Police Use of Force and Citizen Rights

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Legal Association for Women

Wednesday, October 11, 2017

Coopers Tavern – Madison, Wisconsin

INTRODUCTION

Generally, citizens have the right to be free from police use of excessive force; meaning an officer may not use unreasonable force. The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof. Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865 (1989). Over the years the U.S. Supreme Court, federal courts, and state courts have tried to define what force constitutes excessive force in certain situations. This discussion will not cover all situations. Instead, I will focus on a small slice of the law involving police use of excessive force with examples involving resisting arrest, failure to comply with officer orders, overuse of force for an arrest, and give practical advice on how to litigate an excessive force claim.

Excessive Force Cases Against Police Are Typically Filed Pursuant to 42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Section 1983 was enacted on April 20, 1871 as part of the Civil Rights Act of 1871, and is also known as the "Ku Klux Klan Act." Actions against police officers under this law began in 1961 after the U.S. Supreme Court decided Monroe v. Pape, 365 U.S. 167 (1961) where it held that 13 police officers who broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, ransacked every room, emptying drawers, ripping mattress covers, and then arrested Mr. Monroe, held him for 10 hours, interrogated him about a murder, refused to take him to a magistrate, refused to permit him to call his family or an attorney, and then released him without criminal charges were acting under "color of state law" and violated Mr. Monroe's rights as they did not have a search warrant, no arrest warrant, and detained Mr. Monroe without arraignment.

Who Do You Sue When An Officer Has Used Excessive Force?

1. Individual Police Officer Liability

A Plaintiff must sue each officer in their individual capacity.

2. Municipal Liability

    1. You can sue a municipality for prospective or injunctive relief under 1983.

    2. To sue the municipality for the officer's conduct one must bring a 1983 claim under Monell v. Dept. of Social Svcs. of city of New York, 436 U.S. 658 (1978). These claims are essentially claims arguing a failure to train or supervise and a claim that the municipality promotes or furthers a policy or custom that allows the individual officer's illegal behavior to continue.

There are several types of claims that can be brought against an individual officer involving an incident where the force used was excessive. Some include:

1. Excessive Force;
2. Failure to Intervene (against an officer who was present and did not try to stop the force);
3. False Arrest/False Imprisonment;
4. Malicious Prosecution.

Understanding the Fourth Amendment

To understand claims by citizens against police for excessive force one should have an understanding of the Fourth Amendment. The Fourth Amendment protects against unreasonable searches and seizures and is enforced through the Fourteenth Amendment. Often every excessive force case involves a Fourth Amendment violation.

1. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) – "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

2. Seizures must be reasonable to pass constitutional muster. State v. Brown, 2014 WI 69, ¶ 19; Whren v. United States, 517 U.S. 806, 809-10 (1996).

3. Reasonable suspicion to justify a seizure exists if "the facts of the case would warrant a reasonable officer, in light of his or her training and experience, to suspect that the individual has committed, was committed, or is about to commit a crime." State v. Post, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. This is an objective standard and applies to automobile stops as well.

4. Under Terry v. Ohio an officer may approach an individual for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. "in the absence of reasonable suspicion, 'the balance between the public interest and

appellant's right to personal security and privacy tilts in favor of freedom from police interference,' because 'the risk of arbitrary and abusive police practices exceeds tolerable limits.'" Brown v. Texas, 443 U.S. 47, 52 (1979)

5. Temporarily stopping a car requires reasonable suspicion of criminal activity. Wisconsin courts have routinely confused the difference between reasonable suspicion and probable cause thus causing those terms to be used interchangeable in Wisconsin case law. But, for purposes of excessive force claims it is important to understand that although an officer can stop a person with reasonable suspicion of criminal activity, he/she cannot arrest the person without probable cause.

6. An arrest without probable cause is a per se violation of the Fourth Amendment. And, any amount of force used to effectuate such an arrest is excessive force.

Failure to provide identification or information does not constitute criminal conduct or probable cause of criminal activity.

1. We do not equate the failure to identify oneself with the act of giving false information. . . . Mere silence, standing alone, is insufficient to constitute obstruction under the statute. Henes v. Morrissey, 194 Wis. 2d 338, 553 N.W.2d 802 (1995); State v. Hamilton, 120 Wis. 2d 532, 542, 356 N.W.2d 169 (1984).

