CourtSmart

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Editors: Anthony Polse, Stephen Scheller, James Volpe, Renee Weingard

OFFICERS' QUESTIONS – OUR ANSWERS

Question(s): "Recently, we received a call from a victim who reported being struck by his aunt and subsequently tased by his niece during an altercation. As units were responding to the location, the victim stated that the offenders fled the scene in a gray sedan possibly heading southbound. Upon arrival, the victim was transported to a local hospital for minor injuries. The victim's injuries were consistent with his account of events specifically being tased, and he wanted to pursue criminal charges against both women. Moments later, a patrol officer observed the offender (who was identified by name from the victim) traveling with her daughter in the gray sedan. An investigative traffic stop was performed. Subsequently, the aunt (who allegedly battered the victim) and her daughter (who allegedly tased the victim) were both placed under arrest and handcuffed after the mother admitted her daughter tased the victim. The aunt was arrested for a domestic battery investigation, and the niece for the aggravated battery investigation. While the two offenders were standing outside of their vehicle in handcuffs, a patrol officer conducted a search of the vehicle and located the taser. Once the taser was located, the search of the vehicle was discontinued.

My question is whether the search was permissible under Gant (Scalia doctrine)? We were in search of evidence related to the arrest of the niece being the Taser. I have read the cases related to this and I'm only finding where Scalia Doctrine was applied to regarding Drug or DUI investigations.

Additionally, could the search be permissible under the automobile exception? In this case, the victim knew the offenders, described the vehicle they were traveling in, updated our Communications that they fled the scene, and the offenders were stopped 10-15 minutes later in traffic. BTW: the offender with the Taser was a juvenile."

Answer(s): Attorneys voiced the opinion that both probable cause and the Scalia doctrine were viable theories for the search. Both should be explained to the prosecutor. Most prosecutors will not know what the Scalia doctrine is, so you must show them the GANT case -- and especially the part in that case that discusses the Scalia doctrine.

USSC -- EXCESSIVE FORCE – QUALIFIED IMMUNITY?

Context

Virtually every case that has gone to the Supreme Court where deadly force was used, the Court has reversed and determined that the officer deserved qualified immunity because there was no prior case that put the officer on notice that he was violating the plaintiff's constitutional rights.

That has not been the case when the allegation of excessive force is less than deadly. *LOMBARDI V ST LOUIS* decided just last month, seemed to reflect that the USSC was creating more and different rules when the issue was *GRAHAM V CONNOR* questions.

DANIEL RIVAS-VILLEGAS V RAMON CORTESLUNA

Facts

The police received a 911 call where a 12-year-old girl, her 15-year-old sister, and their mother were barricaded in a room while their mother's boyfriend, Ramon Cortesluna (hereafter Ramon), threatened to attack them with a chainsaw. The boyfriend was drunk and angry and was apparently sawing off the door knob to the barricaded room. The 911 dispatcher could hear the sound of the saw. Officers asked the girl if she could get out of the house. She said she couldn't.

When the officers arrived, they saw Ramon in the window, holding a beer. The officers told Ramon to come out. Ramon came out, but when Ramon was told to get on his knees, he stopped. The officers then saw a knife in Ramon's pocket, so one of the officers told Ramon to keep his hands up. Ramon started to lower his hands, so an officer shot him with a beanbag gun from about 10 feet. Within a couple seconds, the officer shot a second time. Ramon then put his hands over his head and got down on the ground.

An officer used his foot to push Ramon to the ground and then pressed his knee into Ramon's back, pulled his arms behind his back, and handcuffed him. The officer handcuffed him in about 8 seconds. He then took his knee off his back.

The Federal District Court

Ramon filed a Section 1983 action against the police arguing that both the beanbag gun, and the kneeling on his back constituted excessive force under the Fourth Amendment.

The district court judge ruled that the force was reasonable, and that the officers deserved qualified immunity.

The 9th Circuit Court of Appeals

The Ninth Circuit, using the *GRAHAM V CONNOR* factors, ruled that the officers deserved qualified immunity in reference to the bean bag gun:

- The **crime** (threat with a chainsaw while drunk) was severe;
- The **threat** was serious in that the suspect had a knife;
- The **resistance** occurred when the suspect lowered his hands toward the knife.

The 9th Circuit court ruled, however, that once Ramon "no longer posed a risk" to the officers and was non-resistant, the officer arguably used excessive force handcuffing him. That force was arguably excessive and there was at least one case that put the officer on notice of that, *LaLonde v County of Riverside*, 204 F3d 947 (9th Cir 2000). Therefore, qualified immunity was not appropriate. 979 F3d 645 (CA9 2020)

United States Supreme Court

The Supreme Court stated (again) that circuit court cases might not be considered as precedents by the Court.

The Court stated, "Even assuming that Circuit precedent can clearly establish law for purposes of Section 1983, LaLonde is materially distinguishable and thus does not govern the facts of this case." In other words, the Court ruled that the LaLonde case was not similar enough to the facts in the case at bar (Ramon case) for it to serve as notice to the officers. According to the Court, LaLonde involved a much less volatile and violent suspect where officers were dispatched to a noise complaint. In both cases however, the suspects were face down on the ground and were not resisting.

