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# THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW  
ENFORCEMENT OFFICERS AND AGENTS

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# CASE SUMMARIES

## Circuit Courts of Appeals

### Fourth Circuit

#### **United States v. Coleman, 2021 U.S. App. LEXIS 33246 (4th Cir. VA Nov. 9, 2021)**

On the morning of September 20, 2017, a school administrator contacted the Sheriff's Office and reported that an unknown vehicle was parked erratically in the student/faculty parking lot. The administrator added there was a man "asleep or passed out" in the vehicle with a crossbow visible in the backseat. Deputy Sheriff David Johnson, who primarily served as a school resource officer, was dispatched to investigate.

When Deputy Johnson arrived, the administrator identified the vehicle, which was stopped but running, with the brake lights engaged and the bulk of the vehicle parked in the travel lane. Deputy Johnson pulled behind the vehicle, but when he opened the door of his police cruiser, the vehicle began to drive away. Deputy Johnson conducted a traffic stop and, when he approached the vehicle, he saw a crossbow in the backseat behind the driver. Deputy Johnson identified the driver as Devon Coleman. Coleman, who did not appear to be a student, seemed lethargic. Deputy Johnson told Coleman why he had stopped him and asked Coleman if he had any weapons in the vehicle. Coleman stated that he had a firearm in the vehicle's center console. Deputy Johnson asked Coleman to step out of the vehicle. As Coleman stepped out of the vehicle, Deputy Johnson saw a large bag of a green leafy substance that appeared to be marijuana in between the door and the driver's seat. A search of Coleman's vehicle revealed, among other things, marijuana, methamphetamine, a handgun, and the crossbow.

The government charged Coleman with drug and firearm offenses. Coleman filed a motion to suppress the evidence seized from his vehicle. The district court denied the motion and Coleman was eventually convicted. On appeal, Coleman argued that Deputy Johnson did not have reasonable suspicion that he was engaged in criminal activity to support the investigative stop. Specifically, Coleman claimed that possessing a crossbow on school property was not illegal under Virginia law and it was unreasonable for Deputy Johnson to believe that it was.

The Fourth Circuit Court of Appeals disagreed. An officer may stop and briefly detain a person "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." The court concluded that, even if Coleman had not possessed the crossbow, Deputy Johnson would have had reasonable suspicion to conduct an investigative stop. The court found that a reasonable officer could conclude based on the totality of the circumstances that Coleman was engaged in various unlawful activities such as: 1) trespassing on school grounds; 2) commission of a parking violation; and 3) unlawfully operating a vehicle under the influence.

Alternatively, the court added that it would have reached the same conclusion even if it had considered Coleman's possession of the crossbow, whether in isolation or as part of the totality of the circumstances. Specifically, without deciding whether it is illegal to possess a crossbow on school property under Virginia law, the court held that a reasonable officer could have concluded

that Coleman was in possession of a dangerous weapon on school grounds, which could have been used to harm students, faculty, and/or staff at the school.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca4/20-4093/20-4093-2021-11-09.pdf?ts=1636486223>

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## **Fifth Circuit**

### **Harmon v. City of Arlington, 2021 U.S. App. LEXIS 32142 (5th Cir. TX Oct. 26, 2021)**

A City of Arlington, Texas, police officer pulled over O'Shea Terry and his passenger, Terrance Harmon, for driving a large SUV with an expired registration tag. The officer approached the car and asked the men for identification. After taking their information, the officer advised Terry and Harmon that she smelled marijuana coming from the car and, as a result, had to search it.

In the meantime, Officer Bau Tran arrived on the scene and approached the SUV from the passenger's side next to a curb. While the first officer went back to her patrol car to verify Terry's and Harmon's information, Officer Tran waited with the two men. When Officer Tran asked them to lower the windows and shut off the vehicle's engine, Terry complied. However, after some small talk, Terry started raising the windows and reaching for the ignition. Officer Tran immediately shouted, "hey, hey, hey," stepped onto the running board of the SUV, and grabbed the passenger window with his left hand. Officer Tran reached through the passenger window with his right hand and yelled, "hey, stop." Officer Tran then removed his right hand and rested it on his holstered pistol. At this point, Terry started the SUV and shifted into drive. Just after the SUV lurched forward, Officer Tran drew his firearm, stuck it through the open window past Harmon's face, and shot five rounds, striking Terry four times. Terry lost control of the SUV, which crossed the opposite lane, and jumped the curb. The force of the SUV hitting the curb knocked Officer Tran off of the SUV's running board and onto the street. As Officer Tran rolled over the asphalt, the SUV's rear tires almost struck him. Harmon managed to gain control of the SUV, got it back on the street, and stopped it. Terry died later at the hospital.

