



THIRD CIRCUIT DISCUSSES DEADLY FORCE AND DE-ESCALATION ON THE MENTALLY ILL

November 2016

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Article Source: http://www.llrmi.com/articles/legal_update/2016_johnson_v_city_of_philadelphia.shtml

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On September 20, 2016, the Third Circuit Court of Appeals decided *Johnson v. City of Philadelphia et al.*ⁱ, which is instructive pertaining to use of deadly force when dealing with the mentally ill. The relevant facts of *Johnson*, taken directly from the case, are as follows:

In the early morning hours of April 22, 2012, Officer Thomas Dempsey of the City of Philadelphia Police Department was on solo patrol in a radio car in North Philadelphia. Dempsey was armed with a baton, a taser, and a nine-millimeter Glock handgun. Around 2:00 a.m., Dempsey received a radio call that a naked man was standing in the street in the 5800 block of North Mascher Street. Dempsey and two other patrol officers responded to the call, but found no one. Around 5:30 a.m., Dempsey responded to another call about a naked man on the same block, but again found no one.

At approximately 6:00 a.m., a passing motorist informed Dempsey that a naked man was in the street at the corner of North Mascher and Nedro Avenue. Dempsey radioed in the information and drove down North Mascher to the intersection. There, Dempsey saw a naked man, later identified as Kenyado Newsuan, standing in front of a residence at 5834 North Mascher.

Accounts diverge as to what happened next. The record contains testimony from four eyewitnesses: Officer Dempsey, Juan Cruz, Raimundo Rivera, and Newsuan's girlfriend, Christina La Torre.

i. Testimony of Officer Dempsey

Dempsey testified that as he crossed Nedro Avenue into the 5800 block of North Mascher, he saw Newsuan standing in the middle of the street. Dempsey estimated Newsuan to be six feet tall and 220 pounds. As Dempsey pulled to a stop, Newsuan began walking out of the street toward a house (later determined to be La Torre's residence). Dempsey did not radio to dispatch that he had encountered the subject or stopped his car. As Newsuan headed toward the house, Dempsey exited the car with his taser in his hand

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and told Newsuan to "come here." Newsuan began screaming obscenities at Dempsey and "flailing his arms around." Dempsey could see that Newsuan was completely naked and had nothing in his hands. Dempsey told Newsuan to "[c]ome here" several more times, but Newsuan continued up the walkway to the house. Newsuan entered the house for approximately two seconds and then emerged back onto the walkway. He was still naked, and Dempsey could see that he did not have a weapon.

Upon emerging from the house, Newsuan began running toward Dempsey and yelling. Dempsey gave two verbal commands to stop. When Newsuan was five feet away, Dempsey fired his taser into Newsuan's chest. Newsuan kept coming forward and grabbed Dempsey's shirt. A violent struggle ensued. Newsuan struck Dempsey in the head multiple times, threw Dempsey up against a parked van, and then pushed him into a parked SUV. As they were wrestling against the SUV, Newsuan reached for Dempsey's service weapon. Dempsey removed the gun from its holster, wedged it between his body and Newsuan's, and, from a distance of no more than two inches, fired two shots into Newsuan's chest. Newsuan attempted to reach for the gun, and Dempsey shot him again in the chest. Still grappling, Newsuan reached for the gun again, and Dempsey shot him again. Newsuan collapsed face down and died. La Torre then emerged from the house screaming and crying; according to Dempsey, this was the first time he encountered her. Dempsey was taken to a hospital, treated for minor injuries, and released the same night.

ii. Testimony of Juan Cruz

Cruz lived in a street-facing apartment on North Mascher. At around 5:40 a.m., while Cruz was lying in bed, he heard a commotion between two people. He looked out his window and saw Dempsey and Newsuan standing approximately eight feet apart and "screaming at each other." Newsuan "was approaching" Dempsey. When Newsuan closed within four feet of Dempsey, Dempsey shot him with a taser. After being hit with the taser, Newsuan "stopped, stuttered a little bit," and then "just rushed" Dempsey. Newsuan lifted Dempsey up by his belt, began "beating" Dempsey and "slamming" him onto the hood of the squad car, and then pushed Dempsey against a parked vehicle. At that point "it looked like [Newsuan] was going for" Dempsey's gun Cruz heard a series of gunshots, and Newsuan fell to the ground.

