The Bill Blackwood
Law Enforcement Management Institute of Texas

Police Pursuits after Scott v Harris: Wild Problem

A Leadership White Paper
Submitted in Partial Fulfillment
Required for Graduation from the
Leadership Command College

By
Jon D. Felty

Allen Police Department
Allen, Texas
September 2011

ABSTRACT

In any given year, one third of police officer line of duty deaths are a result of auto crashes. Many of those car crashes start out as a police pursuit (Officer Down Memorial Page Inc., 2011a). For over 50 years, police agencies have been training and developing policy to better protect police officers and the public. There have been a handful of Supreme Court cases that have served as the foundation of police pursuit policy. In general terms, if a felony or DWI had occurred, the officer would engage in a police pursuit. If the offense allowed deadly force to be used, then ramming techniques would be allowed to take the offender into custody. It is important to note that all throughout this period of time, a traffic offense would not rise to the standard that a police pursuit would be used to make a lawful arrest. It is also important to note that no PIT (Police Immobilization Technique) would be used by an officer who had not been thoroughly trained in performing the technique.

In 2007, the Supreme Court case of *Scott v. Harris* turned 50 years of training and policy development upside down. In this one case, the court handed down a decision that allowed police pursuits for traffic violations and allowed PIT maneuvers to terminate an offense where deadly force would not be allowed by law. The following is an attempt to examine how this change affects law enforcement training and policy development for the future. This clearly changes the way police officers will conduct police pursuits and will endanger citizens as well. The development and implementation of police training and policy are forever changed by this one decision. Now, a police officer can make the decision to take someone out using the police vehicle as an instrument of force for virtually any violation of the law.

TABLE OF CONTENTS

Page

INTRODUCTION

In any given year, police officers experience approximately one quarter of all line of duty deaths in car crashes. Police pursuits account for one in five line of duty deaths when considering the total car crash number (Officer Down Memorial Page Inc., 2011b). A pursuit starts when an officer attempts to arrest an offender and the person flees using a vehicle. The public is aware of the danger police pursuits present due to the wide media coverage from in-car video or police helicopters that often assist. A citizen can become a victim if the fleeing offender crashes into them while trying to escape.

Police officers have a sworn duty to protect the public while performing their apprehension function in law enforcement. That duty should be balanced to the greater good of public safety in the conduct of police activity. The police officer has the discretion to pursue and arrest violators as long as that action does not endanger the public in an unreasonable manner. The public should expect discretion to be limited when the officer cannot control the outcome of the arrest due to the circumstances. Police departments all over the world have developed policies that attempt to balance the act of an officer pursuing a fleeing offender. An examination of some of these policies will attempt to determine if too many or too few limits effect the actions of the police officer.

Police pursuits are both dangerous and prudent in that it is a tool officers use to apprehend the most violent of offenders. Pursuits do present danger to the public who are in the area of the arrest. However, pursuits also protect the public in the apprehension of the most violent of offenders. Police departments should, by policy, protect officers in the conduct of offender pursuits and apprehension.

POSITION

The profession of law enforcement in a contemporary society has grown increasingly more complex and difficult. Police officers strive to deliver professional police service in a climate of violence, disrespect and negative publicity. In light of this climate, members of society expect police to pursue and capture law violators. The public thinks police officers should engage in pursuit of violent criminals, arrest, and prosecute those criminals to the fullest extent of the law.

The area of professional police service under constant scrutiny is the subject of police pursuits. For many years, police pursuits have been a subject of academic study and legal review by the appellate court system at all levels. The public agrees that police pursuits are a vital part of policing (Alpert & Smith, 2008). The disagreement comes in the execution of policy and conduct of the pursuing officer. Now police pursuits are becoming a topic of scholarly study and intense legal review for liability issues (Hicks, 2007).

When a police officer uses a firearm to shoot a felon, it is considered deadly force. It is much less clear if it is to be considered deadly force when a police officer uses a vehicle to stop a felon. If a police officer uses a police vehicle in a high speed chase, Alpert and Anderson (1986) have stated, “When a police officer engages in a high speed chase in a high powered police car that vehicle becomes a potentially deadly weapon” (p. 2). It is important to note that police use of force cases closely parallel the same issues as police pursuit cases. Therefore, many of the same legal tactics and issues are used in these cases as they work their way through the appellate court system. Another issue that is often overlooked in police pursuits is that they occur

when an officer is in an intense, stressful driving situation where mental decisions are often not the best.

