ALASKA SUPREME COURT

February 19, 2010
Oral Argument Case Summary

CASE #1
Thomas Olson v. City of Hooper Bay, Officer Dimitri Oaks, Officer Charles Simon, and Officer Nathan Joseph

Supreme Court No. S-13455

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ATTORNEYS

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QUESTIONS PRESENTED ON APPEAL

Are appellee police officers entitled to summary judgment based on qualified immunity against appellant's claim that their use of tasers against him multiple times while arresting him in his home constituted excessive force, in violation of his constitutional rights?

- Are there genuine issues of material fact relevant to the question of whether the police officers reasonably believed their conduct was reasonable?

- Did the trial judge consider the facts in the light most favorable to appellant in making his finding that the police officers reasonably believed that their conduct was reasonable?

- Did the trial judge err by ruling that none of the authorities cited by the parties gave the officers fair notice about the lawfulness of their conduct?

MAJOR AUTHORITIES TO CONSIDER

U.S. Constitution, Amendment IV—Search & Seizure

Alaska Statutes (AS) 09.65.070—Suits against incorporated units of local government

AS 11.51.110—Endangering the welfare of a child in the second degree

AS 11.81.370—Justification: Use of force by a peace officer in making an arrest or terminating an escape

AS 12.25.070—Limitation on restraint in arrest

***Sheldon v. City of Ambler,* 178 P.3d 459 (Alaska 2008)**—Alaska Supreme Court case law on qualified immunity in cases claiming use of excessive force.

SUMMARY OF THE CASE

At about 4:00 AM on December 26, 2006, Hooper Bay police officers Dimitri Oaks and Nathan Joseph went to the home of Thomas "Boya" Olson to conduct a welfare check on his four youngest children. The welfare check was requested by the children's mother, who had left the children in Olson's care earlier in the evening. The officers testified that when they arrived at the home, all three doors leading from outside to the living area at the top of a flight of stairs were open. Officer Joseph testified that he knocked at each of the open doors and each time heard a voice say, "come in."

At the top of the stairs the officers entered the living area, which was one large room with a bed, a couch, and a mattress on the floor, among other furnishings. Olson was on the bed, his brother was on the couch, and the four children were on the mattress—three sleeping and the oldest one awake. The officers testified that they smelled alcohol as they approached the men. Officer Joseph woke Olson and after a brief exchange asked Olson to get up so he could conduct a sobriety test. According to the officers, Olson began shouting and threatening, so they restrained him with handcuffs and called for back-up. According to Olson, he was not threatening the officers but reacting to being awakened and handcuffed in his home at 4:00 AM when he had done nothing wrong.

About 3-5 minutes after the calls for back-up, a third officer—Officer Charles Simon—arrived. Officer Joseph remained with Olson's brother while Officers Oaks and Simon began to walk Olson out of the house. The officers stood on either side of Olson, escorting him, but as they neared the stairway one officer slipped and all three men fell to the floor. According to the officers, Olson started kicking even before the fall and continued kicking and struggling with them

afterwards. At one point, Olson wrapped his legs around a pole at the top of the stairway and refused to stand. Officers Simon and Joseph began using their tasers on Olson, and during the approximately five minute period that followed, Olson was tased in the drive-stun mode either 12-13 times[1] (appellee's contention) or 15-18 times[2] (appellant's contention).

According to the officers, Olson was intoxicated and resisting arrest, and posed an immediate threat to their safety. The tasings were necessary and justified to prevent injury and to control Olson as they tried to remove him from the house. According to Olson, he was sober, he posed no serious threat to the officer's safety, and his movements and actions were largely in response to the multiple drive-stuns and the confusion, fear and excruciating pain that resulted. In his view, the officers' use of force was unnecessary and excessive, and the majority of tasings were administered not to neutralize any threat he might have posed, but to punish him and force him to comply—purposes that were invalid and illegal.

Eventually, Olson stood up and allowed the police to escort him from the home to the police station, where he was charged criminally with four counts of reckless endangerment of a minor, resisting arrest, and three counts of assault on a police officer in the fourth degree.

