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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

By Don Hays

Month of July – 2019

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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Month of July - 2019

Teresa Todero v. Brian Blackwell, et al, 2019 WL 2288266, May 29, 2019.

CASE: Charles Todero stepped out into traffic. When he refused to obey an Officer, he was repeatedly Tased. He died.

FACTS: Charles Todero's father died suddenly; he did not take it well. On the day in question, Todero stepped out into traffic. Looking neither left nor right, he crossed the street, turned around, and walked back into traffic. Two drivers nearly hit Todero; they each called 911.

The dispatcher reported that Todero was attempting to commit suicide in traffic. The arresting Officer responded to the scene and found Todero sitting on the curb. The Officer noticed that Todero held a Bible on his lap. As the Officer approached, he asked Todero what was going on, but got no response. Unsure if Todero was mentally ill, intoxicated, or impaired, the Officer walked to about five feet from Todero and again asked "what's going on"; Todero replied by talking about "Jesus Christ the Prophet." Todero then stood up and walked onto the road. He initially stayed close to the curb as the Officer kept talking to him.

As Todero kept walking—the parties dispute whether he veered away from the curb—Officer Blackwell pulled out his Taser, put his hand on Mr. Todero's shoulder, and ordered Todero to stop. When Todero took about two more steps, the Officer warned him that he would be tased, then tased him in the back from two or three feet away. The Officer continued to pull the Taser trigger and, after about the fourth time, placed the Taser on Todero's calf and deployed it again. By that time, Todero was flat on his face with his hands beneath him. Because Todero's hands were not behind his back, the Officer kept pulling the Taser trigger.

Two other Officers (the backup) arrived to find Todero with his hands underneath him, clutching his Bible. To gain control of Todero's arms, one Officer put her knee on his shoulder and tried to use a pressure point behind his ear. The backup Officers then both tried to pull Todero's arms behind his back. Eventually, one Officer took the Bible and, with the third Officer, gained control of Todero's hands and handcuffed him.

In total, the arresting Officer's Taser logged sixteen discharges in four minutes. The backup Officers arrived between the sixth and thirteenth discharges. When firefighters and paramedics arrived, Todero was lying on the ground. They lifted him onto a stretcher and put him in an ambulance, where they administered a sedative and took him to the hospital. Todero died in the hospital and his mother brought a civil rights action against the Officers in Federal District Court. There Ms. Todero argued that the Officers used excessive force and otherwise violated her son's constitutional rights while arresting him.

FINDINGS: Before the District Court, the arresting Officer asked the Court to dismiss the case against him and argued that he was entitled to qualified immunity on the excessive-force claim because he did not violate clearly established law.

He reasoned that Todero was not merely passively resisting him and that no existing precedent clearly established that he should not have used his Taser in the evolving and complex situation he faced. Todero's mother responded that Todero was passively resisting and that clearly established Fourth Amendment law shows that the Officer's Taser discharges were excessive force.

In response, the District Court noted that qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Therefore, the Court held that to overcome the Officers' invocation of qualified immunity, Todero's mother had to show both (1) that the facts make out a constitutional violation, and (2) that the constitutional right was 'clearly established' at the time of the Officers' alleged misconduct.

Finally, because the arresting Officer moved to dismiss, the Court declared that it would view the facts of this case in the light most favorable to Ms. Todero as the non-moving party.

Excessive force against the Arresting Officer. In this case, the Court ruled that whether the arresting Officer was entitled to qualified immunity was tied to a fact question: Whether Todero was actively or passively resisting him. The Court held that while the use of a taser against an actively resisting suspect generally does not violate clearly established law, officers cannot use significant force on non-resisting or passively resisting suspects.

The Court held that Todero was only passively resisting. Dispatch reported that Todero was suicidal—not hostile or dangerous. When the arresting Officer arrived and began talking to him, Todero merely stood up and walked away. The Officer told him to stop, and he continued walking away. Todero was not far from the curb when the arresting Officer tased him in the back, causing him to fall either to his knees or to the ground. After he was tased again, Todero was on the ground with his hands underneath him. Not long after, the backup Officers arrived and handcuffed Todero's hands behind his back.

