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FRESNO SUPERIOR COURT
By _____ DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

BRIAN HOWEY,

PETITIONER/PLAINTIFF,

v.

CITY OF FRESNO AND PACO BALDERRAMA, IN HIS

OFFICIAL CAPACITY AS CITY OF FRESNO CHIEF OF

POLICE,

RESPONDENT/DEFENDANT

CASE No.: 23CECG01468

DEPT. 404

DECISION DENYING PETITIONER'S REQUEST FOR A WRIT OF MANDATE

Brian Howey is a journalist who, on June 6th, 2022, made a public records request of the City of Fresno ("City") pursuant to the California Public Records Act. In general, Mr. Howey requested recordings, transcripts and police reports associated with the in-custody death of Michael Sanders on August 20, 2004. In response the City provided an events log or CAD (Computer Assisted Dispatch) report. Believing the City's response to be incomplete, Mr. Howey requested additional information from the City suggesting they must have misunderstood his request or the law which applies to it. The City assured him they understood his request and the relevant law and did not disclose anything further to Mr. Howey related to the records associated with Mr. Sanders' death.

Both parties identified early in their correspondence with one another the decision of whether to disclose the requested information rested mostly on their understanding of the facts of what took place during the arrest of Mr. Sanders and its relationship to California Penal Code § 832.7(a)(ii). This code section requires disclosure of a "record relating to the report, investigation, or findings of any of the following:

1 ... (ii) an incident involving the use of force against a person by a peace officer or custodial officer that
2 resulted in death or in *great bodily injury...*” (Emphasis added). There is no dispute Mr. Sanders’ death
3 was the result of high levels of cocaine in his system. It was not caused by Taser applications to his
4 person. See Exhibit A of Petition (also identified as Exhibit 2 of the same). The only dispute is whether
5 the multiple Taser applications upon Mr. Sanders resulted in great bodily injury triggering a disclosure
6 to Mr. Howey of the records he is requesting.

7

8 **The Arrest of Mr. Sanders**

9

10 Both parties cite frequently to *Sanders v. City of Fresno* (E.D. Cal. 2008) 551 F.Supp.2d 1149 as a
11 reliable source of information which provides the details of the interaction between Mr. Sanders and the
12 Fresno Police officers. This court will do the same, but citations to the underlying record referenced by
13 Judge Ishii will be omitted. To provide context the *Sanders* court granted a summary judgment in favor
14 of the City of Fresno after providing a detailed description of the undisputed material facts associated
15 with this incident.

16

17 The incident began when “Michael Sanders became ‘real agitated,’ pulling out drawers and falsely
18 accusing Lavette [his wife] of having a boyfriend and not really being sick (Lavette has multiple
19 sclerosis).” *Id.* at 1155 “When Lavette attempted to call Michael's mother to calm him, Michael grabbed
20 the phone and called 911.” *Id.* “Michael told the 911 operator that someone was trying to kill him....
21 Responding Fresno officers were told of a possible ‘5150’ tearing up the house, with a female crying in
22 the background.” *Id.* at 1155-56. After officers knocked on the door three times and identified
23 themselves as police officers, “Lavette opened the door to the uniformed officers[.] Michael was naked
24 and holding his arm around Lavette's torso from behind.... Michael had a ‘crazed’ or ‘wide eyed’ look
25 about him and was looking ‘beyond the officers.’ Michael was behaving in a paranoid and irrational
26 fashion. [Officer] Herring testified that Michael said that the officers were not going to take Lavette
27 away from him,” and “that Sanders said that the officers were there to kill him. Based upon their
28 observations of Michael and Lavette, the officers suspected Michael to be under the influence of some

1 stimulant and that they were facing a domestic violence situation or worse.” *Id.* at 1156. “Lavette held
2 her stomach, was crying and visibly upset, and said nothing to the officers.” *Id.* at 1156-57. “The
3 officers told Michael that they were there to help. [Officer] Escareno asked Michael to let Lavette go,
4 held out his hand to Lavette, and asked Lavette to come with him. Michael did not let Lavette go. After
5 officers asked Michael to ‘let [Lavette] go,’ Michael pulled Lavette back inside, causing them both to
6 fall. Lavette and Michael both fell on their backs. The fall [] caused a separation of approximately two
7 feet. Just prior to the fall and as Michael was pulling Lavette back in, [Officer] Brown yelled for a Taser
8 to be used. Fearing for the safety of Lavette and to prevent a potential hostage situation, officers rushed
9 inside to take control of Michael and separate him from Lavette. *Id.* at 1157. Herring then fired his
10 Taser at Michael and hit him in the upper body. Herring testified that he first fired his Taser to keep
11 Michael and Lavette separated, not to overcome resistance or prevent escape. Herring shot Michael with
12 the Taser and sent a five second cycle into him, but the Taser had no effect and Michael simply
13 screamed.” *Id.* at 1158.

