Bryan v. McPherson

United States court of Appeals for the Ninth Circuit Restricts the Use of TASER™

2009 U.S. App. LEXIS 28413 (12/28/2009)

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Note: This case may be appealed and at this point is applicable law in jurisdictions covered by the United States Court of Appeals for the 9th Circuit

In a case decided December 28, 2009, the United States Court of Appeals ruled that TASER™ is an intermediate weapon and as such requires a strong government interest before TASER™ or any electronic device can be deployed. This strong government interest as defined by the opinion is that the suspect poses an immediate threat to the officer or some other person.

The court outlined the facts in *Bryan v. McPherson* as follows:

"Carl Bryan's California Sunday was off to a bad start. The twenty-one year old, having stayed the night with his younger brother and some cousins in Camarillo, which is in Ventura County, planned to drive his brother back to his parents' home in Coronado, which is in San Diego County. However, Bryan's cousin's girlfriend had accidentally taken Bryan's keys to Los Angeles the previous day. Wearing the t-shirt and boxer shorts in which he had slept, Bryan rose early, traveled east with his cousins to Los Angeles, picked up his keys and returned to Camarillo to get his car and brother. He then began driving south towards his parents' home. While traveling on the 405 highway, Bryan and his brother were stopped by a California Highway Patrolman who issued Bryan a speeding ticket. This upset him greatly. He began crying and moping, ultimately removing his t-shirt to wipe his face. Continuing south without further incident, the two finally crossed the Coronado Bridge at about seven-thirty in the morning.

At that point, an already bad morning for Bryan took a turn for the worse. Bryan was stopped at an intersection when Officer McPherson, who was stationed there to enforce seatbelt regulations, stepped in front of his car and signaled to Bryan that he was not to proceed. Bryan immediately realized that he had mistakenly failed to

buckle his seatbelt after his earlier encounter with the police. Officer McPherson approached the passenger window and asked Bryan whether he knew why he had been stopped. Bryan, knowing full well why and becoming increasingly angry at himself, simply stared straight ahead. Officer McPherson requested that Bryan turn down his radio and pull over to the curb. Bryan complied with both requests, but as he pulled his car to the curb, angry with himself over the prospects of another citation, he hit his steering wheel and yelled expletives to himself. Having pulled his car over and placed it in park, Bryan stepped out of his car.

There is no dispute that Bryan was agitated, standing outside his car, yelling gibberish and hitting his thighs, clad only in his boxer shorts and tennis shoes. It is also undisputed that Bryan did not verbally threaten Officer McPherson and, according to Officer McPherson, was standing twenty to twenty-five feet away and not attempting to flee. Officer McPherson testified that he told Bryan to remain in the car, while Bryan testified that he did not hear Officer McPherson tell him to do so. The one material dispute concerns whether Bryan made any movement toward the officer. Officer McPherson testified that Bryan took 'one step' toward him, but Bryan says he did not take any step, and the physical evidence indicates that Bryan was actually facing away from Officer McPherson. Without giving any warning, Officer McPherson shot Bryan with his TASER™ gun. One of the TASER™ probes embedded in the side of Bryan's upper left arm. The electrical current immobilized him whereupon he fell face first into the ground, fracturing four teeth and suffering facial contusions. Bryan's morning ended with his arrest and yet another drive--this time by ambulance and to a hospital for treatment."

At the outset of the opinion the court noted: "We, along with our sister circuits, have held that TASER™ and stun guns fall into the category of non-lethal force…Non-lethal, however, is not synonymous with non-excessive; all force--lethal and non-lethal--must be justified by the need for the specific level of force employed." In comparing TASER™ to other non-lethal tools the court stated: "The physiological effects, the high levels of pain, and fore-seeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted." As such, the court, at least for law enforcement agencies in the 9th Circuit's jurisdiction, placed TASER™ at a higher level of force than other non-lethal tools.