The Court held that under Seventh Circuit precedent, that was passive resistance. The Court concluded further that permitting a substantial escalation of force in response to passive non-compliance would be incompatible with the Seventh Circuit's excessive force doctrine. Here, the Officer substantially escalated the force applied as Todero passively failed to comply. He did so even though the "need to mitigate force when apprehending a non-resisting suspect, particularly when the suspect is known to have diminished capacity," is "commonsense."

Turning to qualified immunity, the Court held that the question was whether clearly established law gave the arresting Officer "fair and clear warning" that his specific use of force was unlawful. Here, the Court ruled that the law did provide that clear warning, putting the arresting Officer on notice that repeated Taser use on a person who had committed no crime, posed little or no threat to officer safety, and was passively resisting was unlawful.

The Court noted that this “unfortunate event” occurred years after the Seventh Circuit cases that “squarely govern” these facts were decided. The Court concluded by holding that no reasonable officer could have understood Todero to have been actively resisting; the situation was not rapidly evolving or complex; and the existing precedent gave the Officer Blackwell clear warning.

Therefore, the Court held that the arresting Officer was thus unprotected by qualified immunity. For this reason, the Court denied the Officer’s motion to dismiss the excessive force claim against him.

Excessive force against the backup Officers. With respect to the backup Officers, they argued that they (1) did not violate the Fourth Amendment’s excessive-force prohibition when they handcuffed Todero and (2) are regardless they were entitled to qualified immunity because they violated no clearly established right. Ms. Todero responded that the Officers used substantial force to handcuff Todero and dropped his head on the curb in violation of clearly established law.

In response, the District Court ruled that when the backup Officers arrived on the scene, they knew only that the arresting Officer had used his Taser—they did not know why he had done so, or whether any prior use was unjustified. Also, the Officers could “reasonably misconstrue” any incapacitation of Todero as resistance allowing immediate action and the use of enough force to get his hands out from under his body.

The Court then noted that the Fourth Amendment reasonableness standard accounts for the fact that officers “are often forced to make split-second judgments” in tense and uncertain situations “about the amount of force that is necessary in a particular situation.” For these reasons, the Court held that the backup Officers were entitled to qualified immunity—and thus to the dismissal of the excessive force claim against them brought by Todero’s mother.

Failure to intervene against the backup Officers. The backup then argued they were also entitled have Mrs. Todero’s failure-to-intervene claim against them because—as active participants in a struggle— they had no opportunity to intervene. Ms. Todero responded that they had the opportunity to intervene because they could have at least cautioned the arresting Officer to stop using his Taser.

In response, the Court noted that officers can be liable if they “had reason to know...that excessive force was being used” and “had a realistic opportunity to intervene to prevent the harm from occurring.” Further, the Court noted that the Seventh Circuit “has made clear that the prongs of this analysis almost always implicate questions of fact for the jury.” According to the Court the disputed facts here made this case no different.

Again, taking the facts in Ms. Todero’s favor, the Court held that the backup Officers may have been present for and aware of as many as ten Taser discharges. The Court held that a reasonable jury could find that the Officers heard the noise that the Taser emits with each discharge and the arresting Officer’s announcements that he was going to deploy the Taser again.

Further, a reasonable jury could also find that the Officers were aware that those Taser deployments were excessive force. While Todero kept tensing up, a jury could find that to be an involuntary reaction to Taser shocks instead of resistance that required more shocks. Regardless, the Court held that ten Taser discharges would have been excessive given Todero's mild resistance.

On the issue of a realistic opportunity to intervene, the Court noted that the Officers argued that because they were active participants in a struggle—instead of bystanders—they could not be liable. However, the Court also noted that dismissal was appropriate only if “a reasonable jury *could not possibly conclude*” that the Officers “could have ... cautioned [the arresting Officer] to stop.”

