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Second Circuit Panel Allows Stun Mode to Gain Compliance of Chained Protestors

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❖ Introduction

In police departments across the country there is a growing concern regarding liability arising out of the use of Tasers. ^[2] While the case law surrounding this issue is still developing, recent decisions provide some guidance to law enforcement personnel.

As department heads maintain an interest in protecting their departments and officers from potential lawsuits, the question becomes “when does the use of a Taser go from effecting arrests expeditiously to the unreasonable use of force?”

❖ Civil protest

In a recent case, the Court of Appeals for the Second Circuit upheld a District Court’s ruling that the use of a Taser on protestors who refused to unchain themselves from a barrel was not unreasonable under the Fourth Amendment. ^[3]

On the morning of July 23, 2007, a group of protestors, including Jonathan Crowell and Samantha Kilmurray, gathered on a recently cleared lot in the town of Brattleboro, Vermont. The group intended to stage a protest after being under the mistaken impression that the land was to be commercially developed by the lot's owner, Cheshire Oil.

Shortly after the group gathered at the property, a civilian called the Brattleboro Police Department to inform it that a group of protestors were trespassing on private property.

The dispatcher contacted the President of Cheshire Oil who stated that while "he did not want to start a war with protestors," he wanted the protestors off his land and therefore, asked that trespass orders be issued.

In accordance with this request, Lt. Kirkpatrick and Officer Gorman went to the property and advised the protestors that there was no actual plan to develop the property and that the landowner had stated that the group was not allowed to remain on the property. The officers told the protestors that they would return in one hour and arrest any protestors who remained on the property.

Later that afternoon, Kirkpatrick and Evans returned to the property and found that a number of protestors remained, including Crowell and Kilmurray. The officers asked BPD dispatch to contact the landowner to request additional time for the protestors to leave.

As a result of this telephone call, the President of Cheshire Oil said the protestors could remain on the property overnight but stated that, if the protestors were still there in the morning, "then we got to do something different."

The following morning, Kirkpatrick and Gorman returned to the property and found that only two protestors remained, Crowell and Kilmurray. They also discovered that the two protestors had chained themselves to a barrel that the group had brought to the property the previous day.

The officers could see that the protestors had one arm through a PVC pipe that extended through the barrel. They were unable to see how the two were attached,

however, because the barrel was filled with dirt, string, chicken wire, screws, nails, etc.

It was later learned that the protestors had chains wrapped around their wrists inside the barrel that were clipped to a reinforcing steel bar that extended up from concrete poured into the base of the barrel. The barrel weighed at least 300 pounds and, therefore, was too heavy for the officers to move.

At all times during the entire encounter, however, the two protestors could have freed themselves from the barrel and left the property. In the alternative, they could have explained to the officers how they were attached to facilitate their removal.

After all prior efforts to remove the two protestors failed, and Kilmurray had signaled for more protestors to return to the property, the officers decided to use their Tasers in the “drive-stun” mode as a pain compliance tool that would force the protestors to release themselves.

Before using the Tasers, however, the officers warned Crowell and Kilmurray that the Tasers would be used and that it would “hurt a lot.” Officer DiMarino also “sparked” his Taser to demonstrate its live electric current.

While these warnings made the protestors apprehensive, they still refused to unchain themselves and leave the property. Instead they offered alternatives by suggesting that the officers make a “more serious effort at disassembling the barrel” or wait out the protest.

When the protestors continued to ignore the officers’ warnings, they simultaneously stunned each protestor in the forearm for several seconds. Ultimately, Kilmurray was stunned twice and Crowell three times, with officer warnings between each occurrence, before they disengaged themselves from the barrel.

❖ **Civil suit filed**

In March 2008, Crowell and Kilmurray brought a § 1983 action against all four officers present at the scene during the protest alleging that their arrests were

unlawful and that the use of the Tasers was excessive force under the Fourth Amendment.

The District Court noted that claims of excessive force during an arrest are analyzed under the Fourth Amendment's "general reasonableness standard." The District Court held that the officers had probable cause to arrest the plaintiffs and concluded that the use of force under those particular circumstances was not unreasonable under the Fourth Amendment.

The Second Circuit Court of Appeals affirmed. While the plaintiffs were arrested for relatively minor crimes of trespassing and resisting arrest, and were not threatening the safety of the officers or others, they were actively resisting at the time they were stunned by the officers.

The protestors had chained themselves to a heavy barrel filled with dirt and debris and refused to free themselves and obey police commands, even though at all times they were capable of doing so.

The court also focused on the fact that the officers warned the plaintiffs before applying the Tasers. The panel stated that while the use of a Taser to affect an arrest is always, or even often, objectively reasonable, under the circumstance it was because by chaining themselves to the barrel, the protestors could not have been arrested and removed from the scene by more conventional means.

The three-judge panel concluded that, given the totality of the circumstances, it would be difficult to see how a rational fact-finder could conclude that the officers' actions were anything other than reasonable.

❖ **Role of Training**

The best way for departments and officers to prevent claims for unreasonable or excessive force is to provide ongoing training and clear policies regarding the use of force when affecting an arrest. Periodic bulletins and in-house training that include a review of the "Use of Force Continuum" and alternate methods for interacting with and subduing suspects who are resisting arrest are important to protect all department personnel from liability.

❖ **Notes:**

1. Eric Daigle represents police officers and agencies in Connecticut, and is a member of the faculty of the [AELE workshop](#) on Legal, Psychological and Biomechanical Aspects of Officer-Involved Lethal and Less Lethal Force.
2. TASER® is a trademark of TASER International, Inc.
3. [Crowell v. Kirkpatrick](#), #09-4100-cv, 2010 U.S. App. Lexis 23518 (Unpub. 2d Cir. 2010.). Unpublished cases are not binding precedent.

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