

THE REASONABLE USE OF FORCE: A LEGAL ANALYSIS

By Matthew A. Peluso, Esq.



This summer has seen rising community tensions in some cities as the result of a few tragic deaths and assaults involving law enforcement officers and members of the public. In June, a Nassau County police officer was charged with felony assault for excessive force in the arrest of a 20 year-old during a traffic stop. In July, the death of Eric Garner in Staten Island during his arrest has been ruled a homicide and one of the officers involved has been stripped of his badge and gun pending investigation. Then, in August, an 18 year-old in Ferguson, Missouri was shot and killed by a police officer during an attempted arrest, which has led to rioting and looting in that now-troubled town.

As the result of these highly publicized incidents, the appropriate use of force by law enforcement officers has, again, become a hotly disputed and politicized debate at both the local and national level. Therefore, it is critical that law enforcement officers re-familiarize themselves with the controlling law on the reasonable use of force, especially deadly force, in the performance of their duties.

In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court ruled that a law enforcement officer's use of force must be judged in accordance with the 4th Amendment's "objective reasonableness" standard viewed in light of the facts and circumstances confronting the officers, without regard to their underlying intent or motivation. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation." *Id.* at 396-397.

Similarly, under longstanding New Jersey law, an officer effecting an arrest may use only "such force as is reasonable under the circumstances." *State v. Mulvihill*, 57 N.J. 151, 156 (1970). Pursuant to N.J.S.A. 2C:3-7, the use of force against a suspect is justifiable when a law enforcement officer is making or assisting in making an arrest and "reasonably believes" that, among other potential dangers, such force is immediately necessary to effect a lawful arrest.

As law enforcement officers are aware, the State of New Jersey, Office of the Attorney General, has issued a "Use of Force" policy (the "Policy") consistent with the controlling statutory and legal precedent in this state. Under the Policy, "reasonable belief" is defined as an "objective assessment based upon an evaluation of how a reasonable law enforcement officer with comparable training and experience would react to, or draw inferences from, the facts and circumstances confronting and known by the law enforcement officer at the scene."

Under the Policy, a law enforcement officer "may use deadly force when the officer reasonably believes such action is immediately necessary to protect the officer or another person from imminent danger of death or serious bodily harm." "A law enforcement officer is under no obligation to retreat or desist when resistance is encountered or threatened. However, a law enforcement officer shall not resort to the use of deadly force if the officer reasonably believes that an alternative to the use of deadly force will avert or eliminate an imminent danger of death or serious bodily harm, and achieve the law enforcement purpose at no increased risk to the officer or another person." *Id.*

Further, the Policy reminds law enforcement officers that the use of force should never be considered "routine" and, even when justified in using force, "the utmost restraint should be exercised." When deciding whether to use force, a law enforcement officer must be guided by "the principle that the degree of force employed in any situation should be only that reasonably necessary." Further, the Policy mandates that "law enforcement officers should exhaust all other reasonable means before resorting to the use of force."

On the other side of the equation, 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). This duty imposed on every citizen of our state also applies when the restraint by a police officer is for any lawful purpose. *Mulvihill, supra*. "If, however, 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.), *certif. denied*, 68 N.J. 172 (1975).

Pursuant to N.J.S.A. 2C:3-4(b)(1)(a), use of force by a citizen is not justifiable to "resist an arrest which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such arrest." [Emphasis added.] Pursuant to N.J.S.A. 2C:29-2, a citizen cannot resist arrest even if the law enforcement officer was acting unlawfully in making the arrest, provided the officer was acting under color

of his official authority and provided that the law enforcement officer announces his intention to arrest prior to the resistance.

A citizen may protect himself/herself whenever the force applied is excessive and unnecessary. *Id.* at 157. A citizen must reasonably believe that the use of force is necessary to protect himself/herself from the officer's excessive use of force. *N.J.S.A. 2C:3-4a.* "A right of self-defense, in this circumstance, however, may be exercised only if the repelling force is no greater than that which reasonably appears to be necessary and if submission to the excessive force would not end its use. Otherwise, the defense is forfeited." *Id.* Thus, if an officer uses excessive or unnecessary force a citizen may respond or counter with the use of reasonable force to protect himself. *Mulvihill* at 156.

However, a citizen's right to protect himself/herself in those circumstances is not unqualified. As explained by the New Jersey Supreme Court, a citizen cannot use greater force in protecting himself from an officer's allegedly "unlawful" force than appears necessary under the circumstances, and a citizen loses the privilege of self-defense if he knows that if he submits to the officer, the officer's excessive use of force will cease. *Id.* at 157.

Whether to use deadly force or not is one of the most difficult decisions that any law enforcement officer may have to make in their career, and one that most officers hope that they will never have to make. In addition to possible suspension and termination from employment, potential loss of pension and benefits, and the threat of a premature end to their chosen career, a law enforcement officer who uses

excessive force in effectuating an arrest can be charged criminally for everything from murder, manslaughter and assault to official misconduct. See *N.J.S.A. 2C:30-2.*

Also, numerous studies have been conducted, which have explored the negative emotional, psychological, and physical effects to law enforcement officers involved in shootings. In one such study, researchers found that, following a shooting, most officers suffered from "post-shooting trauma"—a form of post-traumatic stress disorder that often includes guilt, depression, and even suicidal thoughts. See Stratton, John G., David Parker, and John R. Snibbe, "Posttraumatic Stress: Study of Police Officers Involved in Shootings," *Psychological Reports*, 55 (August 1984): 127-131. Thus, even when justified, a law enforcement officer's decision to use deadly force can have serious negative consequences on the officer and his family, friends and co-workers.

As the tragic events of this summer have proved beyond any doubt, law enforcement officers in the 21st century can immediately be placed under a local, and even national, microscope with regard to the performance and public perception of their duties in the increasingly diverse and empowered communities in which they serve. Given the omnipresence of cell-phones with photographic and video capabilities, police conduct is now subject to constant, and often selective, public monitoring and dissemination. A law enforcement officer can go to work in the morning in normal anonymity and, by the end of his or her shift, be the subject of extensive local and national news coverage.

As the former British Prime Minister and

creator of the famous London Metropolitan Police Force, Sir Robert Peel, stated: "The police are the public and the public are the police; the police being only members of the public who are paid to give full time attention to duties which are incumbent on every citizen in the interests of community welfare and existence." For all of the reasons discussed above, increased training and re-training of law enforcement officers in the legal use of force, diversity awareness, and community relations is crucial to ensure the safety of police officers and the citizens of our state, and to encourage the type of mutual respect and trust between officer and citizen that ultimately benefits all of society.

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