



## IS FORCE EXCESSIVE IF OFFICER IS MISTAKEN REGARDING THE INTENT OF SUSPECT?

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On May 15, 2017, the Eighth Circuit Court of Appeals decided *Dooley v. Tharp*<sup>i</sup>, in which the court discussed whether an officer violated the Fourth Amendment when he shot and killed a man whom he thought was attempting to point a rifle at him although the man may have been trying to drop the rifle. The relevant facts of *Dooley*, taken directly from the case, are as follows:

At approximately 11:00 on that clear October morning, a 911 dispatcher in Keosauqua, Iowa, received a call reporting that a man dressed in a military uniform and armed with a rifle was "flipping off" passing motorists as he walked west on Highway 2 toward Cantril, Iowa. A second caller reported the same information and noted that the man may have exited a car that was parked near the highway. According to the second caller, an upside down American flag hung from the parked car's open trunk.

Deputy sheriffs Jon Tharp and Bradley Hudson were on duty in the Van Buren County Sheriff's Office when the calls came in. Hudson, who was chief deputy sheriff and acting sheriff that day, decided that he and Tharp would together respond to the calls, using Hudson's patrol vehicle, a 2011 Ford F150 SuperCrew pickup truck. The vehicle displayed law enforcement markings on its body, and the top of the cab was equipped with a light bar that flashed red, white, and blue lights when activated. The truck also had a microphone installed in the headliner above the passenger seat and a camera mounted in the center of the dashboard that pointed outward. The audio/video system automatically began recording whenever the truck's emergency lights were activated.

Both Hudson and Tharp were wearing uniforms and bulletproof vests. They had been assigned AR-15 .223-caliber rifles and 12-gauge shotguns, which they carried in their separately assigned patrol vehicles. While entering his patrol vehicle, Hudson removed his rifle from its locked mount and placed it between his legs, where he could easily reach it while driving. After retrieving his rifle and shotgun, Tharp sat in the front passenger seat of Hudson's vehicle. Hudson activated the vehicle's siren and emergency lights as he

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drove away from the sheriff's office, causing the audio/video system to begin recording, and sped south on Highway 1 toward its intersection with Highway 2.

As they proceeded on their journey, the officers began discussing what they would do upon encountering the now-afoot motorist, using what Hudson described as "gallows humor," an example of which was Tharp's statement, "F--- it. Shoot him," accompanying his remark with a laugh. When Hudson spoke about what might happen if the man had a gun and pointed it at the officers, Tharp interrupted, saying, "Blast his ass." Tharp also expressed concern that the parked car displayed an upside down American flag, later testifying that he thought it might indicate anti-government sentiment. Hudson recognized that the upside down flag might also signify distress. Both officers were concerned about whether the man had had military training, based on the reports that he was wearing a military uniform. Possessing only the information they had received from dispatch, Hudson and Tharp decided to pursue the following strategy: Tharp would roll down the passenger side window and "stick [his] gun out the window as [they] approach[ed]." Upon seeing the man, Tharp would "start telling him to drop the f---ing gun." The deputies discussed whether Tharp should remain in the cab or move to the cargo area of the truck, but they did not discuss any alternative ways of approaching the man, nor did they reconsider their plan after the man came into view.

It was approximately twelve miles from the sheriff's office to where the solitary walker was finally spotted, with Hudson driving at speeds of 85 to 90 miles per hour. After they had driven some four miles, Hudson turned off his patrol vehicle's siren but kept the emergency lights activated, later explaining that he did not want to alert the man to the deputies' presence or otherwise give him an opportunity to take a defensive position. While en route, Hudson and Tharp received a report from dispatch that it had received another call regarding the man.

The officers drove past a sedan with an open trunk that was parked on the shoulder of Highway 2. An American flag lay crumpled on the ground behind the car. Less than a minute later, Hudson spotted the man—later identified as Dooley—walking west along the north side of the highway. Hudson said to Tharp, "There he is, Jon. He's on your side." Hudson testified that he observed Dooley "flip off" a car that was driving east. The video recording shows that a red truck heading west drove unmolested past Dooley a few seconds before the officers reached him. Soon thereafter, Tharp said, "He's got the f---ing gun." Dooley seemed unaware of any law enforcement presence as the patrol vehicle approached him. Some six minutes had elapsed from the time the audio/video system began recording to the time the officers first saw Dooley.

Because Dooley and the patrol vehicle were both heading west, the video recording shows Dooley from behind. He was dressed in a brown wide-brimmed hat, a tan-colored coat, and tan jodhpur-style pants that were tucked into his brown knee-high riding boots. He carried what appeared to be a rifle over his right shoulder. The rifle was tucked mostly between the right side of Dooley's body and his right arm, with the stock positioned behind Dooley and pointed toward the sky, the muzzle pointed toward the ground, and Dooley's right hand placed on or near the barrel. Hudson testified that "[the rifle] appeared to be slung over his right shoulder."

