

MEMORANDUM OF LAW

THE ISSUE: Whether the law supports a prosecution for criminal negligent homicide against a police officer, acting in the line of duty and not contrary to police department policies and procedures, who unintentionally shoots and kills a fleeing felon, under the following circumstances: (1) where the suspect is a known heroin dealer who is reasonably believed to be under the influence of illegal narcotics and who has just completed a drug purchase and who may, as a known drug trafficker, be armed and dangerous; (2) where the suspect disobeys the lawful order of the officer to stop, and who continues, after the officer has drawn his gun, to attempt to avoid arrest not only by driving away, but by driving in the direction of the officer; (3) where the officer intended to use the butt of his gun to break the driver's side window and thereby gain access to the interior so that he could exercise control over the vehicle by grabbing the steering wheel or grabbing the suspect; and (4) where the gun discharged as a result of the suspect vehicle's speed and direction of travel, which threw the officer off balance as he moved alongside the vehicle, distorting his aim as he brought the butt of the gun toward the window, and causing the officer to lose control of the gun and to pull the trigger as a non volitional reaction.

THE FACTS: The relevant facts for purposes of this memorandum are essentially set forth in the presentation of the issue, above.

SUMMARY OF THE LEGAL ANALYSIS: This case presents complicated legal issues involving Oregon statutes which have never been interpreted by our appellate courts in the context of a police officer shooting a fleeing felon. These statutes are those defining criminal negligence, ORS 161.085(10), negligent homicide, ORS 163.145(1), and a group of complete defenses known collectively as "justification," ORS 161.190 to ORS 161.275.

It is clear that a police officer acting in the line of duty has statutory defenses not available to the ordinary citizen defendant accused of a negligent shooting; it also appears that an officer acting in the line of duty may have constitutional defenses under the Fourth and

Fourteenth Amendments. What legal standards should apply to determine whether an officer, who does NOT intend to use deadly force but nonetheless kills a fleeing felon, acted both with criminal negligence and without justification is the subject of this memorandum. It is suggested that some guidance may be found in the United States Supreme Court and lower federal court opinions in civil rights cases involving claims of excessive force by police officers.

OREGON STATUTORY LAW

"A person commits the crime of criminally negligent homicide when, with criminal negligence, the person causes the death of another person." ORS 163.145(1) (1995).

The statute therefore requires that the defendant act with "criminal negligence," and that the defendant's acts constitute both the "cause in fact" and the "legal cause" of the victim's death. *State v. Quinn*, 112 OrApp 608, 616-17 (1992); *State v. Simmons*, 34 Or App 929 (1978); see, *State v. Petersen*, 270 Or 166 (1974). Criminal negligence "means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." ORS 161.085(10). These elements deserve further discussion in light of the facts of the instant case.

The first inquiry must be what acts by the officer coincide with the requisite "mental state" of criminal negligence: is it the intended act of using the butt of his gun to attempt to break the window, or is it the reflexive act of pulling the trigger as he is losing control of the gun? If it is the intended act of using the butt of his gun to attempt to break the window, the State must establish that using a gun butt to break a car window presents "a substantial and unjustifiable risk that the result [the fatal shooting of the suspect or, at least, the weapon firing into the occupied passenger compartment of the vehicle] will occur." ORS 161.085(10).

Under the basic premises of criminal law, a reflexive or "non volitional" act cannot form the basis of criminal liability; alternatively stated, "A bodily movement, to qualify as an act forming

the basis of criminal liability, must be voluntary." LaFave and Scott, Criminal Law, 177 (1972).

These authors go on to explain:

At all events, it is clear that criminal liability requires that the activity in question be voluntary. The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no basis to impose punishment on this basis as to those whose actions were not voluntary. . . .

Just what is meant by the term "voluntary" has caused theorists considerable difficulty. Sometimes a voluntary act is said to be an external manifestation of the will. Or, it may be said to be behavior which would have been otherwise if the individual had willed or chosen it to be otherwise. . . . The Model Penal Code . . . identifies certain movements which are deemed not to be voluntary acts: a reflex or convulsion; those during unconsciousness or sleep; those during hypnosis or resulting from hypnotic suggestion; and others which are not a product of the effort or determination of the actor, either conscious or habitual.

