Shooting at Moving Vehicles â?? Orn v. City of Tacoma

Description

Over the last few years, several cases have arisen where officers have fired at moving vehicles. This continues to be the subject of debate among officers, legal counsel and the courts. In each case the outcome is critically dependent on the facts determined either through the police report, deposition testimony or video footage.

Even though a vehicle shooting incident is highly dependent on the individual facts of that particular case, I continually hear from officers that the Supreme Court has clearly stated that officers can shoot at a moving vehicle; nothing could be farther from the truth. The two precedent cases from the United States Supreme Court are the *Plumhoff v. Rickard* case in 2014 and the *Mullenix v. Luna* case in 2015.

In *Plumhoff v. Rickard* Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard kept moving and accelerating his car against a patrol car and an officer fired three shots into Rickardâ??s car. Rickard managed to drive away, almost hitting an officer in the process. Officers then fired twelve more shots as Rickard sped away, striking him and his passenger, both of whom died. Rickardâ??s daughter then filed against officers claiming that they had used excessive force that violated the 4th and 15th Amendment. The District Court denied the officersâ?? motion for summary judgment based on qualified immunity, holding that their conduct violated the Fourth Amendment and was contrary to clearly established law at the time in question. The Sixth Circuit also held that the officersâ?? conduct violated the Fourth Amendment. It affirmed the District Courtâ??s order, suggesting that it agreed that the officers violated clearly established law. SCOTUS later reversed this decision. The Supreme Court determined that the officers were entitled to qualified immunity because they did not violate the Fourth Amendment since the Rickardâ??s flight posed a grave public safety risk and the officers acted reasonably in using deadly force to end that risk. Rickard never stopped trying to flee and his actions kept intensifying.

In *Mullenix v. Luna* Israel Leija, Jr. fled after he was approached regarding a warrant that was out for his arrest. Sgt. Baker and Trooper Gabriel Rodriguez chased Leija for 18 minutes at speeds between 85 and 110 miles per hour. Twice during the chase, Leija called the Tulia Police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. As Baker and Rodriguez maintained their pursuit, other law enforcement officers set up tire spikes at three locations. DPS Trooper Chadrin Mullenix also responded to the chase. Upon learning of the other spike strip positions, however, Mullenix began to consider another tactic: shooting at Leijaâ??s car in order to disable it. Mullenix had not received training in this tactic and had not attempted it before, but he radioed the idea to Rodriguez. Rodriguez responded â??10-4.â?• Mullenix then asked the DPS dispatcher to inform his supervisor, Sergeant Byrd, of his plan and ask if Byrd thought it was â??worth doing.â?• Before receiving Byrdâ??s response, Mullenix exited his vehicle and took a shooting position on the overpass. Respondents allege that from this position, Mullenix still could hear Byrdâ??s response to â??stand byâ?• and â??see if the spikes work first.â?• As Leija approached the overpass, Mullenix fired six shots. Leijaâ??s car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled 2 1/2 times. It was later determined that Leija had been killed by Mullenixâ??s shots, four of which struck his upper body. Respondents sued Mullenix alleging that he

had violated the Fourth Amendment by using excessive force against Leija. Mullenix moved for summary judgment on the ground of qualified immunity, but the District Court denied his motion, finding that â??[t]here are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances.â?• Mullenix appealed, and the Court of Appeals for the Fifth Circuit affirmed. Again, SCOTUS reversed this decision, stating that a police officer was entitled to qualified immunity for his conduct in shooting and killing a reportedly intoxicated fugitive who was fleeing in a vehicle at high speed, twice threatened to kill officers, and was racing toward another officerâ??s location before the vehicle reached a spike strip placed on the road, since it was not beyond debate that the officer acted unreasonably in the unclear border between excessive and acceptable force.

In neither of these cases, however, did the Court find that the officersâ?? actions were reasonable. Rather, in both cases the Court held that there was no clearly established precedent that put the officer on notice that his actions were constitutionally prohibited. So, letâ??s look at this latest case out of the 9th Circuit and see what the court had to say.

Facts

During the evening of October 12, 2011 Than Orn was driving his wifeâ??s vehicle in the city of Tacoma Washington when a Tacoma PD officer observed Orn driving without his headlights on. When the officer signaled for Orn to pull over Orn continued driving at a slow speed. Orn later testified that he did not stop because his license was under suspension, he had been smoking crack cocaine and his wife needed the car to go to work.

During the 15-minute drive back to his apartment complex Orn drove at speeds of 25 to 35 MPH and stopped for all stop signs and traffic lights. A cavalcade of police cars joined in the â??pursuitâ?•. Several times during the pursuit officers attempted to use their vehicles to block Orn or use spike strips but in each case Orn drove around the obstacle and continued on. Officers determined that Orn was driving back to the apartment complex and took up a position in the parking lot.

