



Police Law Bulletin



City Attorneys' Office

Toni M. Smith, Senior Assistant City Attorney

In this issue:

Defendant Not Seized Until He Submitted to Officer's Show of Authority – Pgs. 1-2

Officers Used Excessive Force By Inappropriately Using Taser to Execute Involuntary Commitment Order,
But Officers Entitled to Qualified Immunity – Pgs. 2-4

FOURTH CIRCUIT COURT OF APPEALS



Defendant Not Seized Until He Submitted to Officer's Show of Authority

United States v. Stover, ___ F.3d ___, 2015 (4th Cir. Dec. 18, 2015).

In the early morning hours of March 13, 2013, two county police officers in Maryland were patrolling an area where several violent robberies had recently occurred. They saw a vehicle double-parked in an apartment building's private parking lot. A man was in the driver's seat and a woman in the front passenger seat. The officers decided to return a few minutes later to check on the vehicle. When they did, the vehicle and its occupants were still there. Because of the vehicle's out-of-state plates, the area's high-crime reputation, the late hour, and double-parking, the officers decided to check further on the situation. They pulled their vehicle into the lot and parked at a 45-degree angle about three feet behind the vehicle, blocking it in. They activated their vehicle's emergency lights, and one of the officers illuminated the driver's side of the parked vehicle with a spotlight. The defendant then got out of the car, opened the backside driver's side door, and walked away from the officers to the front of the car. One of the officers told him to get back in the car when he saw the defendant move to the front of the car and drop a gun. When he did not do so, the officer ran to the defendant with his gun out and pointed it at the defendant's face. Only then did the defendant get back in his vehicle. The officers retrieved a loaded 9mm Glock from the grass in front of the hood of the vehicle.

The defendant was convicted in a Maryland federal district court of possession of a firearm as a felon. The district court denied the defendant's motion to suppress. The defendant appealed to the Fourth Circuit Court of Appeals arguing that the trial court had erred in denying his motion because the gun was the fruit of an illegal seizure.

In response, the government did not maintain that the officers had reasonable suspicion to block the defendant's vehicle with their vehicle. Instead, the government argued that, under *California v. Hodari D.*, 499 U.S. 621 (1991), defendant did not submit to the police – and thus was not seized- until after he dropped his loaded gun, and so abandoned it, at the hood of his car.

The Fourth Circuit Court of Appeals affirmed the federal district court's denial of defendant's motion to suppress agreeing with the government's analysis. In accordance with *California v. Hodari D.*, a seizure of a person occurs when an officer applies physical force or offers a show of authority, and defendant submits to that force or authority. Although the officers' vehicle had blocked the defendant's parked vehicle, the defendant thereafter left his vehicle, and walked away from the officers to the front of his vehicle despite an officer's command to return to his vehicle. Defendant did not submit, and therefore was not seized, until an officer later pointed a gun at him.

Officers Used Excessive Force By Inappropriately Using Taser to Execute Involuntary Commitment Order, But Officers Were Entitled to Qualified Immunity In Civil Lawsuit Brought By Person's Estate

Estate of Armstrong v. Village of Pinehurst, ___ F.3d ___, (4th Cir. Jan. 11, 2016).

Armstrong suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medication for five days and was poking holes through the skin on his leg "to let the air out." His sister convinced him to go with her to Moore Regional Hospital in Pinehurst, North Carolina. He checked in, but during the mental health evaluation he fled from the hospital. The examining doctor found him to be a danger to himself and issued involuntary commitment papers to compel his return. Armstrong's doctor could have, but did not, designate him as a danger to others on the commitment form. As soon as Armstrong fled the hospital, the police were called. Three Pinehurst officers responded and found Armstrong at an intersection near the hospital. He was acting strangely (eating grass and dandelions, chewing on a gauze-like substance, and putting cigarettes out on his tongue) while the officers waited for the commitment order. Once the commitment papers were complete, the officers surrounded Armstrong, who by then had wrapped himself around a post that was supporting a stop sign. They could not pry him from the post (he was 5'11" tall and weighed 262 pounds). Two hospital security officers arrived to help, and his sister was present, pleading with her brother to return to the hospital. Thirty seconds or so after officers told Armstrong that his commitment order was final, one officer drew his taser, set it to "drive stun mode," and announced that if Armstrong did not let go of the post, he would be tased. The warning had no effect, so the officer employed the taser five separate times over a period of about two minutes. The tasing seemed to actually increase Armstrong's resistance. Shortly after the tasing ceased, the two security guards assisted the three officers who were again trying to pull Armstrong off of the post, and the group of five then successfully removed him and laid him facedown on the ground. Once separated from the post, Armstrong was handcuffed but because he continued to kick, the police shackled his legs too. While the officers stood up to collect themselves, Armstrong was left face down in the grass. The sister then noticed that Armstrong was not moving – at all. The officers immediately checked on Armstrong, but when he was flipped over, his skin had turned blue and he did not appear to be breathing. Resuscitation attempts were unsuccessful and Armstrong died shortly thereafter.