Terry's estate sued Officer Tran under 42 U.S.C. § 1983 for excessive use of force in violation of the Fourth Amendment. Terry's estate also sued the City of Arlington, alleging that the city was liable for Officer Tran's use of excessive force. Finally, Harmon claimed that Officer Tran violated his rights by shooting Terry and thereby unlawfully seizing the entire SUV.

The district court held that Officer Tran was entitled to qualified immunity and dismissed all claims against him as well as the city. The plaintiffs appealed.

In [Graham v. Connor](#), the Supreme Court held that, in evaluating whether an officer used excessive force, courts must consider: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officer or others; and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. In addition, when an officer uses deadly force, the threat of harm posed to the safety of the officer or others is generally the dominant factor in a court's analysis. Accordingly, the Fifth Circuit Court of Appeals recognized that its cases have held that "an officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or others."

In this case, the court held that it was reasonable for Officer Tran to believe that he was at risk of serious physical harm while he was clinging to the accelerating SUV. The court concluded that common sense dictated that falling off a moving vehicle onto the street can result in serious physical injuries. In addition, as Officer Tran tumbled across the asphalt, the SUV's rear tires nearly ran him over. The fact that this near miss occurred after Officer Tran shot Terry was irrelevant, as it confirmed that Officer Tran could reasonably perceive a serious threat of harm as Terry drove away with him holding onto the SUV. Finally, the court noted that, in previous opinions, it had recognized the obvious threat of harm to an officer on the side of a fleeing vehicle.

The court was not persuaded by the plaintiffs' argument Officer Tran's use of deadly force was unreasonable because he could have simply stepped off the running board and let Terry drive away. Citing Graham, the court commented that the threat of harm to the officer must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

The court also rejected the plaintiffs' argument that Officer Tran shot too quickly, about a second after the engine was engaged, for his use of deadly force to be reasonable. The court found that the speed with which an officer resorts to force can factor into the reasonableness analysis. However, the court added this only applies in only in situations where officers "deliberately and rapidly" forgo lesser responses "when such means are not only plainly available but also obviously recommended by the situation." In this case, even though he ordered Terry to stop reaching for the ignition, Officer Tran did not have the luxury of engaging in negotiation or deliberation with Terry.

The court further held that the plaintiffs failed to identify any clearly established law which held that it was unreasonable for an officer to use deadly force when he has become an unwilling passenger on the side of a fleeing vehicle. Therefore, the court held that Officer Tran was entitled to qualified immunity. Because the court found that Officer Tran committed no constitutional violation, the court then affirmed the district court's dismissal of the lawsuit Harmon filed against the city.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/20-10830/20-10830-2021-10-26.pdf?ts=1635291018>

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## **Sixth Circuit**

### **Browning v. Edmonson County, 2021 U.S. App. LEXIS 34090 (6th Cir. KY Nov. 17, 2021)**

At approximately 9:30 p.m. on February 27, 2018, Deputy Austin Meredith of the Edmonson County Sheriff's Office ("ECSO") attempted to initiate a traffic stop on an automobile for an unilluminated license plate and the failure of a passenger to wear a seatbelt. The automobile was being driven by Brandon Embry, with plaintiffs M.S. and C.S., who were minors, sitting as passengers in the vehicle. After following Embry for a short distance, Deputy Meredith activated his police cruiser lights and attempted to stop the vehicle. Instead of stopping, Embry immediately accelerated and attempted to flee. Deputy Meredith accelerated to follow and was soon joined in the pursuit by Deputy Jordan Jones, an ECSO Deputy Sheriff. Deputy Jones took over the pursuit, which lasted approximately 12 minutes over an 18-mile stretch of highway, with the vehicles reaching speeds of almost 130 miles-per-hour.

During the pursuit, Deputy Jones learned that the initiating offense was an unilluminated license plate, that there were multiple passengers in the vehicle, and that at least one passenger was believed to be unbelted. In addition, Deputy Jones saw objects being thrown out of the vehicle but could not identify them aside from a single “grocery bag sack.” Approximately two minutes before the pursuit ended, another officer radioed that he had found ammunition in the area where the objects had been thrown from Embry’s vehicle.

