

The Local Government LIABILITY BEAT



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UNITED STATES SUPREME COURT CLARIFIES “CLEARLY ESTABLISHED LAW” FOR QUALIFIED IMMUNITY IN DEADLY FORCE

By Jack Ryan, Attorney, Legal & Liability Risk Management Institute

In a per curiam decision the United States Supreme Court has directed the lower courts that in denying qualified immunity to officers, they must consider the particularities of the case rather than relying on general legal principles as providing officers with clear law [notice] governing their actions.

The case, *White v. Pauly*¹ involved a case where three officers were dispatched to a road rage incident on a highway near Santa Fe, New Mexico. Two women reported that Daniel Pauly was likely an intoxicated driver as he was “swerving all crazy.” The women followed Pauly for a distance with their high beams on, causing Pauly to pull over and confront the women. The court described the encounter as brief and non-violent, after which Daniel Pauly drove a short distance to a secluded house he shared with his brother, Samuel Pauly.

Officer Truesdale initially responded to the off-ramp where the confrontation took place and spoke with the women. Truesdale was joined at the off-ramp by Officer Ray White and Officer Michael Mariscal. After discussing what occurred the officers decided that two of them would respond to the Pauly home, while White would remain at the off-ramp in case Daniel Pauly returned.

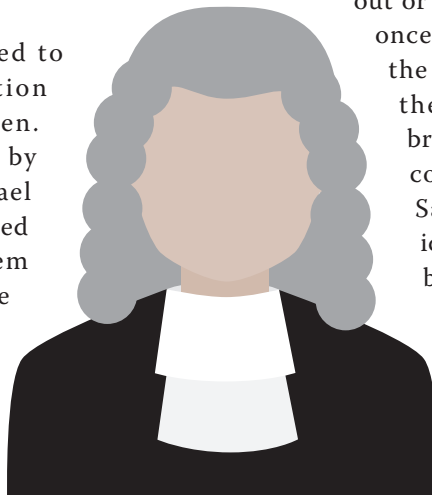
The Court described that when Truesdale and Mariscal arrived at the address and found two houses,

only one of which had lights on. The Court noted that when Truesdale and Mariscal arrived they approached the house with the lights covertly for officer safety and they did not use their vehicles’ emergency lighting in approaching the address.

The Court described the encounter at the house as follows:

Upon reaching the house, the officers found Daniel’s pickup truck and spotted two men moving around inside the residence. Truesdale and Mariscal radioed White, who left the off-ramp to join them. At approximately 11 p.m., the Pauly brothers became aware of the officers’ presence and yelled out “Who are you?” and “What do you want?” In response, Officers Mariscal and Truesdale laughed and responded:

“Hey, (expletive), we got you surrounded. Come out or we’re coming in.” Truesdale shouted once: “Open the door, State Police, open the door.” Mariscal also yelled: “Open the door, open the door.” The Pauly brothers heard someone yelling, “We’re coming in. We’re coming in.” Neither Samuel nor Daniel heard the officers identify themselves as state police. The brothers armed themselves, Samuel with a handgun and Daniel with a shotgun. One of the brothers yelled at the police officers that “We have guns.” The officers saw someone run to the back of the house, so Officer Truesdale



positioned himself behind the house and shouted “Open the door, come outside.” Officer White had parked at the first house and was walking up to its front door when he heard shouting from the second house. He half-jogged, half-walked to the Paulys’ house, arriving “just as one of the brothers said: ‘We have guns.’” When White heard that statement, he drew his gun and took cover behind a stone wall 50 feet from the front of the house. Officer Mariscal took cover behind a pickup truck. Just “a few seconds” after the “We have guns” statement, Daniel stepped part way out of the back door and fired two shotgun blasts while screaming loudly. A few seconds after those shots, Samuel opened the front window and pointed a handgun in Officer White’s direction. Officer Mariscal fired immediately at Samuel but missed. “Four to five seconds” later, White shot and killed Samuel. [Citations Omitted].