The estate of Armstrong sued under 42 U.S.C. § 1983 and alleged that the officers used excessive force when seizing him in violation of Armstrong's constitutional rights. The federal district court granted summary judgment to the officers on the ground that they had qualified immunity. The Fourth Circuit Court of Appeals held that the officers used excessive force under the Fourth Amendment by inappropriately using the taser on Armstrong, but agreed that the officers were entitled to qualified immunity and therefore, affirmed the district court's summary judgment ruling.

Qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, would reasonably believe that their actions were lawful. A qualified immunity analysis typically involves two inquiries: (1) whether the plaintiff has established the violation of a constitutional right, and (2) whether that right was clearly established at the time of the alleged violation. An appellant's case (here, the estate of Armstrong) survives summary judgment only if an appellate court answers both questions in the affirmative.

The court held that the plaintiff established a violation of the Fourth Amendment by showing that the defendant officers used excessive force in executing the commitment order under the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989). This reasonableness test requires a balancing by the court of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. There are three factors that a court may use as a guide in determining this balance. First, a court will look to the severity of the crime at issue; second, the extent to which the suspect poses an immediate threat to the safety of the officers or others; and third, whether the suspect is actively resisting.

As for the first factor, in the case at hand, Armstrong was not being taken into custody because he had committed a crime. Even if custody were based upon Armstrong's failure to obey the officers' lawful commands, such an offense is minor.

As for the second factor, the doctor determined Armstrong to be a danger to himself. Where a seizure's sole justification is to prevent harm to the subject of the seizure, using force that risks substantial harm to the subject is then contrary to the government's stated interests.

As to the third factor, Armstrong clearly was resisting the seizure. Noncompliance with lawful orders may justify some use of force, but the level of justified force varies based upon the risks posed by the resistance. In the case at hand, the court found little risk – Armstrong was stationary, non-violent, and surrounded by 6 people intent upon returning him to the hospital. That Armstrong was not allowing his arms to be pulled from the post and refusing to comply with orders to let go, “while cause for some concern, did not import much danger or urgency into a situation that was, in effect, a static impasse.”

When considering the proportionality of the force used in light of the circumstances presented, the court found that the level of force the officers used was not objectively reasonable. The court found that deploying a taser is a serious use of force, noting the physiological effects, the high levels of pain, and foreseeable risk of physical injury associated with tasers. The court concluded that an officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude the circumstances present a risk of immediate danger that could be mitigated by the use of force. Physical resistance is not synonymous with risk of immediate danger. In the case at hand, when the taser was deployed, Armstrong was a mentally ill man being seized for his own protection, was seated on the ground, was hugging a post to ensure his immobility, and was surrounded by three police officers and two security guards, and had failed to submit to a lawful seizure for only 30 seconds. A reasonable officer would have perceived a static stalemate with few, if any, exigencies – not an immediate danger so severe that the officer must deliver the exact harm the seizure was intended to avoid. Thus, the officers used excessive force in violation of the Fourth Amendment.

The court noted that it was not suggesting that the officers had a constitutional duty to stand idly by and hope that Armstrong would change his mind and return to the hospital on his own accord. However, the facts established that tasing Armstrong did not force him to succumb to the seizure, but actually increased his resistance in response. When the officers stopped tasing and enlisted the hospital's security guards to help pull Armstrong off of the post, the group was able to remove Armstrong and place him in

restraints. Had the officers limited themselves to permissible uses of force when seizing Armstrong, they would have had every tool needed to control and resolve the situation.

However, the court also held that Armstrong's right not to be tased under these circumstances was not clearly established by case law on April 23, 2011, the date of the tasing in this case, and thus, the officers were entitled to qualified immunity. The court explicitly noted though that while qualified immunity shielded the officers in this case from liability, law enforcement is now on notice that such taser use violates the Fourth Amendment and officers using a taser in such a manner from this point forward will not be entitled to qualified immunity as a defense.

Note: General Order 4008, Use of Force, was recently revised and re-issued for clarification, and to ensure consistency with current departmental training and the *Armstrong* decision. Officers should ensure that they read and familiarize themselves with the new legal and policy requirements as set forth in this revised Order.