he opined, the subject in this case "would have likely been talked into surrendering without an altercation."

Many excited delirium researchers would no doubt take exception to that opinion. But, the appellate majority notes, the dead man's widow "based on this evidence...argue[d] that the deputies had a 'clearly established duty' to use de-escalation techniques prior to using force against" her husband (italics added).

Under the ADA, she insisted, officers are obligated to "adjust the application of force downward" when confronting individuals who are "conspicuously mentally unstable." To "accommodate" the subject's disability, she argued, the deputies should have used "verbal de-escalation techniques" (including conversing "in a non-threatening manner"), paused to gather information from witnesses, and called " EMS services before engaging" with force.

Instead, by moving to control him physically and mechanically, the officers "foreseeably caused" his resistance and "escalated the encounter by failing to use verbal and tactical de-escalation." The force applied was excessive, she charged, and resulted from a "lack of adequate policies and training."

Moreover, she added, the investigation of the encounter was "inadequate." It "merely rubber-stamped the deputies' unconstitutional conduct...and failed to review whether the deputies' actions violated...policies and procedures."

JUDICIAL RESPONSE. The appellate majority agreed that officers are "required to take into account [a subject's] diminished capacity before using force to restrain him."

But, the decision emphasizes, no judicial precedent required the deputies "to use only verbal de-escalation techniques" and "no caselaw supports [the] assertion that [they] were prohibited from using any physical force...before first attempting alternative de-escalation techniques." Despite the subject's evident mental condition, they were permitted to use "a reasonable amount of force to bring him under control."

The man "had committed a series of property crimes that a reasonable officer could infer might escalate," the majority explains. "The fact that [he] had not yet committed a more serious felony did not preclude the deputies from using force to restrain him."

The force they used—"physically restraining his limbs, wrestling with him, attempting to tase him, and shackling his arms and legs—was likely not excessive," the decision states. The deputies "grappled" with him but did not "repeatedly beat" him or "apply compressive body pressure to his back." And "our cases firmly establish that it is not excessive force for the police to tase

someone (even multiple times) when the person is actively resisting arrest."

Indeed, among the range of force options, the majority states, a "growing national judicial consensus" regards the use of a CEW in dart mode as constituting "only an intermediate use of force."

Although the subject yelled repeatedly that he was unarmed," he was holding objects that could have been used as weapons amid a scene of property destruction," giving the deputies "a reasonable basis to believe that [he] presented an immediate threat," the majority states. The decision takes note of one deputy's testimony that "the hose and metal nozzle could have been used as a weapon to hit or to choke him."

Further, the decision characterizes as "dubious" the plaintiff's claim that the deputies themselves caused the confrontation to escalate. But even if true, the majority says, LEOs "cannot be held liable solely because they created the circumstances requiring the application of force."

As to the allegation of inadequate training, the majority observes that the "record shows that the deputies received training on topics that included the use of force and tasers, crisis intervention techniques, interacting with the special-needs population and mentally ill suspects, and recognizing the symptoms of excited delirium." No problems there.

Likewise, the majority endorses the investigation into the subject's death. Even the plaintiff's own expert, the decision notes, "testified that he could not think of any additional interviews that should have been conducted during the investigation, could not point to any physical evidence that was not preserved or test results that were not considered, and could not identify any specific inadequacies in the collection of testimonial or tangible evidence."

All said, the majority concludes, after more than 20 pages of written analysis and explanation, that its decision was inevitable: the District Court judge, Sandra Beckwith, had been right. Given the totality of circumstances, her granting of summary judgment for the deputies and their employer should stand.

The full decision in this case, Roell v Hamilton County, Ohio, can be accessed free of charge by clicking here. The decision includes a seven-page dissent by Judge Karen Moore, who argues that the case should have been sent to a jury.

Our thanks to Atty. Michael Brave, Director, CEW Legal for Axon Enterprise Inc., for alerting us to this case.

II. Free webinar: A "rational approach" to de-escalation policy issues

Additional insights into de-escalation issues can be gleaned from a recent webinar on "A Rational Approach to Incorporating De-escalation into Policy," presented by Calibre Press and Lexipol, the provider of law enforcement policies and training solutions. The hour-long program can be accessed free of charge by clicking here.

