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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

By Don Hays

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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Lopez v. Sheriff of Cook County, No. 20-1681, 2021 WL 1326828, April 9, 2021.

Lopez was seen firing a firearm on a public street. An Officer shot him. Excessive force?

FACTS: Lopez was driving his car down a street when he bumped into a car parked outside a local bar. After the accident, some bystanders who had been standing outside the lounge approached Lopez's car and started to beat him. (A security video recorded the incident.) One of Lopez's passengers got out of the back seat and waved a handgun around. As the assailants started to scatter, Lopez also got out of the car and took the gun from his passenger. Lopez then brandished the gun toward the now-scattered ex-assailants. Toward the end of Lopez's on-street confrontation with the scattered assailants, an off-duty officer arrived on the scene. Lopez walked back toward his car and fired his gun—twice—in the general direction of the assailants (though at an upward angle). The Officer started moving toward Lopez with his gun drawn, and Lopez continued to move toward his car, which was in the general direction of the Officer. As Lopez and the Officer moved generally toward each other, Lopez waved the gun up to shoulder level and then quickly back down.

Lopez tried to open his car door with the gun still in hand. Before Lopez could get into the car, the Officer started firing. According to Lopez, the Officer did not announce his office and did not order Lopez to drop his gun. The Officer's first shot struck Lopez at 3:56:27. Lopez dropped the gun one second later as he turned and started to run from the Officer. The Officer continued to fire for two more seconds, ending at 3:56:30, for a total of three seconds of shots fired. Lopez ran to the sidewalk with the Officer trailing close behind. A sidewalk struggle ensued between the pair, as the officer tried to restrain Lopez from behind while holding his arm around Lopez's neck. (A choke hold?) Meanwhile, Lopez's passenger picked up the gun Lopez dropped and almost immediately fired a shot (or possibly two) at the Officer. While the Officer and Lopez were struggling, the passenger came within a few feet of the Officer and then aimed the gun *directly* at the Officer. The passenger then backed away several feet and eventually circled around the sidewalk, changing the angle of approach to the Officer, who in turn rotated with Lopez so that the officer remained crouched behind Lopez. Meanwhile, the Officer alternated between pointing his gun toward Lopez's temple, waving off persons who came too near, and pointing his gun at the passenger as Lopez continuously swatted at the officer's gun arm, including when the Officer was pointing his gun at the passenger rather than Lopez. In these few minutes, the passenger pointed the gun at the Officer at least three more times. After the third time, the passenger ran away just as police cars started arriving on the scene.

Lopez filed a civil-rights action against the county, the sheriff, and the officer, alleging that the officer used excessive force. The Defendants then moved for summary judgment. The Federal District Court grant the defendant's motion.

DISTRICT COURT'S FINDINGS: #1: The Court held that it was not clearly established in this case that the officer's decision to shoot Lopez was objectively unreasonable, and thus the officer was entitled to qualified immunity from liability in Lopez's civil-rights excessive force action, even if Lopez did not point the gun at the officer, Lopez's shots were fired at an upward angle rather than at someone, the officer did not announce his authority, the officer did not order Lopez to drop his gun, and the officer continued shooting Lopez after he dropped his gun. **WHY:** The officer heard two gunshots and then immediately saw Lopez holding a gun; there were several pedestrians nearby; the parties were close to one another, and Lopez had not surrendered. **#2:** The Court also held that it was not clearly established in this case that the Officer's actions in placing Lopez in a "chokehold," pointing a gun at his temple, threatening to kill him, and using him as a "human shield" after Lopez had dropped his gun violated the Fourth Amendment, and thus the Officer was entitled to qualified immunity from liability in this civil-rights excessive force action, even if the Officer had not announced his authority. **WHY:** Another suspect had picked the gun up and attempted to shoot the Officer, and Lopez repeatedly swatted at the Officer's gun arm.

ISSUE ON APPEAL: Did the District Court properly grant summary judgment to the defendants?

THE LAW: A: Doctrine of qualified immunity balances dueling interests, allowing officials to perform their duties reasonably without fear of liability on one hand and affording members of public ability to vindicate constitutional violations by government officials who abuse their offices on the other. **B:** For law to be clearly established for purposes of qualified immunity, existing precedent must have placed statutory or constitutional question beyond debate. **C:** Assessing whether officer used excessive force turns on whether officer's actions are objectively reasonable in light of facts and circumstances confronting officer. **D:** In evaluating Fourth Amendment excessive force claim, court must consider facts and circumstances of each particular case, including severity of crime at issue, whether suspect poses

immediate threat to safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. **E:** Person has right not to be seized through use of deadly force unless he puts another person, including police officer, in imminent danger or he is actively resisting arrest and circumstances warrant that degree of force. **F:** When individual has become subdued and is complying with officer's orders, officer may no longer use deadly force. **G:** Determining whether officer violates "clearly established law" for qualified immunity purposes requires court to look at past cases with specificity **H:** Specificity is critical to making qualified immunity workable doctrine in Fourth Amendment context, where it is sometimes difficult for officer to determine how relevant legal doctrine will apply to factual situation that officer confronts. **I:** In evaluating qualified immunity defense, clearly-established-law assessment does not require case with identical factual circumstances, lest qualified immunity become absolute immunity, but right in question must be so clearly established such that it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. **J:** Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. **K:** Putting gun to someone's head is use of force for Fourth Amendment purposes.

