



COURT APPLIES GRAHAM IN DECIDING THAT USE OF THE TASER® WAS UNCONSTITUTIONAL



United States Court of Appeals for the Ninth Circuit

October 2011

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Article Source: http://www.llrmi.com/articles/legal_update/2011_9th_TASER@.shtml

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In a consolidated case, the United States Court of Appeals for the Ninth Circuit reheard two cases that were previously considered by panels of the Ninth Circuit. *Brooks v. Seattle* and *Mattos v. Agarano* Circuit were heard en banc in 2011. The decision in the case, issued on October 17th, found that the actions of the officers in both cases were unconstitutional, but then gave the officers qualified immunity.¹ The case, which applies to officers working in a Ninth Circuit jurisdiction provides an officer with a view of how use of a TASER® specifically, or an electronic control device generally will be reviewed in their jurisdiction.

Brooks involved the car stop of a woman who was 7 months pregnant. When Brooks, the female, refused to sign the citation she was told she was under arrest however she resisted the officers' attempt to take her into custody. The officers ended up using the TASER®, in the drive-stun mode three times to achieve custody.

At the outset, the court noted that it was not necessary to decide the significance of the use of TASER® in the drive-stun mode as compared to the probe mode since the case could be decided without reaching this particular issue. In considering the conduct of the officers in *Brooks*, the court wrote:

We begin by considering the nature and quality of the force used against Brooks: a taser in drive-stun mode. We have previously described the force involved when a taser is deployed in dart-mode. In *Bryan*, we explained that in dart-mode the taser uses compressed nitrogen to propel a pair of "probes"--aluminum darts tipped with stainless steel barbs connected to the [taser] by insulated wires--toward the target at a rate of over 160 feet per second. Upon striking a person, the [taser] delivers a 1200 volt, low ampere electrical charge . . . The electrical impulse instantly

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overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless.

When a taser is used in drive-stun mode, the operator removes the dart cartridge and pushes two electrode contacts located on the front of the taser directly against the victim. In this mode, the taser delivers an electric shock to the victim, but it does not cause an override of the victim's central nervous system as it does in dart-mode. Each of the three times that Jones tased Brooks in drive-stun mode, the shock was "extremely painful." In *Bryan*, we held that tasers used in dart-mode "constitute an intermediate, significant level of force."

Here, the record is not sufficient for us to determine what level of force is used when a taser is deployed in drive-stun mode. We follow the Supreme Court's guidance in *Scott*, however, and need not decide this issue in order to assess the reasonableness of the tasing. ("Whether or not [a defendant's] actions constituted application of 'deadly force,' all that matters is whether [the defendant's] actions were reasonable."). Instead, we proceed to determine whether Jones's use of the taser against Brooks in this case was reasonable, keeping in mind the magnitude of the electric shock at issue and the extreme pain that Brooks experienced. See *Brown v. City of Golden Valley*, 574 F.3d 491, 495 (8th Cir. 2009) (noting that a woman who was tased in drive-stun mode experienced "extreme pain" and "felt a sharp pain where the Taser met her arm, with the pain radiating from her upper arm and causing her muscles to clench").

In evaluating the reasonableness of Jones's action, we consider the governmental interests at stake and begin with (1) how severe the crime at issue was, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. (cites omitted).

The court then examined the facts in accordance with the three-part test from [Graham](#).

According to the facts as alleged by Brooks, the officers pulled her over for speeding and then detained and took her into custody because she refused to sign a traffic citation. She refused to sign the citation after she gave Ornelas her driver's license and he spent five minutes in his squad car with the license, presumably checking the status of her license. We appreciate the danger associated with speeding, and we do not minimize the particular importance of observing school zone speed limits. We also recognize the importance of having people sign their traffic citations when required to do so by state law. However, we have no difficulty deciding that failing to sign a traffic citation and driving 32 miles per hour in a 20-mile-per-hour zone are not serious offenses. Indeed, our case law demonstrates that far more serious offenses than Brooks's do not constitute severe crimes in a *Graham* analysis.

