



## EIGHTH CIRCUIT DISCUSSES USE OF FORCE AND PROVOCATION DOCTRINE

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On October 17, 2017, the Eighth Circuit Court of Appeals decided *Frederick v. Motsinger, et al.*<sup>1</sup>, which serves as an excellent explanation of use of force law and the provocation doctrine. The relevant facts of *Frederick*, taken directly from the case, are as follows:

Frederick entered the convenience store just after 10:30 a.m. on August 1, 2011. A store surveillance video captured the tragic events of the next ten minutes, and Officer Torkelson's microphone audio-recorded events after he arrived. Holding a four-inch folding knife, Frederick told store clerk Elida Sandoval to call 911. From behind a counter, the frightened Sandoval handed Frederick the phone. Frederick dialed 911. Audio of the call records her asking the operator to send police because she was "being followed." The operator asked for more detail; Frederick hung up and dialed again. A second operator asked what was happening. Frederick responded, "I really would like to say, but I would like a police officer to show up, please." The operator told Frederick police were en route to the store. Dispatchers notified police that the caller at the store was "irate," "not listening," and unable to answer questions about who was following her.

Officer Motsinger was dispatched to the scene. Sergeant Clifton was near the store, heard the dispatch, and went to the store to comfort the caller until Motsinger arrived. Clifton entered the store's northwest corner and saw Frederick, who had walked to the northeast corner, next to doors to two restrooms. Frederick demanded, "I want to see your badge number." Clifton stated it. Frederick excitedly announced she had a knife, which Clifton could see. Clifton backed away from Frederick, drew his firearm, and radioed for assistance, stating "I've got one at gunpoint; she's got a knife inside the store." Frederick said she did not believe Clifton was a police officer, again asked his badge number, and demanded to know where his backup was, making quick, impatient movements. A customer rushed out of the store. Clifton, concerned someone might exit the restrooms, told Frederick to drop the knife, saying, "I'm here to help you. Nobody has to get hurt." Frederick did not comply.

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Officer Nick Torkelson arrived one minute after Clifton requested backup. When Torkelson entered, Frederick asked his badge number. Clifton responded. Frederick asked why Clifton knew Torkelson's badge number. Clifton explained he was a supervisor on the force. Torkelson told Clifton he had a beanbag shotgun in his patrol car; Clifton directed Torkelson to use his taser instead. Torkelson proceeded down the aisle toward Frederick, who was holding the knife "in a stabbing position" or "pick style." Like Clifton, Torkelson was unable to assess who else was in the store. Frederick told Torkelson, "I do not believe that you're a police officer," and "I'm a paranoid schizophrenic." Torkelson said, "I'm gonna have to tase you if you don't drop the knife, okay? I need you to drop the knife."

At this point, Motsinger entered the store and saw that Clifton's gun was drawn and Torkelson was deploying his taser at Frederick. Motsinger proceeded down the aisle to provide Torkelson lethal cover. Torkelson and Clifton again asked Frederick to drop the knife but she did not. Torkelson waited until Frederick's blade was facing down, so she would not fall on it, and discharged his taser. One probe struck Frederick in the chest but the other lodged in her purse, so the probes did not complete an electrical circuit and Frederick was not incapacitated. She paused for a moment, then yelled, raised her knife, and charged toward Torkelson in an apparent effort to stab him. The store video confirms that Frederick charged with her knife in a stabbing position. Torkelson testified he "was in fear that she was going to stab me." Motsinger testified that he feared for Torkelson's life when Frederick started charging toward him. As Torkelson retreated, Motsinger threw him out of the line of fire and fired three shots at Frederick, who succumbed to the wounds.

Both Clifton and Torkelson testified that throughout this encounter they believed Frederick was impaired by methamphetamine or some other stimulant, as she was moving erratically and expressing illogical thoughts. Both officers were dressed in police attire, with name tags, firearms, patches, and duty belts, but Frederick repeatedly questioned whether they were police officers. After the incident, store clerk Sandoval told police that Frederick appeared to be "on drugs," as she was shaking and sweating in an abnormal manner. Toxicology tests confirmed that Frederick was under the influence of methamphetamine at the time.<sup>ii</sup>

Frederick filed suit on behalf of the Estate and alleged both Fourth Amendment and state law claims. This article will only address the Fourth Amendment claims. The district court granted qualified immunity for the officers and Frederick appealed to the Eighth Circuit Court of Appeals.