14
15 This is the first Taser deployment noted in the *Sanders* case. The Petitioner bases their argument for
16 great bodily injury being inflicted upon Mr. Sanders as a result of several Taser deployments as well as
17 drive stuns. It is not lost on this court this initial deployment is described as having no effect, but noting
18 that Mr. Sanders screamed. These two statements: “no effect” and “screaming” seem to contradict one
19 another. The court will presume for the purposes of this case the screaming was related to the use of the
20 Taser, but understands the scream could have been a result of pain, fear and/or frustration. What is clear
21 is the Taser did not have such an effect on Mr. Sanders that he stopped struggling with the officers.

22
23 “Escareno had entered the house and grabbed for Lavette; [Officer] Figueroa also entered the house and
24 took Lavette to a side room away from Michael and the other officers.” *Id.* at 1158. Officer “Brown
25 struck Michael in the forearm and struggled with Michael on the floor. As they were struggling, they
26 began sliding across the floor towards the kitchen.” *Id.* at 1158-59. Officer “Burger also entered the
27 house and attempted to control one of Michael's arms. Burger told Michael to stop fighting. Escareno
28 also told Michael to calm down. Burger and Escareno were trying to control Michael's arms. While

1 Burger, Escareno, and Brown were struggling with Michael and unable to control him, Herring fired his
2 Taser a second time, hitting Michael in the left arm. Herring sent two cycles through Michael during the
3 second shot. Again, the two Taser cycles had no effect on Michael, and Michael continued to struggle
4 with the officers.” It is unclear why the Taser once again had no effect on Mr. Sanders, but it is an
5 undisputed fact. As Herring sent ineffective “cycles into Michael during the second Taser shot,
6 Escareno drew his Taser and fired into Michael's stomach.” *Id.* at 1159. “However, Michael continued to
7 struggle and slide on the floor.” Michael’s ability to continue his fight suggests Officer Escareno’s
8 deployment of his Taser also had little or no effect. In fact, “as Michael continued to struggle, he was
9 beginning to sit up and Herring fired his third Taser shot into Michael's back. Herring sent one cycle
10 through on the third shot. Michael ‘went down,’ but the darts came out.” The fact Mr. Sanders actually
11 went down is the first indication a Taser deployment was effective, however, the effectiveness was
12 short-lived because the darts did not stay in him. As a result, “Michael [] continued to struggle, rising
13 up and down. Herring then holstered his Taser and went to try and control Michael's feet. During this
14 time, Brown was yelling Michael's name and telling him to stop and put his hands behind his back. At
15 some point, Escareno reloaded his Taser and sent his second shot into Michael, hitting him in the back.
16 Escareno held the trigger down between 10 and 20 seconds, or a maximum of four 5-second cycles.”
17 Once again this Taser deployment “did not appear to affect Michael, and he kept struggling with the
18 officers.” *Id.* at 1159-60. “Escareno testified that Michael was still sliding on the ground towards the
19 kitchen and Michael's knees were starting to come up past Brown's shoulders. Escareno eventually let go
20 of his Taser and tried to control Michael, but Michael was lifting Escareno up with his arm. At this
21 point, Burger and Escareno were at Michael's arms, Herring had a hold of Michael's ankles, and Brown
22 had managed to straddle Michael's body. During this time, Michael was continuing to yell, scream,
23 kick, and trying to get up. In other words, despite several applications of the Taser, Michael continued to
24 physically resist officers' verbal orders and attempts to subdue him. Michael was yelling incoherently
25 and at points in the struggle (towards the end) yelled, ‘I'm dead, I'm dead,’ over and over again. Brown
26 then took Escareno's Taser from him. Brown then performed several drive-stuns to Michael's groin area.
27 Brown continued to drive stun until Michael stopped moving and the officers were able to handcuff
28 Michael. In other words, Michael did not stop physically resisting officers until the Taser was finally

