



Published: Sunday, February 22, 2004

THE GARDEN THAT GRIEF BUILT: PART 8

Courtroom offers a chance for resolution

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Ralph Lowery sat in the courtroom, feeling old and tired and outnumbered.

The deep wrinkles on the 69-year-old grandfather's face and the slump in his shoulders showed what was going on inside. The Snohomish man was just holding on, waiting for one of the biggest battles in his life to finally end.

A few feet away sat a row of Portland, Ore., police officers. There were seven men, mostly large, mostly young and muscular.

These were the people Ralph blamed most for the death of his son, Damon, 29. Along with Damon's mother, Carol Marsall of Lynnwood, Ralph had come to this courtroom 200 miles from his home in hopes of holding somebody responsible.

Ralph and the police officers didn't look at each other. Instead, all eyes were focused on one of the Lowery family's attorneys, Erik Heipt.

The lawyer stood before the jury, deliberately saying nothing. He studied his watch, letting the silence pile up.

At 30 seconds, spectators began to shift in their seats. A minute passed with uneasy grins. A minute thirty. Two minutes.

The silence had grown uncomfortable before Heipt finally began speaking.

He said that Damon's Dec. 5, 1999, death while in police custody was a tragedy that happened because the officers had lost control.

Damon had needed their help that morning. He was on drugs and couldn't make rational choices. The officers responded by hitting him with steel clubs, dousing him with pepper spray and blasting him with bags of metal pellets fired from a shotgun.

They trussed Damon up in handcuffs and hobbles, and one of them stood on his back for at least two minutes, squeezing the breath from his lungs, the lawyer said.

"Two minutes is an eternity," Heipt said. "For Damon Lowery, it was a lifetime."

Ralph and Damon's mother hoped the federal civil rights lawsuit in U.S. District Court in Oregon would air the truth about what happened to their son, whose death had attracted little public scrutiny. Maybe, they thought, it would spare another family similar pain.

As he listened to his lawyer sum up the case, Ralph wrestled with doubt.

Bad things had happened to him in courtrooms. It started as a teenager in Seattle during the 1940s when Ralph had appeared in front of a one-armed judge who ordered him placed in a juvenile detention camp. At 16, Ralph was sentenced to three years of hard labor in an Oklahoma prison for auto theft. In the decade that followed, Ralph had stood in courtrooms three more times to be sentenced for crimes ranging from forgery to armed robbery.

The jurors in Portland knew nothing about Ralph's long-ago criminal past. Yet, it was memories from that time that awoke him in the night, shaking and sweating. His years in a cage, and the things he did that put him there, would find him in his sleep.

Ralph had been 29 when he'd finally found someone who showed him a way out of prison. Damon was the same age when he died. Ralph hadn't been able to save his son.

Win or lose, the trial wouldn't get Ralph what he desired most: a chance to somehow save a life.

Reasonable force?

The trial was heard in the Portland courtroom of U.S. District Court Judge Janice Stewart in late September 2003. Even before the first witness was sworn in, Ralph knew that he and Damon's mother couldn't have done a better job of picking attorneys.

Heipt and his partner, Ed Budge, had signed on in 2001 shortly after winning an \$8 million judgment on behalf of an Oregon woman. She'd been handcuffed, blasted with pepper spray, hit with a club and shot in the shoulder during a traffic stop.

The attorneys said they were stunned by the amount of force used on Damon.

Ralph's son had become irrational after taking hallucinogenic mushrooms. Tests also found traces of methamphetamine.

Police said Damon had assaulted a friend and cut himself going through a second-story window. Records showed that in the course of trying to get Damon to a doctor, police shot him 10 times with bean-bag rounds from a 12-gauge shotgun, soaked him with a half-dozen cans of pepper spray and repeatedly clubbed him. He was then restrained with handcuffs and hobbles.

Budge and Heipt were joined in the case by attorney Joseph Grube, also of Seattle, and Christian Bottoms, a Portland lawyer. The attorneys told Ralph they were drawn to the case because they knew many young men like Damon, who sometimes did stupid, illegal things but still merited compassion.

As the trial neared, Heipt put framed photographs of Damon in his office next to those of his own family. Under his button-down shirt, Budge wore a pendant with a snapshot of Damon as a little boy.

Ralph knew the lawyers were putting their hearts into the case. He also believed they had the evidence on their side.

The lawyers' 2 1/2-year investigation found a lot of evidence surrounding Damon's death that either contradicted the official police version or was absent from their reports.

Police said they had reached for their weapons because Damon exhibited extreme resistance, including displays of what they described as "superhuman" strength.

