

Part I Graham v. Connor

Hi. I'm Tim Miller. I'm the Use of Force Subject Matter Expert for the Federal Law Enforcement Training Center's Legal Division. This is Part I of a 9 part podcast series on use of force. You can print the transcript for any of these podcasts. The transcripts have the case sites for cases we will discuss.

Comments about these podcasts should be sent to me at my email address, tim.miller@fletc.dhs.gov.

“How will I be judged by a court of law if someone sues me for using excessive force?” That is a fair question from someone studying to be a law enforcement officer. These podcasts focus on the legal aspects for using force in the course of effecting an arrest, investigatory stop, or other seizure of a free citizen.

A. Graham v. Connor

The leading case on use of force is the 1989 Supreme Court decision in Graham v. Connor. The Court held, “...that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other *seizure* of a free citizen should be analyzed under the Fourth Amendment and its objective reasonableness standard...”

The Court stated that a seizure occurs when a law enforcement officer terminates a free citizen's movement by a means intentionally applied. An officer may seize a person in many ways. Traffic stops, investigative detentions, and arrests are all seizures under the Fourth Amendment. To seize someone, an officer may yell, “Stop!” The officer may use handcuffs, a baton, or firearm to make the suspect stop. Every seizure must be objectively reasonable – meaning reasonable at its inception, in the manner it was effected, and in its duration.

B. What Happened in Graham – the Facts?

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Mr. Graham was a diabetic. After feeling the onset of an insulin reaction, he called his friend Berry and asked for a ride to a convenience store. Graham hoped to buy some orange juice. He thought that the sugar in the juice would counteract the reaction.

After Graham and Berry arrived at the store, Graham got out of the car and “hastily” went inside. (The Court does not explain “hastily”; but one might imagine Mr. Graham running, jogging, or walking with a very quick pace.) Unfortunately, the check-out line was too long and concerned about the wait, Graham “hastily” returned to the car, got in, and told Berry to drive to another friend’s house. Maybe this friend would have some juice.

Waiting outside the store was Officer Connor. Connor had watched Graham hastily enter and leave the store and suspected something was amiss. Connor followed the two men for a block or so before activating his overhead lights. Berry pulled over.

Berry tried to explain that his friend was just having a “sugar reaction” but Connor was not convinced. Connor told the two men to wait at their car while another officer returned to the store in order to determine what happened. Things got worse from that point.

Graham got out of the car. He ran around the car two times, sat down on the curb, and momentarily passed out. Back-up officers arrived, and Graham was handcuffed, picked up, and put – not too gently - into the backseat of a police car.

All this time, Berry - and Graham after he regained consciousness - tried to explain that that Graham was just having an insulin reaction. But their pleas had no effect. One officer commented that he had seen a lot of people with diabetes before and that none of them had acted like Graham. In the officer’s opinion, Graham was just drunk.

Connor finally received the report from the officer who

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returned to the store. The officer confirmed what Berry and Graham had been saying – nothing was amiss. But in the meantime, Mr. Graham had suffered cuts on his wrist, a bruised forehead, a broken bone in his foot, an injured shoulder, and persistent ringing in his ears.

Graham sued the police officers, but the Fourth Circuit dismissed his case based on insufficient evidence that the officers *maliciously and sadistically* tried to hurt him. Graham petitioned the Supreme Court for review under a writ of certiorari.¹

The Supreme Court reversed the Fourth Circuit, based in part on the *subjective standard*. (Whether the officers acted maliciously or sadistically requires a subjective inquiry into the actual beliefs of the officers.) The Supreme Court remanded the case back to the lower court with orders to judge the officers based on the Fourth Amendment’s *objective reasonableness test*.

C. What is the Objective Test?

The Court stated that, “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.” The objective test requires the court to envision a reasonable officer and ask this question: Based on the *totality of the facts and circumstances*, could such an officer believe that the force was reasonable?

Since the objective test judges the officer through the lens of a reasonable officer, the subjective beliefs of the actual officer – whether they are good, or bad – are not relevant. Officer Connor, for example, may have honestly believed that Graham was a shoplifter; however, Connor’s personal beliefs are not relevant. The relevant question is whether a reasonable officer could believe that Graham was a shoplifter, based on the facts.

Facts make force reasonable. The objective reasonableness test requires officers to rely on their senses – or

¹ Mr. Graham was the petitioner; hence the case is captioned *Graham v. Connor*.

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what they saw, heard, smelled, tasted, or touched – and then articulate a factual basis for the seizure. Was the seizure reasonable – meaning reasonable at its inception, in the degree of force used, and in its duration? This series of podcasts on use of force focuses on the degree of force an officer may use to seize someone. The Fourth Amendment chapter in the Student Handbook covers investigative detentions, their length, and probable cause to arrest. Nevertheless, all of these aspects are related and go to the overall question – was the seizure reasonable?

