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Constitutional Gut-Check: If an Officer Shoots an Individual Who Escapes, Is it a Seizure?

By Allison K. Riddle

MARCH 27, 2020. The Supreme Court will hear oral argument this term in *Torres v. Madrid*. The case raises the compelling question whether one who has been shot by a police officer has been seized for Fourth Amendment purposes if they are still able to "flee" the scene. *Torres* originated as a complaint filed in federal district court alleging excessive use of force by the police in violation of 42 U.S.C. § 1983. The district court granted summary judgment for the officers, ruling that the officers had not seized the complainant because she was able to flee the scene after being shot. The Tenth Circuit affirmed the decision, and the Supreme Court granted cert on December 18, 2019.

In July of 2014, New Mexico state police officers went to an apartment complex to locate a suspect involved in an organized crime ring. Upon arrival, the officers saw two women standing in the parking lot near a car. As the officers approached, one of the women ran into an apartment while the other got in the car and started its engine. The woman in the car was the complainant, Roxanne Torres, who, at the time, was "trip[ping] . . . out" on methamphetamines and believed the officers were carjackers. As Ms. Torres drove forward, the officers, fearing they were going to be struck, shot at her. Two bullets hit Ms. Torres in the back. Ms. Torres crashed into another vehicle, got out of her car, stole a parked running vehicle, and drove to a hospital seventy-five miles away. She was subsequently arrested and pled no contest to three crimes: aggravated fleeing from a police officer, assaulting a police officer, and unlawfully taking a motor vehicle.

In October of 2016, Ms. Torres sued the officers for use of excessive force. The officers challenged this claim, arguing that because Ms. Torres was able to escape, she was never "seized," so there could be no Fourth Amendment excessive force claim. The district court agreed with the officers and dismissed the case. The Tenth Circuit affirmed this decision holding that police officers who shoot a fleeing person do not "seize" the person unless the officers' bullets succeed in terminating movement. The Supreme Court granted an appeal on the following question: "Whether an unsuccessful attempt to detain a suspect by use of physical force is a 'seizure' within the meaning of the Fourth Amendment. . . or whether physical force must be successful in detaining a suspect to constitute a 'seizure'."

Shockingly, federal courts cannot agree on whether physical force without a submission to authority constitutes a seizure, even in the context of an excessive force claim under § 1983. *See Nelson v. City of Davis*, 685 F.3d 867, 873-74 (9th Cir. 2012) (holding that any application of physical force is a seizure, even if there is no submission by the individual); *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010) (holding

that no seizure occurred, even when the suspect was shot, because he was still able to evade capture); *Moore v. Indehar*, 514 F.3d 756, 758-59 (8th Cir. 2008) (finding that seizure occurred when the individual was stuck by an officer's bullet, even though he fled to an emergency room); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003) (holding that a seizure occurred when an individual was shot by police but did not stop). The existence of a circuit court split is hard to understand in light of Supreme Court precedent establishing that the use of physical force constitutes a seizure. *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (reasoning that any application of physical force meant to restrain is a seizure even if the individual escapes). Only when physical force is absent does the seizure analysis examine (1) whether there was a "show of authority" and (2) whether the individual submitted to it . *Hodari D.*, 499 U.S. at 626. *See also United States v. Stover*, 808 F.3d 991, 995 (4th Cir. 2015). Virginia's courts recognize this fundamental principal. *Hill v. Commonwealth*, 297 Va. 804 (2019) (holding that an individual was seized when an officer put hands on him and pulled him from his vehicle); *Motley v. Commonwealth*, 17 Va. App. 439, 443 (1993) (finding a seizure occurred when the defendant complied with the officer's command to 'stop').

Firing a bullet is a use of force undeniably meant to seize an individual. Whether the individual is able thereafter to walk away should be immaterial. The Supreme Court has clearly ruled that an individual is seized whenever law enforcement uses physical force. Perhaps *Torres'* procedural posture is complicating the straightforward question of whether a seizure occurs when an officer shoots someone. In addressing excessive force claims under § 1983, the specific constitutional right infringed by the use of force must first be identified. The validity of the claim is then judged by the "specific constitutional standard which governs that right [and not] some generalized excessive force standard." *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989). Ms. Torres' excessive force claim, therefore, must be judged by the Fourth Amendment's standards for seizures. Whether the question is raised in a civil § 1983 action for damages or through a motion to suppress unlawfully seized evidence in a criminal case, the Fourth Amendment's requirements are the same. Under existing Supreme Court precedent, it seems clear that Ms. Torres was seized when the officers shot at her. Thus, the focus of the case should be on the lawfulness of that seizure, not whether it occurred.

The Founders designed the Fourth Amendment to protect citizens from arbitrary intrusions by the government. The right extends to all unreasonable seizures, even those which are ultimately not successful. If an individual who has been unlawfully shot by police officers is not able to invoke the protections of the Fourth Amendment, then the Founders have failed to secure our right to be free from unconstitutional governmental intrusions. We hope the Supreme Court agrees.

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