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Bryan v. McPherson- A New Standard for the Use of Electronic Control Devices?

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In December 2009 the United States Court of Appeals for the Ninth Circuit decided *Bryan v. McPherson*[1] decision which has inappropriately led some people to believe that the law regarding the use of electronic control devices (ECDs) has dramatically changed. Whether or not this is true in Ninth Circuit states[2] or other states remains to be seen.[3] However, law enforcement must be familiar with the case as the Court ruled that in order to lawfully deploy an ECD in probe mode "the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public." [4]

The case was decided based on a motion for summary judgment, thus the Court was required to use a "perceptual lens" that presumes that the plaintiff's facts are true. According to the plaintiff, Bryan, Officer McPherson stopped him for a seatbelt violation. Upon being stopped, Bryan, who was 21 years old, did not respond to the Officer's questions, hit the steering wheel and yelled expletives at himself. Although Officer McPherson ordered him to stay in the car, he claimed that he did not hear that order and got out. Standing outside the car, Bryan, angry at himself, dressed only in boxer shorts and tennis shoes, was agitated, yelling gibberish, and was hitting his thighs.

Bryan was standing 20-25 feet from the officer, was not attempting to flee, and did not take any step toward the Officer. While Bryan was facing away from the officer, the officer, without warning, fired a TASER® X26™ ECD at Bryan, hitting and immobilizing him, and causing him to fall face first to the pavement, fracturing 4 teeth and causing facial contusions. One ECD probe required surgical removal in the emergency room.

The Court ruled that Officer McPherson's use of the ECD under these circumstances was not a reasonable use of force under *Graham v. Connor.*[5] The court followed the familiar Fourth Amendment constitutional standard, as clarified by *Chew v. Gates*[6], in determining whether an officer's use of force in seizing a person is excessive and evaluated the government's interest in the use of force by examining the core factors: (1) whether the suspect poses an immediate threat to the safety of the officers or others; (2) whether the suspect is actively resisting arrest; (3) the severity of the crime at issue; and (4) whether the suspect is attempting to evade arrest by flight.

The court further considered additional force factors of: (5) plaintiff's mental status and behaviors; (6) the officer's failure to consider less-intrusive tactics and force alternatives; and (7) the officer's failure to give a warning of impending force to attempt to gain volitional compliance. The court also made a distinction between passive and active resistance in excessive force cases and distinguished the facts in the 11th Circuit opinion in *Draper v. Reynolds*[7], which held that a TASER ECD was not excessive force when used during the traffic arrest of an aggressive, argumentative individual.

The Court concluded that Bryan did not objectively or reasonably pose an immediate threat of harm to the Officer, himself or others, nor did he evade, or resist at the time the ECD was used. More specifically, from the court's perspective interpreting plaintiff's facts the Court concluded that Bryan:

- was stopped for a seat-belt violation;
- was not a dangerous felon;
- was not a flight risk;
- did not offer resistance at all; and
- was not an immediate threat because he:
  - was unarmed (wearing only boxer shorts and tennis shoes);
  - did not level a threat at the officer;
  - was standing 15-25 feet away from the officer and not advancing;
  - was, at most, a disturbed and upset young man, not an immediately threatening one; and
  - was not facing the officer when he was hit with the ECD in probe mode.

The Court further concluded that the Officer:

- failed to warn Bryan that he would be shot with an ECD if he did not volitionally comply;
- did not consider what other tactics if any were available to effect the arrest; and
- failed to consider less-intrusive alternatives (*e.g.* waiting for approaching backup).[8]

Based on these facts, the Court found that the Officer had used an "intermediate" level of force that was not objectively reasonable under the circumstances. The Court stated:

> We recognize the important role controlled electric devices like the [TASER X26 ECD] can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike. *We hold only that the X26 and similar devices constitute an intermediate, significant level of force that must be justified by 'a strong government interest [that] compels the employment of such force*.' (emphasis added)[9]

In applying prior Ninth Circuit case law, the court found that while the TASER X26 ECD is a "non-lethal" use of force, it is an "intermediate or medium, though not insignificant", use of force due to the incapacitation and pain it causes and the risk of secondary injuries from falls. The Court stated that "[t]he physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted."[10]

The officer asserted that the ECD use was justified because Bryan may have been mentally ill. The Court stated that if that were true, the officer "should have made greater effort to take control of the situation through less intrusive means." The Court explained that it has refused to create "two tracks of excessive force analysis, one for the mentally ill and one for serious criminals," However, the Court believes that "acting out" by "emotionally disturbed" individuals diminishes the level of force that is necessary and that such individuals are "in need of a doctor, not a jail cell" and that, "in the usual case – where such an individual is neither a threat to himself nor to anyone else - the government's interest in deploying force to detain him is not as substantial as its interest in deploying force to apprehend a dangerous criminal."

