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Fatal Use of Force – Fifth Circuit

By **Daigle Law Group**

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Today we travel to the Fifth Circuit to review a fatal use of force case. As officers, we never want to be in the position where we get to the point of needing to deploy our firearm to protect ourselves, but as you will see in this case the use of force was more than necessary. What should have been a simple traffic stop turned into an altercation that ultimately led to Deputy Luker needing to shoot the suspect in the back. As tensions heighten between law enforcement and the community cases like these may become more prevalent, so it is important to review all of the steps taken here and what the Fifth Circuit Court of Appeals has to say on the matter. Here are the facts of the case.

FACTS

Around midday on August 29, 2017, Deputy Kyle Luker observed Joshua Cloud speeding and conducted a traffic stop. Deputy Luker issued Cloud a ticket for driving thirteen miles-per-hour over the speed limit. Cloud refused to sign his ticket, which is grounds for arrest under Louisiana law.

Planning to arrest Cloud, Deputy Luker had Cloud exit his pickup truck and face its side with his hands behind his back. While standing behind Cloud, Deputy Luker handcuffed his left wrist, at which point Cloud turned partially around to his left. Deputy Luker ordered Cloud to turn back around and reached for his right hand to finish handcuffing him. Cloud did not comply but instead he spun all the way around, turning away from Deputy Luker's reach, facing him head-on, with the handcuffs hanging from his left wrist.

Deputy Luker stepped back a few feet and deployed his taser, striking Cloud in the chest. Although both taser prongs hit Cloud and began cycling, they did not incapacitate him. Cloud yelled and pulled the prongs from his chest. Deputy Luker then released his police dog from his car with a remote button and tried to regain control of Cloud. Deputy Luker grabbed Cloud around the waist and tased him again, now with the taser in "drive-stun" mode.

The two men, grappling with each other, moved toward the truck's open door. Cloud produced a revolver from somewhere near the driver's seat. As the two struggled for control of the gun, it discharged twice, the second shot hitting Deputy Luker in the chest. Deputy Luker was in pain but unable to tell how badly he was injured, as his protective vest spared him all but a minor injury. As the struggle continued, Deputy Luker managed with one hand to radio police dispatch that shots had been fired. Deputy Luker was then able to get the revolver out of Cloud's hands and throw it to the ground on

the street behind him. With Cloud disarmed and the police dog now engaging, Deputy Luker drew back a short distance, withdrew his duty weapon, and ordered Cloud to get on the ground.

At this point, Cloud was crouching in his truck's doorway, keeping the dog at arm's length with his hand on the dog's head. Cloud's revolver was on the ground, behind Deputy Luker and to his left. Cloud then rushed toward Deputy Luker and started to move past him. As Cloud lunged toward the revolver lying on the ground, Deputy Luker fired two shots into Cloud's back. Cloud died at the scene.

Cloud's parents (Plaintiffs) sued Deputy Luker and others alleging a variety of constitutional and state tort law violations. After the district court dismissed all the plaintiffs' claims, they appealed. The sole issue on appeal was whether Deputy Cloud used excessive force against Cloud during the encounter.

The plaintiffs claimed that Deputy Luker's non-lethal force, first tasing Cloud from a few feet away, then using his taser in drive-stun mode while wrestling with Cloud, violated Cloud's Fourth Amendment right to be free from excessive force during his arrest.

FIFTH CIRCUIT OPINION

As we have discussed in prior legal updates, in *Graham v. Connor*¹ the Supreme Court outlined several factors that courts should analyze to determine the reasonableness of an officer's use of force: 1) the severity of the crime at issue, 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The court found that the extent of Cloud's resistance was the most important factor in determining the reasonableness of Deputy Luker's use of his taser.

The court noted that Fifth Circuit Court of Appeals cases on police use of tasers have paid particular attention to whether officers faced active resistance when they resorted to deploying their tasers. Specifically, the court found that when a suspect resists arrest or fails to follow police orders, officers do not violate the suspect's right against excessive force by deploying their tasers to subdue him. The court added that other circuits (4th, 6th, 8th and 11th), which have addressed police tasing, have held that if a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him. In contrast, the court found that the 5th Circuit and other circuits (8th and 9th) have found force to be excessive when officers tased someone offering only passive resistance or no resistance at all.

In this case, Cloud was suspected of committing a minor offense. However, Cloud interrupted the handcuffing process by turning partially around. When Deputy Luker ordered Cloud to turn back around and reached for Cloud's right hand, Cloud turned to face him, with the handcuffs dangling from his left

wrist. Until this point, Deputy Luker had addressed Cloud's general uncooperativeness and modest resistance with verbal commands and milder force. The court concluded that when Cloud took this "confrontational" stance, depriving Deputy Luker of the use of his handcuffs and thwarting his efforts to complete the arrest, he created a threat to Deputy Luker's safety; therefore, it was reasonable for Deputy Luker to tase Cloud.

The court also held that Deputy Luker's use of the taser in drive-stun mode against Cloud was reasonable. The court recognized that the same incident could include both lawful and unlawful uses of force. However, in this case, the court concluded that the circumstances that justified Deputy Luker's initial tasing of Cloud were still present during the drive-stun tasing. The court found that there was no evidence indicating that Cloud complied with any commands or ceased to resist after the first tase. In addition, the court noted that the situation remained "tense, uncertain, and rapidly evolving." Under these circumstances, the court held that Deputy Luker's continued force to complete the arrest, like his initial tase, was reasonable.

The court also held that Deputy Luker's use of lethal force against Cloud was reasonable. In *Tennessee v. Garner*ⁱⁱ, the Supreme Court stated that, "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." In addition, the Fifth Circuit has held that officers are justified in using lethal force if they reasonably believe that a person is reaching for a gun, even in cases where officers had not yet seen a gun when they fired, or when no gun was ever found at the scene.

In this case, the court held that Deputy Luker could have reasonably believed that Cloud threatened him with serious physical harm. First, Deputy Luker knew that a loaded revolver lay on the ground behind and to the left of him. Second, Deputy Luker knew that the gun had just discharged twice, once into his chest, and that he had just had to wrestle it from Cloud's hands and toss it away. Finally, Deputy Luker shot Cloud as Cloud was moving toward the revolver, potentially seconds from reclaiming it. Based on all of these facts, the court held that it was reasonable for Deputy Luker to shoot Cloud.

TAKEAWAYS

It is a sad day in law enforcement when we are forced to shoot a suspect, especially over something as minor as a speeding ticket. As the court stated Deputy Luker did what he had to do. Deputy Luker tried to calm Cloud with his words first and then with his taser, neither of which worked. It is important to note here that it was originally Cloud that shot at Luker as well, which meets the *Graham* standard for

posing an immediate threat to the officer. It is also clear that Luker was trying to evade arrest. More than ever before remain vigilant and protect yourselves out there.

Thank you for all that you do and please join us at our annual Use of Force Summit, live from Mohegan Sun, for more on the *Graham* standard and other Use of Force policies.

Cloud v. Stone, 993 F.3d 379 (5th Cir. 2021)

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