A Refresher on Tasers – Tenth Circuit

Description

In Emmett v. Armstrong, we travel over to the Tenth Circuit to examine a taser and UOF case. This case is from 2020, but raises some important use of force topics regarding tasers and qualified immunity.

To begin, a review of Electronic Control Weapon guidelines from IACP. According to the IACP, the ECW is authorized to be used:

- to protect the officer or others from reasonably perceived immediate threat of physical harm from the person to be exposed to the ECW
- to restrain or subdue an individual who is actively resisting or evading arrest, or
- to bring an unlawful situation safely and effectively under control.

An ECW should not be used:

- on individuals who passively resist and are not reasonably perceived as an immediate threat or flight risk;
- on individuals in restraints, except as objectively reasonable to prevent their escape or prevent imminent bodily injury to the individual, the officer, or another person; however, in these situations, only the minimal amount of force necessary to control the situation shall be used;
- when the officer has a reasonable belief that deployment may cause serious injury or death from situational hazards including falling, drowning, or igniting a potentially explosive or flammable material or substance, except when deadly force would be justified;
- when the suspect's movement or body positioning prevents the officer from aiming or maintaining appropriate body part targeting unless the risk of increased injury to the suspect is justified because of a perceived threat or flight risk.

With that in mind, let's look at the facts surrounding this case.

FACTS

In October 2015, several police officers, including Officer Shannon Armstrong, responded to two 911 calls reporting a fight at a wedding reception. When Officer Armstrong arrived, he was driving a marked police car with its blue and white lights flashing, he was dressed in his police uniform, and he was wearing a body camera. After Officer Armstrong exited his vehicle, he saw a group of people in the parking lot standing next to a pickup truck. Officer Armstrong ordered the group to "shut up and stand there." After one of the men in the group, responded, "That's not appropriate," Officer Armstrong handcuffed the man and placed him in the back of his police car. Afterward, Officer Armstrong asked a group of people who had been fighting and a woman told him, "Morgan Emmett." As Officer Armstrong walked back to the group near the pickup truck, one of the men, later identified as Morgan Emmett, began to walk away. At this point, Officer Armstrong yelled to the man, "Morgan, Morgan. Come here." Emmett glanced back but continued to walk away. Officer Armstrong followed Emmett, who began

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running. Officer Armstrong chased Emmett for a short distance, yelling “stop” once before catching up with Emmett, and then yelling “stop” once more as he tackled Emmett to the ground.

After Officer Armstrong regained his footing, he stood over Emmett, who lay on his back on the ground. Once Emmett was on his back, he became visibly relaxed, and he made no further movements indicating an attempt to run or fight back. Officer Armstrong attempted to grab one of Emmett’s arms, and Emmett asked, “What the fuck are you doing?” Officer Armstrong responded, “When I tell you to stop, you stop! Roll over!” Emmett giggled while looking at Officer Armstrong, but he did not roll over. Officer Armstrong then said, “You’re going to get tased!” and immediately tased Emmett in the abdomen for a single, five-second taser cycle. Approximately ten seconds had elapsed from the time Officer Armstrong tackled Emmett to the time he tased Emmett. Afterward, Officer Armstrong arrested Emmett for interfering with a police officer.

Emmett sued Officer Armstrong under *42 U.S.C. § 1983* claiming violations of his constitutional rights to be free from unreasonable seizures and excessive force. Officer Armstrong argued that he was entitled to qualified immunity. After the district court found that Officer Armstrong was entitled to qualified immunity on all of Emmett’s claims, Emmett appealed to the Tenth Circuit Court of Appeals.

TENTH CIRCUIT COURT OPINION

Emmett argued to the Court that Officer Armstrong lacked probable cause to arrest him for interfering with a peace officer because Officer Armstrong did not verbally identify himself a police officer. The court explained that the Fourth Amendment does not require police officers to verbally identify themselves before arresting someone or otherwise requiring their compliance with an order. Instead, the court found that, under the Fourth Amendment, it must be objectively reasonable for an officer to believe the suspect knew he was an officer before the officer can require compliance from a suspect.

