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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

By Don Hays

Month of November – 2022

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Esker v. Lutz, No. 21-2574, 2022 WL 3544402, August 18, 2022.

Esker was a mean drunk. While drunk he picked up a chain saw and threatened his ex-wife. An Officer shot and killed him. *Excessive Force*?

FACTS: Linda Esker ("Linda") called the Monroe County Sheriff's Department about her ex-husband, Edwin. Edwin had a drinking problem, and when he was angry, his eyes would get big, and his jaw would get set. Prior to calling the police, Linda, who had been out shopping, had been informed by her son that Edwin was drunk. He also told her to call the police. Her daughter also called her and told her that Edwin had been in the house looking for ammunition for his handgun. When Linda returned home, Edwin was yelling and came to the door with a "sad zombie-like look on his face." Since she had been warned about Edwin, since she knew he had been looking for ammunition, and since he mouthed, "I'm going to kill you" while at the door, she called the police. She told the 911 dispatcher that Edwin was at her door and that he threatened to kill her. She also told the dispatcher that Edwin had a chain saw that worked and he was headed toward the driveway.

Two Officers in separate cars were dispatched to the Esker residence. The dispatcher told Officer A that there had been a disturbance, that Esker had made threats, and that Esker was yelling and screaming and drunk. Officer B was informed that Esker was screaming at his ex-wife (Linda), was banging on the door, had a chainsaw, and threatened to kill her. Although Officer A was not in direct communication with Linda, he was aware of the ongoing 911 conversation, and he provided advice regarding hiding in a safe place and being ready to defend herself with a baseball bat. Prior to arriving at the Esker residence, Officer A turned off his siren and emergency lights to de-escalate the situation and not announce his arrival; however, he was in full uniform and driving a fully marked squad car. Officer A arrived at the address before Officer B. As Officer A came around a 90-degree turn, he saw the top of a man's head through tall grass and stopped his vehicle. Believing it to be Esker, Officer A stopped his vehicle so he could talk to him. Officer A got out of his squad car and walked to the front of his vehicle. He saw Esker coming towards him with a clenched jaw and wide eyes and the chainsaw in his hands. (The saw was running, and it was loud.) Officer A drew his firearm and tried to get Esker to lower the chainsaw, but he continued forward and started to raise the chainsaw. Officer A feared for his safety and, after giving a final verbal warning, fired off three (3) shots in quick succession.

Esker's Estate (his daughter) brought suit against Officer A and alleged that he had used excessive force. Officer A asked the Federal District Court to dismiss the Estate's case against him. It did. The Estate then brought this appeal before the Seventh Circuit Court of Appeals.

ISSUE: Did the district court err in dismissing the Estate's case?

ARGUMENT: The daughter argued that Officer A was unjustified in using deadly force by discharging his service weapon, which resulted in the death of her father. Specifically, she asserted that Officer A's actions deprived her father of the following rights under the U.S. Constitution: (a) Freedom from the use of excessive force; (b) Freedom from deprivation of liberty without due process of law; and (c) Freedom from summary punishment and/or execution. She further claimed to have been deprived of her father's love, companionship, society, guidance, and affection.

SUB-ISSUE #1: Excessive Force.

THE LAW: A police officer's use of deadly force constitutes a "seizure" within the meaning of the Fourth Amendment; and therefore, is constitutional only if it is reasonable. Reasonableness is not based on hindsight, but rather is determined considering the perspective of the officer on the scene, allowing "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." The focus is on whether the actions of the officer are objectively reasonable. In other words, if an officer believes that the suspect's actions place him, or others in the immediate vicinity, in imminent danger of death or serious bodily injury, deadly force can reasonably be used. Deadly force may be used if the officer has probable cause to believe that the armed suspect (1) "poses a threat of serious physical harm, either to the officer or to others," or (2) "committed a crime involving the infliction or threatened infliction of serious physical harm" and is about to escape. Whenever possible under the circumstances, the officer should try to identify himself as a law enforcement officer to the suspect. An officer's determination of the appropriate level of force to use must be measured from the "perspective of a

reasonable officer on the scene, rather than with the 20/20 vision of hindsight." What is important is the amount and quality of the information known to the officer at the time he fired the weapon when determining whether the officer used an appropriate level of force. Thus, "when an officer believes that a suspect's actions [place] him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force."

