Part III Deadly Force- Tennessee v. Garner.

Hi. I'm Tim Miller and this is Part III of our podcast series on use of force. So far, we have been talking in generalities. In the last section, we said that courts weigh the nature of the intrusion against the countervailing governmental interest at stake. I think we agreed that the test may sound a little complicated for a police officer on the street who may be forced to make a split-second decision about a force option. But the test is not hard. In short, what did the officer do, and why did the officer do it? The officer must be ready to articulate facts justifying any use of force. Let's begin with deadly force, and what facts make deadly force reasonable.

II. Deadly Force

The general rule is that the more intrusive the seizure, the stronger the governmental interest should be for effecting it. And since the Supreme Court stated that deadly force is unmatched, there should be a compelling government interest for using it. Over the years, it has been clearly established that deadly force is a reasonable force option when the officer has probable cause to believe that the suspect poses an immediate threat of death or serious bodily harm to the officer or others. While a warning adds to the reasonableness of any force options, it is not always feasible.

A. Tennessee v. Garner[1] – When is it Reasonable to use a Firearm?

The Supreme Court's decision in Tennessee v. Garner provides some good examples of when a police officer may use a firearm to seize someone. The Garner case started with a complaint about a *burglary*-in-progress. Two police officers responded to the scene and one of them *saw* Garner, the suspect, *run* out of the house. The officer described Garner as a 17 or 18 year old male and about 5'5" or 5'7" tall. The officer *saw* no sign that Garner was carrying a weapon and based on the facts, was "reasonably sure" he was not armed.

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[1] *Tennessee v. Garner* is briefed in the Legal Division Reference Book.

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The officer *yelled*, "police, halt!"; but Garner kept *running away*. When Garner began to *climb*-over a fence, the officer had two options. He could let Garner escape, or use deadly force to stop him. Relying on a Tennessee statute that allowed police officers to use all necessary force to effect the arrest of a fleeing felon, the officer did what he deemed was necessary - and shot Garner in the back of the head. Garner died on the operating table.

"Deadly force is unmatched," stated the Court. The Court held that the Tennessee statute was unconstitutional in so far as it authorized the use of deadly force to stop a fleeing suspect who posed no immediate threat to the officer or others. "It is not better that all felony suspects die than that they escape" stated the Court. "We conclude that [deadly] force may not be used unless it is necessary to prevent the escape and the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others."

It follows that deadly force *is* authorized when the officer can articulate facts rising to a probable cause that the suspect poses an immediate threat of death or serious bodily harm either to the officer or others. A warning adds to the reasonableness of any force option, but is not always feasible. In light of Graham, the officer will be judged from the perspective a reasonable officer on the scene.

B. Other Firearm Cases

Let's discuss some cases where courts decided whether to grant police officers qualified immunity from trial.[2] The first two cases have "Use of Force Reports." These reports have two purposes. First, they provide facts where deadly force is reasonable. Second, they illustrate some of the report writing skills discussed above. They are not the actual reports of the

[2] Qualified immunity is discussed in the last section of this chapter. It is immunity from suit. If granted, it dismisses a plaintiff's claim for excessive force against the officer. Since granting qualified immunity effectively denies the plaintiff his day in court, the judge is required to consider the facts in a light most favorable to the plaintiff.

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officers, but are based on the courts' written opinions.

1. Krueger v. Fuhr[3]

Use of Force Report: I am Officer Fuhr, a Springfield, Missouri police officer. On June 6, 1989, I received a be-on-the-lookout (BOLO) for Leon Kruegar. Dispatch described Kruegar as a white/male, wearing blue jeans, and a black shirt with the number 12 on it. Dispatch stated that Kruegar escaped from a half-way house and was later involved in an assault at the Tri-State Laundry. Another officer's radio transmission stated that Kruegar was high on drugs and that he had a knife. A third transmission stated that Kruegar was spotted on East Walnut. I drove to East Walnut. I saw a person that matched Kruegar's description. He was a white male wearing a black shirt and blue jeans. He was lying on his stomach between two cars, as if he was hiding. I stopped my cruiser. I got out of the car and I drew my pistol. The man got up and began running. I chased him for about 200 feet and yelled, "Freeze!" When I was within about 3 to 4 yards of the man, I saw him reach to his right hip and grab a knife. The man gripped the knife in a fist. Before he could turn around, I shot him three times in the back.

