

## **Use of the Electronic Control Weapon: Is the Standard Changing?**

On January 11, 2016, the Fourth Circuit Court of Appeals decided the case of *Armstrong v. Pinehurst*, 2016 U.S. App. LEXIS 380. The Court's decision has astounded much of the law enforcement community on the east coast and, since that day, we have not stopped talking about the use of the electronic control weapon. I must say, however, that I was not surprised by the 4<sup>th</sup> Circuit Court's decision. Excessive use of force regarding Taser use is not a new topic, particularly in the 9<sup>th</sup> Circuit, where the courts have already been examining this issue.

In 2011, Daigle Law Group released an article addressing the 9<sup>th</sup> Circuit's decision in *Brooks v. The City of Seattle* (consolidated with the *Mattos v. Agarano* case), 661 F.3d 433. The court held that the use of a Taser on a pregnant woman, who refused to get out of a vehicle when ordered to do so by clutching the steering wheel and stiffening her body, was an excessive use of force. The *Brooks* case looked to the 9<sup>th</sup> Circuit's decision in *Bryan v. MacPherson*, 630 F.3d 805, a case released in 2009, wherein the court concluded that Tasers "constitute an intermediate, significant level of force that must be justified by "a strong government interest [that] compels the employment of such force. The *Bryan* court denied qualified immunity, finding that the use of the Taser against Bryan, who, while acting erratically, was not a flight risk, dangerous felon, or immediate threat, violated his constitutional rights.

We have long cautioned police departments on the use of an ECW in passive, non-aggressive situations. This caution has included the need to ensure officers follow Taser International's training program, and use stringent and direct policy guidance. This article will provide a summary of the *Armstrong* case, as well as recommendations for your policies on the use of the ECW and interventions with mentally ill or emotionally unstable individuals. First, let's discuss the case.

### **FACTS:**

Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medication for five days and was poking holes through the skin on his leg "to let the air out." His sister, worried by his behavior, convinced Armstrong to accompany her to Moore Regional Hospital ("Hospital") in Pinehurst, North Carolina. He willingly went to the Hospital and checked in, but he eventually left the Hospital. Based on that flight and his sister's report about his odd behavior over the previous week, the examining doctor judged Armstrong a danger to himself and issued involuntary commitment papers to compel his return. Armstrong's doctor did not designate him a danger to others.

The Pinehurst police were called as soon as Armstrong left the Hospital, and three members of the department, Officer Gatling, Sergeant Shepard, and Lieutenant McDonald, responded. Armstrong had not traveled far when the officers arrived. He was located near an intersection near the Hospital's main entrance.

When the police arrived, Armstrong's commitment order had not yet been finalized. Therefore, the officers engaged Armstrong in conversation. The parties were calm and cooperative at this point, but Armstrong was acting strangely.

Armstrong wandered across an active roadway that intersects with the Hospital's driveway. He then proceeded to eat grass and dandelions, chew on a gauze-like substance, and put cigarettes out on his tongue while the police officers waited for the commitment order.

As soon as the police officers learned that the commitment papers were complete, the officers surrounded and advanced toward Armstrong, who reacted by sitting down and wrapping himself around a post. The officers tried to pry Armstrong's arms and legs off of the post, but he was wrapped too tightly and would not budge. Armstrong's sister was also on the scene, pleading Armstrong to return to the hospital. Two Hospital security officers were also present.

The officers did not attempt to engage in further conversation with Armstrong. Instead, just 30 seconds after the officers told Armstrong his commitment order was final, Lieutenant McDonald instructed Officer Gatling to prepare to tase Armstrong. Officer Gatling drew his taser, set it to "drive stun mode," and announced that, if Armstrong did not let go of the post, he would be tased. That warning had no effect, so Gatling deployed the taser five (5) separate times over a period of approximately two (2) minutes. Rather than have its desired effect, the tasing increased Armstrong's resistance.

Shortly after the tasing, the three Hospital security officers jumped in to assist the three police officers trying to pull Armstrong off of his post. That group of five successfully removed Armstrong and laid him face-down on the ground. The officers put handcuffs and shackles on his legs because he was resisting. They left Armstrong face-down in the grass with his hands cuffed behind his back and his legs shackled. At this point, he was no longer moving at all. Armstrong's sister was the first to notice that her brother was unresponsive, so she asked the officers to check on him, and they did so immediately. When the officers flipped him over, his skin had turned a bluish color, and he did not appear to be breathing. EMS responders transported Armstrong to the Hospital's emergency department where resuscitation attempts continued but were unsuccessful. He was pronounced dead shortly after admission. Six and one-half minutes elapsed between dispatch advising the police officers that Armstrong's commitment papers were final and the officers radioing for EMS.

