



ISSN 1935-0007

Cite as: 2012 (10) AELE Mo. L. J. 101

Civil Liability and Jail & Prisoner Law Sections – October 2012

Use of Electronic Control Weapons Against Handcuffed or Restrained Persons

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This is a two-part article. Part 1 addressed police activities and can be accessed [here](#).

❖ Corrections and confinement

Officers using ECWs in corrections and confinement situations face special circumstances. ECWs may be used in involuntary cell extractions, such as when an inmate must be moved to another facility or to administrative segregation. While a multi-officer team will ordinarily be utilized for such a task, the availability of an ECW to compel compliance in the event of resistance is useful, in order to lessen the possibility of a fist-fight in a small, confined space. See, [Staff Use of Force, Part V: Cell Extraction](#), 2009 (4) AELE Mo. L. J. 301, which includes a section on the use of ECWs during cell extractions.

Unlike the use of an ECW in the outside world, corrections officers ordinarily need not be concerned about the likelihood of a detainee or prisoner engaging in flight or escape, as there is nowhere for them to go. Accordingly, avoiding flight or escape will not be among the factors that officers can point to when attempting to show that ECW use was

necessary under the circumstances. Avoiding injuries to third parties may also be less of an issue, although in some circumstances, an actively resisting detainee or prisoner may harm another inmate, a civilian employee or a visitor to a facility.

In [*Vasquez v. Gempeler*](#), #06-cv-743, 2008 U.S. Dist. Lexis 57168 (W.D. Wis.), an inmate struck a correctional officer. He was later moved to a segregation unit, and while restrained, he was stunned with an Ultra stun gun. He claimed that this use of force against him was excessive.

A federal judge declined to dismiss the suit, noting, “a jury could find that defendants used force not in a good faith effort to maintain or restore discipline, but maliciously and sadistically for the very purpose of causing harm,” which is the general legal standard for the permissible use of force in a correctional context. Subsequently a [jury found](#) the use of force to be reasonable. The case was dismissed and a motion for a new trial was denied.

The same legal standard was applied in [*Orem v. Rephann*](#), #07-1696, 523 F.3d 442, 2008 U.S. App. Lexis 9178 (4th Cir.). A deputy’s use of a Taser against an arrestee when she was handcuffed and in foot restraints was unnecessary and excessive if the arrestee’s version of the incident was true. While the Taser was only applied for 1.5 seconds, it was allegedly applied in a wanton and sadistic manner, and not as part of a good faith effort to restore discipline.

The Taser caused the plaintiff to experience pain and electric shock, and to develop a scar. The use of a Taser to intimidate or punish an arrestee is not objectively reasonable and violates clearly established law, so that the deputy was not entitled to qualified immunity.

In another case, a team of five to six prison guards forcibly extracted a Pennsylvania prisoner from his cell, where he had been exhibiting erratic and threatening behavior. He was handcuffed and led by the guards towards an observation cell. On the way, he placed his feet against a door and pushed off, causing the group to stumble off balance, and the prisoner either fell or was pushed to the floor.

While he was on the ground, one of the officers applied an EBID (Electronic Barring Immobilization Device) to the prisoner at least once. The brief use of the stun weapon and other force used during a twenty-second confrontation when the prisoner refused to

walk through a doorway was not excessive, but was reasonably necessary to regain control of the prisoner. [*Camp v. Brennan*](#), #02-2003, 54 Fed. Appx. 78 (3rd Cir. 2002).

A detainee at a county jail claimed that his rights were violated when jailers, in the course of taking him from his cell, allegedly used a Taser against him in the stun mode while he was handcuffed, as well as “piling” on top of him, making it difficult for him to breathe. The court found that two defendants were entitled to summary judgment as they were not involved in the incident at issue, but merely involved in booking the plaintiff into the jail. There were material issues of fact as to whether five other jailers, who were involved in the incident, had used excessive force. [*Higgs v. Sanford*](#), #5:07CVP77, 2009 U.S. Dist. Lexis 111966 (W.D. Ky.).