LaFave and Scott, *supra*, at 178-180.

The reports of various experts who have reviewed the facts of the instant case lend considerable scientifically-based support for the officer's claim that he did not consciously or volitionally pull the trigger. Thus, although firing a gun into the passenger compartment of an automobile may well present a substantial risk of a fatality, unless the act of firing the gun was voluntary, no crime is thereby committed.

The discussion now turns to the element of causation, which is a two-part inquiry regarding cause in fact and legal causation. It is submitted that the "cause in fact" portion of the analysis would incorporate the preceding discussion regarding which act by the officer should be used for determining criminal liability. Simply put, pulling the trigger is clearly the "cause in fact" of the suspect's death, but it was not a volitional act which can be used as the basis of criminal liability. The officer's act of using the butt of his gun to attempt to break the window is not the direct "cause in fact" of the suspect's death. Indeed, one could argue persuasively that had the suspect not driven the vehicle in an unlawful effort to escape, that the butt of the gun would have broken the window and the officer would have gained control of the suspect without any resulting injury.

Thus, the facts of this case present a clearly unlawful, intentional and voluntary act on the part of the suspect--attempting to escape arrest by driving his vehicle towards an officer who has drawn his weapon and who has absolutely no duty to retreat--without which act the suspect would still be alive. See, ORS 161.260 (a person may not use physical force to resist an arrest by a peace officer), *State v. Hill*, 298 Or 270 (1984)(automobile may be a "dangerous weapon"), and *Reed v. Hoy*, 909 F2d 324, 331 (9th Cir. 1989)(recognizing that police officers in Oregon have no duty to retreat before using force, including deadly force). The actions of the suspect therefore may constitute an intervening cause which supersedes the officer's actions as the "cause in fact" of the suspect's death, or they may result in a finding of no legal causation.

"The general rule is that tort concepts such as contributory negligence and assumption of the risk are not defenses in a criminal prosecution," *Simmons, supra*, 34 OrApp at 934. The sense of fairness achieved by these concepts, however, has been incorporated by the Oregon Supreme Court under the requirement of legal causation. *State v. Petersen, supra*. *Petersen* involved a manslaughter prosecution arising from a "drag race" where the defendant, who was the driver of one of the vehicles, was charged with the homicide of the passenger in the second vehicle. The Supreme Court adopted the dissenting opinion in the Court of Appeals decision in reversing the conviction. 270 Or at 167-168.

In unusual cases like this one, whether certain conduct is deemed to be the legal cause of a certain result is ultimately a policy question. The question of legal causation thus blends into the question of whether we are willing to hold a defendant responsible for a prohibited result. Or, stated differently, the issue is not causation, it is responsibility. . . . My point is that people frequently join together in reckless conduct. As long as all participants do so knowingly and voluntarily, I see no point in holding the survivor(s) guilty of manslaughter if the reckless conduct results in death [to one of the participants].

State v. Petersen, 17 Or App 478, 495-97 (1974)(Schwabe, dissenting).

The issue of legal causation was applied to a criminal negligent homicide in *State v. Simmons, supra*, and *State v. Quinn, supra*, but the facts in those cases are in no way analogous to the facts at bar. It is submitted that given the totality of the circumstances in the instant case, a finding of legal causation against the officer would be contrary to public policy.

Even if one could articulate a plausible theory for a negligent homicide prosecution against this officer, a successful prosecution must be able to overcome the defenses available in justification of the officer's conduct. Even though the officer did not intend to use deadly force and therefore did not reach the point of forming a belief that such force was necessary, the defense of justification is available.

"*In any prosecution for an offense*, justification as defined in ORS 161.195 to 161.275, is a defense." ORS 161.190 (emphasis supplied); *and compare*, ORS 161.085(10)(defining criminal negligence as failing to be aware "of a substantial and *unjustifiable* risk that the result will occur"). Oregon law provides the following statutory defenses which may be applicable in this case:

1) "[C]onduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by law or by a judicial decree or is performed by a public servant in the reasonable exercise of official powers, duties or functions." ORS 161.195.

