

# FBI-LEEDA insightter



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**Toronto, Canada**

**Congratulations:** Pictured are the attendees from the Toronto, Canada Command Institute for Law Enforcement Executives® class held in June 2008. We would like to thank **Chief William Blair** and **Staff Superintendent Glenn DeCaire** for another great class and the hospitality of the **Toronto Police Service**.

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# Feature Articles

## Taser Liability

### ACTIVE VS. PASSIVE RESISTANCE

As a legal advisor to law enforcement command, I often receive many inquiries regarding the legal liability imposed by municipalities, police departments and officers in the carrying and use of the Taser device. The question most routinely asked when conducting an analysis of Taser usage is whether or not the application(s) of the Taser against a suspect constitutes excessive force under the Fourth Amendment. That question has begun to be analyzed by courts across the country and it is upon this premise, that you are provided this review of Taser liability.

In 2004, the 11th circuit provided support *Draper v. Reynolds*<sup>1</sup> regarding the use of the Taser device by law enforcement officers to subdue a belligerent or unruly arrestee or inmate. In *Draper*, the Eleventh Circuit Court held that “a single use of a Taser gun causing a one-time shocking against a ‘hostile-belligerent’, and uncooperative, arrestee in order to effectuate an arrest is not excessive force in the totality of the circumstances.” The facts of this case show that Mr. Draper was stopped for a traffic violation and when approached, he became hostile, belligerent and uncooperative. Officer Reynolds, no less than five times, asked Draper to retrieve documents from his truck cab and, each time, Draper refused to comply. During the traffic stop Mr. Draper used profanity, moved around and repeatedly yelled at Officer Reynolds. Since Draper repeatedly refused to comply with Officer Reynolds’ verbal commands and, more importantly, a verbal arrest command accompanied by an attempted physical handcuffing, the court found that in these particular factual circumstances the actions of Draper may well have or would likely have escalated a tense and difficult situation into a serious physical struggle in which either Draper or Reynolds would be seriously injured. As such, it was reasonable for Officer Reynolds to use force to complete the arrest.

The *Draper* court acknowledges that “although being struck by a Taser gun is an unpleasant experience, the amount of force Reynolds – a single use of a Taser gun causing a one-time shocking– was reasonably proportionate to the need of force and did not inflict any serious injuries.” The court found as conclusive evidence the police video showing Draper handcuffed and coherent shortly

after the Taser gun stunned and calmed him. Furthermore, the fact that the entire incident (from stop through arrest) was video recorded, supported the officers’ account of Draper’s failure to comply with commands. The significance of the court’s findings in *Draper* is that Officer Reynolds gave not only verbal commands, but that those commands were accompanied by an attempted physical handcuffing for which Mr. Draper actively resisted. In *Draper*, the court found that the actions were not unreasonable and, therefore, there was no discussion as to the use and/or implication of qualified immunity for Officer Reynolds.

In 2007, the United States District Court for the Western District of Washington in Seattle issued an opinion in its analysis of a summary judgment motion in *Beaver v. The City of Federal Way*.<sup>2</sup> In *Beaver*, the issue clearly presented was at what point, if any, would multiple Taser applications against a suspect constitute excessive force. After being “tased” five times, during the course of an arrest for a residential burglary, the plaintiff, Mr. Beaver, sued the defendants under 42 U.S.C. Section 1983 claiming that Officer Laird had used excessive force in making the arrest. A three-day non-jury trial took place in August of 2007 and the court issued an opinion which constituted a finding of facts and conclusion of law. It was the court’s opinion that the first three firings of the Taser by Officer Laird did not constitute excessive force. However, the court did find that the fourth and fifth firings of the Taser violated Mr. Beaver’s constitutional rights. Thus, the court had to determine whether the officers were liable under the Doctrine of Qualified Immunity.

The background of the *Beaver* case is as follows. During the evening of August 26 and the morning of August 27, 2004, Mr. Beaver had been smoking crack cocaine, marijuana and drinking alcohol. The evidence of the case showed that sometime around noon on August 27, 2004, a Federal Way Police Officer Douglas Laird was dispatched to investigate the report of a residential burglary. Officer Laird was advised by dispatch that no weapons had been seen on the suspect. Upon making contact with Mr. Beaver, he recognized him as someone he had encountered before. Based on his training and experience, Mr. Beaver *v. The City of Federal Way*, No. C05-1938, 507 F. Supp. 2d 1137, 2007, LEXIS 64665 (W.D. Wash. 2007).

<sup>1</sup> / *Draper v. Reynolds*, 369 F.3d 1270, 1277-78 (11th Cir. 2004)

ver showed no signs of comprehending Officer Laird's commands and appeared to Officer Laird that he was "under the influence." Several commands were given to Mr. Beaver to halt and when Mr. Beaver failed to do so, Officer Laird shot Mr. Beaver with the first of what turned out to be several Taser applications.

