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# Video, Use of Force, and Qualified Immunity

By **Daigle Law Group**

August 24, 2021

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# Video, Use of Force, and Qualified Immunity

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Dashcams and body-worn cameras can be both a blessing and a curse for law enforcement. They allow for the court system to view an incident in real time, but they sometimes cloud perception and make it difficult to not view an incident with 20/20 hindsight. In *Cunningham v. Shelby County*<sup>[i]</sup> Deputies Paschal and Wiggins appealed a case through the Sixth Circuit Court. Paschal and Wiggins were not granted qualified immunity after the fatal shooting of Nancy Lewellyn. Although the incident was captured on each deputies' dashboard camera, the district court originally tried the case using only "screenshots" of the eleven-second event.

Before reviewing the facts of the case and the court's overall opinion, it is important to note how qualified immunity is granted when video footage is available, as it differs from a regular qualified immunity case. Because of the rulings in *Scott v. Harris*<sup>[ii]</sup> and *Rudlaff v. Gillispie*<sup>[iii]</sup>, a reviewing court does not need to base qualified immunity off of facts from the plaintiff's perspective. The reviewing court should use a videotape if they have one in order to ensure that facts that "blatantly contradict" the video do not exist. So, in this case the court had the videotape of the incident to see if a constitutional right had been violated (basing the facts of this incident on the video versus the plaintiff's retelling of events) and they then argued if that right was clearly established at the time of the incident. Because Lewellyn's son argued that his mother's rights were violated using many different cases, the Sixth Circuit was able to weigh in on if the second prong of qualified was truly met in the original case, which helps us better understand the differences between an incident with video versus a qualified immunity case tried in the light most favorable to the plaintiff. More on that later, but first the facts of this case.

## FACTS

On March 17, 2017, the dispatcher for the Shelby County Sheriff's Department alerted three of the department's deputies to the potential danger posed by a 911 caller. That caller was Nancy Lewellyn. She told the dispatcher that "she was depressed and suicidal, that she had a gun, and that she would kill anyone who came to her residence." Three deputies—Justin Jayroe, Paschal and Wiggins—responded. Each drove a Department cruiser equipped with a dashboard camera, which recorded video, sound, and the time of day.

The deputies were also told by dispatch that Lewellyn was "suffering from some type of mental illness and/or crisis," and that she was saying she was armed with "what may be a .45 caliber pistol."

Deputy Jayroe arrived first and parked his cruiser facing Lewellyn's house. Deputy Paschal arrived soon thereafter and parked behind him, as did Deputy Wiggins. Lewellyn then walked out of her front door and turned towards the driveway in front of her home's garage where a sedan was parked. She carried something in her right hand, which was later determined to be a BB handgun but resembled a .45 caliber pistol.

The video recorded by the dashboard camera in Jayroe's cruiser shows that she began walking towards the driveway and, as she proceeded, began to raise the handgun. One of the deputies yelled to her. The parties disagree whether the video shows Lewellyn beginning to turn towards the deputies. Paschal then fired his service pistol once. A second shot followed after a short pause. As Lewellyn continued walking with her right arm extended horizontally and the pistol pointed in the direction of her car, Deputy Wiggins also began shooting. After reaching the vehicle, Lewellyn leaned on its hood briefly and then turned back toward the house. As the firing continued, she took a few steps and collapsed. A total of eleven seconds had elapsed since she exited her house.

Altogether, ten shots were fired and eight struck Ms. Lewellyn. It was not visible at the time by the deputies or on the video, but Lewellyn dropped the BB handgun on the sedan's hood before turning back towards her car. As she lay on the driveway, the deputies approached her and demanded that she show her hands before discovering that she was unarmed. They rendered medical aid while awaiting EMS personnel. Ms. Lewellyn died at the scene.

## **SIXTH CIRCUIT OPINION**

The Sixth Circuit mainly focused on the second prong of qualified immunity, which is whether or not Lewellyn's Fourth Amendment rights were clearly established at the time of the fatal shooting. For Paschal and Wiggins to be entitled to qualified immunity they must have perceived a threat from Lewellyn. According to the district court's "screenshots", Lewellyn did not have her gun pointed towards the officers and she was not using force that could have been perceived as a threat. When reviewing the incident in its entirety, however, the court felt that there was a justifiable threat of a .45 caliber pistol (which later was determined to be a BB gun).