On February 10, 1941, Milton Elmore was driving his milk wagon northbound on Center Street in Owensboro, KY. Wren Shearer was being pursued by the Owensboro police at an approximate speed of 75 miles per hour. Shearer struck Elmore and he was seriously injured. Elmore and the Ideal Pure Milk Company sued the Owensboro Police Department and were awarded damages for property and injury in excess of $11,000.00. Hence, the first case of a police pursuit verdict in *Chambers v Ideal Milk Company* (1942).

In the 1960s and 1970s, little attention was paid to the police pursuit issue. Most police departments' officer training focused on driver skills and how to drive emergency vehicles, but there was little attention on the technical aspects. Similarly, little attention was given to crashes that resulted in injury or death. In the late 1960s, a group of emergency room physicians began a movement known as Physicians for Automotive Safety. This group held that over one-half of all police pursuits resulted in a crash, many ended with serious injury, and one in five police pursuits resulted in death (Fennessy, Hamilton, Joscelyn, & Merritt, 1970). This research was not based on valid data. Even so, this finding became of great interest to major police departments who were already concerned with police pursuits all across the United States. This lead to a second attempt to research police pursuits in the 1980s. The lead agency in this effort was the California Highway Patrol (CHP). In 1983, CHP released a study showing that in California, one in 30 pursuits resulted in a crash, one in ten ended in injuries, and one in a 100 may result in death (CHP, 1983).

While the CHP study had many errors and was not based on accurate data it did show a major difference from the earlier Physicians study. The physicians held that police pursuits were very dangerous. The CHP study concluded that "a very effective technique in apprehending pursued violators may be simply to follow the violator until he voluntarily stops or crashes" (CHP, 1983, p. 4). As the research methods improved throughout the late 1980s, some clearer findings began to emerge. First, it was found that most fleeing suspects were not violent or dangerous felons. Second, most suspects who did flee were young males who had committed minor crimes and then made the bad decision to flee (Alpert & Fridell, 1992).

The 2007 United States Supreme Court decision in *Scott v Harris* changed the direction of previous decisions over a span of 25 years. For over two decades, the standard was that deadly force could not be used to seize a fleeing suspect unless the suspect poses a significant threat of death or serious bodily injury to the officer or another. Therefore, Police Immobilization Techniques (PIT) and the use of a vehicle as an instrument of force were considered as deadly force. This type of force would not be reasonable for minor violations or traffic related offenses, particularly if the fleeing suspect was a known person to the police. The focus of this paper will consider the issues of police agencies that always pursue, pursue with limits governed by policy and law, and police agencies that pursue based on individual officer discretion, again governed by policy.

The 1985 Supreme Court case of *Tennessee v Garner* set the standard upon which police pursuit policy was established. In short, the amount of force used in police pursuits must be reasonable and pass the reasonableness standard. Also, the use of

deadly force must include threat to human life, or that force may cause serious bodily injury or death to the fleeing suspect or the public.

Police agencies across the United States have spent the last 20 years in the development and updating of their vehicle pursuit policies. Most vehicle pursuit policies are based on some common factors. An officer would pursue only if there is a felony offense or Driving While Intoxicated. An officer would pursue only if there is clear danger to the public if the offender is not taken into custody. An officer would pursue with deadly force if the offense would allow that level of force absent a pursuit. An officer would employ PIT or any other ramming technique only if a deadly force situation were present. And in any pursuit, a police supervisor must be aware of and involved in the management of the incident.

During this time the appellate courts refined the issues of liability to the police agency and to the individual police officer. Liability is a complex issue that depends upon the circumstances of the incident. The police agencies may incur liability if they do not have a written vehicular pursuit policy. Also, training on policies must occur on a consistent basis. Police driver training must also be used to train officers in the use of a police vehicle as an instrument of force and high speed driving to improve driving skill level. As for the police officer as an individual, again it depends highly on the circumstances of the incident. In simplest terms the officer must have used reasonable force for the lawful seizure of the suspect. If the officer's actions pass the reasonableness doctrine, they are not held personally liable for injury or damage to the suspect also known as qualified immunity. The reasonable test is if another police

officer would do the same thing, given the same set of circumstances. At best, this is a difficult standard to apply in court before a jury of non-police officers.

Based on the period of time and numerous court cases involved in the development of these policies, one could assert that any major departure from this line of procedure would be a major development. That is exactly what happened when the United States Supreme Court handed down the decision on the aforementioned case of *Scott v Harris* (2007). Simply stated, this case changed the use standard of deadly force. This case also changed the deadly force standard in that, now, pursuits can take place when there is not a clear danger to life or serious bodily injury to any person. Therefore, if a police agency and officer follow their written policy that would allow pursuits for minor or traffic offenses that would be an acceptable pursuit according to the United States Supreme Court. An often cited case regarding police liability was that of *County of Sacramento v Lewis* (1998), as this case resulted in the "shocking to the conscience" standard that left many courts uncertain how to apply this measure. In short, the standard asserts that an officer's conduct must be so negligent that it shocks the conscience of any person.

