REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE

Report of:
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PURPOSE:

The sole purpose of this report is to review the use of deadly force by CPD Officer Timothy Loehmann from the perspective of the United States Constitution. No opinion is rendered with respect to Ohio state criminal law or CPD policy.

STATEMENT OF FACTS:

At approximately 3:22 in the afternoon on November 22, 2014, City of Cleveland Division of Police (CPD) Communication Center received a 911 call advising that there was a "guy in the park with a pistol, pointing it at people." The caller, who later identified himself as "[redacted]," described the individual in question as a black male wearing a camo hat and a grey jacket with black sleeves. [redacted] also stated that the individual was "probably a juvenile" and the weapon was "probably fake."

At 3:26 pm, dispatch requested an available unit to respond to a Code 1 at the Cudell Rec Center (CRC). When Officers Frank Garmback and Timothy Loehmann advised dispatch they were able to respond, they were informed by dispatch that there was a black male sitting on a swing in the park by the Youth Center pulling a gun out of his pants and pointing it at people. The dispatcher further provided the address of the location and a description of the clothing worn by the individual with the weapon.

Officers Garmback and Loehmann proceeded to the park in their vehicle, jumped the curb, traveled across the grass and came to a stop near a gazebo were an individual matching the description provided by dispatch was standing. Video surveillance at the park shows Officer Loehmann exiting the vehicle as the individual suspected to be armed reaches toward his right side waist and lifts his jacket. Within one to two seconds of exiting the vehicle, Officer Loehmann fired his weapon twice from a distance of 4.5 to 7 feet, striking the individual in the abdomen. The individual, later determined to be twelve-year-old Tamir Rice, died the following day of the injuries he sustained. The weapon which was in the possession of Tamir Rice at the time of the incident was an "airsoft gun" with the orange markings of a toy removed.

CONSTITUTIONAL STANDARD OF REVIEW:

The only constitutional provision at issue when law enforcement officers seize an individual by using deadly force is the first clause of the Fourth Amendment that provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated…"

It is significant that the Fourth Amendment does not require a law enforcement officer to be right when conducting a seizure. Rather, the standard is one of objective reasonableness. In Graham v. Connor, 490 S.Ct. 386 (1989), the Supreme Court of the United States held that the determination of the reasonableness of an officer's decision to use force must be made from the perspective of an officer on the scene. The Court noted that *"officers are often forced to make split-second judgements-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation."* Furthermore, the Court concluded that the issue must be viewed "*from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight…"*

The practical effect of the Supreme Court's decision in Graham v. Connor and other federal court cases,[1] is that those sitting in judgment of an officer's use of force must view the relevant facts from the perspective of the law enforcement officer on the scene. Accordingly, the relevant facts are those facts, and only those facts, that were available to the officer at the time the decision to use force was made. After acquired information cannot be used to determine the validity of an officer's actions. Moreover, because the perspective must be that of the law enforcement officer on the scene, it is extremely important to look at those relevant facts through the eyes of an officer trained to recognize and react to a threat.

RELEVANT FACTS:

In light of the foregoing, the only relevant facts are those possessed by Officer Loehmann at the moment he fired his weapon. At that time, Officer Loehmann was aware that a 911 caller had reported a man in the park with a gun that he kept pulling from his pants. When he arrived on the scene, Officer Loehmann observed an individual matching the description provided by the 911 caller reach to his right side near his waist and pull up his jacket. Officer Loehmann, who had exited his vehicle, was within 7 feet of the individual and without cover when he made the decision to use deadly force.

The after acquired information - that the individual was twelve-years-old, and the weapon in question was an "airsoft gun"- is not relevant to a constitutional review of Officer Loehmann's actions. Similarly, the 911 caller's uncommunicated speculations that the individual might be a minor and the weapon was "probably fake" cannot be considered.