The pursuit ended when Embry’s vehicle crashed into a third-party’s vehicle in a T-bone impact at an intersection. After the collision, Deputy Jones exited his vehicle, pulled his gun out, pointed the gun at Embry, and ordered him to get out of the vehicle. After Deputy Jones handcuffed Embry, he saw an individual, later identified as C.S., slumped over “kind of rocking back-and-forth.” Deputy Jones noted that his observation of C.S. “rocking back-and-forth could have been due to the vehicle itself rocking back-and-forth as it was coming to a rest. At this point, Deputy Jones ordered C.S. to show his hands multiple times without receiving a response. Deputy Jones then tased C.S. because of the information he had received about ammunition being in the car and C.S. not showing his hands after multiple orders to do so. C.S. was eventually removed from the vehicle and airlifted to a hospital to receive treatment for his injuries. C.S. did not remember anything after the crash because he believed that he lost consciousness and did not regain consciousness until he was lying face down on the ground and handcuffed.

The plaintiffs, C.S. and M.S., filed a lawsuit against Edmonson County, Deputies Jones and Meredith, and Sheriff Shane Doyle for, among other things, the decision to initiate and continue the pursuit of Embry’s vehicle and for excessive use of force for tasing C.S. while he was allegedly unconscious in the back of Embry’s vehicle. Deputy Jones and Sheriff Doyle appealed the district court’s denial of their motion for summary judgment based upon qualified immunity.

The Sixth Circuit Court of Appeals (the court) agreed with the district court and held that Deputy Jones was not entitled to qualified immunity on C.S.’s excessive use of force claim. After a severe collision following a car chase, there was no sign of verbal hostility or physical resistance by C.S. While Deputy Jones might have had a suspicion that C.S. was armed, he did not attribute C.S.’s rocking back-and-forth as verbal hostility or physical resistance. In addition, it was not disputed that C.S. was found slumped over in the backseat following the collision. The court added that at the time of the incident it was clearly established that C.S. had a constitutional right not be tased where he showed no resistance other than a passive failure to respond to an order to show his hands, and where an obvious reason not to respond was the shock of the collision.

The court held that Deputy Jones was entitled to qualified immunity for his decision to initiate and continue the pursuit of Embry’s vehicle. The court recognized that for Deputy Jones to be entitled to qualified immunity on this claim, his conduct must have been: 1) a discretionary act or function; 2) performed in good faith; and 3) within the scope of his authority in order for him.

Only the first prong, whether Deputy Jones’s conduct was discretionary or ministerial, was at issue in this case. Consequently, Deputy Jones would not be entitled to qualified immunity if his conduct was a ministerial act which “requires only obedience to orders of others, or when the officer’s duty is absolute, certain, and imperative, involving mere execution of a specific fact.” Conversely, a discretionary act entails “the exercise of discretion and judgment, or personal deliberation, decision and judgment.” The court recognized that to determine whether Deputy Jones’s act of initiating and continuing the pursuit was a discretionary act or a ministerial duty, it was necessary to examine ECSO department policy (the policy) regarding pursuits and emergency response driving.

The court concluded the policy showed that Deputy Jones's actions were discretionary in nature. Specifically, the policy provided that the "decision to initiate pursuit . . . *will be discretionary* with each individual officer" and "[t]he officer will *use his discretion* and terminate the pursuit . . . ." The court noted that the policy does not absolutely mandate when a pursuit must be initiated or when an officer must discontinue pursuit. The policy simply laid out factors for the officer to consider when making that decision based on the circumstances. Consequently, because Deputy Jones's decision to continue the pursuit was a discretionary act, he was entitled to qualified immunity on the plaintiffs' claims concerning his decision to continue the pursuit of Embry.

Finally, the court held that Sheriff Doyle was entitled to qualified immunity on the plaintiffs' claims that he negligently allowed Deputies Jones and Meredith to continue pursuing Embry's vehicle and for not enforcing the ECSO pursuit policy. The court found that Sheriff Doyle's conduct of loosely supervising Deputy Jones and other officers during the pursuit was discretionary in nature. The court added that "Kentucky courts have repeatedly held that supervising employees is a discretionary function subject to the defense of qualified official immunity."