When questioned by attorneys, the officers admitted that when they first approached Damon, he had been passive, lying on his stomach with his hands to his sides. He was twitching as if in a seizure.

Under questioning, the officer carrying the bean-bag shotgun said he decided to begin shooting because Damon, who was already prone, failed to follow this command: "Face down! On your stomach! Hands out! Palms up! Cross your ankles!"

Damon was shot with bags of metal pellets traveling at 300 feet per second, more than triple the speed of a major league pitcher's fastball. As he rolled over, more shots struck him in the stomach and groin, testimony showed.

Police said shooting projectiles designed to stun, not kill, was justified because Damon was sitting in broken glass and a pool of his own blood. They said trying to wrestle him into handcuffs could have exposed them to the risk of cuts and blood-borne infection, or the chance a glass shard could be used as a weapon.

The officers doused Damon with pepper spray, a liquid that causes stinging pain, temporary blindness and makes it difficult to breathe. Instead of making Damon follow orders, the pain appeared to bring him to his feet.

The officers said Damon tried to tackle one of them and injured the officer's knee. Budge and Heipt found evidence suggesting Damon was stumbling blindly trying to escape the pain, and that the officer twisted his knee trying to dodge out of the way.

Damon eventually went down in a blizzard of baton strikes. He was hit so often that one of the officers said his arm grew tired.

The medical examiner in Oregon attributed Damon's death to blood loss from cuts to his neck veins. Ralph's lawyers found evidence that the cause of death had been determined without a complete review of the facts.

A Portland paramedic reached Damon's side while he was still in police custody. Damon's eyes were fixed. There was no pulse. A gurgling hiss came from his mouth. At the time, one of the officers, a 190-pound man, was standing on Damon's upper back and neck while the others pressed him to the ground. That detail -- the officer standing on Damon -- wasn't shared at the time of his autopsy.

Damon took his last breaths while in a position known as "maximum restraint," or hogtied. He was on his stomach. His arms were handcuffed behind his back. His feet were hobbled with a nylon strap and pulled up behind him by another strap connected to his wrists.

Hogtying has been banned by many police departments, including in Everett and Seattle, because evidence suggests it may decrease the restrained person's ability to breathe. Portland police had been trained to exercise great care when hogtying. They weren't trained to stand atop suspects, the department acknowledged.

Lowery lawyers used police radio records and other evidence to create a timeline suggesting that Damon had been crushed under the weight of the officers for more than two minutes after he had already been handcuffed.

Dr. Jerry Jurkovich, chief of trauma surgery at Seattle's Harborview Medical Center, examined Damon's medical records and concluded it was unlikely the young man bled to death during the roughly 15 minutes he struggled with police. The wounds, while serious, should have been survivable for hours.

Dr. Werner Spitz, a forensic pathologist who has consulted on cases such as the murders of Nicole Brown Simpson and JonBenet Ramsey, reviewed Damon's autopsy reports and other records. He concluded that Damon almost certainly died from suffocation as a result of being hogtied while the officer stood on his back.

Ralph was told the new evidence would bring into focus one of law enforcement's most controversial topics. It is called sudden in-custody death syndrome, a phenomenon that sometimes occurs among people who struggle with police, particularly after using drugs.

Some experts link sudden deaths like Damon's to "excited delirium," a physiological change in mentally altered drug users that makes a person capable of literally scaring themselves to death.

Others say the deaths are most often the result of medical factors not connected to the arrest such as heart disease or a self-inflicted injury.

Some experts argue that police tactics are at fault, that the liberal use of pepper spray, combined with hogtying and other forms of restraint, restrict a suspect's ability to breathe. They say what police often call superhuman strength is actually the death struggle of someone fighting for oxygen.

In early 2003, Portland police had asked the judge to dismiss the Lowery case without a trial. All the police really needed to prove was that their actions were reasonable under the circumstances.

The judge declined, ruling that the evidence suggested Damon's behavior had been passive and could "hardly be realistically described as violent or superhuman" before police reached for their weapons.

The facts of that morning were in dispute, the judge noted.

But viewing the evidence in the light most favorable to Damon's family, "Reasonable police officers would not believe that an unarmed, disoriented, severely injured man who posed no threat or risk of flight and had not committed any serious crime could lawfully be subjected to at least 10 'less-lethal' shotgun blasts and five (sic) full canisters of mace, then beaten with steel batons and held in a position that restricted his breathing under the body weight of several officers until he suffocated," Stewart wrote.

