

# Intermediate Weapons – Dart Taser

**Hi. I'm Tim Miller and this is Part VI of our Podcast Series on Use of Force. We are discussing intermediate weapons. In the last section we talked about batons. A baton is a reasonable force option against combative suspects – meaning someone who poses an articulable threat of harm to the officer. These are fights. Fights are dynamic encounters, and while officers cannot always predict what will happen in a fight, the Physical Techniques Division teaches officers to strike at the suspect's attacking limbs and large muscle groups and to avoid areas like the head, neck, or spine - unless deadly force is objectively reasonable. Now let's discuss tasers in the dart-mode.**

## C. Tasers – In the Dart-Mode.

Tasers have been credited with effecting lawful arrests, and with fewer injuries to officers and suspects, alike. That was the case in Draper v. Reynolds.<sup>1</sup> This case started late one night on a Georgia highway. The light over the license plate on Draper's truck was out. Draper stopped the truck, but accused the officer of shining a flashlight in his eyes. From there, things got worse. Five times the officer asked Draper for documentation. Five times, Draper failed to get it. Draper accused the officer of harassment. He paced beside the road, yelled, and cursed, "How about you just go ahead and take me to f---ing jail..." and "I don't have to kiss your ass because you're a police officer." After the fifth request for documents, the officer promptly tased Draper. Draper fell, and was quickly handcuffed.

Draper's argument was like this: "The officer didn't have to tase me! I would have complied with the officer's arrest commands!" The 11<sup>th</sup> Circuit looked to the reasonable officer for the answer. Based on these facts, a reasonable officer could believe that a verbal arrest command, accompanied by attempts to handcuff Draper, would only escalate an already tense and difficult situation into a more serious physical struggle and cause either the officer or the suspect to be seriously hurt.

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<sup>1</sup> Draper v. Reynolds, 369 F.3d 1270 (11<sup>th</sup> Cir. 2004).

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While the threat was articulable in Draper, it was not in Bryan v. MacPherson.<sup>2</sup> Bryan was a twenty-one year old male stopped by Officer MacPherson for driving without a seat belt. Officer MacPherson approached the car, told Bryan to turn down the radio, and asked him if he knew why he was stopped. Bryan turned the radio down, but just stared ahead without answering. MacPherson told Bryan to pull to the side of the road. Bryan did so, but began to pound the steering wheel and curse. Clad only in boxer shorts and tennis shoes, Bryan got out of the car.<sup>3</sup> Frustrated and upset about the pending ticket, Bryan yelled gibberish, expletives, and hit his thighs. Officer MacPherson tased Bryan. MacPherson shot Bryan without warning, and from about twenty, to twenty-five feet away. One of the darts hit Bryan in the back. Bryan fell to the pavement, shattering his front teeth.

The Ninth Circuit held that the force was excessive and that reasonable, less intrusive options were available. Backup was on its way and there were insufficient facts that could lead a reasonable officer to believe that Bryan was an immediate threat. Bare chested and wearing only boxer shorts, he did not appear to be armed. One of the darts lodged in Bryan's back, suggesting that he was facing away from MacPherson. While Bryan's behavior could lead a reasonable officer to be wary, under these facts they did not support a belief that Bryan posed an immediate threat.

In Bryan there was no articulable threat. In Beaver v. City of Federal Way,<sup>4</sup> there was an articulable threat, at least initially, but the threat began to diminish after the first tasing. Beaver was a burglary suspect. The responding officer saw Beaver at the scene, ordered him to stop, and Beaver fled. The

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<sup>2</sup> Bryan v. MacPherson, 630 F.3d 805 (9<sup>th</sup> Cir. 2009).

<sup>3</sup> Bryan v. MacPherson is another case where the police officer requested qualified immunity from suit. Since the court would be dismissing the case and denying the plaintiff, Bryan, his day in court, the judge is required to consider the facts in a light most favorable to the plaintiff. There were a couple of disputes in this case. First, Officer MacPherson claimed that he told Bryan to wait in the car; Bryan said he did not hear the order. Second, Officer MacPherson said that Bryan took a step towards him after Bryan got out. Bryan said that he did not. Those facts had to be considered in Bryan's favor.

<sup>4</sup> Beaver v. City of Federal Way, 507 F.Supp. 2d 1137 (W.D. Wash. 2007).

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taser brought Beaver to an abrupt halt.

But the first tasing was not the problem. Once down, the officer ordered Beaver in a loud voice to roll over on his stomach. Sixteen seconds after the first, Beaver was tased a second time, when he tried to get up. Before the second - and after each additional tasing - the officer commanded Beaver in a loud voice to roll over on his stomach and extend his arms. Beaver did not immediately comply, and two seconds after the second tasing, he was tased a third time.

Then a back-up officer arrived, but conflicting commands – one for Beaver to lie on his stomach and another to lie on his back – were given by the two officers. Beaver suffered the consequences, and ten seconds after the third tasing, he was tased a fourth time.

