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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

By Don Hays

Month of August – 2022

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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE WEEK

Month of August - 2022

Doxtator v. O'Brien, No. 21-2101, 2022 WL 2681409, July 12, 2022.

CASE: O'Brien shot an unarmed suspect. Was this conduct unreasonable and should O'Brien receive qualified immunity?

FACTS: The police arrested Jonathon Tubby after discovering he had an outstanding arrest warrant. Following his arrest, the Officers placed Tubby in the back of squad car, handcuffed and secured by a seatbelt, in order to transport him to the county jail. Somehow, during the ride to the jail, Tubby managed to move his hands under his legs, removed his seatbelt, and moved his right hand under his shirt. Once at the jail, the Officers attempted to remove Tubby from the squad car, but he refused to cooperate. During this interaction, the Officers noticed that Tubby kept his right hand under his shirt. Suspecting that they may have overlooked a weapon when initially searching Tubby, the Officers immediately backed off and called for backup. A SWAT team arrived and attempted to convince Tubby to exit the squad car. He refused and kept warning the Officers that he "would do it."

Eventually, the SWAT team broke out the rear window of the squad car and, without warning Tubby, sprayed OC spray into the passenger compartment of the car. While still refusing to show the Officers both of his hands, Tubby crawled out of the rear window of the squad car and stood on its trunk. An Officer fired a bean bag round that struck Tubby in the abdomen. This caused him to fall off of the squad car. Tubby quickly regained his feet and started running towards an open sally port door. At that moment, a K-9 officer released his dog. The dog locked onto Tubby's rear-end, and the officer controlling the dog pulled back on the lead to keep Tubby from advancing towards the sally port entrance. Video recorded from a squad car parked outside of the sally port shows officers scattering to find cover as this was transpiring. An Officer fired another beanbag round at Tubby, causing him to fall to the ground. While he was falling, his right hand fell above his head, empty. However, the Officers were then unable to see Tubby's left hand. Then, as the dog pulled Tubby backwards, Officer O'Brien heard a "pop" and fired his gun eight times, striking Tubby with five of those rounds. All told, approximately ten seconds passed between Tubby exiting the squad car via the rear windshield and O'Brien shooting him. Tubby died as a result of his wounds and Tubby's estate sued claiming the excessive use of force. The defendants moved to dismiss, and the District Court granted their motion. The Estate then brought this appeal.

ARGUMENT: The Estate's primary cause of action was its civil rights claim against O'Brien alleging use of excessive force. The defendants argued that the dismissal of the case against them was proper on this claim because the Estate could not show O'Brien's use of deadly force was unreasonable. In the alternative, they argued that even if the use of deadly force was unreasonable, O'Brien was entitled to qualified immunity.

THE LAW: Federal law allows suits against government officials who violate a person's constitutional rights. "A police officer's use of deadly force on a suspect is a seizure within the meaning of the Fourth Amendment," so an unreasonable seizure is a violation of the Fourth Amendment cognizable under § 1983. This reasonableness standard is objective, in the sense that it is the facts and circumstances presented to the officer at the time of the conduct at issue, rather than the officer's subjective intent, that matter. With regard to the use of deadly force, the Supreme Court has clarified: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon ..., deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

In evaluating whether an officer used excessive force, we are wary of hindsight bias and acknowledge the real challenges that officers regularly face on the job. These challenges often turn dangerous, calling for "split-second judgments" to safeguard both the public and the responding officers "in tense, uncertain, and rapidly evolving" circumstances. The opportunity to debate the merits of various law enforcement responses "in the peace of a judge's chambers" is a privilege unavailable to most officers in real time.

ISSUE #1: Did O'Brien Violate a Constitutional Right Belonging to Tubby?