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[1] See e.g., Smith v. Freland, 954 F.2d 343 (6th Cir. 1992), United States v. Cortez, 449 U.S. 411 (1980), Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) and Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988).

LAW ENFORCEMENT OFFICER TRAINING:

There are two concepts that are universal to all law enforcement training regarding the use of force: threat identification and action versus reaction.

Human beings are not born recognizing a threat – it is something that must be learned. For example, without training, many people would not recognize an unarmed individual, or one armed only with a knife or a club, as posing an extremely serious threat to an officer with a firearm. The Supreme Court of the United States previously recognized the significance of law enforcement training by noting *"…when used by trained law enforcement officers, objective facts, meaningless to the untrained,* [may permit] *inferences and deductions that might well elude an untrained person."*[2] Law enforcement officers are trained to recognize that any confrontation with a person harboring a malicious intent may pose a significant threat if, left unchecked, they are able to kill or incapacitate the officer and gain access to the officer's weapon. Because officers cannot be expected to read the minds of individuals and determine intent, they are instead trained to scrutinized individuals' behavior for telltale signs. An individual's actions are often the only signals of their intent. Obviously, if the individual being confronted is reasonably believed to be armed, the officer's attention to those actions will be intensified. In such a situation, officers are taught to focus on the hands of the individual.[3] If the hands move in the direction of a "high-risk area" – an area where a weapon may be concealed, such as inside a jacket, towards the waistband of pants, or under the seat of a car, well trained officers will immediately identify this as a serious threat.

When threat identification is combined with the concept of action versus reaction, an officer's need to make split-second judgments with respect to the use of force becomes evident. Action versus reaction is simply the recognition that there is a certain amount of time required for every person to recognize a stimulus, formulate a response to that stimulus, and then carry out that response. When applied to deadly force situations, action versus reaction refers to the time it takes for an officer to observe the actions of an individual, such as the movement of an individual's hands, perceive those actions as threatening, calculate possible responses to the treat, determine what level of force is necessary, and then complete the reaction. The reactions of a well-trained officer may be quick, but they are not instantaneous. The time differential between a threatening action occurring and the ability to respond to that threat always puts law enforcement officers in the position of having to catch-up. The practical effect of action versus reaction in deadly force situations is that officers cannot wait to react until they are absolutely certain of an individual's malicious intent. If an officer waits to be certain that the individual reaching into a high-risk area is retrieving a weapon, action versus

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[2] Cortez at 418.

[3] Patrick and Hall. *In Defense of Self and Others*, Carolina Academic Press, Durham, NC, 2005, p. 139. "[*a*] *truism universal throughout law enforcement is that a person's hands are the source of danger and a clear indicator of imminent risk."*

reaction dictates that the weapon could easily be used against the officer before he or she has an opportunity to respond.

APPLICATION TO THE RELEVANT FACTS:

When the concepts of threat identification and action versus reaction are applied to the relevant facts of this case, it becomes apparent that not only was Officer Loehmann required to make a split-second decision, but also that his response was a reasonable one.

When Officers Garmback and Loehmann arrived on the scene, Officer Loehmann was on the passenger side of the vehicle which was within close proximity to Rice. At the time, Rice was reportedly armed with a handgun, and Officer Loehmann was without cover. Following universal training and procedures, Officer Loehmann's attention would be focused on Rice's hands as they moved towards his waist band and lifted his jacket. Unquestionably, the actions of Rice could reasonably be perceived as a serious threat to Officer Loehmann. Waiting to see if Rice came out with a firearm would be contrary to action versus reaction training. Considering Officer Loehmann's close proximity to Rice and lack of cover, the need to react quickly was imperative. Delaying the use of force until Officer Loehmann could confirm Rice's intentions would not be considered a safe alternative under the circumstances.

