

Father pleased by trial reversal

By Scott North
Herald Writer

The family of a Snohomish County man who died in a 1999 struggle with police in Portland, Ore., has been handed a victory by a federal judge who ruled a jury erred last fall in not holding police accountable for excessive force.

U.S. District Court Judge Janice Stewart wrote she has "the definite and firm conviction that the jury committed a mistake" in siding with police in the civil rights trial regarding Damon Lowery's death.

Lowery, 29, of Lynnwood, died after a violent arrest during which Portland officers doused him with pepper spray, struck him with metal clubs and hit him with repeated blasts from a shotgun firing bags of metal pellets. The young man was then trussed up in hobbles while a police officer stood on his head and neck.

Stewart, who presided over the Oregon trial, late Friday tossed out the jury's verdict, which had absolved police.

The judge instead took the rare step of substituting her own findings that officers used unjustified force.

She also ordered a new trial to determine the dollar amount of damages owed Lowery's family, and to re-examine whether the death was a result of police actions.

Word of Judge Stewart's 55-page opinion and order reached Damon's father, Ralph Lowery of Snohomish, late Saturday.

"I'm a little on the emotional side, to tell you the truth," he said Saturday night. "When you are right, justice seems to work its way through."

Damon's mother, Carol Marsall of Lynnwood, could not immediately be reached for comment.

The controversy surrounding Damon Lowery's death, and the place that tragedy occupies in Ralph Lowery's life, were chronicled in an eight-part series that appeared in The Herald in February.

At that time, Judge Stewart had already filed court papers indicating she believed errors may have been made in the case, including failure on her part to fully instruct jurors on the law regarding excessive force.

Lowery family attorneys Ed Budge and Erik Heipt had urged Stewart to find that the jury's verdicts were an injustice. They were grateful for Friday's ruling.

"It was a good result," Heipt, of Seattle, said Sunday. "It was about everything she could do for us. She is a very careful judge. She wrote a very detailed opinion that is very fair and balanced."

Attorneys for the Portland Police Bureau had resisted calls for a new trial, noting in court papers the city has already spent more than \$370,000 defending the case, and could expect to spend about \$100,000 more if forced to do so again.

"Mr. Lowery's death was a tragedy, and defendants do not fail to appreciate the sense of loss his parents and loved ones feel," Portland deputy city attorney Harry Auerbach wrote in February. "But the officers too have paid a heavy emotional price for their attempts to save him."

Portland police have argued all along that officers acted properly that rainy December morning more than four years ago.

Damon Lowery had ingested hallucinogenic mushrooms and was not rational when officers were called to the Portland home he was visiting. He had fought with a friend. When officers called inside the home, they were met by a tremendous crash as Damon Lowery went through a second-story glass window.

Lowery was in the backyard, prostrate and bleeding profusely from cuts, when first encountered by office.

When he didn't follow commands, police shot Damon Lowery up to five times with bags of metal pellets fired from a 12-gauge shotgun. They also emptied three cans of pepper spray into his face. At that point, Damon Lowery had done nothing, the judge noted.

As a matter of law, "the evidence is insufficient to allow a reasonable juror to conclude the amount of force used was anything other than excessive, given that Lowery was severely injured, unarmed, emotionally or mentally disturbed and had not attacked or even verbally threatened" police, Judge Stewart found.

Police may have been justified in using force after the young man rose to his feet and either charged or stumbled into one of the officers, the judge found.

But Stewart wrote she was "alarmed by the (officers') willingness to increase the use of force against an injured and unarmed person, particularly in view of how ineffective the same force had already proven."

Before his death, Damon Lowery was doused with six full cans of pepper spray, repeatedly hit with steel clubs, and shot up to 10 times with bags of pellets. He was then hobbled and an officer stood on his upper body, according to court papers.

Jurors could conclude the force was justified, but the panel in the next trial, unlike those in the first, must be told police are not blameless if their earlier, unlawful actions provoked the young man's reaction, the judge ruled.

"Although (the Lowery family) did not request these jury instructions, they were necessary to prevent a miscarriage of justice," Stewart wrote. "This court prefers to avoid another lengthy and costly trial, but cannot, due to these plain errors."

Reporter Scott North: 425-339-3431 or north@heraldnet.com.