

Use of Force: Employing the TASER

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What is the law within our Sixth Circuit Court of Appeals when it decides cases of qualified immunity?

In spring 2013, the Tenth Circuit Court of Appeals ruled against a police officer in the case of Roosevelt-Hennix v. Prickett, 717 F.3d 751, C.A.10 (Colo.), 2013. The case involved a fairly common situation that law enforcement officers face.

Officer James Barr of the Florence City (Colo.) Police Department initiated a traffic stop when he observed Lara Roosevelt-Hennix's vehicle exceeding the speed limit. Roosevelt-Hennix pulled her vehicle off the road and into a grocery store parking lot. Officer Barr pulled his patrol car in behind Roosevelt-Hennix's vehicle, approached Roosevelt-Hennix and explained the reason for the stop. At this point, Barr observed the following: (1) accompanying Roosevelt-Hennix in the vehicle were an adult male and Roosevelt-Hennix's young daughter (2) an odor of alcohol was emanating from the vehicle and (3) Roosevelt-Hennix appeared to have been drinking. When Barr asked Roosevelt-Hennix how much alcohol she had consumed, she admitted consuming two or three drinks.

At Officer Barr's request, Roosevelt-Hennix agreed to step out of her vehicle and perform standard roadside sobriety tests. Barr conducted the horizontal gaze nystagmus test, which indicated Roosevelt-Hennix might be intoxicated. Barr also began to instruct Roosevelt-Hennix through additional tests, but stopped when Roosevelt-Hennix indicated a back injury prevented her from performing some physical tasks. At that point, Officer Barr handcuffed Roosevelt-Hennix's arms behind her back and placed her under arrest for DUI. Roosevelt-Hennix voluntarily presented her hands for cuffing. Barr placed Roosevelt-Hennix in the back seat of a patrol vehicle and closed the door. Officer Barr testified Roosevelt-Hennix was compliant as he placed her in the patrol vehicle. Although the exact timing of his arrival is less than clear, Roosevelt-Hennix testified Officer Shane Prickett arrived on the scene by the time Barr placed her in the patrol car.

Roosevelt-Hennix began to panic after Barr placed her in the police car. She yelled at the officers to return to the patrol vehicle and tell her what was going on with her daughter, but Officers Barr and Prickett initially ignored her request. During this outburst, Roosevelt-Hennix banged her head against the window of the patrol vehicle to try and get the officers' attention. Officer Prickett returned to the patrol vehicle and opened the door. According to Roosevelt-Hennix, she asked Prickett if "one of the officers could stand by the car with her so that the door could remain open so she would not go into a full panic because of being in a confined space." Officer Prickett refused her request and told Roosevelt-Hennix to calm down and stop banging her head against the window.

During the process, Officer Prickett determined Roosevelt-Hennix should be "hobbled" prior to transport to the police department. Prickett opened the patrol vehicle's rear door and ordered Roosevelt-Hennix to place her feet outside the vehicle. At this critical point, the parties have different

versions of the events. However, at this time Officer Prickett used a TASER on Roosevelt–Hennix while her hands were cuffed behind her back and she was seated in the back seat of the police car. Immediately thereafter, Roosevelt–Hennix advised Barr she could not feel her legs. Barr contacted dispatch and requested that medical personnel meet him at the police department to evaluate Roosevelt–Hennix. Medical personnel met Barr and Roosevelt–Hennix at the police department and then transported her to the hospital. The next day, Roosevelt–Hennix underwent back surgery for paralysis in her lower extremities. Roosevelt–Hennix brought suit pursuant to 42 U.S.C. § 1983, alleging Officer Prickett subjected her to excessive force in violation of the Fourth Amendment.

