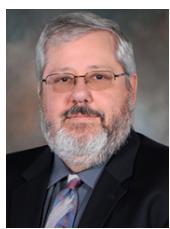


Police Use of Force



By Paul Engel

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- How do courts evaluate the reasonableness of police use of force?
- Should courts use the moment of threat or the totality of the circumstances?
- Does officer safety supersede the safety of the rest of us?

Like any other profession, there are good law enforcement officers and bad law enforcement officers. While I believe that most LEOs are good men and women, doing a difficult and dangerous job, often with little respect because of the actions of bad LEOS. For years, courts have been protecting these bad officers through their rules and doctrines. A recent Supreme Court case finds that one of those rules violates the Constitution of the United States.

Background

As with any case, the details matter.

On the afternoon of April 28, 2016, Roberto Felix, Jr., a law enforcement officer patrolling a highway outside Houston, received a radio alert about an automobile on the road with outstanding toll violations. Felix soon spotted the car, a Toyota Corolla, and turned on his emergency lights to initiate a traffic stop. The driver, Ashtian Barnes, pulled over to the highway's shoulder. Parking his own car just behind, Felix walked to the Corolla's driver-side door and asked Barnes for his license and proof of insurance. Barnes replied that he did

not have his license with him, and that the car was a rental in his girlfriend's name.

Barnes v. Felix Opinion

If this was a rental car, then most likely Mr. Barnes was not the one who committed the toll violations. I've been concerned about this before, because I've been in locations where you cannot just pay the toll, you have to have a toll tag, which many rental cars do not have.

As he spoke, Barnes rummaged through some papers inside the car, causing Felix to tell him several times to stop "digging around." Felix also commented that he smelled marijuana, and asked if there was anything in the car he should know about.

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Rummaging around during a traffic stop is one way to make an officer nervous. I am rather suspicious when an officer suddenly claims to "smell marijuana." It seems to frequently be used as an excuse to search a vehicle. And, of course, how does the driver argue that the driver did not smell something?

Barnes responded that he might have some identification in the trunk. So Felix told him to open the trunk from his seat. Barnes did so, while also turning off the ignition. All that happened (as a dashcam recording of the incident shows) in less than two minutes.

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Again, having your ID in the trunk can certainly heighten an officer's anxiety. While things have not gone smoothly, nothing life threatening has happened yet.

Then things began moving even faster. With his right hand resting on his holster, Felix told Barnes to get out of the car. Barnes opened the door but did not exit; instead, he turned the ignition back on.

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I'm not sure what caused the officer to reach for his firearm, but he did. That might explain Barnes' concern that his life may be in danger. I'm not saying fleeing was a wise thing to do, but justified or not, the officer threatened Barnes with a deadly weapon while asking him to get out of the car.

Felix unholstered his gun and, as the car began to move forward, jumped onto its doorsill.

Barnes v. Felix Opinion

In response to Barnes' dangerous move of trying to flee, Officer Felix pulls his weapon, then jumps on the doorsill. I'm not sure if Felix even knew what he was going to accomplish by jumping on the car; it was probably a simple reflex.

He twice shouted, "Don't f***ing move." And with no visibility into the car (because his head was above the roof), he fired two quick shots inside.

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A blind shot like that is extremely dangerous. First, the use of deadly force requires officers to reasonably believe that they, or an innocent bystander, is in imminent danger. Second, because Felix could not see where he was shooting, he could have easily shot through the window and hit a bystander. As every conscientious gun owner knows, you are responsible for every round from the time it leaves the barrel of your gun until it stops.

Barnes was hit, but managed to stop the car. Felix then radioed for back-up. By the time it arrived, Barnes was dead.

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Thankfully, Barnes was able to stop the car before he died.

Imagine the car careening down the highway with a dead driver and an officer hanging on the drivers side doorsill. All of this happened very quickly.

All told, about five seconds elapsed between when the car started moving and when it stopped. And within that period, two seconds passed between the moment Felix stepped on the doorsill and the moment he fired his first shot.

