



michigan municipal league

Law Enforcement Action Forum Newsletter



October 2012 Edition

Volume 19, Issue 3

Officer Response To New Hazard Could Be Critical! Legally Possessed Electro-Muscular Disruption Weapons

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During the past few months, the Michigan Legislature has been busy passing Public Act 122 of 2012, effective August 6, 2012, which amended MCL 750.224a(2)(b). PA 122 gives civilians with a Concealed Pistol License (CPL) the ability to possess and carry an electro-muscular disruption device (EMD). To purchase an EMD, the buyer must be trained in the use, effects, and risks of the device. A discussion of the relevant changes in the law are available on the Michigan State Police website in Legal Update 100. This newsletter will focus on officer response when faced with a subject armed with an EMD.

In Michigan, and across the country, law enforcement repeatedly has asserted that using an EMD is a safe, reasonable alternative for controlling resisting subjects, especially in situations where an intermediate weapon between hands on defensive tactics and a firearm is necessary. Different courts have opined that the use of an EMD is legitimate even in circumstances where multiple cycling of the EMD may take place to overcome continued resistance. Some police agencies have asserted that using an EMD can save lives. This is supported by a plethora of examples where using an EMD reduced injuries and, when used properly, was effective in subduing

subjects safely. Because law enforcement and EMD manufacturer have touted the safety and effectiveness of the device, the legislature decided that those civilians who meet the qualifications to obtain a CPL should have a less lethal option to use in the defense of themselves or others.

TASER, the predominate manufacturer of EMD's sold to Michigan law enforcement, also markets a Personal Safety Electronic Control Device (TASER C2) that uses a onetime firing of probes designed to stop threats. Like the law enforcement versions X26 or Advanced X26, the C2 launches two probes up to 15 feet from a disposable TASER cartridge. The probes deliver an electric signal designed to incapacitate an attacker for one thirty second cycle. The TASER law enforcement models have more advanced capabilities and are only available to law enforcement. These models can be cycled for multiple times and some are capable of firing several pair of projectiles. The law enforcement units can also record data for use by investigators and in court.

A Refresher Of The Law

Now that civilians have the ability to purchase and carry an EMD, officers may encounter the weapon

while handling an incident. To ensure that officers respond appropriately, LEAF's Legal Advisor, Audrey Forbush, feels it is important for LEAF to refresh officers on the Reasonable Officer Standard. The Standard is used in evaluating whether, in a criminal and civil context, an officer's use of force during an incident was the reasonable amount necessary to bring the subject under control. MCOLES also felt this component was an important part of understanding the use of force and included the topic as part of the annual Firearms Standard training on decision-making and mechanical skill.

The Reasonable Officer Standard, a Fourth Amendment analysis, is founded in the U.S. Supreme Court case *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989): The Court said: The "inquiry in an excessive force case is an objective one: the question is whether the officers' actions are *objectively reasonable in light of the facts and circumstances confronting them, without regard to underlying intent or motivation.*" *Graham*, 490 U.S. at 388. Reasonableness is evaluated under a totality of the circumstances approach, which requires that we consider the following factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Additionally, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* That perspective includes an "examination of the information possessed by the [officers]." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Under State law claims, Michigan has a different Standard in determining whether officers acted appropriately in an incident. The Michigan Supreme Court, in *Odom v Wayne County*, 482 Mich 459, 479-480; 760 NW2d 217 (2008), clarified when a governmental employee is immune from liability for an intentional tort such as claims of assault and battery, intentional infliction of

emotional distress, gross negligence. The *Odom* Court held that MCL 691.1407(3) "grants immunity to governmental employees from intentional-tort liability to the extent allowed by common law before July 7, 1986." This Court therefore reaffirmed and applied the intentional tort immunity test from *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). *Id.* In order to be immune, a governmental employee must "establish that (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he as acting, within the scope of his authority, (2) *the acts were undertaken in good faith*, and (3) the acts were discretionary, rather than ministerial, in nature."