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/20-6078/20-6078-2021-11-17.pdf?ts=1637175616>

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**Elhady v. Unidentified CBP Agents, 2021 U.S. App. LEXIS 34407 (6th Cir. MI Nov. 19, 2021)**

Anas Elhady, a United States citizen living in Michigan, drove to Canada to visit friends for the night. On his return, border-patrol agents stopped Elhady at the border and detained him for questioning. During his detention, the officers took Elhady's jacket and shoes, leaving him wearing only his shirt, pants, undergarments, and socks. Elhady complained to the officers that the cell was cold, asking them to either return his jacket and shoes or provide a blanket. According to Elhady, he claims his requests went unanswered.

According to Elhady, the cell "got colder and colder," and he began shivering uncontrollably. Elhady claimed he yelled to the officers that he was freezing and needed to go to the hospital, but they told him not to worry, "you'll be out soon." Four hours later, the officers told Elhady that he could leave. Elhady told the officers that he felt too ill to drive and needed to go to the hospital. Elhady was transported to a hospital where the treating physician gave him a blanket and let him rest. Elhady fell asleep and when he awoke, the doctor told him he was "good to go."

Elhady later sued several border-patrol officers, including Blake Bradley, the lead officer assigned to his case, under [Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics](#). Elhady argued that the officers detained him under conditions that violated his Fifth Amendment due-process rights.

The district court dismissed Elhady's suit against all of the officers except Officer Bradley. In Officer Bradley's case, the district court found enough evidence to show that he had violated Elhady's right to be "free from exposure to severe weather and temperatures." Because the district court also found that this right was clearly established, it held that Officer Bradley was not entitled to qualified immunity. Officer Bradley appealed.

The Supreme Court has recognized an implied cause of action to recover damages from federal officers who violate constitutional rights in only three narrow circumstances: 1) a Fourth Amendment search-and-seizure violation by federal narcotics agents; 2) a Fifth Amendment employment-discrimination violation by a United States congressman; and 3) an Eighth Amendment inadequate-medical-care violation by prison officials.

In [Hernandez v. Mesa](#), decided in 2020, the Supreme Court declined to extend Bivens in a case involving a border patrol agent and a cross-border shooting incident. In Hernandez, the Court commented that the three cases in which it recognized an implied cause of action against federal officers were “handed down at a time when the Court routinely assumed that it was the judge’s job to infer a cause of action whenever a substantive provision may have been violated,” even when no law prohibiting such conduct applied. However, since 1980, on ten separate occasions, the Court has “consistently refused to extend Bivens liability to any new context or new category of defendants,” recognizing that judges interpret laws, they do not make them.

Citing Hernandez, the Sixth Circuit Court of Appeals held that border patrol officers serving in their capacity as agents protecting the border cannot be sued under Bivens. The court added that the Fourth, Fifth, and Eleventh Circuits, when faced with the issue of whether to expand Bivens to the border/immigration context, they have declined to do so. Consequently, the court reversed the district court and directed it to dismiss Elhady’s case against Officer Bradley.

It should be noted that in [Boule v. Egbert](#), decided in May 2021, the Ninth Circuit Court of Appeals held that a cause of action under Bivens was available where a United States citizen claimed that a border patrol agent violated the First and Fourth Amendments. On November 5, 2021, the Supreme Court granted certiorari in Boule to decide whether a cause of action exists under Bivens for: 1) First Amendment retaliation claims; and (2) for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff’s Fourth Amendment rights.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca6/20-1339/20-1339-2021-11-19.pdf?ts=1637352016>

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## **Eighth Circuit**

### **United States v. Campbell-Martin, 2021 U.S. App. LEXIS 33094 (8th Cir. IA Nov. 8, 2021)**

On May 25, 2018, at Officer Nicole Hotz was patrolling a school parking lot and asking people to leave because suspicious activity had been occurring there overnight. When Officer Holtz saw a vehicle drive into the lot, she pulled up near the vehicle and parked two spots away from it so that she could ask the occupants to leave. A woman was sitting in the driver’s seat and seemed to be hiding her face with her hands. Officer Hotz shined a spotlight on the driver’s side window to get the woman’s attention and then walked up to the window. The woman rolled down the window and Officer Hotz noticed that “she was very nervous and fidgety, her speech was quick, and her pupils were constricted,” which Officer Hotz thought was unusual in the dark. Officer Hotz also noticed that the woman “kept pulling her knees to her chest and breathing really heavy.” Officer Hotz thought that the woman might be under the influence of drugs. Officer Hotz also thought it was strange that the two male passengers were very quiet and did not look toward her.