After the incident, Olson was treated for 25 taser burn wounds to his body. He filed a civil lawsuit against the police officers and the City of Hooper Bay, claiming the officers used excessive force against him and violated his constitutional rights.

LEGAL ISSUES GENERALLY

Summary Judgment. In most circumstances, parties to a lawsuit have the right to trial by a jury of their peers on the factual disputes in their case. The jury hears the testimony of witnesses and other evidence presented and renders a decision on what they believe occurred. However, sometimes a lawsuit can be resolved on a legal question alone, without a trial—an outcome known as "summary judgment." To be granted summary judgment, the party seeking it (the "movant") must demonstrate that there are no "genuine issues of material *fact*" in the case, and that it can be resolved as a matter of *law*. Because granting summary judgment prevents the non-moving party from having their day in court on the factual issues, the trial court must "draw all reasonable inferences of fact from the proffered materials *against* the movant and *in favor of* the non-moving party."

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[1] According to the officers, Officer Simon tased Olson seven times and Officer Joseph tased Olson five or six times.

[2] According to Olson's expert witness, he was tased 15-18 times.

After Olson's civil lawsuit was filed in Bethel Superior Court, the officers and City of Hooper Bay filed a motion for summary judgment based on qualified immunity, claiming that the police officers were entitled to "qualified immunity" from suit or liability under state law. They claimed that factual disputes in the case were not relevant to their entitlement to immunity, and that the trial judge could rule in their favor as a matter of law. Superior Court Judge Leonard Devaney of Bethel granted summary judgment.

The fundamental issue on appeal in *Olson v. City of Hooper Bay, et. al*, is whether the police officers and the City of Hooper Bay were entitled to summary judgment on their qualified immunity claim, or whether Olson should instead be allowed to take his claims to trial. Olson argues that there are genuine issues of material fact surrounding the circumstances of the arrest that make summary judgment improper, and that the trial judge failed to consider the evidence in the light most favorable to him. The officers and the City of Hooper Bay counter that summary judgment was proper given the qualified immunity claim because the relevant issue was a narrow one: not whether excessive force actually occurred, but whether the officers reasonably believed that their use of force was reasonable.

Qualified Immunity. Whether police officers are entitled to "qualified immunity" for their actions turns on both statutory and case law. Alaska statutes bar actions for damages against a municipality or its agents, officers, or employees, if the action is based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty." AS 09.65.070(d)(2). However, an officer's discretion is not unlimited. Under AS 11.81.370, "a peace officer may use non-deadly force and may threaten to use deadly force when and to the extent the officer *reasonably believes* it necessary to make an arrest, to terminate an escape or attempted escape from custody, or to make a lawful stop." And under AS 12.25.070, "a peace officer or private person may not subject a person arrested to greater restraint than is necessary and proper for the arrest and detention of the person."

The Alaska Supreme Court has interpreted these statutes to require a two-part inquiry on the question of whether an officer's conduct is reasonable. This test is described in the case of *Sheldon v. City of Ambler,* 178 P.3d 459 (Alaska 2008). First, the court must decide whether the officer's conduct was "objectively reasonable." If so, qualified immunity applies. If not, the court must decide a second question: did the officer reasonably believe that his conduct was lawful—"that is to say, not excessive"[3]? If so, qualified immunity still applies, even if the officer was mistaken in his belief.

To decide the second prong, a court must evaluate the reasonableness of an officer's belief by first examining whether he or she had "fair notice" that his actions were unlawful. The court in *Sheldon* stated:

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[3] *Sheldon v. City of Ambler* at 466.

> …(T)he approach we adopt here, is to look to our own jurisdiction and other jurisdictions to see if there are any cases, laws, or regulations which would suggest that the type of action taken by the officer is considered unlawful. The existence of such laws or cases would demonstrate, or at least serve as probative evidence, that there was some kind of "notice" that the officer could have had about the legality of his actions.[4]

In this case, both parties offered case law and policies on taser use to the trial judge to suggest that the officers were on notice either (1) that the multiple tasers were excessive when deployed against a man who was restrained,[5] or (2) that the taser use was appropriate to prevent harm.[6]

A second consideration in determining the reasonableness of an officer's belief is whether the conduct is "so egregious, so excessive, that he should have known it was unlawful."[7] If so, even a lack of "fair notice" would not foreclose the conclusion that the officer acted unreasonably. On this point, the *Sheldon* court stated: "One should not let the lack of explicit law in an area be a substitute for the reasonable officer's common sense."