In a subsequent ruling, [*Higgs v. Sanford*](#), #5:07CVP77, 2010 U.S. Dist. Lexis 48507 (W.D. Ky.), the court upheld a jury verdict in favor of the remaining defendants on the excessive force claims, denying the plaintiff’s motions to set aside the jury’s verdict, as there was ample evidence on which the jury could have reached its conclusions. It also rejected the plaintiff’s argument that he should have been permitted to testify that he regarded the Taser as a “deadly weapon” in response to the defendants’ statement that the Taser was one of two “non-lethal” weapons used at the jail. The defendants did not testify as expert witnesses but only referred to a jail handbook/manual classifying the Taser as a type of non-lethal force.

The use of a Taser in stun mode on a prisoner's neck while he was confined in a restraint chair was “objectively reasonable.” The prisoner refused to stop yelling and screaming after he was placed in the chair, and had dislodged an IV, causing himself to bleed, while telling an officer that he had Hepatitis C. The important interest of protecting the safety of the officer and preventing the spread of communicable disease, as well as maintaining control of the prisoner justified the use of force. [*McBride v. Clark*](#), # 04-03307-CV, 2006 U.S. Dist. Lexis 9143, 2006 WL 581139 (W.D. Mo.).

Two other decisions in the same case granted summary judgment to the county, [*McBride v. Christian County*](#), #04-03307, 2006 U.S. Dist. 9144 (W.D. Mo.), and to the county sheriff. [*McBride v. Robertson*](#), #04-03307, 2006 U.S. Dist. Lexis 9161 (W.D. Mo.). The court also held that the county was entitled to summary judgment on a battery claim, based on sovereign immunity. [*McBride v. Christian County*](#), #04-03307, 2006 U.S. Dist. Lexis 18179 (W.D. Mo.).

The use of a Taser against a handcuffed non-resistant detainee led to criminal sanctions in *State of North Carolina v. Joshua Denton*, as reported in the Asheville Citizen Times, August 20, 2009. A Polk County deputy sheriff was convicted of criminal charges of assault for using a Taser to shock a woman while she was in custody. The woman was arrested for larceny and other charges, and became disruptive at the county jail, so that the deputy Tasered her several times. The criminal charges related to his action of shocking her with the Taser again after she was handcuffed to a chair and subdued. The deputy, who is no longer employed by the sheriff's department, received a 30-day suspended jail sentence and a \$500 fine.

Similarly, in *U.S. v. Althea Mallisham*, #7:11-cr-00290, PACER Doc. 29 (N.D. Ala. 4-26-2012) ([DoJ Press release](#)), a former sheriff's sergeant was sentenced to 61 months in federal prison for using a X26 Taser against three pre-trial detainees during three separate incidents over a four-month period. The detainees were either restrained in handcuffs or were securely locked in a jail cell and did not pose a physical threat when they were shocked.

Civil liability was imposed in *Mendoza v. City of West Covina*, #B227812, 206 Cal. App. 4th 702, 141 Cal. Rptr. 3d 553, 2012 Cal. App. Lexis 639 (2nd Dist.), based on the use of a Taser against a restrained detainee. In this case, an officer took a suspect arrested on suspicion of burglary from a holding cell to a hospital to be medically cleared for booking, after he complained that he heard voices, had stomach pains and suffered from diabetes and high blood pressure. In the hospital, and while handcuffed to a chair, he objected to a nurse drawing his blood. Officers claimed that he rushed towards a deputy sheriff who was present, getting out of his chair in a threatening manner.

Because the arrestee was not complying with orders and the officer feared he might use the chair he was handcuffed to as a weapon, the officer said he applied the Taser in the stun mode once, and a struggle followed, during which the Taser was used again three or four more times. The arrestee died of asphyxiation after being Tasered and then pinned to the ground, with several officers aiding in subduing him. The plaintiffs produced witnesses to support a different version of events, claiming that the arrestee was seated when the officer first used the Taser and was compliant.