ADDITIONAL CONSIDERATIONS:

WARNINGS: There is some dispute regarding whether Officer Loehmann issued any warnings before he discharged his weapon. While the issuance of warnings (or the lack thereof) may be considered during a policy or tactical review, it is insignificant to this constitutional review. The Fourth Amendment permits the use of deadly force in two situations: when it is reasonably necessary to (1) protect oneself or others from the imminent threat of death or serious physical injury, or (2) prevent the escape of a dangerous person. Warnings would never be required in the first (defense of self and others) category. If an officer's reasonable perception is that his or another's life is in imminent danger, delaying the use of force for the purpose of issuing a warning creates an unreasonable risk. As previously noted, the concept of action versus reaction already necessarily puts an officer at a disadvantage. Any further delay caused by issuing a warning (and waiting to determine whether the warning has been heeded) needlessly increases that risk. Thus, the only time warnings factor into a determination of reasonableness is when law enforcement officers are attempting to prevent the escape of a dangerous individual and, even then, warnings are to be given <u>when feasible</u>.[4]

AGE: Although he may have looked older, Tamir Rice was only twelve years old at the time of the fatal shooting. When interviewed, officers who were on the scene shortly after the incident stated that Rice appeared to be in his late teens or early twenties. However, whether Rice looked his age or not is irrelevant to the determination of the reasonableness of Officer

[4] See, Patrick and Hall, pp143-44.

Loehmann's actions. Once again, Officer Loehmann had to make a "split-second" decision regarding the use of force. When he exited the police car, the officer was likely focused on Rice's hands as they moved to his waist and lifted his jacket, and not on Rice's age. Even if Officer Loehmann was aware of Rice's age, it would not have made his use of force unreasonable. A twelve-year-old with a gun, unquestionably old enough to pull a trigger, poses a threat equal to that of a full-grown adult in a similar situation. Law enforcement training often incorporates lessons designed to dispel the notion that minors are harmless. In 1995, the Department of Justice implemented its new Deadly Force Policy and the FBI subsequently created interactive video scenarios to illustrate and train FBI Special Agents on the practical application of this policy. One of the scenarios that was developed required Agents to confront a mildly handicapped fifteen-year-old with a gun. Most agents faced with this scenario never recognized either the age or the handicap of the subject because they were focused on his behavior. Those agents who took note of the subject's age or handicap and, consequently, hesitated to use deadly force when appropriate, could not react in a timely manner when the subject quickly raised the gun and fired several shots - the video screen would go black, indicating the agent had not survived the confrontation. The purpose of this training scenario was to illustrate that a firearm in the hands of ANY person capable of pulling the trigger can pose a serious threat regardless of their physical and mental development. As stated by the Seventh Circuit Court of Appeals in Pena v. Leombruni,[5] "*Very little mentation is required for deadly action. A rattlesnake is deadly but could not form the mental state required for a conviction of murder."* This is not to suggest that law enforcement officers would shoot a toddler with a gun. Most law enforcement officers would rather take a bullet than shoot a toddler. However, Tamir Rice was not a toddler and, even if his age was known at the time of the incident, he was perfectly capable of inflicting death or serious physical injury.

REPLICA WEAPON: As previously stated, the fact that the weapon possessed by Rice was an airsoft gun is not relevant to a review of the reasonableness of Officer Loehmann's actions. Officer Loehmann had no information to suggest the weapon was anything but a real handgun, and the speed with which the confrontation progressed would not give the officer time to focus on the weapon. Moreover, interviews of the officers who responded to the shooting suggest that, even if time was not a factor, it would have been extremely difficult if not impossible to determine that the handgun was a replica. In fact, there have been several cases where law enforcement offices used deadly force to seize subjects they believed to be reaching for a firearm, only to determine later that there was no weapon present, not even a replica.[6] These cases make it clear that "knowledge of facts and circumstances gained after the fact…has no place in the trial court's or jury's post-hoc analysis."[7]

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[5] 200 F.3d 1031 (7th Cir. 1999)

[6] See, e.g., Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988), and Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991).