Where an officer uses deadly force, that officer must have "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Whether the officers' actions are "objectively reasonable" depends on the facts and circumstances confronting them, not the officers' underlying intent or motivation."

FINDINGS: The District Court considered what Officer A knew. He knew the following, which was being conveyed by the dispatcher: (1) Linda called 911 saying that Esker had been in her house looking for ammunition for his gun; (2) Esker had a firearm and maybe ammunition; (3) Esker threatened to kill Linda; (4) Esker was trying to gain entry into her home; (5) Esker was intoxicated and agitated; and (6) Esker had a running chainsaw and was headed up the driveway. The Court held that given these facts, Officer A's belief that he could use deadly force was reasonable and justified. The Court held that although a person has a constitutional right not to be shot, that right is not absolute and is inapplicable if an officer reasonably believes that he poses a threat to the officer or someone else. Because Officer A reasonably feared for his life, the life of his partner, as well as lives of the Esker family members, the Court held that his use of excessive force was justified and there was no constitutional violation that prohibited the defense of qualified immunity. The Court of Appeals agreed with this finding.

SUB-ISSUE #2: Qualified Immunity? Next, the District Court considered whether Officer A's conduct was so egregious so as to violate his right to qualified immunity? The Court said no, because he did not violate Esker's constitutional rights. Officer A was acting in defense of himself and defense of others. According to the Court, fourth amendment principals hold that a police officer may not seize an unarmed, non-dangerous suspect by shooting him dead, and that, when feasible, some warning should be given before the use of deadly force. The Court concluded that in this case the record was clear that Esker was not an unarmed, non-dangerous suspect – he was carrying a running chainsaw and he had threatened to kill his ex-wife, Linda. Moreover, Officer A stated that he drew his firearm and gave verbal warnings. The Court declared that it would not impose an additional burden that the Officer must be certain the decedent heard the warnings over the running chainsaw. Again, the Court of Appeals agreed with this finding.

The Estate's position was that the Officer shot Esker in the jaw, and then six seconds later shot him two more times in the chest in quick succession. It argued that the Officer's conduct was in violation of clearly established law and was egregious because that first shot to the jaw would most likely have neutralized or incapacitated the perceived threat and the Officer should not have fired the second and third shots. The Estate further argued that the second shot was survivable, but that it would have incapacitated Esker. According to the Estate, the third shot fired as a Coup de Grace, which was, in essence, an execution. However, the District Court and the Court of Appeals noted that the 911 audio recording itself disproved this argument, wherein all three shots were heard in quick succession with no break in between.

The Estate also contended that Officer A should have stopped to reassess the situation between the second and third shots fired. In response, the Court noted that there is no evidence that the threat was neutralized. The Court held that when all shots are fired in one quick volley, as here, there is no effect on the qualified immunity analysis. Indeed, if police officers are justified in firing at a suspect to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. The Court held that had a second round of shots occurred after an initial round incapacitated the decedent, it would be a different case, but there is no evidence that Officer A fired more than one round of shots, nor was there any evidence that Esker was incapacitated before the first round of shots ended. According to the Court, qualified immunity operates to protect officers from the sometimes "hazy border between excessive and acceptable force". The qualified immunity standard "gives ample room for mistaken judgment" and protects "all but the plainly incompetent or those who knowingly violate the law". This accommodation for reasonable error exists because officials should not always err on the side of caution because they fear being sued. The Court of Appeals once more agreed and concluded that numerous cases have held that under these circumstances, the arresting officer was permitted not only to shoot once, but to keep shooting until "the threat [had] ended."

CONCLUSION: The Court concluded that the estate did not show that the use of deadly force on these facts (close proximity and continuing to advance, a running chainsaw, and a failure to obey oral commands) was a violation of the suspect's constitutional rights. Nor is the conduct so obviously egregious as to make qualified immunity inappropriate. For these reasons, the findings of the District Court were affirmed.

QUIZ QUESTIONS FOR THE MONTH OF NOVEMBER – 2022

Esker v. Lutz, No. 21-2574, 2022 WL 3544402, August 18, 2022.

