Electronic Control Devices – Where Are We Now?

Description

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The utilization of Electronic Control Devices ("ECD") has led to a windfall of litigation and court decisions which police departments must interpret to draft policies, conduct appropriate training, and implement the ECD into operation. A recent decision from the United States Court of Appeals for the Ninth Circuit, *Mattos v. Agarano*,[1] reinforced and clarified applicable standards regarding the permissible use of an ECD. While agencies located within the 9th Circuit are bound by this legal standard, the remainder of the country's agencies would be wise to utilize the 9th Circuit court's analysis and rulings as a gauge when examining its current police practices as they relate to its use of the ECD. The *Mattos* case involved the consolidation of two separate cases – *Mattos v. Agarano* and *Brooks v. City of* Seattle – in which questions arose as to whether the use of a ("ECD") involved an excessive use of force, and whether the officers were entitled to qualified immunity.

In *Brooks v. City of Seattle*, a woman was pulled over in a school zone for driving 32 miles per hour in a 20 miles per hour zone. She was cited for a speeding violation, but refused to sign the citation. Another officer arrived and also instructed Brooks to sign the citation and, when she refused, ordered her to get out of the car, which she also refused. When the officer then pulled out his taser, Brooks informed both officers that she was seven months pregnant. The officer continued to display the taser. When the officers opened Brooks driver's side door, one officer twisted her arm behind her back, but she clutched to steering wheel. With her arm still clutched, one officer cycled the taser to show Brooks what it would do. Within twenty-seven second of cycling the taser, and with her arm still behind her back, the officer tased Brooks' left thigh in drive stun mode. Thirty-six seconds later, Jones tased Brooks' left arm and then, six seconds later, tased Brooks' neck. Brooks was then dragged from the vehicle and handcuffed. Brooks sued the City for a violation of her constitutional rights, including a Fourth Amendment claim for excessive force.

In *Mattos v. Agarano*, the police responded to a domestic dispute call and found the Plaintiff, Jayzel Mattos' husband, Troy, sitting on the front stairs. He was large in stature and smelled of alcohol. One officer asked to speak the plaintiff to determine her status. The officer followed Troy into the residence, who then became angry and yelled at the officer to get out. The officer asked the plaintiff to speak with him outside. Before she could comply, however, another officer told Troy that he was under arrest. The plaintiff did not immediately step aside. When trying to reach Troy, the officer brushed against the plaintiff's chest, causing her to extend her arms to protect her body. Suddenly, without any warning, the officer shot his taser at Mattos in dart-mode. Mattos felt incredible pain, her joints and muscles locked up, and she fell hard to the floor. Mattos was charged with harassment and obstructing government operations, but all charges were ultimately dropped. Jayzel Mattos sued the officers for violations of her constitutional rights, including a Fourth Amendment claim of excessive force from the tasing.

In *Mattos*, the Appellate Court began its analysis by stating that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[2]

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Qualified immunity will shield a police officer from liability even if his or her actions resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact."[3]

Courts use a two-part test to determine whether officers are entitled to qualified immunity. First, the court determines whether the officer violated an individual's constitutional rights. Second, if the court determines that the officer violated those rights, it determines whether the constitutional rights are "clearly established in light of the specific context of the case" at that time.[4]

When addressing step one, courts look to *Graham v. Connor*[5] for guidance with excessive use of force claims. In *Graham*, the court stated that "[d]etermining whether the force used to affect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment rights against the countervailing governmental interests at stake."[6]

To determine the governmental interests at stake, courts look at "(1) how severe the crime at issue is, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."[7] Courts may also consider additional facts necessary to account for the totality of circumstances in a given case."[8]

In *Mattos,* the Court applied the three-part test listed above to the facts and circumstances in the *Brooks v. City of Seattle* matter to determine the reasonableness of Officer Jones actions and found: (1) driving 32-miles-per-hour in a 20-mile-per-hour zone was not a serious offense;[9] (2) Brooks never verbally threaten the officers, was unarmed, behind the wheel of the vehicle, and not physically threatening; and (3) Any resistance from Brooks did not involve any violent actions towards the officers.[10]

The court also looked at the totality of the circumstances and found that: (1) Brooks notified the officers that she was pregnant, and the officers considered this information when deciding where to apply the taser; and (2) the officers tased Brooks three times over the course of less than one minute. The Court stated that tasing Brooks in such a rapid succession allowed no time for her to recover from the pain and reconsider her refusal to comply with the officers' requests.

