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Excessive Force Claims Concerning Pointing Firearms

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Introduction

There are few areas of law enforcement activity that raise as great a potential for civil liability as the use of deadly force. Constitutional rules on the use of such force are clearly set forth in Tennessee v. Garner, #83-1035. 471 U.S. 1 (1985), and the basis of analysis for when the use of force by officers will be considered excessive under the Fourth Amendment is spelled out in Graham v. Connor, #87-6571, 490 U.S. 386 (1989).

In Garner, the Court held that if a suspect "threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

In Graham, the Court held that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, stop, or other "seizure" of a free person are properly analyzed under the Fourth Amendment's "objective reasonableness" standard.

The right to make an arrest or investigatory stop necessarily includes the "right to use some degree of physical coercion or threat thereof to effect it."

In determining whether an officer's use of force was objectively reasonable, a court looks at factors including the seriousness of the crime allegedly being committed, whether the officer reasonably believes the suspect poses an immediate threat to anyone (including the officers present), and whether a person is attempting to escape or actively resisting arrest.

But what about actions short of the actual use of deadly force? What about the mere display and pointing of weapons? While officers may be able to threaten the use of more force than they are going to use, and certainly need not wait until a suspect is actually firing at them to unholster their weapon, are there circumstances in which the courts may consider the pointing of weapons an unreasonable, excessive use of force?

Indeed there are. This article takes a brief look at some of the cases that have reached conclusions either approving or disapproving officers' pointing of weapons, and some of the key factors relied on by the courts in making that determination.

At the conclusion of this part of this two-part article, a list of relevant resources and references is presented.

Pointing weapons in the absence of a threat can be unreasonable

In an important case directly on this point, a federal appeals court ruled that a reasonable jury could possibly find that an officer's action in pointing a submachine gun at people present during the execution of a search warrant, including both the suspect and others present, was unreasonable and violative of the Fourth Amendment in the absence of any indication of a threat to the officers or others. Baird v. Renbarger, #08-2436, 576 F.3d 340 (7th Cir.).

In this case, the defendant officer was one of a number of officers involved in the execution of a search warrant at an auto body shop and resale business located at an industrial park. The search sought evidence for the crime of altering a vehicle identification number (VIN).

The court noted that the crime itself did not involve violence, and there was no indication of even a suspicion that anyone at the location of the search was dangerous or armed. Further, no one offered any resistance whatsoever.

Despite this, the officer came to the search with a 9-millimeter submachine gun slung around his neck. He pointed the submachine gun at all those present in the auto body shop, who were then peacefully complying with police instructions to gather in the center of the building and sit down on the concrete floor.

He then made the rounds of the surrounding shops and warehouse to round up everyone present at gunpoint and take them to the auto body shop. Those gathered in this manner included a group of Amish men working in the area, a group well known for their non-violent beliefs and practices. Everyone was detained for approximately two hours while the search was completed.

When the car sought was found, it turned out that its VIN had not be modified or removed.

A number of those present filed a federal civil rights lawsuit against the officer, contending, among other things, that his actions in pointing the submachine gun at them had been unreasonable.

Upholding the denial of qualified immunity to the defendant officer, a federal appeals court noted that courts attempt to give "considerable leeway" to officers' assessments about the appropriate use of force in dangerous situations. This is an acknowledgment of the fact that law enforcement is a difficult job, and that officers "are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving."

Moving from general principles to specifics, the court stated:

> "This latitude ends, however, when police officers employ force that is clearly excessive or unreasonable under the circumstances. That is the case here."

There clearly was a Fourth Amendment seizure of the plaintiffs. The court found that the three major factors spelled out in Graham all tended in this case to show that the force used was objectively unreasonable. The crime was not a violent one. There was no indication that those being detained posed an immediate threat to anyone. And none of them attempted to resist or flee, instead they were all compliant.

> "[T]aking the facts in the light most favorable to the plaintiffs, as we must, we see a scene of peaceable folks (including the famously pacifist Amish) going about their business, while the police inspect various vehicles for identifying information.