When Officer Hotz requested everyone's identification, the woman and the man in the front passenger seat stated that their names were "Shannon Mckelvy" and "Favian Estrada." Both denied having identification and neither knew the last four digits of their social-security numbers, which Officer Hotz thought was strange. Officer Hotz then asked, "What's going on? Run me through. Something's going on right now." The woman said that the two passengers picked her up because her boyfriend was "beating the crap out of" her, causing Officer Hotz to ask her if she was okay. Afterward, Officer Hotz ran "Estrada's" name and discovered that it was false and that his real name was Adam Leiva, so she arrested him for providing false identification information.

Sergeant Richard Holland arrived to assist Officer Hotz, and he asked "Mckelvy" if a purse in the back seat belonged to her. She said it did not. After the man in the back seat said he was the one who had been lent the car, Officer Hotz asked him to look for identification in the purse. When the man found "Mckelvy's" identification stating that her real name was Christin Campbell-Martin, the officers arrested her for providing false identification information.

Afterward, Sergeant Holland searched the vehicle and found a backpack on the floor of the front-seat passenger area. Inside of the backpack he found a bag of what he thought was methamphetamine. He also found \$2,850.10 in cash, a small scoop, paperwork addressed to Leiva and Campbell-Martin, and smaller baggies. Leiva's identification was found in the center console.

The government charged Campbell-Martin and Leiva (defendants) with drug-related offenses. After the district court denied the defendants' motion to suppress the evidence seized from the backpack, they pled guilty, but reserved the right to appeal the denial of their suppression motion.

On appeal, Campbell-Martin argued that the initial stop was an unconstitutional seizure because Officer Hotz lacked reasonable suspicion that the individuals in the car were involved in criminal activity. Accordingly, she claimed the evidence should have been suppressed as the fruit of the unlawful stop.

The court disagreed. During an encounter with an individual, a Fourth Amendment seizure occurs when "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." In this case, the court held that Officer Hotz's initial encounter with Campbell-Martin and Leiva was not a Fourth Amendment seizure but instead, it was a consensual encounter, as her conduct would not have communicated to a reasonable person that he or she could not leave. First, Officer Hotz was alone, she did not display a weapon, she did not touch the defendants, and she did not use forceful language. Second, she parked her vehicle 10 – 15 feet away, beside the defendants' car rather than in front of or behind it so the driver would have been able to drive away. Third, she did not ask the occupants to get out of the car until she knew they had provided false names. Finally, Officer Hotz's request for identification, and her questions to the defendants did not convey a message that their compliance was required.

Next, the defendants argued that Sergeant Holland's warrantless search of the backpack violated the Fourth Amendment.

Again, the court disagreed. Police officers may search a vehicle incident to a recent occupant's arrest if: 1) the arrestee is within reaching distance of the passenger compartment at the time of the search; or 2) it is reasonable to believe the vehicle contains evidence of the offense for which the occupant was arrested. Here, the court held that it was reasonable to believe that the defendants' vehicle contained evidence of the offense of providing false identification information.

Although the officers already knew Campbell-Martin and Leiva's real names, and that both had provided false identification, they did not have Leiva's actual identification. Finding Leiva's actual identification would help prove that he provided false identification information to the officers. The court concluded that it was reasonable to think that his identification would be in the car because he had not given the officers any identification even after he was arrested. As a result, the backpack that was sitting at Leiva's feet in the car was a logical place to look for identification such as a driver's license, mail, receipts, credit cards, or checks. As it turned out, the officers found paperwork in the backpack with Leiva's real name on it and Leiva's identification in the center console.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/20-3181/20-3181-2021-11-08.pdf?ts=1636389027>

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### **Lemay v. Mays, 2021 U.S. App. LEXIS 33758 (8th Cir. MN Nov. 15, 2021)**

Jennifer Lemay and Courtney Livingston (plaintiffs) live together in a home with Lemay's two children and two five-year-old American Staffordshire Terriers (commonly referred to as pit bulls) named Ciroc and Rocko. One of Lemay's children is disabled, and Ciroc, a 60-pound male, served as the child's service animal. Rocko, a 130-pound male, served as Livingston's "emotional service . . . and seizure alert animal."