FINDINGS: In this case, the Court determined that first and foremost, Tubby intentionally led the officers to believe he was armed by keeping his hand concealed under his shirt in a manner that imitated the shape of a gun, and he threatened repeatedly to "do it" as officers attempted to persuade him to surrender. By doing so, he effectively escalated the situation into an armed standoff between himself and police. Furthermore, even when he eventually did exit the squad car after being

forced out with pepper spray, Tubby did not surrender. Instead, even after he was hit with a bean bag round, he stood up and ran towards the exit and the group of officers standing thereby. Given that Tubby was undeterred by the officers' attempts to subdue him via less forceful means and given that Tubby himself seemed to be intentionally communicating to the officers that he was armed and not afraid to “do it,” it was reasonable for O'Brien to deploy deadly force as Tubby rushed towards the exit and the nearby officers.

SUB-ISSUE #1: The Estate argued that O'Brien and the other officers should have known that Tubby was unarmed because an Officer had already searched him before placing him handcuffed in the back of the squad car. In response, the Court of Appeals noted that by the time the officers reached the sally port and opened the door to let Tubby out, he had squirmed his handcuffed hands from behind his back. The Court held that it would have been reasonable for O'Brien to infer that Tubby had done this with a particular goal in mind—for instance, to retrieve a weapon not found on Tubby's person or one that was laying in the back of the squad car. In short, the fact that Tubby had wriggled his handcuffed hands under his feet and then began acting like he was concealing a weapon under his shirt was more than enough to justify O'Brien's belief that he was armed, notwithstanding the earlier search.

SUB-ISSUE #2: The Estate also repeatedly claims that Tubby was “subdued” at the time O'Brien shot him, because he was “handcuffed, blinded, face-down on the ground, and being attacked by a police canine.” This, the Estate argued, makes O'Brien's decision to shoot unreasonable. The Court responded by declaring that after carefully reviewing the record, it could find no clear video showing how Tubby was positioned when O'Brien shot him. The autopsy photos are consistent with his being shot while in a prone position, however, and the Estate's expert testified that the abrasions on his chin were sustained pre-mortem, indicating he may have fallen to the ground before being shot. Even so, however, we conclude that no reasonable jury could find O'Brien's decision unreasonable under the circumstances. First, being on one's stomach on the ground does not preclude one from firing a gun, so the fact that Tubby was face down on the ground and handcuffed does not render him “subdued,” especially if officers believed that one of his hands contained a firearm. Additionally, by the time he was shot, Tubby had thwarted all other attempts officers had made to subdue him. These included: handcuffing him, spraying him with pepper spray, firing two bean bag rounds at him, and releasing a canine unit to apprehend him. Even after all of these measures, Tubby continued to rush towards the sally port exit and the officers guarding it. So, although Tubby was on the ground at the time O'Brien fired his gun in response to what he believed to be a gunshot, it was reasonable for O'Brien to believe that Tubby was not in fact subdued and would imminently get back up to his feet to rush for the exit. In fact, mere seconds earlier, O'Brien had observed Tubby do just that after being shot with the first bean bag round.

SUB-ISSUE #3: Finally, the Estate argued that O'Brien's conduct was unreasonable because, by the time he fired his weapon, he had seen each of Tubby's hands empty and thus should have deduced that he was unarmed. The Court concluded that the district court properly rejected this argument. Even if O'Brien had seen each of Tubby's hands empty, he never saw them simultaneously empty and thus could not be sure that Tubby had not simply moved his weapon from one hand to the other underneath his shirt. Moreover, the Court noted that although the Estate insisted that O'Brien should have known that both of Tubby's hands were empty, the record revealed that only about ten seconds elapsed between Tubby's exit from the squad car and O'Brien's discharge of his firearm. And this was a hectic ten seconds: multiple bean bag rounds were fired, officers were frantically shuffling around the sally port's exit with guns drawn, a canine unit was released to pursue Tubby, and Tubby fell multiple times. The Court held that to expect the responding officers to have kept a running mental inventory of exactly what was in which of Tubby's hands at each moment was unreasonable given the pandemonium playing out in the sally port.