The real issue raised by the officer conduct, under plaintiff’s version of events in this case, is whether a reasonable officer should have known that the manner in which they initially approached the house and the lack of a clear identification may lead to the Paulys defending their home from intruders, thereby causing the deadly encounter. Note that under the Paulys version of events it was reported that they never heard any of the officers identify themselves as law enforcement.

The District Court denied qualified immunity to all three officers. The United States Court of Appeals for the 10th Circuit agreed with the District Court.

With respect to Truesdale and Mariscal the 10th Circuit held:

As to Officers Mariscal and Truesdale, the court held that “[a]ccepting as true plaintiffs’ version of the facts, a reasonable person in the officers’ position should have understood their conduct would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force against Samuel Pauly by Officer White.”

The United States Court of Appeals, relying on the language of *Tennessee v. Garner* as clearly establishing the law that officers must give a warning where feasible determined that Officer White should not get qualified immunity because he was behind the cover of a stone wall at the time Samuel was shooting and thus would have time to give a warning.

The 10th Circuit “concluded that a reasonable officer in White’s position would have known that, since the

Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon.’

The United States Supreme Court asserted that the 10th Circuit’s finding that the law against Officer White was clearly established, “relied on general statements from this Court’s case law” to include that “where feasible, some warning has been given.”

The United States Supreme Court vacated the denial of qualified immunity for Officer White because the finding that the law was clearly established by the 10th Circuit was based on generalities rather than on whether the law was clearly established based on the particular facts that White faced:

In doing so the Court wrote:

Today, it is again necessary to reiterate the longstanding principle that “clearly established law” should not be defined “at a high level of generality.” *Ashcroft v. al-Kidd*, 563 U. S. 731, 742 (2011). As this Court explained decades ago, the clearly established law must be “particularized” to the facts of the case. *Anderson v. Creighton*, 483 U. S. 635, 640 (1987). Otherwise, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Id.*, at 639 . . . The panel majority misunderstood the “clearly established” analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment.

The Court noted the impact of just citing to *Garner* and *Graham* as clearly establishing the law in force cases directing:

Instead, the majority relied on *Graham*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, “general statements of the law are not inherently incapable of giving fair and clear warning” to officers, *United States v. Lanier*, 520 U. S. 259, 271 (1997), but “in the light of pre-existing law the unlawfulness must be apparent,” *Anderson v. Creighton*, *supra*, at 640. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside “an obvious case.” [emphasis added].

In finding that the law was not clearly established the Court asserted:

Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

It is noted that each officer, as the law sits today, takes the scene as he or she finds it and does not have to re-investigate before using force or taking other enforcement action but can rely on the belief that other involved officers have acted properly.

It is important to note that the Court expressed no opinion as to whether it's decision impacted the denial of qualified immunity for Truesdale and Mariscal. More importantly, the Court did not let White completely out of the case.

The Court wrote:

On the record described by the Court of Appeals, Officer White did not violate clearly established law. The Court notes, however, that respondents contend Officer White arrived on the scene only two minutes after Officers Truesdale and Mariscal and more than three minutes before Daniel's shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force. Brief in Opposition 11, 22, n. 5. This Court expresses no position on this potential alternative ground for affirmance, as it appears that neither the District Court nor the Court of Appeals panel addressed it. The Court also expresses no opinion on the question whether this ground was properly preserved or whether—in light of this Court's holding today—Officers Truesdale and Mariscal are entitled to qualified immunity.

Bottom Line

Plaintiff cannot assert that the law is clearly established with prior decisions that provide general statements of law, but instead must

establish a more particularized principle of law based on the circumstances the officer faced.

Officers should recognize that where officers, through improper conduct, do not properly alert a subject that law enforcement is present when such a warning was feasible, summary judgment and qualified immunity may be denied.

Note that feasibility is a combination of timing and the circumstances the officer is being confronted with to include the immediacy of the threat.

An officer generally takes the scene as they find it and are not required to second-guess the actions of officers who are already present to make sure they have acted properly.

If plaintiff can establish that the officer was in a position to observe or otherwise know that officers that arrived first did not do it right, then officer may lose qualified immunity because of their knowledge.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

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Endnotes

1. *White v. Pauly*, 580 U.S.____, slip opinion 16-67 (2017).





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