> [The officer's] subjective concerns do not transform this setting into one calling for such a heavy-handed use of force. Moreover, the facts show that the police were familiar with the site and had no reason to believe that there would be resistance."

U.S. Supreme Court cases

Two prior U.S. Supreme Court cases were pointed to by the officer in the Baird case as having supposedly upheld conduct similar to his as reasonable. Yet, as the Baird court sharply pointed out, the facts in both those cases clearly indicated the presence of a serious potential for danger to the officers carrying out the searches.

In L.A. County v. Rettele, #06-605, 501 U.S. 609 (2007), officers carrying out the search had knowledge that at least one of the suspects likely to be present owned a registered handgun, making it only prudent to proceed as though they would encounter an armed individual who might resist. In actuality, the home had been sold, and the couple found under the covers at the house were totally unconnected to the suspects sought, but the officers did not know that.

The fact that the couple found in the bedroom were a different race than the suspects sought did not alter the result, as the suspects sought could have been in another room in the house. Additionally, officers were not required to turn away and let the couple get out of bed unobserved to get dressed, since, given their expectation that at least one gun was in the house, the couple might have been concealing a weapon under the sheets.

In Muehler v. Mena, #03-1423, 544 U.S. 93 (2005), the nature of the crime was clearly different than the non-violent alteration of a car VIN—the officers were conducting a search pursuant to a warrant seeking a number of deadly weapons. Additionally, they had reason to believe that one person living at the residence to be searched was a criminal gang member with recent involvement in a drive-by shooting. These officers were justified in detaining the suspects present in handcuffs until the search was concluded, and in pointing weapons at them.

While the Court, in both these cases, had no difficulty in finding the officers' actions in detaining suspects with weapons drawn reasonable, this was the case because of the expectation of the presence of weapons, dangerous suspects, or violence-related serious crimes.

Nature of the crime

If the crime in both the Supreme Court cases discussed were serious enough to be a factor tending to justify the officers' display and pointing of weapons, Robinson v. Solano County, #99-15225, 278 F.3d 1007 (9th Cir. 2002), illustrates the principle that less serious crimes have just the opposite impact, as well as the principle that the kind of threat that justifies the officer's display and pointing of a weapon must be an immediate threat.

This case involved the police seizure at gunpoint of an apparently unarmed 64-year-old man, a retired police officer, who was suspected of having earlier used a shotgun to shoot two dogs.

The former officer lived in a farmhouse on five acres of land, and owned various livestock. The dogs he shot belonged to his neighbor, and he allegedly observed them attacking and killing his livestock on his property, which he had fenced in. He killed one dog and wounded the other, and then went off his land with his shotgun, looking for the wounded dog.

When police came to his home later, he went out to talk with them, and was unarmed. He claimed he was calm but the officers claimed he was agitated.

He complied with orders to put his hands up as an officer pointed his gun at him. Then an officer thrust his pointed gun within three or four feet of his head. The ex-officer was then handcuffed, and placed in a police vehicle for a few minutes while officers talked to neighbors. He was released when they determined that he had broken no law.

The federal appeals court found that none of the factors justifying the use of force were present. The crime being investigated was "at most a misdemeanor," and the suspect was apparently unarmed and approaching the officers peacefully. Additionally, the officers outnumbered the plaintiff.

While it was true that he had earlier been armed with a shotgun, the court believed that, under the circumstances, his earlier use of a weapon, which he no longer carried, was insufficient to justify the "intrusion" into his "personal security."

The court did find, however, that the officers were entitled to qualified immunity, as the law on the subject at the time was not clearly established.

The least serious crime, of course, is no crime at all. An officer may arguably have some justification for the display of force at one point, only to lose it when it becomes clear to all that the suspect is exonerated or simply the wrong person.

In Binay v. Bettendorf, #09-1249, 601 F.3d 640 (6th Cir. 2010), an officer received an anonymous call indicating that drug sales were taking place at an apartment. On two occasions, the officer then went to the building, and a drug sniffing dog alerted to the presence of narcotics on the outside of the apartment door. Based on this, he obtained a search warrant. No drugs were found during the ensuing search.