What could a reasonable officer say? The force was reasonable, held the court. A reasonable officer could believe that the man posed a serious and immediate threat of physical harm.

2. Hudspeth v. City of Shreveport[4]

Use of Force Report: I am Officer Hathorn of the Shreveport Police Department. On March 15, 2003, I was one of several officers involved in a high-speed pursuit of Mr. Hudspeth. Mr. Hudspeth failed to stop at a red light. After one of my fellow officers activated the police car's overhead lights, Hudspeth fled. The chase lasted about 5 minutes and ended in the parking lot of the Circle K convenience store. I saw

[3] Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993)
[4] Hudspeth v. City of Shreveport, 2008 U.S. App LEXIS 5829 (2009)

Hudspeth get out of the car at the Circle K. Immediately after he got out, he pointed what I believed was a small silver handgun at another officer. That officer quickly ducked down behind a police car. I yelled at Hudspeth to "get down…" Instead, Hudspeth pointed the silver object at me. I was sure that the object was a pistol based on the way Hudspeth held it. Hudspeth held the object in front of him - with both arms extended - in what looked like a shooting stance. I was directly in Hudspeth's line of fire when he pointed the silver object at me. I crouched to avoid being shot. I fired two shots at Hudspeth; that caused him to turn back towards me. Using the same shooting stance – or with both arms extended outward - Hudspeth again pointed the object at me again. I crouched and shot. I continued shooting until Hudspeth went down. The silver object turned-out to be a cell phone.

What could a reasonable officer say? The Fifth Circuit held that the officer had a reasonable, articulable basis to believe that Hudspeth was armed and posed a threat of serious bodily harm. While the silver object turned out to be a cell phone, the courts do not judge the officer based on 20/20 hindsight.

3. Ellis v. Wynalda[5]

The Seventh Circuit denied Officer Wynalda qualified immunity in this case and held that a jury could find the force *unreasonable* because the plaintiff, Ellis did not pose an immediate threat of serious bodily harm at the time Wynalda shot him. Around 7:00 am in the morning, Officer Wynalda responded to a silent-alarm activation at the Gee Pharmacy. A store employee arrived about the same time as Officer Wynalda and let Wynalda in. The store was in considerable disarray. Wynalda drew his weapon and started to look for the intruder. He soon found a hole in the wall. It looked like someone had used a blunt object, like a sledge hammer, to break through the wall of the adjoining building into the Gee Pharmacy. Officer Wynalda looked through the hole and saw someone walk out of the adjoining building's back door. To catch the suspect,

[5] Ellis v. Wynalda, 999 F.2d 243 (7th Cir. 1993)

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Wynalda ran out and saw a man, later identified as Mr. Ellis, walking away. Ellis was wearing pants, a sleeveless shirt, and was carrying a jacket in one hand and a mesh bag in the other. Officer Wynalda yelled, "stop!" But Ellis kept walking. Wynalda yelled "stop" again. This time Ellis stopped, but turned and through the mesh bag at Officer Wynalda. The bag hit Wynalda's shoulder. It was light and fell to the ground. Ellis then turned away and ran. Officer Wynalda shot Ellis in the back.

What could a reasonable officer say? Under *these* facts, the court held that the force was not reasonable because the suspect did not pose an immediate threat of death or serious bodily harm *when the officer shot him.*

While Officer Wynalda was denied qualified immunity under these facts, such a decision does not mean that he is also liable for excessive use of force. This case is discussed again in the last section to illustrate how the court might weigh the facts at trial.

Let's stop there for a minute. When we come back, we will look at the Supreme Court's decision in Scott v. Harris and how the Court reconciled its opinion in Graham v. Connor with Tennessee v. Garner.