In the original argument Cunningham and his attorney used three court cases to prove that Paschal and Wiggins had fair warning that their conduct violated the Fourth Amendment. The three cases are *King v. Taylor*<sup>[iv]</sup>, *Brandenburg v. Cureton*<sup>[v]</sup>, and *Dickerson v. McClellan*<sup>[vi]</sup>.

In *King*, the district court argued whether or not the victim of a deadly shooting had pointed a gun at an officer just before he was shot, which is how the officer described the incident. The officer was originally granted qualified immunity, but this was later overturned due to the need to view the incident

in the light most favorable to the plaintiff, as the prongs of qualified immunity require. According to the Sixth Circuit this case does not correlate to the argument at hand, because there are not two differing stories to debate due to the fact that there is footage of the incident happening.

*Bradenburg* and *Dickerson* were both cited in order to argue that “the use of lethal force against an armed suspect who does not pose an imminent threat of harm constitutes a Fourth Amendment violation.” In both of these cases law enforcement officers fatally shot an individual after they discharged their firearm. Both of these cases had differing portrayals of events and therefore had to be submitted to a jury before qualified immunity could be granted.

In today’s case, however, the Sixth Circuit Court reminded us that “*there are no conflicting stories as to whether the deceased posed an imminent threat to the officers or others.*” In this case because of case law stemming from *Rudloff* the Sixth Circuit used the video footage to understand the incident, so there is no dispute on how the shooting unfolded. So, the court argued that they needed to view the video in order to determine if there was a constitutional violation present. After reviewing the full video, the court determined that Paschal’s perception of feeling threatened because of Lewellyn’s weapon was warranted and correlated to the exact happenings that exist in the video footage.

The court then used the *Graham* standard to determine if excessive force was used. The reasonableness standard used “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” It is especially important to note that you cannot view the actions of an officer with 20/20 hindsight, but as an officer in the exact same situation in real time. Using this reasoning the court felt that Paschal and Wiggins acted reasonably and Lewellyn did seem to pose an immediate threat to their safety.

The court also cautioned and warned the district court that using “screenshots” instead of the full dashcam video was irresponsible. This goes directly against the *Graham* standard of reasonableness because being able to analyze an eleven-second video long enough to pick specific “screenshots” is absolutely acting with the luxury of 20/20 hindsight.

For these reasons the Sixth Circuit vacated and remanded the original ruling, entitling Wiggins and Paschal to qualified immunity.

## **TAKEAWAYS**

In today's case dashcams proved to be a blessing for Paschal and Wiggins. Here at Daigle Law Group, we think dashcams and body-worn cameras are an absolutely crucial tool, and they should be used in every situation. Just as it is important to write up a full report of an incident, it is also important to save footage in the event of a use of force case. Memory retrieval can only go so far and in court, footage happening in real time can help justify your actions when using force. As I have said before, if officers are going to be judged by a video it should be the one worn by the officer that shows the whole event from their perspective, not from someone else's camera. There is a strong need for the protection of officers to combat the cell phone videos that can be misleading based on the length of the recording, and location and perspective from the person taking the video. Good police work always benefits from recording incidents, as it did in today's case. While law enforcement is getting a bad reputation in today's media, dashcam footage and body-worn cameras can offer some transparency and build back trust that you very much deserve. Thank you for all that you do and I hope this case summary helps you moving forward.

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[i] <https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0085p-06.pdf>

[ii] <https://www.law.cornell.edu/supremecourt/text/05-1631>

[iii] <https://law.justia.com/cases/federal/appellate-courts/ca6/14-1712/14-1712-2015-07-01.html>

[iv] <http://casetext.com/case/king-v-taylor>

[v] <https://casetext.com/case/brandenburg-v-cureton>

[vi] <https://casetext.com/case/dickerson-v-mccllellan>

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Originally published at <https://dlglearningcenter.com/cunningham-v-shelby-county-body-worn-cameras-and-qualified-immunity/>

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