

**Franklin v. Charlotte** was decided by the Fourth Circuit Court of Appeals on April 4, 2023.

S.C.: Plaintiff's estate appeals the dismissal of his lawsuit against Police for Use of Force on Fourth Amendment grounds.

**Issues:**

Whether the officer was entitled to qualified immunity for the shooting?

Whether the city was responsible for the officer's conduct under federal or state law?

**Facts:**

Officers responded to a call that the plaintiff was threatening patrons and staff with a firearm. Before they arrived, the plaintiff exited the restaurant and crouched down next to the passenger side of a car parked in the restaurant parking lot. When the officers arrived, both officers exited their vehicles, weapons drawn. Immediately, each officer shouted, "Let me see your hands," and "Let me see your hands, now!" The lead officer (Officer Kerl) saw the plaintiff crouching directly in front of her but facing the open passenger side of the car with his left shoulder in full view of the officers. He was on the balls of his feet, about one foot away from a passenger who had been trying to calm the plaintiff down.

The plaintiff's hands appeared to be clasped together between his legs. The officers repeatedly yelled at the plaintiff "Drop the gun!" "Drop it!" "Drop the weapon!" "I said drop it!" "Put it on the ground!" The officers gave a total of twenty-one commands to the plaintiff to drop his firearm, although in fact, the gun was concealed under his jacket, not in his hands.

The plaintiff did not move for a while, but soon, without moving his head or legs, the plaintiff slowly reached into the right side of his jacket and retrieved a black handgun with his right hand. When the gun was in Officer Kerl's view, her body camera shows that it was not in a firing grip; the plaintiff held it by the top of the barrel slide with the grip-side closest to the officers and the muzzle pointed away from them. Immediately, Officer Kerl shot the plaintiff twice, killing him. As he fell to the ground, the plaintiff looked in the officers' direction with a face of shock and stated: "You told me to."

The officers recounted that they gave, and the plaintiff ignored, repeated commands to show his hands and indicated that the plaintiff brandished a gun pointed in their direction. During her interview, Officer Kerl told investigators that the plaintiff ignored her commands, retrieved the gun, and turned toward her just before she shot him. An independent review board did not find fault with the officers for the shooting and the City Manager concurred with the finding.

The plaintiff's estate filed a lawsuit against Officer Kerl for the shooting, as well as the city for not finding fault with the shooting. The plaintiff's estate also sought damages for negligent training by the city. The district court granted summary judgment for the defendants after concluding that the officer was entitled to qualified immunity and the city was not responsible for the officer's conduct under federal or state law.

**Holding:**

Affirmed in Part and Reversed in Part. The Court began by stating: "When an officer issues a clear command to an armed suspect to do one thing and that person does another, we seldom question the officer's use of force. But when the officer's abstruse commands require the suspect to divine their meaning, the law cannot be so forgiving. In those circumstances, courts are duty-bound to engage in a searching examination of an officer's resort to deadly violence." It seems likely that Officer Kerl made a mistake in shooting the plaintiff because the plaintiff appeared to be complying with the officers' orders to drop the gun when he took the weapon out of his jacket pocket. The question is whether her mistake was reasonable.

Regarding the officers' own liability, the Court agreed that, under the facts, a jury could find that Officer Kerl's mistake was unreasonable and thus, violated the Fourth Amendment. The Court described that "despite receiving 911 accounts of a man terrorizing people at a fast-food restaurant, the officers arrived at a very different scene than the one described in those reports. [The plaintiff] was no longer inside the restaurant, nor was he aggressive or outwardly threatening when Officer Kerl approached him. He also made no attempt to resist the officers or flee the area." The Court focused on the plaintiff's dilemma: that the only way for him to obey the officers' commands to drop the gun was to reach into his jacket to retrieve it. The Court repeated that carrying a weapon, without more, does not justify an officer's choice to shoot. The Court explicitly blamed the officers for the intensity of the situation, writing: "one cannot help noticing that the intensity of the situation emanated not from [the plaintiff], but from the volume and vigor of the officer's commands." A reasonable jury could conclude that the plaintiff did not pose an imminent threat to the officers or anyone else.

The Court citing previous cases where Courts had ruled that people who defied clear commands provoked lawful deadly force. In this case, however, the Court concluded that the officers' "commands simply were too ambiguous to transform [the plaintiff's] hesitation into recalcitrance." The Court also found it unreasonable under these circumstances to assume that the plaintiff must have been holding a weapon in his hands "without leaving any daylight for the possibility that he was not." The Court wrote: "Viewing the non-threatening way [the plaintiff] handled the weapon once he retrieved it, a jury may conclude that this was not a menacing act, but mere compliance with orders."

However, the Court affirmed the dismissal of the plaintiff's claim against the city. The Court repeated that a municipality cannot properly be held liable unless the "injury was inflicted by [its] 'lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" In this case, the Court ruled that the city manager's post-facto approval of an internal shooting investigation cannot possibly have caused the constitutional violation. The Court also affirmed the dismissal of the plaintiff's claim against the city for negligent training claim because the plaintiff failed to show evidence of "inherent unfitness or previous specific acts of negligence" or that the city "had any actual or constructive notice of any unfitness or incompetence by" the officer.

**Bottom Line:**

The Court ruled that qualified immunity was not appropriate for Officer Kerl and the case against her will proceed to trial. The lawsuits against the city were dismissed.

The Court explicitly blamed the officers for the intensity of this situation. The Court noted that the officers rushed headlong onto a scene that had subsided, established no dialogue, gave ambiguous commands, and shouted at the plaintiff loudly enough that they did not hear him try to communicate back. The Court stated that the officers gave commands that defied reality. When an officer issues a clear command to an armed suspect to do one thing and that person does another, courts seldom question the officer's use of force. In this case, however, the Court concluded that the officers' commands were too ambiguous and left the plaintiff having no choice - obey and risk death or disobey and risk death. This is a warning to officers to use clear commands and communicate effectively so that a suspect can comply without risk of injury or death. Be careful not to use commands that conflict with earlier commands as was illustrated in this case.

Full Case at:

<https://www.ca4.uscourts.gov/opinions/212402.P.pdf>