Claims Brief

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The Danger of Courts Not Practicing What They Preach

Judging the Use Force Through Judicial Hindsight
-A Case Study-

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

Introduction:

The quoted language is that of the Supreme Court of the United States in *Graham v. Connor*, the seminal 1989 decision concerning police use of force during arrests and other seizures of the person. The "instruction" from the Supreme Court was intended for those tasked with judging whether an officer's use of force in effecting an arrest or other detention of a person was "reasonable," as required by the Fourth Amendment. The *Graham* Court recognized that the right to make an arrest or investigatory stop necessarily carried with it the right to use some degree of physical coercion or threat thereof to effect it. Consequently, determining whether or not an officer "crossed the line" in a given situation requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. In other words, the "totality of the circumstances" must be examined by the reviewing court.

How this is to be done leads us directly back to the opening quotation: The court must make the calculus of "reasonableness" "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Further, the *Graham* Court emphasized that the test for reasonableness was an "objective" one---one that did not allow for an inquiry into the officer's state of mind, his or her intent or motivation. Finally, the *Graham* Court cautioned that the calculus of "reasonableness" "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." In the context of Fourth Amendment jurisprudence, perhaps wiser words have never been written, and courts have repeated them thousands of times in the countless decisions in use of force cases.

But what of the dangers when a reviewing court converts the "reasonableness" inquiry from an objective one to a subjective one? What is, or can be, the result when a court disregards the objective standard established by the Supreme Court and applies one that is, at least in part, driven by the courts' own beliefs concerning trends in the use of force, trends that it believes must be checked? In the words of the Supreme Court, the results must be assessed by "careful attention to the facts and circumstances of each particular case…." Below, I discuss one such case recently decided by the United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit").

The Case:

The case in question, *The Estate of Ronald Armstrong v. The Village of Pinehurst, et al.*, [No. 15-1191] was decided by the Fourth Circuit on January 11, 2016. The case was heard by a panel of three judges and

decided unanimously, with one judge writing a separate opinion. The case arose from the tragic death of Ronald Armstrong ("Armstrong") during police efforts to return him to a hospital emergency room from which he had fled.

Armstrong suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medications for five days and was poking holes through the skin on his leg "to let the air out." His sister, Jinia Armstrong Lopez ("Lopez"), worried by his behavior, convinced Armstrong to accompany her to Moore Regional Hospital in Pinehurst, North Carolina. Armstrong willingly went to the hospital and checked in. During his evaluation, however, he became frightened and ran from the emergency department. The doctor who had been evaluating Armstrong deemed him to be a danger to himself and issued involuntary commitment papers to compel his return. The doctor did not designate Armstrong a danger to others although he could have.

The Pinehurst police were called as soon as Armstrong fled from the hospital. Three officers immediately responded. Officer Arthur Gatling ("Officer Gatling") arrived first, followed by Sergeant Tina Sheppard ("Sergeant Sheppard") and Lieutenant Jerry McDonald ("Lieutenant McDonald"). Officer Gatling located Armstrong near the hospital's main entrance where he was found wandering across the roadway that intersects the hospital's driveway. Cars had to swerve to avoid Armstrong, and Officer Gatling finally convinced him to move to the roadside. There, Armstrong proceeded to eat grass and dandelions, chew on a gauze-like substance, and put lit cigarettes out on his tongue. At this point, the commitment order had not yet been finalized. Consequently, Officer Gatling and Sergeant Sheppard conversed with Armstrong, and, although Armstrong was still acting strangely, everything was calm at this point.

After approximately twenty minutes, the officers were informed that the commitment papers had been completed. They immediately told Armstrong they were going to return him to the hospital. The officers surrounded Armstrong and moved toward him. And that is when the trouble began. Armstrong sat down and wrapped himself around a four-by-four post that was supporting a nearby stop sign. Armstrong, who was 5' 11" tall and weighed 262 pounds, refused to budge. The officers tried prying his arms and legs from the post, but were unsuccessful. Lopez, who was standing nearby, pleaded for Armstrong to let go and just return to the hospital. Two hospital security guards were also standing close by.