One evening, Livingston accidentally set off the burglar alarm in the home. The home security alarm company notified the police department, and Officers Michael Mays and Daniel Ledman responded to the call. Before the officers arrived at the home, LeMay called the security company to report the alarm had been accidentally triggered; however, it was unclear whether the security company relayed that information to police.

Upon arrival at the home, Officer Mays jumped over the six-foot privacy fence surrounding the backyard while Officer Ledman knocked on the front door. Livingston answered the front door with Rocko at her side and told Officer Ledman that she accidentally set off the alarm. Officer Ledman did not tell Livingston that another officer was in the backyard.

While in the backyard, Officer Mays encountered Ciroc who, according to the plaintiffs, "walked toward Mays wagging his tail in a friendly manner to greet Mays." Officer Mays then shot Ciroc in the face. After the shots were fired, Rocko entered the backyard and according to the plaintiffs, "presented himself to Officer Mays in a non-threatening manner." Officer Mays then "shot Rocko multiple times in his body." Neither dog was killed, but both were severely injured, rendering them unable to perform their tasks as service animals.

The plaintiffs sued Officer Mays under 42 U.S.C. § 1983, claiming that he searched their home and seized their dogs in violation of the Fourth Amendment. The district court denied Officer Mays qualified immunity, holding that nothing in the plaintiffs' complaint showed that either dog posed an imminent threat; therefore, the shootings were not objectively reasonable. Officer Mays appealed.

The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" Privately-owned dogs are "effects" under the Fourth Amendment; therefore, police officers must act reasonably when seizing them. When an officer "shoots and kills an individual's family pet when that pet presented

no danger and when non-lethal methods of capture would have been successful[,]” this is an unreasonable seizure of property.

The Eighth Circuit Court of Appeals held that Officer Mays did not act reasonably when he shot Ciroc and Rocko. Accepting the plaintiffs’ allegations in their complaint as true, which it was required to do, the court found that the plaintiffs stated a plausible claim that Officer Mays unreasonably seized the dogs.

In their complaint, the plaintiffs claimed that Ciroc “walked toward Mays wagging his tail in a friendly manner to greet Mays.” Mays then “shot Ciroc in the face, causing Ciroc fear and great pain.” Then, “Rocko presented himself to Mays in a non-threatening manner.” Mays then also “shot Rocko multiple times in his body.”

In both instances, the court held that the plaintiffs’ complaint alleged that Officer Mays shot both Ciroc and Rocko when they presented no imminent danger and were not acting aggressively. Consequently, this established a viable claim that Officer Mays unreasonably seized the dogs in violation of the Fourth Amendment. The court further held that at the time of the incident, it was clearly established that a police officer “cannot shoot a dog in the absence of an objectively legitimate and imminent threat to him or others.” As a result, the court affirmed the district court, and held that Officer Mays was not entitled to qualified immunity.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/20-2632/20-2632-2021-11-15.pdf?ts=1636993822>

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## **Tenth Circuit**

### **Estate of Taylor v. Salt Lake City, 2021 U.S. App. LEXIS 32046 (10th Cir. UT Oct. 26, 2021)**

On August 11, 2014, at approximately 7:00 p.m., Officer Bron Cruz heard a radio transmission stating that a man located at the intersection of 1900 South Street and 200 East Street “flashed a gun” but did not make a threat. Officer Cruz learned the man was accompanied by a second man and received physical descriptions of both men. Officer Cruz was not informed which man had “flashed” the firearm.

Officer Cruz responded to the area and saw three men, two of whom matched the previous descriptions he had received. While waiting for back up officers to arrive, the three men, later identified as Dillon Taylor (Taylor), Jerrail Taylor (JT), and Adam Thayne, entered a 7-11 convenience store. In the meantime, Officers Andrew Sylleloglou and Uppsens Downes arrived. When the men exited the store, Officers Cruz and Sylleloglou ordered the men to stop and put their hands above their heads. Officer Downes detained Thayne and JT after they put their hands up and complied with the officers’ commands. However, Taylor made a 180-degree turn and started walking away from the officers. Officer Sylleloglou ordered Taylor to stop and show his hands, but he continued to walk away. Both officers followed Taylor with their guns drawn but not pointed at him. Officer Sylleloglou moved parallel to Taylor and continued to order him to stop and show his hands, but he refused to comply. Officer Cruz walked behind Taylor, who was wearing a baggy t-shirt and baggy pants with the shirt hanging outside the pants. Shortly after he started walking, Taylor appeared to pull up his pants by reaching his hands down on either side of his pants and tugging them upwards.