According to the Court, the evidence showed that the Officers were communicating with the arresting the arresting Officer; in fact, one Officer even told him that one Taser discharge was shocking her too. A reasonable jury could therefore conclude that the Officers had a realistic opportunity to intervene, or it could conclude the opposite. Either way though, the Court held that a jury—not the Court—must weigh the witness credibility and disputed issues of fact. The Officers were also not entitled to qualified immunity on this claim because, under clearly established case law, they should have intervened if it was apparent to them that the arresting Officer was applying potentially deadly pressure to Mr. Todero. How apparent that was to them was a disputed fact, so “[a] jury should decide.”

CONCLUSION: The District Court dismissed the excessive force allegations against the backup Officers but refused to dismiss the rest of the allegation. **NOTE:** A jury will have to decide if all or any of the Officers will be held liable.

QUIZ QUESTIONS FOR THE MONTH OF JULY – 2019

Teresa Todero v. Brian Blackwell, et al, 2019 WL 2288266, May 29, 2019.

1. The doctrine of “qualified immunity” shields police Officers from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
 - a. True.
 - b. False.
2. The amount of force that a police Officer can use against a suspect who is resisting arrest depends upon whether the suspect is actively or passively resisting the Officer. In this case, the District Court concluded that Todero was actively resisting the efforts of the arresting Officer.
 - a. True.
 - b. False.
3. In this case, the Taser used by the arresting Officer logged sixteen discharges in four minutes. Did the trial court conclude that the arresting Officers Taser use was excessive?
 - a. Yes.
 - b. No.
4. In this case, Mrs. Todero accused the backup Officers of failing to prevent the arresting Officer’s excessive use of force. Can Officers be held liable for failing to intervene to prevent the excessive use of force against a suspect even if they do not use excessive force themselves?
 - a. Yes.
 - b. No.

QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF JULY – 2019

Teresa Todero v. Brian Blackwell, et al, 2019 WL 2288266, May 29, 2019.

1. The doctrine of “qualified immunity” shields police Officers from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

a. True. “[Q]ualified immunity shields officials from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known’” *Mullenix v. Luna*, 136 S. Ct. 305, (2015) (quoting *Pearson v. Callahan*, 129 S. Ct. 808, (2009))
2. The amount of force that a police Officer can use against a suspect who is resisting arrest depends upon whether the suspect is actively or passively resisting the Officer. In this case, the District Court concluded that Todero was actively resisting the efforts of the arresting Officer.

b. False. The Court held: “Mr. Todero was only passively resisting.”
3. In this case, the Taser used by the arresting Officer logged sixteen discharges in four minutes. Did the trial court conclude that the arresting Officers Taser use was excessive?

a. Yes. The Court held: “Here, the law did provide that clear warning, putting (the arresting Officer) on notice that repeated Taser use on a person who had committed no crime, posed little or no threat to officer safety, and was passively resisting was unlawful.”
4. In this case, Mrs. Todero accused the backup Officers of failing to prevent the arresting Officer’s excessive use of force. Can Officers be held liable for failing to intervene to prevent the excessive use of force against a suspect even if they do not use excessive force themselves?

a. Yes. The Court held: “As the parties recognize, officers can be liable if they “had reason to know...that excessive force was being used” and “had a realistic opportunity to intervene to prevent the harm from occurring.” (quoting *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994)).

LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Month of July - 2019 - ALTERNATIVE

People v. Todd L. Hasselbring, 2019 IL App (3rd) 170117-U, June 12, 2019

After arresting Hasselbring for a weapons violation, the Officers seized, inventoried and tow his car. The car was parked in Hasselbring's driveway. Hasselbring moved to suppress the firearm the Officers discovered in his parked car.