While recognizing the value of electronic control devices, the court placed the tool at a higher level of force than most law enforcement agencies, and the International Association of Chiefs of Police have placed them. The court asserted: "We recognize the important role controlled electric devices like the TASER™ X26 can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike. We hold only that the X26 and similar devices constitute an intermediate, significant level of force that must be justified by 'a strong government interest [that] *compels* the employment of such force.'"

In analyzing the use of force which occurred in this case, the court began by applying the analysis required by the United States Supreme Court. The court in applying this analysis wrote: "Under *Graham v. Connor*, we evaluate the government's interest in the use of force by examining three core factors, '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'...The 'most important' factor under *Graham* is whether the suspect posed an immediate threat to the safety of the officers or others. A simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. The district court correctly concluded that Bryan's volatile, erratic conduct

could lead an officer to be wary. While Bryan's behavior created something of an unusual situation, this does not, by itself, justify the use of significant force. A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. Rather, the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public."

In concluding that Bryan did not pose an immediate threat the court asserted: "We agree with the district court that Bryan did not pose an immediate threat to Officer McPherson or bystanders despite his unusual behavior. It is undisputed that Bryan was unarmed, and, as Bryan was only dressed in tennis shoes and boxer shorts, it should have been apparent that he was unarmed. Although Bryan had shouted expletives to himself while pulling his car over and had taken to shouting gibberish, and more expletives, outside his car, at no point did he level a physical or verbal threat against Officer McPherson. Bryan was standing, without advancing, fifteen to twenty-five feet away from Officer McPherson between the door and body of the car. We reject Officer McPherson's contention that Bryan constituted a threat by taking a step in Officer McPherson's direction. First, when explicitly asked if he '[took] a step out of the car' or a 'step out away from the car,' Bryan testified 'no.' There is, therefore, a genuine issue of fact on this point, one that, on this procedural posture, we must resolve in Bryan's favor and conclude that Bryan did not advance towards the officer. Second, even if Bryan had taken a single step toward Officer McPherson, this would not have rendered him an immediate threat justifying an intermediate level of force, as he still would have been roughly nineteen to twenty-four feet away from Officer McPherson, by the officer's own estimate…Not only was Bryan standing, unarmed, at a distance of fifteen to twenty-five feet, but the physical evidence demonstrates that Bryan was not even facing Officer McPherson when he was shot: One of the TASER™ probes lodged in the side of Bryan's arm, rather than in his chest, and the location of the blood on the pavement indicates that he fell away from the officer, rather than towards him. An unarmed, stationary individual, facing away from an officer at a distance of fifteen to twenty-five feet is far from an 'immediate threat' to that officer. Nor was Bryan's erratic, but nonviolent, behavior a potential threat to anyone else, as there is no indication that there were pedestrians nearby or traffic on the street at the time of the incident. Finally, while confronting Bryan, Officer McPherson had un-holstered and charged his X26, placing him in a position to respond immediately to any change in the circumstances. The circumstances here show that Officer McPherson was confronted by, at most, a disturbed and upset young man, not an immediately threatening one."

Officer McPherson also argued that the TASER™ was justified due to Mr. Bryan's mental state. In rejecting this defense the court observed: "Although we have refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals, we have found that even 'when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.' The same reasoning applies to intermediate levels of force. A mentally ill individual is in need of a doctor, not a jail cell, and in the usual case (*where such an individual is neither a threat to himself nor to anyone else*) the government's interest in deploying force to detain him is not as substantial as its interest in deploying that force to apprehend a dangerous criminal. Moreover, the purpose of detaining a mentally ill individual is not to punish him, but to help him. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community. Thus, whether Officer McPherson believed that Bryan had committed a

variety of nonviolent misdemeanors or that Bryan was mentally ill, this *Graham* factor does not support the deployment of an intermediate level of force."

