

JONES & MAYER

Attorneys at Law
3777 N. Harbor Blvd.
Fullerton, CA 92835

Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

CLIENT ALERT MEMORANDUM

To: All Police Chiefs and Sheriffs

From: Martin J. Mayer, Esq.

QUALIFIED IMMUNITY DENIED WHEN FORCE IS USED AGAINST NON-THREATENING PERSONS

On July 11, 2012, the Ninth Circuit U.S. Court of Appeals upheld the denial of qualified immunity for police officers who fired pepperballs into a crowd of partygoers who posed no threat to them. In the case of Nelson v. City of Davis, 2012 DAR 9528, the court ruled that the use of force was unreasonable and violated “clearly established” constitutional rights.

Facts

In April, 2004, approximately 1,000 people gathered at an apartment complex for the annual “Picnic Day” festivities at the University of California at Davis. When officers observed numerous traffic violations and extreme congestion on Cantrill Drive, where the apartment complex was located, City of Davis Police Sgt. John Wilson instructed officers to issue parking tickets to vehicles illegally parked. Officers eventually moved into the party to begin citing individual students for underage drinking.

Sgt. Wilson contacted the owner of the apartment complex and reported his observations which, in addition to the large

number of attendees and the underage drinking, included seeing individuals rocking a car and hearing bottles breaking. In response to this report, the owner requested that Wilson order non-residents to leave the complex.

Wilson and the other officers present began individually informing those around the fringes of the crowd that they were trespassing and that it was necessary for them to leave, but that method proved ineffective to disperse the nearly 1,000 partygoers.

After requesting and receiving backup from various law enforcement agencies including the U.C. Davis Police Department, 30 to 40 officers assembled in riot gear at the southwest corner of the apartment complex and prepared to disperse the crowd. U.C. Davis Officers Barragan, Chang and Garcia, were among these officers and were armed with pepperball guns.

The officers gathered in front of a breezeway in the apartment complex that was described as a “very narrow and confined space.” A group of fifteen to

twenty persons had congregated in this breezeway on the ground floor, including Nelson and his friends. The students were attempting to leave the party but the police blocked their means of egress and did not provide any instructions for departing from the complex.

At various times the students called out to the police, asking the officers to inform them what they wanted the students to do, and repeatedly raised their hands to show their willingness to comply. When the partygoers failed to disperse, Wilson ordered his team to “disperse them,” at which point Barragan, Chang and Garcia shot pepperballs towards Nelson’s group from a distance estimated by various parties to have been 45 to 150 feet away. No warning that force was to be used was given, which could be heard by the students.

A pepperball launched from one of the officers’ guns struck Nelson in the eye. Nelson suffered temporary blindness, and “a permanent loss of visual acuity,” and endured “multiple surgeries to repair the ocular injury he sustained.” Additionally, as a result of his injury Nelson was forced to withdraw from U.C. Davis due to the loss of his athletic scholarship.

Nelson filed suit in district court under 42 U.S.C. § 1983 alleging, among other things, a violation of his Fourth Amendment right to be free from unreasonable seizure. The district court found that a constitutional violation had occurred and that the officers were not entitled to qualified immunity from civil liability. The court of appeal affirmed that decision.

Seizure of Nelson

“The officers first contend that Nelson was not seized under the Fourth Amendment.

We reject this argument. A person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied.”

“In this case, the U.C. Davis police officers took aim and intentionally fired in the direction of a group of which Nelson was a member. Nelson was hit in the eye by a projectile filled with pepper spray and, after being struck, was rendered immobile until he was removed by an unknown individual. Nelson was both an object of intentional governmental force and his freedom of movement was limited as a result. Under these facts, Nelson was unquestionably seized under the Fourth Amendment.”

“To constitute a seizure, the governmental conduct must be purposeful, and cannot be an unintentional act which merely has the effect of restraining the liberty of the plaintiff.” The Court held that “the intentionality requirement is satisfied when the termination of freedom of movement [occurs] *through means intentionally applied.*” (Emphasis in original.)

“Regardless of whether Nelson was the specific object of governmental force, he and his fellow students were the undifferentiated objects of shots intentionally fired by the officers in the direction of that group. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson’s person as well as the termination of his movement. Nelson was therefore intentionally seized under the Fourth Amendment.”