The public expects the police to pursue law violators because they want justice served to those who choose not to obey the law. If a person sees another with their stolen property the expectation is the police will follow and apprehend that person. The problem comes when force is used to make the apprehension. An officer would be using excessive force if he rammed a rider on a stolen bicycle, yet the victim might want the rider rammed in order to retrieve the stolen property. Often this type of force is used. As long as no one is injured, the arrest is made, the property is returned and all

parties are satisfied. Yet, this is an unlawful use of force. Ramming a cyclist on a stolen bicycle with a vehicle is deadly force in a non-deadly force situation. Therefore, police Code of Criminal procedures and department pursuit policy must govern the appropriate use of an officer's force engaged in a vehicle pursuit.

COUNTER POSITION

On the evening of March 29, 2001, a deputy of a rural (Georgia) sheriff's department was running radar on Highway 34. He observed a motorist (Victor Harris) going 73 mph in a 55 mph speed zone. The deputy used his overhead lights to alert the motorist to slow down. The deputy decided to follow Harris and attempt a traffic stop for the speeding. As Harris sped away he crossed double yellow lines and ran a red traffic light in an attempt to keep distance between him and the deputy. The deputy told dispatch he was pursuing a fleeing suspect. The deputy radioed the license plate number to dispatch and learned that the vehicle was owned by Victor Harris. Because of the speeding offense and the name and address of the vehicle's owner being known this pursuit was a violation of Coweta's pursuit policy. Another deputy (Scott) in the area has heard the radio traffic and joins the pursuit of Harris. Deputy Scott does not know the only offense is speeding and drives his police vehicle at speeds over 100 mph to catch up with the chase. Harris pulls through a pharmacy parking lot and strikes a police vehicle that attempts to block him in. Harris again entered the highway and drove at high speeds, crossed many double yellow lines, and ran several red traffic lights. Deputy Scott now becomes the primary pursuit officer as deputy #1's car stalls. Deputy Scott asks for permission from the on duty shift commander to PIT (ramming technique) Harris even though he had never been trained in the PIT technique. The shift

commander states over the radio “go ahead and take him out. Take him out”. The shift commander was aware that the deputy and other persons were not in immediate danger because of this pursuit, as it now was in a rural area.

While driving approximately 90 mph, Deputy Scott rammed the rear quarter panel of Harris. Harris lost control, rolled down an embankment and crashed. As a result of the crash, Harris was rendered a quadriplegic. Harris later filed suit in federal court, alleging excessive force resulting in an unreasonable seizure under the Fourth Amendment. The appellate court denied Scott’s claim of qualified immunity as a deputy. The court felt that Scott’s use of force was deadly force for a non-deadly force incident. The United States Supreme Court granted a writ of certiorari that maintains Deputy Scott had not been given fair warning that his conduct was unlawful (*Scott v. Harris* 2007). Oral arguments were heard, in car video were reviewed. On April 30, 2007, the United States Supreme Court reversed the denial of the Eleventh Circuit and granted summary judgment to Deputy Scott.

At stake in this case is the question as to whether Harris had his constitutional right to be free from the excessive use of force violated. The standard the court has established in the past requires the view of the injured party in light of the most favorable circumstances. This case relied heavily on the video taken from Deputy Scott’s vehicle. The court agreed that Harris drove in a dangerous and reckless manner and posed a real threat to the public. The opinion stated that Harris’s version of the pursuit is “so utterly discredited by the record (video) that no reasonable jury could have believed him” (Alpert & Smith, 2008 p. 10). Yet, the lower court viewed the same video and found Harris’s claims to be credible as charged in his formal complaint. The only

question remaining was whether the actions of Deputy Scott passed the test of being "objectively reasonable." The fact that the speeding was the offense and the pursuit violated department policy was not an issue with the majority opinion. The force that Deputy Scott used was not found to be deadly force as set out in the case of *Tennessee v Garner.* It was found that the use of force is not an "on and off switch," and each circumstance must be considered in the application of force. The Court's opinion noted that *Garner* did not create a rule but rather "was simply an application of the Fourth Amendment's 'reasonableness' test, to the use of a particular type of force in a particular situation" (Alpert & Smith, 2008, p. 5). The decision was not based on whether Scott used deadly force or excessive force, but if it was reasonable. Because this decision is a major departure from the last two decades of direction regarding police pursuits, the public can now expect police pursuits for a variety of reasons.