As Hudson pulled over to the shoulder of the highway and slowed down, Tharp leaned out of the passenger side window yelling, "Drop the gun! Drop it!" The video shows Dooley turning clockwise to face east, where the patrol vehicle was coming to a stop. After completing the turn, Dooley's body was not quite square with the camera, with the muzzle of his rifle remaining pointed toward the ground. The video shows Dooley quickly taking hold of the barrel with his right hand and bringing his right hand toward his waist, whereupon Tharp again shouted, "Drop the gun! Drop it!" The video then shows Dooley using his right hand to move the rifle in a manner that the district court described as "arc-like," during the course of which Dooley moved his left hand. Tharp fired a single shot that struck Dooley's skull, killing him instantly. Some five seconds elapsed from the time Tharp yelled the first command to the time he fired the fatal shot.

It was soon determined that what had appeared to the officers to be a real rifle was in reality a pellet gun that had been attached to a wire sling that had been buttoned under the right epaulet of Dooley's coat. That after-the-fact information served to explain Dooley's hand movements as his attempt to loosen the wire sling or unbutton the epaulet in an apparent attempt to comply with Tharp's command to drop the weapon.<sup>ii</sup>

Dooley's estate filed suit and alleged that Tharp's shooting of Dooley was excessive force in violation of the Fourth Amendment. Dooley further alleged state law claims which will not be discussed in this article. The district court granted Deputy Tharp's motion for qualified immunity and dismissed the suit concluding that Tharp's use of force was reasonable under the Fourth Amendment. Dooley appealed to the Eighth Circuit Court of Appeals.

This only issue on appeal was whether Deputy Tharp used excessive force, in violation of the Fourth Amendment, when he shot Dooley.

The court first noted various constitutional principles that are relevant to this issue and stated

To establish this alleged constitutional violation, the plaintiffs must show that the amount of force Tharp used was not reasonable under the circumstances. See Graham v. Connor, 490 U.S. 386, 396 (1989). **"The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others."** Loch, 689 F.3d at 965 (citing Tennessee v. Garner, 471 U.S. 1, 11 (1985)). **"Before employing deadly force, an officer should give 'some warning' when it is 'feasible' to do so."** Id. at 967 (quoting Garner, 471 U.S. at 11-12).

**We evaluate the reasonableness of an officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."** Graham, 490 U.S. at 396. **This calculus recognizes that officers must make split-second judgments regarding the amount of force necessary in a particular situation and that the circumstances surrounding those judgments can be "tense, uncertain, and rapidly evolving."** Id. at 397. **Nevertheless, "the reasonableness inquiry in an excessive force case is an objective one: the question is whether the**

**officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id.<sup>iii</sup>**  
[emphasis added]

The court also examined four cases from the Eighth Circuit Court of Appeals that are relevant to this issue in Dooley's case. The first case was *Sinclair v. City of Des Moines*<sup>iv</sup>, in which officers were dispatched to a fight. Officers arrived and found an injured woman who said the suspects fled to an apartment on the top floor. Officers proceeded to that apartment and knocked and announced their presence. They also covered the peephole on the door for safety reasons. A male answered the door holding what appeared to be a long barreled rifle and one of the officers shot and killed the male. The court, in granting qualified immunity for the officer, held that

no constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon." Id. at 596.<sup>v</sup>

The second case examined was *Partlow v. Stadler*<sup>vi</sup>, in which officers were dispatched to a suicidal male armed with a shotgun. Officers arrived and ordered the male to drop the gun. The officers perceived that the male raised the gun in their direction as if to shoot at them and a female witness testified that the male was attempting to drop the gun in compliance with the officer's command. The court upheld the grant of qualified immunity for the officers because they held that the officers observed Partlow moving the shotgun in such a way that caused them to reasonably perceive he was aiming the barrel of the gun at them.

The third case examined was *Aipperspach v. McInerney*<sup>vii</sup>, in which the court granted immunity when

[R]esponding officers were confronted with a suspect who held what appeared to be a handgun, refused repeated commands to drop the gun, pointed it once at [a responding officer], and then waved it in the direction of officers deployed along the ridge line in an action they perceived as menacing." 766 F.3d at 807.<sup>viii</sup>

Lastly, the court noted that, in *Malone v. Hinman*<sup>ix</sup>, officers received a dispatch advised that approximately three gunshots were fired in a crowd of people, and when officers arrived, they observed a male carrying a gun and running toward the officer and other people. The officer shot the male when he failed to comply with an order to stop. The Eighth Circuit upheld the grant of qualified immunity for the officer.

