

## Increased Scrutiny In Officer Use of Force!

By Gene King, Law Enforcement Action Forum Coordinator



A number of people in law enforcement have expressed concern about a recent Fourth Circuit United States Court of Appeal's case *Armstrong v. Village of Pinehurst* because of the limits the court places on the use of force, particularly an Electronic Controlled Weapons (ECW), like a Taser. In short, the court declared that, in the Fourth Judicial Circuit, which covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina, the Fourth Amendment prohibits ECW use as a pain compliance tool against a resisting subject unless the police can articulate "immediate danger" to the officer apart from the fact of resistance alone.

*Armstrong* involved a mentally ill man being seized for his own protection. The man was on the ground, at the entrance to the hospital, hugging a post and was surrounded by three police officers and two hospital security guards. For 30 seconds the man failed to submit to a lawful seizure as demanded by the officers before he was tased five times in two minutes and then swarmed by the officers and guards involved.

LEAF felt this case has drawn so much national attention in the law enforcement profession that a discussion should be made of cases in the Sixth Circuit that are similar. To start, it is important to understand that decisions of the Fourth Circuit are not binding on the states within the Sixth Circuit, which are Michigan, Ohio, Kentucky and Tennessee.

### What About The Sixth Circuit?

LEAF Legal Advisor Audrey Forbush, Plunkett Cooney PC, was asked to review the *Armstrong* decision and determine what cases in the Sixth Circuit may be similar. Her initial response was that, as LEAF has discussed in past LEAF Newsletters, the Sixth Circuit has strongly supported the *Graham v Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989), objective analysis of the Reasonable Officer Standard. She went on to explain that the Sixth Circuit has ruled that the reasonableness of the use of force is directly related to the resistance encountered.

As a brief explanation, Forbush continued, the courts evaluate reasonableness by a totality of the circumstances analysis found in *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). This approach requires the court to consider the following factors found in *Graham*, "the severity of the crime at issue, whether the

subject 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.”

To enable the court to draw specific inferences and see the full scope of an incident, Forbush emphasized that officers need to provide an outline of events giving the court a complete picture of the incident from the officer’s point of view. The picture must establish the when, what, why and how that lead to the decision to take the specific action the officer took. Forbush continued that the officer’s words paint the canvas, which forms the picture, by clearly articulating what the officer saw; the actions of the subject; the resistance encountered; the conclusions and decisions the officer made; the specific action taken to overcome that subject’s resistance; and how the officers de-escalated the force used as the subject is brought under control and the resistance lessens allowing custody to be established.

### Mentally Ill

To recap, Forbush remarked that *Armstrong* was about more than the level of resistance necessary before an ECW can be used, but the case also involves the use of force on a mentally ill subject. The subject was diagnosed with bipolar disorder and paranoid schizophrenia and had gone off his medication before the incident. His sister got him to a hospital but the subject fled when he learned a doctor was going to issue involuntary commitment papers. The police were called and located the subject wandering in traffic at the hospital’s street entrance. At this point, the doctor had not completed the papers so the officers calmed the subject and talked with him as he acted bizarrely. As soon as the doctor reported the paperwork’s completion, the subject attached himself to a post. The officers and guards then took action and applied force to make the seizure. The Fourth Circuit ruled, “[T]he use of force that may be justified by” the government’s interest in seizing a mentally ill person, therefore, “differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community,” and “mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations.”

Forbush reports the Sixth Circuit, as far back as 2004, ruled in a case involving an autistic subject who could not communicate and in which the officers had been told was having a crisis and acting out, that “It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill or retarded, even though the officers may not have known the full extent of (his) autism and his unresponsiveness. The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.” *Champion v Outlook Nashville Inc.*, 380 F.3d 893,904 (Sixth Cir, 2004),

Again, in *Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007) the court reiterated *Champion* because the record established that the officers knew before they had contact with the subject that he was having some mental or emotional difficulty that had caused alarm in his mother. Forbush commented that *Griffith* is the first time the Sixth Circuit Court of Appeals was very specific about officers being responsible for recognizing mentally ill or emotionally distressed individuals.

The *Griffith* Court held that officers are responsible for managing the situation based on the mental condition of the subject. Forbush continued that even though the court may have not specifically said so, its expectations appear to be that officers in these incidents need skills to recognize the situation. The court laid out their expectation that officers should be skilled enough to avoid unnecessarily escalating the incident by choosing action that serves to decompress the situation, avoiding the need for a high level of force response. Forbush said *Griffith* also is the first time the Sixth Circuit has been this specific concerning how the court will evaluate use of force when dealing with a person who is mentally ill other than the reasonable officer found in *Graham*.

