Part VII Intermediate Weapons-Stun Taser and OC

I'm Tim Miller and this is Part VII of our Podcast Series on Use of Force. We have been discussing intermediate weapons. Batons and tasers in the dart-mode are reasonable force options against combative suspects – meaning someone who poses an articulable threat of harm to the officer. Tasers in the dart-mode have also been used to stop fleeing suspects. While the court in Beaver v. City of Federal Way had no trouble finding that a taser was reasonable to stop a fleeing burglar high on drugs, the officer in Cockrell v. City of Cincinnati used it to stop a fleeing *jaywalker*. The law is not clear as to when tasers may be used to stop fleeing suspects for minor offense when serious secondary impact injuries are reasonably foreseeable. The law, however, is clear when a force option creates a foreseeable risk of death or serious bodily harm. Tasing someone in a tree, climbing over a fence, off of a raised platform, or around flammable liquids, creates such a danger and would require very strong governmental interest, such as when a suspect poses an immediate threat of serious bodily harm. Absent facts to support such a strong governmental interest, the force is deemed unreasonable.

Now let's look at tasers in the drive-stun mode and OC spray.

D. Tasers in the Drive-Stun Mode and OC Spray.

Like other intermediate weapons, tasers in the drive-stun mode and OC spray can also be used to bring combative suspects under control. In Griffin v. City of Clanton,[1] Griffin fled the scene of a traffic stop for driving under the influence. Other officers joined the chase and Griffin was cornered in a house. A struggle ensued, and by the time Officer Bearden arrived, several officers still appeared to be wrestling with Mr. Griffin. Bearden reached down and sprayed Griffin with OC, directly on the face. Unfortunately, Officer Bearden had failed to notice during all the commotion that Griffin had been handcuffed.

[1] Griffin v. City of Clanton, 932 F.Supp. 1359 (M.D. 1996)

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Griffin sued, claiming that the pepper spray was excessive, but the court dismissed the case. Griffin had attempted to evade arrest by flight. He resisted arrest in the home. He was intoxicated. It was chaotic when Officer Bearden arrived. And while Griffin was handcuffed, that fact was not reasonably known to Bearden. A reasonable officer could believe that OC was still necessary and that spraying Griffin directly on the face would prevent contaminating other officers.

Resistance may pose a threat to the officer, or others. In Monday v. Oullette,[2] Mr. Monday's resistance posed a threat to himself. He had a long history of drug and alcohol abuse and depression. Physically, he was approximately 6'0" tall and weighed over 300 pounds. Police went to his home after a mental health counselor reported that he was attempting to commit suicide by ingesting pills (Xanax) and drinking alcohol. The responding officers discovered that many of the pills were missing and insisted that Monday go with them to the hospital. Monday refused to get up out of his chair. After approximately 20 minutes, an officer told him that if he did not get up, he would be sprayed. He remained seated, drinking a bottle of beer. A single spray of OC was reasonable to make him get up.

OC hurts – and it will continue to hurt, even after the suspect is under control. So while OC may be reasonable to bring a combative suspect under control, the officer should try to alleviate its harmful effects after the suspect surrenders. Failing to do so without cause is excessive force.[3]

E. Force Options

While OC and tasers in the stun-drive mode are "reasonable" force options against combative suspects, they are not always the weapon of choice. Experienced officers have reported that dangerous, determined people have fought through them. The baton and dart-mode taser may be the better choice in a fight, leaving OC and stun-drive tases as pain

[2] Monday v. Oullette, 118 F.3d 1099 (6th Cir. 1997)
[3] See Lalonde v. Co. of Riverside, 204 F.3d 947 (9th Cir. 2000)

compliance tools.