On appeal, the Estate argued that the use of the Taser was excessive force under the Fourth Amendment and that excessive force provoked Frederick's violent reaction thereby causing the officer to use deadly force; thus, Frederick argued that the use of deadly force was a Fourth Amendment violation. This is called the "provocation rule." In other words, under the provocation rule

Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his

otherwise defensive use of deadly force." Glenn v. Wash. Cty., 673 F.3d 864, 879 (9th Cir. 2011).<sup>iii</sup>

However, while this appeal was pending, the Supreme Court decided *Cty. Of L.A. v. Mendez*<sup>iv</sup> where the court rejected the Ninth Circuit's provocation rule. Discussing *Mendez*, the Eighth Circuit stated

[T]he Supreme Court rejected the Ninth Circuit's provocation rule, agreeing with other circuits that its "fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1546 (2017). **The Court made clear that "the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Id. at 1547. If the use of deadly force was objectively reasonable under Graham, based on what the officers knew when the force was applied, "it may not be found unreasonable by reference to some separate constitutional violation." Id. at 547 n.\*.<sup>v</sup> [emphasis added]**

In *Frederick*, the court of appeals noted that the Estate's brief did not allege that the use of deadly force was, in and of itself unreasonable under the Fourth Amendment, thus the court set out to determine if the use of the Taser violated the Fourth Amendment. The court stated

[T]he Estate argued that the attempted tasing was objectively unreasonable, and this was a distinct Fourth Amendment claim raised and argued in the district court and vigorously pursued on appeal. **The Supreme Court in Mendez noted "the principle that plaintiffs can -- subject to qualified immunity -- generally recover damages that are proximately caused by any Fourth Amendment violation. . . . The harm proximately caused by . . . two [Fourth Amendment] torts may overlap, but the two claims should not be confused."** 137 S. Ct. at 1548.<sup>vi</sup>

Therefore, the court of appeals set out to determine if the use of the Taser was unreasonable under the Fourth Amendment.

The court discussed various factors that should be considered when determining if a use of force was reasonable under the Fourth Amendment. The court stated

The Fourth Amendment's objective reasonableness standard governs claims that officers "used excessive force in the course of making an arrest, investigatory stop, or other 'seizure.'" Graham, 490 U.S. at 388. **The inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. Courts must consider "the reasonableness of a particular use of force . . . from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Mendez, 137 S. Ct. at 1546 (quotation omitted). We assess the reasonableness of each individual officer's conduct, because "§ 1983 liability is personal." Doran v. Eckold, 409 F.3d 958, 965 (8th Cir.) (en banc), cert. denied, 546 U.S. 1032 (2005). Contrary to the Estate's contention, whether**

the officers' use of force was constitutionally excessive is an issue of law for the court. Brossart, 859 F.3d at 624.<sup>vii</sup> [emphasis added]

The court noted that the use of the Taser has been held to be reasonable to control potentially violent, defiant suspects who pose a safety risk to the officer or others, especially when the officer warns the suspect regarding the Taser. Conversely, the courts have held that the use of the Taser was unreasonable where the suspect was a non-violent, misdemeanor suspect who was not fleeing or resisting arrest and posed little to no threat to the officer's safety.

The Estate argued that, at the time the officer deployed the Taser, Frederick had not directly threatened the officers with the knife. However, the court observed that she acted erratic and irrational, refused to drop the knife, held it in a stabbing position, and challenged the officer's authority. While she did not lunge or move to stab an officer, it was reasonable for the officers to perceive that she was ready to use the knife to attack them or someone else. The court then held

**The officers did not need to wait until Frederick attacked them. "[I]t is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others." Sheehan, 135 S. Ct. at 1775 (quotation omitted). Even if she was suffering from mental illness or other impairment, the relevant inquiry is whether she posed a threat, not what prompted her threatening conduct. See Morgan, 686 F.3d at 498 (intoxication); Hayek v. City of St. Paul, 488 F.3d 1049, 1055 (8th Cir. 2007) (mental illness); Hassan v. City of Minneapolis, 489 F.3d 914, 919 (8th Cir. 2007) (mental illness); Sanders v. City of Minneapolis, 474 F.3d 523, 527 (8th Cir. 2007) (mental illness).<sup>viii</sup> [emphasis added]**

Thus, the court held that the officers acted reasonably under the Fourth Amendment by using the Taser.

Further, the court also noted that the law was not clearly established that it would be unreasonable to use the Taser on Frederick in that situation. Therefore, even if the court were to, for the sake of argument, assume that the use of the Taser violated the Fourth Amendment,

existing precedent must have placed the . . . constitutional question beyond debate" at the time the officers acted. Id. at 551 (quotation omitted). As the above-cited Eighth Circuit cases demonstrate, existing precedent did not place "beyond debate" that the officers violated Frederick's Fourth Amendment rights when they discharged a taser at Frederick in these circumstances.<sup>ix</sup>

Therefore, the court of appeals affirmed the decision of the district court.

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<sup>i</sup> No. 16-3523 (8<sup>th</sup> Cir. Decided October 17, 2017)

<sup>ii</sup> Id. at 2-4

<sup>iii</sup> Id. at 5

<sup>iv</sup> 137 S.Ct 1539 (2017)

<sup>v</sup> Frederick at 5-6

<sup>vi</sup> Id.

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vii Id. at 6-7

viii Id. at 8

ix Id.

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