At this point the description of the events in the parking lot diverge between Officer Clark and the plaintiff. The plaintiff claimed at as he attempted to avoid another cruiser there was a collision and he saw Officer Clark running towards his vehicle and fire several shots. The first shot entered through the front passenger side window and two additional rounds entered through the rear passenger side window. The third round struck Orn in the back causing him to lose all feeling and his foot floored the accelerator. Officer Clark then ran behind the vehicle firing 7 additional rounds.

Officer Clark claimed that as he took up a position behind his vehicle, he saw Orn turn his vehicle towards him and propel the vehicle with â??hard accelerationâ?•. The officer then fired one or two rounds into Ornâ??s vehicle as it passed by him. The officer then ran after Ornâ??s vehicle and fired several additional rounds to protect other officers he feared may have been in peril. The suspect vehicle then crashed into several parked cars and a fence before coming to rest. Three of the ten rounds fired by Officer Clark struck Orn and he remains paralyzed from the waist down.

At a subsequent jury trial Orn was acquitted of all charges except a MV violation for failing to obey a police officer and was ordered to pay a $250.00 fine. Orn then filed a Section 1983 claim against the City of Tacoma and Officer Clark alleging that the shooting amounted to excessive force in violation of his 4th Amendment protections. The defendant officer filed a summary judgment motion based on

Qualified Immunity. The trial court denied the officerâ??s motion and this appeal followed.

Ninth Circuit Findings

At the outset, we understand that these types of cases do not usually fare well in the 9th Circuit. A second note of caution â?? when the court is reviewing a summary judgment motion and there is a difference between the officerâ??s version of the facts and the plaintiffâ??s version, the court must consider the plaintiffâ??s version unless those facts are clearly wrong.

Turning then to the facts as provided by the plaintiff the court first determined that a jury could reasonably determine that the officersâ?? actions constituted excessive force. Based on the trajectory of the bullets fired from the officersâ?? weapon it showed the defendant officer was standing to the side of the vehicle and the vehicle passing by him. Where the car is passing by and away from the officer it would be unreasonable for the officer to believe he was in peril and required to use deadly force to protect himself. The court cited cases 2nd, 3rd and 6th circuits in support of its position.

Next, the court turned to the question of whether Clark was justified in shooting in order to protect other officers. Again, turning to the facts in a light most favorable to Orn, the court determined that at every instance during the pursuit Orn had turned his vehicle away from other officers and vehicles. Under these circumstances a jury could reasonably believe that Orn did not pose a threat to other officers.

Finally, the court looked at whether the defendant officerâ??s actions were reasonable to protect the public at large. The court first noted that â?• *To warrant the use of deadly force, a motoristâ??s prior interactions with police must have demonstrated that â??he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those aroundâ?•.* Under the circumstances presented, a jury could reasonably find that Ornâ??s driving did not evince a threat to the public to a degree that would warrant the use of deadly force.

The court then turned to the question of whether Ornâ??s right was â??clearly establishedâ?• at the time of the shooting. Clarifying those cases where the officer was in the PATH of the offending vehicle and those cases where the officer stood to the SIDE of the offending vehicle, the court determined that *â??existing precedent squarely governs the specific facts at issueâ?•* and prohibits an officer from firing at a vehicle moving away from him and not presenting a present danger.

Determining that the officer had a â??fair and clear warning of what the constitution requiresâ?•, the appellate court affirmed the district courtâ??s denial of summary judgment.

Takeaways

This case will now head back to the trial court. As I said earlier, the Supreme Court has not provided any clear direction to officers concerning this subject. More importantly, this is not an aberrant 9th Circuit ruling. Similar rulings have been made by courts in several circuits. In a nutshell, those circuits have differentiated between those cases where officers are standing squarely in the path of dangerous fleeing operator who has shown a propensity for putting officers and the public at risk â?? and those cases where the vehicle is moving away and does not pose a danger to the officer or the public.

More importantly, good tactics and risk management will ensure the safety of officers and the public. Looking at the facts from either side in the case at hand, could there be an argument made to back off, allow Orn to return home and then take him into custody or issue a citation?

Whether you utilize the DLG Pursuit policy or have your own policy, more likely than not your directive includes language that put the onus on you, the pursuing officer, to constantly gauge the factors and conditions involved in the pursuit. Like it or not, the days of continuing a pursuit at all costs are long gone. Where data continues to show the injuries and death to unsuspecting innocent motorists during police pursuits, calling off the pursuit might just be the best alternative.

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