January 6, 2010

Short Synopsis of the *Bryan v. McPherson* Decision

Readers are strongly encouraged to read, analyze, and understand the full case and discuss it with their legal advisors. This synopsis does not constitute legal advice or the practice of law and does not include every aspect of the *Bryan* case.

The December 28, 2009, 9th Ninth Circuit *Bryan v. McPherson*[1] decision has led some individuals to assert that the law regarding the use of electronic control devices (ECDs) has changed. As a result, the question must be addressed, namely, has *Bryan* changed the law regarding the use of ECDs? The short answer is **<u>no</u>** and here is why:

The decision in *Bryan* was based on a very specific set of factual circumstances which the court had to view in a light most favorable to the plaintiff's allegations. In short, the facts indicated that the plaintiff in *Bryan* did not objectively or reasonably pose an immediate threat of harm to the officer, himself or others, evasion, or resistance at the time the ECD was used. More specifically, from the court's perspective of interpreting the plaintiff's facts the court concluded that this particular plaintiff:

- Was stopped for a seat-belt violation;
- Was not a dangerous felon;
- Was not a flight risk;
- His conduct did not constitute resistance at all; and
- Was not an immediate threat because he:
  - was unarmed (wearing only boxer shorts and tennis shoes);
  - did not level a threat at the officer;
  - was standing 15–25 feet away from the officer and not advancing;
  - was, at most, a disturbed and upset young man, not an immediately threatening one; and
  - was not facing the officer when he was hit with the TASER® ECD in probe deployment mode.

From plaintiff's version of the facts, the court further concluded that the officer:

- Failed to warn that plaintiff would be shot with a TASER ECD if he did not comply;
- Did not consider what other tactics if any were available to effect the arrest; and
- Failed to consider less-intrusive alternatives (*e.g.*, waiting for approaching backup).

Based on these particular circumstances, the court therefore found that the intermediate level of force used by the officer was objectively *un*reasonable. More specifically, the court stated:

> 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*' (emphasis added).

In following prior case law in the 9th Circuit, the court also found that while the TASER X26 is a "non-lethal" use of force, it is an "intermediate or medium, though not insignificant" use of force due to the incapacitation and pain it causes and the risk of secondary injuries from falls. The court stated that "[t]he

[1] *Bryan v. McPherson* ___ F.3d ___, 2009 WL 5064477, Case No. 08-55622 (9th Cir. (CA) 2009).

physiological effects, the high levels of pain, and foreseeable 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."[2] (Specifically, oleoresin capsicum (OC or pepper spray) and nonchakus.)

The court followed the Fourth Amendment constitutional standard set forth in *Graham v. Connor*, as risk prioritized by *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir.1994), in determining whether a use of force is excessive and evaluated the government's interest in the use of force by examining three core factors: (1) whether the suspect poses an immediate threat to the safety of the officers or others; (2) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; and (3) the severity of the crime at issue. The court also considered factors of: (4) the plaintiff's mental status and behaviors; (5) the officer's failure to consider less-intrusive tactics and force alternatives; and (6) the officer's failure to give a warning of impending force to attempt to gain volitional compliance. The court also made a distinction between passive and active resistance in excessive use of force cases and distinguished the facts in the Eleventh Circuit opinion in *Draper v. Reynolds*[3], which held that a TASER ECD was not excessive force when used during the traffic arrest of an aggressive, argumentative individual.

Therefore, in accordance with both pre-existing law and the *Bryan* decision, the use of intermediate force would be least justified for a nonviolent misdemeanor suspect who poses little or no threat of harm, resistance or evasion, such as the plaintiff in *Bryan*.

As always, context is critical in determining the justification of uses of force and this case is no exception. Under the specific facts of *Bryan*, the use of an ECD at that juncture in the officer's interaction with the plaintiff was found to be unjustified. Significantly, there were several established protocols regarding the use of ECDs that were allegedly not followed by the officer. For instance, the court strongly considered the officer's failure to give a preemptive warning to the plaintiff along with the failure to attempt to use less intrusive means to engage compliance in determining that the immediate jump to using the ECD was not justified. In spite of spin to the contrary, the decision in *Bryan* is in line with existing training protocols and established law regarding the proper use of ECDs.

Ultimately, *Bryan* does serve as a significant and important reminder of multiple points. First, ECDs cause pain and are not risk free, and officers need to consider the risk of secondary injuries from incapacitation and falls in determining when and how to deploy an ECD. Second, ECDs are an "intermediate or medium, though not insignificant" use of force and every trigger pull must be justified as a separate use of force. Third, as in any 4th Amendment force analysis, an officer must consider the totality of the circumstances, including whether the suspect poses an immediate threat to the safety of the officers or others, whether he is actively resisting arrest or attempting to evade arrest by flight, and the severity of the crime at issue. Fourth, especially when a suspect is not an immediate threat or a flight risk, when officers are attempting to use force to gain voluntary compliance, officers should warn of the impending use of an ECD, assess whether their warnings are clearly heard and understood, and give a reasonable time for volitional compliance with officers' commands. Fifth, there should be regularly scheduled, refresher or remedial training for officers using ECDs. And, officers should be reminded to engage suspects in a manner consistent with their department's use of force protocols, including the consideration of less than intermediate uses of force where appropriate.

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[2] "The X26 thus intrudes upon the victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not. While pepper spray causes an intense pain and acts upon the target's physiology, the effects of the X26 are not limited to the target's eyes or respiratory system. Unlike the police "nonchakus" we evaluated in *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir.1994), the pain delivered by the X26 is far more intense and is not localized, external, gradual, or within the victim's control. In light of these facts, we agree with the Fourth and Eighth Circuit's characterization of a taser shot as a "painful and frightening blow." We therefore conclude that tasers like the X26 constitute an "intermediate or medium, though not insignificant, quantum of force." (internal citations omitted)

[3] 278 Ga.App. 401, 629 S.E.2d 476 (Ga. App. Mar 23, 2006), certiorari denied (Sep 08, 2006).