DPS Legal Review

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United States Supreme Court

USE OF DEADLY FORCE IN RAPIDLY-ESCALATING SITUATION

Earlier this month, the U.S. Supreme Court considered the use of deadly force by a New Mexico State Police officer. The encounter leading to the use of force began when two motorists called 911 regarding the erratic driving of Daniel Pauly. The motorists followed Pauly while speaking with 911 until Pauly – who noticed he was being followed – pulled over at an off ramp. Pauly had a brief, non-violent encounter with the motorists before leaving the area. Three New Mexico State Police officers then arrived at the off-ramp, where the motorists explained what happened and provided the officers with the license plate number of Pauly's vehicle. Though the officers did not believe they had probable cause to make an arrest at that point, they proceeded to the residence to get Pauly's side of the story and to make sure he had not been drinking. Two of the officers proceeded to the address listed for the owner of the vehicle, while the third, Officer Ray White, remained at the off-ramp.

Upon arrival at the vehicle's listed address, officers saw two persons moving inside a residence and approached it covertly in an effort to maintain officer safety. The officers on scene radioed for backup to Officer White, who began travelling to the residence. Meanwhile, the residents of the house, Daniel Pauly and his brother Samuel, became aware of the officers' presence and shouted "who are you?" and "what do you want?" An exchange followed in which the officers ordered the Pauly brothers to "come out or we're coming in," and at least one of the officers stated he identified himself as a state police officer. Samuel Pauly and Daniel Pauley's estate claimed that the brothers did not hear the officers identify themselves, but only heard "We're coming in. We're coming in."

At this point, Officer White arrived on the scene and heard yelling from the residence. As he approached, he heard one brother shout, "We have guns." White then drew his service weapon and took cover behind a stone wall in front of the house. Seconds later, Daniel Pauly stepped out of the back door of the residence and fired two shotgun blasts while screaming loudly. Samuel Pauly then opened a front window and pointed a handgun in Officer White's direction. In response, Officer White shot and killed Samuel.

Samuel's estate and Daniel filed suit against the responding officers, including White, arguing among other things that Officer White's use of deadly force was excessive. Officer White moved for summary judgment on the basis that, even accepting the Paulys' version of events as true, he had not violated any of Samuel Pauly's clearly established constitutional rights. The district court denied Officer White's motion, finding that even though "Officer White ... arrived late on the scene and heard only 'We have guns' ... before taking cover behind a stone wall... a reasonable officer in White's position would have known that, since the Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon." Officer White appealed to the United States Court of Appeals for the Tenth Circuit, which upheld the decision. Officer White then appealed to the United States Supreme Court.

The U.S. Supreme Court reversed the lower courts' opinions. The Supreme Court held the lower courts had not shown that Officer White violated a clearly established constitutional right. The Court held that **"[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here."** Because the Court held that Officer White was entitled

to assume the other officers had already followed proper procedure, he did not violate Pauly's clearly established constitutional rights by failing to identify himself or issue a warning under the circumstances. *White v. Pauly*, 16-67, 2017 WL 69170 (U.S., Jan. 9, 2017).

U.S. Court of Appeals – Eleventh Circuit

USE OF DEADLY FORCE - REASONABLE FEAR OF ARMED MOTORIST

Opelika, Alabama, police officer Phillip Hancock responded to the scene of a reported erratic driver and located an SUV driven by Michael Davidson and an 18-wheeler in the process of pulling off the road and stopping. Davidson had just struck the 18-wheeler. As Davidson's vehicle stopped and parked, Officer Hancock stopped his vehicle behind Davidson's and trained his spotlight on the driver-side front door of Davidson's vehicle.

Officer Hancock then exited his vehicle with his gun drawn. Davidson then began exiting his vehicle and, as he pushed his way out, "he withdrew his wallet from his pocket." As he was exiting the vehicle, Officer Hancock shouted, "Let me see your hands!" twice. "Simultaneously, Davidson brought his hands together and then extended them outward toward Hancock. Davidson's wallet was visible over the top of his clasped hands." Believing that Davidson was armed and was aiming a weapon at him, Officer Hancock "fired two shots in rapid succession as he finished his second command to Davidson." Davidson was struck with one shot and seriously injured.