The appeals court held that the defendant officers were not entitled to qualified immunity, based on the plaintiff's version of events in which the arrestee was Tasered and punched despite his compliance, and did no more than flinch from pain when initially Tasered.

The court found that the officers had waived their qualified immunity defense, but that, even on the merits, the conduct of the officer who Tasered the arrestee was not qualifiedly immune.

A jury awarded a total of \$1.5 million for wrongful death compensatory damages, but also found that the decedent had been 30 percent at fault, reducing the award to \$1,050,000. The court also awarded \$4,500 in punitive damages against the officer who deployed the Taser. The appeals court rejected arguments that the damages awarded were excessive.

The use of a Taser against an actively resisting detainee, even though handcuffed or restrained, will ordinarily be upheld. A man in custody after being arrested for probation violation and suspicion of other crimes resisted being processed at the police station. Although handcuffed, he attacked an officer without any provocation. The officer discharged his Taser four times against the arrestee, who continued to attack him. The arrestee got the Taser away from the officer, and the officer, fearing that the Taser was about to be used against him, drew his gun and shot and killed the arrestee, who was then on top of him.

The trial court found that the officer's use of force was reasonable under the circumstances. [*Jensen v. Burnsides*](#), #CV-06-2356, 2008 U.S. Dist. Lexis 89325, 2008 WL 4700020 (D.Ariz.). That ruling was upheld on appeal. [*Jensen v. Burnside*](#), #08-17608, 356 Fed. Appx. 928, 2009 U.S. App. Lexis 27243 (Unpub. 9th Cir.).

- ***Justice Department Action***

The U.S. Justice Department intervened in a class action lawsuit brought by detainees and prisoners claiming that a county sheriff's office engaged in a policy and practice of excessive and abusive use of Tasers against them, including unnecessary use against non-resisting persons handcuffed or otherwise restrained. [*Shreve v. Franklin County*](#), #2:10-cv-644, 2010 U.S. Dist. Lexis 131911 (S.D. Ohio). The Justice Department filed its own [complaint](#) in the case, with the aim of ensuring "the uniform national interpretation and application of civil rights laws pertaining to excessive force by law enforcement."

Without admitting liability or the truth of the allegations in the complaints, the defendant sheriff's office entered into a court-enforceable [settlement agreement](#) with the Justice Department on February 4, 2011. While there are a number of aspects to the settlement,

the general thrust is that it attempts to ensure that those who disobey deputies' orders in a non-violent manner will not be subjected to use of an ECW against them.

As to the use of a Taser or other ECW against restrained detainees or prisoners, the settlement agreement provides that the sheriff's policy shall prohibit such use "against handcuffed or otherwise manually or mechanically restrained subjects unless: (1) the restrained subject is endangering the safety of the deputy or others by attempting to employ physical force that is reasonably perceived to pose as a threat of injury to a deputy, the subject, or others; or (2) it is the constitutionally proportionate amount of force necessary to overcome resistance to a legitimate penological purpose."

❖ **Confronting mentally disturbed persons**

Special considerations may be considered by the courts when officers confront mentally-impaired and substance-impaired persons, who may or may not also be criminal suspects.

The use of a Taser against a mentally ill or drug intoxicated person may carry with it enhanced risks of harm, or even be regarded as the use of deadly force based on enhanced susceptibility to harm. In [*LeBlanc v. City of Los Angeles*](#), #04-cv-8250, 2006 U.S. Dist. Lexis 96768 (C.D. Cal.), a private security guard encountered a disturbed man in the middle of the street, waving his arms and chasing cars, while saying "they're after me." Ultimately, the guard decided to handcuff the man for his own safety, as he kept wandering back into traffic, and appeared to be either under the influence of a substance or mentally ill. He was only able to handcuff one of the man's wrists, which he then fastened to another handcuff in turn fastened to a link on a chain-linked fence.

A police officer who arrived on the scene decided that the man, who was increasingly combative, might be under the influence of PCP. He used his Taser M-26 in the dart mode, discharging it twice. The man was also subjected to being pinned to the ground by the collective weight of five police officers. After that, the man did not appear to be breathing. He was later pronounced dead.

