



LEGAL DEFENSE TRUST TRAINING BULLETIN

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***En Banc* Ninth Circuit Revises the Definition of “Deadly Force” Under Civil Rights Laws**

*Police K-9 Bite Might Constitute Deadly Force Under
Rule Announced*

by Michael P. Stone

The United States Ninth Circuit Court of Appeals recently re-defined the term “deadly force” to be applied in civil rights cases brought under Title 42, *United States Code*, §1983 (“42 USC §1938”).

In *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) an *en banc* Ninth Circuit panel of 11 Circuit judges overruled recently-applied precedent in this Circuit (*Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998)) by a margin of eight to three.

This case featured two separate issues: (1) The use of a K-9 as “deadly force” and (2) whether Smith could present claims under §1983 after he was convicted in a criminal court for violating *Penal Code* §148(a)(1) for willfully resisting, delaying, or obstructing a peace officer in the performance of his duties.

We shall examine the “deadly force” issue first, and employ the factual background taken directly from the opinion:

The facts of the encounter between Smith and the police are not seriously disputed. To the extent that there is a difference between the parties, however, we look to the version most favorable to the plaintiff, the non-moving party. On the night of August 26, 1999, Smith’s wife placed an emergency phone call to the Hemet Police Department (“Department”) reporting that her husband “was hitting her and/or was physical with her.” Mrs. Smith informed emergency personnel that her husband did not have a gun, there were no weapons in the house, and he was clad in his pajamas. Officer Daniel Reinbolt was the first officer to arrive at the house in order to investigate the incident. He observed Smith standing on his front porch and “noticed Smith’s hands in his pockets.” The officer announced himself and instructed Smith to remove his hands from his pockets. Smith refused, responding with

expletives and directing Officer Reinbolt to come to him. Officer Reinbolt informed Smith that he would approach, but only after Smith removed his hands from his pockets and showed that he had no weapons. Smith again refused to remove his hands from his pockets and instead entered his home.

After Officer Reinbolt advised dispatch of what had transpired, Smith reemerged onto the porch with his hands still in his pockets. Officer Reinbolt again instructed Smith to show his hands. Smith complied with his instruction, but then refused to follow an order to "put his hands on his head and walk towards [the officer's] voice[.]" Instead, Smith again asked Officer Reinbolt to approach and enter the home with him.

Officer Nate Miller arrived in response to Officer Reinbolt's radioed request for assistance. Observing Smith's refusal to cooperate with Officer Reinbolt, Officer Miller contacted dispatch to request additional assistance, including a canine unit. Officer David Quinn, a canine handler with the Department, arrived shortly thereafter with "Quando," a police canine. Officer Aaron Medina also responded to one of the assistance calls.

**694 Officer Quinn instructed Smith to turn around and place his hands on his head. Smith again refused to obey the order, despite being informed that Quando could be sent to subdue him and might bite. Without further warning, Officer Quinn sprayed Smith in the face with pepper spray. Smith responded with expletives and attempted to reenter his residence, but the door had been locked by Mrs. Smith. Several more officers then moved onto the porch, grabbed Smith from behind, slammed him against the door, and threw him down on the porch; Officer Quinn ordered the canine to attack him. Quando bit Smith on his right shoulder and neck area. At some point, either before or after the order to attack, the dog sank his teeth into Smith's arm and clung to it.*

With at least four officers surrounding him and Quando's teeth sunk into his shoulder and neck, Smith agreed to comply with the officers' orders and submit to arrest. Although Smith submitted, he admits that he was "curled up" in a fetal position in an attempt to shield himself from the dog and that one of his hands was "tucked in somewhere," still out of the officers' view. As one of the officers attempted to secure both arms, Quando was instructed by Officer Quinn to bite Smith a second time; this time the dog bit Smith on his left side and shoulder blade. Upon Officer Quinn's order, Quando ultimately retreated, and the officers dragged Smith off the porch, face down. Once off the porch, Smith continued to shield one of his arms from the dog's attack. Officer Quinn then ordered Quando to bite Smith a third time. This time, the dog bit into Smith's buttock. While all this was transpiring, Smith was pepper-sprayed at least four times, at least two of which sprayings occurred after the police dog had seized him and broken his skin, and at least one after the officers had pinned him to the ground.

Eventually, the officers secured the handcuffs on both of Smith's arms. Officer Reinbolt then washed Smith's eyes out with water from a nearby hose, but did not cleanse the wounds he received as a result of the dog bites. Paramedics arrived shortly thereafter and attended to Smith's injuries.

Smith pled guilty in California Superior Court to a violation of California Penal Code §148(a)(1).

Since the 1989 Supreme Court decision in *Graham v. Connor*, 450 U.S. 386, it is clear that claims of excessive force in §1983 cases are analyzed under the Fourth Amendment, where the force is used to effect an arrest, overcome resistance, or prevent escape. The standard applied is whether the force used was "objectively reasonable" from the standpoint of a reasonable officer in the same or similar circumstances.

On the other hand, in another U.S. Supreme Court case, *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court held that an officer may not use deadly force to apprehend a person, "unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 471 U.S. 3.

In the Ninth Circuit, following *Vera Cruz*, *supra*, the rule has been that "deadly force" means "force reasonable likely to kill." Arguably, *controlled* use of a K-9 service dog to bite a suspect is not "reasonably likely to kill."

But in *Smith*, the *en banc* panel seized the opportunity to re-visit *Vera Cruz*, and ultimately, to overrule it, substituting in its place a new definition of "deadly force": "...whether the force employed creates a substantial risk of causing death or serious bodily injury."

The Court reasoned that this definition brings the Ninth Circuit "into conformity with the other (seven) circuits" that have adopted this standard 394 F3d. at 705.

The Court stopped short however, of finding that the use of Quando in this case constituted deadly force, and remanded the issue to the District Court.

Nothing of course in the law *prohibits* the use of deadly force in appropriate circumstances. However this case, by redefining deadly force to include the creation of a "substantial risk of causing death or serious bodily injury" will likely expand the range of force applications that will be considered "deadly".

The three dissenters noted that Quando's teeth had been previously capped and were incapable of inflicting deep puncture wounds, and that Smith's bite injuries were superficial and did not require any treatment beyond cleaning the wounds.

The other issue decided by the Court was whether Smith's §1983 suit was barred by the rule in *Heck v. Humphrey*, 512 U.S. 477 (1994). There, the Supreme Court held that a §1983 suit is barred if

successful prosecution of the §1983 claim(s) would necessarily imply the invalidity of a state court criminal conviction. Put another way, if the plaintiff suffered a state conviction of a crime, say *Penal Code* §148, suing the police for the use of excessive force in overcoming the plaintiff's resistance to arrest would necessarily call into question the validity of the conviction, since if the officers were using excessive force, then they could not also be engaged in the performance of their duties – a necessary element of §148. So, if the conviction for §148 is final, then a claim under §1983 for the use of excessive force would be necessarily foreclosed by virtue of the valid conviction of §148.

Smith does not dispute this rule. However, the judges held that Smith could maintain a §1983 excessive force claim for any force used on him *after* he quit resisting. This is of course a highly fact-oriented analysis, to determine whether excessive force was used *after* the conduct of Smith that constituted the crime under §148.

Trainers, experts and force policy writers will need to take this new definition into consideration when training officers in use of force, particularly with regard to continuums and policies that focus on the intermediate to deadly force options. Policies on use of force should be reviewed to determine how this new definition might lead to liability issues when it is superimposed over existing policies which simply employ the term “deadly force.”

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