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Knowing When to Say, “Hold It!”

By Gene King, LEAF Coordinator



This issue of the LEAF Newsletter will discuss cases that illustrate how the failure of officers to remain composed and objective when managing a situation can lead to its getting out of hand, often with bad results. LEAF’s Legal Advisor, Audrey Forbush of Plunkett Cooney, chose the cases from several recent ones because they underscore how important it is for officers to receive training and practice on remaining focused on the big picture of an incident, so they can accelerate or decelerate when making a decision on a course of action.

At some time during their careers, police officers experience “contempt of cop” when handling an incident. During such an incident, the subject’s defiance of authority, the subject’s failure to submit to an officer’s attempts at control, or the subject’s refusal to meet the officer’s reasonable expectations leads to frustration on the officer’s part, the frustration can override the officer’s good judgment. When this happens, the officer may focus solely on the subject’s lack of compliance and this drives his or her decision-making. In some situations, officers focus so intently on the subject’s refusal to submit that they fail to recognize changes in the incident as they occur. If multiple officers are involved, the incident may become even tenser. The officers are so intent on controlling the subject that they forget the

evolution of the incident or confrontation. Once at this level of fervor, the officers forget about the risk exposures that are associated with their actions.

When one of these incidents occurs and everything works out, neither the subject nor the officers are seriously hurt. The officers take a deep breath and kind of walk away thinking, “Whew, survived that one!” In rehashing the incident, we hope that the participants recognize the course of the events did not necessarily justify the means or the outcome. This is the time to take action to mitigate what has happened. Otherwise, justice is not served and the subject may become a victim of the system.

If things go wrong, the subject may receive serious injuries or be killed. Sometimes, once an incident is resolved, the officers are just happy they survived. This is when they face the challenge of justifying the incident’s outcome. They report what they believe are the facts. However, when comparing their version of the incident to that of other witnesses, it may seem that the officers’ perceptions are distorted because their single-mindedly focused on one aspect of the incident. Their officers frequently focus on the highest level of threat they believe they encountered. As a result, when reviewing the incident, officers may

find it difficult to justify how or why they got to the level of force they used.

These types of situations often have the potential for criminal charges and litigation. Even if no one files criminal charges, over the next five years, attorneys, then a judge or jury will analyze every record whether spoken, recorded, or written. All comments heard, photos taken, statements given and answers in depositions will come under scrutiny to find the discrepancies between what the officers said happened and what the others decide the evidence proves. The officers' appearance, behavior, temperament and perceived honesty will come under evaluation -- all to reach a determination of the case's outcome. Officers who have been through this experience can tell you they had a heavy toll upon them.

And now, to the cases . . .

Case One

The first is an unpublished U.S. Sixth Circuit Court of Appeals case, *Landis v Baker*, 2008 WL 4613547 (CA 6, MICH). In this case, the State Police responded to a call about an individual driving a piece of construction equipment on to an interstate highway, causing a hazardous condition. When the trooper arrived, the subject was attempting to drive another piece of equipment on to the interstate. The trooper confronted the subject who muttered something about God and then ran toward the other lanes of the interstate. The trooper caught the subject at the fence line on the far side of the interstate and ordered the subject to stop. When the subject failed to stop, the officer pepper sprayed him. Despite this, the subject climbed the fence and walked down a road that ran parallel to the interstate. When the subject saw another trooper approaching him, he turned and ran back toward the original trooper who was able to tackle the subject. The second trooper attempted to assist in controlling the subject, but this was not successful. During the struggle, the subject grabbed one of the troopers by the throat and began choking him.

Having heard the original dispatch and the troopers' request for a Taser, three deputy sheriffs arrived to help. During the ensuing fracas, the subject got away from the troopers and ran into a swampy wooded area. During the entire encounter, the subject said nothing to the troopers. The deputies described the subject as lethargic -- almost Frankenstein-like. He was oblivious to the surroundings and did not respond to requests for his name or demands to give up and to come out of the water. All of the officers reported that they did not feel the subject was armed.