In discussing the issue of *good faith*, the Supreme Court clearly held that this aspect of the *Ross* test is subjective in nature and "protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent." *Odom*, 482 Mich at 482. In discussing the nature of the conduct that was protected by good faith and conduct that would potentially subject an officer to liability, the Court made a number of points that are applicable to this case. The Court observed that Supreme Court precedent has described *a lack of good faith as "malicious intent, capricious action or corrupt conduct' or 'willful and corrupt misconduct."* *Odom*, 482 Mich at 474. The Court also quoted from *Firestone v Rice*, 71 Mich 377, 384; 38 NW 885 (1888):

"There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through *malice or wantonness or a reckless indifference to the common dictates of humanity.*"

The Court also stated:

“In addition, this Court has held that “willful and wanton misconduct is made out *only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does.*” Similarly, our standard civil jury instructions define “*willful misconduct*” as “*conduct or a failure to act that was intended to harm the plaintiff*” and “*wanton misconduct*” as “*conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result.*” These instructions are consistent with the negation of the common-law definition of “good faith” and can be a useful guide for a trial court considering a defendant’s motion for summary disposition based on individual governmental immunity.”

Officers Need to Think Through Their Response If Threatened

The discussion of the law above is to bring attention to the issues an officer needs to consider should they face a subject who is threatening the officer with a personal EMD. Officers at this point should know that each incident in which force is used is very fact specific and will be evaluated on the reasonableness of their actions, in light of the totality of the circumstances at the time. It is reasonable to conclude that during an incident there will be factors that an officer must weigh as they make decisions on the type of force they determine is necessary to overcome the threat or resistance they face. This also emphasizes the importance of reporting all the factors and decisions the officer made in response to the threatening behavior and/or resistance of the subject.

Because the personal safety version of EMD allowed in Michigan is not the same as the Law Enforcement version, each incident involving an EMD can become very complicated. Any officer

confronted with a subject threatening to use an EMD has to consider the totality of the circumstances surrounding the incident and just what level of threat the subject actually poses. To illustrate, the following scenarios are intended to provide examples of officer response:

The Incident:

An officer is dispatched to a domestic at a residence between a husband and wife. The incident involves a physical fight and dispatch notifies the officer in route that the husband has a CPL. The officer asks for backup and heads to the scene. Before arrival, dispatch tells the officer that two handguns are registered to a male subject identified as the husband. Upon arrival, the officer sees a male in the driveway rummaging through a vehicle. The officer approaches the subject using the vehicle as a barrier, identifies himself and tells the subject to step away from the vehicle, stand up straight and keep his hands in view. When the subject steps away from the vehicle, it is obvious he is holding an EMD weapon in his right hand. He points the EMD at the officer and tells him to leave the property. The hood of the vehicle separates the subject from the officer.

Now What?

Using the factors outlined in *Graham*, we have an officer faced with a subject who poses an immediate threat by assault. The subject is actively resisting the officer by pointing an EMD at him, which can render the officer helpless and unable to defend himself or others. This behavior could be considered life threatening. Because the officer is in a close proximity to the subject, which would be reasonable to say is within the distance of the reach of the EMD, it may be reasonable for the officer to use deadly force to protect himself. Another option may be to retreat past the 15-foot reach of the EMD and give commands to surrender or disengage and wait for backup to arrive. The evaluation of the actions of the officer in *Graham* is based on the objective reasonableness of the

action taken without hindsight and whether a reasonable officer is likely to do the same thing under similar circumstances. It is probably safe to say that if the officer were to use deadly force in this scenario the action would also meet the criteria of *Odom* which is *(1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he as acting, within the scope of his authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature.*"

Same Story, But Backup Officer Is On Scene!

Let us examine the same incident, but this time the back officer arrives at the same time as the dispatched officer. They both approach with caution and use the cover available. The rest of the facts of the incident remain the same. The situation has changed. Remember, law enforcement is on record that EMD's, when used properly, are generally safe and the effects are temporary with generally little injury. Unlike the law enforcement TASER, the subject is armed with an EMD that has a single shot capability, with a range of up to 15 feet, with one thirty second cycle. Additionally, many officers have "taken the ride" in training and have experienced the effects and survivability of being hit by a Taser. Though they may not want to experience "the ride" again, they know they will survive it.

