



FOURTH CIRCUIT HOLDS OFFICERS ACTED REASONABLY IN SHOOTING MAN IN STAND-OFF ARMED WITH A SHOE

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On May 5th, 2016, the Fourth Circuit Court of Appeals decided *Lee v. Bevington et al.*, which serves as an excellent review of the law pertaining to when deadly force is reasonable under the Fourth Amendment. The relevant facts of *Lee*, taken directly from the case, are as follows:

On July 14, 2010, officers of the Richmond Police Department ("RPD") arrived at Fleming's family home in Richmond, Virginia, to execute a warrant for Fleming's arrest on charges of robbery and use of a firearm in the commission of a felony. Fleming was also suspected of being involved in a homicide and home invasion committed earlier that day. When police entered the residence, Fleming retreated and barricaded himself in an upstairs bathroom. Officers present on the scene reported that Fleming refused to exit the bathroom and repeatedly threatened to shoot the police officers.

After that initial interaction, the RPD officers dispatched a SWAT team to the residence; Bevington was a member of that SWAT team. The commander of the SWAT team, Lieutenant Mauricio Tovar ("Tovar"), communicated to the SWAT officers, including Bevington, the threats that Fleming had made to the RPD officers. Tovar also showed the SWAT officers Fleming's "wanted poster," which described Fleming as "armed and dangerous" and advised that he "[would] not go quietly." J.A. 357. The poster also included Tovar's handwritten notes describing communications he had received from RPD officers investigating the homicide. Those notes indicated that Fleming was possibly armed with a handgun and had made statements that he "will shoot" and was "not going down without a fight." J.A. 354. When Fleming's father, Jotaynun Lee ("Lee"), arrived at the residence and spoke with officers on the scene, he told the officers that Fleming did not have a gun.

After Tovar briefed Bevington and the other SWAT team members on the foregoing information, the SWAT team members staged themselves in a spare bedroom across the hall from the master bedroom, which connected with the bathroom where Fleming remained barricaded. Police negotiators deployed a "throw phone" into the bathroom, which allowed for audio communication between Fleming and negotiation officers, as

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well as video surveillance of the scene in the bathroom. The negotiation team informed Tovar that based on the video surveillance relayed through the throw phone, Fleming appeared to have a gun tucked into his waistband. Tovar communicated this fact to Bevington and other SWAT team members in the staging area. The negotiation team, using the throw phone, attempted to convince Fleming to peacefully surrender for several hours. In addition, throughout the course of the negotiations, Bevington repeatedly instructed Fleming on how to surrender, telling him to come out of the bathroom with his hands up.

While barricaded, Fleming communicated with police negotiators and members of the SWAT team, telling them he wanted to speak to his father and that he wanted a cigarette. At one point during the standoff, negotiators informed the SWAT team members that Fleming had asked what the SWAT officers would do if he "came out with his junk." J.A. 355, 365. SWAT officers, including Bevington, heard Fleming repeat this question from the bathroom, yelling at the SWAT team, "What are you-all going to do when I come out with my junk? What are you going to do when I come out with my shit? You-all better get ready to kill me," and "you-all are going to have to shoot it out with me." J.A. 365, 751-52, 795. Officers interpreted "junk" to be a slang word for "gun" or "weapon."

After several hours, Fleming stopped responding to communications from the negotiators and began breathing heavily. Based on communications with the negotiators, Tovar determined that Fleming was preparing to exit the bathroom in a violent manner. Tovar then decided to fire tear gas into the master bathroom from outside the house in order to force Fleming to exit and surrender. In preparation for the tear gas deployment, Bevington and the other SWAT team members put on gas masks.

At the time the gas was deployed, Officer Wesley Moore ("Moore") was the first officer in the single-file SWAT line, kneeling and holding a ballistic shield. Bevington was stationed as the second officer in the team, standing directly behind Moore and providing "cover to a lethal threat." J.A. 368. Moore was positioned in the doorway of the spare bedroom; Bevington was leaning over the top of Moore, holding a rifle. The SWAT team members in line behind Moore and Bevington were also carrying rifles and service pistols; one carried a Taser to deploy if necessary. The last two officers in line were part of the "arrest team" responsible for handcuffing Fleming.

