California Penal Code Section 835a.

(a) The Legislature finds and declares all of the following:

(1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law.

(2) As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.

(3) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(4) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

(5) That individuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement.

(b) Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

(c) (1) Notwithstanding subdivision (b), a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.

(B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a

peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

(2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

(d) A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or to prevent escape or to overcome resistance. For the purposes of this subdivision, “retreat” does not mean tactical repositioning or other deescalation tactics.

(e) For purposes of this section, the following definitions shall apply:

(1) “Deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

(2) A threat of death or serious bodily injury is “imminent” when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(3) “Totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

Knapp v. The State.

SUPREME COURT OF INDIANA

168 Ind. 153*; *79 N.E. 1076*; *1907 Ind. LEXIS 102

February 8, 1907, Filed

Prosecution by the State of Indiana against John Knapp. From a judgment of conviction and a sentence of life imprisonment, defendant appeals.

DISPOSITION: Affirmed.

OPINION

Gillett, Judge

Appellant appeals from a judgment in the above-entitled cause, under which he stands convicted of murder in the first degree. Error is assigned on the overruling of a motion for a new trial.

Appellant, as a witness in his own behalf, offered testimony tending to show a killing in self-defense. He afterwards testified, presumably for the purpose of showing that he had reason to fear the deceased, that before the killing he had heard that the deceased, who was the marshal of Hagerstown, had clubbed and seriously injured an old man in arresting him, and that he died a short time afterwards. On appellant's being asked, on cross-examination, who told him this, he answered: "Some people around Hagerstown there. I can't say as to who it was now." The State was permitted, on rebuttal, to prove by a physician, over the objection and exception of the defense, that the old man died of senility and alcoholism, and that there were no bruises or marks on his person. Counsel for appellant contend that it was error to admit this testimony; that the question was whether he had, in fact, heard the story, and not as to its truth or falsity.

While it is laid down in the books that there must be an open and visible connection between the fact under inquiry and the evidence by which it is sought to be established, yet the connection thus required is in the logical processes only, for to require an actual connection between the two facts would be to exclude all presumptive evidence. Within settled rules, the competency of testimony depends largely upon its tendency to persuade the judgment. As said in 1 Wharton, Evidence (3d ed.), § 20: "Relevancy is that which conduces to the proof of a pertinent hypothesis." In *Stevenson v. Stewart (1849), 11 Pa. 307*, it was said: "The competency of a collateral fact to be used as the basis of legitimate argument, is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth."

We are of opinion that the testimony referred to was competent. While appellant's counsel are correct in their assertion that the question was whether appellant had heard a story to the effect that the deceased had offered serious violence to the old man, yet it does not follow that the testimony complained of did not tend to negative the claim of appellant as to what he

had heard. One of the first principles of human nature is the impulse to speak the truth. "This principle," says Dr. Reid, whom Professor Greenleaf quotes at length, "has a powerful operation, even in the greatest liars; for where they lie once they speak truth a hundred times." Truth speaking preponderating, it follows that to show that there was no basis in fact for the statement appellant claims to have heard had a tendency to make it less probable that his testimony on this point was true. Indeed, since this court has not, in cases where self-defense is asserted as a justification for homicide, confined the evidence concerning the deceased to character evidence, we do not perceive how, without the possibility of a gross perversion of right, the State could be denied the opportunity to meet in the manner indicated the evidence of the defendant as to what he had heard, where he, cunningly perhaps, testifies that he cannot remember who gave him the information. The fact proved by the State tended to discredit appellant, since it showed that somewhere between the fact and the testimony there was a person who was not a truth speaker, and with appellant unable to point to his informant, it must, at the least, be said that the testimony complained of had a tendency to render his claim as to what he had heard less probable….

Judgment affirmed.

856 F.2d 802
United States Court of Appeals,
Seventh Circuit

Lucien SHERROD, Individually and as Administrator of the Estate of Ronald Sherrod, deceased, Plaintiff–Appellee,
v.
Willie BERRY, Frederick Breen and the City of Joliet, a municipal corporation, Defendants–Appellants.

Decided Aug. 22, 1988.