The Court concluded that the officers' use of force was unreasonable, and therefore constitutionally excessive.[11] The court then considered whether, at the time the officer tased Brooks, the constitutional violation was "sufficiently clear" that every "reasonable official would have understood" that his actions violated that right.[12]

To do so, courts look at the most analogous case law that existed at that time. In *Mattos,* the court found only three relevant opinions from other circuits. These cases, however, were not applicable because they did not present similar facts and circumstances. Therefore, the court looked to *Bryan v. MacPherson,*[13] *wherein* the Court reasoned that there was no "Supreme Court decision or decision of [the district court] addressing the use of a taser in dart mode."[14] Therefore, since no guidance from the courts existed, a reasonable officer could have made a reasonable mistake of law regarding the constitutionality of the taser use.[15]

In *Mattos*, the Court applied the three-part test to Jayzel Mattos' facts. The court found: (1) Jayzel's actions did not rise to the level of obstruction, and therefore, the severity of the crime, if any, was minimal;[16] (2) Jayzel did not pose a threat to the officers because she was not armed, did not verbally

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threaten the officers, and her only physical contact with the officer was a defensive move to stop her breasts from being pressed against the officer;[17] and (3) Jayzel, at most, only "minimally resisted Troy's arrest."[18] The court also noted that Jayzel was attempting to comply with the officer's request when she got caught in the middle between another officer and Troy. The court also noted that the officer failed to warn Jayzel before using the taser. The court concluded that the officer's use of force on Jayzel was constitutional excessive in violation of the Fourth Amendment.

The *Mattos* court makes several points that are important to law enforcement policy and the use of electronic control devices: (1) The court makes it clear that it does not prohibit the use of electronic control devices to gain compliance from a suspect who is "actively resisting" arrest. Rather, the Court sets forth certain guidelines for the use of such weapons in the field; (2) The court also made it clear that it will look at the totality of the circumstances, not just those factors provided in the three-part test above, when deciding the applicability of qualified immunity as provided in *Graham*; and (3) As more excessive force cases involving the use of tasers are decided in the judicial system, and the law becomes more clearly defined, the ability of officers to utilize qualified immunity will shrink.

The last point leads us to another very important detail, officers and departments must keep current with developing case law. A department can protect itself and its officers by maintaining vigilance when keeping current with the ever-developing body of case law in the area of electronic control devices and excessive use of force claims. As this case law develops, departments should provide regular bulletin updates and training sessions for its officers to provide guidance for the use of electronic control devices. It is imperative for a department to continually update its Use of Force and Electronic Control Device policies. When a department reviews its current policies, it should make certain that these policies include the following guidelines that were highlighted in the *Mattos case:*

1. Each and every application of an ECD must be legally justified.
2. When using an ECD in "drive-stun" mode to gain compliance from a suspect who is "actively resisting" arrest, the officer must give the suspect reasonable opportunity to comply with the officer's commands prior to each ECD application. Specifically, as discussed in *Mattos*, the officer:
    1. Must perceive that the suspect is "actively resisting."
    2. Must be certain that the suspect is capable of compliance with the officer's commands.
    3. Must give a warning prior to each application of the ECD.
    4. Must give the suspect time to recover from the "extreme pain" experienced during the ECD application.
    5. Must give the suspect a reasonable amount of time to "gather herself."
    6. Must give the suspect a reasonable opportunity to consider the consequences of her refusal to comply with commands before each ECD application.
3. Officers may not use an electronic control device on a visibly pregnant woman (or one who informs the officer of her pregnancy) unless deadly force is the only other option. These same restrictions would apply to children and the elderly.
4. The reporting requirements contained in the policy must provide that an officer is required to include in his report specific information indicating that all of these guidelines were followed prior to the application of an ECD.

In conclusion, to answer the question of "where does this leave us" it is apparent now more than ever that police departments and officers must continue to review, interpret, and understand the clearly established law passed down by the courts. That clearly established law identifies the legal standards

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which must be included in policies, training, and application to protect departments and officers from excessive force claims arising out of the use of an electronic control device.

1. *Mattos v. Agarano*, — F. 3d —, 2011 WL 4908374 (9th Cir. October 17, 2011.) ?
2. *Id.* at *5 (citing *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).) ?
3. *Id.* ?
4. *Id.* ?
5. 490 U.S. 386 (1989.) ?
6. *Id.* at 396. ?
7. *Mattos,* 2011 WL 4908374 at *6 (citing *Deorle v. Rutherford*, 272 F. 3d 1272, 1280 (9th Cir. 2001).) ?
8. *Id.* ?
9. *Id.* at *8 ?
10. *Id.* at *9. ?
11. *Id.* at *10. ?
12. *Id.* ?
13. 630 F.3d 805 (9th Cir. 2010) ?
14. *Id.* at 833. ?
15. *Id.* ?
16. *Mattos,* 2011 WL 4908374 at *13 ?

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17. *Id.* ?

18. *Id.* ?

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