2. In Henes the police stopped Mr. Henes while walking along a highway in the early morning because they thought he was a suspect in a reported auto theft. When Mr. Henes refused to identify himself during this investigatory stop, the officers arrested and charged him with obstructing their investigation. The criminal case was dismissed for lack of probable cause (that's a Fourth Amendment violation) and then he brought a civil action under 42 U.S.C. 1983 against the officers for false arrest as the officer arrested Mr. Henes for obstruction for his failure to identify himself. The trial court granted Mr. Henes summary judgment and allowed the jury to determine damages ($500) and awarded attorney fees. Morrissey appealed and the Wisconsin Supreme Court decided there was a Fourth Amendment violation but the officer was entitled to qualified immunity because at the time it was not clearly established law that the police officer could not arrest Mr. Henes for obstructing an investigation simply because he failed to identify himself.

Qualified Immunity

1. Qualified Immunity is the government's way of say you cannot sue us because we were doing our job. So, if we are negligent in the course of our job and we hurt you then you cannot sue us. Like the companion federal cases qualified immunity applies in excessive force cases if the right violated was not clearly established before the officer's conduct occurred.

2. "If the right violated was not clearly established" really means – was there a prior case in which an officer did something similar in which an appellate court said that conduct is excessive force but because this was the first time we saw it you get qualified immunity?

3. Alternatively, one can say it means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640, 107 S. Ct. at 3039.

4. If you are going to bring an excessive force case you should research the conduct you claim was excessive and make sure you can find a case where similar conduct was previously ruled excessive – particularly by the U.S. Supreme Court or the Seventh Circuit.

5. When Defendant raises qualified immunity Plaintiff bears the burden of showing clearly established right violated.

Excessive Force

1. Use of excessive force by police officers during an investigatory stop constitutes a Fourth Amendment violation actionable under 42 U.S.C. § 1983. Clash v. Beatty, 77 F.3d 1045, 1047 (7th Cir. 1996).

2. The seminal case Graham v. Connor, 490 U.S. 386 (1989) provides the framework for determining whether an officer used excessive force.

    a. The Fourth Amendment as applied to the states by the Fourteenth Amendment protect against unreasonable seizures.

    b. Determining whether force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a balancing of the "nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake. 490 U.S. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

    c. The reasonableness test requires "careful attention to the facts and circumstances of each particular case, including 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.

    d. "An officer's use of force is unreasonable if, judging from the totality of the circumstances at the time of the arrest, the officer uses greater force than was reasonably necessary to effectuate the arrest." Phillips v. Community. Ins. Corp., 678 F.3d 513, 519 (7th Cir. 2012) (citing Gonzales v. City of Elgin, 578 F.3d 526, 539 (7th Cir. 2009)).

e. Other considerations include whether the citizen was under arrest or suspected of committing a crime, was armed or was interfering or attempting to interfere with the officer's execution of his or her duties. Jacobs v. City of Chicago, 215 F.3d 758, 773 (7th Cir. 2000).

f. The excessive force inquiry also looks to whether the force used to seize the suspect was excessive in relation to the danger he posed to the community or to the arresting officers if left unattended. McDonald v. Haskins, 966 F.2d 292, 292-93 (7th Cir. 1992).

EXAMPLES

Cyrus v. Town of Mukwonago, 624 F.3d 856, 863 (7th Cir. 2010).
Where the offense of arrest is a misdemeanor and where the individual is not exhibiting violent behavior, a lesser degree of force than a Taser is reasonable. Cyrus suffered from paranoid schizophrenia and other mental health disorders. His parents called for assistance as they could not find him. There was a report of a man near a home that fit his description and officers from the Town of Mukwonago responded, finding Cyrus near the partially built home wearing only a bathrobe. When Cyrus did not comply with the officer's command to come to the patrol car, one officer fired his Taser at Cyrus which caused him to fall to the ground, attempt to get up, fall down again, and roll down toward the officers. When the officers tried to get Cryus' hands from underneath him to arrest him, he refused and so he was tasered several more times. In all the officers admitted to at least 6 shots with their Tasers while the coroner report details at least 12 shot wounds. When the officers turned him over onto his back he was not breathing and pronounced dead at the scene. The trial court dismissed the case on qualified immunity. The Seventh Circuit reversed. "Force is reasonable only when exercised in proportion to the threat posed, see Oliver v. Fiorino, 586 F.3d 898, 907 (11th Cir.2009) ("Quite simply, though the initial use of force (a single Taser shock) may have been justified, the repeated tasering ... was grossly disproportionate to any threat posed and unreasonable under the circumstances."), and as the threat changes, so too should the degree of force, see Santos v. Gates, 287 F.3d 846, 853 (9th Cir.2002). Force also becomes increasingly severe the more often it is used; striking a resisting suspect once is not the same as striking him ten times. It's the totality of the circumstances, not the first forcible act, that determines objective reasonableness."