The court also considered Bryan's resistance as required by the *Graham* 3-part analysis. In doing so the court asserted: "Turning to Bryan's 'resistance,' we note that Bryan in fact complied with every command issued by Officer McPherson except the one he asserts he did not hear--to remain in the car. Even if Bryan failed to comply with the command to remain in his vehicle, such noncompliance does not constitute 'active resistance' supporting a substantial use of force. Following the Supreme Court's instruction in *Graham*, we have drawn a distinction between passive and active resistance. By shouting gibberish and hitting himself in the quadriceps, Bryan may not have been perfectly passive. 'Resistance,' however, should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer. We must eschew ultimately unhelpful blanket labels and evaluate the nature of any resistance in light of the actual facts of the case…The only resistance Officer McPherson testified to was a failure to comply with his order that Bryan remain in his car. Shouting gibberish and hitting one's quadriceps is certainly bizarre behavior, but such behavior is a far cry from actively struggling with an officer attempting to restrain and arrest an individual."

The court also took issue with Officer McPherson's failure to warn Bryan that he would be stunned with a TASER™ and that Officer McPherson did not consider lesser alternatives to the use of an intermediate weapon. It should be noted that this "**less intrusive means**" language has never been an element of use of force analysis by the United States Supreme Court and is contrary to all of the other United States Circuits.[i] There are cases within the United States Court of Appeals for the 9th Circuit where this type of analysis has been rejected.[ii]

In addressing these two issues the court wrote:

> "Two additional considerations militate against finding Officer McPherson's use of force reasonable. First, it is undisputed that Officer McPherson failed to warn Bryan that he would be shot with the X26 if he did not comply with the order to remain in his car… Here, it was feasible to give a warning that the use of force was imminent if Bryan did not comply. While a warning to Bryan may or may not have caused him to comply, there was "ample time to give that order or warning and no reason whatsoever not to do so."
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> "Second, we have held that police are 'required to consider' '[w]hat other tactics if any were available' to affect the arrest.' Officer McPherson argues that there were no less intrusive alternatives available to apprehend Bryan. Objectively, however, there were clear, reasonable, and less intrusive alternatives. Officer McPherson knew additional officers were en route to the scene. He was, or should have been, aware that the arrival of those officers would change the tactical calculus confronting him, likely opening up additional ways to resolve the situation without the need for an intermediate level of force. Thus, while by no means dispositive, that Officer McPherson did not provide a warning before deploying the X26 and apparently did not consider less intrusive means of effecting Bryan's arrest factor significantly into our *Graham* analysis."

Two things become evident in this decision, first the United States Court of Appeals for the 9th Circuit has placed TASER™ and other electronic control devices as a heightened level of force. Second, as a heightened level of force, deployment must be justified by an immediate threat posed by the subject. It is also noted that the court found facts, which many officers would consider threatening to not qualify as an imminent threat.

Bottom Line:

1. Ninth Circuit Jurisdictions:

   Nevada, Washington, Montana, Idaho, Oregon, California, and Arizona: Policies and training must be reviewed to reflect the following:

   - TASER™ and other electronic control devices are intermediate weapons thus policies which place TASER™ at a lower level must be changed.
   - Use (at least in the probe mode as here) requires a strong government interest which this opinion indicates is "an immediate threat" by the subject to the officer or others.
   - Warning is important and should be done unless exigent circumstances exist.

2. Other Jurisdictions: Consider this case as instructive, however it is limited to those jurisdictions listed above at this point in time.

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[i] See e.g., *Williams v. Holt,* 2006 U.S. Distt. LEXIS 55148 (E. Dist. Tennessee 2006) "Contrary to Williams' exhaust-other-means argument, "[t]he Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force." Forrett v. Richardson, 112 F.3d 416, 420 (9th Cir. 1997). *See also Deering v. Reich,* 183 F.3d 645, 652-53 (7th Cir. 1999)(same). As the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") has said: **"The fourth amendment reasonableness standard does not turn on the availability of less intrusive alternatives."** *Collins v. Nagle,* 892 F.2d 489, 493 (6th Cir. 1989). Clearly, Williams's proposal deadly force is justified only after all other options have proven futile has no basis in the law and is frivolous." (emphasis added)

[ii] *Id.*

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