No. 14-10256

Attorney General's Copy

IN THE

SUPREME COURT OF THE UNITED STATES

Jeffery Weinhaus — PETITIONER
(Your Name)

vs.

State of Missouri — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Missouri Court of Appeals for the Eastern District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeffery Weinhaus #1261776
(Your Name)

Eastern Reception, Diagnostic Correctional Center
(Address) 2727 Highway K

Bonne Terre, Missouri, 63628
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION PRESENTED

Does resting one's hand on a legally holstered weapon in the presence of a law enforcement officer constitute a "substantial step" towards first degree assault, or does the Eastern District's opinion conflict with *State ex rel. Verweire*, 211 S.W.3d 89 (Mo. banc 2006) and *State v. Dublo*, 243 S.W.3d 407 (Mo. App. W.D. 2007), where pointing a loaded weapon at a victim (*Verweire*), or holding a knife to a victim's neck (*Dublo*), only constituted a "mere threat" and insufficient for a "substantial step?"

STATEMENT OF FACTS AND LEGAL BASIS:

Facts

On September 11, 2012, two highway patrolmen shot Appellant, Jeff Weinhaus, four times at close range – twice in the head and twice in the chest – in a gas station parking lot (Tr.223, 227, 330, 339, 349; Ex.15). Miraculously, Jeff survived, and the shooting was captured on his wrist-watch camera (Ex. 15). Jeff is a citizen-journalist who has, since 1996, published papers and videos that are critical of the government, law enforcement and the judiciary (Lf.75, 95-96, 129-132; Ex.1A). His goal is to bring to light the alleged corruption of elected officials and law enforcement officers (Lf.75, 129-132). Jeff was also running for the office of Crawford County Coroner, in order to expose corruption that he believed was occurring there (Ex.1A).

On August 18, 2012, Missouri Highway Patrol Sgt. Folsom received a phone call from Judge Kelly Parker (Tr.168). Judge Parker had concerns about a YouTube video that Jeff had posted (Tr.168-169; Ex.1&1A). Parker felt that it threatened some judicial officers, including himself, and he asked Sgt. Folsom to investigate (Tr.169; Ex.1A). Jeff routinely asks that corrupt officials step down on Constitution Day, and this video made a similar request (Lf.132). While Jeff's publications often contained offensive statements, critical of elected officials, he has no record of violence (Lf.75-76, 129-132). Indeed, law enforcement did not believe that Jeff was a dangerous or violent person; Sgt. Folsom even described Jeff as "a non-confrontational philosophical religious man" (Tr.286, 293).

Sgt. Folsom met with other officers to "determine the validity of the threats" contained in Jeff's video (Tr.171). They determined that most of the video constituted

free speech (Tr.171). However, they decided to contact Jeff to discuss the video and determine if he actually intended to harm anyone or himself (Tr.171). During this contact at Jeff's house, officers ultimately obtained a search warrant and seized Jeff's computers and video cameras (Tr. 179-180).

The Highway Patrol decided to take Jeff into custody before September 17 – his deadline for corrupt officials to step down (Ex.1A). Sgt. Folsom said it was not his idea to arrest Jeff and he did not believe it was an appropriate under the circumstances, but he was just following orders (Tr.274, 276).

September 11, 2012

Sgt. Folsom and Corp. Mertens devised a ruse where they would ask Jeff to meet them to return his computers, but they would arrest him instead (Tr.208, 385). They called Jeff and arranged to meet at a gas station near his home (Tr.209-210). They did not expect any trouble from Jeff, and did not consider him a dangerous or violent person (Tr.216, 286, 293). He had a history of making ultimatums, but had never used violence (Tr.294, 401). The officers did not wear bullet-proof vests (Tr.216, 295, 389).

As Jeff pulled into the parking lot, Folsom and Mertens got out of their car (Tr.213, 217). Mertens went to the trunk pretending to retrieve Jeff's computer equipment (Tr.218, 390). Jeff exited his car with both hands empty; he was openly carrying a holstered gun on his hip, which he is legally entitled to do (Tr.219, 304, 403). Folsom unholstered his own weapon and questioned Jeff about his gun (Tr.219, 317; Ex.15). Jeff asked Folsom what he was doing with a gun (Tr.220, 317,317; Ex.15).

Folsom replied that he was authorized to have a gun, and Jeff said he was also authorized to have one (Tr.220, 317; Ex.15). Folsom thought Jeff was being a smart-aleck (Tr.318).

According to Folsom, Jeff manipulated the flap of the holster with his right hand and placed his hand on the butt of the gun (Tr.220-221). Mertens saw Jeff put his hands straight down to his side, have a "tremor," and then put his hand on the butt of the gun (Tr.391-392). Folsom and Mertens ordered Jeff to the ground (Tr.222, 329, 392, 414). According to Folsom, Jeff started shaking and said, "you're going to have to shoot me," (Tr.223, 321, 327). Jeff's gun never left the holster (Tr.421). Three seconds later, Folsom and Mertens shot Jeff four times (Tr.223, 227, 330, 339, 349, 393; Ex.15).