In his brief, Officer Prickett asserted his use of the TASER was precipitated by Roosevelt–Hennix’s refusal to comply with his order. In particular, Officer Prickett asserts Officer Barr attempted to physically remove Roosevelt–Hennix’s feet from the patrol car, but was unable to do so because Roosevelt–Hennix wedged her feet underneath the cage partition separating the front seat from the back seat. Accordingly, Officer Prickett contends that in analyzing his claim for qualified immunity, this court must view Roosevelt–Hennix’s excessive force claim through the lens of an individual actively resisting a lawful police order. In her brief, Roosevelt–Hennix asserts she told the officers a preexisting back injury left her unable to lift herself and turn her body to place her feet outside the vehicle. Furthermore, she specifically asserts that “the two officers never attempted to lift her legs to obtain compliance.”

The Court’s decision found that review of the record reveals sufficient evidence for a jury to conclude Roosevelt–Hennix informed the officers she was physically unable to comply with their request to move her feet outside the patrol vehicle. It likewise contains sufficient evidence for a jury to conclude the officers never attempted to aid Roosevelt–Hennix in moving her feet before applying the TASER. Accordingly, the Court affirmed the denial of qualified immunity for Officer Prickett, who was then required to continue as a participant with the on-going litigation.

On Aug. 26, 2013, in the case of Wells v. City of Dearborn Heights, 2013 WL 4504759, C.A.6 (Mich.), 2013, the Court examined another fairly common law enforcement situation.

On Feb. 12, 2008, officers from the Dearborn Heights Police Department executed a search warrant at the home of Robert Wells, authorizing the search of Wells’s home and seizure of all controlled substances and drug paraphernalia. The various depositions of defendant officers indicate that officer Patrick Mueller entered the residence first, followed by Officers Timothy Ciochon and Christopher Pellerito. One of the two dogs in the residence, a bulldog weighing approximately 80 pounds, came growling towards Officer Mueller, teeth bared. According to the officers, Mueller shot the dog, only once, when it lunged and tried to bite his leg. Officer Mueller claims that Wells became enraged at the shooting of the dog and approached Mueller. When Wells ignored Mueller’s instructions to “drop to the ground” and pushed aside Officer Mueller’s outstretched hand, Mueller kicked him, but Wells continued to advance. Officer Mueller recounted that he then kicked Wells a second time, knocking him to the ground. Once Wells was on the ground, Wells began to kick Mueller and tried to stand back up,

prompting Mueller to deploy his TASER on Wells in the abdomen. Mueller claims that he handcuffed Wells only after Wells had been tased.

A subsequent search of the house revealed marijuana, various drug paraphernalia and methadone pills. Wells later pled guilty to possession of marijuana.

Wells alleges that Mueller used excessive force when he kned him to the ground and when he tased him while handcuffed.

The Court's analysis was made by looking at several cases, and the opinion provides: "The Fourth Amendment prohibits the use of excessive force by arresting and investigating officers." In evaluating whether this prohibition has been violated, we employ an "objective reasonableness" test, which requires us to determine "whether the officers' actions were 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." In citing from the United States Supreme Court case of Graham v. Connor, 109 S.Ct. 1865, (1989) the Court states that "The test is fact specific, not mechanical, and the three most important factors for each case are: **(1) the severity of the crime at issue (2) the threat of immediate danger to the officers or bystanders and (3) the suspect's attempts to resist arrest or flee.**" [emphasis by author]. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"; and our inquiry must be conducted with "allowance for the fact that police officers often are forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation." The Supreme Court of the United States has acknowledged that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence," Michigan v. Summer, 101 S.Ct. 2587, (1981), and thus that the detention of occupants in the place to be searched, through the use of reasonable force, is constitutional. In this case, Officer Mueller was justified in attempting to detain Wells at the outset of the search, and Wells's apparent failure to drop to the ground quickly enough provided him adequate justification to knee Wells to the ground.