SUB-ISSUE #1: Did the District Court err in finding the Officer immune from liability for shooting Lopez in the street?

FINDING #1: The Court held that it was not clearly established in November 2014 that the off-duty officer's use of deadly force against gunman violated the Fourth Amendment, and thus the officer was entitled to qualified immunity from liability in the gunman's § 1983 excessive force action, even if the officer had not given a warning, and the officer continued firing after the gunman had dropped his gun. **WHY:** The gunman had just popped off two rounds in populated city street, the gunman was walking toward the officer and bystanders, and the officer fired all his shots in a span of three seconds.

SUB-ISSUE #2: Did the District Court err in finding the Officer immune from liability for using Lopez as a "human shield?"

FINDING #2: The Court held that it was not clearly established in November 2014 that the off-duty officer's aggressive restraint of the gunman after subduing him--including using the gunman's body as a shield and placing his gun to the gunman's head when the gunman's companion picked up the gun and tried shooting the officer--violated the Fourth Amendment, and thus the officer was entitled to qualified immunity from liability in gunman's § 1983 excessive force action.

CONCLUSION: The Court held: "What makes this case difficult is the distinct impression the video leaves us with after watching it multiples times. By the looks of it, there is a reasonable chance that Fernando Lopez was about to get in his car and leave the scene right when (the Officer) opened fire. That observation invites the conclusion that (the Officer) may not have needed to use lethal force at all. This whole situation may have been avoided had cooler heads prevailed that morning. "Hindsight—aided by watching this scene unfold frame by frame on video footage from four distinct angles in the comfort of the courthouse—allows us to ponder how (the Officer) could have best handled the situation. But that is not our inquiry here. We are left to evaluate whether (the Officer's) conduct violated clearly established law, given the dangerous, delicate, and dynamic circumstances he faced that morning and the state of the law at the time. The benefit of hindsight does not lower the clear and high bar that is the law of qualified immunity. In this case that bar compels us to affirm the grant of qualified immunity."

QUIZ QUESTIONS FOR THE MONTH OF DECEMBER – 2021

Lopez v. Sheriff of Cook County, No. 20-1681, 2021 WL 1326828, April 9, 2021.

1. Under Illinois law, an officer cannot continue to use force against a suspect who is subdued and complying with an officer's orders.

- a. True.
 - b. False.
2. The doctrine of “Qualified Immunity” was created to shield Officers from civil liability pursuant to Illinois law.
- a. True.
 - b. False.
3. In this case, Lopez argued that the Officer who shot him should be held liable for his use of excessive force because the Officer failed to warn Lopez before shooting him. Did the District Court agree with that argument?
- a. Yes.
 - b. No.
4. The Officer argued that his use of Lopez as a “human shield” to fend off the passenger’s attack did not violate clearly established Illinois law. Did the District Court agree with this argument?
- a. Yes.
 - b. No.

QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF DECEMBER – 2021

Lopez v. Sheriff of Cook County, No. 20-1681, 2021 WL 1326828, April 9, 2021.

1. Under Illinois law, an officer cannot continue to use force against a suspect who is subdued and complying with an officer's orders.
a. True. This Court noted: “And a police officer cannot continue to use force against a suspect who is subdued and complying with an officer's orders. Johnson v. Scott, 576 F.3d

2. The doctrine of “Qualified Immunity” was created to shield Officers from civil liability pursuant to Illinois law.

a. ***True.*** The Court held: “Under qualified immunity, government officials are shielded from civil liability so long as ‘their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” Zimmerman v. Doran, 807 F.3d 178 (7th Cir. 2015).

3. In this case, Lopez argued that the Officer who shot him should be held liable for his use of excessive force because the Officer failed to warn Lopez before shooting him. Did the Courts agree with that argument?

b. ***No.*** The District court concluded that under the circumstances of this case, the conduct of the Officer in shooting Lopez without first warning him did not violate clearly established Illinois law.

4. The Officer argued that his use of Lopez as a “human shield” to fend off the passenger’s attack did not violate clearly established Illinois law. Did the Courts agree with this argument?

a. ***Yes.*** The Court held that “(i)t was not clearly established in 2014 that the sheriff's officer's actions in placing the suspect in a chokehold, pointing a gun at his temple, threatening to kill him, and using him as human shield after the suspect had dropped his gun violated the Fourth Amendment, and thus the officer was entitled to qualified immunity from liability in the suspect's § 1983 excessive force action, even if the officer had not announced his authority, where another suspect had picked the gun up and attempted to shoot the officer, and the suspect swatted at officer's gun arm.”