

## **Multiple Applications of Electronic Control Weapon(s) Attempt to Control or Punitive Measures?**

**April 2013**

In the past months, two different courts released decisions analyzing an officer's use of an electronic control weapon in the context of the 4<sup>th</sup> Amendment and allegations of excessive force. Both of these decisions give insight into the manner in which courts are currently evaluating the use of the weapon, the facts and circumstances surrounding an arrest, and a comparison of the suspect's behavior and resistance versus the level of force used. While these decisions come from two different judicial districts, one thing is certain, a disturbing trend is emerging in the method and manner in which officers employ force through the use of an electronic control weapon and the way in which courts are analyzing the officers' actions.

In Meyer v. Baltimore,<sup>1</sup> The Fourth Circuit Court of Appeals denied qualified immunity to an officer who repeatedly activated his "taser," holding that the officer's use of the taser was not objectively reasonable after the suspect was no longer resisting arrest; and that a reasonable person in his position who have known that the use of the "taser" in this manner violated clearly established constitutional rights.

In Parrish v. City of Mason,<sup>2</sup> the District Court denied summary judgment, finding the officers were not entitled to qualified immunity because the five tasings of the suspect once he was on the ground was unreasonable, and that the law was clearly established that the use of a taser on an incapacitated suspect who is not resisting is excessive force. The District Court also found that the department was not entitled to qualified immunity for the allegations of failure to meaningfully investigate the unconstitutional conduct and failure to properly train and supervise its officers.

### Meyer v. Baltimore

Ryan Meyers was a forty year old man diagnosed with bipolar disorder since the age of fifteen, who struggled with mental illness throughout his adult years, and lived with his parents. Through the years, law enforcement had been called to the Meyers house on five occasions prior to this incident to have Ryan forcibly detained and transported to a mental health facility for a psychiatric evaluation. On the evening of March 16, 2007, Ryan's mother called 911 to report that Ryan and his brother were engaged in a fight, and the 911 operator heard screaming in the background. Police were dispatched to the residence and Officer Romeo was the first to arrive on the scene. Upon arrival, Romeo found Ryan's father in the front yard with a towel against his face, covering a laceration on his nose, which was also swollen. Romeo then observed Ryan pacing inside the home carrying a baseball bat.

Officer Gaedke was second responder to the scene, and was familiar with Ryan's mental illness as she had recently arrested him following an incident at a nearby liquor store. Officers Romeo and Gaedke attempted to convince Ryan to surrender but concluded that Ryan would not voluntarily leave the residence, and based on his agitated state and possession of the baseball bat, Ryan posed a threat to the officers' safety. Romeo



contacted dispatch and requested an officer trained in the use of a taser be sent to the Meyers' residence. Officer Mee, authorized to use a taser, responded to the scene. Upon arrival, Mee spoke to Ryan in an attempt to get him to surrender voluntarily, but was unsuccessful. All officers, including Officer Callahan who had arrived on scene, entered the Meyers' house with a key provided by Ryan's brother, Billy.

Upon entering the home, Officer Mee ordered Ryan to drop the baseball bat. Ryan was still holding the bat when Mee deployed the taser, which struck Ryan's upper body. Ryan, who was six feet tall and weighed 260 pounds, did not drop the bat following the first taser shock (which lasted five seconds.) Mee tased Ryan a second time for five seconds, which caused Ryan to drop his bat. The third taser shock, lasting five seconds, caused Ryan to fall to the ground. After Ryan fell, Officer Mee and two other officers sat on Ryan's back. While the officers were on his back, Mee tased Ryan a fourth time – still in "probe mode." Mee then changed the taser's mode to "stun mode" and, during a period lasting slightly more than one minute, delivered six additional taser shocks to Ryan, each shock lasting between two and four seconds.

Following the tenth taser shock, officers discovered that Ryan appeared to be unconscious. When paramedics arrived on scene they found Ryan in a state of cardiac arrest, and were unable to revive him. The officers and witnesses gave conflicted statements regarding Ryan's actions during Officer Mee's fourth through tenth taser applications. Some of the officers stated that Ryan was actively resisting their efforts to place him in handcuffs, that Ryan was able to gain control of the bat, and that he had attempted to bite one of them. Officer Gaedke, however, testified that after Ryan fell, the officers were sitting on his upper, mid, and lower body, and that Ryan was "stiffening up and keeping his body rigid and keeping his hands underneath of his body." Billy testified that after Ryan fell to the ground, and the officers sat on his back, he was only able to move his legs.

