Officer Involved Shootings – How Are Courts Analyzing the Use of Deadly Force?

Description

On May 13, 2013, the United States Court of Appeals for the Ninth Circuit came down with a favorable opinion for law enforcement involved in a fatal “officer involved shooting” incident. The Court’s opinion is well thought out and analyzes and evaluates each step of the incident as it progressed, ultimately leading to the fatal shooting of the suspect. A case such as this can serve as a useful learning tool for your officers to demonstrate how their actions will be critiqued and discussed post-incident, as well as those factors a court focuses on when determining whether an officer’s use of deadly force in a particular incident was objectively reasonable.

On September 25, 2009, at 2:00 a.m., Officers Daron Wyatt and Matthew Ellis were en route to a routine call. While turning left at an intersection, the officers were cut off by a van driven by the deceased, Adolf Anthony Sanchez Gonzalez, who then proceeded to make an illegal left turn in front of them and pull into a gas station. The Officers were forced to brake aggressively to avoid a collision, but continued on their way to the routine call. The officers, returning from the call a minute or two later, noticed that Gonzalez’s vehicle was still at the gas station.

Due to the manner in which Gonzalez had operated his vehicle just a few minutes prior, the officers became suspicious and ran his plates. Upon determining that the vehicle had been involved in a prior narcotics stop, the officers decided to follow the vehicle to determine the need for any further law enforcement action. A few blocks from the station, the officers observed Gonzalez’s vehicle weaving within its lane and proceeded to pull it over. Even though the officers activated their lights, the vehicle proceeded for an additional 200 feet before making a wide-sweeping turn to pull over. The officers pulled in behind the vehicle and approached from both sides, with Ellis approaching on the driver’s side and Wyatt on the passenger’s side.

As Ellis approached, he observed Gonzalez reach back with his right hand toward the area between the driver and passenger seat. Wyatt drew his gun and yelled at Gonzalez, warning him that if he reached back again, he would shoot him. Gonzalez then proceeded to clench his hands tightly in his lap. Gonzalez refused to comply with Ellis’ repeated commands to turn off the vehicle. When Ellis noticed a plastic baggy in Gonzalez’s right hand, which he believed to be drugs, both officers ordered Gonzalez to open his hands; which he ignored.

The officers reached through the vehicle’s open windows to unlock both doors. Wyatt then reached through the now-open door and struck Gonzalez on the arm with his flashlight three times. Gonzalez proceeded to move his right hand toward his mouth, and his left hand toward the area between the seat and the door. Wyatt believed Gonzalez was attempting to swallow the item in his hand. Wyatt stated that Ellis, in an attempt to gain control of Gonzalez’s arms, reached through the driver-side window and attempted to apply a carotid restraint (or “sleeper hold”) on Gonzalez. Wyatt, believing that Gonzalez was attempting to strike Ellis, entered the vehicle from the passenger side and, with his knees on the seat, began punching Gonzalez in the head and face.

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During the struggle, Gonzalez tried to shift the vehicle into gear and Ellis, in an attempt to stop Gonzalez, hit him on the back of the head three times with his flashlight. Gonzalez nevertheless managed to put the vehicle in gear and pull away while Wyatt was still kneeling in the passenger seat. According to Wyatt, Gonzalez "floored the accelerator." Wyatt moved to a seated position and yelled at Gonzalez to stop. When Wyatt attempted to knock the vehicle out of gear, Gonzalez slapped his hand away from the gearshift. Without giving another warning, Wyatt shot Gonzalez in the head. Wyatt testified that the vehicle had traveled approximately 50 feet in less than 10 and possible less than 5 seconds. After the shot, the vehicle hit a parked car and came to a stop. Others officers who had arrived at the scene pulled Gonzalez out of the vehicle, handcuffed him, and performed chest compressions. Gonzalez died shortly thereafter.

On June 23, 2010, Gonzalez's father sued the officers and City of Anaheim under 42 U.S.C. § 1983 for violation of his 14th Amendment right of familial association and Gonzalez's 4th Amendment right to be free from unreasonable and excessive force. Gonzalez's daughter brought a separate suit raising similar claims and the district court consolidated both actions.

The district court granted summary judgment to defendants and held that the force used throughout the incident was reasonable and that the officers' conduct did not violate Gonzalez's 14th Amendment rights.

On appeal, Gonzalez's representatives allege that the officers applied excessive force in five instances during the incident leading to Gonzalez's death: (1) Wyatt's use of the flashlight to hit Gonzalez's arm; (2) Ellis's attempt to place Gonzalez in a carotid hold; (3) Wyatt's punches to Gonzalez's head and face while Ellis tried to restrain him; (4) Ellis's strikes to the back of Gonzalez's head with his flashlight; and (5) Wyatt's close-range shot to Gonzalez's head.

To determine whether the officers' use of force was reasonable the Court applied the factors set forth in *Graham*[1]: (1) the severity of the crime; (2) whether the suspect posed an immediate threat to the officers or others; and (3) whether the suspect was actively resisting arrest. The Court evaluated each of the Plaintiff's claims listed above in turn.

