ILLINOIS DEFENSE COUNSEL
IDC QUARTERLY

Civil Rights Update

Keith B. Hill
Heyl, Royster, Voelker & Allen, P.C., Edwardsville

Police Committed "Seizure" Under Fourth Amendment by Shooting Fleeing Woman

Against a backdrop of increasing national attention to law enforcement's use-of-force, and efforts by state and federal legislators to reform policing, including bills that would eliminate qualified immunity, the United States Supreme Court decided *Torres v. Madrid*, 141 S. Ct. 989 (2021). In *Torres*, the Supreme Court resolved a 30-year circuit split by holding that the application of physical force to the body is a Fourth Amendment seizure—even if the person does not submit and is not subdued.

The Fourth Amendment of the Constitution protects against unreasonable searches and seizures, which begs the question: when exactly does a seizure occur? Prior to its decision in *Torres*, the Supreme Court had provided two conflicting definitions of a seizure. In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Supreme Court held that a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.* at 596-97 (emphasis original). Two years later, in *California v. Hodari*, *D.*, 499 U.S. 621, 626 (1991), the Supreme Court held that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id*. at 626. This difference in interpretation led to a circuit split. In some circuits, the seizure of a person occurs upon contact with intent to restrain (*Hodari D.*), while in others, the seizure required the intended termination of movement (*Brower*). After 30 years, via its ruling in *Torres*, the Supreme Court issued a bright-line ruling on Fourth Amendment seizures.

In *Torres*, New Mexico State Police officers arrived at an apartment complex to execute an arrest warrant. *Torres*, 141 S. Ct. at 994. The officers saw Roxanne Torres standing with another person near a vehicle in the complex's parking lot. *Id*. The officers, who were wearing tactical vests marked with police identification, decided to make contact with Torres and her companion although neither was the subject of the warrant. *Id*. At the time, Torres was experiencing methamphetamine withdrawal. *Id*. As the officers approached the vehicle, the companion left, and Torres got into her car and started the engine. *Id*. Torres claimed she did not notice the officers until one of them tried to open her car door, at which time she believed she was being carjacked and stepped on the gas to escape. *Id*. As she fled, two officers fired 13 shots at Torres to stop her, striking her twice. Torres was arrested at the hospital the following day on a variety of charges. *Id*. Torres subsequently sued the officers for damages under 42 U.S.C. § 1983, accusing them of using excessive force, making the shooting an unreasonable seizure in violation of the Fourth Amendment. *Id*.

The district court concluded that the officers were entitled to qualified immunity, reasoning that the officers had not seized Torres at the time of the shooting and, without a seizure, there could be no Fourth Amendment violation. *Torres v. Madrid*, 769 F. App'x 654, 656 (10th Cir.), *cert. granted,* 140 S. Ct. 680, and *vacated and remanded,* 141 S. Ct. 989 (2021). The Court of Appeals for the Tenth Circuit affirmed on the ground that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." *Id*. at 657. The court relied on Circuit precedent that "no seizure can occur unless there is physical touch or a show of authority….[and] such physical touch (or force) must terminate the suspect's movement…." *Brooks v. Gaenzle*, 614 F.3d 1213, 1223 (10th Cir. 2010).

The Supreme Court took the case to "sort out the confusion" over the definition of a seizure. *Torres*, 141 S.Ct. at 1005 (Gorsuch, J., dissenting). In a 5-3 opinion written by Chief Justice John Roberts, the majority vacated the judgment of the Court of Appeals, concluding that the officers seized Torres even though she did not submit and was not subdued. *Id.* at 1003.

To resolve the circuit split, the Supreme Court first revisited *Hodari D.* According to the *Torres* court, *Hodari D.* articulated two pertinent principles. "First, common law arrests are Fourth Amendment seizures. And second, the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped." *Torres*, 141 S.Ct. at 995.

With those principles in mind, the Court recognized that at common law, as applied to a person, the word seizure meant "laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.* at 995 (citing *Hodari D.*, 499 U.S. at 626).

