



LEGAL UPDATE · RESOURCES · USE OF FORCE

# What Validates Use of Force?

By **Daigle Law Group**

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Today's case from the Fifth Circuit Court of Appeals involves the use of deadly force and poses a question regarding qualified immunity. The standard used to examine the use of force is proscribed by *Tennessee v. Garner*. In *Garner*, the Supreme Court held that **when an officer uses deadly force, the reasonableness of such force turns primarily on whether “the officer had probable cause to believe that the suspect posed a threat of serious physical harm, either to the officer or to others.”**

While a determination of threat assessment can be a difficult decision to ascertain, the case before us presents a narrow standard, leaving little room for debate.

## FACTS

On the afternoon of March 19, 2019, the Bastrop Police Department received two reports of an armed confrontation at the Eden Apartments. The first report warned that, “they are drawing guns.” The second report identified one suspect as Thomas Johnson, a man who was driving a red truck. Officer Joshua Green responded to the reports.

As Green approached the apartment complex, he saw a red truck that appeared to be stationary, in the proximity of a closed elementary school. Officer Green initiated a traffic stop of the red vehicle. When Officer Green exited his car, Thomas Johnson stepped out of the truck's passenger side holding a semiautomatic pistol with an extended magazine.

Officer Green ordered Johnson to shut the car door, but Johnson ignored him and ran towards the school. As vehicles passed nearby, Officer Green drew his firearm and yelled, “Drop the gun!” When Johnson failed to comply and continued to run in said direction, Officer Green fired at him but missed. Officer Green chased Johnson into an adjacent open field that was away from the road and reported, “Shots fired!” over his radio. Officer Green continued to chase Johnson across the field, ordering him to drop the gun and instructing onlookers to lie on the ground.

Officer John McKinney responded to Officer Green's call, and when he heard the distant gunshots, he proceeded to the opposite side of the field. When he arrived, he saw Johnson approaching his squad car and outrunning Officer Green. Johnson saw Officer McKinney and changed his direction to run towards the tree line that bordered the Eden neighborhood. Officer McKinney ordered Johnson to stop and drop the gun. When he refused, Officer McKinney fired from his squad car, causing Johnson to

stumble and drop his gun. Johnson looked at Officer McKinney, picked up his gun, and continued to flee. Officer McKinney stepped out of his squad car and fired three more shots. Both officers continued to chase Johnson and repeatedly ordered him to stop and drop the gun, as he approached closer to the tree line. When in range, both officers shot causing Johnson fall and drop his gun. Johnson died on the scene from the gunshot wounds.

Johnson's brother, among others, sued Officers Green and McKinney under 42 U.S.C. §1983, alleging that the officers used excessive force in violation of the Fourth Amendment when they shot and killed Johnson. After the district court granted the officers qualified immunity and dismissed the case, the plaintiffs appealed.

### **FIFTH CIRCUIT COURT OPINION**

Applying the *Garner* standard to this case, the Fifth Circuit Court of Appeals held that Officer Green could have reasonably believed Johnson posed a serious physical threat to bystanders and to Officer Green himself. The court noted several factors which bears directly upon the reasonableness of the belief. First, before the stop, Officer Green had reason to believe Johnson was brandishing a firearm at the apartment complex. Officer Green was alone when he first encountered Johnson, and Johnson stepped out of the truck holding a pistol with an extended magazine. Next, instead of obeying Officer Green's orders, Johnson ran towards the school with the gun in hand, ignoring Officer Green's commands for him to drop the gun. Although the school had been closed for a few months, a danger to others was still present because moments after the traffic stop, a school bus carrying students passed Officer Green's patrol car. Also, as Officer Green chased Johnson, he repeatedly ordered him to stop and drop the gun, yet Johnson disobeyed and ran toward Officer McKinney before disappearing. When Johnson did emerge, he had dropped his gun but quickly picked it up and ran toward the Eden neighborhood, while continuing to ignore Officer Green's commands to drop his weapon. Finally, Officer Green shot Johnson after Officer Green noticed nearby onlookers. Based on these facts, the court held that the district court properly granted Officer Green qualified immunity.

Next, the court held that similar to Officer Green, Officer McKinney could have reasonably believed that Johnson threatened him and others with serious physical harm. Therefore, McKinney was entitled to qualified immunity. First, Officer McKinney heard distant gunshots, followed by receiving a radio call which indicated that shots had been fired. Given these conditions, McKinney was unsure of whether it was Officer Green or the suspect that had fired. Second, when Officer McKinney arrived at the scene, Johnson was running at him while holding a gun, and he soon changed direction toward a tree line bordering a neighborhood. Third, Johnson repeatedly ignored Officer McKinney's orders to stop and drop the gun. Fourth, even after Officer McKinney fired at Johnson, he kept his gun and continued to

flee. Finally, during the chase, Officer McKinney saw Officer Green nearby.

The court rejected the Plaintiffs' argument contending that Johnson did not pose a threat because he never fired his weapon. The court asserted that officers are not required to "wait until a defendant turns towards them with a weapon in hand, before applying deadly force to ensure their safety." Similarly, the court added that officers need not wait until a fleeing suspect turns his weapon towards bystanders before using deadly force to protect them.

## **TAKEAWAYS**

An examination of the facts of this case indicated numerous instances that validate the officer's use of force. Officers Green and McKinney provided Johnson with several warnings and opportunities to comply with commands before they resorted to the use of force. Validity for this use of force was further affirmed when considering the fact that Johnson clearly planned on using his weapon at a school. Although he did not end up firing his weapon, his vehicle was found outside of the school and he brandished the gun in front of Officer Green. The court here reiterated the principle that an officer does not need to wait until someone actually fires their weapon to know that intervention is necessary. *Garner* only dictates the requirement that a suspect must *pose* a threat.

## **Wilson v. City of Bastrop, 26 F.4th 709 (5th Cir. 2022)**

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