2) ORS 161.235(1) explains that a "peace officer is justified in using *physical force* upon another person only when and to the extent that the peace officer reasonably believes it necessary: (1) To make an arrest or to prevent the escape from custody of an arrested person unless the peace officer knows that the arrest is unlawful."

3) "A peace officer who is making an arrest is justified in using the physical force prescribed in ORS 161.235 and 161.239 unless the arrest is unlawful and is known by the officer to be unlawful." ORS 161.245(2).

4) ORS 161.239 states that *deadly force* is justified "only when the peace officer reasonably believes that:

(a) The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person; or

* * * *

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force; or

(d) The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; or

(e) The officer's life or personal safety is endangered in the particular circumstances involved."

There is no appellate case law in Oregon which has interpreted ORS 161.235(1)(officer's use of force to make an arrest) or ORS 161.239(officer's use of deadly force to make an arrest) in connection with the criminal prosecution of an officer, i.e., when these statutes were raised as a defense. However, both common sense and the basic premise of criminal liability that requires a volitional act would seem to make ORS 161.239 inapplicable to the facts at issue. This holds so long as ORS 161.239 requires proof that the officer formed a reasonable belief and acted with a conscious intent to use deadly force. Application of ORS 161.235(1) is also suspect because the officer did not use physical force "upon another person" by the act of trying to break the car window with the butt of his gun.

If neither of these two statutes apply based on the facts, one is left with the more generalized justification defense set forth in ORS 161.195: "[C]onduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by law . . . or is performed by a public servant in the *reasonable exercise* of official powers, duties or functions." (emphasis supplied). Analyzing the officer's conduct under this statute and Oregon law reveals the following: (1) The officer had probable cause to arrest the suspect for a felony; (2) The officer had a legal duty to arrest the suspect, and was not required to simply stand by and allow the suspect to escape, and then seek an arrest warrant; (3) When the suspect chose to disobey the officer's order to stop, the officer had a legal right to use some degree of force to prevent escape and make the arrest, see ORS 161.245(2); (4) When the suspect chose to drive his vehicle towards the officer, the officer had no duty to retreat, *Reed v. Hoy, supra*, 909 F2d at 330-331.

The issue thus becomes whether, under the totality of the circumstances, the officer's conduct in attempting to use his gun butt to break the window and thereby prevent the escape and make the arrest was a "reasonable exercise" of his official powers and duties. ORS 161.195. There is no Oregon case law on point, and the most analogous cases are the civil rights actions for excessive use of force by police officers. These cases are analogous because the courts analyze the officer's conduct to determine if it was "reasonable" under all the circumstances.

FEDERAL LAW

In *Graham v. Connor*, 490 US 386, 109 SCt 1865 (1989), the Supreme Court made clear that in all civil actions for damages under Section 1983 based on a claim of excessive use of force by police, resulting in death or less serious injury to the suspect, the police conduct must be analyzed under the Fourth Amendment's "objective reasonableness standard."

The reasonableness of the degree of force used to effectuate an arrest or prevent an escape "requires proper attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." The question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure." *Graham v. Connor*, 109 SCt at 1872.

"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." *Graham v. Connor*, 109 SCt at 1872. Additionally, the "calculus of reasonableness must embody allowance for the fact 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, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of

the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Graham v. Connor*, 109 SCt at 1872.

Although *Graham* involved conduct by police which could be fairly characterized as intentional or at least "knowing," the Court specifically held "that *all* claims that law enforcement officials have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard," 109 SCt at 1871 (emphasis original). Thus, this standard applies when the officer is alleged to have used excessive force through gross negligence. *Pleasant v. Zamieski*, 895 F2d 272, 275-76 (6th Cir. 1990).