On the issue of Officer Mueller's tasing of Wells, the Court found that Officer Mueller did indeed employ excessive force. According to Wells, Officer Mueller tased him after he was handcuffed and lying on the ground. Wells recounts that once he was on the ground, he shouted profanities at Officer Mueller and attempted to "turn my body around, all the way around, trying to get on my back and my butt just to see what was going on." The Sixth Circuit's prior opinions clearly establish that it is unreasonable to use significant force on a restrained subject even if some level of passive resistance is presented. The Court has ruled finding excessive force when an officer attempting to search a handcuffed but still belligerent suspect used an arm-bar takedown to bring her to the ground. This is especially true when the suspect is already handcuffed, and noting the "well-established" rule that **"the gratuitous use of force on a suspect who has already been subdued and placed in handcuffs is unconstitutional"** [emphasis by author].

And there are a number of cases explicitly addressing **the illegality of using “non-lethal, temporarily incapacitating force, such as a TASER, on a handcuffed suspect who no longer poses a safety threat, flight risk, and/or is not resisting arrest.”** [emphasis by author]

In another case, Eldridge v. City of Warren, 533 Fed.Appx. 529, C.A.6 (Mich.), 2013, the Court was asked to determine what constitutes “active resistance” by a suspect that justifies a police officer’s use of force?

On the morning of June 18, 2009, the Warren Police Department received a call complaining of a man erratically driving a truck on Stephens Road. Maria Tramble, the caller, suspected that the driver was drunk. She watched as the truck drove into her condominium complex, over a curb, and through patches of grass. It eventually came to a halt at a construction area, with further progress stifled by temporary construction barricades. Understandably concerned, Tramble called the police again.

Officers Patrick Moore and Robert Horlocker were dispatched to the scene, where a dashboard camera recorded the events. When they arrived, the two officers found the truck parked behind the barricades it had knocked over. The motor was still running.

Officer Moore approached the driver’s side window of Ralph Eldridge’s truck, with Officer Horlocker placing himself on the passenger’s side. Officer Moore asked, “What’s going on?” Eldridge, sitting in the driver’s seat, muttered something inaudible. Moore tried again by inquiring, “What are you doing?” The response was incomprehensible. “Turn the car off,” Moore commanded. Eldridge’s response was, yet again, inaudible. Moore attempted to open the driver’s side door, found it locked, and repeated his command: “Turn the car off.” He unlocked and opened the door. Having obtained access to the steering wheel, Moore turned off the car’s ignition and removed the key.

With the truck immobilized for the moment, Moore chided Eldridge for his erratic driving by shouting, “What are you doing? You ran over the parking lot, you’re driving all over the lawn. What are you doing?” The officer began inspecting the immediate area around Eldridge. “Step on out,” Moore demanded once more. His partner opened the passenger-side door.

As Eldridge was unresponsive to Moore’s instruction, the officer repeated his command: “Step on out.” Eldridge’s reply was a softly-spoken “I’m fine, thank you.” “Step on out. You ain’t going nowhere,” Moore responded. The driver’s reaction remained the same, with him muttering the words, “I’m fine.” Officer Horlocker began inspecting the other side of the truck. At this point, Moore’s commands became variations of the same refrain. Similarly, there was no change to Eldridge’s response. Moore tried again by saying, “Come on out. I’m not going to tell you again.” The response? “I’m fine.” Horlocker joined his colleague by shouting, “Get out of the car!” A cacophony of commands surrounded Eldridge as both officers demanded his compliance.

Standing next to the open passenger-side door, Horlocker remarked, “There’s not even keys in there.” Moore tried the same by adding, “There’s not a key in there, it’s not going to go anywhere. Step out of the car. Come on out.”