As to the defendants' contention that they didn't intend to target Nelson, "(w)hether the officers intended to subject the students to a shower of pepper spray via area contamination or intended to hit them with the pepperball projectiles themselves, the officers intentionally directed their use of force at the students."

The Seizure was Unconstitutional

"A seizure results in a constitutional violation only if it is unreasonable. *Graham v. Connor*, 490 U.S. 386 (1989). Defendants contend that any seizure here did not meet that standard. The determination of unreasonableness requires us to decide "whether the totality of the circumstances justified a particular sort of . . . seizure. . . ."

"When balancing the degree of force used against the governmental interests, "it is the *need* for force which is at the heart of the [analysis]." In addition, the amount of force used is relevant to the analysis and the court held that, "we have previously rejected the contention that the use of pepper spray is a "minimal" intrusion, due to the immediacy and "uncontrollable nature" of the pain involved." As such, said the court, "the possibility of serious injury was apparent to the officers at the time of the shooting."

The court concluded that, "both the risk of harm and the actual harm experienced by Nelson were significant and must be justified by substantial government interests. To evaluate the need for the government's use of force against Nelson we consider a number of factors, including "the severity of the crime at issue, whether . . . [Nelson] pose[d] an immediate threat to the safety of the officers or others, and whether he . . . actively resist[ed] arrest or attempt[ed] to evade arrest by flight."

The court ruled that no one was charged with a crime and, even the nature of the crime which might have been charged was a trespass, it was nothing but a minor misdemeanor. "The fact that Nelson and his friends did not commit any chargeable offense or, at most, a misdemeanor, weighs heavily against the defendants' use of force but does not necessarily in itself determine the outcome of the reasonableness analysis."

"We must also consider whether the officers reasonably perceived Nelson and his friends as posing a threat to the officers' safety or the safety of other civilians, regardless of whether they ultimately determined that no one had engaged in criminal conduct." After analyzing all of the evidence, including the officers' reports, the court found that "the undisputed facts support the conclusion that the officers did not reasonably believe Nelson or any of his companions posed a threat."

"These individuals were observed prior to the officers' use of force and were seen not to be engaged in any violent conduct. Nonetheless, the projectiles were launched towards them. Under these circumstances, the general disorder of the complex cannot be used to legitimize the use of pepperball projectiles against non-threatening individuals."

The court also concluded that there was no "active" resistance by Nelson or the others. "(E)ven if Nelson heard and was in non-compliance with the officers' orders to disperse, this single act of non-compliance, without any attempt to threaten the officers or place them at risk, would not rise to the level of active resistance. There is therefore no justification for the use of force to be found in the third *Graham* factor."

“Finally, we have held that the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test.”

Qualified Immunity

The court concluded that qualified immunity from civil liability was not appropriate in this case since, as a result of many court decisions, “any reasonable officer . . . would have been on notice prior to April 2004 that the application of pepper spray to individuals such as Nelson and his associates, whose only transgression was the failure to disperse as quickly as the officers desired, would violate the Fourth Amendment.”

“Thus, just as our prior cases provided notice to all reasonable officers that targeting Nelson and his group with a projectile weapon with concussive force that could cause serious physical injury *or* targeting them with pepper spray was unreasonable under the Fourth Amendment, our precedents make it equally clear that utilizing a weapon against Nelson’s group that combined *both* of these forms of force amounted to a constitutional violation.”

HOW THIS AFFECTS YOUR AGENCY

The court concluded that “a reasonable officer would have known that firing projectiles, including pepperballs, in the direction of individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and who engaged in only passive resistance, was unreasonable.”

The analysis by the court is very detailed and highlights, once again, the need for constant training of officers in the use of force. The need for officers to articulate when and why the use of force is justified, as well as justifying the nature of the force used, must be constantly reinforced. Reports, and investigations of the use of force, must be detailed and must set forth these criteria in order to avoid agency, as well as personal, liability.

Securing advice, guidance and training from the agency’s attorney is an on-going need. As always, if you wish to discuss this case in greater detail, feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

Information on www.jones-mayer.com is for general use and is not legal advice. The mailing of this Client Alert Memorandum is not intended to create, and receipt of it does not constitute an attorney-client relationship.