Because the subject would not respond to officer commands, the decision was made to shoot the subject with a Taser. The probes failed, and the subject started to pull on the wires. The officers then converged on the subject to take him into custody. The officers struck the subject's legs with a baton ten times with no effect. The Taser was drive stunned on the subject four times. The subject neither responded nor submitted to the attempts to control him. The officers jumped on the subject, who, in response, had arched himself by his legs and hands to stay above the water, to get him to submit by getting his hands behind his back. Once they gained control, one of the officers noticed the subject's head was under the water and attempted to pull it out. The subject resisted until he was thrown onto the higher ground. In all, five officers were involved in the fight. Shortly after the officers got the subject to dry ground, they noticed his lips had a blue tint. They called EMS and started CPR. EMS dislodged a substantial amount of debris and mud from the airway in an attempt to save the subject and transported him to the hospital. Hospital staff pronounced him dead; the autopsy found that he had drowned.

The family filed suit alleging wrongful death, a 42 U.S.C. §1983 claim for violation of the subject's constitutional right to be free from unreasonable searches and seizures, claiming that the defendant officers used excessive force in arresting him. Plaintiff also alleged a section 1983 claim against the county claiming it had a policy of violating constitutional rights by its conscious disregard of the substantial risk of harm posed by its failure to

properly train, screen, investigate and discipline its employees. Count three of the complaint alleged state claims of assault and battery. Plaintiff sought both compensatory and punitive damages.

The officers and county filed a motion for summary judgment under qualified and governmental immunity. The U.S. District Court denied the motion and the officers appealed.

Case Two

In this case -- *Porter v Osborne* ___F.3d_,2008WL 4614334 (CA 9 Alaska), from the Ninth Circuit Court of Appeals -- a trooper was dispatched to a remote snow covered parking pullout to investigate a suspicious vehicle that flashed its headlights at a highway employee each time he came near the car. A second trooper heard the call and arrived first at the location. He found what he thought was an abandoned car. The trooper shined his headlights in the car and approached. As he did, a person suddenly sat up in the driver's seat and began to drive the car away.

Following protocol, the trooper turned on his overhead lights to stop the car, but it kept moving. The trooper then tried to block its progress with his patrol vehicle, but the car kept maneuvering around him. To avoid damage to the patrol vehicle, the trooper let the suspicious car pass. As the car passed, the trooper made eye contact with the driver, shouted, and motioned through the closed window to stop. At this point, the originally dispatched trooper arrived, turned on his overhead lights, and attempted to block the car to stop it from leaving.

The first trooper exited his vehicle and approached the subject's car, walking along side of it while ordering the driver to stop. The car finally stopped a car length away from the dispatched trooper's vehicle. Both troopers shouted orders for the driver to stop and get out of his vehicle. The driver opened his window and asked the troopers what was wrong. The troopers believed the driver was just buying time and was preparing to elude them since he had "done so once already."

The troopers attempted to enter the car. They said the driver had a "confused look on his face," and kept bringing his hands up above and then below their sight line. When the driver tried to wind up the window, one of the troopers sprayed the inside of the car with pepper spray. The driver went into the fetal position and moaned that he had done nothing to deserve the spray. One trooper went to radio in a report on the situation while the other stayed beside the car and continued to shout orders at the driver.

The driver then shot upright, grabbed the steering wheel in a white-knuckle grip, and revved the engine. With the wheels spinning, the driver attempted to leave, heading in the direction of the trooper who was outside his patrol vehicle using the radio. The trooper beside the car, fearing for his partner's safety, pulled his weapon and fired at the driver until the vehicle stopped revving. In the process of trying to move forward, the driver bumped the trooper's patrol vehicle on the push bumper. The patrol vehicle had no damage and barely moved. The driver of the car was dead. The troopers neither saw nor found any weapons in his car.

The entire incident took about five minutes. It was less than a minute between the pepper spray and the shooting.