We next consider whether Brooks "posed an immediate threat to the safety of the officers or others." When the encounter began, Brooks was compliant: she pulled over when signaled to do so, gave her driver's license to Ornelas when asked, and waited in her car while Ornelas checked her information. When Ornelas returned and informed Brooks that he was going to cite her for the speeding violation, she became upset and proceeded to become increasingly agitated and uncooperative as the incident evolved. At no time did Brooks verbally threaten the officers. She gave no indication of being armed and, behind the wheel of her car, she was not physically threatening. At most, the officers may have found her uncooperative and her agitated behavior to be potentially threatening while Brooks's keys

remained in the ignition of her car. In theory, she could have attempted to drive away rapidly and recklessly, threatening the safety of bystanders or the officers. But at some point after Ornelas grabbed Brooks's arm and before Jones applied the TASER® to her, Ornelas removed the keys from Brooks's car ignition and the keys dropped to the car's floor. Thus, at the time Jones applied the TASER® to Brooks, she no longer posed even a *potential* threat to the officers' or others' safety, much less an "immediate threat." We reiterate that this is the "most important single element" of the governmental interests at stake.

The third governmental interest factor in the *Graham* test is whether Brooks was "actively resisting arrest or attempting to evade arrest by flight, and any other exigent circumstances that existed at the time of the arrest." Brooks refused to get out of her car when requested to do so and later stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. In other words, she resisted arrest. We observe, however, that Brooks' resistance did not involve any violent actions towards the officers. In addition, Brooks did not attempt to flee, and there were no other exigent circumstances at the time. The facts reflect that the officers proceeded deliberately and thoughtfully, taking an aside in the midst of the incident, to discuss where they should *tase* Brooks after they found out she was pregnant. There is no allegation that an exigent circumstance requiring the attention of one of the three officers existed *somewhere else*, so that the encounter with Brooks had to be resolved as quickly as possible. Still, Brooks engaged in some resistance to arrest.

Finally, we must examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." We note that Brooks bears some responsibility for the escalation of this incident, which influences the totality of these circumstances. There are, however, two other specific factors in this case that we find overwhelmingly salient. First, Brooks told Jones, before he *tased* her, that she was pregnant and less than 60 days from her due date. And as explained above, Jones and Ornelas paused after they learned she was pregnant and discussed where they should *tase* Brooks in light of this information. The record unambiguously reflects that the officers knew about and considered Brooks's pregnancy before *tasing* her.

The second overwhelmingly salient factor here is that Jones *tased* Brooks three times over the course of less than one minute. Twenty-seven seconds after Jones cycled his TASER® as a warning, he applied the TASER® to Brooks. Thirty-six seconds later, he *tased* Brooks for the second time. Six seconds after that, Jones *tased* Brooks for the third time. Each time, Brooks cried out in pain. Three *tasings* in such rapid succession provided no time for Brooks to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply.

In sum, Brooks's alleged offenses were minor. She did not pose an immediate threat to the safety of the officers or others. She actively resisted arrest insofar as she refused to get out of her car when instructed to do so and stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. Brooks did not evade arrest by flight, and no other exigent circumstances existed at the time. She was seven months pregnant, which the officers knew, and they *tased* her three times within less than one minute, inflicting extreme pain on Brooks.

A reasonable fact-finder could conclude, taking the evidence in the light most favorable to Brooks, that the officers' use of force was unreasonable and therefore constitutionally excessive.

Having found that the use of the TASER® in the drive-stun mode on Brooks to be a violation of the Constitution, the court went on to hold that at the time the TASER® was deployed on Brooks, the law was not clearly established, thus, the officers were entitled to qualified immunity.

Note: The court did not decide what level of force, on the significance scale, a drive-stun would be in the Ninth Circuit.

The facts in the *Mattos* case were outlined by the court as follows:

On August 23, 2006, Jayzel Mattos and her husband Troy had a domestic dispute. Around 11 p.m., Jayzel asked C.M., her 14-year-old daughter, to call the police, which C.M. did. Several minutes later, Maui Police Officers Darren Agarano, Halayudha MacKnight, and Stuart Kunioka arrived at the Mattoses' residence. As the officers approached the residence, they saw Troy sitting on the top of the stairs outside the front door with a couple of open beer bottles lying nearby. Troy is six feet three inches tall, approximately 200 pounds, and he smelled of alcohol when the officers arrived. Officer Ryan Aikala arrived by himself soon after.

Kunioka approached Troy first and informed him about the 911 call. Troy told Kunioka that he and Jayzel had an argument, but he stated that nothing physical had occurred. As Kunioka continued to question Troy, Troy became agitated and rude. Kunioka asked Troy if he could speak to Jayzel to ensure that she was okay. When Troy went inside to get Jayzel, Agarano stepped inside the residence behind him. Troy returned with Jayzel and became angry when he saw Agarano inside his residence. Jayzel was initially behind Troy, but she ended up in front of him on her way to the front door to speak with the officers. Troy yelled at Agarano to get out of the residence because he had no right to be inside. Agarano asked Jayzel if he could speak to her outside.

