



December 22, 2010

Government Liability - Taser Considered Intermediate Level of Force

Bryan v. MacPherson, et al.

9th Circuit Court of Appeals (November 30, 2010)

Electronic Control Devices, otherwise known as "Tasers," have become one of the most important less lethal weapon options for police officers. In this case, the 9th Circuit Court of Appeals has now characterized the use of a taser as an intermediate level of force, and has set forth guidelines to weigh when considering a claim of excessive force under the Fourth Amendment.

On the early Sunday morning of July 25, 2005, plaintiff Carl Bryan was stopped by defendant Bryan MacPherson, a Coronado police officer, at a seatbelt check point, as he crossed the Coronado bridge onto Coronado Island. Bryan had already been given a speeding ticket that morning by the California Highway Patrol and apparently had forgotten to put his seatbelt back on. When Officer MacPherson indicated he was going to give Bryan another ticket, Bryan, dressed only in boxer shorts and tennis shoes, became extremely agitated. He began banging his hands on his dashboard, cursing to himself. He then got out of his car and began cursing again and pounding his fists on his thighs.

Officer MacPherson, who was alone, ordered Bryan to get back into his vehicle. At the time, Officer MacPherson was 20 feet from Bryan. When Bryan did not get back in his car as ordered, and turned toward Officer MacPherson, Officer MacPherson deployed his taser, striking Bryan on his side. Plaintiff fell forward, knocking out four teeth.

Plaintiff filed suit against the Coronado Police Department, the City of Coronado and Officer MacPherson, alleging that the use of the taser was excessive. He argued that under the standards of *Graham v. Connor* 490 U.S. 386 (1989), no reasonable police officer would have believed that the level of force used against an unarmed man in his boxer shorts and tennis shoes, and standing approximately 20 feet away, posed a threat to a police officer, necessitating the use of a taser in dart mode that delivers a 1,200-volt shock into the body of the suspect.

Officer MacPherson brought a motion for summary judgment on the grounds of qualified immunity. Qualified immunity holds that a reasonable police officer would have concluded that Bryan presented



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an immediate danger to Officer MacPherson and that he was entitled to use the taser to protect himself. The court found triable issues of fact that Bryan presented no immediate danger to Officer MacPherson and that no use of force was necessary. Furthermore, even if Officer MacPherson perceived Bryan as a threat because of his cursing and agitation, Bryan was not facing him or advancing toward him at the time, and the use of the taser would be expected to cause a great deal of pain and cause Bryan to fall, which ultimately caused his injuries.

Officer MacPherson appealed, and on first review, the 9th Circuit rejected the appeal. Subsequent to the holding, two other taser cases were heard by other panels of the 9th Circuit, upholding qualified immunity. The matter was re-submitted and the court again held that there was excessive force, but now granted Officer MacPherson qualified immunity on the grounds that a reasonable police officer confronting the circumstances faced by Officer MacPherson on July 24, 2005 could have made a reasonable mistake of law in believing the use of the taser was reasonable. As such, Officer MacPherson, in making a mistake of law, was granted absolute immunity.

On November 30, 2010, the 9th Circuit, *en banc*, upheld the ruling, and set forth factors establishing that if a taser is used in dart mode, it would be considered an intermediate use of force requiring a higher level of scrutiny to justify the use of a taser in dart mode under *Graham v. Connor*.

The court first reiterated that Connor requires that the totality of the circumstances must be examined, including the crime; the threat posed by the suspect; and the resistance of the suspect. The most important factor is whether the plaintiff posed an immediate threat to the safety of the officer. Here, the court noted that Bryan was dressed in tennis shoes and boxer shorts, and clearly unarmed. Bryan was shouting profanities and gibberish, but it was self-directed. The evidence showed that Bryan never physically advanced toward Officer MacPherson, but turned toward him. At the time, Officer MacPherson was approximately 20 feet away.

The court then looked at the severity of the offense: a seatbelt violation, punishable by a fine. The court did not consider Bryan's refusal to immediately comply and get back into the car as active resistance elevating Bryan into a dangerous person. The court highlighted that even if Officer MacPherson concluded that Bryan was mentally disturbed, it was not enough under all the circumstances to use the level of force posed by a taser in the absence of an actual immediate threat to the officer.

Lastly, the court found that it was undisputed that Officer MacPherson failed to warn Bryan he would be shot with the taser if he did not comply with the order to remain in the car. The 9th Circuit has held that a warning, when feasible, even in a lethal force case, must be given, and that factor must be considered. Officer MacPherson admitted he never gave a warning.

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Two other cases are currently pending before the 9th Circuit en banc. In *Mattos v. Agarano* 590 F.3d 1082 (2010) [the use of a taser with darts in a domestic violence situation], it was found that the officers did not use excessive force on an unarmed woman who was agitating her husband in a dispute. In *Brooks v. City of Seattle* 599 F.3d 1018 (2010) [use of a taser in stun mode on a woman who was seven months pregnant and refused to sign a traffic ticket], the lower court found it was an appropriate use of force; i.e., a pain compliance technique appropriate to an active resister. The current state of law in the 9th Circuit is that the justifiable use of a taser in dart mode will be analyzed primarily on the threat posed by the suspect that the officer confronts. To a lesser extent, the crime and type of resistance is also going to be considered. The court strongly suggests that a warning be used to further justify the use of the taser. One final note from this case: Until this ruling, issued *en banc* on November 30, 2010, officers using tasers did not have guidelines under law as to the justifiable use of a taser. Thus, any pending claims involving the use of a taser would appear to have available the absolute defense of qualified immunity, assuming the officer was using the taser in accordance with training and procedures adopted by the department on use of force.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/08-55622.PDF](http://www.courtinfo.ca.gov/opinions/documents/08-55622.pdf)

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