iii. Testimony of Raimundo Rivera

Like Cruz, Rivera also lived in a street-facing apartment on North Mascher. In the early morning hours, he heard yelling outside his apartment and what sounded like a car door slamming. He also heard a man yelling, "I'm Jehovah. The end is near. Rivera then heard (but did not see) someone being tased. Rivera testified that he did not hear "any statements or yelling or anything immediately preceding the taser," and he never heard Dempsey issue any commands to stop or get down on the ground. Rivera got up and went to the window, where he saw Newsuan "completely naked, rushing over to the police officer." Newsuan "slam[med] the officer against his patrol car and grab[bed] him by the neck and start[ed] pummeling his head against the car." Newsuan "reach[ed] for" Dempsey's gun. While Newsuan "had him by the neck," Dempsey unholstered the gun and shot Newsuan three times at close range, at which point Newsuan fell to the ground.

iv. Testimony of Christina La Torre

La Torre testified that on the night of April 21, Newsuan showed up at her house high on PCP and acting paranoid. Over the course of the night, Newsuan became progressively more agitated, running out of the house and into the street several times and yelling nonsensical phrases. At some point around sunrise, Newsuan removed his clothes and walked back onto North Mascher. Some minutes later, Dempsey's cruiser started coming up the block. La Torre, who was standing near the doorway of her home, told Newsuan to go inside to avoid arrest. Newsuan began walking toward the house. According to La Torre, Dempsey pulled up and asked her "what's the problem." At this point, Newsuan was "standing right there and trying to go into the house." La Torre told Dempsey, "he's on PCP" and "he needs to be 302'd"—meaning, in police code, that Newsuan needed to be involuntarily committed to a mental health facility. Dempsey told her, "don't worry about it, everything is under control." He also instructed her not to let Newsuan into the house because there might be weapons inside.

Dempsey began walking from the street toward the house. As he did so, he said to Newsuan, "hey you, come here." Newsuan "didn't say anything" but just "star[ed] at" Dempsey. Dempsey walked up the path to the house and repeated the command "to come towards him." According to La Torre, Newsuan "just look[ed] at" her. Dempsey backed up, stepped down onto the pavement, and asked Newsuan if he could hear him. Newsuan "started walking" toward Dempsey. According to La Torre, "[a]s he started approaching the police officer, [Dempsey] tased him." At the time Dempsey tased him, Newsuan was not running at Dempsey, but rather "walking in response to the officer telling him to come here."

Upon being tased, Newsuan's "body started convulging [sic], like shaking." Newsuan reached up and pulled the taser prongs from his body, at which point Dempsey drew his gun and began backing away from Newsuan. Newsuan was "just staring" at Dempsey. La Torre ran back into the house, grabbed her phone, and began calling Newsuan's mother and brother. Through the window, she could see Dempsey with his gun still drawn, but could not see Newsuan. La Torre became frightened and ran into her bedroom, meaning that she did not see the physical altercation between Dempsey and Newsuan. While in the bedroom, she heard four gunshots in rapid succession. She went back out to the street and saw Newsuan lying in the street. Newsuan died shortly thereafter.ⁱⁱ

Johnson, as Administratrix of Newsuan's estate, sued the city and officers for violating Newsuan's Fourth Amendment right to be free from excessive force. The city and the officer filed motions for summary judgment and the district court granted the motion, dismissing the suit in favor of the city and officer. Johnson appealed the district court's grant of summary judgment to the Third Circuit Court of Appeals.

On appeal, Johnson argued that the shooting was unreasonable under the Fourth Amendment because Dempsey unnecessarily, and in violation of department policy, initiated a one-on-one confrontation with Newsuan that led to the subsequent fatal altercation.