OPINION

COFFEY, Circuit Judge.

I.

On December 8, 1979, the operator of Ziggy's Plant and Gift Shop in Joliet, Illinois, reported to the police that a robbery had just taken place. Willie Berry, a Joliet police officer on patrol in the area, heard a police radio dispatch recounting the robbery and describing the suspect. Officer Berry told his partner, Officer Richard Klepfer, that the description of the robbery suspect fit Gary Duckworth. Berry testified at trial that he previously knew Duckworth to have been a suspect in other assaultive crimes, including "robberies and purse snatchings." After receiving another radio communique that the suspect had returned to the area of the robbery, Officer Berry and his partner decided to investigate and proceeded to the crime scene. En route, the officers observed two men sitting in a 1969 Cadillac in the bank parking lot adjacent to Ziggy's.

The 1969 Cadillac exited the parking lot and pulled onto the street where Officers Berry and Klepfer were patrolling. Officer Berry activated the squad's "mars lights" and directed the driver of the Cadillac to pull over. As the officer's car approached the Cadillac, Berry recognized Duckworth as the passenger in the Cadillac. At that point in time, Officer Berry believed he was apprehending the perpetrator of the Ziggy's robbery, who was probably armed and thus considered dangerous. As the suspect's car slowed to a stop, Officer Berry and his partner exited the patrol car and removed their guns from their holsters believing the automobile stop to be of high risk. Officer Berry and his partner assumed positions outside the police vehicle with their guns pointed at the occupants of the Cadillac, covering the suspects from separate angles. Following accepted police procedures, Berry ordered the suspects to raise their hands. The two suspects failed to comply with the command, and Berry had to order them to raise their hands three times before the suspects complied; this recalcitrance on their part to follow the raised arm order further aroused Berry's suspicion as to the imminent danger confronting him. Berry testified that "*it seemed to me as though the passenger [Duckworth] was looking at the driver [Ronald Sherrod] as more or less 'what are we going to do next?'* "

Officer Berry asked his partner, who had also drawn his gun, if he had the suspects under cover. Officer Klepfer responded in the affirmative. At this time, Officer Berry raised his gun and cautiously approached the Cadillac. Patrolman Berry testified that while looking into the vehicle and approaching the suspect, he observed the driver make a "quick movement with his hand into his coat ... [as if] he was going to reach for a weapon." At that point, Officer Berry fired his revolver at Sherrod, killing him instantly.

Lucien Sherrod, the father of the deceased, filed a 42 U.S.C. § 1983 action individually and as administrator of his son's estate against Officer Berry, the City of Joliet, and the Joliet Chief of Police. The first count of the complaint alleged that: (a) Officer Berry violated 42 U.S.C. § 1983 when he shot and killed Ronald Sherrod [by] using deadly force

During the trial, evidence was received over the objection of the defendants-appellants that a search of the deceased (Sherrod) failed to disclose that he was armed with a weapon. The trial judge admitted the evidence, reasoning that "had plaintiff been prevented from introducing this evidence, the record would have been such that the jury would have been left to speculate on whether Berry was justified in thinking that the claimed movement by Sherrod posed a danger to the police officer. The jury ultimately found for the plaintiff on both counts and awarded $1,601,700 in damages.

II.

Defendants urge this court to reverse the jury's verdict, arguing that the trial court's receipt of evidence demonstrating that Ronald Sherrod was unarmed when Officer Berry discharged his weapon is not relevant to the question of whether Officer Berry reasonably believed that the use of deadly force was justifiable at the time of the shooting. The district court not only found that evidence as to whether Sherrod was unarmed was both relevant and material to determining whether Berry acted reasonably under the circumstances, but even *implicitly stated on the record in its written findings dealing with a motion for a new trial that it would have been prejudicial to the plaintiff had the evidence not been received.*

Under Federal Rule of Evidence section. 401, "relevancy is a relationship between a proferred item of evidence and a 'fact that is of consequence to the determination of the action.' " "Whether or not a fact is of consequence is determined not by the Rules of Evidence but by substantive law." *Id.* at 401–19. Thus, before the district court could properly have received evidence that Sherrod was unarmed at the time of the shooting, the district court had to find that this fact was relevant to the determination of Officer Berry's liability in the first instance.