[7] Sherrod v. Berry, supra, at 804-5.

TACTICS: The question of whether Officers Garmback and Loehmann could have avoided the situation had they used better tactics is one that is worthy of consideration from the prospective of policy and training for future events. However, it should not be considered when determining the constitutionality of the use of force. It could be argued that the officers enhanced that risk by entering the park and stopping their vehicle so close to a potentially armed subject. However, this type of "armchair quarterbacking" has no place in determining the reasonableness of an officers use of force, and is exactly the type of analysis the Sixth Circuit Court of Appels warned against in Smith v. Freeland[8] when it stated: *"…we must avoid substituting our personal notions of proper police procedures for the instantaneous decision of the police officer on the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.*[9] In Plakas v. Drinski,[10] the court refused to consider officers' actions leading up to a deadly confrontation and rejected the notion that the officers' tactics preceding the event actually caused the problem. In doing so, the court made the following statement: *"Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing then no force would have been used. In this sense the police always cause the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.*[11] Support for this position can be found in the Supreme Court's decision in California v. Hodari D.,[12] wherein the Court held that the Fourth Amendment only protects people from unreasonable searches and seizures, and a suspect is not seized until he submits to the police's show of authority or the police subject him to some degree of physical force.[13]

In addition to the foregoing case law, it is significant to note that Officers Garmback and Loehmann received information that there was an armed individual sitting on the swings in the park outside a recreation center. Considering this an obvious risk to the community, the officers quickly proceeded to the park in a manner that would take them to the swings. However, when they arrived at the park and observed there was no one on the swings, it is likely that they continued on until they spotted an individual matching the 911 callers description. At that time, they were within a few feet of the pavilion where Rice was located. Whether the officers' actions were courageous or foolhardy is not relevant to a constitutional review of the subsequent use of force.

SHOT PLACEMENT: A common misconception often voiced loudly after a lethal law enforcement shooting is that there was no need to kill the subject, the police could have shot him in the arm or the leg. Certainly, a large portion of the population subscribes to this belief because of what they have seen on television and the movies. Unfortunately, Hollywood does not always reflect reality. Police officers are not trained to "shoot to kill." Rather, they are trained to shoot to stop an imminent

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[8] 954 F.2d 343 (6th Cir. 1992)
[9] Id at 347.
[10] 19 F.3d 1143 (7th Cir. 1994).
[11] Id. At 1150.
[12] 111 S.Ct. 1547 (1991).
[13] Id at

threat. The quickest, most efficient and practical way for a law enforcement officer to forcibly bring about a timely halt to threatening actions is to deprive the subject's brain of the oxygen necessary to continue conscious action. Because oxygen is carried to the brain by blood, law enforcement officers are trained to aim for center mass where most of the blood-bearing organs are located. Attempts to incapacitate by shooting a subject in the arm or leg are not only impractical, they are contrary to universal law enforcement training.

CONCLUSION:

According to the Supreme Court, the standard that must be used to evaluate a law enforcement officer's use of deadly force is one of objective reasonableness. The question is not whether every officer would have reacted the same way. Rather, the relevant inquiry is whether a reasonable officer, confronting the exact same scenario under identical conditions could have concluded that deadly force was necessary. Based on the proceeding discussion, and in light of my training and experience, it is my conclusion that Officer Loehmann's use of deadly force falls within the realm of reasonableness under the dictates of the Fourth Amendment.

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PROFESSIONAL EXPERIENCE:

2009 – Present: Northern Virginia Community College
Associate Professor of Criminal Justice
•Criminal Law, Evidence and Procedure
•Criminal Investigations
•Case Studies in Murder and Other Violent Crimes
•Terrorism
•Organized Crime
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1985 – 2004: Federal Bureau of Investigation
Supervisory Special Agent assigned to Legal Instruction Unit
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•Instructed FBI, DEA and National Academy
°Deadly Force
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