The Court identified the 1605 *Countess of Rutland's Case*, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605), as the "closest decision" to the circumstances of *Torres*. In that case, serjeants-at-mace executing a writ for a judgment of debt on the Countess of Rutland "shewed her their mace, and touching her body with it, said to her, we arrest you, madam." *Torres*, 141 S.Ct. at 997. Based on that case, the Supreme Court saw no basis for "drawing an artificial line between grasping with a hand and other means of applying physical force to effect an arrest." *Id.* The required seizing of a person can be "as readily accomplished by a bullet as by the end of finger." *Id*. at 997.

The Court stressed that applying the common law rule does not turn every instance of physical contact between the government and public into a Fourth Amendment seizure. *Id*. at 998. The delineating factor is motive. "A seizure requires the use of force with *intent to restrain*." *Id*. The appropriate inquiry is, therefore, whether the challenged conduct objectively manifests an intent to restrain. *Id*. Applying these principles to the facts in *Torres*, the Court held that the officers' shooting applied physical force to Torres's body and objectively manifested intent to restrain her from driving away, and so, the officers seized Torres for the instant that the bullets struck her. *Id*. at 999.

Justice Neil Gorsuch authored the dissent, which Justices Thomas and Alito joined. The dissent argues that the word "seizure" has always meant "taking possession," and accuses the majority of a "schizophrenic reading of the word 'seizure'" in the Fourth Amendment. It notes that the majority accepts that a seizure of an inanimate object requires possession, and a seizure in response to a "show of authority" requires submission to an officer's possession. *Id*. Yet, the majority insists a different rule should apply where an officer "touches" a person.

The dissent points out that the "mere touch" arrest cases relied on by the majority arose from civil debt collection practices in England. There, a bailiff could not break into a home to effect a civil arrest, but could touch a person hiding in his home, often through a window, thereby effecting a civil arrest. *Id.* at 1010-11. Because this mere touch was deemed an arrest, the bailiff was then permitted to break into the home and seize the debtor. *Id.*

The dissent argues that "obscure and long-abandoned" civil debt-collection practices have little relevance to the Fourth Amendment. *Id.* at 1011-12. First, the Fourth Amendment speaks of "seizures," not "arrests." *Id*. Second, nothing suggests that the founders contemplated overriding settled doctrine equating arrests with possession by utilizing the civil debt-collection arrest rule in the criminal law. *Id*. Third, the majority did not cite case law suggesting that hitting a fleeing debtor with an object amounted to an arrest. *Id.* at 1012.

The dissent and the officers proposed a different touchstone for defining a seizure: "an intentional acquisition of physical control." *Id*. at 1001 (citing *Brower*, 489 U.S. at 596). Under this approach, all seizures of persons or property would require actual control. While the majority faults *Brower* for "improperly eras[ing] the distinction between seizures by *control* and seizures by *force*," (*Id.* at 1001), the dissent asserts that "the majority's 'distinction' is a product of its own invention." *Id.* at 1015. According to the dissent, the Court "has always recognized that *how* seizures take place can

differ. Some may take place after a show of authority, others by application of force, still others after a polite request. But to *be* a 'seizure,' the same result has always been required: An officer must acquire possession." *Id*.

The dissent raises a number of interesting questions that lower courts will have to address in the wake of the *Torres* decision. What qualifies as an "objective intent to restrain?" What kind of "touching" will suffice? Does pepper spray that enters a person's lungs amount to a "touch"? What about a flash-bang grenade that damages a person's eardrum? Finally, "[w]hat about an officer's bullet that shatters the driver's windshield, a piece of which cuts her as she speeds away? Maybe the officer didn't touch the suspect, but he set in motion a series of events that yielded a touching. Does that count?" 141 S.Ct. at 1015.

About the Author

Keith B. Hill is a partner in the Edwardsville office of *Heyl, Royster, Voelker & Allen, P.C.* He has extensive experience advising governmental entity clients with respect to state and federal civil rights law as well as litigating claims brought under state and federal constitutions and other civil rights statutes. Mr. Hill has defended civil rights claims filed by detainees and inmates against correctional health care professionals, sheriffs, correctional officers, and police officers.

About the IDC

The Illinois Defense Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.IDC.law or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, admin@IDC.law.