FORCE SCIENCE® NEWS

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In This Edition:

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2 new UOF court decisions offer valuable "learning points"

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I. 2 new UOF court decisions offer valuable "learning points"

Two recent federal appellate decisions are good reminders of how US judges may assess claims of excessive force where unarmed suspects are involved.

Atty. Michael Brave, always a popular legal updater at ILEETA conferences and other venues, tells *Force Science News* that these cases "have many learning points" for trainers, police attorneys, and street officers alike.

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Case #1: Attempted gun grab, a violent scuffle, then flight unarmed

The first case began one night when a patrol officer in Tennessee stopped to offer assistance to two men tending to a flat tire alongside an interstate highway. When the men declined help, the officer decided to run their license plate and got feedback suggesting the car was stolen.

When the officer stepped out of his unit to investigate further, one of the men "leaned down inside" the stalled vehicle through the driver-side window as if, from the officer's perspective, he "was reaching for a weapon." When he rose from the car, he "did not appear to have a weapon in his hands," according to the appellate decision, but matters escalated quickly nonetheless.

When the officer placed a hand on the suspect's sleeve, the man swung two punches at the officer's torso, then rabbited. He ignored commands to stop, but the officer tackled him to the ground.

During "several seconds of active struggle," the two "exchanged punches" and the suspect "repeatedly grabbed at" the officer's holstered sidearm without gaining control of it. The officer deployed his CEW into the suspect's abdomen. When that proved ineffective, the officer unsuccessfully applied drive stuns to the suspect's torso and neck and, in the process, "became tangled in the Taser wires [himself] and was shocked as a result."

At one point, the suspect had the officer flat on his back and was straddling him, although he made no attempt to disarm him then.

When the attacker finally stood up and turned to flee, the officer drew his handgun and fired—three shots from the ground, three more after he scrambled to his feet. From first physical contact to final firing took 35 seconds. The suspect died from six GSWs, all to his back.

IMMUNITY DENIED. The suspect's next of kin brought a Sect. 1983 legal action against the officer, alleging excessive force. The officer asked the federal district court to grant summary judgment in his favor on the ground of qualified immunity. The court refused, ruling that the case should go to a jury.

"[S]ome level of force [by the officer] was objectively reasonable under the circumstances," the court said, but "the use of deadly force was not." The officer "had no objective reason for believing that [his adversary] posed a serious threat while fleeing unarmed." Thus, "a reasonable jury could conclude [the suspect] was not a threat to anyone when he turned and began to flee."

The law is "clearly established that when an individual is obviously not armed and is attempting to flee at the time he was shot, the use of deadly force is typically unreasonable under the circumstances," the court said. The officer appealed to the 6th Circuit US Court of Appeals, which hears cases from KY, MI, OH, and TN.

APPELLATE ACTION. In a decision written by Judge John Marshall Rogers, a three-judge panel upheld the district court's ruling. In his appeal, the officer had argued that he had "probable cause to fear for his safety, even in the seconds after [the suspect] had turned to flee," because the assailant had grabbed at

his holstered sidearm "several times during their struggle." The panel, however, was unpersuaded.

The reasonableness of the use of deadly force depends "primarily on objective assessment of the danger a suspect poses" at the "particular moment" lethal force is used, Rogers wrote. "Even if [the officer] had probable cause to fear for his safety *during* his struggle with [the suspect], it could well be that he lacked the same cause *after* the struggle had ended and [the suspect], still unarmed, had turned and begun to flee."

This unpublished decision, *Carden v. City of Knoxville (TN)*, can be accessed in full, free of charge, by clicking here https://caselaw.findlaw.com/us-6th-circuit/1867702.html.

Case #2: Medical distress, use of physical force, handcuffing, & the ADA

Also an excessive force claim from the 6th Circuit, this case involves an unarmed man who suffered an epileptic seizure while driving in Ohio one cold February morning. When he steered his car into a residential yard, honked his horn "for help," and got out unsteadily, a neighbor called 911 to report "suspicious activity."

A sheriff's deputy found the man sweating and "grasping a waist-high chain-link fence, swaying back and forth" with his pants "down around his knees." He was yelling out "Baby," and kept yelling without complying when the deputy asked him to return to his car to "discuss the incident."

The deputy thought he "was under the influence of something" and began to peel his fingers from the fence. The man yanked his arm away and the deputy "took him to the ground with a leg sweep." He landed facedown and the deputy fell on top of him.

As they wrestled, with the deputy trying to gain control of the subject's arms for cuffing, a municipal officer arrived. With the man still struggling and with one of his arms now concealed beneath him, the officer drive-stunned him repeatedly to the back and neck. Not until two more officers arrived and helped hold him down was the man finally controlled and handcuffed.