The decision found in this case does little to provide protection to the public and may "green light "unrestrained police vehicular tactics in agencies that do not hold a tight control of their officers. The decision clearly asserted that an officer's attempt to stop a fleeing vehicle that endangers the public does not violate the Fourth Amendment, even if it places the violator in danger. In fact, after *Scott v. Harris* (2007), any use of force is justified to stop a fleeing motorist, when there is probable cause to believe they pose a threat to the public. This ruling does not address responsibility of the police agency if an innocent person is injured or killed.

RECOMMENDATION

This decision creates a true dilemma for state courts, appellate courts, police departments, officers, trainers, and police policy makers. Now, law enforcement has

the ability to “take someone out” if they are fleeing in a vehicle and it can be articulated that their actions create a danger to the public or the police officers. In one minority opinion, a justice wrote “Unless the chase occurs below the speed limit on a deserted highway, the use of deadly force to end a motor vehicle pursuit is always a reasonable seizure” (*Scott v. Harris* 2007). Or stated differently, a police officer’s claim to qualified immunity is now unqualified. The public maintains that police should pursue offenders because it serves the good to seize those who break the law. Now the police officer may pursue everyone who flees because they can without fear of any recourse. The public should expect juries to be making the decision as to whether one’s actions are too much or not enough in the establishment of risk. Juries should decide if the crime is too major or too minor to justify killing the fleeing motorist. It would appear that now the fleeing suspect charts the course for what happens next. If actions create danger to the public or the pursing officer, one can expect deadly force to be used against them.

For the last five decades law enforcement agencies have been hard at work developing and fine-tuning vehicle pursuit policies that protect the public and the police officer. Most departments train their officers not to contact a vehicle merely to engage in a vehicle pursuit. Many police departments continue to train officers in the idea that *Scott v. Harris* does not change department policy. More importantly, many police departments train that officers are not authorized to use deadly force against a fleeing suspect absent a felony offense that would meet the old standard found in *Tennessee v*. *Garner* (1985). It is clear that this decision has broad implications for a flood of federal lawsuits. It will most likely not effect action at the state level for negligence actions.

Only time will tell if this decision increases the temptation of young officers to "take out" those who flee for minor offenses. Most interestingly, over 1,300 subjects were asked to view the *Scott v. Harris* video, and over one-half of those agreed with the findings of the court. Yet there were significant views among the subjects across cultural and ideological positions regarding when and why a pursuit should occur (Kahan, Hoffman, & Braman, 2008). The road from 1942 until now has been long and full of bumps, but the public should not expect their police officers to have this sort of legal authority without clear limits to its intended use.

REFERENCES

Alpert, G. P., & Anderson, P. (1986, March). The most deadly force: Police pursuits. *Justice Quarterly, 3,* 1-15.

Alpert, G. P., & Fridell, L. (1992). *Police vehicles and firearms: Instruments of deadly force.* Prospect Heights, IL: Waveland Press.

Alpert, G. P., & Smith, W. C. (2008, June). Police pursuits after Scott v Harris: Far from ideal? *Police Foundation,* 10, 1-15.

California Highway Patrol. (1983). *Pursuit Study.* Sacramento, CA: Author.

Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589 (Ky. App. 1952)

County of Sacramento v Lewis, 523 U.S. 833 (1998).

Fennessy, E., Hamilton, T., Joscelyn, K., & Merritt, J. (1970). *A study of the problem of hot pursuit.* Washington, DC: U.S. Department of Transportation.

Hicks, W. L. (2007). *Police Vehicular Pursuits.* Springfield, IL: Thomas.

Kahan, D.M., Hoffman, D.A., & Braman, D. (2009). Whose eyes are you going to believe? Scott v. Harris and the perils of cognitive illiberalism. *Harvard Law Review: Vol. 122.* Retrieved from http://www.harvardlawreview.org/issues/122/january09/Article_57.php

Officer Down Memorial Page, Inc. (2011a). *Honoring officers killed in 2007*. Retrieved from http://www.odmp.org/search/year?year=2007

Officer Down Memorial Page, Inc. (2011b). *Honoring officers killed in 2009*. Retrieved from http://www.odmp.org/search/year?year=2009

Scott v. Harris, 550 U.S. 372 (2007).

Tennessee v Garner, 471 U.S. 1 (1985)