

Ninth Circuit Puts Control Hold on TASER Use

By: Harry S. Stern and Justin E. Buffington

A three-judge panel of the Ninth Circuit Court of Appeals has recently issued a unanimous decision spelling out under what circumstances law enforcement officers may use TASERs (generically known as “electronic control devices”).

The opinion, *Bryan v. McPherson* 2009 U.S. App. LEXIS 28413, 18-19 (9th Cir. Cal. Dec. 28, 2009) arises out of an early morning traffic stop in the Southern California city of Coronado.

Facts

During the summer of 2005, Officer Brian McPherson was working a walking traffic detail, designed to catch seatbelt law violators. Officer McPherson noticed a vehicle carrying two young men. The driver, Plaintiff Carl Bryan, was not wearing his seatbelt. Officer McPherson stepped into the path of Bryan’s car and signaled Bryan to stop.

Officer McPherson walked over to the passenger side window and asked Bryan if he knew why he was being stopped. Bryan, upset both because he had already received a speeding ticket earlier in the day and because he was in all likelihood facing a second citation, refused to acknowledge McPherson and, instead, continued to stare straight ahead. Officer McPherson instructed Bryan to turn his stereo down and pull to the curb. Bryan smacked his steering wheel and cursed at himself out of frustration.

Bryan parked and stepped out of his car, clad only in boxer shorts and tennis shoes. Bryan was clearly agitated as he yelled gibberish and smacked his thighs. Bryan stood with his back to Officer McPherson and did not make any apparent attempt to flee. In fact, according to Officer McPherson, the only “resistance” offered by Bryan was his failure to comply with Officer McPherson’s order to remain in his vehicle (which Bryan claimed he did not hear). As Bryan continued to behave strangely, Officer McPherson removed his TASER and, without warning, fired from twenty to twenty-five feet away, striking Bryan in the upper left arm. In his deposition, Officer McPherson testified that Bryan had started to take a step toward him.

The TASER responded as intended, overriding Bryan’s central nervous system, and causing him to fall, face first, to the pavement. The fall broke four of Bryan’s teeth and caused facial contusions. Bryan was transported to a hospital where a doctor had to surgically remove one of the TASER’s barbs, which had been embedded in his skin.

Bryan sued the Coronado Police Department, the City of Coronado and Officer McPherson personally. The City and the Police Department won summary judgment motions based on their qualified immunity. However, the District Court held that a reasonable jury could find that Officer McPherson’s use of force was excessive under the circumstances. Therefore, the lawsuit against Officer McPherson could proceed to a jury trial.

Constitutional Principles

Every modern law enforcement agency has policies that regulate uses of force. Sound policies reflect Constitutional underpinnings. The Federal Ninth Circuit Court of Appeals (within whose jurisdiction the entire State of California falls) has carved out its own dictates regarding the use of force. The *Bryan* case is the latest pronouncement on this topic.

As many of you know, police uses of force are examined in light of Fourth Amendment standards. A well-established body of court decisions has deemed that all but the most minor police uses of force constitute “seizures” under the Constitution. The Fourth Amendment protects citizens from “unreasonable searches and seizures.” The courts are generally mindful of the difficult circumstances under which officers use force. The seminal case on police uses of force (which was cited in the *Bryan* decision) is *Graham v. Connor*. In *Graham* the U.S. Supreme Court acknowledges that police must take action in rapidly unfolding and tense circumstances and sets forth the test that force must be “objectively reasonable in light of the facts and circumstances confronting [an officer].”

Dividing force under two overarching rubrics (“lethal” and “non-lethal”) has its roots in the Supreme Court’s *Tennessee v. Garner* decision, in which an officer had shot a fleeing residential burglar. The Supreme Court found that uses of deadly force must be accompanied by a commensurate justification. A property crime suspect who was evading arrest did not present a sufficient reason for applying lethal force according to *Tennessee v. Garner*.

The Ninth Circuit has previously considered the swabbing of pepper spray on anti-logging protesters (deemed non-lethal but a significant seizure nonetheless requiring Fourth Amendment analysis), nunchuk holds on anti-abortion activists (non-lethal force that did not rise to the level of a significant seizure under the Fourth Amendment) and now TASERs.

The *Bryan* court considered Officer McPherson’s use of the TASER under the broad category of “non-lethal force.” The court wrote that “non-lethal, however is not synonymous with non-excessive; all force – lethal and non-lethal – must be justified by the need for the specific level of force employed.” The court went on to opine that “a blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Rather than relying on broad characterizations, we must evaluate the nature of the specific force employed in a specific factual situation.”

In other words, the court rejected the idea that force could be pigeonholed into just two categories – “lethal” and “non-lethal.”

In this particular instance, the court found that the TASER was “an intermediate or medium, though not insignificant, quantum of force.” In so doing, the justices recited (perhaps in somewhat histrionic fashion) the actual effects of the TASER: “the pain is intense, is felt throughout the body, and is administered by effectively commandeering the victim’s muscles and nerves.” Accordingly, the court decided that “the physiological effects, the high levels of pain, and foreseeable risk of injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted.”

By determining that the TASER is more intrusive than other forms of non-lethal force, the court raised the bar for the justification required to fire a TASER. “We hold that the X26 and similar devices constitute an immediate, significant level of force that must be justified by a strong government interest [that] *compels* the employment of such force.” [emphasis in original]

Under the facts of this case, the opinion held that a jury could find that such a compelling reason was not present. “Not only was Bryan standing, unarmed, at a distance of fifteen to twenty-five feet, but the physical evidence demonstrates that Bryan was not even facing Officer McPherson when he was shot. . . An unarmed, stationary individual, facing away from an officer from a distance of fifteen to twenty-five feet is far from an ‘immediate threat’ to that officer. The circumstances here show that Officer McPherson was confronted by, at most, a disturbed and upset young man, not an immediately threatening one.”

Conclusion

A number of important points are raised in the *Bryan* decision. First and foremost, the court determined that TASERs are not insignificant uses of force. Instead, a TASER is an “intermediate” use of force, more serious (and intrusive) than other tools such as pepper spray.

The second notable result of the *Bryan* decision is the court’s conclusion that the firing of a TASER must be justified by a compelling reason: a mere statement that an officer was in fear for his or her safety without the accompanying articulation of objective factors is insufficient. As the court stated, “while Bryan’s behavior created something of an unusual situation, this does not, by itself, justify the use of significant force. . . the objective facts must implicate that the suspect imposes an immediate threat to the officer or a member of the public.”

The fact that the Justices also examined the initial reason for the police contact should be kept in mind. Here, it was what the court described as a “mere” traffic infraction. In light of this decision, officers must be able to objectively justify deployment of the TASER with circumstances leading to the conclusion that the person being tased is an actual threat. That equation would presumably include something more than mere unusual behavior after a contact for a traffic offense.

¹ These “facts” are from the opinion. It should surprise no one that in reaching a decision that is adverse to a party a court will focus on those facts that are unfavorable to that party. One may assume that Officer McPherson has a different version of the events in question.

² Cynics might suggest that these rulings reflect the Ninth Circuit’s preference for green-types over the religious right.

DISCLAIMER

This issue of The Ultimate Backup News Bulletin does not constitute legal advice and is for information only. Our disclaimer, along with past issues of this Newsletter and other important information, can be found on our website. To opt out of future email newsletters from RLS, please reply to this email with the words "OPT OUT" in the subject line.

Rains Lucia Stern is dedicated to providing clients with quality representation in civil and criminal litigation, disciplinary proceedings, collective bargaining, personal injury cases, estate planning, and real estate matters. Please visit us on the web at www.RLSlawyers.com.