Therefore, in accordance with both pre-existing law and the *Bryan* decision, the use of intermediate force would be *least* justified for a nonviolent misdemeanor suspect who poses little or no threat of harm, resistance or evasion, such as the plaintiff in *Bryan*. [11]

As always, context is critical in determining the justification of force and this case is no exception. Under the specific facts of *Bryan*, the use of an ECD at that juncture in the officer's interaction with Bryan was found to be unjustified. Significantly, the Court cited several

established protocols regarding the use of ECDs that were not followed by the officer. For instance, in a situation where the suspect was not an immediate threat or attempting to flee, the court strongly considered the officer's failure to give a preemptive warning to Bryan to gain volitional compliance, along with the failure to attempt to use less intrusive means to engage compliance in determining that the immediate jump to using the ECD was not justified. The decision in *Bryan* is in line with existing training protocols and established law regarding the proper use of ECDs.

Ultimately, *Bryan* serves as a significant and important reminder of multiple points. First, ECDs cause pain and are not risk free, and officers need to consider the pain element and the risk of secondary injuries from incapacitation and falls in determining when and how to deploy an ECD. Second, ECDs are an "intermediate or medium, though not insignificant" use of force and every trigger pull must be justified as a separate use of force. Third, as in any Fourth Amendment force analysis, an officer must consider the totality of the circumstances, including whether the suspect poses an immediate threat to the safety of the officers or others, whether he is actively resisting arrest, the severity of the crime at issue, and whether he is attempting to evade seizure by flight. Fourth, especially when a suspect is not an immediate threat or a flight risk, when officers are attempting to use force to gain voluntary compliance, officers need to warn of the impending use of an ECD, assess whether their warnings are clearly heard and understood, and give a reasonable time for volitional compliance. Fifth, there should be regularly scheduled, refresher or remedial training for officers using ECDs. Officers should be reminded to engage suspects in a manner consistent with their department's force protocols, including the consideration of less than intermediate uses of force where appropriate.

This column is written by members of the Legal Officers Section. Readers are strongly encouraged to read, analyze, and understand the cases cited herein, and confer with their legal advisors. This synopsis does not constitute legal advice or the practice of law and does not address every aspect of the *Bryan* case.

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1 ___ F. 3d ___, 2009 WL 5064477 (9th Cir. (CA) 2009).

2 The Ninth Circuit U.S. Court of Appeals includes within its jurisdiction Alaska, Arizona, California, the Island of Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

3 On January 12, 2010 the Ninth Circuit Court of Appeals decided *Mattos v. Agarano,* --- F.3d ----, 2010 WL 92478 (9th Cir.(Hawai'i) in which it ruled that the use of an ECD under circumstances where officers responded to a domestic violence call, were in close quarters confronted by an intoxicated suspect whose spouse was interfering with the arrest, including by touching the officer was *not* a constitutional violation, even though "the Taser stun gun [is] a serious intrusion in to the core interests protected by the Fourth Amendment…" This court distinguished these facts from those presented in *Bryan*, and demonstrates that these cases remain highly fact-specific.

4 2009 WL 5064477 at *4.

5 490 U.S. 386 (1989).

6 *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir.1994).

7 *Draper v. Reynolds*, 278 Ga. App. 401, 629 S.E.2d 476 (Ga. App. Mar 23, 2006), cert. denied (Sep 08, 2006).

8 *Compare Buckley v. Haddock,* 292 Fed. Appx. 791 (11th Cir. 2008) (use of ECD against a non-compliant suspect was reasonable because (1) the incident occurred at night on the side of a highway with considerable passing traffic; (2) the deputy could not compete the arrest because the suspect was resisting and (3) the deputy resorted to use of the Taser only after trying to persuade the suspect to comply and repeatedly warning him that an ECD would be deployed and giving him time to comply).

9 2009 WL 5064477 at -------- ADD A PINPOINT CITE HERE

8 "The X26 thus intrudes upon the victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not. While pepper spray causes an intense pain and acts upon the target's physiology, the effects of the X26 are not limited to the target's eyes or respiratory system. Unlike the police "nonchakus" we evaluated in *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir.1994), the pain delivered by the X26 is far more intense and is not localized, external, gradual, or within the victim's control. In light of these facts, we agree with the

Fourth and Eighth Circuit's characterization of a taser shot as a "painful and frightening blow." We therefore conclude that tasers like the X26 constitute an "intermediate or medium, though not insignificant, quantum of force." (internal citations omitted)

[11] *See also Landis v. Baker,* 297 Fed. Appx. 453 (6th Cir. 2008) (unconstitutional to sue ECD against a person not resisting,, not threatening anyone's safety or attempting to evade arrest by flight).