Featured are two law enforcement attorneys with Force Science credentials, Ken Wallentine, director of the Utah Attorney General's Training Center in Salt Lake City, and Laura Scarry, a partner in the DeAno &

Scarry law firm in Chicago. Scarry is a Force Science Analyst who instructs for the five-day Force Science Certification course and Wallentine is both a Force Science Analyst and a Force Science Advanced Specialist.

In the current public dialogue, Wallentine claims in the webinar, people outside law enforcement too often have come to regard de-escalation as "a magical button a cop could have pushed to create a different outcome" in a use-of-force incident.

"We have to be careful in our effort to promote de-escalation to get the public and the media to realize that de-escalation isn't always possible." Officers often are "not able to control the violence, the intensity, and the tempo of urgent calls."

In addition, he says, officers can be confused about what's expected of them. He cites one case in which an officer was fired after not attempting de-escalation before fatally shooting a subject, while in another situation, an officer who tried calming strategies with an armed suspect was fired for "failing to eliminate a threat" promptly. "It can seem like a lose-lose situation," Wallentine says.

Still, some major departments are reporting dramatic declines in uses-of-force, force complaints, and officer-involved shootings after instituting de-escalation policies and training. While optimistic, we don't yet know if these changes are "coincidental or causational," Wallentine cautions. "We have to be very, very careful not to jump to conclusions" over a statistical correlation.

Scarry stresses that caution is also needed in the design of de-escalation policy and training.

Certainly, both presenters agree, de-escalation tactics should be included in use-of-force instruction, including practical scenarios, and the inclusion should be well documented. "This is an area of high risk for law enforcement agencies," Wallentine says. "We are starting to see lawsuits claiming a failure to train on de-escalation techniques."

But, Scarry warns, "integrating de-escalation as a required step" into training or policy "is something else entirely. If you fill your use-of-force policy with all sorts of steps an officer must go through or complete before employing force, you can inadvertently create a situation where the policy is actually used against an officer in court even when his or her actions were completely justified."

She advises, "Don't go into detail on tactics or procedures" in policy. "Tactics and procedures are best covered in training, and it's best not to "box officers into specifics" in policy.

During the webinar, Scarry discusses a variety of policy issues and recommendations related to use of force, crisis intervention, mental health commitments, and civil disputes. Also during the program, listeners were polled on where their agencies stand on certain de-escalation issues, and results are posted as the presentation progresses.

At the end of the program, moderator Crawford Coates of Calibre Press asks the attorneys for their parting thoughts.

"I can't predict where the courts and legislatures are going to go with this subject," Scarry observes. "There is always a

moral obligation to engage in de-escalation tactics" whenever possible, "but there may not be a legal obligation at this point.

"Plaintiffs' attorneys are always going to come up with new theories to hold officers responsible. I call them 'the flavor of the month.' So long as we can articulate whether or not an officer acted reasonably, it's more than likely the officer won't be held liable."

From Wallentine: "I encourage administrators to provide your folks with the best rules you can, but then step back and realize at the end of the day policing is a profession of humans. We are policing humans with humans."

The presenters can be reached at: kwallentine@lexipol.com and lscarry@lexipiol.com.

III. First day back on patrol...

Just as we were locking up this issue of Force Science News, we received an email from Atty. Scott Wood, the Force Science instructor who successfully defended Tulsa Ofcr. Betty Shelby against a first-degree manslaughter charge after she fatally shot a resistant subject as he was reaching toward what she thought was a weapon in his vehicle. (See FSN #342, 343, & 345)

Wood writes:

"Yesterday, on the one-year anniversary of her shooting, now Reserve Dpty. Betty Shelby worked her first shift in the field for the Rogers County (OK) SO, which hired her after her acquittal. She said it was a busy shift. She had several traffic stops, and reported each motorist told her 'We're glad you are here!' Also answered a man-with-a-shotgun call.

"A truly resilient person is Betty Shelby."

Written by Force Science Institute
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