In this case the parents brought litigation alleging the troopers violated their Fourteenth Amendment "fundamental liberty interest" in the society of their child, entitling them to relief under 42 U.S.C. § 1983. The district court denied the troopers' motion for summary judgment claiming qualified immunity, finding that the parents had shown enough to establish the violation of a clearly established constitutional right.

The Thoughts of the Legal Advisor

Audrey said these cases are significant because even though the facts of each situation are different, the outcomes are similar. It is generally very difficult to second-guess officers in these

types of situations, yet, in these specific cases, the officers felt they were in escalating incidents and made hasty judgments on the amount of force necessary to bring the person they were dealing with under control.

That is why the courts use the Reasonable Officer Standard. In quoting from *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989), Audrey explained: The "inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to underlying intent or motivation." *Graham*, 490 U.S. at 388. Reasonableness is evaluated under a totality of the circumstances approach, which requires that we consider the following factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Additionally, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* That perspective includes an "examination of the information possessed by the [officers]." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)

Acknowledging that the facts presented in these cases are those most favorable to the plaintiff, Audrey is still concerned that in each of these cases, the officers may have lost track of the reason why they were there and what the incident really involved. In each case, the officers initiated the contact and escalated the situation well beyond the resistance they faced. Each incident had a pivotal point in which the officers should have de-escalated the situation but they missed the queue. Unfortunately, the officers remained focused on what they perceived was the peak point of subject resistance and applied that level of subject control instead of de-escalating as the resistance reduced.

The types of facts found in these cases can result in rulings that are unfavorable to law enforcement

and erode the protections offered under *Garner and Graham*. This is why Audrey believes that an officers' use of plain language and the ability to articulate the essential facts that led to their course of action are critical to their protection under the Reasonable Officer Standard. She also reminds officers to remember Contempt of Cop is not a crime. (See March 2008 edition of the LEAF Newsletter, *Yes, Cops Can Practice "Catch and Release" With A Subject They Have Taken Into Custody*)

Both the cases were remanded back to the District Court either because the summary judgment was denied or for further discovery and action. Below is a brief outline of the Courts' findings. The Courts were not kind to the officers!

Case One Ruling:

The Sixth Circuit Court ruled the district court was correct in denying Summary Judgment by ruling the officers' actions were clearly unreasonable and violated the subject's constitutional rights. The Court took exception to the amount of force the officers used and ruled that the officers violated a clearly established right when they struck the subject with the baton 10 times, a frequency that was more than was reasonably necessary. The Court found that the officers used the Taser more than was necessary on a subject who presented no threat, and who was standing in water surrounded by officers who had received instructions that they should not use the Taser in a wet environment. The Court also found that the officers acted in an unreasonably dangerous manner when they jumped the subject, thereby submerging his head in muddy water for a period. The Court ruled that all the officers at the scene were responsible because each of them had the means and opportunity to prevent the harm to the subject.

Furthermore, the Court noted that the subject's behavior throughout the incident should have led to the officers' recognition that he was either on drugs or mentally ill. Since the subject was not resistive or combative during the final confrontation and had not committed a serious

crime, the officers should have reevaluated the level of force necessary to bring the subject into compliance. In this specific case the subject did not actively resist he just would not comply. Based on Michigan's Force Continuum, officers should have deescalated the force to a level consistent with the resistance.

Case Two Ruling

The Ninth Circuit remanded the case to the district court. The district court was to review the shooting trooper's conduct under the proper Fourteenth Amendment standard and to determine whether the facts showed that his actions shock the conscience because he acted with a purpose to harm for reasons unrelated to legitimate law enforcement objectives. The court cited the Supreme Court for making it clear, as the district court correctly recognized that only official conduct that "shocks the conscience" is cognizable as a due process violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) at 846 (citing *Rochin v. California*, 342 U.S. 165, 172-73 (1952)).