As a side note, Forbush remarked that the court in *Griffith* also supported *Champion's* ruling that officers' action creating asphyxiating conditions by applying "substantial or significant pressure" to restrain a suspect who presents a minimal safety risk, amounts to excessive force. She said *Griffith* went further and put officers on notice that using severe force, including a neck restraint, against an unarmed and minimally threatening individual *before* he was subdued violates the Constitution. This was notice that remaining on top of, or using pressure to hold down, a prone subject who is restrained and no longer resisting is excessive force.

#### Use of an ECW

The Fourth Circuit, in *Armstrong*, established strict guidelines for the use of pain to gain compliance or to gain control especially in situations where the subject is mentally ill, unarmed and minimally threatening. The Fourth Circuit has ruled "Serious injury force" is excessive if the subject is only presenting "physical resistance" and is not a "risk of immediate danger" or a "serious threat" to others. "Serious injury force" could be ECW, impact weapon, pepper spray, striking, takedowns, tackling or wrestling.

The Sixth Circuit in *Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015), has once again ruled that officers are expected to follow the precedent from this circuit that police officers can tase someone who resists lawful arrest and refuses to move his hands so the police can handcuff him, citing *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 509 (6th Cir. 2012)

Forbush said the court in *Rudlaff* also restated their expectation from *Hagans* that officers are also expected to follow the precedent that "active resistance does not include being compliant or having stopped resisting." She said the court established a simple distinction: "When a suspect actively resists arrest, the police can use a taser (or a knee strike) to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot."

In a recent Sixth Circuit case, *Goodwin v. City of Painesville*, 781 F.3d 314, 328 (6th Cir. 2015), Forbush said the court ruled on the use of force using an ECW. In this case, officers twice encountered a subject who was intoxicated in his home, playing music loud and acting belligerently. On the second encounter at the back door of the subject's apartment, the officers ordered the subject to come out of his home to talk to them. He refused and walked further into the house. The officers decided they were going to arrest the subject and entered the home and tasered him in the chest for 21 seconds and then drive stunned him. The subject subsequently died and the estate sued.

The court ruled "To arrest a person in his home, police officers need both probable cause and either a warrant or exigent circumstances. A holding that a simple refusal to exit one's own home—and surrender the heightened Fourth Amendment protections it provides—constituted active resistance of an officer's command sufficient to justify a tasing would undermine a central purpose of the Fourth Amendment." The *Goodwin* court also said, "We have found that by mid-2005, "[t]he general consensus among our cases is that officers cannot use force . . . on a detainee who has been subdued, is not told he is under arrest, or is not resisting arrest." citing *Grawey v. Drury*, 567 F.3d 302, 314 (6th Cir. 2009).

#### ECW Use Restricted In Sixth Circuit

In a case decided in January of 2016, *Kent v. Oakland County*, 810 F.3d. 384 (6th Cir., 2016), Forbush outlined that the Sixth Circuit Court of Appeals concurred with the District Courts opinion that that the deputies' use of the Taser was objectively unreasonable and violated clearly established law, and it denied the deputies' motion for summary judgment on qualified and governmental immunity grounds.

In *Kent*, the subject, who is a Doctor, alleged the use of excessive force by officers who responded to the natural, at-home death of the subject's father at the subject's home. Adamant that his father, who had died 15 or more minutes before the arrival of the medical technicians, had not wished for life-sustaining procedures and the subject vehemently objected to emergency medical technicians' efforts to attach an Automated External Defibrillator to resuscitate his father. When the subject continued to yell at the deputies, wave his arms and refuse to calm down as commanded, the deputies threatened to use an ECW. In response, the subject backed against the wall, raised his hands and told the officer to go ahead. He was tased.

Forbush said the court used the reasonableness analyses outlined in *Garner* and *Graham*. The court took note that during the incident, the subject was unarmed and made no evasive movements to suggest he had a weapon. In addition, there was no evidence that the subject had tried to avoid being handcuffed or that he attempted to flee from police and he was never charged with any crime. Further, there was no indication that he attempted to hit officers or make a display of force. At most, the subject used hand gestures, which did not pose an immediate threat to safety under existing case law. The court ruled that at the most, according to the officer's account, the subject used agitated hand gestures, which do not amount to the same immediate threat to safety found to justify tasing under our case law.

Forbush opined that it is very important to recognize that the court in *Kent* reasoned that although the subject was not compliant, his language could not be characterized as "continued resistance and hostility" to amount to active resistance. She continued that the court drew an analysis with *Goodwin*, who, like the subject in *Kent*, refused to comply with an officer's command and verbally indicated as much. Additionally, the subjects' conduct in *Kent* and *Goodwin* does not resemble the "continued resistance and hostility" often present in our active resistance cases such as in *Hagans*.

