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Pointing a gun at a person.

**Reasonable Force
or
Excessive Force?**

By: A. Nathan Zelif, Attorney at Law ⁽¹⁾

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In Thompson v. Copeland, No.16-35301 (9th Cir. 2018), the 9th Circuit held that a police officer had used excessive force when he pointed a gun at the suspect in the context of a felony arrest. The court found that the use of excessive force violated the suspect's constitutional rights. However, the Officer was entitled to qualified immunity because the suspect's right not to have a gun pointed at him under the circumstances of this case was not clearly established at the time the events took place. But, going forward, the court stated that the law is now clearly established in this scenario.

As to CCW holders, review of this case is relevant because it discusses the use of force, the METHOD OF DISPLAY OF A FIREARM, and what is "excessive", and thus, not "reasonable". As CCW holders, you won't be doing traffic stops. But, you may have to hold someone at gun point. It is submitted that the discussion within this case has application as to how you hold someone at gun point, and why the facts and circumstances are so important.

In this case, certain facts were assumed to be true, by virtue of the nature of the legal proceeding (summary judgment).

After a traffic stop, and after a backup officer arrived, the suspect was asked to step out of the car, and was patted down for weapons. No weapon was found. The suspect was told to sit on the bumper of the patrol car. As the suspect was being watched over by the backup officer, the 1st officer conducted an inventory search of the vehicle and viewed a loaded revolver sitting in an open plastic bag on the rear passenger-side floorboard.

After seeing the firearm in the vehicle, the officer **DREW HIS FIREARM**, having decided to arrest the suspect as being a felon in possession of a firearm. It is the **Officer's METHOD OF DISPLAY of his firearm which is a key issue in this case.**

As to the METHOD OF DISPLAY OF THE OFFICER'S FIREARM, the facts were disputed:

The Officer claimed that he unholstered his firearm and assumed a low-ready position, with his gun clearly displayed but NOT pointed directly at the suspect.

On the other hand, the suspect claimed that the Officer pointed his gun at the suspect's head, demanded that he surrender, and threatened to kill him if he did not.

Following the above events, the Officer directed the suspect to get on the ground, face-down, so that he could be handcuffed. He was handcuffed without incident and arrested for being a felon in possession of a firearm.

The METHOD OF DISPLAY OF THE OFFICER'S FIREARM - Facts and circumstances.

The suspect was six feet tall and weighed 265 pounds.

The suspect was taller and heavier than the Officer.

This involved a nighttime felony arrest.

The suspect had already been searched and:

- Was calm and compliant.
- Was being watched over by a second armed deputy.
- Was an unarmed felony suspect under control.
- Was seated on the bumper of a police cruiser 10 - 15 feet away from a gun found in the suspects car (and was not handcuffed).
- Was a convicted felon, most recent felony conviction was for possessing a firearm.
- Was not in close proximity to an accessible weapon.

Such was the conclusion of the Appeals Court, but the lower court had found that the suspect was in relatively close proximity to a weapon.

The Appeals Court held that pointing a loaded gun at the suspect's head in the circumstances of this case constituted excessive force (and a violation of the Fourth Amendment). However, the Appellate Court

also found that the officers were entitled to qualified immunity (disputed by the dissenting judge) because the law was not clearly established at the time of the traffic stop.

As to the "excessive force" element, the Appeals Court discussed the following factors:

1. The Officers use of force in arresting the suspect was not objectively reasonable.
2. Pointing the gun at the suspects head and threatening to kill him if he did not surrender, can hardly be characterized as "minor".
3. Pointing a loaded gun at a suspect (citing a confrontation in a residential context) and employing the threat of deadly force, is use of a high level of force.
4. The suspect was suspected of driving with a suspended license and in violation of the Uniform Firearms Act, which the court viewed as potential crimes of low and moderate severity, respectively.
5. The court stated that the government's claim that the suspect "could have charged past [the Deputy] and grabbed the revolver (in the back of the car) in a matter of seconds" was "weak" (commenting that he would have "had to travel 10-15 feet to his car to grab the gun or make any use of it"). [But note, the obvious contradiction by the court in remarks which appear below].
6. The suspect was sitting on the bumper of a squad car and being watched over by an armed deputy. He was not actively resisting arrest or attempting to evade arrest by flight, and was compliant with the

directions of law enforcement at all times. The Officers did not have reason to believe that he would resist or flee.

Based upon the totality of the circumstances, the Appeals Court held that the force used against the suspect was excessive when balanced against the government's need for such force.

LEGAL DOUBLE SPEAK

It is interesting to view the double speak that the Appeals Court used concerning the suspect being -- 10-15 feet away from a loaded gun.

As to the Excessive Force issue:

In the context of determining whether the officer used excessive force, the Appellate Court stated that the government's claim that the suspect "could have charged past [the Deputy] and grabbed the revolver (in the back of the car) in a matter of seconds", was "weak" (commenting that he would have "had to travel 10-15 feet to his car to grab the gun or make any use of it").

As to the Qualified Immunity issue:

On the other hand, in a clear illustration of double speak, the Appellate Court, in the context of finding that the officers had qualified immunity stated: "although [the suspect] was cooperative, the situation was still critical in terms of potential danger to the officers, especially given that a loaded gun was only 10-15 feet away". The court also stated "[the suspect] was heavier and taller than [the officer]. And critically, [the suspect] was within seconds of a firearm ...".

The above shows that that the Appellate Court contradicted itself by characterizing the exact same fact concerning distance from a weapon

with two contradictory and opposite conclusions (within the same opinion)! To apply different legal standards is one thing. But here, there was no legal reason for the courts contradiction. Specifically, the court emphasized that an argument based on this fact was "weak" when the court discussed "excessive force". But, the court did a 180 degree turn and emphasized the same fact as "critical" when discussing the qualified immunity issue. The distance factor should have been given the same weight under both issues. It is almost as if the court emphasized the importance of this distance factor in order to bootstrap and arrive at its decision in favor of qualified immunity.

As a CCW carrier, you most likely won't be in a position of arresting someone. You are not a police officer. But, you may find yourself in the position of having to hold a person at gun point. In that context, the facts and circumstances and your METHOD OF DISPLAY are going to be used by the legal system to determine if you used "excessive force" or "reasonable force".

For CCW holders, lessons to be learned.

1. You want to avoid the legal system (observe the court's double speak, above).

2. **A gun pointed to the head - was excessive force (under the facts of this case).**

3. **On the other hand, (under the facts of this case), if the officer had held the gun in a low-ready position, with the gun clearly displayed but NOT pointed directly at the suspect, the court viewed that such would have been a superior option for the officer (presumably, not "excessive force").**

4. In your training, you must take into account the facts and circumstances. Pointing a gun directly at someone may be justified in one circumstance. In another, your gun may need to be clearly displayed but NOT pointed directly at the person.

5. Think about the issues, before you get into situations.

End Note:

(1) A. Nathan Zeliff is a California Attorney at Law. He is also a Certified NRA Pistol Instructor, Certified NRA Rifle Instructor; Certified NRA Range Safety Officer; Certified NRA Personal Protection in the Home Instructor; and Approved Firearms Instructor for CCW instruction classes required for original and renewal permit applications in Shasta County and Tehama Counties.

(2) This is not intended to be legal advice. Consult a lawyer in your jurisdiction.