FACTS: An Officer (the arresting Officer) was dispatched to Hasselbring's home based on a report that Hasselbring pointed a gun at the victim at Hasselbring's ex-girlfriend's residence. After receiving this report, the arresting Officer drove to Hasselbring's home. Hasselbring allowed the Officer to enter his residence. While the Officer spoke to Hasselbring, another officer spoke with Hasselbring's minor child. That Officer relayed to arresting Officer that the minor stated her father had pointed a firearm at the victim. The arresting Officer stated that he took the minor's statement into consideration when he chose to arrest Hasselbring because her story matched the victim's. (Unfortunately, the arresting Officer neglected to mention the child's statement in his report.)

Following Hasselbring's arrest, officers inventoried his vehicle as part of an administrative seizure and tow without first obtaining a search warrant to search the vehicle. A firearm was discovered in the car. The arresting Officer did not believe a search warrant was necessary because of the department's inventory policy. He explained as follows: "Our ordinance had admin seizure policies. UUW, unlawful use of a weapon, falls under that ordinance where if the vehicle is used in the commission of a felony which is UUW that we tow the vehicle administratively.

In other words, there's a fine on the vehicle before the vehicle can be released. Prior to towing any vehicle, we inventory the vehicle. We write down on a sheet, on the tow sheet, what's in the vehicle." According to the arresting Officer's testimony, he "could see the handle of a gun prior to even opening the [car] door through the back window." He indicated that the vehicle's back window was tinted, but he could still see the silver handle of the firearm through the window.

Again, the Officer admitted that his report did not reflect that he first observed the firearm in plain view before opening the door to the vehicle. The Officer could not explain why he omitted this observation from his police report.

THE CHARGES: Thereafter, Hasselbring was charged with aggravated unlawful use of a weapon and aggravated assault. Prior to trial, he moved to suppress the firearm discovered during the investigation of the alleged offenses.

TRIAL COURT FINDING: Following a hearing, the trial court found the arresting Officer's statements regarding his plain view of the firearm to be "less than compelling." The court noted that the Officer's testimony conflicted with his written report. The trial court found the Officer had been impeached on the matter pertaining to the visibility of the firearm and stated, "I cannot find from the evidence that the officer in fact observed that firearm inside the vehicle from outside the vehicle."

Then, after questioning the arresting Officer's credibility, the trial court stated "I don't think (the City) can pass an ordinance saying we can tow for — we can tow for certain purposes a vehicle that happens to be properly parked in somebody's driveway and that that would trigger a lawful inventory search. I don't think that that could happen."

The trial court found the officers had no right to inventory Hasselbring's vehicle and that the search was not valid on that basis. However, the trial court found that the search was lawful on other grounds pertaining to the automobile exception to a warrant requirement.

The trial court ruled that the minor's statement to the officers corroborated the victim's statement and gave officers probable cause to arrest Hasselbring. Consequently, the court found this allowed the law enforcement to search Hasselbring's automobile and lawfully seize his firearm. On this basis, the trial court denied Hasselbring's motion to suppress.

ISSUE: Should the firearm have been suppressed? On appeal, Hasselbring argued that the current state of the law prevents law enforcement from conducting warrantless searches of motor vehicles located in the driveway of one's home. On this basis, he argued the firearm discovered during the warrantless search should not have been presented to the jury.

Conversely, the People argued the trial court's ruling should be affirmed for at least three reasons. First, even if the officers conducted an impermissible warrantless search of the car, the officers acted in good faith on the date of the warrantless search. Second, the search of Hasselbring's vehicle was proper under the plain view doctrine. Third, the warrantless search of the vehicle constituted a lawful inventory search based on a local ordinance.

APPELLATE COURT FINDINGS: **VEHICLE EXCEPTION:** First, the Court noted that in 2018, the United States Supreme Court declared that the automobile exception to the warrant requirement did not apply to searches of automobiles when the vehicle is within the curtilage, the land immediately surrounding and associated with one's home. More specifically, the Supreme Court held that a vehicle parked in the driveway next to the defendant's home was within the curtilage of the home, thus, a warrantless search of that vehicle would be unreasonable even if officers had probable cause to believe the vehicle contained incriminating evidence.