Was it reasonable to stop and investigate Mr. Graham and Mr. Berry? The Supreme Court told the lower courts how to judge police officers accused of excessive use of force in civil actions. What follows are some facts and circumstances that could cause a court to dismiss Mr. Graham’s claims for excessive force. Some of these facts are for illustrative purposes only and are not in the Graham decision.

For example, Officer Connor might write in his use of force report:

“I *saw* Mr. Graham run into the store. Less than 15-seconds later, I *saw* him run back out and get into Berry’s car. I *heard* the tires screech as the car drove away at a high rate of speed.”²

Based on those facts, what could a reasonable officer say? The Supreme Court’s decision in Terry v. Ohio states that an officer may conduct an investigative detention based on articulable facts that criminal activity afoot.³

An officer’s training and experience is also relevant. Connor might add:

“Based on what I saw, and my department having received no less than four complaints of shoplifting from

²This is a hypothetical use of force report that is intended for instructional purposes only. It is not Officer Connor’s report.

³ See Terry v. Ohio in the Legal Division Reference Book.

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this store within the past two weeks, I activated my overhead lights, and Berry pulled to the side of the road.”

Connor would be admitting to effecting a Fourth Amendment seizure; but again, a Terry Stop is reasonable if Connor can point to specific, articulable facts that criminal activity is afoot.

It should be obvious by now that the officer must help the court visualize what happened. Using good action verbs in a written report makes that visualization possible. Connor might write:

“After Berry *stopped*, I *walked* to his car. I *saw* Berry behind the wheel. I *saw* Graham seated on the passenger side. I *told* both of the men to wait at the car. I ordered another officer to go back to the convenience store and find out what happened.⁴ Then Graham got out of the car. Graham *opened* the passenger door. He *ran* around the car two times. Then he *sat-down* on the curb and *fell* over – as if he had passed out.”

Personal beliefs (or conclusions) are generally appropriate, *if* they are supported by facts. Connor might state:

“I *believed* that Graham was under the influence of alcohol *because* I have seen many people who are under the influence of alcohol or narcotics. They are generally irrational. Graham was irrational; he ran around the car two times after I (a police officer) told him to wait at the car. Then he sat on the curb and fell over - as if he passed out.” Connor might also add, “Graham’s eyes were glassy. His speech was slurred. His breath smelled sweet, like alcohol.” Referring back to his training and experience, Connor could explain why intoxication is relevant. “I know that over 80 percent of the assaults on police officers are committed by people under the influence of alcohol or narcotics.”

⁴ A seizure should last no longer than necessary to confirm or deny the officer’s reasonable suspicion. Holding Graham and Berry long enough to check-out the convenience store should be reasonable.

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But unsupported conclusions are not relevant. Without facts, statements like “Graham appeared drunk” or “He posed a threat to me” are nothing more than the officer’s subjective beliefs. They are *mere* conclusions, and play no part in the fact-bound analysis of whether an officer’s actions are objectively reasonable.

Other language to avoid begins like, “The suspect *indicated* [that he would not do as I ordered]” or “He *suggested* [that he would fight me]” or “He *implied* [that he had a weapon].” For the court, trying to visualize what happened, those statements raise too many questions. How? How did the suspect *suggest* [what the officer wanted the reader to believe?]

Making conclusions is easy; good fact articulation is not. And to make matters more difficult, experts will say that officers often experience sensory deprivation in use of force encounters. Tunnel vision and auditory exclusion are two common physiological reactions to a perceived threat. But officers should still try to tell their story with the sounds, smells, and colors that they remember. While it may be impossible to recall exactly what the suspect said, the officer may still remember, “The suspect screamed at me”; that “his face was beet red”; and that “he clenched his fists, like a boxer.”

D. There is no “20/20” Hindsight in an Objective Test.

When a plaintiff sues a defendant, like Mr. Graham sued Connor, the plaintiff may make several complaints about the seizure. First, Graham could allege that Connor’s decision to stop the car was unreasonable. Next he could complain about the handcuffs and the way he was placed in the cruiser. In short, Graham could complain that the seizure was unreasonable in many ways - at its inception, in the manner it was effected, or in its duration. But officers are judged based on the facts that are reasonably known to them at the time. What they learn later is not relevant. And what was not available to the officers when Graham was initially stopped, handcuffed, and put in the cruiser was the report from the

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officer who returned to the store. Nothing was amiss. But using that report would be judging the officers based on 20/20 hindsight – and the Supreme Court specifically rejected that type of test.

E. There are no “Perfect Answers”

The Supreme Court stated that, “The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” Allowance must be made 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.”

Obviously, there may be more than one way to effect a seizure in a tense, uncertain, and rapidly evolving event - and while one force option may be better than another - all that really matters under the objective test is whether the force used was reasonable. In short, what would a reasonable officer say? Did the force fall within the *range* of reasonableness, or was it excessive and unconstitutional?

So, that’s enough for right now. Let’s stop for a minute. When we come back, we’ll begin to answer the question “When is Force Reasonable?”