1. The Fourth Amendment provides that an Officer's use of deadly force against a suspect constitutes a seizure of that suspect.

   a. True.

   b. False

2. The Court in this week's case stated: "Whenever possible under the circumstances, the officer should try to identify himself as a law enforcement officer to the suspect." Does Illinois statutory law now require a police officer to identify himself as a police officer before using force against a suspect?

   a. Yes.

   b. No.

3. In this week's case the Court declared: "whether the officers' actions are "objectively reasonable" depends on the facts and circumstances confronting them, not the officers' underlying intent or motivation." Does Illinois statutory law now provide that a police officer's "intent or motivation" may render the Officer's use of force illegal?

   a. Yes.

   b. No.

4. **ILLUSTRATIVE CASE:** Two Officers noticed that a suspect they had detained had a plastic baggie in his mouth. In order to prevent the suspect from swallowing the baggie, the Officers grabbed the suspect by the throat and forced him to spit the baggie out. The appellate court declared that the Officers had probable cause to believe that the baggie contained evidence of a crime, that the Officers had not used excessive force in recovering the baggie, and that the Officers had not used a "Choke-Hold" on the suspect. Nevertheless, the Court declared that the Officers' conduct was illegal and suppressed the evidence.

   a. True.

   b. False.

QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF NOVEMBER – 2022

Esker v. Lutz, No. 21-2574, 2022 WL 3544402, August 18, 2022.

1. The Fourth Amendment provides that an Officer's use of deadly force against a suspect constitutes a seizure of that suspect.

   a. ***True.*** As the Court in this case stated: "A police officer's use of deadly force constitutes a "seizure" within the meaning of the Fourth Amendment; and therefore, is constitutional only if it is reasonable. Tennessee v. Garner, 471 U.S. 1, 11 (1985); DeLuna v. City of Rockford, Ill., 447 F.3d 1008, 1010 (7th Cir. 2006).

2. The Court in this week's case stated: "Whenever possible under the circumstances, the officer should try to identify himself as a law enforcement officer to the suspect." Does Illinois statutory law now require a police officer to identify himself as a police officer before using force against a suspect?

   a. ***Yes.*** Effective July 1, 2021, Section 7-5 of the Criminal Code, Peace officer's use of force in making arrest, now provides: "Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify himself or herself as a peace officer and to warn that deadly force may be used." (720 ILCS 5/7-5(a-5)) Public Act 101-0652.

3. In this week's case the Court declared: "whether the officers' actions are "objectively reasonable" depends on the facts and circumstances confronting them, not the officers' underlying intent or motivation." Does Illinois statutory law now provide that a police officer's "intent or motivation" may render the Officer's use of force illegal?

   a. ***Yes.*** Effective July 1, 2021, Section 7-5.5 (e) (1) of the Criminal Code, Prohibited use of force by a peace officer, now provides: "A peace officer, or any other person acting under the color of law, shall not: (i) use force as punishment or retaliation. (720 ILCS 5/7-5.5(e)(1)) Public Act 101-0652. Consequently, an Officer's intent or motivation (to punish or to retaliate) may render the acts of the Officer illegal under Illinois law.

4. **ILLUSTRATIVE CASE:** Two Officers noticed that a suspect they had detained had a plastic baggie in his mouth. In order to prevent the suspect from swallowing the baggie, the Officers grabbed the suspect by the throat and forced him to spit the baggie out. The appellate court declared that the Officers had probable cause to believe that the baggie contained evidence of a crime, that the Officers had not used excessive force in recovering the baggie and that the Officers had not use a "Choke-Hold" on the suspect. Nevertheless, the Court declared that the Officers' conduct was illegal and suppressed the evidence.

   a. ***True.*** In the case of People v. Quennel Augusta, 2019 IL App (3rd) 170309, the Court held that the conduct of the Officers violated Section 7-5.5 of the Criminal Code. It declared: "The Officers' seizure of the defendant, in which they held him by throat to prevent him from swallowing an object located in his mouth, was unreasonable, and thus, suppression of the evidence was warranted. **WHY:** Although neither officer employed a chokehold to restrain the defendant, lesser contact with the throat of another was specifically prohibited by the statute. 720 Ill. Comp. Stat. Ann. 5/7-5(b).