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Excessive Force Claims Concerning Pointing Firearms

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The impact of location and setting

Sometimes the location and setting of an encounter may help justify a display and pointing of weapons. This may be true despite the crime being investigated being apparently minor, or even in instances where officers are not even investigating any crime at all, but trying to cope with situations involving mentally disturbed or suicidal individuals.

An example of this is provided by Estate of Bennett v. Wainwright, #07-2169, 548 F.3d 155 (1st Cir. 2008). In that case, officers encountered a mentally ill young man who had ceased taking his prescribed medication, and went to his grandmother's house in a disturbed state. He had previously killed a dog, and told his mother, who arrived to try to assist him, to leave him alone since "I don't want to kill you too."

There were weapons in the house, including a single-shot breach-loader shotgun that the disturbed individual gained access to. In the course of attempting to get this young man out of the house so he could be taken to a mental health facility, officers were confronted with a volatile situation in which it was difficult to predict what the disturbed man might do.

Attempts to communicate with him were unavailing, and at one point, a deputy pointed an AR-15 "long gun" at him, demanding that he put his hands up.

Ultimately, as it turned out, deputies had little choice in the circumstances other than to shoot and kill him, after he pointed the shotgun at a deputy, ignored demands to drop the gun, and fired at the deputy. [The complex factual and legal issues involved in the case are discussed at some length in an earlier article in this publication].

Relevant to our current topic, a federal appeals court addressing claims of excessive force in the case stated that a reasonable officer "could have believed that pointing a firearm at a mentally ill individual with access to weapons did not amount to excessive force under the circumstances."

In reaching that conclusion, the court cited Flowers v. Fiore, #03-1170, 359 F.3d 24 (1st Cir. 2004), a case in which it was held that officers did not use excessive force when they displayed firearms, including a shotgun, when making a traffic stop, when the description of the motorist stopped fit the description of a person known to be armed, so that police perceived a threat to their safety. The suspect sought had allegedly made a threat of violence targeted at a nearby residence, making it only prudent for the officers to draw and display their weapons when conducting their investigatory stop.

In Harris v. Smith, #09-1130, 2010 U.S. App. Lexis 15599 (Unpub. 7th Cir.), an arrestee claimed that officers illegally entered his home and then used excessive force in attempting to arrest him, including a restrained police dog and the brief display of a shotgun when he emerged suddenly from a bathroom. A federal appeals court found that the decision to enter the premises with a restrained police dog and to briefly display the shotgun was not excessive, given the arrestee's prior flight from officers, and his involvement in a crime of aggression, child molestation, which he was subsequently convicted of.

In other cases, courts have justified the drawing of and display of weapons, despite the minor nature of the immediate crime, based on such factors as the location in which an encounter occurs, the possibility (or known fact) of the suspects being armed, and the suspect's past record or current level of cooperation or resistance. In Ready v. City of Mesa, #02-17102, 89 Fed. Appx. 44 (Unpub. 9th Cir. 2004), for instance, a court ruled that a police officer did not use excessive force in drawing and pointing his gun at the occupants of a vehicle even though they were not resisting in any way and had only committed a traffic violation, when they had guns in the vehicle and were in a high-crime neighborhood at 1 a.m.

Similarly, when suspects attempt to resist a lawful search or detention, this may justify the display of weapons. In Unus v. Kane, #07-2191, 565 F.3d 193 (4th Cir. 2009), a mother and daughter failed to show that a federal agent who obtained a warrant for their residence made any material misrepresentations of fact in the affidavit seeking the warrant, either deliberately or with reckless disregard for the truth. The entry of federal agents, armed with the warrant, into the home did not amount to "assault," and their pointing of guns at the plaintiffs was reasonable, since the plaintiffs tried to prevent their entry into the house, which was legally authorized.

See also Reeves v. Churchich, #04-4240, 484 F.3d 1244 (10th Cir. 2007), finding that officers were entitled to qualified immunity on claims that they unlawfully seized residents of an apartment downstairs from residence of a suspect when they surrounded and entered the common areas of a duplex building looking for the suspect. The defendants allegedly pointed their weapons at downstairs residents when they did not obey commands to go back inside or stay in their apartment.

It is well established, the court noted, that it is reasonable for an officer to temporarily display force or restrain a person until that person's relationship to the suspect and possible reaction to the situation can be ascertained. In this case, the officers were attempting to locate and arrest a potentially armed suspect believed to be in the same building as the plaintiffs, so that their conduct did not rise to the level of a Fourth Amendment violation.

Age of the person pointed at

The age of the person at whom the weapon s pointed, particularly in some extreme examples, may clearly have an impact on the objective reasonableness or unreasonableness of the display of weapons.

Perhaps the most unusual example is the case of Motley v. Parks, #02-56648**.** 432 F.3d 1072 (9th Cir. 2005), in which the court had little trouble in reaching the conclusion that a 5-week-old infant that an officer allegedly pointed a gun at was hardly in a position to threaten the officer or anyone else, and that this constituted an unreasonable use of force, if true.

The court found that officers were engaged in a lawful parole-related search of the home. The infant present was the son of the parolee and his girlfriend, who also lived there.