In this case, the court held while Officer Armstrong did not verbally identify himself as a police officer, that the totality of the circumstances established that it was objectively reasonable for Officer Armstrong to believe that Emmett knew that he was a police officer. Number one, when Officer Armstrong arrived on scene, he was in a marked police vehicle, with the lights on and flashing. Number two, Officer Armstrong was wearing his police uniform. Number three, after arriving, Officer Armstrong conducted “police action” in front of the crowd by issuing commands to several individuals and arresting another. Based on these facts, the court found that when Officer Armstrong ordered Emmett to stop, and Emmett did not comply, an objectively reasonable officer could conclude that probable cause existed to arrest Emmett for interfering with a peace officer. Accordingly, the court held that Officer Armstrong was entitled to qualified immunity because Emmett’s arrest did not violate the Fourth Amendment.

Next, Emmett claimed that Officer Armstrong’s use of his taser violated Emmett’s clearly established Fourth Amendment right to be free from excessive force. Specifically, Emmett claimed that it was unreasonable for Officer Armstrong to tase him without sufficient warning and after he had stopped actively resisting.

The court explained that in deciding whether Officer Armstrong was entitled to qualified immunity, it was bound to accept Emmett’s version of the story to the extent that it was not so discredited by other evidence that no reasonable jury could believe it. The court added that it would rely on the video footage from Officer Armstrong’s body camera only where it “blatantly contradict[ed]” Emmett’s story.

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Applying this standard, the court found that under Emmett's version of events, Emmett was lying on his back, relaxed and laughing and he was no longer attempting to flee or actively resisting when Officer Armstrong tased him. Next, applying the factors outlined by the Supreme Court in *Graham v. Connor* to Emmett's version of events, the court held that Officer Armstrong's use of the taser was objectively unreasonable.

The court found that the first Graham factor, the severity of the crime, weighed in Emmett's favor, as interfering with a police officer is a "non-severe misdemeanor" punishable under Wyoming law by a fine of up to $750 and no possibility of jail time. Similarly, the court found that the second Graham factor, the immediacy of the threat posed by the suspect to the officer or others, weighed in Emmett's favor. When Officer Armstrong tackled Emmett, he had effectively neutralized any safety concerns arising from Emmett's flight. Consequently, the court concluded the only "immediate threat" to safety was that arising from Emmett himself.

However, under Emmett's version of events, he was lying on his back on the ground, visibly relaxed, laughing, and had ceased any active resistance. In addition, the court noted that Officer Armstrong's chase placed the two men away from any bystanders, and there were no allegations that any weapons were involved. The court found that the final *Graham* factor, whether the suspect was actively resisting arrest or fleeing, weighed in Emmett's favor. Under Emmett's version of events, Officer Armstrong tased him approximately ten seconds after tackling him; therefore, Emmett was no longer fleeing. In addition, although Emmett did not immediately comply with Officer Armstrong's order to roll over, he was not actively resisting arrest at that point, and Officer Armstrong deployed his taser before he completed his "taser warning" to Emmett, which did not give Emmett time to modify his behavior and comply with Officer Armstrong's orders.

The court concluded by adding that the video footage arguably could support either Emmett's version of the events or Officer Armstrong's version of the events. However, because it was bound to accept Emmett's version events and because the video evidence did not "blatantly contradict" Emmett's version, the court held that it was not objectively reasonable for Officer Armstrong to deploy his taser against Emmett; therefore, he was not entitled to qualified immunity.

The court further held that at the time of the incident it was clearly established under Tenth Circuit case law that the use of a taser by a police officer on a non-violent offender who is not actively resisting arrest is unreasonable.

TAKEAWAYS

So how should this case affect your use of a taser moving forward? Keep in mind that the use of tasers is a highly debated topic and you should absolutely review your department's policy on proper ECW use. In the case we just reviewed Officer Armstrong let anger get in the way of good judgment. Emmett posed no threat and was not resisting arrest (even though he did run away). While there is a lot of controversy surrounding ECWs, there are a few things that modern policing always agrees on as best practice: it is of course preferable to incapacitate a violent individual than to kill that individual. Next, the use of tasers should be permitted to the extent that such use is necessary to protect officer safety while minimizing the risk of physical injury to suspects. And lastly, police officers should have some understanding of the effects that using a weapon is likely to have upon a suspect before deploying the weapon in question. Use your best judgment when using ECWs and be sure to check in on department

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policy.

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