The court also examined relevant facts of this case. Numerous callers reported the male, Dooley, in military clothing, with a rifle, walking along the road making obscene gestures at passing motorists. A caller advised there was a car parked along the road with a upside down flag, which may indicate distress or anti-government views. The court noted that the deputies had a non-chaotic drive to the location where Dooley was reported where they discussed a brief plan of action. When they arrived, Tharp, leaned out the window of the police truck, pointed a rifle at Dooley and screamed for him to drop the gun. At this point, Tharp described Dooley's actions as follows:

"[I]nstantaneously, the subject began to turn toward us and I saw him spin around, raising his rifle and pointing it at me." According to Tharp, he believed "that the subject was going to fire at me or Deputy Hudson unless I fired first." Hudson testified that Dooley had

pointed the rifle at Tharp and "look[ed] directly at Deputy Tharp as he moved his rifle into a firing position."<sup>x</sup>

It was at this point, Tharp fired his rifle, killing Dooley.

The plaintiff sought to have the court consider the video, played in slow motion, from the deputy's patrol vehicle. In slow motion, it appears that Dooley was attempting to unsecure the weapon from where the sling attached to his coat so that he could comply with the deputy's command. The court stated

When viewed frame-by-frame, the video appears to contradict the officers' description. It shows Dooley turning to face the deputies and using his right hand to maneuver the rifle. It also shows that Dooley did not place his right hand near the trigger and did not place his left hand on the rifle. It shows that at the moment of the bullet's impact, Dooley's arms were crossed over his chest and the muzzle of the rifle was pointed toward the sky.<sup>xi</sup>

However, the court noted that officers do not have the benefit of viewing incidents in slow motion but rather see them "real time." The court stated

When viewed in slow motion, the video of Dooley's actions could be seen as creating a genuine issue of fact whether Tharp used excessive force in the light of Dooley's response to the shouted commands to drop the gun. **But law enforcement officers are not afforded the opportunity of viewing in slow motion what appears to them to constitute life-threatening action.** In contrast to the situation in Scott v. Harris, 550 U.S. 372, 378 (2007), **the real-time view of the video does not clearly contradict Tharp's account of what he perceived Dooley's actions to have been.** Cf. Boude v. City of Raymore, No. 16-1183, 2017 WL 1749664, at \* \_\_\_ (May 5, 2017) (concluding that, even though the video evidence did not "blatantly contradict" the plaintiff's factual allegation that she was reaching for the gear shift to ensure her vehicle was in park, the officer's belief to the contrary was objectively reasonable) (citing Scott, 550 U.S. at 380). **Accordingly, we must view Tharp's mistaken-perception action for objective reasonableness.** See Loch, 689 F. 3d at 966 ("An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment."). [emphasis added]

In other words, the court stated that even if an officer is mistaken about his perceptions of a suspect's actions, if that mistaken belief is "reasonable," the officer is still entitled to qualified immunity.

The Eighth Circuit noted that a real-time viewing of the video does not clearly contradict the Deputy Tharp's account of his interaction with Dooley. The court then held

Viewing the dash-cam video at regular speed and considering the facts of this case in light of the forgoing decisions, we conclude that Tharp's mistaken perception that Dooley posed a threat of serious physical harm to Tharp was objectively reasonable. We agree with the district court's determination that "[a] reasonable officer could believe that at some point in this arc of movement the man was pointing his gun at the officers and [could] feel himself to be at risk of serious harm." D. Ct. Order of August 31, 2015, at 12.

We thus conclude that, however tragic the circumstances of Dooley's death, Tharp was correctly granted qualified immunity in the constitutionally based action.<sup>xii</sup>

Thus, the court affirmed the grant of qualified immunity to Deputy Tharp.

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<sup>i</sup> No. 15-3368 (8th Cir. Decided May 15, 2017)

<sup>ii</sup> Id. at 2-5

<sup>iii</sup> Id. at 6-7

<sup>iv</sup> 268 F.3d 594 (8<sup>th</sup> Cir. 2001)

<sup>v</sup> Dooley at 9

<sup>vi</sup> 774 F.3d 497 (8<sup>th</sup> Cir. 2014)

<sup>vii</sup> 766 F.3d 803 (8<sup>th</sup> Cir. 2014)

<sup>viii</sup> Id. at 9-10

<sup>ix</sup> 847 F.3d 949 (8<sup>th</sup> Cir. 2017)

<sup>x</sup> Id. at 8

<sup>xi</sup> Id.

<sup>xii</sup> Id. at 10