There was expert witness testimony that the man was in "an agitated state that placed him at elevated risk of electrical injury." The police department had previously issued a training bulletin that discussed the risk of sudden death for vulnerable suspects during struggles with officers, and provided a "suspect/situational profile of an 'at-risk' suspect

for sudden death,” identifying obesity, mental illness, and drug/alcohol intoxication as pre-existing conditions that may render a suspect more susceptible to sudden death.

The court found that, because the man was both obese and either mentally ill or under narcotic influence, and there was medical testimony that the Taser discharges caused him to enter into cardiac arrest, it would not be unreasonable for the jury to find the applied force to be deadly. While the man did attempt to hit the officers, they were easily able to evade this by standing outside the range of motion allowed by the stationary handcuff. The man was not primarily wanted for a crime (although drug use may have been an issue), but rather, the officers wanted to restrain him for his own safety and to take him to a hospital for medical treatment.

Given all this, the court concluded that a jury could reasonably find that the force used was unreasonable. Even if the use of the Taser was not deadly, it could still be found unreasonable, given the opinions of the plaintiff’s expert witnesses. The individual officers, however, were entitled to qualified immunity given the state of the law on the issues at the time of the incident. Subsequently, the court [dismissed](#) remaining federal claims for municipal liability.

- ***Testimony by mentally impaired litigants***

One issue that sometimes arises is whether to credit the testimony of a possibly mentally impaired plaintiff as to what happened. In one case, correctional officers used their Tasers in stun mode against a female arrestee several times while escorting her into the county detention center vestibule, resulting in her being hospitalized for multiple burns. While she had been combative while arrested, she was handcuffed and compliant when she first arrived at the detention center. She claimed that the Taser use was unprovoked and unnecessary, while correctional officers claimed that she again became combative and non-compliant requiring them to use Tasers on her after she arrived, and again while taking her to the hospital.

The trial court completely discounted the arrestee’s version of events, finding that she was “undergoing a psychotic episode of some sort on the day in question, leaving her with a dim and incomplete memory of the day's events.”

The appeals court disagreed, saying that this was not a case in which “the plaintiff’s testimony is so fantastic or internally inconsistent that no reasonable jury could credit it.”

A summary judgment for the defendants was therefore reversed for reconsideration, taking the plaintiff's testimony into account. [*Skelly v. Okaloosa County Bd. of County Comm'rs*](#), #10-11842, 415 Fed. Appx. 153, 2011 U.S. App. Lexis 3371 (Unpub. 11th Cir.). In a subsequent opinion, the federal appeals court rejected the correctional officers' appeal of the trial court's denial of their motion for summary judgment on the basis of qualified immunity.

Under the arrestee's version of the incident, in which she was handcuffed, compliant, and in a secure area of the jail, the officers' unprovoked use of Tasers against her would be unreasonable and in violation of the Fourteenth Amendment under clearly established law. [*Skelly v. Okaloosa County Bd. of County Comm'rs*](#), #11-11969, 456 Fed. Appx. 845, 2012 U.S. App. Lexis 2238 (Unpub. 11th Cir.).

❖ Recommendations

1. Agencies should conduct scenario-based ECW training that discusses under what circumstances a transition to other force options should be considered. Officers issued an ECW should be trained to use the weapon in the dart and stun modes for purposes of incapacitating a person or as a countermeasure to gain separation between officers and the individual.
2. Officers should be made aware that use of an ECW in drive-stun mode is only a pain compliance tool; it does not provide incapacitation of the subject (unless used in the "3-point" mode when there is a dart miss or darts are spaced too close together). Use of the drive-stun mode may even exacerbate the situation by inducing rage in the subject if the subject feels the pain. Taser International [advises](#) that:

“Reasonable efforts should be made to minimize the number of ECD exposures. ECD users should use the lowest number of ECD exposures that are objectively reasonable to accomplish lawful objectives and should reassess the subject's behaviors, reactions, and resistance level before initiating or continuing the exposure. If [the] subject is non-compliant after a number of ECD exposures, consideration should be given to whether alternative control measures in conjunction with or separate from the ECD are appropriate under the circumstances.”