"Gross negligence" is the civil counterpart to "criminal negligence," and its meaning is quite similar, if not equivalent, to the *mens rea* element of negligent homicide. See, *State v. Hodgon*, 244 Or 219, 223 (1966)(discussing meaning of "gross negligence" under former negligent homicide statute), and compare ORS 161.085(10)(defining "criminal negligence"). In *Pleasant v. Zamieski, supra*, a claim of gross negligence arose from the accidental shooting death of Jeffrey Pleasant by Michael Zamieski, a Detroit police officer. The shooting occurred shortly after Pleasant unsuccessfully attempted to steal an automobile located in a bakery parking lot. Zamieski, an off-duty Detroit police officer, was called to the scene by a bakery employee who observed Pleasant's actions.

Zamieski approached the car in which Pleasant was seated. He identified himself as a police officer and showed Pleasant his badge and gun. Zamieski told Pleasant to get out of the car. Initially, Pleasant refused. He then left the car and began to climb over a fence located near it. As Zamieski grabbed Pleasant from behind, Zamieski's gun accidentally discharged, firing a fatal shot into Pleasant's back. *Pleasant v. Zamieski*, 895 F2d 272, 273 (1990). Pleasant's mother filed an action against Zamieski.

On appeal from the jury verdict in favor of officer Zamieski, the court had to determine whether Zamieski's actions in the course of his attempt to arrest Pleasant were objectively reasonable under the circumstances. This first involved determining whether Zamieski's decision

to draw his gun at the scene was reasonable. Next, the court had to determine whether Zamieski's decision not to return his gun to its holster before trying to prevent Pleasant's escape was reasonable. *Pleasant v. Zamieski*, 895 F2d at 276.

The court held that even though Pleasant did not pose a threat to Zamieski or anyone else, it was not unreasonable for him to draw his gun. This holding was based on the fact that the incident occurred at night, that it was a felony, and that Zamieski did not know if Pleasant had anything in the car with him. The court was careful to note that it could not use the wisdom of hindsight to judge the officer's actions nor could it assess the practical difficulties of attempting to evaluate the suspect's dangerousness. *Pleasant v. Zamieski*, 895 F2d at 276.

Next the court ruled that although Zamieski should have been aware that Pleasant did not pose a threat, his failure to re-holster his gun was not unreasonable under the circumstances. The court explained that Zamieski had little time to react and, had he taken the time to put his gun away, Pleasant would have escaped. Finally, the court stated that while the consequences of Zamieski's actions were, by accident, tragic, they were not objectively unreasonable. *Pleasant v. Zamieski*, 895 F2d at 277.

It is submitted that the conduct of the officer in the case at bar was objectively reasonable under the totality of the circumstances; or, alternatively stated, that the officer's conduct was a "reasonable exercise" of his official powers and duties, ORS 161.195. Indeed, it is difficult to see how the State could maintain a criminal prosecution against an officer who acted in a constitutionally permitted manner; i.e., the Fourth Amendment itself may be the basis of a defense for an officer charged with a crime involving a claim of excessive force employed in the line of duty.

Most of the public criticism of this officer's conduct has arisen from erroneous assumptions that the officer had a duty to retreat rather than use any force to attempt to prevent the suspect's escape, or that the officer could have used alternative measures to effect the arrest, such as applying for an arrest warrant and catching the suspect later, presumably when the suspect was in a less-resistant mood.

The Ninth Circuit has made it clear in a recent case, which affirmed a summary judgment in favor of the defendant officers in a fatal shooting incident, that officers are not obliged by the Fourth Amendment to use less intrusive alternatives during a confrontation with a suspect. *Scott v. Henrich*, 39 F3d 912, 915 (9th Cir. 1994).

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable. 39 F3d at 915 (emphasis original).

Under the exigencies of the situation, it was reasonable for the officer in the instant case to use the only tool available to him--the butt of his gun--to attempt to break the window and thereby gain control of the vehicle and the fleeing felon. The fatal shooting would not have happened but for the suspect unlawfully and intentionally driving his vehicle towards the officer as he attempted to escape arrest. What occurred may be tragic, but the officer's conduct was objectively reasonable under the Fourth Amendment and was justified under Oregon law. No law supports a criminal prosecution of this officer for any offense.