UP IN THE AIR: THE EFFECT OF ESTATE OF ARMSTRONG EX. REL. ARMSTRONG V. VILL. OF PINEHURST ON FUTURE TASER USAGE IN THE FOURTH CIRCUIT

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by Lori Keeton

What should law enforcement officers do if faced with a "a non-criminal" "mentally ill man being seized for his own protection, [who is] seated on the g hugging a post to ensure his immobility… surrounded by three police officers and two Hospital security guards, [who has] failed to submit to a lawful s only 30 seconds"?

What should they do if faced with a 260-pound, strong, unrestrained, mentally ill man who refuses to comply with their attempts to arrest him and is t kick them who moments earlier had been walking erratically near a busy road and "is a danger to himself having been off his medication for several da engaging in self-destructive behaviors…" and a possible danger to others and the officers do not know if he is armed and have tried to use lesser force form of verbal commands and soft hands techniques without success?

And what would you expect them to do if these two scenarios described the same individual?

These are the types of perplexing questions that law enforcement officers are called upon to answer every day and that the Fourth Circuit recently gra in Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892 (4th Cir. 2016).

In Armstrong, the police were called to assist with a subject suffering from bipolar disorder and paranoid schizophrenia who had gone off his medicati sister had convinced him to go to the hospital after watching him engage in erratic and self-injurious behaviors. While they were in the process of obta involuntary commitment papers, Armstrong ran away. The police were called. When Armstrong learned about the commitment papers, he wrapped h around a sign and refused to leave. In the course of trying to effectuate the commitment, officers utilized their Taser/electronic control device ("ECD") i drive stun mode, but it did not stop Armstrong from resisting. Ultimately, the officers and two hospital security guards physically removed him from th him face-down on the ground and cuffed both his arms and his legs. Soon after, the officers saw that Armstrong was unresponsive. He was pronounce shortly after arrival at the nearby hospital.

The family sued the Village of Pinehurst and TASER International in the Middle District of North Carolina alleging violations of the decedent's Fourth an Fourteenth Amendment rights by using excessive force. The United States District Court for the Middle District of North Carolina granted summary jud the officers based on qualified immunity.

On appeal, the United States Court of Appeals for the Fourth Circuit upheld the granting of summary judgment, finding that the ECD usage was excess but the officers were nonetheless entitled to immunity because it was not clearly established at the time of this incident that Mr. Armstrong had the ri be tased while offering stationary and non-violent resistance to a lawful seizure."

Ironically, however, it isn't the Court's ruling per se that has garnered national attention, but rather the Court's use of the opinion to put officers "on no limited situations in which they may lawfully use ECDs in the future.

In particular, the Fourth Circuit characterized the use of ECDs- in either probe mode or drive stun mode- as "[p]ainful, injurious [and] serious" and advi the level of resistance required to justify use of an ECD must rise to the level of a "risk of immediate danger."

The obvious question thus becomes what is a "risk of immediate danger"? Rather than providing examples of what would satisfy this standard, the Cou guidance as to what would not be sufficient:

- The fact that a subject is unrestrained.

- The fact that a subject is actively resisting.
- The fact that a subject is noncompliant.
- The fact that a subject is unrestrained, actively resisting AND noncompliant.

We can also extrapolate some guidance from the Court's application of the Graham v. Connor factors in analyzing the reasonableness of the force at is

FACTORS THAT FAVOR ECD USAGE

- The subject is believed to have committed a serious/violent crime.
- The subject is advancing towards the officers (or someone else).
- The subject is/could be armed.
- The subject is violently resisting.
- The subject is a danger to others.
- The danger the subject poses could be mitigated by ECD usage.
- Lesser uses of force have been unsuccessful.

FACTORS THAT WEIGH AGAINST ECD USAGE

- The subject is mentally ill.
- The subject is stationary or being restrained.
- The subject is non-violent.
- The number of officers on the scene outnumbers the number of subjects.
- The subject is only a danger to himself.
- The proposed use would be contrary to manufacturer's instructions.
- The officers have only been working to restrain the subject for a brief period of time.

Justice Wilkinson wrote a concurring opinion for the case joining in the decision of the majority but differing in its analysis. "The majority... left it all up according to Wilkinson.

What is clear is that while ECDs have been marketed as an alternative to deadly force since their inception, the Fourth Circuit has significantly narrowe between when an officer can lawfully use an ECD versus when an officer can use deadly force and more or less abolished any legal difference betwee ECDs in drive stun mode versus probe mode.

And the fight isn't over yet. The defendants have recently petitioned the United State Supreme Court to review the case and TASER International, the N Fraternal Order of Police and the Southern States Benevolent Association have submitted amicus briefs joining in the request. Stay tuned....

To read the opinion, click here.

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