#### Officers Need To Know What Active Resistance Is!

Forbush cautioned officers to recognize the court in *Kent*, using facts most favorable to the plaintiff, clearly establishes notice that a man who yelled at officers and refused to comply with commands to calm down, but was never told that he was under arrest, never demonstrated physical violence, and had his arms in the air and his back to the wall when tased has a right to be free from the use of a ECW under these circumstances.

The "active resistance" of a subject is used by the court as a component to evaluate the "objective reasonableness" of the use of force and whether that force violates the Fourth Amendment.

Actively resisting, based on Sixth Circuit cases, is behavior that demonstrated a deliberate choice to be defiant including some outward manifestation, either verbal or physical, on the part of the suspect that suggested a willing and conscious defiance. Going forward, Forbush opined, officers must know that they cannot use a ECW on a subject who is not actively resisting as the court described; is not a threat, is not armed or has not been told they are under arrest.

She also pointed to a common thread in the Sixth Circuit case law on evaluating the use of force: noncompliance alone does not indicate active resistance; there must be something more to indicate they pose an immediate threat. Forbush opined that active resistance as described by the court could be a verbal showing of hostility by clinched fists or posturing in a fighting stance or threats with an apparent intention to carry them out. It can also be a deliberate act of defiance like resisting handcuffing or refusing to keep hands visible or using one's own body, such as pulling or pushing away, blocking, striking, kicking or grabbing, or use of some other mechanism, such as a weapon or vehicle.

Similarly, the Michigan Commission on Law Enforcement Standards defines Active Resistance in the *Subject Control Continuum Training Guide for Escalation and De-Escalation of Subject Control*, 2008 as any action by a subject that attempts to prevent an officer from gaining control of the subject. MCOLES uses pulling/pushing away, blocking as examples with Active Aggression examples as physical actions or assaults, advancing, challenging, punching, kicking or grabbing.

Forbush remarked that the term “active resistance” is difficult for officers to grasp and even more difficult for them to properly articulate. She repeated the importance of the officer’s report painting a picture of action they took in response to the resistance encountered. Because this is a difficult area, emphasis should be placed on incident and report review by supervisors to ensure compliance.

### The Bottom-Line

Forbush was adamant that officers have to know the standard of law in the Sixth Circuit for the use of force. She continued that a person who may be noncompliant, loud and argumentative, using agitated hand gestures, but is unarmed, making no furtive movements to suggest they have a weapon, has not tried to hit officers or make a display of force, is not trying flee or avoid being handcuffed, is not under arrest, cannot be subject to the use of force, especially a ECW.

### Action Points

After reviewing cases from the Sixth Circuit Court of Appeals, Forbush offers the following suggestions to prepare officers for incidents involving subjects who are mentally ill, intoxicated or agitated and those where subjects are not actively resisting an officer:

- Department policy, practice and training needs to be audited to ensure it meets the current standard of law concerning the application of implements, weapons and control techniques in the use of force.
- Officers need training to identify situations involving subjects who are suffering from a mental illness, are highly intoxicated or highly agitated.
- Officers must know the requirements of the Michigan Mental Health Code for using force and recognize that unless a subject is actively resisting, officers cannot escalate their force response in order to take the subject into custody.
- Officers need to understand they are accountable for their response to an incident and cannot escalate that response causing a need to elevate the level of force to overcome the corresponding escalated resistance to bring the subject into control and custody.
- Officers need scenario-based exercises to practice the use of de-escalation techniques as a common sense way to help calm an incident. The training should teach officers situational awareness and to plan their response to an incident so generally only one officer gives commands. Officer’s need to understand, when several officers are shouting and barking orders as a general response to an incident, it causes those involved confusion, breeds mistrust, which may lead to an escalation in tension.
- Officers need training to recognize incidents of excited delirium, techniques for responding and the importance of EMS participation.

- Officers need regular training in the use of each authorized implement, weapon or control technique. The training should include top management's expectations for the level of subject resistance that officers must encounter before using a particular implement, weapon or control technique.
- Mental Health and Community Resources should be identified that can assist officers in resolving incidents involving subjects who are mentally ill or highly intoxicated or agitated by their circumstance.
- Mid-level managers and supervisors must be trained and held accountable to review incident reports to ensure officers clearly articulate the behavior of a subject encountered and the specific action the officers took in resolving the incident.
- Top command must audit the activity of the department to ensure the behavior and action taken complies with department policy and rules, industry standards, statutes, court decisions and expectations of the elected officials.

#### Are you a MML Insurance Program Member?

Go to the League's online Law Enforcement Risk Control Manual, [now compatible with any browser](#), to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click "Don't Have an Account". To add to the ease of use, the manual now contains a complete keyword search function.

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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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