## *Did Officer Mehserle Negligently Kill Oscar Grant?*

### ***People v. Mehserle,*** *206 Cal. App. 4th 1125 (2012), Marchiano, P. J.*

Defendant Johannes Mehserle served as a police officer for the Bay Area Rapid Transit District (BART). Shortly after 2:00 a.m. on January 1, 2009, while responding to a report of a fight on a BART train, he shot and killed BART passenger Oscar Grant during a tense confrontation. The defendant was attempting to arrest and handcuff Grant for the misdemeanor of obstructing a police officer. While Grant was lying facedown on the BART platform, the defendant shot Grant, who was unarmed, in the back. The defendant contended he meant to pull his Taser and shock Grant to subdue him, but drew his handgun by mistake and fired the fatal shot.

Defendant carried two weapons: a black model 226 40-caliber Sig Sauer handgun and a bright yellow Taser International X26 Taser. The handgun weighed more than three times as much as the Taser. The handgun had no manual safety switch, while the Taser had a safety switch that also functioned as an on/off switch. The Taser had a red laser sight; the handgun did not.

In the small hours of the early morning of New Year's Day 2009, Grant boarded a BART train in San Francisco with his fiancée, Sophina Mesa, and several other friends. The group was bound for the Fruitvale BART station. The train was very crowded with New Year's Eve celebrants, and people were standing in the aisles.

As the train approached the Fruitvale BART station in Oakland, Grant began to argue with a fellow passenger and the two men started "tussling around." They attempted to strike each other, but the train was so crowded they were reduced to pushing and shoving. The aggression spread into a large fistfight, involving at least 10 men.

Passengers used the train intercom to report the fight to the operator, who in turn contacted BART central control. Central control apparently contacted BART police, whose dispatcher contacted officers in the field with a report of a fight at the Fruitvale BART station in the train's "lead car, no weapons, all black clothing, large group of B[lack] M[ales]."

Officer Anthony Pirone ordered Grant off the train. . . . Grant did not comply. Pirone said, "I've asked you politely. I'm going to have to remove you in front of all these people now." Pirone grabbed Grant by his hair and the scruff of his neck and forced him off the train. . . . Pirone forced Grant to his knees. A passenger's video shows Pirone drawing his Taser and pointing it. . . . Grant pleaded with Pirone not to "Tase" him because "I have a daughter."

Pirone and defendant placed Grant on his stomach. Pirone used his knees to pin Grant's neck to the ground. Grant protested, "I can't breathe. Just get off of me. I can't breathe. I quit. I surrender. I quit." Defendant ordered Grant to give up his arms, presumably so he could handcuff him. Grant responded that he could not move. Defendant repeatedly pulled at Grant's right arm, which apparently was under Grant's body.

Defendant testified as follows.

He did not intend to shoot Grant, but only to "Tase" him. He mistakenly drew and fired his handgun. . . . Defendant did not hear Grant complain that he could not breathe. Defendant did not notice that Officer Pirone had restrained Grant by placing his knee on Grant's neck.

Defendant saw Grant's right hand go into his pocket as if he were grabbing for something. Although he did not see a weapon, he thought Grant might be reaching for one. He decided to "Tase" Grant. He stood up to get sufficient distance to properly deploy the Taser, and announced, "I'm going to tase him. I'm going to tase him."

Defendant was not aware he had mistakenly drawn his handgun until he heard the shot. He looked down and saw he was holding his handgun, . . . and did not notice the lack of a red laser sight which would have emanated from his Taser.

We find sufficient evidence that [the defendant's] conduct of mistakenly drawing and firing his handgun instead of his Taser constitutes criminal negligence. . . . [H]e believed he was "Tasing" an arrestee, but mistakenly, and criminally negligently, drew and fired his handgun with lethal results.

CALCRIM No. 580 defines criminal negligence as follows. "A person acts with criminal negligence when:

1. He or she acts in a . . . way that creates a high risk of death or great bodily injury; AND

2. A reasonable person would have known that acting in that way would create such a risk.

[T]he jury could have reasonably found that when defendant did decide to use his Taser, he was criminally negligent in mistaking his handgun for his Taser. . . . Defendant had drawn his Taser earlier. The handgun weighed more than three times as much as the Taser. The Taser was bright yellow. The handgun was black. The Taser had an on/off safety switch. The handgun did not. The Taser had a red laser sight.