The Plaintiff's filed a complaint against Baltimore County and Officers Mee, Romeo, and Gaedke, under 42 U.S.C. § 1983, alleging excessive force in violation of the Fourth Amendment. The District Court granted summary judgment as to all defendants, finding that the officers were immune from suit under the doctrine of qualified immunity. The Plaintiff's appealed the court's decision. "The doctrine of qualified immunity shields government officials from civil damages, provided that their conduct does not violate clearly established statutory or constitutional rights within the knowledge of a reasonable person." When applying the doctrine of immunity, courts utilize the two-step approach established in *Saucier v. Katz*:<sup>3</sup> (1) whether the facts alleged or shown establish that the police officer violated a constitutional right; and, if so (2) whether the right was "clearly established" at the time of the officer's conduct.

The Appellate Court first addressed Officer Mee's first three uses of the taser and concluded they did not constitute an unreasonable or excessive use of force, and did not violate Ryan's 4<sup>th</sup> Amendment rights. In reaching this conclusion the Court examined the time period surrounding these three tasings and found that Ryan was acting erratically, holding a baseball bat that he did not drop until receiving a second shock, and continued to advance toward the officers until receiving the third shock. The Court found that immediately prior to and during the deployment of the first three tasings Ryan posed an immediate threat to the officers' safety and that he was actively resisting arrest.

With regard to the additional seven taser shocks, the Court found that because at this point Ryan did not pose a threat to the officers and was not actively resisting arrest, the additional shocks were “unnecessary, gratuitous, and disproportionate” and violated Ryan’s 4<sup>th</sup> Amendment rights. In reaching this conclusion, the Court stated that “force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated.” The Court found that after the first three taser shocks, the evidence showed that Ryan dropped that bat and had fallen to the floor, several officers were on Ryan’s back, and he was only able to move his legs. The Appellate Court affirmatively stated that “[i]t is excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who no longer is armed, is brought to the ground, has been restrained physically by several other officers, and no longer is actively resisting arrest.”

Finding that Ryan’s 4<sup>th</sup> Amendment rights were violated, the Court next considered the second step of the qualified immunity analysis, a determination of whether the constitutional right was clearly established at the time the conduct occurred. Despite the 4<sup>th</sup> Amendment violation, Officer Mee would still be entitled to qualified immunity if a reasonable person in his position could have failed to appreciate that his conduct would violate Ryan’s rights. In its analysis, the Court stated that established law finds that “officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity.” The court further found that it was of no consequence that established law did not specifically indicate that it applied to a “taser” weapon. This conclusion applies to all unnecessary, gratuitous, and disproportionate force whether it be through the use of a gun, impact weapon, electronic control device, or any other weapon. Based on the preceding analysis, the Appellate Court concluded that Officer Mee was not entitled to qualified immunity.

There are several things that are concerning about the Court’s reasoning in *Meyer*. First, the Court contends that after the deployment of the first three taser shocks Ryan was no longer actively resisting. A reasonable officer, however, might interpret Ryan’s actions differently. In this case, the Court believed that the officers had control over the suspect given that three officers were “sitting” on his upper, mid, and lower back/torso area. A reasonable officer, however, could interpret the facts surrounding Ryan’s actions to indicate that by holding his body in a rigid manner with his arms tucked under his body (as described by the court) he was actively resisting. An officer may very well deem this behavior to be actively resisting, while this court claims this behavior indicated he was no longer resisting. Reading between the lines, the Court appears to be saying that so long as he is not thrashing about, he is not actively resisting. This is a troublesome interpretation of this suspect’s actions but is one that officers must bear in mind when using force to subdue a suspect. It appears that the reasonableness of the force used rests not on whether the suspect is in full compliance but whether the officers have “control” of the suspect. Second, the Court’s reasoning surrounding its finding of qualified immunity for the other two officer’s on scene is also concerning. The Court allowed the other two officer’s out of case through qualified immunity because they were “not responsible for the manner in which Officer Mee used his taser.” Departments should use caution in relying on this court’s reasoning on this particular issue. Often times Officers in this situation could still be held liable for their failure to intervene when an officer is using excessive or unreasonable force. Officers should not rely on the concept that because they did not have actual “control” over the actions of a particular officer that they have nothing to be worried about in terms of potential liability.