The Third Circuit first examined the law that is relevant to Johnson's argument above. The court stated the following:

Before proceeding, it is necessary to clarify our Fourth Amendment standard in deadly-force cases. Following the Supreme Court's lead in *Tennessee v. Garner*, we have previously suggested that an officer's use of deadly force is justified under the Fourth Amendment only when (1) the officer has reason to believe that the suspect poses a "significant threat of death or serious physical injury to the officer or others," and (2) deadly force is necessary to prevent the suspect's escape or serious injury to others. In *Scott v. Harris*, however, the Supreme Court clarified that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" Rather, ***Garner* was "simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation."** ***Scott* abrogates our use of special standards in deadly-force cases and reinstates "reasonableness" as the ultimate—and only—inquiry. "Whether or not [an officer's] actions constituted application of 'deadly force,' all that matters is whether [the officer's] actions were reasonable."** This is not to say that the considerations enumerated in *Garner* are irrelevant to the reasonableness analysis; to the contrary, in many cases, including this one, a proper assessment of the threat of injury or the risk of flight is crucial to identifying the magnitude of the governmental interests at stake. But such considerations are simply the means by which we approach the ultimate inquiry, not constitutional requirements in their own right.

The reasonableness of a seizure is assessed in light of the totality of the circumstances. We analyze this question "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."ⁱⁱⁱ [emphasis added][internal citations omitted]

In light of the above legal standards, the court stated that, at the time Newsuan was reaching for Officer Dempsey's gun, the officer was justified in using deadly force to defend himself. Specifically, the court stated

Each of the three witnesses to the fight (Cruz, Rivera, and Dempsey) testified that Newsuan rushed at Dempsey, began violently grappling with him, and slammed Dempsey into multiple cars. Dempsey and Rivera testified that Newsuan struck Dempsey in the head multiple times. **All three witnesses agree that Newsuan then attempted to grab Dempsey's gun out of its holster. At that point there was a serious risk that Newsuan would kill Dempsey, and no reasonable juror could conclude that it was unreasonable for Dempsey to deploy lethal force in response.**^{iv} [emphasis added]

That said, the court went on to note that that alone does not end their inquiry because the use of force analysis involves the "totality of the circumstances" and in the Third Circuit, this includes the conduct leading up to the shooting.^v Plaintiff argued that, even though Officer Dempsey was justified in using deadly force when he was attacked as Newsuan was attempting to grab his gun, the officer's conduct

in initiating the one-on-one encounter with Newsuan was unreasonable because of a police department policy instructs officers who encounter severely mentally disabled persons or persons in drug-induced psychosis to wait for back-up. Further, the policy instructs officers encountering this type of person to attempt to de-escalate with conversation and to even retreat rather than using force against such person.

The plaintiff argued that Officer Dempsey knew or should have known that Newsuan was mentally disabled regarding the policy on back-up, de-escalation, and retreat because Newsuan was naked, unarmed, and the officer had responded to two prior calls in the area that did not involve Newsuan being violent or threatening. Therefore, based on this, the plaintiff alleged on appeal that it was unreasonable for Officer Dempsey to violate department policy and initiate the one-on-one encounter with Newsuan.

Regarding this argument, the Third Circuit stated

[O]fficial police department policies may be considered among other things in the reasonableness inquiry and that a "totality of the circumstances" analysis should account for whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force.^{vi} [emphasis added]

Thus, in the Third Circuit, the court will consider as part of the reasonableness analysis, whether an officer's reckless or deliberate conduct unreasonably created a need to use deadly force.

The court then set out to examine whether Officer Dempsey's conduct in initiating a one-on-one encounter with Newsuan, in possible violation of department policy, unreasonably created the need to use deadly force. The Third Circuit stated

Whether or not Dempsey acted unreasonably at the outset of his encounter with Newsuan, **Plaintiff must still prove that Dempsey's allegedly unconstitutional actions proximately caused Newsuan's death. Under ordinary tort principles, a superseding cause breaks the chain of proximate causation.** In *Bodine v. Warwick*, we recognized that this principle limits Section 1983 liability for an officer's use of force even where the officer's initial actions violate the Fourth Amendment:...

While there is no precise test for determining when a civilian's intervening acts will constitute a superseding cause of his own injury, relevant considerations include whether the harm actually suffered differs in kind from the harm that would ordinarily have resulted from the officer's initial actions; whether the civilian's intervening acts are a reasonably foreseeable response to the officer's initial actions; whether the civilian's intervening acts are themselves inherently wrongful or illegal; and the culpability of the civilian's intervening acts.