That, too, had little effect. Stymied by the seemingly uncooperative Eldridge, Moore asked, "You coming out, or do I have to help you out?" "I'm fine," said the sluggish driver. Moore began tugging at Eldridge's arm. He coupled this with a new form of persuasion - a threat. "Come on out. I'm not - I'm going to tell you to get out of this car one more time, if you don't get out, I'm going to shoot you with a TASER," Moore warned. He sought confirmation by inquiring, "You got it? You gonna get out of the car?" Officer Horlocker chimed in once more by asking, "Get out, what's so hard about that?" Finding his tugs of Eldridge's arm and his commands unsuccessful, Moore yelled, "I'm not going to tell you again. Get out of the car. Get out of the car or you're going to get tasered. You wanna get tasered?" Eldridge's response? "I'm fine." By this point, Horlocker had joined his partner at the driver's side of the truck. Both officers tugged at Eldridge's left arm to pull him out of the car, repeating their demands for him to exit the vehicle. In the midst of their shouting, Eldridge could be heard saying, "I'm trying to ..." but he was cut off. Officer Horlocker drowned out Eldridge's voice by shouting, "Get out of the ... car!" Moore yelled, "Get out of the car, let go of the steering wheel and get out of the car!" Horlocker warned, "You're going to get tasered!" Moore did the same. Horlocker then commanded, "Step out of the truck!" Moore gave one final caution by exclaiming, "I'm not telling you again. Get out!" His partner added, "Out, let's go!"

Two minutes and nine seconds after the encounter began, Officer Moore activated the TASER, causing Eldridge to thrash about erratically while yelling "I'm fine!" After Eldridge crashed into a temporary construction barricade, the officers grabbed him and pinned him to the side of his car. They repeatedly yelled, "Get on the ground!" Eldridge seemed slow to comply. "Get on your knees!" Horlocker instructed. Eldridge weakly responded, "I'm trying." He slowly began lowering his knees.

Officer Moore grabbed Eldridge and pushed him to the ground into the prone position with his partner's assistance. Moore placed his knee at Eldridge's neck, causing Eldridge to hit his head on the pavement in the process. In the meantime, Horlocker began handcuffing Eldridge, with both officers continually demanding his compliance. After Eldridge was secured, Horlocker began searching his body. A few seconds later, the officer found something. They ultimately concluded that it was an insulin pump. Eldridge was a diabetic. He was suffering from a hypoglycemic episode.

Seeking recompense for his ordeal, Eldridge filed suit under 42 U.S.C. § 1983, alleging violations of the Fourth Amendment's prohibition against the use of excessive force. He later amended his complaint to allege an additional Eighth Amendment violation for the officers' deliberate indifference to his medical condition.

As in the Wells v. City of Dearborn Heights case, the Court reviewed the three factors from the Graham v. Connor decision: (1) the severity of the crime at issue; (2) the threat of immediate danger to the officers or bystanders; and (3) the suspect's attempts to resist arrest or flee." From the outset, we note that the first two factors are not at issue here. The severity of the crime at issue could not justify the type and degree of force used in this incident. Eldridge was suspected of driving under the influence. Such a crime is undoubtedly serious, but not categorically "severe" nor "severe" on this particular

occasion. Twenty seconds had elapsed between Officer Moore's initial approach to the driver's side window and his act of turning off the ignition to Eldridge's truck. Taking the facts in the light most favorable to Eldridge, a reasonable jury could conclude that Eldridge was going nowhere.

The Court stated that these facts also belie the notion that Eldridge posed "an immediate threat to the safety of the officers or others." Once Officer Moore turned the car off, Eldridge posed little risk to the public at-large. As for the safety of the officers, the facts taken in the light most favorable to Eldridge require reaching the conclusion that Eldridge presented no risk—he was not threatening either verbally or physically, as demonstrated by his polite responses to the officers' questions about his physical incapacity to move from his stationary vehicle. Insofar as the officers argued that Eldridge's stature was physically imposing to the officers, a review of the video reveals that Eldridge was no taller or larger than either of the two officers dispatched to the scene.

The Court found that "the true flashpoint of this controversy is the third Graham factor - whether Eldridge "actively resisted" in a manner that warranted the use of a TASER." To Officers Moore and Horlocker, Eldridge was noncompliant and therefore actively resisting. They argue that their actions are protected under Sixth Circuit precedent establishing that when an officer employs a TASER on a suspect who is actively resisting, such action does not constitute excessive force. The Court disagreed, stating, "Taken in the light most favorable to Eldridge, a reasonable officer faced with the same circumstances could not have determined that Eldridge's actions bore the hallmarks of active resistance. Rather, these facts demonstrate that Eldridge was not actively resisting, and under our precedent it is unreasonable to tase a nonresisting suspect."