In the aftermath of the shooting, Jeff was charged with two counts of attempted assault on a law enforcement officer, and two counts of armed criminal action, resisting arrest, tampering with a judicial officer, and some drug charges (Lf.23-25). Before trial, Jeff moved to sever the tampering, drug and assault charges (Lf.60-71; PT2 39-43, 83-87). The defense was concerned that the jury would see the YouTube video – the only evidence to support the judicial tampering charge – and it would prejudice the other counts (PT2 84-85). The defense worried that Jeff would be convicted based on his controversial views and speech (PT2 85). The trial court denied the motion to sever, stating that the charges were a "sequence of events" (PT2 87).

Jeff also moved to dismiss the judicial tampering charge, asserting that his political speech is protected under the First Amendment and was not a threat (Lf.72-140; PT2 73-82). The trial court initially denied the motion to dismiss (PT2 82), and the jury viewed the YouTube video (Tr.169-171). However, the court granted defense counsel's

motion for judgment of acquittal on the tampering count, noting that the YouTube video was "offensive, rude and a lot of other things" but protected by the First Amendment (Tr.544-545). The trial court instructed the jury that the tampering count was "no longer an issue in this case" (Tr.562). However, it did not instruct the jury not to consider the video. On appeal, Jeff raised that the trial court should have instructed the jury to disregard the video, after dismissing the tampering count. The Eastern District held that the video was admissible "to present a complete and coherent picture of the events that transpired" (Slip op. at 12).

As to the assault counts, the jury instructions required the jury to find that "the defendant attempted to cause serious physical injury to (Folsom)/(Mertens) *by shooting him*" (Lf.178, 180). The deliberating jury asked for a definition of first degree assault (Lf.193; Tr.645). The trial court told them to refer to the instructions (Tr.645). The jury found Jeff not guilty as to Corp. Mertens, but guilty of first-degree assault as to Sgt. Folsom (Lf.195-198; Tr.651).

On appeal, Jeff challenged the jury instruction because there was no evidence that Jeff *shot at* Sgt. Folsom; however, the Eastern District did not reach the substantive claim, finding instead that the certified jury instruction contained in the legal file could not have been the correct instruction that was submitted to the jury (Slip op. at 7-8).

Jeff also raised insufficient evidence for attempted assault, noting that his actions were no more than a "mere threat," citing *Verweire*, *supra*, and *Dublo*, *supra*. The Eastern District held that Jeff's case was different because "the defendants in those cases were not displaying weapons at the time law enforcement officers arrived and caused no

harm to their potential victims," and further, that Jeff "never abandoned his threatening behavior – the only thing that stopped him from pulling out his gun and shooting the officers was that the officers shot him first," and that placing a hand on his gun was a "substantial step" toward the commission of assault (Slip Op. at 5).

Legal Basis for Transfer

1) The Eastern District's opinion, which finds that resting one's hand on a legally holstered weapon in the presence of a law enforcement officer constitutes a "substantial step" towards first degree assault, conflicts with *State ex rel. Verweire*, 211 S.W.3d 89 (Mo. banc 2006) and *State v. Dublo*, 243 S.W.3d 407 (Mo. App. W.D. 2007), where pointing a loaded weapon at a victim (*Verweire*), and holding a knife to a victim's neck (*Dublo*), constituted a "mere threat" and insufficient to establish a "substantial step."

The Eastern District's opinion states that Jeff's case is differentiated from *Verweire* and *Dublo* because "the defendants in those cases were not displaying weapons at the time law enforcement officers arrived and caused no harm to their potential victims," and further, that Jeff "never abandoned his threatening behavior – the only thing that stopped him from pulling out his gun and shooting the officers was that the officers shot him first." (Slip Op. at 5). The opinion held that the jury could find that Jeff intended to shoot Sgt. Folsom and that placing his hand on his gun was a "substantial step" toward the commission of that act (Slip Op. at 5).

However, the defendants in *Verweire* and *Dublo*, like Jeff, neither "displayed" a weapon, nor caused harm to any victim. Jeff openly carried a holstered gun on his hip, which he is legally entitled to do under Missouri law (Tr.219, 304, 403). A private

citizen wearing a holstered weapon is no more "displaying" it than an officer wearing his holstered service weapon. Jeff did not exit his car brandishing the weapon; rather, he had it secured in its holster and his hands were at his sides (Tr.220). Indeed, the officers led him to believe that he was meeting them at that location to retrieve his computers that had been seized from him earlier (Ex.15; Tr.291). He had no reason to think otherwise.

Just like the defendants in *Verweire* and *Dublo*, Jeff caused no harm to anyone. Rather, it was Jeff who was shot four times, three seconds after being ordered to the ground; his gun never having left its holster. (Tr. 223, 227, 330, 339, 349; Ex.15). It should be noted that Sgt. Folsom was reprimanded for this shooting and is no longer allowed to work as a State Trooper (Tr.254-255).