Jayzel agreed to go outside, but before she could comply with Agarano's request, Aikala entered the residence and stood in the middle of the living room. When Aikala announced that Troy was under arrest, Jayzel was already standing in front of Troy. She did not immediately move out of the way. As Aikala moved in to arrest Troy, he pushed up against Jayzel's chest, at which point she "extended [her] arm to stop [her] breasts from being smashed against Aikala's body." Aikala then asked Jayzel, "Are you touching an officer?" At the same time, Jayzel was speaking to Agarano, asking why Troy was being arrested, attempting to defuse the situation by saying that everyone should calm down and go outside, and expressing concern that the commotion not disturb her sleeping children who were in the residence.

Then, without warning, Aikala shot his TASER® at Jayzel in dart-mode. Jayzel "felt an incredible burning and painful feeling locking all of [her] joints [and] muscles and [she] f[e]ll hard on the floor." Agarano and MacKnight handcuffed Troy. Troy and Jayzel were taken into custody; Troy was charged with harassment, in violation of *Hawaii Revised Statutes* § 711-1106, and resisting arrest, in violation of *Hawaii Revised Statutes* § 710-1026, and Jayzel was charged with harassment and obstructing government operations, in violation of *Hawaii Revised Statutes* § 710-1010. All charges were ultimately dropped.

In analyzing the case in light of the *Graham* factors, the court reported:

Considering the first governmental interest factor, the severity of the crime at issue, we are mindful that we must construe the facts in the light most favorable to Jayzel at this stage. See *KRL*, 512 F.3d at 1188-89. When Jayzel appeared in the

hallway, Agarano asked to speak to Jayzel outside; she agreed, but before she could comply, Aikala entered the residence. When Aikala announced that Troy was under arrest, Jayzel was already standing in front of Troy. She did not immediately move out of the way. As Aikala moved in to arrest Troy, he pushed up against Jayzel's chest, at which point she "extended [her] arm to stop [her] breasts from being smashed against Aikala's body." Aikala then asked Jayzel, "Are you touching an officer?" At the same time, Jayzel was speaking to Agarano, asking why Troy was being arrested, attempting to defuse the situation by saying that everyone should calm down and go outside, and expressing concern that the commotion might disturb her sleeping children who were in the residence. Taking the evidence in the light most favorable to Jayzel, and resolving all conflicts in her favor, the most that can be said about her actions is that, while standing between Troy and Aikala, she attempted to prevent Aikala from pressing up against her breasts. While this may have momentarily deterred Aikala's immediate access to Troy, it did not rise to the level of obstruction. Thus, under *Graham*, the severity of the crime, if any, was minimal.

The next, and most important, *Graham* factor is whether "the *suspect* posed an immediate threat to the safety of the officers or others." Here, Jayzel was the "suspect" against whom force was used, so we consider whether *she* posed an immediate threat to the officers' safety. The officers came to the residence in response to a 911 call made at Jayzel's request during a domestic dispute with Troy. Once the officers arrived and saw Jayzel, there were no objective reasons to believe that she was armed, she did not verbally threaten the officers, and her only physical contact with Aikala resulted from her defensively raising her hands to prevent him from pressing his body against hers after he came into contact with her. Jayzel's main contribution to the scene consisted of repeatedly entreating the officers and her husband to calm down and go outside so that her sleeping children would not be awakened. Jayzel posed no threat to the officers.

The third enumerated governmental interest factor is whether Jayzel was actively resisting arrest or attempting to evade arrest by flight. According to Jayzel's rendition of the facts, the most that can be said is that she minimally resisted Troy's arrest. She was standing between Aikala and Troy *before* Aikala moved in to arrest Troy, and her physical contact with Aikala was defensive, intended to protect her own body from contact with Aikala. That being said, when Aikala stated that Troy was under arrest, Jayzel did not immediately move out of the way to facilitate the arrest. For the purposes of this *Graham* factor, however, we draw a distinction between a failure to facilitate an arrest and active resistance to arrest. Moreover, the crux of this *Graham* factor is compliance with the officers' requests, or refusal to comply. Here, Jayzel was attempting to comply with Agarano's request to speak with her outside when she got physically caught in the middle between Aikala and Troy. Accordingly, this factor weighs in Jayzel's favor.