For purposes of this appeal, the People conceded that Hasselbring's vehicle, parked in his driveway, was within the curtilage of his home. Therefore, the vehicle exception to the warrant requirement did not apply in this case.

GOOD FAITH: The People argued that the Officers here acted in good faith in conducting their search of the car. In response, the Court ruled that when determining whether officers acted in good faith, the relevant inquiry for a court is when "police acted with an objectively reasonable, good-faith belief that their conduct [was] lawful, or when their conduct involved only simple, isolated negligence." The case law provided that "where state courts are silent on the constitutionality of a particular police practice, law enforcement officers who engage in that practice without first obtaining

a search warrant from a neutral magistrate must knowingly accept the risk that their conduct will be found unconstitutional.”

The Court then noted an appellate court decision which stated: “[t]he curtilage, the land immediately surrounding and associated with the home, ‘warrants the Fourth Amendment protections that attach to the home’” and “[b]y parking a vehicle in the driveway or yard of one’s home, one brings the vehicle within the zone of privacy relating to one’s home.” Based upon these considerations, the appellate court rejected the People’s good faith argument.

PLAIN VIEW: Next, the People argued the search of Hasselbring’s vehicle was proper on another ground, namely, the plain view doctrine. The Court noted that plain view doctrine applies where: (1) the officer can view the object from a lawful position; (2) the officer has a lawful right of access to the object; and (3) the incriminating nature of the object is readily apparent. Here, the trial court noticed that the arresting Officer’s testimony conflicted with the contents of his written report.

Consequently, the trial court found that the officer’s credibility had been successfully impeached by the defense and stated, “I cannot find from the evidence that the officer in fact observed that firearm inside the vehicle from outside the vehicle.” Since the trial court found the officer was not credible, the appellate court concluded that it had no basis to conclude the officer testified truthfully when he claimed the firearm had been in plain view.

Therefore, like the trial court, the appellate court declared that the plain view exception to the exclusionary rule did not apply in this case.

INVENTORY SEARCH: Finally, the People argued the warrantless search of Hasselbring’s vehicle was lawful as a valid inventory search prior to towing and pursuant to standard police procedures. In response, the Court ruled that a valid inventory search may be established where: (1) the original impoundment of the vehicle is lawful; (2) the purpose of the inventory search is to protect the owner’s property and to protect the police against claims of lost, stolen, or vandalized property; and (3) the inventory search is conducted in good faith pursuant to reasonable standardized police procedures and not as a pretext for an investigatory search.

With regard to the purported inventory search here, the Court noted the Officers testified that their Village had a local ordinance providing for the administrative tow of vehicles when certain offenses, including AAUW, take place and involve the use of a vehicle.

Also, it was undisputed that the People presented the trial court with a “guide sheet,” which listed the local ordinance numbers associated with certain offenses. The Court then held that Illinois case law provides that “(W)here police inventory procedures are reasonable and administered in good faith, the inventory search will be deemed reasonable.

However, the existence of a police policy, city ordinance, or state law alone does not render a particular search or seizure reasonable or otherwise immune from scrutiny under the Fourth Amendment.” As such, the Court concluded that the question here was not whether the Officers’ conduct complied with the mandates of the Village’s ordinance or departmental policy, but rather whether the department’s inventory policy and search, based on the provisions of the ordinance, satisfied the reasonableness requirement of the Fourth Amendment.

Ultimately, the Court found the department’s inventory policy was unreasonable as applied to this set of facts. According to the Court, the scope of the ordinance “blindly empowers” law enforcement to tow vehicles involved in certain offenses, regardless of whether such action is necessary or reasonable. Before towing, the law enforcement must conduct an inventory search of the vehicles. Once towed away as a “public nuisance,” the Village requires the owner of a towed vehicle to pay a \$500 administrative fee to “bond out” their vehicle.