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Obviously, there was no planning or training for a situation like this. But the actions of both Barnes and Felix led to this court case.

The Case

It should surprise no one that the death of Barnes at the hands of a police officer would lead to a lawsuit.

Barnes's mother sued Felix on Barnes's behalf, alleging that Felix violated Barnes's Fourth Amendment right against excessive force.

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Except the Fourth Amendment doesn't say anything about excessive force, unless she is claiming the force used made the seizure unreasonable.

The District Court granted summary judgment to Felix, applying the Fifth Circuit's "moment-of-threat" rule. The Court of Appeals affirmed, explaining that the moment-of-threat rule requires asking only whether an officer was "in danger at the moment of the threat that resulted in [his] use of deadly force." ... Under the rule, events "leading up to the shooting" are "not relevant." ... Here, the "precise moment of threat" was the "two seconds" when Felix was clinging to a moving car. ... Because Felix could then have reasonably believed his life in danger, the panel held, the shooting was lawful.

Barnes v. Felix Opinion

Once again we see the courts making up a “rule” that is both irrational and unreasonable. Take this case for example. The District Court said the “moment of threat” was the two seconds when officer Felix was clinging to the car. They completely ignored the fact that the officer put himself in that situation when he jumped on the car. And that is just the beginning.

The moment-of-threat rule applied below prevents that sort of attention to context, and thus conflicts with this Court’s instruction to analyze the totality of the circumstances. By limiting their view to the two seconds before the shooting, the lower courts could not take into account anything preceding that final moment. So, for example, they could not consider the reasons for the stop or the earlier interactions between the suspect and officer. And because of that limit, they could not address whether the final two seconds of the encounter would look different if set within a longer timeframe.

Barnes v. Felix Opinion

The traffic stop was for alleged toll violations, hardly a dangerous threat to others. Yes, during the stop Barnes did help escalate the officer’s tension by not having his identification on him, rummaging through his stuff, and of course driving off. But does that lead a reasonable person to conclude that it’s also reasonable that Mr. Barnes was a danger to others?

A rule like that, which precludes consideration of prior events in assessing a police shooting, is not reconcilable with the fact-dependent and context-sensitive approach this Court has prescribed. A court deciding a use-of-force case cannot review the totality of the circumstances if it has put on chronological blinders.

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How can a court consider the reasonableness of the use of force without the context in which it was used? After all, you wouldn't consider the shooting of someone while ignoring that fact that they had broken into a home while armed.

Concurrence

While the Court was unanimous, Justice Kavanaugh wrote a concurrence which Justices Thomas, Alito, and Barrett joined. I found Kavanaugh brought up a few interesting points worth looking at.

I join the Court's opinion. I agree that the officer's actions during the traffic stop in this case should be assessed based on the totality of the circumstances. I write separately to add a few points about the dangers of traffic stops for police officers, particularly when as here the driver pulls away in the midst of the stop.

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Justice Kavanaugh agrees with the court's opinion, but wants to add a few points to it, specifically how dangerous traffic stops are.

Even for routine traffic violations, traffic stops are "fraught with danger to police officers." ... An "inordinate risk confront[s] an officer as he approaches a person seated in an automobile." *Pennsylvania v. Mimms*, ... That is in part because officers operate at a "tactical disadvantage" when "approaching an unknown vehicle, with limited visibility and unpredictable threats." ... As this Court noted nearly 50 years ago, "a significant percentage of murders of police officers occurs when the officers are making traffic stops." ... Traffic stops remain highly dangerous today.

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Law enforcement is a dangerous job. And within that job, I can see how traffic stops are one of the more dangerous activities we ask officers to undertake. The question is, does officer safety supersede the safety of those they engage with?

What should the officer do when a driver flees from a traffic stop? There are no easy or risk-free answers. Every feasible option poses some potential danger to the officer, the driver, or the public at large—and often to all three. And an officer in that situation must make a split-second choice among those various dangerous options.