Given this scenario of more than one officer, the use of deadly force when confronted with a subject they know is armed with an EMD may not be considered reasonable. The level of risk changes with multiple officers on scene. If one happens to be unfortunate enough to be hit by the EMD probes, unless the subject makes an overt action to disarm the officer on "the ride" or escalates his resistance, there are actions the second officer can take to control the subject and still maintain protection for the down officer. The more officers at the incident, lowers the risk and heightens the focus on a reasonable response.

Nothing Has Changed; Officers Just Have To Think It Through!

Michigan still embraces and trains to an Officer-Subject Control Continuum. For years, officers have been trained that if they face resistance from a subject, they should respond to the threat with a 1 + 1 response. They are to escalate and de-escalate the response based on the level of resistance presented by the subject. If the subject stops resisting, is brought under control or submits, the officers must de-escalate their response but maintain control. Keeping that scenario in mind, ***when officers are faced with a less than lethal weapon that has only one use, once the threat is over, that level of resistance has ended as well and officer must remain vigilant but respond with the control that is reasonable considering the level of resistance presented.***

Most departments have trained their officers that if they are disarmed of their TASER or face a TASER, it is reasonable to use deadly force to protect themselves. Even with multiple officers at an incident, with the newer TASER law enforcement restricted units having the capability to fire multiple projectiles, there is the potential of significant risk for officers and when reasonable, a deadly force response may be appropriate.

The same is not true for the personal safety electronic control device allowed by Michigan law that is a one and done weapon. Using the factors in *Graham* from which reasonableness is evaluated: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." The subject's use of a once and done weapon diminishes the reasonableness, with multiple officers on scene, of a deadly force response. The subject is threatening with a less lethal weapon that has no lasting effect on the officer; it only has one use so the unfortunate officer that gets too close and takes the ride will at least have solace in that the others will keep him safe. The only factor that remains is whether the

subject is still resisting or produces another weapon, which resets the entire evaluation of reasonableness.

Should officers choose a deadly force response in a multiple officer response scenario and are sued under state law in Michigan courts, the evaluation of their actions will be as outlined in *Odom*. The court may view the officers as using a deadly force response on a subject who presents no significant threat beyond use of a less lethal weapon. The presence of multiple officers creates a relatively controlled environment in which there is little risk beyond the first assault. Depending on the facts of the case, the officers' motive may be viewed as a lack of good faith and their action may be considered as "'malicious intent, capricious action or corrupt conduct' or 'willful and corrupt misconduct.'"

Officers must be aware, should they be in a multiple officer response and use deadly force on a subject armed only with a personal safety electronic control device, they may risk criminal charges and civil penalties at the federal and state levels. To ensure consistency, it is very important to discuss with the Prosecuting Attorney and/or Legal Advisor the issues surrounding these types of incidents.

Discussion For Training

It is important that departments, as part of their MCOLES Firearms In-Service Standard training, include discussions about the CPL changes and the appropriate response when faced with rapidly evolving incidents involving a subject with an EMD. Like controversy over the "shall issue" Concealed Pistol License law and the open carry spectacles, the probability is correspondingly low that officers will encounter a person with an EMD who may try and do them harm. However, it is the low frequency that helps make these encounters high

risk. Officers may not recognize that if the subject fires the personal safety EMD, that action changes the resistance encountered and influences the level of control that should be applied.

Experience shows that there may be a probability that can be formed identifying particular types of incidents or locations that officers can expect to encounter a subject with an EMD, just as there is for a firearm. Trainers should take advantage of identifying those probable incidents or location within a jurisdiction as an opportunity to engage in round table discussions using scenarios with a variety of variables. The goal is to provide scenarios that will actively engage the officers in learning and help them recognize how rapidly incidents can escalate and de-escalate and the importance of reacting reasonably to the level of resistance they encounter as things change. MCOLES speaks to an interactive learning environment in their Firearms In-service Training Facilitators Guide, which could be useful in facilitating the discussion.

The rules of reasonableness are the same in all force situations with the additional caution that an inappropriate response can evolve into a good faith violation for failure to act appropriately under Michigan law. Probably the most important factor is for officers to remain situationally aware and formulate a plan of action that will best protect them even if it means they have to retreat to a safer position until more help arrives. No matter what the circumstances, the primary goal is for officers to recognize they have to work safely to provide for their own survival so they can protect those who need them.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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