Thirty seconds passed and Armstrong refused to comply. Lieutenant McDonald then instructed Officer Gatling to prepare to tase Armstrong. Officer Gatling then unholstered his taser, set it to drive stun mode (direct contact as opposed to firing darts), and warned Armstrong that if he didn't let go of the post, he would be tased. Armstrong ignored him. Officer Gatling deployed the taser—approximately five separate times over a period of two minutes. The tasing produced more resistance from Armstrong instead of less. When the tasing was ineffective, the two hospital security guards moved in to help the officers pull Armstrong off of the post. During the struggle, Armstrong said that he was being choked, but no chokeholds were used. Finally, after much effort, the officers and security guards managed to pull Armstrong from the sign. Lieutenant McDonald and Sergeant Sheppard pinned Armstrong face down on the ground by placing a knee on his back and standing on his back, respectively. Armstrong was handcuffed while on the ground, but, even so, he continued to kick at Sergeant Sheppard. Because of the kicking, the officers shackled Armstrong's legs too.

When the officers stood up to collect themselves, Lopez noticed that Armstrong wasn't moving and asked the officers to check on him. They did, and when they flipped him over, his skin had turned a bluish color and he was not breathing. Sergeant Sheppard and Lieutenant McDonald administered CPR, and Lieutenant McDonald called for EMS. EMS responders quickly transported Armstrong to the emergency department, but he was pronounced dead shortly after admission.

Lopez, as administrator of Armstrong's estate, filed a lawsuit alleging that the officers had violated Armstrong's Fourth Amendment rights by using

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excessive force. The federal district (trial) court granted a motion by the officers and town to dismiss the suit and Lopez appealed.

The Outcome on Appeal:

The first question decided by the Fourth Circuit was whether the officers had used excessive force. They decided against the officers. As reasons, the court pointed out that Armstrong had not been charged with a crime, and that, although the officers knew that Armstrong was mentally ill, they did not know that he presented a danger to anyone but himself. The court did conclude that, based on his behavior, Armstrong did in fact threaten the safety of others and resist the officers. In the court's opinion, however, these determinations justified only the use of "some—limited—use of force." But not the degree that was used by the officers. In the court's reasoning, the force that could have, and should have, been used against Armstrong was limited to a level of force that only prevented his flight or escape.

How did the court get to this point? How could it have reached such a conclusion? I suggest the court did so, in part, by ignoring the precepts of *Graham*. In other words, the court refused to look at the "totality of the circumstances," choosing instead to isolate on a few. The court focused on the fact that, at the time the officers decided to use force, Armstrong was "stationary, seated, clinging to a post, and refusing to move. He was also outnumbered, five to one." Focusing on just these circumstances, how could the court have concluded other than it did, that only "quite limited" force was justified? That kind of selective, subjective approach led the court to this end: "Immediately tasing a non-criminal, mentally ill individual, who seconds before had been fully conversational, was not a proportional response." But the court seemingly gave little regard to other undisputed facts and circumstances: Armstrong repeatedly ignored officer commands; the officers did apply, including verbal commands and hands-on, graduated levels of force; Armstrong's physical size made taking him into custody a strenuous task; Armstrong was kicking officers and/or trying to; Armstrong had not been frisked or searched for weapons; and other than a box checked in an evaluation that was not finished, the officers lacked any assurance that Armstrong did not present a danger to them or others. Don't these undisputed facts show that it was reasonable for the officers to conclude that Armstrong did present an immediate danger? If focusing on facts in isolation helped lead the court to its conclusion that excessive force was used, what else, if anything contributed to that conclusion?

It is the opinion of this writer that the other factor leading to the finding of excessive force is the court's belief that tasers (a relatively "new" addition to the police arsenal) are being over-utilized to the detriment of the public. Specifically, the court believes that the use of tasers in drive stun mode as a pain compliance measure is counter-productive as it was in this case. As support, the court turned to industry and manufacturer recommendations, and said, "Since at least 2011, the Police Executive Research Forum ("PERF") and the Department of Justice's Office of Community Oriented Policing Services ("COPS") have cautioned that using drive stun mode to achieve pain compliance may have limited effectiveness and, when used repeatedly, may even exacerbate the situation. The organizations, therefore, recommend that police departments carefully consider policy and training regarding when and how personnel use the drive stun mode[] and…discourage its use as a pain compliance tactic." The court also pointed out that, in 2013, Taser International warned that "Drive-stun use may not be effective on emotionally disturbed persons or others who may not respond to pain due to a body-mind disconnect." (internal citations and quotations omitted).