Whether the officers receive qualified immunity thus turns on whether failing to comply with an officer's commands, with nothing more, constitutes active resistance. The Court noted that "What makes the officers' argument difficult to accept on this issue, however, is the meaning of "active resistance" under our precedent. In cases where we concluded **that an officer's use of force was justifiable because it was in response to active resistance, some outward manifestation - either verbal or physical - on the part of the suspect had suggested volitional and conscious defiance**, neither of which is present here." [emphasis by author]

Looking at two prior cases, the Court found in the first, the suspect had been physically active - he resisted arrest by laying down on the pavement and deliberately locking his arms tightly under his body while kicking and screaming so as to avoid arrest; and noted that these actions indicated that the suspect was "out of control" and "forcefully" resisting arrest. This justified an officer's use of a TASER. In the second case, the suspect reached into the backseat, giving officers the impression that he was reaching for a weapon. Finding it necessary to disable the vehicle, the officers used an axe to break the driver's side window. In response, the suspect intentionally revved up the vehicle "to the point that the tires were spinning at a very high rate of speed and the area was filling up with smoke again." Feeling threatened by the breaking of the window, the suspect also began violently thrashing about. At that point, the officers deemed it necessary to use a TASER. The Court determined that the officers' use of the TASER was reasonable. Several factors indicated that the suspect had actively resisted arrest. One

consideration was the suspect's repeated refusal to comply with the officers' demands. But again, this noncompliance was not viewed in isolation - instead, it was viewed in conjunction with the fact that the suspect was hostile, belligerent, and had thrashed about in an agitated state.

The Court says: "If there is a common thread to be found in our case law on this issue, it is that noncompliance alone does not indicate active resistance; there must be something more." It can be a verbal showing of hostility; It can also be a deliberate act of defiance using one's own body, or some other mechanism, such as a truck. Taken in the light most favorable to Eldridge, his noncompliance was not paired with any signs of verbal hostility or physical resistance, and therefore cannot be deemed active resistance.

When the totality of the circumstances is considered, it is clear that the interaction at issue here does not follow the typical course of active resistance. Generally, a confrontation leading to an excessive-force suit unfolds in a manner where the suspect causes the officers to be exposed to volatility, hostility and danger in a way that increases with the passage of time, thus justifying (and often requiring) the use of force. Here, we have the opposite - officers Moore and Horlocker approached Eldridge's vehicle and disabled it without incident. During the sequence of events that followed, the only individuals conveying any sense of aggression were the two officers. Eldridge played no role in escalating the aggression. Under our precedent, such a scenario does not justify the use of a TASER.

In denying the officers qualified immunity, the Court noted "that the two officers' actions violated a clearly-established right: the right of a suspect to be free from the use of physical force when he is not resisting police efforts to apprehend him. Also, from prior Sixth Circuit precedent that "The right to be free from physical force when one is not resisting the police is a clearly established right."

Officers must recognize that the use of a TASER is the use of force. In addition to the statutory provisions of Chapter 503 of the Kentucky Revised Statutes that govern the use of force, officers need to consider the three factors from the United States Supreme Court case of Graham v. Connor. **The three factors are: (1) the seriousness of the crime at issue, (2) whether the suspect poses a threat to the officer or others, and (3) whether the suspect is actively resisting or attempting to evade arrest by flight.**

The Courts have held in these cases where the situations demonstrate a circumstance of passive resistance and where there is no threat to the officers, a TASER is not an appropriate force option. Officers must also be mindful of an individual's physical and mental capability, and where there is a complaint of injury or medical condition, adopt alternative methodology to obtain compliance or seek additional assistance.