

SPECIAL BULLETIN

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THE NINTH CIRCUIT SETS STANDARDS FOR DEPLOYMENT OF TASERS

In what could be a landmark decision concerning the use of Tasers and similar controlled electric devices ("Tasers") by law enforcement, the Ninth U.S. Circuit Court of Appeals ruled that a City of Coronado police officer was not entitled to qualified immunity for his use of a Taser against Carl Bryan, who, by all accounts, acted irrationally and erratically during a traffic stop.

The unanimous decision by the three-judge panel in *Bryan v. McPherson* (2009) ___ F.3d ___; 2009 WL 5064477, should prompt law enforcement agencies to re-examine Taser and use of force policies to ensure compliance with the more rigorous judicial standards announced by the Court concerning these widely-used devices.

Facts and Procedural Background

Taking the mandate to review the facts most favorable to Bryan to the extreme, the Court's recitation of facts began with: "Carl Bryan's California Sunday was off to a bad start." Early one morning in the summer of 2005, Bryan - a 21 year-old tennis coach and part-time actor - drove over large stretches of Southern California wearing the t-shirt and boxer shorts in which he had slept, to retrieve some car keys mistakenly taken by a friend. While on the 405 highway, Bryan was stopped by the California Highway Patrol and issued a speeding ticket. He was so upset by the ticket that he "began crying and moping, ultimately removing his t-shirt to wipe his face." He also forgot to buckle his seatbelt.

When Bryan crossed over the Coronado Bridge near the end of his journey later that morning, the Court opined that "an already bad morning for Bryan took a turn for the worse." The Court did not address whether the Coronado officer was having a good day, but it would stand to reason that his morning also quickly deteriorated after he motioned for Bryan to pull over as part of his assigned duties to enforce seatbelt regulations. Bryan pulled his car to the curb, hit his steering wheel, yelled expletives, and - without any clear reason - stepped out of his car.

Bryan's strange behavior then turned bizarre. Clad only in boxer shorts and tennis shoes, and without his tear-stained t-shirt, Bryan was clearly agitated, began yelling "gibberish" and hitting his thighs. The officer told Bryan to remain in the car. Bryan did not hear the command. According to the officer, Bryan took a step toward him. Bryan denied taking any step. The officer shot Bryan with his Taser from approximately fifteen to twenty-five feet. The electrical current immobilized Bryan and he fell to the ground, fracturing four teeth and suffering facial contusions.

Bryan sued the officer, the Coronado Police Department, its police chief, and the City of Coronado for federal and state causes of action.

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On summary judgment, the district court granted relief to the City of Coronado and Coronado Police Department, but determined that the officer was not entitled to qualified immunity. The district court held that, because a reasonable jury could find that Bryan did not pose an immediate threat to the officer and the officer knew that the Taser would cause pain and possible injury under the circumstances, "it would have been clear to a reasonable officer that shooting Bryan with the Taser was unlawful." The officer appealed.

Court's Analysis

The opinion of the Ninth Circuit, by Judge Kim McLane Wardlaw, first took up the issue of where Tasers should fall on the continuum of force available to officers. The Court reasoned that a Taser "intrudes upon the victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not" and that the Taser shot delivered a "painful and frightening blow." Comparing the pain of a Taser shot with pepper spray and a control device called "police nunchakus" (two sticks of wood connected at one end by a cord, used to grip a subject's wrist), the Court found that the pain from a Taser shot was "far more intense...not localized, external, gradual, or within the victim's control." Accordingly, the Court concluded that Tasers "constitute an 'intermediate or medium, though not insignificant, quantum of force.'"

Next, the Court turned to the specific facts of the case before it and applied what it characterized as the "most important" factor in the U.S. Supreme Court use-of-force case of *Graham v. Connor*: i.e., whether the suspect posed an "immediate threat" to the safety of the officer or others. The Court held that Bryan did not pose an immediate threat and pointed to several factors in support of that conclusion, including: that Bryan was obviously unarmed; that Bryan did not significantly advance on the officer; and, the physical evidence suggested that Bryan was facing away from the officer when he was shot. Taken together, the Court concluded that the circumstances indicated that the officer "was confronted by, at most, a disturbed and upset young man, not an immediately threatening one."

The Court further held that Bryan's misdemeanor offenses - resisting arrest, failure to comply with a lawful order, and using or being under the influence of a controlled substance - were minor and not inherently dangerous or violent enough to support the use of the Taser. The three-judge panel also firmly rejected the officer's contention that the Taser use was justified because he believed Bryan to be mentally ill, holding that "a mentally ill patient is in need of a doctor, not a jail cell..."

Turning to Bryan's level of resistance, the Court noted the legal distinction between "active" and "passive" resistance - from the individual who physically assaults an officer to the protester who simply refuses to stand - and the wide range of activities which fall between those convenient labels. Reviewing Bryan's conduct, the court concluded that his level of resistance fell closer to the sit-in protesters who refuse to obey commands. The Court reasoned that, "shouting gibberish and hitting one's quadriceps is certainly bizarre behavior, but such behavior is a far cry from actively struggling with an officer attempting to restrain and arrest an individual" and "viewing the facts most favorable to Bryan... his conduct does not constitute resistance at all."

The Court noted that two additional factors compelled a finding that the use of the Taser was unreasonable under the circumstances. First, the officer did not provide a warning to Bryan that he would be shot with the Taser if he did not comply with the order to remain in his car, despite the feasibility to provide such a warning. Second, the officer did not consider "less intrusive means" to apprehend Bryan - namely, to await the additional officers that were en route to the scene and whose arrival might have resolved the situation without the use of a Taser.

The Court concluded that the officer's "desire to quickly and decisively end an unusual and tense situation is understandable. His chosen method for doing so violated Bryan's constitutional right to be free from excessive force."

How This Case May Affect Your Agency:

While many in law enforcement may take issue with judges "Monday morning quarterbacking" what must have been a dynamic, tense, and bizarre situation faced by the Coronado officer that morning, unless and until the U.S. Supreme Court grants review and issues a different opinion, the *Bryan* decision is now the law in the Ninth Circuit and persuasive precedent in the remainder of the country. Accordingly, it is suggested that law enforcement agencies review and appropriately amend their use of force and Taser policies, and ensure that officers are made aware of the following:

- ◆ The use of a Taser is to be considered an "intermediate use of force" - a more intrusive use of force than pepper spray or pain compliance devices like "police nunchakus."
- ◆ All factors which lend themselves to an "immediate threat" by a subject should be clearly articulated in the police report following the deployment of a Taser.
- ◆ Absent an articulable "immediate threat," Tasers should not be deployed to apprehend non-violent misdemeanants.
- ◆ Absent an articulable "immediate threat," Tasers should not be deployed to detain non-violent mentally ill subjects.
- ◆ Absent an articulable "immediate threat," Tasers should not be deployed against a passively resistant subject.
- ◆ When feasible, a warning should be given to a subject that the Taser will be deployed if the subject does not comply with commands. The warning, or reasons for the lack of warning, should be documented in the police report following the deployment of a Taser.
- ◆ When feasible, "less intrusive means" to apprehend the subject should be considered - such as awaiting the arrival of fellow officers. The consideration of "less intrusive means," and reasons that "less intrusive means" were not used, should be documented in the police report following the deployment of a Taser.

Because use of force and Taser policies vary, each law enforcement agency should consult with its legal counsel about whether and how to update policies in keeping with this case.

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