Evidence submitted from data downloaded off Officer Laird's M26 Taser shows that in a period of 1 minute 15 seconds, Officer Laird's Taser was fired five times with five-second cycles. What I consider important is the court's application and analysis of each of the individual Taser applications. Mr. Beaver was initially "tased" following his refusal to respond to Officer Laird's commands to halt. As a result of the Taser dart striking Mr. Beaver in his right shoulder and lower back and the electrical pulses causing Mr. Beaver's muscles to contract involuntarily, he fell to the ground. Mr. Beaver then attempted to get up and succeeded in propping himself up on his elbows before Officer Laird fired his Taser a second time, 16 seconds after the first. Again, Mr. Beaver fell to the ground. Before the second and after each firing of his taser, Officer Laird commanded Mr. Beaver in a loud voice to lie on his stomach and extend his arms out to his side. Eye witness testimony stated that Mr. Beaver continually responded by saying "I can't," in response to Officer Laird's commands to put his hands behind his back. The evidence showed that after the second tasing, Mr. Beaver did not immediately comply with Officer Laird's commands and was on his back. Officer Laird tased Mr. Beaver a third time, only two seconds after the end of the second tasing. After his third tasing, a backup officer arrived on the scene. Evidence suggested that Mr. Beaver (at this time) was on his side slowly rolling and resting on his elbow. This was contrary to Officer Laird's command to lie on his stomach. There appears to have been conflicting commands given to Mr. Beaver, with one officer telling him to lie on his stomach and another officer instructing him to lie on his back. However, when Mr. Beaver refused to comply with the commands, he was again tased 10 seconds after the end of the third tasing.

The evidence before the court showed that after the fourth tasing, Mr. Beaver lied on his stomach, as directed by Officer Laird, but his arms were curled under his chest and not extended out to his side. Twenty-two (22) seconds elapsed before Officer Laird fired the Taser a fifth and final time. In response, Mr. Beaver extended his hands out above over his head, and Officer Laird kicked them down to his side. He was then handcuffed and placed in the patrol vehicle.

In conducting its analysis, the Beaver court determined that the use of Taser did constitute a significant force. The court recognized that while the advent of the Taser has undeniably provided law enforcement officers with a useful tool to subdue suspects with minimal risk of harm to the suspect or the officer, it is equally undeniable that being "tased" is a painful experience.

The court then conducted an analysis based on the standards for analyzing claims of excessive force as established by the Supreme Court in *Graham v. Connor*.<sup>3</sup> The standards for the analysis set forth by the Graham court in determining the reasonableness of the use of force are: "(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether he was actively resisting arrest or attempting to evade arrest by flight."<sup>4</sup>

In conducting an analysis of those factors, the court found that regarding the severity of the crime at issue, Mr. Beaver was suspected of committing a residential burglary. The court found that although a burglary is a felony offense, it is not necessarily a violent crime. The second factor the court considered was whether Mr. Beaver posed an immediate threat to the safety of the officers or others. In analyzing cases held by the Ninth Circuit, it determined that Mr. Beaver never issued any threats to Officer Laird or Officer Castro either physically or verbally and he had no visible weapons. While the court conceded that the circumstances of the arrest were, in the words of the Graham decision, "tense, uncertain, and rapidly evolving," the court had difficulty in seeing how Mr. Beaver's prone body, with no apparent weapon, lying a safe distance from Officer Laird posed an "immediate threat" to the officer. The third factor in the Graham court analysis was whether Mr. Beaver was actively resisting arrest or attempting to evade arrest by flight. The court found that initially Mr. Beaver was attempting to flee and the court had no trouble concluding that the first tasing was justified to stop him. After the first tasing and with each additional tasing, however, the issue became less clear to the court.

It is clear that during the subsequent tasing, Mr. Beaver appeared to be ignoring Officer Laird's commands, that is assuming that he understood those commands and that he attempted to rise off the ground. The defendant officers stated that they interpreted Mr. Beaver's actions as "active resistance." In conducting its continued analysis of the actions of Officer Laird, the court found that up to and including the third tasing of Mr. Beaver, Officer Laird was faced with the inevitable choices and had to make split-second decisions. As such, the court advised that it would not second guess his decision to apply the use of taser. It found that the officer was alone with a fleeing felony suspect, who was apparently under the influence of a controlled substance, who ignored his commands to stop and was attempting to rise and perhaps flee. As such, the court found that under the objective inquiry set forth in the Graham tests, Officer Laird's decision to tase Mr. Beaver the first three times was objectively reasonable and did not violate the Fourth Amendment. However, the court changes its analysis when it began to analyze the arrival

<sup>3</sup> / *Graham v. Connor*, 490 U.S. 386 109 S.Ct. 1865 (1989).  
<sup>4</sup> / *Graham*, *Id.* at 396.



of a backup officer on the scene to assist Officer Laird. The court finds that at this point two officers were on the scene to control the situation. To the extent that Mr. Beaver posed an “immediate threat” to Officer Laird during the first three tasings, that threat was significantly diminished when Officer Castro arrived to provide backup.