Therefore, the officers deserved qualified immunity.

Training Tips

1. The Court again in this case is serving notice to all judges, attorneys and officers that the facts of the precedent must be the same as the case at bar (In this case, *Ramon*) As to the specific issue here, what could be more similar than in both cases the suspect was face down and not resisting? Both officers, in the two cases, put their knee(s) in the suspects' backs and handcuffed them?
2. The more important lesson for the lower courts, attorneys and officers is that the Supreme Court is (probably) going to use only USSC cases as precedent(s). So everyone will know that the Court has not yet decided if the precedent that puts officers on "notice" must be a USSC case.
3. At least for the present, when the USSC rules that the officer deserves qualified immunity, no officer in the country can know whether the officer violated the plaintiff's / victim's rights as the Court is simply repeating the mantra that there was no case on point telling the officer(s) that they violated anybody's rights. This gives the Court the weasel room / ability to later to say that the conduct either is – or is not – constitutional. The big problem is that it provides no direction to lower courts as to how to rule in similar cases. In other words, the USSC is not providing any legal leadership.
4. For example, in the *Ramon* case, if the force was "reasonable" under *GRAHAM*, which it definitely was, the Court should have awarded summary judgment without the necessity of deciding qualified immunity issue.
5. The only reason officers must know their Section 1983 circuit court's cases is that the USSC takes very few cases on review. So if the Supreme Court refuses to take a 7th Circuit case, the officers in your circuit are probably stuck with it – and must follow it.

QUALIFIED IMMUNITY -- WHAT DOES "PLAINLY INCOMPETENT" MEAN?

Context

For many years the Supreme Court has told lower courts that officers must be given qualified immunity unless they "knowingly violate the law" or are "plainly incompetent." The lower courts do not seem to understand that when it comes to comparing the case at bar to other precedents, it must be clear from the precedent that the officer is in the same situation as the officer in the precedent who violated the suspect's rights.

TAHLEQUAH V BOND

Facts

Officers were dispatched to a home where a woman, Joy, had called about her ex-husband, Bond, who was drunk and in the garage. The officers arrived and Bond retreated further into the garage and grabbed a hammer. All of this time the officers were ordering Bond to stop and then to drop the hammer. Bond raised the hammer above his head. Two officers fired their guns, killing Bond. This was videotaped.

Federal District Court

Bond's estate filed an excessive force Section 1983 action. The federal district court judge ruled that the officers deserved summary judgment as they did nothing unconstitutional. But the court hedged its decision by also granting qualified immunity.

The 10th Circuit Court of Appeals

The 10th Circuit reversed the district court ruling that although the shooting was reasonable, the officers were reckless in getting themselves into a position where they had to shoot Bond. Therefore, their shooting Bond was unconstitutional. The court further held that there were a number of cases that had previously ruled that such shootings were unconstitutional, and the officers did not deserve qualified immunity.

United States Supreme Court

The USSC ruled that none of the cases the 10th Circuit cited as precedent were even remotely close in

facts to the case at bar. So the officers were not put on notice by those cases. The officers therefore deserved qualified immunity.

Further the 10th Circuit failed to follow the general rule that unless the officer is totally "incompetent" or intentionally violates a suspect's rights, the lower court should find for qualified immunity.

Training Tips

1. If the officers did nothing unconstitutional, why didn't the Court simply give summary judgment, like the district court judge did?
2. Again, as we have stated before, it is virtually impossible for plaintiffs to find a case where the facts of precedent is close enough to satisfy the Supreme Court.
3. Hopefully this case will kill the doctrine so prevalent throughout the circuits. That doctrine goes by many names – the 9th Circuit called it the "provocation" doctrine (before the USSC killed that doctrine in the *MENDEZ* case). What it means is that if the officer would not have done something (unwise?) before or during the confrontation, the officer would never have had to use deadly force against the suspect. This doctrine keeps raising its ugly head in different forms and under different names in circuits all over the country. See #4 below.
4. The 7th Circuit has a precedent where officers surrounded the driver of a stolen car in a parking lot. The suspect saw a way to get out of the circle by driving between two poles. An officer jumped in between the poles, so the driver could not stop. The officer shot and killed the driver. The officer was denied qualified immunity. *Estate of Starks v Enyart*, 5 F3d 230 (7th Cir 1993)

CAN YOU GET QUALIFIED IMMUNITY IF THERE IS NO RESISTANCE?

Context

Generally, even when officers have used force unconstitutionally, the United States Supreme Court and the 7thCircuit have ruled that since there was no case that would have put the officers on notice that the officers were violating a constitutional right, the officers have gotten qualified immunity. (See the first article above.)

What if there is a dispute as to whether there was resistance, and the judge can't decide who is right?

Ferguson v McDonough

Facts

Officers found out from a woman that Ferguson committed a domestic assault and battery on her, including Ferguson's threatening her with a knife.