At this point, the two officers stood over Beaver. Beaver lay on the ground. He was on his stomach. However, his arms were curled underneath his chest. There were no conflicting commands by the officers about Beaver's arms, and twenty-two seconds after the fourth tasing, Beaver was tased for a fifth, and final time. He extended his arms, as ordered, and was handcuffed.

The court looked at each tasing and found that the first three were reasonable.<sup>5</sup> Beaver was suspected of burglary. He fled when the officer ordered him to stop. A reasonable officer could believe he was under the influence of drugs because he showed no signs of comprehension; his veins were bulging; he

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<sup>5</sup> In Beaver, 507 F.Supp. at 1145, the court found the first three tasings reasonable. The court had no problem with the first, but expressed some concern about the second and third. The court stated that Beaver may not have had the ability to obey the officer's orders. For instance, a witness testified that he heard Beaver say "I can't" in response to the officer's commands. An expert witness also testified that Beavers' actions (trying to get up) may have been as much a reaction to being tased as an intentional effort to resist arrest. Furthermore, the period between the second and third tasing was only two seconds, making it difficult to see how Beaver even had the opportunity to comply. Still, the court held that the first three tasings were reasonable. The officer was alone and he had to make a split second decisions in a situation where a reasonable officer could believe that Beaver was trying to get up and resist arrest.

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was sweating; and the officer said, “he had that far off look.” He was also a big man – about six feet tall and heavy-set – or about the same size as the officer who tased him. He was attempting to get up. And the officer was alone, at least initially.

But the analysis changed when the backup officer arrived. The court stated, “To the extent that Beaver posed an immediate threat to [the responding officer] during the first three tasings, that threat was significantly diminished when [the backup officer arrived].” When backup arrived, the officers had reasonable, less intrusive options. Instead of tasing Beaver, one officer could hold the taser - in the ready - while another went in with handcuffs.

Still, there are no absolutes in use of force, and while police officers generally find greater comfort in greater numbers, the facts may change that, too. In Teran v. County of Monterey,<sup>6</sup> for example, five police officers faced only one suspect – but on a roof. The suspect was a prowler. He was high on drugs, and after the officers climbed the roof to arrest him, he began to wrestle with them. The officers made a good plan. One officer was to grab one of the suspect’s limbs. That much of the plan worked, but the wrestling still continued, and when one of the officers came perilously close to the edge of the roof, another tased the suspect two times in rapid succession in the drive-stun mode in order to make him give up his hands. Reasonable? The court thought so.

And what about fleeing suspects? At over 160 miles per hour, the taser’s probes can out-run the fastest suspect within about 25-feet. But there are constitutional limits to a device that causes temporary paralysis and a headlong crash to the pavement. While the court in Beaver had no trouble finding that a taser was reasonable to stop a fleeing burglar, Cockrell v. City of Cincinnati<sup>7</sup> involved a fleeing *jaywalker*. The officer stopped to investigate. The jaywalker fled, and without any warning, the officer tased him. The court framed the issue this

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<sup>6</sup> Teran v. County of Monterey, 2009 U.S. Dist. LEXIS (2009)

<sup>7</sup> Cockrell v. City of Cincinnati, 2012 U.S. App. LEXIS 3787 citing Pearson v. Callahan, 555 U.S. 223, 236-37 (2009).

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way: Whether a misdemeanor, fleeing from the scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, had a *clearly established right not to be tased*. The court expressed no opinion on the constitutionality of the officer's actions. It dismissed the case because the law was not clearly established, under these circumstances.<sup>8</sup>

But the law is clear when a force option creates a foreseeable risk of death or serious bodily harm. Tasing someone in a tree,<sup>9</sup> climbing over a fence,<sup>10</sup> off of a raised platform, or around flammable liquids,<sup>11</sup> creates such a danger. Serious spinal injuries and deaths have resulted from falls. People have been seriously burned from flammable liquids. Absent a strong governmental interest for using the taser under these circumstances – such as an immediate threat of serious bodily harm – the force is deemed unreasonable. “It is not better that all felony [or misdemeanor] suspects die than that they escape” warned the Court in Garner.

**Let's stop. When we come back, we'll discuss tasers in the drive-stun mode and also, OC Spray.**

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<sup>8</sup> Qualified immunity is immunity from trial. It has two elements. Dismissal is appropriate if the officer did not violate a constitutional right or if the law defining the right was not clearly established at the time of the challenged conduct. The elements may be addressed in any order. The court dismissed the case because the law was not clearly established. See Cockrell, 2012 U.S. App. LEXIS 3787 citing Pearson v. Callahan, 555 U.S. 223, 236-37 (2009).

<sup>9</sup> Harper v. Perkins, 2012 U.S. App. LEXIS 4064

<sup>10</sup> Snauer v. City of Springfield, 2010 U.S. Dist. LEXIS 124770.

<sup>11</sup> Brown v. Burghart, 2012 U.S. Dist. LEXIS 73543