The Estate of Armstrong sued each police officer involved in Armstrong's seizure, under 42 U.S.C. § 1983, alleging that the officers used excessive force, in violation of Armstrong's Fourth and Fourteenth Amendment rights, when seizing him. The district court granted summary judgment and stated that the defendants were entitled to qualified immunity. Plaintiffs appealed to the Fourth Circuit Court.

#### **ANALYSIS AND HOLDING:**

The Court of Appeals concluded that the defendants used unreasonably excessive force against Armstrong, violating his constitutional rights. However, since Armstrong's rights were not clearly established at the time of the incident, the Court of Appeals stated that the officers were entitled to qualified immunity. However, the Court of Appeals warned police officers that qualified immunity will not be extended to those who use the ECW

against individuals who do not pose a threat to officers or others even though they may be exercising non-violent resistance. The Court stated that this standard was even more important when dealing with mentally ill individuals. As such the law in the Fourth Circuit is clearly established.

In reaching its decision, the Court used the use of force standard established in *Graham vs. Connor*. The following facts led the Court to the conclusion that the use of force that was used against Armstrong was excessive:

- 1) Armstrong was not committing or did not commit any crime.
- 2) Police officers knew that Armstrong was mentally ill.
- 3) Armstrong was ruled by doctors to be a danger to himself, no to others.
- 4) Police officers were having a conversation with Armstrong before they decided to use force against him.
- 5) Armstrong was exercising non-violent resistance when he decided to sit down and wrap himself to the post.
- 6) Police officers only waited 30 seconds before using the ECW against him.
- 7) Police officers used the drive stun mode of the ECW against Armstrong 5 times in less than 2 minutes.

Based on these facts, the Fourth Circuit Court of Appeals stated that the following factors should be considered in making use of force decisions:

- 1) Using force likely to harm a subject who is a danger to himself is manifestly contrary to the government's interest in initiating that seizure.
- 2) The amount of force to be employed against, an unarmed, mentally ill, or emotionally distraught individual, who is creating a disturbance or resisting arrest, is ordinarily different from that used to subdue an armed and dangerous criminal, who has recently committed a serious offense.
- 3) The degree of force necessary to prevent an individual who is affirmatively refusing to move and resisting the seizure is limited.
- 4) Deploying an ECW is a serious use of force because it causes excruciating pain.
- 5) Use of ECW can constitute excessive force when used in response to non-violent resistance.
- 6) The use of ECWs is a proportional use of force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using it.
- 7) Drive stun mode use of the ECW should be discouraged by law enforcement agencies. Using the ECW in drive stun mode to achieve pain compliance may have limited effectiveness and when used repeatedly, may even exacerbate the situation.

**RECOMMENDATIONS:**

After analyzing this case, our conclusions regarding the use of the ECW remain unchanged. The standards discussed above have previously been clearly established in the Ninth Circuit, Taser International Training, and effective policy standards.

Taser International has for several years' trained smart use guidelines that provide:

**If a person is not an immediate threat or flight risk:**

- Do not immediately resort to a CEW without first attempting to use negotiation, commands, or physical skills;
- Avoid using a CEW on a person who is actually or perceived to be mentally ill;
- Avoid using a CEW on elevated risk population member, unless necessary and justifiable;
- Do not use pain compliance if circumstances dictate that pain is reasonably foreseeably ineffective (usually due to drug, alcohol, or mental illness cause elevation of pain tolerance)

Prior to the ruling, the DLG Policy Center has recommended much of the following language referred to as Smart Use of ECWs:

- 1) Use of an ECW is considered a serious use of force.
- 2) When to use it: When confronting violent resistance that poses an immediate threat to the officers of others. It does not have to be a threat of great bodily harm or death.
- 3) When not to use it:
  - a. When confronting non-violent resistance, that does not represent a threat to police officers or others.
  - b. Do not resort to ECW without first attempting to use negotiation, command or physical skills.
  - c. Avoid using the ECW on an elevated risk population member unless it is necessary and objectively reasonable.
  - d. Do not use pain compliance or Drive Stun Mode when circumstances dictate that pain is reasonably foreseeable to be ineffective. (Example: Persons who are under the influence of alcohol or drugs or persons who appear to be or are known to be mentally ill.

Dealing with Mentally Ill or Emotionally Unstable Individuals:

- 1) Officer should make a greater effort to control the situation through less intrusive means.
- 2) When a person is neither a threat to himself or 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.

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