During the search the officers drew their weapons and forced the married couple who lived there to get on the floor. The couple's son was also present and was detained.

A federal appeals court found that the plaintiffs adequately stated claims for excessive use of force in the execution of the search warrant, as well as continuing the residents' interrogation and the use of force against them after it had become plain that no drugs were present. The officers allegedly kept the plaintiffs at gunpoint and handcuffed for over an hour, even though they prepared a confidential operation plan for the raid stating that no firearms were anticipated to be found in the apartment.

Also of interest is Brown v. Miami-Dade County, No. 3D00-3540, 837 So. 2d 414 (Fla. App. 2001), holding that a county and officer could be sued under Florida law for injuries that a bystander suffered when he slipped and fell when officer startled him by pointed a gun at him and yelling at him to freeze while conducting a prostitution "sting" operation.

The officer's actions created a "foreseeable zone of risk" to the bystander and the county was not immune from suit because his injuries were allegedly caused by the manner in which the police implemented their operation, utilizing a display of deadly force in the context of an investigation of a relatively minor crime.

A very serious crime was involved in Curiel v. County of Contra Costa, #07-17233, 2010 U.S. App. Lexis 1358 (Unpub. 9th Cir.). In this case, a murder suspect lived in a house with other individuals. Police received information from a friend of his that the suspect had tried to destroy evidence in a related crime, and feared that he might destroy evidence of the murder or flee. They therefore carried out an unannounced warrantless entry into the house.

During the ensuing search, officers allegedly pointed guns at residents, including children, and detained them for 13 hours. Detention of the residents was justified by the dangerousness of the suspect, the need to carry out an orderly search, and the fear that evidence could be destroyed. Despite the investigation of a serious crime, summary judgment was overturned on excessive force claims, since a reasonable jury could find that the officers used excessive force by entering with guns drawn, pointing guns at the residents, and putting handcuffs on one of them in a manner that caused pain.

Resources

The following are some useful resources related to the subject of this article.

- Firearms Related: Intentional Use. Summaries of cases reported in AELE publications.
- Officer-Involved Shooting Guidelines, ratified by the IACP Police Psychological Services Section, Denver, CO. (2009).
- Use of Force Incident Report, Federal Law Enforcement Training Center (FLETC, June 2008).
- Use of Force Report Writing Guide, Federal Law Enforcement Training Center (FLETC)

Prior Relevant Monthly Law Journal Articles

- Anatomy of a Fatal Police Shooting -- Allegations and Holdings, 2009 (2) AELE Mo. L. J. 101.
- Civil Liability for Use of Deadly Force-- Part One, 2007 (11) AELE Mo. L.J. 101.
- Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training, 2007 (12) AELE Mo. L.J. 101.
- Civil Liability for Use of Deadly Force-- Part Three. Supervisory Liability and Negligent/Accidental Acts, 2008 (1) AELE Mo. L.J. 101.
- Force and the Fatigue Threshold: The Point of No Return, 2010 (6) AELE Mo. L. J. 501
- Long v. Honolulu Police Sharpshooter Decision, 2008 (5) AELE Mo. L.J. 501.
- Shooting at Moving Vehicles**,** 2010 (9) AELE Mo. L. J. 101
- Use of Force and the Hollywood Factor, 2007 (4) AELE Mo. L.J. 501.

References:

- Brian S. Batterton, "Pointing a Gun, Excessive Force and the Fourth Amendment," PATC Legal & Liability Risk Management Institute (January 2010).

- Kevin Reak, "Selected Materials on Use of Force & Pointing Guns," a paper presented at the October 4, 2009 conference of the International Association of Chiefs of Police (IACP) Legal Officers Section (LOS) in Denver, CO.
- Charles Joyner and Chad Basile, "The Dynamic Resistance Response Model," 76 FBI Law Enforcement Bulletin, No.9 pgs 15-20 (September 2007).
- Dan Montgomery, "Excessive Force 101," 74 FBI Law Enforcement Bulletin No. 8 pgs. 8-12 (Aug. 2005).
- Michael A. Brave and John G. Peters, "What's Your Use-of-Deadly-Force Standard?" (1992).

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- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.