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Justice Kavanaugh's statement is absolutely correct. It's why law enforcement officers require so much training. In such split-second situations, there is no time to think or analyze. In these situations, officers revert to their training. Hopefully, that training would lead an officer to consider situations and possibilities before and during the encounter. So when the moment of decision comes, their reactions tend toward the best outcome. But what about when something happens that the officer had not prepared for?

... as happened here, the officer could attempt to stop the fleeing driver at the outset by jumping on or reaching into the car. The dangerousness of that option is readily apparent. Perhaps the driver will hit the brakes once he realizes an officer is clinging to the car or attempting to reach through the window. But if the driver does not slow down, then the officer may suffer serious and perhaps fatal injuries. The officer could try to fire his weapon to incapacitate the driver and bring the car safely to a stop. But the car may be just as likely to go careening into traffic, thereby threatening the safety of the officer, other drivers, passengers, pedestrians, and more.

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A lot of bad situations and bad options for an officer to choose from, with no time to consider. I am curious as to what training led to the Officer Felix jumping on the doorsill?

Of course, when an officer uses force against a fleeing driver, the judiciary still must assess any resulting Fourth Amendment claim under the standard of objective reasonableness. Under this Court's precedents, that inquiry involves "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."

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So the court sees balancing interests. On the one hand, the subject has an interest in surviving the encounter. On the other hand, government has an interest in protecting the rights of the others. The court talks about a balancing, but how many courts place their thumb on the side of government's interest? How often do courts simply take the word of an officer, unless there is physical evidence to contradict them?

I could go on. The point here is that when a driver abruptly pulls away during a traffic stop, an officer has no particularly good or safe options. None of the options available to the officer avoids danger to the community, and all of them require life-or-death decisions that must be made in a few seconds in highly stressful and unpredictable circumstances.

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I agree, there aren't any really good options when a driver takes off from a stop. Of the bad options available, I think jumping on the vehicle is probably one of the worst. In this case, it wasn't Mr. Barnes who put officer Felix in jeopardy, but his own jumping onto the doorsill. But this case isn't about the traffic stop, or the officer jumping on the doorsill, but the reasonableness of the shoot. Specifically,

how do courts evaluate the reasonableness of a use of force?

Conclusion

The District and Circuit Courts both used the “moment of threat” rule. Meaning that in this case, the court looked only at the two-seconds between the officer jumping on the doorsill and pulling the trigger.

Held: A claim that a law enforcement officer used excessive force during a stop or arrest is analyzed under the Fourth Amendment, which requires that the force deployed be objectively reasonable from “the perspective of a reasonable officer at the scene.” ...

Barnes v. Felix Opinion

“[T]he perspective of a reasonable officer at the scene.” What about the perspective of a reasonable subject at the scene? Would a person who’s been pulled over for toll violations consider it reasonable for the officer to reach for his sidearm? While the subject was rummaging through his stuff, the officer having his hand on his weapon would be reasonable. But after that? That is why the totality of the circumstances is so important to the analysis of reasonableness.

The inquiry into the reasonableness of police force requires analyzing the “totality of the circumstances.” ... That analysis demands “careful attention to the facts and circumstances” relating to the incident. ...

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In other words, police use of force does not happen in a vacuum. Everything in the encounter leading up to the use of force is important to the analysis. In this case, the courts should not have looked solely at the moment before officer Felix fired the shots, but his actions beforehand. Was officer Felix’s life in danger because of what Barnes had done or

because of what he himself had done? Was the action of driving away from a traffic stop really worth Barnes' life?

The recognition of this need to look at the totality of the circumstances is very important. For example, if a person shoves a police officer, that could be considered assault, justifying the use of force to detain the subject. However, if the officer initiated contact, say by intentionally walking into someone, then it is not an assault on a police officer, but a person defending themselves from assault.

The decision of the Circuit Court was vacated, and the case was remanded back for further review. Whether the court finds the use of force reasonable or not, hopefully they will use the right standard for doing so.

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E-Mail Paul Engel: paul@constitutionstudy.com