

RACE AND THE EXCESSIVE USE OF FORCE BY POLICE OFFICERS

By Matthew A. Peluso, Esq.



“Once you begin to explain or excuse all events on racial grounds, you begin to indulge in the perilous mythology of race.” ~ James Earl Jones, actor

Over the last year, I have written several articles for this publication about the increasing hostility between the law enforcement community and the public they serve and protect. Beginning with the shooting of Michael Brown in Ferguson, to the death of Eric Garner in Staten Island, the shootings of Walter Scott and Eric Harris, through to the recent death of Freddy Gray, national and international media coverage on law enforcement has been at its highest level since the Rodney King incident and subsequent rioting over 20 years ago. These articles have addressed many of the legal issues raised by the recent tragic deaths of citizens at the hands of police officers, and the increasing retaliatory attacks and murder of police officers in the aftermath of those deaths.

In my law practice, I represent law enforcement officers in civil rights case arising from the racist, bigoted, sexist, ageist and homophobic conduct of other law enforcement officers and government employees at the municipal, county and state level. My clients bring lawsuits under state and federal civil rights statutes, including the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* (“LAD”) and Title VII of the Civil Rights Act of 1964, as amended in 1991 (“CRA”), 42 U.S. Code § 2000, *et seq.* The essential purpose of the LAD is the “eradication of the cancer of discrimination.” *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988)(quoting *Jackson v. Concord Co.*, 54 N.J. 113, 124 (1969).

The law enforcement officers I represent know that, unfortunately, they often work side-by-side with racist and bigoted officers. They also know that racist and bigoted behavior by ranking and fellow officers is too often accepted in headquarters,

or, at very least, tacitly permitted to exist through “turning a blind-eye” approach. In addition, as all police officers know, there is the heightened duty of loyalty that exists between law enforcement officers because of their dangerous jobs, and the unwritten code of silence that prevents many law enforcement officers from complaining about the racist and bigoted conduct of their fellow officers.

Law enforcement officers who file complaints against other officers for racist and bigoted conduct face hostility and retaliation from their superior and fellow officers. They are considered traitors and betrayers. They are personally investigated and attacked. Their professional and personal stress increases, and their families suffer as collateral damage. However, all of the police officers whom I have had the pleasure to represent knew that what they were doing was as important to the integrity, effectiveness and future of policing as any new technology, SOP or advanced training they receive to better perform their duties. They knew that if racism and bigotry are permitted to exist in the locker room between police officers, it will also show its ugly face out on the street, where police officers come into direct contact with the public, and where racist and bigoted officers have both the full authority of the law behind them and little supervision over their conduct. This dangerous combination increases the chances that racist officers can act with impunity and indulge their hatred with often tragic results for citizens of color.

However, in the debate on the highly publicized deaths of African-American males at the hands of police officers over the last year, the role that race played in those deaths has unfortunately been subjected to exaggerated and inflammatory comments, and unsupported conclusions

and speculations, by too many people in positions of authority and influence. Despite all of the voluminous discussions, articles and media coverage, as well as investigations conducted at the state and federal levels, it now appears that race *per se* was not the determinative causal factor in the deaths of Michael Brown, Eric Garner or Freddy Gray.

For example, in the Michael Brown incident, local African-American residents of the Ferguson neighborhood where the shooting took place apparently gave independent and credible grand jury testimony that confirmed Officer Wilson’s version of events, and which directly contradicted most of the conclusions and false stories repeated, and accepted as truthful, in the public debate on the incident. According to these witnesses, Mr. Brown engaged in a physical confrontation with Officer Wilson, tried to flee the scene, and then made a threatening and aggressive movement back toward Officer Wilson right before he was shot. Based upon the testimony of eye-witnesses, it appears that the physical size and aggressiveness of Mr. Brown played a greater role in Officer Wilson’s use of deadly force than race. Had all of the initially false and inaccurate allegations been subjected to greater immediate scrutiny and skepticism, and not encouraged and accepted as truthful, there is every reason to believe that the resulting violence and riots would not have occurred.

Similarly, in the tragic death of Eric Garner, his physical size, refusal to comply with the officer’s instructions and personal health complications, combined with the officer’s unlawful use of a choke-hold, played a more significant role in his death than the color of his skin. In addition, the

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potential negligence of the EMT personnel who failed to sufficiently and timely treat Mr. Garner at the scene appears to have contributed to his wrongful death more than his race. For this reason, although there were no criminal charges arising from the incident, the City of New York will more than likely settle the civil rights lawsuit filed by Mr. Garner's family.

A "private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances obtaining." *State v. Koonce*, 89 N.J. Super. 169, 184 (App. Div. 1965). "If... the citizen resists, the officer is not only justified in but has the duty of employing such force as is reasonably necessary to overcome the resistance and accomplish the arrest." *State v. Moriarity*, 133 N.J. Super. 563, 573 (App. Div.), cert. denied, 68 N.J. 172 (1975). In the case of a fleeing suspect, a police officer can use deadly force if he or she believes that the suspect is a danger to the officer or other members of the public. *Tennessee v. Garner*, 471 U.S. 1 (1985).

In the Brown and Garner cases, and even in Scott and Harris cases, there is every reason to believe that if the suspects had not resisted arrest or fled the scene, they would all be alive today regardless of their race. In the Brown case, there was apparently persuasive evidence of Mr. Brown's aggressive resistance and refusal to comply with Officer Wilson's instructions. In the Garner case, cell-phone video from a bystander clearly showed Mr. Garner repeatedly refusing to comply with the officers' instructions and to lower his hands so that he could be cuffed. For some reason (possibly an outstanding warrant for his

arrest), Mr. Scott decided to flee the scene of a routine traffic stop, as did Mr. Harris to avoid capture in a sting operation. Tragically, those decisions to flee ultimately led to their wrongful deaths. The officers in those cases have been criminally charged, and the Scott and Harris families have lost a father, son and brother.

In the case of Freddie Gray, there are questions about how race was a determining factor in his tragic death. Even assuming that his initial stop, frisk and arrest by white police officers may have been unlawful, it appears that his fatal injury occurred while he was in the custody of an African-American police officer. The Chief of Police for Baltimore is an African-American, as are the Mayor of Baltimore and the Baltimore City State's Attorney. Although it is legally possible for members of a racial or ethnic group to engage in discriminatory conduct against other members of that same group, there is no evidence at this time that race was a factor in Mr. Gray's death.

One of the first rules learned by suspects, their defense attorneys and prosecutors is that running away, resisting arrest or assaulting a police officer ultimately hurts the accused. Judges don't like resisting and fleeing allegations, and often either outright deny (or significantly increase) bail for the accused. Potential plea deals can be removed from consideration, since prosecutors are usually put under pressure to seek higher bail amounts and to offer tougher plea deals to suspects who have assaulted police officers. Often, even after it is ultimately found that there was no right to have searched or arrested the suspect initially, the only charges left will relate to the resisting, fleeing or assault allegations. For this reason, defense attorneys always tell their clients not to resist arrest and to say as little as possible

to police officers. Just comply, say little or nothing to everyone, and call an attorney as soon possible.

As the law enforcement community attempts to end racism and the use of deadly force on unarmed civilians of color through more diversity and training, it is also important for the public to understand that resisting arrest, assaulting a police officer or fleeing the scene of an arrest are crimes, and can tragically lead to a police officer's unlawful use of excessive or deadly force. In the heat of a difficult arrest or a lengthy foot-chase, the potential for an officer to make a bad decision on the appropriate use of force increases exponentially, which the tragic events of the last year have confirmed.

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