And what would the court have had them do instead? Use a canine? Pepper spray? Police batons? A choke-hold? Closed hand strikes? What if Armstrong's death had resulted from any of these forms of force? Would the court have second-guessed the officers' decision not to use a taser? This is exactly why judicial hindsight in use of force cases is so dangerous.

What the Opinion Reflects:

Beyond this specific kind of taser usage, the court's opinion reflects a far more alarming belief: That taser

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misuse has become rampant and that courts, and not police agencies, must serve as the deterrent. How is this accomplished? By, in the words of the judge who did not join this part of the opinion, making "abstract pronouncements" that "will be of less than limited help to officers wondering what exactly they may and may not do." And what is the "abstract" formulation or pronouncement in this case? "A police officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that can be reduced by the use of force." To officers making split-second decisions on the street, this means that mere "physical resistance" does not automatically mean a "risk of immediate danger." The nature of the resistance is but one factor in determining what level of force to use. The critical factor is that the circumstances must dictate that the officer or others are in immediate danger. That implies a level of mind reading that should leave a patrol officer feeling far from comfortable. Uneasiness aside, if, in the wisdom of 20/20 hindsight, a court concludes that the officer's response was disproportional, i.e., excessive, in the situation presented, the officer loses.

It is almost anti-climax that, despite holding that the officers had used excessive force, the court held that they were protected from liability by qualified immunity. This is because the law that the court was establishing, i.e., that officers are prohibited from using tasers in the face of stationary and non-violent resistance to being handcuffed, and can only use them when an officer is facing an immediate safety risk, was not established until this very case was decided.

The Danger Inherent in the Opinion:

The law established by this case seems a dangerous proposition. Requiring an officer to wait until he or she, or others, are in immediate danger before resorting to "serious" levels of force will require officers, in some situations, to wait until it is too late. In this case, the officers had not searched Armstrong. What if he had been armed with a knife when they laid hands on him? Would it have been too late to use the taser at that point? Of course it would have been too late. Were the officers required to presume that Armstrong had no history of violence or was, in fact, unarmed? Imposing such presumptions in use of force situations such as this one will assuredly result in loss of life---the lives of arrestees, officers, and others. Courts have the luxury of making decisions over the course of months and years---police officers have just seconds or minutes. In the words of the concurring judge, "[t]he majority (of the court) has left it all up in the air." The court did so by delivering a vague proclamation "about the do's and don'ts"---a proclamation that "runs the risk of incentivizing officers to take no action, and in doing so leave individuals and their prospective victims to their unhappy fates." Because of the uncertainty of the court's "proclamation," "[l]aw enforcement will learn soon enough that sins of omission are generally not actionable." In other words, officers will be in far less trouble for not acting at all instead of, in a court's opinion, overreacting.

Where Do We Go From Here?

On January 25, 2016, the defendants petitioned the court to rehear the matter. If the court agrees, all judges of the court, and not the standard three-judge panel, will hear the case. In my opinion, there is more than a fighting chance the entire court ultimately will decide this case.

If the decision, or at least the portion finding that excessive force was used, is allowed to stand, the impact on agencies that utilize tasers will be immediate. Agencies will have to review and amend their taser and use of force policies to comply with the principles of the case. If your policies haven't caught up with industry standards concerning tasers, especially in drive stun mode, they will have to do so. Those standards, combined with the vagueness and uncertainty of the judicial pronouncements in this case, may very well cause agencies to rethink their very use or contemplated use of tasers. In more direct language, the uncertainties created by the decision when it comes to the use of tasers, may lead to the conclusion that officers may be safer without them, and that, without them, they be less likely to be second-guessed. At least until the next court decision.

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