1 deployed in the “drive stun” mode. Brown guessed that he did five drive stun applications to Michael.
2 Each application appears to have been for 5-second cycles. Drive stun mode is considered a last resort
3 and should rarely be used. Prior to this incident, Brown had never performed a drive stun application on
4 a suspect. During the struggle, Michael had been shot five times (three by Herring and two by Escareno)
5 with Taser darts, drive stunned 5 times by Brown, and had a maximum of fourteen 5-second cycles
6 applied to him (5 by Brown, 5 by Escareno, and 4 by Herring). When Michael stopped moving and
7 screaming, he said that he gave up. Burger handcuffed Michael; Michael was on his back and his hands
8 were over his head. Michael behaved in a calmer fashion, and apparently was in a sitting position. The
9 officers then unlocked one cuff, put Michael's hands behind his back, and then connected a second set of
10 handcuffs (due to Michael's size) to the set already on Michael. *Id.* at 1160-61. Michael then sat with
11 his hands cuffed behind his back. Escareno testified that Michael was first breathing hard, but later was
12 able to talk normally after sitting up against a cabinet. Apparently prior to cuffing, the officers called for
13 paramedics, not because Michael exhibited signs of distress, but as part of their routine since a Taser had
14 been applied/utilized. Before the paramedics arrived, Michael rolled over onto his stomach/the side of
15 his stomach several times. When Michael rolled over, he would say that he could not breathe, so the
16 officers would place him back in a sitting position. When paramedics arrived, Michael was prone on his
17 stomach and no one told the paramedics that Michael had been sitting up, but the paramedics were told
18 that this had been a 5150 call, there had been a struggle, and Michael had been tazed numerous times.
19 Paramedic Henrickson took Michael's pulse, observed that Michael was breathing well on the ground,
20 and communicated with Michael, although Michael was not making much sense. Michael was then
21 placed face down on a gurney, his handcuffs were removed, soft restraints from the gurney were
22 fastened on him, and he was then placed on his back on the gurney. No one said that Michael should not
23 be placed face down on the gurney. A couple of minutes after the soft restraints were attached, Escareno
24 noticed Michael's eyes rolling back and informed the paramedics. One paramedic responded that
25 Michael was fine. Michael was rolled out of the house, but shortly thereafter, as Escareno was leaving,
26 the ambulance door opened and the paramedics said that Michael had “coded,” i.e. gone into respiratory
27 distress.” *Id.* at 1162

28

1 The efforts to resuscitate Mr. Sanders were “not enough and Michael died. The coroner's report indicates
2 that Michael died due to ‘complications of cocaine intoxication.’ *Id.* at 1162. Nobody argues Mr.
3 Sanders’ cause of death was related to the use of the Taser. It is also undisputed by Judge Ishii in the
4 *Sanders* opinion the Taser deployments were ineffective. The only question left for this court to answer
5 is whether the drive stuns caused great bodily injury and require the City of Fresno to disclose to Mr.
6 Howey the records he is requesting.

7
8 The Coroner’s report describes a total of 11 Taser puncture wounds which each measured about a 1/16
9 of an inch wide. There were 4 Taser marks to the groin area which seemed to be the only applications
10 which appeared to be effective. These were localized within in an area which measured 5 ¾ inches by 3
11 inches. One of those 4 Taser marks left a burn.

12
13 Tasers have been described as “a non-lethal device commonly used to subdue individuals resisting
14 arrest. It sends an electric pulse through the body of the victim causing immobilization, disorientation,
15 loss of balance, and weakness. It leaves few, if any, marks on the body of the victim.” *Matta-*
16 *Ballesteros*, 896 F.2d at 256 n. 2. Similarly, another court has explained that a Taser “works by causing
17 involuntary muscle contractions, similar to muscle cramps, that preclude the suspect from engaging in
18 the type of coordinated motion necessary to fight or flee.... [O]ther than superficial skin markings and
19 the temporary pain associated with muscle contractions, there are no indications [the suspect] suffered
20 any injuries from the Taser applications.” *McDonald v. Pon*, 2007 WL 4420936, at *3 (W.D. Wash.
21 Dec. 14, 2007). Further, one court has noted that pain is a necessary byproduct of the Taser, pain is not
22 the primary motivator, the Taser is considered to inflict considerably less pain than other forms of force,
23 and the effects of the Taser are generally temporary. See *Beaver v. City of Federal Way*, 507 F.Supp.2d
24 1137, 1142–43 (W.D.Wash.2007). No California reportable case has been identified which conclude
25 Taser applications on their own can cause great bodily injury. (Though there is an argument to be made
26 when a Taser application is used on a person who may fall a great height when it is applied could suffer
27 great bodily injury. Those are not the facts here. Mr. Sanders was on the ground for all of the Taser
28 applications.)

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2 The parties invested a great deal of their argument on how the court should define great bodily injury in
3 the context of California Penal Code § 832.7. This court does not need to engage in this debate. No
4 matter which definition propounded by the parties this court would choose, neither would cause the
5 disclosure of the documents requested by Mr. Howey. The world is not so upside down a non-lethal
6 device used to prevent injury to a suspect actively resisting detention would now be identified as a
7 weapon which causes great bodily injury. If it should ever be true, it was not true here.

8
9 To be clear, even if the court was to adopt the California Penal Code § 12022.7(f) definition standard
10 suggested by the petitioner – which it is choosing not to do in this case – the injury suffered by Mr.
11 Sanders at the hands of these officers was not “significant or substantial”. The puncture wounds were
12 only 1/16 of an inch wide and did not result in any injury of significance to Mr. Sanders. The only
13 effective use of the Taser was in drive stun mode, however its use was localized and only resulted in a
14 small burn in one spot of that small localized area.

15
16 **Conclusion**

17
18 Mr. Howey’s petition for a Writ of Mandate to issue against the City of Fresno is denied. The injuries
19 suffered by Mr. Sanders as a result of his struggles against law enforcement do not rise to a level of
20 great bodily injury no matter how any reasonable person defines that phrase.

21
22 November 1, 2023

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26 HON. ROBERT MICHAEL WHALEN, JR.
27 Judge of the Superior Court
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