As such, the Court concluded that the department’s broad-sweeping inventory policy appeared to focus on raising money for the Village and served as a pretext for investigatory searches. Accordingly, the Court declared that the inventory search exception to the exclusionary rule was inapplicable in this case.

CONCLUSION: For the above listed reasons, the Court held that because none of the exceptions to the exclusionary rule relied on by the People applied in this case, the trial court erred when it failed to suppress evidence of the firearm. Therefore, Hasselbring’s convictions were reversed and the case remanded back to the trial court.

QUIZ QUESTIONS FOR THE MONTH OF JULY – 2019 - ALTERNATIVE

People v. Todd L. Hasselbring, 2019 IL App (3rd) 170117-U, June 12, 2019

1. The “automobile exception to the warrant requirement” provides that while a search warrant is generally constitutionally required for search of automobile, warrantless searches of automobiles are permissible where they are made incident to an arrest, under the moving-automobile exception. Does this “automobile exception” now apply to vehicles parked within the curtilage of the suspect’s home?
 - a. Yes.
 - b. No.
2. The People argued that the Officers acted in good faith in conducting their search of Hasselbring’s car. The appellate court agreed with this argument and concluded that the good faith of the Officers made their search of Hasselbring car legal?
 - a. True.
 - b. False.
3. The trial court concluded that the arresting Officer had failed to prove that the “plain view” doctrine justified his act of opening Hasselbring’s car door and seizing his firearm. Did the appellate court agree with the finding of the trial court?
 - a. Yes.
 - b. No.
4. The People argued that the seizure of the firearm was justified under the inventory search policy of the Village. The appellate court held that an inventory policy of a Village can justify the search of a vehicle that has been impounded.
 - a. True.
 - b. False.

QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF JULY – 2019 - ALTERNATIVE

People v. Todd L. Hasselbring, 2019 IL App (3rd) 170117-U, June 12, 2019

1. The “automobile exception to the warrant requirement” provides that while a search warrant is generally constitutionally required for search of automobile, warrantless searches of automobiles are permissible where they are made incident to an arrest, under the moving-automobile exception. Does this “automobile exception” now apply to vehicles parked within the curtilage of the suspect’s home?

b. No. The Court in this case held: “Significantly, in 2018, the United States Supreme Court in *Collins* clarified that the automobile exception to the warrant requirement did not apply to searches of automobiles when the vehicle is within the curtilage, the land immediately surrounding and associated with one’s home. See *Collins*, 138 S. Ct. 1663.” ¶ 39.
2. The People argued that the Officers acted in good faith in conducting their search of Hasselbring’s car. The appellate court agreed with this argument and concluded that the good faith of the Officers made their search of Hasselbring car legal?

b. False. The Court ruled: “Ultimately, we reject the State’s contention that the officers were relying, in good faith, upon binding, well established, precedent thereby justifying the warrantless search of defendant’s unoccupied automobile parked within the curtilage of his home.” ¶ 46.
3. The trial court concluded that the arresting Officer had failed to prove that the “plain view” doctrine justified his act of opening Hasselbring’s car door and seizing his firearm. Did the appellate court agree with the finding of the trial court?

a. Yes. The Court declared: “Since the trial court found the officer was not credible, we have no basis to conclude the officer testified truthfully when he claimed the firearm had been in plain view. Therefore, like the trial court, we conclude that the plain view exception to the exclusionary rule does not apply in this case. ¶ 52.
4. The People argued that the seizure of the firearm was justified under the inventory search policy of the Village. The appellate court held that an inventory policy of a Village can justify the search of a vehicle that has been impounded.

a. True. The Court noted: “Where police inventory procedures are reasonable and administered in good faith, the inventory search will be deemed reasonable.” *People v. Mason*, 403 Ill. App. 3d 1048, 1054-55 (2010). ¶ 58.