Flashlight Strikes to Gonzalez's Arm

The Court stated that "officers may use a reasonable level of force to gain compliance from a resisting suspect who poses a minor threat." The Court found that in this instance, the use of the flashlight to strike Gonzalez's arm was not excessive force given that he refused to comply with the officers' commands to shut off the vehicle and open his hands.

Carotid Restraint, Wyatt's Punches to Gonzalez's Face, and Ellis's Flashlight Strikes to Gonzalez's Head

The Court first evaluated the severity of the crime and found that the officers had reason to believe that Gonzalez possessed illegal drugs and was attempting to destroy evidence, and therefore committing a "felony-grade offense." The Court next evaluated the immediacy of the threat posed to the officers and others, finding this to be the most important factor. Both officers testified that they observed Gonzalez reach between the driver's side door and the seat. The court noted that a reasonable officer in that position would be concerned that Gonzalez had a weapon concealed in that location. Furthermore, given Gonzalez's refusal to follow repeated orders and his multiple furtive reaches, the officers had

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reason to suspect danger. In addition, Gonzalez shifted the vehicle into gear and drove with the officer still in the passenger seat. The court found that given the escalating situation, "the officers' justification for force increased commensurately." Accordingly, the second *Graham* factor weighed in the officers' favor.

With regard to the last factor, "actively resisting arrest or attempting to evade arrest by flight," the Court found that Gonzalez engaged in active resistance both with his motions with his hands and by struggling with the officers. Then, when Gonzalez put the vehicle in drive, his active resistance became an attempt to evade arrest by flight. The Court concluded that because all three *Graham* factors weighed in the officers' favor, they were justified in their use of significant force.

Deadly Force

Wyatt argued that, as an unbuckled passenger in a rapidly moving vehicle, he had probable cause to believe that Gonzalez posed a "significant threat of death or serious physical injury to himself or others." [2] The Court stated that it is difficult to evaluate summary judgment in deadly force cases because the officer is the only surviving eyewitness. To assist in its analysis, courts "should ensure that the officer's story is 'internally consistent and consistent with other known facts' to avoid simply accepting a self-serving statement by an officer."

The Plaintiffs took issue with the officer's estimation as to the approximate speed of the moving vehicle and the estimation of the amount of time that transpired during the incident. The Court reasoned that: (1) even if the vehicle was traveling at a slow rate of speed, the threat of acceleration – and to Wyatt's life remained – therefore, the speed of the vehicle was not a material fact; (2) rough estimates as to time are just that, rough estimates; and (3) the testimony of both officers support the contention that the van was moving rapidly. The Court reiterated that Gonzalez's flight could have killed or severely injury Wyatt and the circumstances did not allow for a deliberate and most measured response by Wyatt. Wyatt testified that he yelled at Gonzalez to stop the vehicle and attempted to knock it out of gear. The Court reasoned that any further hesitation on Wyatt's part could have been fatal and therefore, it was objectively reasonable for Wyatt to use deadly force.

With regard to the Plaintiffs' claim that the officers violated their due process right to familial association, the Court held that nothing in the officers' behavior suggests that they had an ulterior motive or that the officers had "a purpose to harm Gonzalez for reasons unrelated to legitimate law enforcement objectives."

Conclusion

Departments should review this case with officers to reinforce the countless hours of training spent clarifying the facts and circumstances officers must articulate, following an incident, to justify the use of force, including deadly force. The *Graham* factors provide a clear roadmap for officers to explain what occurred in plain English. The question posed following the incident is: "were the officer's actions "objectively reasonable" judging from the perspective of a "reasonable officer" on the scene. What exactly does this mean? Simply, would a reasonable, well-trained officer believe it was necessary to use a similar amount of force in light of the facts and circumstances confronting the officer at that time?

When training officers on how to provide a clear picture of the force incident, officers should be told to focus on the ability, opportunity, and intent of the subject during the interaction with the officer.

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Departments should use the *Graham* factors as part of the use of force decision-making curriculum, and as a report writing template. To their benefit, the officers in this case provided a clear, concise, and factually-based accounting of the incident, which the Court found to be reasonable. This case should be read by all trainers, officers, and supervisors, and encourage them to get back to the basics of report writing, e.g., the use of verbs, nouns, and adjectives to accurately describe the actions of the subject, the subject's response to the officer's orders, and the officer's reaction to the subject's response. Unfortunately, the most important part of the force incident – report writing – is often the worst part of the incident. Departments can avoid this pitfall by ensuring that their force-related policies are clear, and that officer's receive training on them often. The success of proper force reporting starts with officers. Supervisors, however, provide checks and balances on conducting proper and complete force investigations. As such, Supervisors should focus on the factual accounting of the incident in the report to ensure it supports the officer's decision to use force at that time. Like many high liability areas, this one starts at the beginning. As this case exemplifies, the importance of proper documentation of a force incident cannot be stressed enough.

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1. *Graham v. Connor*, 490 U.S. 386 (1989) ?

2. *See Tennessee v. Garner*, 471 U.S.1, 3 (1985)(speeding vehicle poses "actual and imminent threat" to those around him, justifying force posing a "high likelihood of serious injury or death") ?

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