Soon after the tear gas canisters were launched into the bathroom where Fleming was barricaded, Fleming exited the master bathroom,¹ moved into the master bedroom, and advanced toward the officers, who were waiting approximately 13 feet away in the threshold of the door to the spare bedroom across the hall.

Moore and Bevington both testified that when Fleming exited the master bathroom, his hands were outstretched toward the SWAT team. They both testified that Fleming was holding a black cylindrical object wrapped in some sort of cloth, and that they perceived this object as a gun. What Moore and Bevington thought was a gun was later determined to be a woman's high-heeled shoe wrapped in a t-shirt. As Fleming came toward the officers, Moore fired a single shot at him. Moore later testified that he shot

because he feared for his life and thought that Fleming was going to shoot him or another member of the SWAT team.

Bevington testified that as Fleming came out of the bathroom and moved toward the officers, Moore shifted upwards a few inches, knocking Bevington's gun slightly. Bevington believed that the shot fired by Moore had come from Fleming. Bevington testified that after the first shot was fired, Fleming was still coming toward the officers with his hands straight out in front of him, holding what appeared to be a weapon. Bevington then fired several shots at Fleming.² Bevington testified that after he fired the first round of shots, Fleming fell to the ground but was still pointing his "weapon" at the officers and attempting to get back up as the officers approached. Moore also testified that after Fleming fell to the ground, he was still holding what appeared to be a weapon and was pointing it toward the officers. Bevington continued to fire until Fleming rolled over and Bevington could no longer see Fleming's hands. Bevington stated that the time between the first and second round of shots he fired was "less than seconds." J.A. 382. Moore and Bevington fired a total of nine rounds at Fleming, who was struck multiple times in his hands, arms, torso, and chest.

When the shooting ceased, the two arresting officers handcuffed Fleming, removed him from the scene, and placed him in a waiting ambulance.³ After being transported to a hospital, Fleming was pronounced dead within 30 minutes. Upon inspecting the scene after the shooting, officers did not find a gun. Photographs of the scene reveal a woman's high-heeled shoe and a blood-stained, light-colored t-shirt on the floor of the master bedroom.ⁱⁱ

The plaintiff sued and argued that the officers violated Fleming's Fourth Amendment right to be free from an unreasonable seizure (excessive force) by shooting him. The district court granted summary judgment for the officers and held that they acted reasonably. On appeal to the Fourth Circuit Court of Appeals, the plaintiff argued that the trial court erred in holding that there was no issue of material fact regarding the suspect's body position when he was shot both the first time and the second time when he was shot while he was on the floor.

The Fourth Circuit first examined relevant rules that pertain to this case. First, the court stated:

Excessive force does not arise if an officer's actions "are 'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." *Id.* (quoting *Graham*, 490 U.S. at 397). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application...[but] requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."ⁱⁱⁱⁱ [emphasis added]

In other words, the court stated that they must look at the totality of the circumstance viewed objectively, rather than examining the subjective (or personal) thoughts or intentions of the officers. Additionally, the court will balance the nature of the intrusion into a person's constitutional rights, against the governmental interests that may have justified some intrusion, in order to ensure that the intrusion was proportional or reasonable.

Next, the court discussed factors that were outlined by the Supreme Court in *Graham v. Connor* in examining the reasonableness of a use of force to determine if it was proportional regarding the nature of intrusion balanced against the government interest at stake. The court stated:

Three factors guide us in this balancing: 1) the severity of the crime at issue; 2) the extent to which the suspect poses an immediate threat to the safety of the officers or others; and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. "Ultimately, the question to be decided is 'whether the totality of the circumstances justifie[s] a particular sort of ... seizure.'" *Smith*, 781 F.3d at 101 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). **This court has previously noted that, as opposed to considering an officer's actions piecemeal in a "segmented sequence of events," "[t]he better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances."** *Id.* at 101-02 (quoting *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994)). **In addition, our determination of reasonableness must account "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."** *Graham*, 490 U.S. at 396-97.^{iv} [emphasis added]

Thus, in considering the three factors outlined above, the court must view the totality of the circumstance and consider the fact that officers must make split second decisions in tense, rapidly evolving circumstances regarding the amount of force to use in any given situation.