In his *Order Granting Motion for Summary Judgment on Qualified Immunity,*[8] Judge Devaney found (1) that Olson was actively resisting arrest in a situation that was escalating out of control, (2) that Olson had kicked at and attempted to bite the officers prior to the taser deployments, (3) that viewing the evidence in the light most favorable to Olson, he had been tasered 15-18 times; (4) that the initial deployments of the taser were "objectively reasonable" because the officers were faced with the immediate threat of bodily harm from Olson's kicking and biting; and (5) that genuine issues of fact exist on the issue of whether later tasings were objectively reasonable.

Because a genuine issue of fact remained on the objective reasonableness of the officer's actions, Judge Devaney did not grant summary judgment on this

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[4] *Sheldon v. City of Ambler* at 466.
[5] Olson offered unpublished orders from federal district courts in Washington and California; *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137 (W.D. WA 2007); and the International Association of Chiefs of Police Model Policy on the use of Electronic Control Weapons, which limits taser use to situations where it "reasonably appears necessary to control or subdue a violent or potentially violent person."
[6] The officers and the City of Hooper Bay offered an unpublished Alaska superior court order in *Page v. City of Kotzebue*, 2KB-07-76CI (Exc. 73); the *Sheldon* case, where the court considered the reasonableness of a "bear hug" and takedown; and the Hooper Bay Police Department General Order on the use of the Advanced Taser, which states: "The Advanced Taser shall not be used on a restrained or controlled subject unless the actions of the subject present an immediate threat of death or great bodily harm or substantial physical struggle that would result in injury to themselves or any other person including the deploying officer."
[7] *Sheldon v. City of Ambler* at 467.
[8] Exc. 349.

basis. Instead, he evaluated the second prong of the two-prong test and concluded that the officers could have reasonably believed that their conduct was reasonable. Specifically, he found that the officers were not on notice that their conduct was unreasonable or unlawful, concluding:

> (A)t the time of the arrest here, the contours of Fourth Amendment jurisprudence on the claims of excessive force involving Tasers was not sufficiently clear such that a reasonable law enforcement officer in the officers' position under these circumstances would have known that the multiple tasings of the Plaintiff violated his Fourth Amendment right to be free of excessive use of force.

Judge Devaney essentially ruled that, because the officers were not on notice that their conduct was excessive, qualified immunity attached, and any factual disagreements over whether excessive force was actually used became irrelevant. He made no specific ruling on whether the conduct was "so egregious, so excessive" that the officers should have known it was unlawful.[9]

QUESTIONS FOR STUDENTS TO CONSIDER

1. Read the case of *Sheldon v. City of Ambler.* How are the facts in that case similar to those in this case? How are they different?

2. Some facts in this case are undisputed and some are strongly contested. Make a list of the facts you think are most significant and identify whether they are contested or uncontested. Which facts, if proven, support the officer's position that their actions were *reasonable*? Which facts, if proven, favor Olson's position that the officers acted *unreasonably*?

3. The trial judge concluded that the first tasings of Olson were "objectively reasonable," but that there were "genuine issues of material fact" on whether the later tasings of Olson were objectively reasonable. Do you agree or disagree? Why?

4. The trial judge concluded that the officers were not on notice about the legality of their actions. Do you agree that the materials cited by the parties were inadequate to advise the officers that multiple taser use could be excessive? Why or why not?

5. Do you agree that police officers should be granted immunity for their reasonable beliefs about the boundaries of allowable force, even if mistaken? What are the advantages of such a policy? What are the disadvantages?

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[9] Olson argues that the officers' conduct was so egregious and excessive that they should have know it was unlawful (Appellant's Opening Brief at 24-34). The officers and City of Hooper Bay argue that this issue was not properly raised before the trial court and should not be considered on appeal (Apellee's Reply Brief at 21-22, footnote 11).