The data recorder on the CEW showed it had been "deployed eight times, for a total of 48 seconds, during an encounter...that lasted less than two minutes." None of the officers ever informed the man that he was under arrest.

In his lawsuit, the man claimed that he told the deputy he was "sick and having a seizure" early in the encounter. He said he didn't remember struggling or being tased, but he alleged that he "has post-traumatic stress disorder as a result of the incident."

MULTIPLE DISMISSES. In this case, a federal district court did grant summary judgment in the defendant officers' favor on the ground of qualified immunity.

The officers had used justified "measured force"—not unconstitutional excessive force—in response to the plaintiff's "defiance of their orders and reaching where the officers could not see his hands," the court ruled.

The district judge not only dismissed the plaintiff's excessive force claim but also dismissed his allegations that the officers had violated his rights under the federal Americans with Disabilities Act and

dismissed his state-law claims for "assault and battery and for intentional infliction of emotional distress."

REVERSALS. A three-judge appellate panel, however, saw the circumstances much differently when the plaintiff appealed.

As to the deputy who first dealt with him, the judges ruled that he violated the subject's "right to be free from excessive force when he took [the plaintiff] to the ground with a leg sweep and landed on top of [him]."

The deputy "did not state, either in his incident report or in his deposition testimony, that he believed that [the unarmed man] presented a safety threat." He conceded that the plaintiff said he was sick and that he was holding the fence to maintain his balance.

It is well-established, the panel declared, that "a non-violent, non-resisting, or only passively resisting suspect who is not under arrest has a right to be free from an officer's use of force.... '[P]assive' resistance does not justify substantial use of force."

The only reason the deputy knocked the man down was to handcuff him and restrain him forcibly. "Significantly," the judges said, "at no point during the entire episode was [the plaintiff] under arrest for any offense whatsoever....[T]he mere failure of a citizen—not arrested for any crime—to follow the officer's commands does not give a law enforcement official authority to put the citizen in handcuffs."

In short, the deputy "is not entitled to qualified immunity."

As to the officer who tased the subject, he did not warrant immunity either, the panel decided. It is "clearly established," the judges ruled, "that a police officer violates a suspect's right to be free from excessive force by repeatedly tasing the suspect without giving him a chance to comply with orders."

Applying the CEW for 48 seconds in less than two minutes did not give the man sufficient time to comply with commands to submit to handcuffing and thus was unreasonable, the panel said.

The appeals panel did sustain the district court's ruling that the officers had not violated the plaintiff's **ADA rights**. To establish a violation, the judges explained, "the plaintiff must show that the defendants intentionally discriminated against him because of his disability," and there was no evidence of that in this case.

As a final blow to the defendants, the panel suggested that the district judge might want to "reconsider" his decision to dismiss state claims against the officers, in light of his being overruled in the matters of excessive force.

With that suggestion included, the panel remanded the case to the district court "for further proceedings consistent with" its opinion.

The published decision in this case, *Smith v. City of Troy (OH)*, can be accessed in full without charge by clicking here https://caselaw.findlaw.com/us-6th-circuit/1878601.html.

II. New BWC study confirms positive impact on police performance

Now comes another study of how body-worn cameras impact police performance,

this one suggesting that the public is correct in its general belief that body cams decrease complaints of officer misconduct and use of force.

More than 400 patrol officers and sergeants from the Las Vegas Metropolitan PD—predominately white males with 9-10 years on the job—were divided into camera-equipped and unequipped groups and tracked for a year. Their experiences were then compared with their records for the 12 months preceding the start of the test year.

Highlights:

• **Complaints.** For those with cameras, the percent that generated at least one complaint of misconduct dropped from about 55% to 38%, while complaints against the non-camera control group remained roughly the same.

• **UOF.** Camera-wearers who had at least one use-of-force incident dropped from 31% to less than 20%, while the control group's UOF rate actually increased slightly.

• **Enforcement.** Officers with body cams issued slightly more citations and made slightly more arrests than their counterparts, despite there being "few differences" in dispatched calls, responses to crimes, and officer-initiated stops.

• **Cost.** Researchers estimate that body cams save about $3,000 per year per user over their cost "as the result of fewer complaints and fewer resources spent on investigations."

The study, headed by Dr. Anthony Braga of the School of Criminology and Criminal Justice at Northeastern University in Boston, has been accepted for publication in the *Journal of Criminal Law and Criminology*.

A 67-page, detailed report on the findings and their implications, titled "The Benefits of Body-Worn Cameras: New findings from a randomized controlled trial at the Las Vegas Metropolitan Police Department," is available without charge by clicking here https://www.cna.org/cna_files/pdf/IRM-2017-U-016112-Final.pdf.

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