Parrish v. City of Mason

Boucher was a thirty-nine year old male, weighing more than 200 pounds, who entered a convenience store and made a lewd proposition to a lone nineteen-year-old female clerk. On that night, Boucher left the store after the clerk told him he was making her uncomfortable and had to leave. The next evening, however, Boucher returned and again made lewd comments to the clerk. Unbeknownst to Boucher, two officers (McCormick and Fry) were at the back of the store. The clerk approached the officers and informed them about Boucher's behavior. McCormick instructed Boucher to leave and both officers followed Boucher out of the store. In the parking lot, the officers instructed Boucher to stay away from the store and suspected that he might be intoxicated. The officers further noted that Boucher's vehicle was parked outside the marked lines and the front of his vehicle was damaged. As Boucher yelled that he was leaving and reached for his car door, the officers ordered him to stop and turn around. Boucher told McCormick to get away from him and McCormick told him to place his hands on the top of his vehicle or he would use his taser. Boucher then placed his hands on his vehicle. After Fry secured Boucher's left hand in the handcuffs, but before he could secure the right hand, Boucher spun around and struck Fry in the face. Boucher struck Fry a second time and drove him into Boucher's vehicle. McCormick aimed and deployed his taser at Boucher's chest area for a full five seconds. Boucher then jumped to his feet and proceeded for run across parking spaces, at which time the officers ordered him to stop or be tased again. Boucher did not stop and Fry tased him in his back, causing Boucher to fall face-first into the sidewalk in front of the store.

At this point, the Court noted that Boucher was on the ground and not actively resisting. A third officer, Walker, then arrived on scene and attempted to handcuff Boucher. Officers Fry and McCormick advised the third officer to back off and proceeding to taser Boucher five additional times – five second each – over the next fifty-six seconds. During this time, McCormick also kicked Boucher and struck him two to seven times with his baton. Fry and McCormick removed Boucher's hands and cuffed him with no resistance. Once they rolled Boucher over, however, the officer realized there was a large amount of blood on his face and the ground. Two officers began CPR, which was continued by arriving medics, but Boucher was pronounced dead at the medical center. Plaintiff's expert contends that the repeated tasings caused Boucher's heart to stop. Defendants' expert, however, contends that a skull fracture was the cause of his death.

The plaintiffs claimed that the tasings, strikes, and kicks after Officer Walker arrived on scene (and Boucher was on the ground) constituted excessive force and filed suit against Fry, McCormick, and the City of Mason, Ohio. The Defendants contend that they were justified in stopping Boucher and that, under established law, repeated tasings of a suspect that is actively resisting arrest does not constitute excessive force. The plaintiffs, however, claim that utilizing the "segmenting approach" of *Dickerson v. McClellan*,<sup>4</sup> Boucher was not actively resisting once he was on the ground and therefore, any force used against him after this point was excessive. In an excessive force case, the "segmenting approach" requires reevaluation of the reasonableness of force as the circumstances change. Under this approach, "officers must have acted reasonably during the application of force and in the moments directly preceding."<sup>5</sup> The court stated that although a "segmenting" analysis is correct, courts must also look at the totality of circumstances when viewing the officers' actions. The court further stated that it does not consider "the extent of the injury inflicted, but rather whether an officer subjects a detainee to gratuitous violence."<sup>6</sup>

As a preliminary matter, the Court found that the officers' initial stop of Boucher was justified. The court concluded, however, that even though Boucher was not a sympathetic character, and it was a rapidly unfolding situation, the Defendants "repeatedly tased Boucher in such a manner that a jury might find he was subjected to gratuitous violence from officers that momentarily 'lost it.'" The court found that a jury could conclude that the officers could have known that something other than resistance was the cause of Boucher's failure to comply while he was face down, and that the five tasing crossed the line of reasonableness. The Court further found that the facts could be viewed in a way to indicate that Boucher was not resisting at the time of the repeated tasers. Furthermore, established law finds that the use of a taser on an incapacitated suspect that is not resisting constitutes excessive force. The Court concluded that based on the preceding reasoning, the officers were not entitled to qualified immunity.