Approximately nine seconds after he started walking away from the officers, Taylor raised his hands to waist level. with the position of his elbows extended on either side, with his long, baggy t-shirt raised to waist level. Taylor appeared to have one or both of his hands in the front of his pants' waistband. At this point, the officers pointed their firearms at Taylor; neither officer, however, had his finger on his gun's trigger. Officer Cruz was now ten to twenty feet directly behind Taylor, while Officer Sylleloglou walked parallel to Mr. Taylor at approximately the same distance. During this time, Taylor challenged the officers, stating, "What are you going to do? Come on, shoot me."

Approximately two seconds after Taylor put his hands in his waistband, Officer Cruz told him, "Get your hands out now." In response, Taylor turned around to face Officer Cruz, but he continued to move away from him by walking backwards. Taylor kept both hands in his waistline where he appeared to be moving them in a "digging" motion like he was "manipulating" something. Officer Cruz continued walking at a steady pace toward Taylor while, again, ordering Taylor to show his hands. Officer Cruz had started ordering Taylor to remove his hands a third time when, without verbal warning, Taylor rapidly removed his left hand from his waistband, lifting his shirt and exposing his torso, and, virtually simultaneously, withdrew his right hand from his waistband but lower than his left hand. The motion took less than one second and was consistent with the drawing of a gun. At that time, Taylor was approximately 10 to 12 feet away from Officer Cruz. In immediate response, Officer Cruz placed his finger on his gun's trigger and shot Mr. Taylor twice in the chest, killing him. When Mr. Taylor was subsequently searched, he was found to be unarmed.

Taylor's Estate (Plaintiff) sued Officer Cruz among others under 42 U.S.C. § 1983 for excessive use of force. The district court held that Officer Cruz was entitled to qualified immunity and dismissed the lawsuit. The plaintiff appealed.

The Tenth Circuit Court of Appeals noted that a police officer is entitled to qualified immunity as long as the officer's conduct does not violate a clearly established constitutional right. In excessive use of force claims, the plaintiff must establish that the officer's use of force was objectively unreasonable. To evaluate whether an officer used unreasonable force, the courts must consider: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officer or others; and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight, which the Supreme Court outlined in [Graham v. Connor](#). In addition, the reasonableness of a particular use of force must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The court also recognized that it had to take into account "that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Finally, if a reasonable officer in officer's "position would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others," that officer's use of force is permissible.

In this case, the court held that the first factor, the severity of the crime in question, favored the plaintiff and weighed against the use of significant force. The undisputed facts established that Officer Cruz responded to the report that an unidentified male "flashed" a gun without making any threat. Depending on the circumstances, the court found this activity could have been a misdemeanor, a felony, or no crime at all under Utah law.

The court held that the third factor, resistance, or evasion of arrest, also weighed in favor of the plaintiff. When the officers approached Taylor and the other men, they did not have probable

cause to arrest them. Consequently, the court found that when the officers first encountered Taylor, he could not have been actively resisting arrest or attempting to evade arrest by flight.

Finally, the court held that the second factor, whether there was an immediate threat to safety, weighted heavily in Officer Cruz's favor. An officer's use of force is justified if the officer has "probable cause to believe that there was a threat of serious physical harm to himself or others." In this case, it was undisputed that Taylor ignored or directly disobeyed the officers' repeated commands to remove his hands from his waistband. When Taylor finally removed his hands, he was approximately 10 to 12 feet away from Officer Cruz, and the rapid manner in which he did so was consistent with the drawing of a gun. The court concluded that a reasonable officer could have reasonably believed that Taylor's drawing motion was hostile and that he sought to use a firearm against the officers, even though this belief ultimately proved to be mistaken. The court added that "the Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately." As a result, the court held that Officer Cruz's split-second decision to use deadly force against Taylor was reasonable; therefore, he was entitled to qualified immunity.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/19-4085/19-4085-2021-10-26.pdf?ts=1635265860>

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