Estate of Starks v. Enyart, 5 F.3d 230, 234 (7th Cir. 1993).
Police officers who unreasonably create a threatening situation in the midst of a Fourth Amendment seizure are not protected by qualified immunity for the use of force in response to the situation they created. Mr. Starks stole a taxicab and drove it to a nearby Taco Bell. Police quickly surrounded him while he was in line at the drive through. Mr. Starks maneuvered the taxi to get out of line while the officers exited their squads and pointed their weapons at him. According to Mr. Starks' witnesses Mr. Starks tried to step on the gas to escape and at that time an officer who was protected and out of the way of his vehicle jumped in front of the vehicle. The officers who shot and killed Starks argued qualified immunity protected their actions because they were trying to protect the officer

who was in the path of the vehicle. The Seventh Circuit denied the officers qualified immunity on the basis that the urgency was created by the officer who chose to jump in front of Starks' vehicle knowing he was going to drive away.

Clash v. Beatty, 77 F.3d 1045, 1048 (7th Cir. 1996)
An officer who does not have probable cause or reasonable suspicion to arrest an individual for wrong-doing and uses force or arrests the individual is per se unreasonable. Officer arrested Mr. Clash after finding a toy gun in his car that his child was using in the parking lot while Mr. Clash was in the store. Upon placing Mr. Clash in the squad car the officer gratuitously shoved him into the car injuring Mr. Clash's knee. Judge Crabb opined that qualified immunity did not apply. "If the shove was wholly gratuitous, it may have constituted such an 'elementary violation' of the Fourth Amendment that plaintiff need not show a precisely analogous case.'" The Seventh Circuit concurred with Judge Crabb. *See also* Reese v. Herbert, 527 F.3d 1253 (11th Cir. 2008).

Phillips v. Community. Ins. Corp., 678 F.3d 513, 519 (7th Cir. 2012) Continual use of a baton launcher at a suspect who failed to exit a vehicle on command constituted excessive force. Tamara Phillips suffered injuries to her ankle and leg necessitating 30 stitches when her skin was ripped from her bone when she was hit four times with a baton launcher for failing to exit her vehicle. She was lying down in the front seat with her feet and lower legs hanging out of the vehicle. Officers asked her to get out and she remained where she was, highly intoxicated at the time. She eventually brought a civil rights claims under 42 U.S.C. 1983 for excessive force against the officers. She lost at trial and appealed arguing she was entitled to judgment as a matter of law because force was used when she posed no threat to the public, was not fleeing, and did not offer any resistance to the arresting officers. The Seventh Circuit reversed finding that the officers used excessive force as a matter of law when they shot a baton launcher 4 times at Ms. Phillips.

How to Build Your Case In An Excessive Force Claim

1. Interview your client and all witnesses to determine what facts you can prove as to the underlying conduct of each officer and your client.

2. Obtain other evidence such as body camera footage, street camera footage, cell phone video, or other demonstrative evidence that may be available.

3. Request in discovery municipal documents, policies, procedures, and training materials that indicate whether the conduct you assert violated your client's Fourth Amendment rights occurred because the municipality condoned it, taught it, or turned its eye away from punishing its officers for such conduct. Request personnel files, discipline records, and training records of involved employees.

4. Depose each party for their version of what happened, for their training and experience, for their prior discipline record.

5. Depose training supervisors or other such individuals to determine if the behavior as you assert occurred is acceptable to the municipality.

Summary Judgment Issues

1. When a defendant moves for summary judgment he/she is asserting there are no material facts in dispute or if there are those facts are inconsequential and therefore they are entitled to judgment as a matter of law. This typically means qualified immunity – our conduct was justified by the situation or it wasn't clearly established at the time to be a violation of the law, or your claim is barred by the doctrine of Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994).

   Heck basically says that your claim can be barred if your successful civil action would call into question your prior conviction in the same incident. "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove *487 that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254."

2. Your defense to these motions should include material facts that support your assertion of excessive force.

3. Your defense should also include case law that the right violated was clearly established at the time of the conduct in your case.