ISSUE #2: Waa O'Brien Entitled to Qualified Immunity from Liability for Shooting Tubby?

THE LAW: The doctrine of qualified immunity shields public officials from being sued in their official capacities unless their actions “violated a statutory or constitutional right that was clearly established.” The Supreme Court has held that a right is “clearly established” for qualified immunity purposes if its “contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.” In other words, “existing precedent must have placed the statutory or constitutional question beyond debate.”

FINDINGS: The Court declared that since the Estate could point to no case similar to this case that declared the Officer's conduct unreasonable or excessive, the right which O'Brien allegedly violated was not clearly established. Therefore, O'Brien was entitled to qualified immunity.

CONCLUSION: The Court of Appeals affirmed the District Court's order dismissing this case. The Court concluded that no reasonable jury could have found O'Brien's conduct unreasonable, and O'Brien was entitled to qualified immunity from liability even if his act of shooting Tubby was found to have been unreasonable.

QUIZ QUESTIONS FOR THE MONTH OF AUGUST – 2022

Doxtator v. O'Brien, No. 21-2101, 2022 WL 2681409, July 12, 2022.

1. Generally, a Federal civil rights action can be brought when a police officer violates the constitutional rights of a suspect.
 - a. True.
 - b. False.

2. Under certain circumstances, can an Illinois police officer be immune from liability for shooting a suspect?
 - a. Yes.
 - b. No.

3. In this case, the People argued that no reasonable jury could have concluded that the Officer acted unreasonably by shooting . Did the Court of Appeals agree with this finding?
 - a. Yes.
 - b. No.

4. In order to hold a police officer liable for violating a suspect's constitutional rights, the plaintiff must prove that the constitution right violated by the Officer was "clearly established." The Court of Appeals concluded in this case that the Estate provided sufficient prior cases to prove that the rights violated by the Officer were clearly established.
 - a. True.
 - b. False.

QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF AUGUST – 2022

Doxtator v. O'Brien, No. 21-2101, 2022 WL 2681409, July 12, 2022.

1. Generally, a Federal civil rights action can be brought when a police officer violates the constitutional rights of a suspect.
 - a. True. In broad terms, § 1983 authorizes suits against government officials who violate a person's constitutional rights. 42 U.S.C. § 1983. “A police officer's use of deadly force on a suspect is a seizure within the meaning of the Fourth Amendment,” so an unreasonable seizure is a violation of the Fourth Amendment cognizable under § 1983. *Ybarra v. City of Chi.*, 946 F.3d 975, 978 (7th Cir. 2020) (quoting *Horton v. Pobjecky*, 883 F.3d 941, 948 (7th Cir. 2018)); see *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989).
 - b. False.
2. Under certain circumstances, can an Illinois police officer be immune from liability for shooting a suspect?
 - a. Yes. The doctrine of qualified immunity shields public officials from being sued in their official capacities unless their actions “violated a statutory or constitutional right that was clearly established.” *Plumhoff v. Rickard*, 572 U.S. 765, 778, 134 S. Ct. 2012, 188 L.Ed.2d 1056 (2014)
 - b. No.
3. In this case, the People argued that no reasonable jury could have concluded that the Officer acted unreasonably by shooting . Did the Court of Appeals agree with this finding?
 - a. Yes. The Court held: “Even viewing them (the facts of this case) in a light most favorable to the Estate, we conclude that no reasonable jury could find O'Brien's conduct unreasonable under these circumstances.”
 - b. No.
4. In order to hold a police officer liable for violating a suspect’s constitutional rights, the plaintiff must prove that the constitution right violated by the Officer was “clearly established.” The Court of Appeals concluded in this case that the Estate provided sufficient prior cases to prove that the rights violated by the Officer were clearly established.
 - a. True.
 - b. False. The Court declared: “Even assuming O'Brien had violated a constitutional right belonging to Tubby, the Estate has not put forth any cases convincing us that the right was “clearly established.”