The court found that instead of tasing Mr. Beaver, Officer Laird could have covered Officer Castro while she approached Mr. Beaver and attempt to handcuff him. The court stated that if Mr. Beaver resisted, Officer Laird could have fired the Taser again or if that posed a hazard to Officer Castro, he could have simply moved in to provide manual assistance. The officers argued that because Mr. Beaver had not complied with Officer Laird’s commands, he was actively resisting arrest and further tasing was warranted. The court found that in light of Mr. Beaver’s failure to comply with Officer Laird’s multiple commands, his altered state of mind and his statement “I can’t,” a reasonable officer would have concluded that Mr. Beaver was unable to comply with the commands given and that his refusal to do so was at least in part involuntary. The court found that involuntary actions cannot form the basis of active resistance.

The defendant officers next argued that using any option other than the Taser would have posed great risk to both them and Mr. Beaver. The court recognized that this argument relied on the assumption Mr. Beaver would have tried to fight them off if they approached him. The court found that “to accept this proposition would effectively eviscerate the protections of the Fourth Amendment and ignore the teachings of *Graham*, which counsels that a key question is whether a suspect posed an “immediate” threat, not a “possible threat.” The court again concludes that under the criteria announced in *Graham*, the fourth and fifth tasing of Mr. Beaver were not objectively reasonable in light of the facts and circumstances surrounding the arrest.

Since the court determined a constitutional violation, this led to the analysis of qualified immunity on behalf of the officers. Under the doctrine of qualified immunity, even if the defendant officers may have violated Mr. Beaver’s constitutional rights, they cannot be liable because they are entitled to qualified immunity. Qualified immunity protects Section 1983 defendants from liability for civil actions if their conduct does not violate a clearly established constitutional or statutory right for which a reasonable person would have known.<sup>5</sup>

In conducting the qualified immunity analysis, the court found that the defendants violated Mr. Beaver’s Fourth Amendment rights. The next analysis was for the court to determine whether the right was clearly established. After reviewing case law, the court concluded that in 2004, when

Mr. Beaver was arrested, the contours of the Fourth Amendment jurisprudence and their particular excessive force claims of this type were not sufficiently clear that a reasonable officer would have understood that multiple tasings of Mr. Beaver under these circumstances violated his rights. As such, the officers were entitled to qualified immunity. The court found that at the time of the arrest, a reasonable law enforcement officer might well have failed to recognize that the action taken by the defendants specifically, the fourth and fifth tasings of Mr. Beaver, violated his Fourth Amendment rights.

The court concluded by stating that as far as it was concerned, the following issues are now clearly established. First, the use of a Taser involves the application of force. Second, each application of a Taser involves an additional use of force. Third, multiple applications of a Taser cannot be justified solely on the grounds that a suspect fails to comply with a command, absent other indications that the suspect is about to flee or poses an immediate threat to an officer. The court found that this is particularly true when more than one officer is present to assist and control a situation. Fourth and finally, the court concluded that any decision to apply multiple applications of a Taser must take into consideration whether a suspect is capable of complying with the officers’ commands.

As you can see, Beaver set forth a handful of standards that are applicable to law enforcement across the country. In use of the Taser and continued use of the Taser, there needs to be a separate analysis as to whether the defendant is actively or passively resisting arrest. Additionally, the court in conducting the Beaver analysis requests officers to continue to utilize physical force to handcuff and secure the suspect once the suspect has moved from active resistance to passive resistance.

Subsequently, on December 10, 2007, the United States Court of Appeals for the Tenth Circuit issued a ruling in *Casey v. The City of Federal Heights*.<sup>6</sup> In *Casey*, the plaintiff went to a courthouse to contest a traffic ticket and when he lost, he walked to the parking lot to retrieve money from his truck to pay the fine, carrying with him the court file. On his way back to the courthouse, he was grabbed, tackled, tasered and beaten by city police officers.<sup>7</sup> The facts analyzed by the court show that one officer tackled the plaintiff and then a second officer arrived at the scene. While the plaintiff and the first officer were struggling, the second officer tasered the plaintiff. The Tenth Circuit held that the second officer used excessive force in tasered the plaintiff and was not entitled to qualified immunity. The court reasoned that the plaintiff’s conduct of removing a record from the courthouse was

<sup>6</sup> / *U.S. District Lexis 67936* (D. Colo. Sept. 21, 2006) (unpublished), *rev’d*. [No. 06-1426] 529 F.3d 1278 (10th Cir. 2007).

<sup>7</sup> / *Casey*, 509 F.3d at 1279.

<sup>5</sup> / See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).