Mistaken Use of Firearm instead of Electronic Control Weapon

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What are the legal implications when an officer reaches for an electronic control weapon (ECW), such as a Taser, intending to subdue a suspect, but mistakenly grabs a firearm instead and unintentionally shoots the suspect? Although this unfortunate event is uncommon, courts have now had the opportunity to address officers' mistaken use of a firearm when they intended to use an ECW.

Objective Reasonableness

The use of force by law enforcement officers is constitutional when it is objectively reasonable. Since "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,"[1] the U.S. Supreme Court has recognized that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[2] The Supreme Court has recently stated that although an attempt to craft an easy-to-apply legal test is admirable, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'"[3]

Recent Cases

In *Henry* v. *Purnell*[4] a deputy sheriff attempted to arrest a suspect during a traffic stop on an outstanding warrant for failure to pay child support. The suspect pushed the deputy and began to flee. Within 10 seconds, the deputy reached for what he thought was his ECW (located just below his holstered handgun) but instead drew his Glock .40-caliber handgun and shot the suspect in the elbow. The deputy immediately told the suspect and a witness that he had not meant to shoot and grabbed the wrong weapon. The court of appeals ruled that a "seizure" occurred but remanded the decision to the district court for a determination of reasonableness after further discovery on the training provided to the officer. On remand, the district court granted summary judgment for the deputy, finding that his mistake was reasonable.[5] The court commented:

> During the course of the training, [the deputy] handled a Taser a single time, and he only fired it once. Moreover, although the record reveals that prior to the training the Taser manufacturer knew of three accidents in which an officer had unholstered and fired the wrong weapon, during the course of the training there was no discussion about the possibility of erroneous weapon usage. Perhaps it

> might be contended that Somerset County ([the deputy's] employer) and/or the Taser manufacturer were negligent in not providing greater training. They, however, are not defendants in this action, and nothing in the training that [the deputy] did receive demonstrates that the mistake he made when he shot Henry with his Glock was anything other than an honest one.[6]

In *Torres* v. *City of Madera*[7] an officer was attempting to subdue a handcuffed arrestee who was kicking the rear window from inside a patrol car. The officer had a Glock pistol in her holster and an ECW immediately below in a thigh holster. She removed what she thought was her ECW, pointed the laser sight at the arrestee's center of body mass, and fired once. Unfortunately, the weapon she drew instead was her firearm. The court of appeals cited *Henry* v. *Purnell* in holding that the officer would be liable only if her mistake was unreasonable. The court also agreed with *Henry* that five factors should be considered in determining the reasonableness of the officer's mistake:

> (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.[8]

Like in *Henry*, this case was remanded for further proceedings to determine whether the officer's mistake was objectively reasonable.

In *Yount* v. *City of Sacramento*[9] an officer attempted to subdue a handcuffed suspect who was kicking, biting, and spitting at officers. Mistakenly drawing his firearm instead of his ECW, the officer shot the suspect in the buttocks. The court ruled that the conviction for obstructing an officer did not bar the arrestee from pursuing a federal civil rights claim against the officer for excessive force.

Conclusion

The small number of reported cases does not establish a widespread trend, but these cases are enough to put users on notice that mistakes can happen. Therefore, the potential for mistakes should now certainly be addressed in both training and policy.[10] Even if an officer is entitled to qualified immunity, an agency may still be liable for inadequate training or supervision.[11] In addition, even if the mistaken use of a firearm is objectively reasonable under the Fourth Amendment, the officer may still be liable under a state negligence or battery claim.

Notes:

[1] *Graham* v. *Connor*, 490 U.S. 386, 396 (1989).
[2] *Id*. at 396–97.
[3] *Scott* v. *Harris*, 127 S. Ct. 1769, 1778 (2007).
[4] *Henry* v. *Purnell*, 501 F.3d 374 (4th Cir. 2007).
[5] *Henry* v. *Purnell*, 559 F. Supp. 2d 648 (D.Md. 2008).

[6]*Id*. at 652.
[7]*Torres* v. *City of Madera*, 524 F.3d 1053 (9th Cir.2008).
[8]*Id*. at 1057.
[9]*Yount* v. *City of Sacramento*, 43 Cal. 4th 885 (2008).
[10]For a comprehensive site of legal resources, see www.ecdlaw.info.
[11]See *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) and *City of Canton* v. *Harris*, 489 U.S.378 (1989).

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