An officer later saw Ferguson driving a vehicle. When Ferguson stopped and got out of his car, the officer told him he was under arrest. (This entire episode is videotaped and audiotaped, although some of the tape is unclear.) The officer tried to handcuff Ferguson, but Ferguson apparently resisted, and the officer took Ferguson to the ground. The officer told Ferguson to stop resisting. Ferguson got up with his pants at his knees and his hands apparently in the air.

The officer stepped back and tased Ferguson.

The Federal District Court

Ferguson sued the officer under Section 1983. The district court judge found that he could not determine if Ferguson was resisting when he was tased. Therefore, the court ruled that the case would have to go to trial.

The 7th Circuit Court of Appeals

The 7th Circuit ruled that they, likewise, could not determine if Ferguson was resisting when he was tased. If he was not resisting, the officer could not avail himself of qualified immunity as there are lots of cases that have ruled that it is unconstitutional to tase someone who is not resisting (even if they were resisting earlier).

So the 7th Circuit held that the case must go to trial. If a jury rules that Ferguson is resisting, the court can at that point rule the officer deserves summary judgment.

Training Tips

1. We have suggested that you should be able to put into your report a threat if you are going to use intermediate force (baton, TASER, or spray). Certainly, in this case, that concern is satisfied in that Ferguson was said by the victim to have threatened her with a knife. Had the officer argued his concern with the threat, he would have been more likely to win.
2. Apparently, the officer told Ferguson to place his hands on top of the car and behind his back. These contradictory orders often occur when there are a number of officers yelling instructions. This is the first one we have seen where one officer yells the contradictory orders, but maybe it happens a lot. It shouldn't.
3. This incident was video and audio taped. You should be able to look it up and see whether you can tell if Ferguson was resisting. But unfortunately, the department is not releasing it because it is the subject of litigation.
4. There are a number of cases where the 7th Circuit has ruled that if the suspect is not resisting, or is passively resisting, an officer cannot use intermediate force. See e.g. Alicea v Thomas, 815 F3d 283, 292 (7th Cir 2016). That is why officers should begin relying on the threat factor and make sure that is in their report.
5. Usually videotaping can settle the case, often in the officer's favor, because a court can simply look at the video and be able to rule solely based on the video. That is what the United States Supreme Court did *SCOTT V HARRIS*, 550 US at 374.

IS IT REASONABLE SUSPICION WHEN A SUSPECT ASSOCIATES WITH CRIMINALS?

Context

Officers often favor the “birds of a feather, flock together” motto. But does the fact that a suspect hangs out with criminals create reasonable suspicion to stop him? The answer is no if that is the only suspicious factor. If it is not enough, what more is necessary to make the stop and detention?

People v Zavalza

Facts

A narcotics agent was targeting Cheloa, a known member of a Mexican drug cartel. The agent noticed that Zavalza associated with Chelo. Additionally, the agent(s) were fed information by a confidential informant, but the case does not disclose exactly what the informant said about Zavalza. The officers watched Zavalza and the cartel over several months as they apparently engaged in drug trafficking activity. In one operation, Zavalza drove to a money drop where over $100,000 was dropped (and ultimately transferred to a drug agent).

At some point, when several members of the cartel were in a car, the officers decided to stop and detain them. Zavalza tried to go over a fence, but was apprehended. A co-conspirator in the car admitted that there were drugs in the vehicle. The officers searched the vehicle and discovered 928 grams of cocaine on the floorboard.

Trial Court

The trial court found that the evidence was admissible against Zavalza and a jury found him guilty. The judge sentenced him to 27 years in prison.

The Illinois Appellate Court

The Illinois Appellate Court ruled that the officers had reasonable suspicion when they stopped Zavalza as they had apparent suspicion of criminal activity over a several month period.

The co-conspirator’s admission that there were drugs in the vehicle (on the floorboard) gave probable cause to arrest Zavalza.

The search of the vehicle was based on two theories, both of which were legitimate:

- The most obvious was the automobile exception as a perpetrator had admitted there were drugs in the vehicle.
- Less obvious was the search incident to arrest theory as the arrestees were within lunging distance of the vehicle and were apparently not handcuffed.

Training Tips

1. Over 50 years ago, the United States Supreme Court held that it is unconstitutional to stop someone simply because they are associating with known criminals. *SIBRON V NEW YORK*, 392 US 40 (1968). In *Zavalza*, of course, there was a lot more than simply talking to or associating with known criminals.
2. It is not clear where Zavalza was sitting in the vehicle. It would seem that if he was not sitting near the drugs that he could easily testify at trial that the drugs belonged to someone else in the vehicle. That would be difficult to disprove.
3. The court reiterates the difference between the tiers in this case, with Tier 2, of course, meaning that it is a *TERRY* stop that must be supported by reasonable suspicion.
4. The court also implied another theory for the searching the vehicle – drug dealers have guns, so there is sort of a *TERRY* search theory there also.
5. Does the Scalia doctrine apply?
6. One agent was certified as an expert in narcotics trafficking. He was therefore qualified to give his opinion on some vital areas of proof.