Although proximate causation is generally a question of fact, it "becomes an issue of law when there is no evidence from which a jury could reasonably find the required proximate, causal nexus between the careless act and the resulting injuries."^{vii} [emphasis added]

Thus, the plaintiff must show that the injury that occurred was “reasonably foreseeable” in light of the conduct of the officer in violating department policy. If the end result is not the type of harm that is foreseeable, the court will consider it a “superseding cause” and the harm will not be the fault of the officer. As stated above, in examining whether an action amounts to a superseding cause, the court considers the following:

- **Whether the harm actually suffered differs in kind from the harm that would ordinarily have resulted from the officer's initial actions;**
- **Whether the civilian's intervening acts are a reasonably foreseeable response to the officer's initial actions;**
- **Whether the civilian's intervening acts are themselves inherently wrongful or illegal; and**
- **The culpability of the civilian's intervening acts.**

The court then noted that, as a matter of law, Newsuan’s own acts of violently attacking Officer Dempsey and ultimately trying to grab his gun were the cause of his death, rather than the officer’s initiation of a one-on-one encounter in possible violation of department policy. The court stated

Whatever harms we may expect to ordinarily flow from an officer's failure to await backup when confronted with a mentally disturbed individual, they do not include the inevitability that the officer will be rushed, choked, slammed into vehicles, and forcibly dispossessed of his service weapon. We therefore have little trouble concluding that Newsuan's life-threatening assault, coupled with his attempt to gain control of Dempsey's gun, was the direct cause of his death.^{viii}

However, the court did offer words of caution that are well-worth reading. Specifically, the court stated the following:

Before continuing on, however, we sound a note of caution. The question of proximate causation in this case is made straightforward by the exceptional circumstances presented—namely, a sudden, unexpected attack that instantly forced the officer into a defensive fight for his life. As discussed above, that rupture in the chain of events, coupled with the extraordinary violence of Newsuan's assault, makes the Fourth Amendment reasonableness analysis similarly straightforward. **Given the extreme facts of this case, our opinion should not be misread to broadly immunize police officers from Fourth Amendment liability whenever a mentally disturbed person threatens an officer's physical safety. Depending on the severity and immediacy of the threat and any potential risk to public safety posed by an officer's delayed action, it may be appropriate for an officer to retreat or await backup when encountering a mentally disturbed individual. It may also be appropriate for the officer to attempt to de-escalate an encounter to eliminate the need for force or to reduce the amount of force necessary to control an individual. Nor should it be assumed that mentally disturbed persons are so inherently unpredictable that their reactions will always sever the chain of causation between an officer's initial actions and a subsequent use of force. If a plaintiff produces competent evidence that persons who have certain illnesses or who are under the influence of certain substances are likely to**

respond to particular police actions in a particular way, that may be sufficient to create a jury issue on causation. And of course, nothing we say today should discourage police departments and municipalities from devising and rigorously enforcing policies to make tragic events like this one less likely. The facts of this case, however, are extraordinary. Whatever the Fourth Amendment requires of officers encountering emotionally or mentally disturbed individuals, it does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state.^{ix} [emphasis added]

In other words, use of force cases are very fact-specific, and every case may not have the same result as this case did based on the facts of this very violent assault on the officer. Alternatively, the language above that states that it cannot “be assumed that mentally disturbed persons are so inherently unpredictable that their reactions will always sever the chain of causation” would seem to imply, for example, that if the officer had information that a person was armed and violent, and then chose to initiate a one-on-one encounter, the result might have been different.

The plaintiff offered an alternative argument for Fourth Amendment liability, particularly, that it was unreasonable for Officer Dempsey to Taser Newsuan in the moments before the fight. The court however, stated, without deciding whether or not it was reasonable, that there was still no proximate cause between the use of the Taser and the later need to use deadly force. The evidence showed that the Taser was not effective on Newsuan and as such, his violent attack on Officer Dempsey was a superseding cause.

As such the Third Circuit affirmed the district court’s grant of summary judgment to Officer Dempsey and the city.

ⁱ No. 15-2346 (3rd Cir. Decided September 20, 2016)

ⁱⁱ Id. at 3-9

ⁱⁱⁱ Id. at 12-13

^{iv} Id. at 13-14

^v Id. at 14

^{vi} Id. at 16-17

^{vii} Id. at 17-19

^{viii} Id. at 19

^{ix} Id. at 19-21