Davidson filed suit against Ofc. Hancock and others alleging use of excessive force by Hancock, among other things. Officer Hancock and the other defendants moved for summary judgment arguing that they were entitled to qualified immunity. The district court granted their motion, and Davidson appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit analyzed Davidson's claim that Officer Hancock used excessive force under the Fourth Amendment. Such claims are analyzed under a test of "objective reasonableness." Analysis under the objective reasonableness standard requires a balancing of the nature and intrusion upon a person's Fourth Amendment rights with the government interests at stake and the facts of the case. In this case, the Court held that **"[a]nalysis of this balancing test is governed by (1) the severity of the crime at issue; (2) whether Davidson posed an immediate threat to Hancock or others; and (3) whether he actively resisted arrest.**"

The Court held that, **in this case, the first and third factors did not support the use of force, because Davidson could not have been reasonably suspected of committing any violent crime, and because there was "no reason whatsoever to believe that Davidson was resisting Hancock.**" But, the Court held, "**the second factor… decides this case.**" The Court explained that "'the second factor can be reduced to a single question: whether, given the circumstances, [the suspect] would have appeared to reasonable police officers to have been gravely dangerous.'… The district court determined that Davidson presented such a threat because '[a]fter reaching behind himself in a motion akin to upholstering [sic] a weapon, Davidson stood clutching a black object with both hands, pointing towards Officer Hancock as though he was preparing to shoot.' The positions of the object and Davidson's hands—established by [Officer Hancock's dashboard] video—are key. To be clear, Davidson exiting his vehicle, reaching behind himself, and holding an unidentified object would not have been sufficient to make Hancock's use of deadly force reasonable under the circumstances. But **the unusual position of the dark object in Davidson's outstretched and clasped hands would have led a reasonable officer to believe that Davidson was pointing a gun at him. For that reason, we concur with the district court that Davidson objectively posed a grave and immediate threat to Hancock.**"

Moreover, the Court held, "'[T]he Supreme Court has cautioned that [t]he calculus of reasonableness must embody allowance 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.'" **The Eleventh Circuit stated that it shared "the district court's concern that Davidson was shot so soon after he exited his vehicle" and that it agreed "with Davidson that Hancock's imprecise language contributed to the uncertain nature of the situation." But ultimately, the Court held, "when we evaluate Hancock's conduct 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,' we conclude that the force used was not excessive."** *Davidson v. City of Opelika*, 16-10857, 2017 WL 164315 (11th Cir., Jan. 17, 2017).

Georgia Court of Appeals

DUI ARREST – VOLUNTARINESS OF CONSENT TO STATE BLOOD TEST

Kirby McKibben was convicted for DUI per se and other charges following a traffic stop by a Holly Springs Police officer. Holly Springs police dispatch had received a 911 call about a suspected drunk driver, and the officer in question pulled McKibben over after seeing his vehicle – which matched the provided description – swerving and failing to maintain lane. Upon approaching McKibben, the officer detected a strong odor of an alcoholic beverage on McKibben's person. McKibben also had glazed eyes, his speech was "thick-tongued," and he appeared off-balance when exiting the vehicle. McKibben denied drinking, however, and refused to take field sobriety tests.

The officer placed McKibben under arrest and immediately read him the appropriate implied consent notice, asking McKibben to submit to a chemical blood test. McKibben replied "yes," and he was taken to a local fire station where a blood draw was performed with McKibben's consent and without any incident. At no point did McKibben "ask any questions about the implied-consent notice or his rights." He did not request an attorney, and never appeared unwilling to have the blood sample taken. The officer "testified that (1) neither he nor McKibben ever raised their voices during this encounter, (2) their conversation was polite, and (3) he did not threaten McKibben or make him any promises in exchange for giving consent."

Nevertheless, McKibben moved to suppress the results of his blood test, arguing that the State failed to show free and voluntary consent under *Williams*. McKibben specifically argued that "the implied-consent notice fails to inform defendants that they may refuse to comply and that the test results could be used against them in a criminal prosecution, thus negating any voluntary consent." The trial court rejected this argument, and McKibben appealed after conviction.

The Georgia Court of Appeals upheld the trial court and rejected McKibben's argument. The Court stated that, **"as we have previously explained, while knowledge of the right to refuse consent is one factor to be taken into account [in determining whether consent was voluntary under *Williams*]," the State does not have to prove such knowledge in every case in order to prove effective consent. Rather, context is key. Here, McKibben gave an affirmative answer, never attempted to withdraw his consent, did not appear so impaired that he did not understand what he was being asked, and was not under any other duress that would call his consent into question. As such, the trial court's decision was upheld.** *McKibben v. State*, A16A1865, 2017 WL 366153 (Ga. Ct. App., Jan. 23, 2017).

ALS REMINDERS

If you do not receive an ALS Hearing notice and your case is dismissed, a motion can be filed requesting that the case be reset for a hearing. If an ALS case is continued while you are in Court for the case, the Judge typically provides a new hearing date at that time and a new hearing notice is not mailed to you. The OSAH website (www.osah.ga.gov) has a calendar of upcoming court dates and cases that are scheduled for an ALS Hearing.

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