Some seasoned use of force experts prefer policies that encourage ECW dart-mode use, and strongly discourage the drive-stun mode, which some believe have become the subject of “much unnecessary litigation.”

3. ECWs should not be used against handcuffed or otherwise securely restrained individuals unless it is necessary to do so to prevent them from causing serious bodily harm to themselves or others and other attempts at control have been or likely would be ineffective.
4. Agencies should consider and discuss whether policies should provide special cautions on the use of ECWs against persons with a mental, physical, or developmental disability, or a particular vulnerability. Taser International [advises](#) that the use on a pregnant, infirm, elderly, small child, or low body-mass index person could increase the risk of death or serious injury, and that use of the weapon has not been scientifically tested on these populations.
5. In deciding motions for summary judgment, federal judges will methodically examine each cycle of an ECW, and an officer must be able to articulate sequentially why each application of the weapon was appropriate.
6. When purchasing ECWs, police agencies should consider the [camera option](#), if officers are not equipped with wearable video devices. Video devices can also be retrofitted to existing X26 and X2 models of the Taser. Video capture discourages officer misconduct, provides independent corroboration of the need to use force, and helps persuade a judge or jury that a person was actively resisting or disobeying lawful commands. In a corrections setting, management should insure that all cell extractions and other high risk activities are audio and video recorded.
7. After a deployment, a non-involved supervisory or command rank officer needs to download and preserve the data and any video. The printout should be attached to the related incident report.
8. All personnel who were present should be required to document their observations. A supervisor should compile a list of the names of any witnesses and ask them to consent to an audio-recorded interview. Download a Taser recommended [checklist](#).

❖ Resources

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

- [Assault and Battery: Handcuffs & Restraints](#). AELE Case Summaries.
- [Electronic Control Weapons - AELE Case Summaries](#).
- [Electronic Control Weapons Articles and Resources](#).
- [Glossary](#) of ECW terminology.
- [Handcuffs](#). Wikipedia Article.
- [Taser](#). Wikipedia Article.
- [Use of Electronic Control Weapons – Precautions in Selected Situational Circumstances](#).

❖ Prior Relevant Monthly Law Journal Articles

- [Civil Liability for the Use of Handcuffs: Part I - Handcuffs as Excessive Force](#), 2008 (10) AELE Mo. L.J. 101.
- [Civil Liability for the Use of Handcuffs: Part II - Use of Force Against Handcuffed Persons](#), 2008 (11) AELE Mo. L.J. 101.
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part I: 4th Amendment claims for excessive force](#), 2007 (3) AELE Mo. L.J. 101.
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part II: Use against juveniles, and inadequate training claims](#), 2007 (4) AELE Mo. L.J. 101.
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part III: Use Against Detainees and Disabled or Disturbed Persons](#), 2007 (5) AELE Mo. L.J. 101.
- [Electronic Control Devices: Liability and Training Aspects](#), by Edmund Zigmund, 2007 (5) AELE Mo. L.J. 501.
- [Taser® Electronic Control Devices \(ECDs\): An “Intermediate” Use of Force?](#), 2010 (2) AELE Mo. L. J. 101.
- [Second Circuit Panel Allows Stun Mode to Gain Compliance of Chained Protestors](#), 2011 (5) AELE Mo. L. J. 501.
- [Ninth Circuit finds that the use of a TASER® constituted excessive force: Two cases involved noncompliant subjects](#), 2011 (12) AELE Mo. L. J. 101
- [Weapon Confusion and Civil Liability](#), 2012 (6) AELE Mo. L. J. 101

❖ References

- [Electronic Control Devices - Where are we now?](#) (Daigle Law Group, Nov. 2011).
- [Mental Health and Treatment of Inmates and Probationers](#), NCJ 174463 (July 1999).
- [Police Use of Force, Tasers and Other Less-Lethal Weapons](#), NIJ (May 2011).

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AELE Monthly Law Journal

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