Further, the Eastern District's opinion that Jeff "never abandoned his threatening behavior [and] the only thing that stopped him from pulling out his gun and shooting the officers was that the officers shot him first" (Slip Op. at 5), is pure speculation in which the Court may not engage. *State v. Whalen*, 49 S.W.3d 181,184 (Mo. banc 2001) (courts may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences.) The only behavior confronting the officers was Jeff's hand resting on his weapon and he was not yet on the ground. Such conduct may be sufficient for third degree assault of a law enforcement officer by "purposely plac[ing] a law enforcement officer in apprehension of immediate physical injury." *See §565.083.1(3)*, but it is wholly insufficient for first degree and conflicts with other cases.

In *Verweire*, 211 S.W.3d at 91-93, this Court held that a defendant's conduct in grabbing the victim while holding a loaded .25 caliber handgun to the victim's side and

cheek while saying that he would "blow his [f-ing] head off" did not constitute a substantial step toward commission of the offense of first-degree assault, which charged that the defendant attempted to cause serious physical injury to the victim. Although it was undisputed that the defendant aimed the loaded pistol, he did not pull the trigger and he retreated from the altercation without ever having attempted to fire the pistol. *Id.* at 92. Under those circumstances, he did not have the intent to cause serious physical injury, but merely threatened to do so. *Id.* The Court gave examples of fact situations that were different: 1) where the defendant would have injured the victim but for a malfunctioning weapon or the intervention of law enforcement; and 2) where the defendant attempted to cause serious physical injury but only caused minor injuries. *Id.*

Here, no injuries were inflicted (except to Jeff), and Jeff never unholstered, pointed at, attempted to fire or fired his weapon – so it is not a situation that fits within the first or second exception of *Verweire.* The facts also do not fit within the first exception because there is insufficient evidence to support this Court's speculation that injuries would have occurred *but for* the intervention of law enforcement. The *Verweire* Court gave an example of such situation: *In re J.R.N.*, 687 S.W.2d 655, 656 (Mo. App. S.D. 1985) (defendant entered a hotel carrying a lug wrench and announced that he was there to assault the manager but was stopped by a police officer); *see also State v. Reese*, 436 S.W.3d 738, 742 (Mo. App. W.D. 2014) (Reese's advance while making stabbing motions with a pencil was only stopped because Officer Fountain and Officer Keough intervened.) There is simply no evidence that, after exiting his car, Jeff was somehow

moving towards the officers in a threatening manner or that he was making any threatening gestures indicating injury would result *but for* their intervention.

Rather, Jeff was lured to the parking lot to collect his computers, and he was wearing a legally holstered weapon. But within twelve seconds of exiting his vehicle, and three seconds of being told to get down, Jeff was shot (Tr. 229; Ex. 15). The most that could be said about Jeff's conduct is that he rested his hand on his holstered weapon while officers pointed guns at him. But, as in *Dublo*, the record is devoid of any strong corroborating evidence to support an attempt to cause serious harm.

In *Dublo*, the defendant put a knife to both victims' throats and had threatened to kill one of them. *Id.* 243 S.W.3d at 408, 410. The Court held that "the mere threat with the ability to carry out that threat did not constitute an attempt to commit the assault without strongly corroborating evidence that it was the defendant's conscious object to carry out the threat." *Id.* Just as in *Verweire* and *Dublo*, there is no strongly corroborating evidence in this case – only speculation that "the only thing that stopped [Jeff] from pulling out his gun and shooting the officers was that the officers shot him first," which is not supported by the evidence. This Court should resolve this conflict.

REASONS FOR GRANTING THE PETITION

In this time of countless excessive use of force allegations against law enforcement officers across thiscountry, the public truly needs this Honorable Court's guidence in determining when and under what circumstances is law enforcement under imminent threat of serious physical injury or death by a citizen and justified to use deadly force. In recent years, citizens have been shot to death by lwas enforcement officers for coming at them with a rake, a butter knife, and even a toy gun that was being weilded by a child. In other instan ces, citizens refusing to be handcuffed have been beaten, kicked, and even choked to death, while others actually carrying weapons, such as clubs, knives and guns have been mowed down from behind by law enforcement vehicles, shot in the back while fleeing and in the case at hand for simply resting a hand on a legally holstered pistol.

Although this is not the Old West or fictional television, viewers would be appalled to watch Marshal Matt Dillion aand Festus Hagan or a character of John Wayne and Dean Martin gun down a man for simply resting his hand on his holstered revolver. Those may just be television andmovie figures, but they always represented this countrys sense of fair play and justice. They never ambushed anyone! Granted, we live in Modern times with more advanced weapons, but those changes should not justify the "take no chances" mentality that many law enforcement officers seem to have today.

This case gives this Honorable Court the opportunity to confront this issue head on. In fact, the public wouldsurely be encouraged by this court's sincere interest in an excessive use of force case. this is not just about Jeffery Weinhous. It is about restraint and common sense when law enforcement use deadly force. There has never been a more crucial time for this court's guidance on this issue. This Honorable Court can send a very meaningful message to both law enforcement as well as to citizens who may choose to carry, weild or actually use weapons in the presence of law enforcement officers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: June 5th, 2015