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TRAINING BULLETIN

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Hostage Shot During Armed Standoff – Are You Liable?

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In 2018, a case came out of the 7th Circuit¹ involving a wrongful death lawsuit filed against two Neenah (WI) police officers who shot and killed Michael Funk, an armed hostage, during a 2015 armed standoff. Officers Craig Hoffer and Robert Ross shot Funk after he escaped Eagle Nation Cycles where he and two others were being held hostage by gunman Brian Flatoff. Theresa Mason-Funk, Funk's widow, sought compensatory and punitive damage alleging that the officers used unnecessary, unreasonable and excessive force against Funk, violating his Fourth Amendment rights.

Facts

On the morning of Dec. 5, 2015, Flatoff entered Eagle Nation Cycles with a MAC-10 machine pistol and took four individuals in the shop, including Funk, hostage. Officers from Neenah Police Department arrived on the scene, including SWAT team leader Hoffer, and assistant SWAT team leader Ross.

Ross received radio communications that provided him with the information that there were three hostages, that Flatoff's gun was a MAC-10, and that he was a white male with long hair and a plaid jacket. NPD Lt. Shawn O'Bre instructed officers to set up a perimeter around the shop which had a main entrance and a rear entrance. O'Bre formed a "hasty response" team that included Hoffer and Ross, to enter the shop and rescue the hostages. The "hasty team" proceeded through the rear entrance of the building where Funk dropped to the floor face down, and Flatoff crawled behind Funk and began shooting at the hasty team. A bullet struck one officer's helmet, then another bullet struck a fire extinguisher, releasing powder into the air and obscuring the officers' view. The hasty team initially returned fire, but then quickly withdrew from the shop. Flatoff then instructed Funk to close the rear door that the officers left open. Funk went to close the door, but immediately ran outside and dove to the ground near the rear entrance as Flatoff fired bullets in his direction.

Funk took cover on the ground near Flatoff's truck, and eventually stood up to maneuver around the truck. While moving around the trunk, Funk retrieved a handgun from his waistband as he started running across the alley. Hoffer and Ross spotted Funk with a handgun and fired at him, striking him in the hip and continually shooting at him as he fell to the ground. The officers never gave warning to Funk as he ran across the alley and he died as a result of his gunshot wounds.

Thereafter, Funk's wife sued the city of Neenah and the two officers who shot Funk for violating his Fourth Amendment rights by exerting excessive force against him. The officers moved for summary judgment, arguing that they did not violate Funk's Fourth Amendment rights and that they were immune from this suit based upon the doctrine of qualified immunity.

Court Findings

In considering the officers' motion for summary judgment, the District Court began by noting that the Fourth Amendment excessive force claim is reviewed under the reasonableness standard and requires a careful balancing of the

nature and quality of the intrusion of the individual's Fourth Amendment rights as well as a careful attention to the facts and circumstances of the case, the severity of the crime at issue, whether the suspect posed an immediate threat to the officers or others, and whether he was actively resisting or evading arrest.

In this case, the District Court concluded that the officers were mistaken in shooting Funk but that their mistake, although tragic, was understandable and reasonable, therefore, not violating Funk's Fourth Amendment rights. The district court entered summary judgment in the officers' favor finding that their conduct was not objectively unreasonable under the Fourth Amendment and that even if their conduct was unreasonable, they were shielded from liability by qualified immunity.

Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). In determining whether an official is entitled to qualified immunity, we examine (1) whether "the official violated a statutory or constitutional right," and (2) whether "the right was 'clearly established' at the time of the challenged conduct." *Id.* at 735.

The court also discussed the meaning of "clearly established." A right is "clearly established" when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). The Supreme Court has reiterated time and again that demonstrating a clearly established right does not require pointing to a case directly on point, but "existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 137 S. Ct. at 551). The court also noted that they are permitted to skip the first prong of the qualified immunity test and decide the second prong if that alone will dispose of the claim. That is what the court chose to do in this case. The court also noted that the Supreme Court has stated that the lower courts should not define "clearly established" law by using cases that state general legal principles. Rather, the facts should be similar enough that a reasonable officer would be on notice that his or her conduct was unreasonable.

Takeaways

The defendants' motion argues that the actions of the officers weren't unreasonable or excessive because they believed that Funk "was a likely participant" in the ambush against the officers. Hoffer and Ross both said in their depositions that they thought Funk was the person who had shot at the officers during the rescue attempt. The facts in this case and existing precedent failed to put Hoffer and Ross on notice that their use of deadly force, without a warning, on an armed individual in a dangerous hostage situation, was unlawful. The

officers did not violate a clearly established right and they are entitled to qualified immunity.

Endnote

¹. *Mason-Funk v. City of Neenah*, 895 F.3d 504 (2018)

About The Author

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