The officers had no reason to believe that the parolee was involved in any particular crime, and they were simply contacting parolees with gang connections in the area, with the aim of "cleaning up" the neighborhood. In fact, at the time of the search, the parolee was actually in custody elsewhere, and his girlfriend told the officers that when they arrived.

Officers with guns drawn nevertheless searched the house, looking fruitlessly for the parolee. One of the officers entered the girlfriend's bedroom, and encountered the baby lying on the bed there. According to his mother, the officer, upon entering, pointed his gun at the baby, keeping it pointed there while he searched the room. He only put his gun away when another officer came to the room to help him search.

The court noted that it has long been established that the use of force against a person who is helpless or has been subdued is constitutionally prohibited. Such force may be unreasonable even when the force is only threatened rather than applied. In this case, none of the factors justifying the use or threat of force towards the baby existed.

Similarly, in McDonald v. Haskins, #91-2045, 966 F. 2d 292 (7th Cir. 1992), the court found that an officer's alleged action, during a lawful search of a residence, of putting a cocked gun to the head of a 9-year-old boy and threatening to pull the trigger, if true, was unreasonable. It rejected statements in an earlier case suggesting that an officer's action in pointing a gun at a person cannot be a viable basis for a federal civil rights lawsuit.

That language was contained in Wilkins v. May, #85-2194, 872 F.2d 190 (7th Cir.1989), cert. denied, 493 U.S. 1026 (1990), in language not essential to the holding in the case (dicta) stating that "the action of a police officer in pointing a gun at a person is not, in and of itself, actionable.... Where the officer merely points a gun at a suspect in the course of arresting him, the suspect would have no basis for claiming that he had been seized with excessive force in violation of the constitution." Yet the Wilkins standard, by its own terms, applies to an officer's actions in the course of arresting a suspect.

In McDonald, the court found, the boy posed no threat to any officer, was not armed, was not resisting arrest or attempting to flee, was not trying to interfere with the officers, and was not under arrest or suspected of any involvement in criminal activity.

In Tekle v. U.S., #04-55026, 457 F.3d 1088 (9th Cir. 2006), the court concluded that keeping an eleven-year-old unarmed boy in handcuffs for 15 minutes, and pointing a gun at his head, while search and arrest warrants were served on his parents' home, if true, could

be found to be an excessive use of force. The federal IRS agents involved in this case, therefore, were not entitled to qualified immunity.

At the time the agents executed the search warrant on the home, they had already arrested the boy's mother elsewhere without incident, as she dropped her two-younger children off at school. They knew the 11-year-old was at home, and that the father, who they knew had recently suffered a heart attack and undergone major heart surgery, might be there too. The boy was dressed in a t-shirt and shorts and was taking out the garbage in his bare feet when the agents encountered him outside the home. When he understood who they were and what they wanted, he put his hands up, and then complied with orders to lay face down on the driveway.

Officers handcuffed him and took him to the sidewalk where he remained for 15 minutes until his father was brought out of the house in handcuffs without incident. The boy's handcuffs were then removed, and he sat on a stool in the driveway, where approximately 15 to 20 officers kept their guns pointed at him.

At the time of the incident, the appeals court said, a reasonable officer knew or should have known that it was excessive to use the level of force employed and use the handcuffs for the time period alleged against an unarmed eleven-year-old boy when he was not resisting the officers' orders.

See also Holland v. Harrington, #99-1373, 268 F.3d 1179 (10th Cir. 2001), ruling that officers in a SWAT team engaged in executing both an arrest warrant and a search warrant were not acting in an objectively reasonable manner in allegedly continuing to detain a number of minors at gunpoint after it was clear that the location was secured and that everyone present was under control.

Some suggestions

It has been suggested that there are three main arguments against the premature drawing or displays of weapons: Such displays run the risk of resulting in accidental discharge or use, leading to unnecessary injuries.

Such displays may limit alternative means of controlling a situation, resulting in escalation of an encounter to the point where the actual use of deadly force may soon occur, when the circumstances did not really necessitate it.

Finally, of course, even if accidental discharge or escalation does not occur, a premature drawing or display of weapons often creates unnecessary apprehension and anxiety on the part of the public.

Such incidents may wreak havoc with the police department's public relations, decreasing the willingness of people in the community to cooperate with important investigations and lessening the possibility that persons upset with such displays will volunteer vital information to police.

Officers should have a valid reason for displaying a weapon. Those reasons are ultimately strongly related to many of the same factors that may help justify the ultimate decision to actually use deadly force, such a threat to the safety of the officers or members of the public, the actual or reasonably anticipated presence of weapons, the nature of the crime being investigated, and the dangerousness of the locale and circumstances.

Training in the use of firearms should include explicit discussion of this issue, so that officers may think about the issue of when the display of a firearm is appropriate and when it may instead create additional problems.

While officers certainly should not wait to draw and display their weapons until an armed suspect is actually pointing their own weapon at them, perhaps making it too late to adequately meet deadly force with equivalent or superior force, neither should officers be pointing weapons at non-resisting, subdued suspects, or at non-suspects not engaged in any criminal activity or without the ability to pose a substantial threat, such as small children or babies and incapacitated persons.

As to liability, the caselaw discussed in this two-part article reveals that courts will not lightly impose civil liability on officers for the drawing and display of firearms when officers act on the basis of the facts and circumstances they reasonably believe they are encountering.

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