Finally, it is important in this case that we consider the additional 'specific factors' relevant to the totality of these circumstances. While Jayzel herself did not pose any threat to the officers' safety, we must also consider the danger that the overall situation posed to the officers' safety and what effect that has on the reasonableness of the officers' actions. As we have recounted, the officers came to the Mattoses' residence in response to a 911 domestic dispute call. When they arrived they encountered Troy, who was sitting by himself outside the residence, hostile, seemingly intoxicated, six feet three inches tall and approximately 200 pounds. We have observed that "[t]he volatility of situations involving domestic violence" makes them particularly dangerous. "When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning.

Indeed, more officers are killed or injured on domestic violence calls than on any other type of call." We have also "recognized that the exigencies of domestic abuse cases present dangers that, in an appropriate case, may override considerations of privacy."

We take very seriously the danger that domestic disputes pose to law enforcement officers, and we have no trouble concluding that a reasonable officer arriving at the Mattoses' residence reasonably could be concerned about his or her safety. In light of such concerns, we have recognized that "the exigencies of domestic abuse cases present dangers that . . . may override considerations of privacy" where the alleged *Fourth Amendment* violation was a warrantless entry into a residence for the purpose of intervening in a domestic dispute, protecting the potential victim, and gaining control over a volatile situation that could endanger the officers. Here, though, the alleged *Fourth Amendment* violation is the excessive use of force against the potential non-threatening victim of the domestic dispute whom the officers ostensibly came to protect. Our previous reasoning for providing some *Fourth Amendment* leeway to officers who must enter a residence without a warrant in response to domestic disputes does not logically extend to officers who use an intermediate level of force on the non-threatening victim of a domestic dispute whom they have come to protect--especially when the domestic dispute is seemingly over by the time the officers begin their investigation.

In drawing this distinction, we are guided by the Supreme Court's reasoning in *Scott*. There, the Court observed that in weighing the *Graham* governmental interests in a situation where someone is likely to get hurt--either a fleeing suspect or innocent bystanders--it is "appropriate in this process to take into account . . . relative culpability." Given the procedural posture at this stage of the proceedings, we cannot say that Jayzel was culpable in this situation. We understand that Jayzel was unintentionally in the way when Aikala attempted to gain control over a potentially dangerous situation by arresting Troy, and we appreciate that "police officers are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." At the same time, we are unable to identify any reasonableness in the conclusion--whether made in a split-second or after careful deliberation--that tasing the innocent wife of a large, drunk, angry man when there is no threat that either spouse has a weapon, is a prudent way to defuse a potentially, but not yet, dangerous situation. We stress that this unreasonableness is compounded by the officers' knowledge that there were children present in the home at the time.

Finally, the fact that Aikala gave no warning to Jayzel before tasing her pushes this use of force far beyond the pale. We have previously concluded that an officer's failure to warn, when it is plausible to do so, weighs in favor of finding a constitutional violation.

To summarize, Aikala used the intermediate force of a TASER® in dart-mode on Jayzel after he and the other officers arrived to ensure her safety. Her offense was minimal at most. She posed no threat to the officers. She minimally resisted Troy's arrest while attempting to protect her own body and to comply with Agarano's request that she speak to him outside, and she begged everyone not to wake her sleeping children. She bears minimal culpability for the escalation of the situation. The officers were faced with a *potentially* dangerous domestic dispute situation in which they reasonably felt that Troy could physically harm them if he chose to, but there was no indication that Troy intended to harm the officers or that he was armed. When Aikala encountered slight difficulty in arresting Troy because Jayzel was between the two men, Aikala *tased* her without warning. Considering the totality of these circumstances, we fail to see any reasonableness in the use of a TASER® in dart-mode against Jayzel. When all the material factual disputes are resolved in Jayzel's favor and the evidence is viewed in the light most favorable to her, we conclude that she has alleged a *Fourth Amendment*

violation. That is, a reasonable fact finder could conclude that the officers' use of force against Jayzel, as alleged, was constitutionally excessive in violation of the *Fourth Amendment*.

After finding that the officers were not entitled to summary judgment based on their use of the TASER® in the probe mode, the court held that the law was not clearly established at the time the officers used the force on Jayzel Mattos. Thus, the officers were granted Qualified Immunity.

NOTE: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

CITATIONS:

ⁱ Mattos v. Agarano; Brooks v. City of Seattle, 2011 U.S. App. LEXIS 20957 (9th Cir.2011).