The Court also found that the City was not entitled to qualified immunity on the allegations that the City ratified the officers' actions by conducting an improper investigation and failure to train or supervise officers. The Court found that a reasonable fact finder could find that the following actions showed that the City ratified the officers' actions rather than conducting a meaningful review: (1) officers failed to complete use of force reports by the end of their shift whenever there is a death or a taser used, as required by policy; (2) there were inconsistencies in the officers' written statements and evidence from the taser download report; (3) officers omitted from their statements that Officer Fry tased Boucher six times; (4) statements were prepared with the assistance of attorneys weeks after Boucher's death; (5) the investigator did not interview Walker (the only officer who did not use force); and chose not to test the tasers despite the Ohio Bureau of Criminal Identification and Investigation's recommendation.

The Court also held that a jury could find that the City failed to adequately train its officers. The Court reasoned that even though the Department integrated recommendations from the October 2009 manufacturer bulletin warning<sup>7</sup> at roll call training for all shifts, McCormick testified that he aimed at Boucher's center mass. The Court concluded that based on this testimony, "a jury might find that the City failed to adequately implement the warnings regarding aiming taser shots at the center mass of a suspect."

What this case most conveys to officers is that they cannot rely on the suspect's initial actions or resistance to justify a repeated use of force once that initial resistance has ended. Furthermore, officers must be cognizant of whether a suspect is capable of following commands issued during an arrest situation. The Court implied that it was quite possible that Boucher may not have been alive at the time the officers issued their commands to comply. Furthermore, the Court used the words "lost it" when describing the officers' actions. Officers must be able to recognize when the use of the taser stops being an attempt to gain compliance of a suspect and becomes a method of delivering punitive measures. If three deployments of an electronic control weapon do not provide the necessary control to arrest a suspect, perhaps officers need to reassess and consider an alternate method.

The Courts analysis of the Department's failure to train is also worrisome and should cause concern among department leaders. The court appears to be saying that even though the department issued the warning bulletin regarding aiming an ECW at center mass and conducted Roll Call training, the fact that the officer still targeted the suspect's center mass was an indication that the Department failed to properly train and

supervise it's officers. This is a very dangerous precedent to be floating around. This analysis does not take into account that subjects don't stand still and that the use of a ECW on a actively resisting subject means that sometimes application will in the chest area. That simply cannot be enough to incur liability for failure to train.

Both of these cases are troubling and should serve as a wakeup call to Department leaders everywhere. As a starting point, Departments would be wise to pull out their ECW polices and take a good, hard look at the guidance and training they are providing their officers. Departments should begin their assessments by focusing on the policy sections pertaining to proper use of the weapon and precautions/prohibitions. Does the policy properly define active versus passive resistance? Does it require officers to provide verbal commands to the suspect before deploying the weapon? Does it require an officer to continually assess the situation to determine whether a suspect is capable of complying with commands? Does it provide that each application of the electronic control weapon is a separate application of force? These are all questions Departments should ask themselves. If the answers to these questions are "no," Departments must take immediate action and update policies to reflect proper police practices and provide training to its officers on any revised policy. It is strongly recommended that ECW training should be more then just the manufacturer training; it should include a detailed review of department policy. Should departments fail to ensure that they maintain comprehensive electronic control weapon policies and provide ongoing training programs, they could very well find themselves and their officers in a situation described in the above cases.

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<sup>1</sup> \_\_\_ F.3d \_\_\_; 2013 WL 388125 (C.A.4, 2013)(Md.)

<sup>2</sup> 2013 WL 1190022 (S.D. Ohio 03/22/13)(No. 1:11-CV-00861-SAS-SKB)

<sup>3</sup> 533 U.S. 194 (2001)

<sup>4</sup> 101 F.3d 1151 (6<sup>th</sup> Cir. 1996)

<sup>5</sup> (citing *Bougress v. Mattingly*, 482 F.3d 886, 889 (6<sup>th</sup> Cir. 2007))

<sup>6</sup> (citing *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505 (2012))

<sup>7</sup> Taser Bulletin 15.0 warning that sudden cardiac arrest can occur when a suspect is tased in the chest area and officer's should not aim for center mass.