Lastly, quoting the district court as they quoted a Fourth Circuit case, *Elliott v. Leavitt*, the court of appeals stated:

No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life...the Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, of the nature of the threat or the suspect's intent to cause them harm—the Constitution does not require that certitude precede the act of self protection. *Lee v. City of Richmond, Va.*, 100 F. Supp. 3d 528, 542 (E.D. Va. 2015) (quoting *Elliott v. Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996)).^v [emphasis added]

The court then set out to analyze the facts of the case in light of the rules discussed above. The court first looked at the first factor from *Graham*, the severity of the crime at issue. They noted that the crime the officers were trying to arrest Fleming for was severe, particularly, armed robbery with a firearm. This weighed in favor of the officers.

Regarding the next factor, the court stated:

As to the second *Graham* factor, the uncontroverted testimony indicates that the officers reasonably believed that Fleming posed an immediate threat to their safety. In addition to being aware of the fact that Fleming was wanted for violent crimes, the officers had been briefed on information from RPD indicating that Fleming was likely armed. They also received reports from the negotiation team that video surveillance revealed what appeared to be a weapon tucked into Fleming's waistband. Moreover, Fleming made overt threats to the SWAT team officers on the scene implying that he was armed. Once he emerged from the bathroom holding what appeared to be a weapon pointed at the officers, there existed a reasonable perception that Fleming posed an immediate risk to their safety. While it was later determined that Fleming was not armed, he intentionally created the perception that he was. Fleming continued to point the apparent weapon at the officers even after Moore and Bevington fired their initial shots. These undisputed facts indicate that Bevington could reasonably have determined that Fleming posed a threat to his safety, as well as that of his fellow officers, over the course of the rapidly evolving and uncertain scenario that unraveled once Fleming came out of the bathroom.

Thus, while it ultimately turned out that Fleming was pointing a shoe rather than a firearm, the court stated that the officers had a reasonable perception that he was pointing a firearm. This reasonable perception, created by Fleming himself, weigh in favor of the officers having a reasonable belief that he posed a threat to them once he emerged out of the bathroom.

Lastly, the court considered the third factor from *Graham*, particularly, whether Fleming was actively resisting arrest. The court noted that Fleming had been actively resisting arrest for several hours prior to the shooting and he chose to emerge from the bathroom in a manner that gave the officers a reasonable belief that he was an armed threat intent on shooting the officers.

The court also briefly discussed the plaintiff's contention that their expert on trajectory of the bullets created a dispute regarding the officer's version of events. However, the court stated that:

[E]xpert opinions as to the trajectories of bullets fired at Fleming, any facts related to the distance and angle from which the bullets were fired would have no material impact on our analysis of the alleged constitutional violation at hand in light of the rest of the uncontroverted evidence discussed herein, even if such facts had been accepted by the district court.^{vi}

In conclusion, the court of appeals held:

In sum, the totality of circumstances here is that Fleming was actively resisting arrest for violent felony charges, threatened and taunted the police with suggestions that they should be prepared to kill him, made statements directly to the officers implying that he was armed, and came out of the bathroom after a multiple-hour standoff with his hands outstretched toward the officers, pointing what appeared to be a weapon at them. The district court properly concluded that considering the factual circumstances as a whole, "[n]o jury instructed on the applicable law could conclude that Bevington acted unreasonably in firing either the first or second volley" of shots. *Lee*, 100 F. Supp. 3d at 541. While the loss of life that occurred in the course of Fleming's attempted arrest is

undeniably heartrending, the totality of circumstances here clearly justifies the actions by law enforcement that took place.

Thus, the Fourth Circuit affirmed the grant of summary judgment to the officers in this case.

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

ⁱ No. 15-1384 (4th Cir. Decided May 5, 2016 Unpublished)

ⁱⁱ Id. at 5-10

ⁱⁱⁱ Id. at 16

^{iv} Id. at 17

^v Id. at 17-18

^{vi} Id. at 22