The police story

Snohomish is a place that celebrates roots. People don't just live there. They glory in making homes. It's a town known for old houses, lovingly restored. Even before the air warms in the spring, people are in their yards, tending flowerbeds, pruning trees and manicuring lawns.

Ralph and his wife, Carol, had begun their backyard garden in 1999. It was a place they channeled grief over the death of Ralph's 19-year-old son, Josh, in a firearms accident. Damon's death a few months into the project turned the garden into a living memorial for lost sons.

By late 2003, Ralph and Carol's garden had grown into one of Snohomish's most beautiful places. It was featured on the city's annual garden tour.

Hundreds trooped through one July. Visitors remarked on the roses lining the paths and the mauve giant allium that nodded near clusters of white poppies. They saw koi swimming in the reflection pond and the stone statues of two young boys under a magnolia tree.

The garden was a place, one person wrote that summer, that could transport you half a world away.

A few months later, as he sat in a courtroom in Portland, the serenity of the garden was far from Ralph's mind, though he wished he could be anywhere else. He barely glanced at the police, who sat shoulder-to-shoulder next to the city's attorney, Mary Danford.

The officers sometimes turned to smile at friends and family sitting in the courtroom's gallery. Ralph's backers were present, too. He traded the most glances with his wife, who came to court prepared with sack lunches of sandwiches and bottled water.

Portland police didn't question much of the evidence the Lowerys' lawyers presented, but vigorously challenged their conclusions. The department's own experts testified that nobody should have stood on Damon, that a lot of pepper spray was used, that the bean-bag shotgun was fired too close and perhaps too often.

All that was irrelevant, the city maintained, because it didn't contribute to Damon's death.

Ralph looked at the jurors. Were they buying this?

An important witness was the Oregon state medical examiner, Dr. Karen Gunson, who gave jurors an anatomy lesson.

On a large courtroom computer screen, she projected a textbook sketch of a human throat. Gunson traced her finger across the image, leaving a row of blue pixels marking the path where sharp glass had gouged into Damon's neck. The cut stretched nearly ear-to-ear. Gunson said she was convinced no other injury explained Damon's death.

At Danford's urging, the medical examiner then detailed the young man's other injuries. Although the city attorney apologized for what was to come, it didn't soften the blow.

Autopsy photographs filled the courtroom screen. Damon's lifeless eyes stared. His battered body, nude on the examining table, was stripped of dignity.

Ralph turned in his chair, facing away. He barely heard his lawyers' objections, or the judge's ruling allowing the display to continue.

Gunson pointed to myriad cuts Damon received bursting through the window glass. There were purple blotches where his body had been hit by the bean bag rounds. Long, parallel welts showed on his back and thighs. The medical examiner called those "train track" bruises, and said they likely were caused by blows from police batons. In places, the bruises were so numerous the dead man's skin looked like a map for a railroad switchyard.

As the trial closed, jurors were instructed that the law required them to view what happened to Damon from the perspective of a reasonable police officer.

Danford argued that police had acted responsibly and that Damon's drug use had precipitated the tragedy. She accused the Lowerys' attorneys of ignoring that officers were only trying to protect Damon from hurting himself and others.

"The officers fought that outcome valiantly and with all their hearts," Danford said. "They couldn't save Mr. Lowery from himself."

Heipt argued that the officers lost control. There was plenty of time to back off, to think, to find some way to arrest the young man without resorting to clubs and pepper spray and a shotgun spitting bags of metal. He tried to use two minutes of silence to underscore the length of time evidence suggested Damon struggled to draw his final breaths.

Ralph felt old and used up as the jurors rose to leave the room. He also felt hope. Some looked him in the eyes. They knew he was a father who had lost a son.

Angry whispers inside

Jurors deliberated for about three hours before ruling Damon's death was not the result of excessive force. The police had not violated his civil rights, and could not be held legally responsible.

Key to the decision was case law that required the struggle to be viewed through the eyes of a reasonable police officer, said one juror, a grandmother in her 50s who lives near Salem, Ore. She asked that her name be kept confidential.

The juror said the panel sided with the seven officers because they all testified that Damon had left them no other options. She stressed, however, that the verdict wasn't an endorsement of what happened. Behind closed doors, the jurors all agreed police needed less violent tactics for responding to someone in Damon's condition, she said.

"The police were not vindicated in what they did," the juror said.

When the verdict was announced, Ralph said he could feel the walls closing in, just like in prison. He needed out of that courthouse, out of the town where his son had died.

He bolted, barely stopping to grab his wife and suitcase. Nobody spoke on the 200-mile drive back to Snohomish. Instead, Ralph was listening to angry whispers from a dark place deep inside.