They held, following Supreme Court precedent and their own cases, that the purpose to harm standard must govern the trooper's conduct. Thus, viewing the facts in the light most favorable to the plaintiff, the court must demonstrate that trooper acted with a purpose to harm the driver that was unrelated to legitimate law enforcement objectives. There are several facts relevant to an unlawful purpose to harm that a court needs to consider on remand — that is, to assess whether under the totality of the circumstances a jury could infer that the trooper was acting for purposes other than legitimate law enforcement.

First is the nature of the suspicious car and the driver that the trooper found in the pullout near the highway. The lone car was stationary and posed no overt threat to officer safety at the outset. Once the driver started moving the car, he created at least a minimal threat to safety, although hardly on the level of a car chase. The trooper standing by his patrol vehicle reported that he did not feel

threatened by driver's car, yet he and his fellow trooper drew their guns.

Second is the nature of interaction between the driver and the troopers. In response to the driver rolling his window down and refusing to exit the vehicle, the trooper precipitously sprayed him with pepper spray, an action that could be viewed as punishing or harassing when it is unclear whether the driver even knew he was dealing with law enforcement. The other trooper's testimony suggests the driver's attempt to drive away may have been a normal effort to escape further spraying, making the shooting trooper an active participant in triggering the driver's flight.

Third and most important is the shooting trooper's severe and sudden escalation of the situation: where the driver's only violation was noncompliance, the shooting trooper's extraordinary response was to fire five shots, which shocked even his partner.

There are other facts suggested by the record that may also bear on the shooting trooper's intent, but they are not clearly developed. Although the shooting trooper may be able to show indisputably that his actions all accorded with proper law enforcement purposes, on the record before the court, it was unable to decide in the first instance whether the parents have presented enough facts to survive summary judgment.

LEAF and Audrey Forbush acknowledges that these incidents are often highly charged and are very rapid and fluid. Police executives have to recognize this as well. Incidents of this nature are not uncommon, even though the outcomes may not be as dramatic as these cases. Even still, Audrey reminds executives of the **highly predictable consequence** philosophy adopted by the Sixth Circuit in *Gregory v City of Louisville*, 444 F.3rd 725 (6th Circuit, 2006) and the **usual and recurring situations** standard outlined in *Canton v Harris*, 489 US 378; 109SC 1197 (1989) which reinforces the need to train officers to be aware of these situations and how to manage them. (See September 2007 LEAF Newsletter, *Officers Just*

Don't Get It: They Are Trained In More Places Than The Classroom!)

How To Avoid These Incidents

1. As you would in Rapid Entry/Active Shooter incidents, designate an officer as the Incident Commander whose job it is to keep the incident on track and in perspective.
2. Instruct the Incident Commander to assign a person who will give voice commands to suspect.
3. Train officers in the rules of engagement and their responsibility to observe actions they feel are illegal, in violation of rules or policy or are inappropriate.
4. Train officers to recognize when their frustration and emotions are escalating to the point that good judgment may be lost.
5. Have officers role play these situations as part of an their force or weapons training.
6. If dispatched to an unusual incident, require officers to have back up available before engaging the subject.

7. When possible, dispatch a supervisor to the incident when officers feel the situation may be getting out of control.
8. Have officers write reports in plain english and include the reason they took a particular action. Make sure officers describe specifically what the subject was doing that led them to believe that they or others were at risk and what their response was. Be truthful.
9. Remind officers to be aware that there may be others who witness the incident so officer behavior after an incident must be appropriate. High fives, celebrations, or end zone demonstrations are unprofessional, inappropriate, and not permissible.

In January of 2009, the *Law Enforcement Executive Forum*, www.iletsbei.com/lee_forum/ will publish a full report on a hostage-taking experiment by Dr. Lewinski of The Force Science Research Center, titled "The Attention Study: A Study on the Presence of Selective Attention in Firearms Officers." The report will be posted on the Force Science Web site. For more information on officer focus and incident reporting in stressful situations go to www.forcescience.org for the latest Force Science Newsletter. The study will more fully explain the officer focus phenomena.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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