[2] In *Lester v. City of Chicago,* 830 F.2d 706 (7th Cir.1987) this court applied an "objective reasonableness under the circumstances" standard to Fourth Amendment excessive force and arrest claims. *Lester* stated that "the Fourth Amendment test measures [the] ... objective reasonableness [of an officer's actions]

under the circumstances." 830 F.2d at 711. In phrasing the test set forth in *Lester* as one of "objective reasonableness under the circumstances," it is obvious that "under the circumstances" refers only to those circumstances known and information available to the officer at the time of his action (firing the fatal shot). When a jury measures the objective reasonableness of an officer's action, it must stand in *his* shoes and judge the reasonableness of his actions based upon the information he possessed and the judgment he exercised in responding to that situation.

Knowledge of facts and circumstances gained after the fact (that the suspect was unarmed) has no place in the trial court's or jury's proper post-hoc analysis of the reasonableness of the actor's judgment. Were the rule otherwise, as the trial court ruled in this instance, the jury would possess more information than the officer possessed when he made the crucial decision. Thus, we are convinced that the objective reasonableness standard articulated in *Lester* requires that Officer Berry's liability be determined exclusively upon an examination and weighing of the information Officer Berry possessed immediately prior to and at the very moment he fired the fatal shot. The reception of evidence or any information beyond that which Officer Berry had and reasonably believed at the time he fired his revolver is improper, irrelevant and prejudicial to the determination of whether Officer Berry acted reasonably "under the circumstances."

Thus, absent a constitutional violation, appellate judges would be well advised not to second-guess an officer's split-second reasonable judgment to protect himself and those around him through the use of deadly force; rather, courts and juries must determine the propriety of the officer's actions based upon a thorough review of the knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment as to whether the use of deadly force was warranted.

[Where] as here, *when an officer believes that a suspect's actions places him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force.* As aptly noted in *Young v. City of Killeen, Tx.,* 775 F.2d 1349, 1353 (5th Cir.1985), "*no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts.*" *Id.* at 1353 (emphasis added).

In this case the investigation conducted after the shooting revealed that Sherrod was unarmed. But at the time Officer Berry made the crucial decision to discharge his revolver, he was unaware of this fact. Officer Berry testified that he believed that he was apprehending an armed and dangerous suspect who had just committed a robbery and further that this suspect made a "quick movement with his hand into his coat ... [as if] he was going to reach for a weapon." The veracity of Officer Berry's testimony and the reasonableness of his actions based upon the totality of the information he possessed at the time of the shooting are questions we leave for a properly informed and instructed jury on

remand. In short, we categorically reject the district court's assertion that fairness requires that the jury be presented with facts unknown and unavailable to Officer Berry at the time of the shooting (that Sherrod was unarmed). To the contrary, we hold that justice requires that the jury analyze and weigh the reasonableness of Officer Berry's conduct just as he was compelled to do in a split second on that fateful day, without the knowledge that Sherrod was unarmed. The Sioux Indians have a prayer that asks for this wisdom: "Grant that I may not judge another until I have walked a mile in his moccasins."

… the jury must determine the reasonableness of Berry's actions limited to the facts known to Berry when he acted, no more and no less. Having ruled that evidence establishing that Sherrod was unarmed is immaterial to the question of the reasonableness of the officers' actions under the totality of the circumstances, we are impelled to conclude that the trial court's error in admitting the evidence was also unfairly prejudicial to the defendants.

Evidence that Sherrod was unarmed (information not available to Officer Childers) is not only irrelevant, as explained above, but also tends to induce the trier of fact to premise its ultimate determination of liability on an improper basis: namely, to infer from the fact that Sherrod was unarmed that Officer Childers' use of his weapon was unreasonable. Such an inference is manifestly inappropriate, and a new trial is the only way to remedy the evidentiary error.

….

III.

Because we reverse and remand for a new trial, we need not discuss the district court's other evidentiary rulings or jury instructions.

For the aforementioned reasons, we reverse and remand this case for further proceedings in the district court consistent with this decision.