Clubs. Guns. Bullets.

Police weren't the only ones who could use those things. Ralph knew that hurting people really wasn't that hard, and it only got easier once you started.

Ralph's youngest son, Jason Lowery, 23, had come from southern Oklahoma to support his father. A restaurant manager who leads his church's youth group, Jason studied his dad on the long ride home.

When they reached Snohomish, father and son went into the backyard garden, where the statues of Damon and Josh stand.

Ralph pulled hard on his cigarette. His eyes narrowed. He didn't notice the way autumn's golden light reflected from the pond he had begun digging when Josh died. He didn't smell the flowers he and Carol had planted after Damon's death.

Ralph told Jason he wanted to hurt somebody, to make them pay.

Jason sat his father down. He told him he was wrong. He said that Ralph had taught him better. Vengeance wouldn't solve anything.

The younger man spoke of his Christian faith, how followers of that religion believe true justice is the province of a higher power. Neither man remembers the exact words spoken or the Scripture quoted that day, but the message Ralph received in the garden could best be summarized in a passage from the Book of Romans:

"Be not overcome of evil, but overcome evil with good."

Ralph looked at his youngest child. Although he hadn't always been there for his son, Jason was there for him now. He'd traveled halfway across the country to support his dad. He cared enough -- and felt close enough -- to tell Ralph when he was wrong.

His boy had grown up, Ralph thought. He was a good man. And that good man loved him.

Before long, father and son walked from the garden and back into the house.

The truth came to Ralph in the days that followed, not as a thunderclap. Like the drumming of gentle rain, it built slowly.

Although he had lived nearly seven decades, Ralph realized his journey was far from over. He'd come a long way from those dark days when he was locked in a cell, convinced that he was worthless and ready to die. He wasn't going to do anything now that could send him back.

He had too much to lose.

Before the trial in Portland, Ralph's lawyers had asked for his life's story. He described what it was like to grow up in a family where neither of his parents wanted him. He shared details of his crimes and his years in prison.

He shared darker secrets, how Damon's death had dredged up memories he had spent a half-century burying, including his own beating and rape while imprisoned as a teen.

Was it just or fair for those things to have happened? No. But they did, and Ralph knew he couldn't change that. Nor could he take back all the bad decisions he made in the years that followed.

Damon made some bad choices, too. He'd lost his life before being able to turn it around. It was unfair, Ralph told himself, but there was nothing anyone could do.

There was nothing but to go on living.

'Born to Love'

The more Ralph thought about his sons, the more he saw the sum of his years and how much beauty surrounded him.

There was his wife, Carol, a woman who has stood by him for more than two decades, gently nudging him to embrace the good.

There are his surviving children and all the joys and pain of being a father and grandfather. Although Ralph is estranged from some of his family, he knows where he belongs. Not long ago, his 11-year-old granddaughter asked him about the fading "Born to Lose" tattoo on his shoulder. When he told her what it said, the girl didn't hesitate:

"You should get that changed to 'Born to Love,' Grandpa," she said.

There are all the people who helped him find his way. Near the top of the list is B.J. Rhay, the former warden at the state penitentiary at Walla Walla. In 1962, Rhay cut Ralph a deal, helping him learn a trade, win parole and build a life outside prison walls.

Ralph said he was ready to start making some deals of his own, giving people a chance when it looks like there's no more hope.

Rhay is one of his heroes, he said. "If he is still alive, you tell him that."

Now 82, Rhay still lives in Walla Walla. He remembers Ralph, and was thrilled to hear that kindness to the young convict so many years before had borne a lifetime's fruit.

Not long ago, Ralph asked his wife to hang the photographs of Damon and Josh back on the walls. He got out his leather-working tools. Then he went to a local youth club to pick up a volunteer application. He doesn't know if they'll take him, but he is hopeful.

Ralph said he wants to find someone like he once was, a kid who is messed up, confused and disconnected from others. He wants to offer him a deal: Spend some time listening to what Ralph has learned, and he'll show how to fashion a wallet or something else beautiful from leather.

Ralph said the time has come for him to take everything he has learned -- about love, about hope, about pain -- and to use it to help grow something beautiful: another person who knows he is worthy of love.

Epilogue

Lawyers for Damon Lowery's family petitioned the court to reopen the case surrounding his death. On Jan. 27, Judge Stewart issued a written order directing attorneys on both sides to prepare for legal argument, likely within a few months.

The judge indicated she was concerned that jurors may not have been given proper instructions about excessive force. Lawyers have until Tuesday to file their arguments.

Ralph said he will support his lawyers in whatever they do.