Pain compliance tools are used in situations where the officer gives an order and the suspect refuses to comply. The pain compliance tool, meaning the OC or the taser in the stun-drive mode, is used to *make* the suspect comply. Most of the litigation over pain compliance tools concern suspects accused of minor crimes. The officer is unable to point to any articulable threat. Flight is not an issue. The problem for the arresting officer is that the suspect will not cooperate in the arrest. Suspects have refused to get out of their car.[4] Or, they have refused to get into the arresting officer's car.[5] In other situations, protesters have simply sat down and refused to leave.[6] Another common factor was time. The officer had plenty of time to choose a reasonable force option. The issue? Could a reasonable officer believe that the pain compliance tool was necessary to effect the arrest?

In Headwater v. Co. of Humboldt,[7] the Ninth Circuit held that OC was not necessary, but excessive. Headwaters concerned three nonviolent protests against the logging of ancient redwood trees in the Headwaters Forest. The plaintiffs linked themselves together with self-releasing lock-down devices, sat-down, and refused to leave. The protests were not new to the officers. Previously, officers had used electric grinders to safely remove the lock-down devices, and protestors, in a matter of minutes. And the officers did so without causing pain or injury to anyone.

In Headwaters, and apparently without any reasonable explanation, the officers decided to use OC. The officers warned the protestors that OC would be used if they did not release themselves from the lockdown devices and leave. When they refused, the officers applied the OC directly to their eyes with Q-tips. If the protestors could be removed safely before without

[4] See Brooks v. City of Seattle, 661 F.3d 433 (9th Cir. 2011)
[5] See Brown v. Cwynar, 2012 U.S. LEXIS 11466 (3rd Cir 2012); Gorman v. Warwick Township, 2012 U.S. Dist. LEXIS 58415 (E.D. Penn 2012)
[6] See Headwaters v. Co. of Humboldt, 276 F.3d 1125 (9th Cir. 2002); Crowell v. Kirkpatrick, 400 Fed. Appx. 592 (2nd Cir. 2010)
[7] See Headwaters, 276 F.3d 1125

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OC before, why was the OC necessary this time?

But a reasonable officer could find the force option necessary in Crowell v. Kirkpatrick.[8] This time officers had an articulable basis for using drive-stun tasers to remove several people chained to heavy barrel drums. Like Headwaters, the crime was minor – trespassing. And the plaintiffs could have released themselves anytime they wished. In Crowell, the officers considered, and attempted, alternative measures to remove them. A sense of urgency also arose when one of the plaintiffs asked an acquaintance at the scene to call other members of their group to return to the property. They were warned that the taser would be used to remove them. They were told it was painful. After the warning, they were given an another opportunity to release themselves and before subsequent tasings, they were warned again.

These are *not* situations where the officer is forced to make split-second decisions with dangerous suspects, as was the case in Beaver. The officer has plenty of time to determine whether each tasing is necessary.

In Brooks v. City of Seattle, for example, the court held that tasing a pregnant woman three times in less than one minute was excessive. Ms. Brooks was arrested after she refused to sign a traffic citation for speeding, but refused to get out of her car. Three officers were on the scene. One of them showed Brooks his taser and asked if she knew what it was. She said that she did not, but added that she was pregnant and "I'm…less than sixty days from having my baby."

The pregnancy was a big concern for the officers, and as one officer continued to display the taser, another asked, "well, where do you want to do it?" The other said, "well, don't do it in the stomach; do it in her thigh." An officer attempted to physically remove Brooks by twisting her arm up behind her back, but she stiffened her body and clutched the steering wheel to frustrate the officer's attempt. At this point, the officer cycled the taser, showing Ms. Brooks what it did. Twenty-seven

[8] Crowell v. Kirkpatrick, 400 Fed. Appx. 592 (2nd Cir. 2010)

seconds after the officer cycled the taser, and with one of the officers still holding her arm behind her back, she was tased in the thigh. Thirty-six seconds later, the officer applied the taser to her left arm. Six seconds later, she was tased in the neck.

The court focused on what it called two salient factors. The first was Brooks' pregnancy. The second was that three tasings in such rapid succession did not give her time to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply.

Let's stop. When we come back, we'll distinguish myths from the realities of using force in Part VIII of our podcast series on use of force.