FEDERAL AGENT SUED FOR EXCESSIVE FORCE FOR NUMBER OF AGENTS EXECUTING SEARCH WARRANT

May 2017

Article Source: http://www.llrmi.com/articles/legal_update/2017_estate_of_redd_v_love.shtml

On February 13, 2017, the Tenth Circuit Court of Appeals of decided the *Estate of Redd v. Love et al.*[i], in which the court discussed whether the number of agents executing a search warrant could constitute excessive force under the Fourth Amendment. The relevant facts of *Redd*, taken directly from the case, are as follows:

> To deal with the problem of people illegally taking and trafficking Native American artifacts from federal lands, BLM agents and FBI agents jointly investigated these crimes occurring in southern Utah and the Four Corners region. As part of their investigation, the two agencies arranged controlled sales of illegally taken artifacts. Agent Love served as the lead BLM agent for the operation. After presenting a judicial officer an affidavit about these undercover transactions, the agents obtained many search and arrest warrants, including warrants to arrest Dr. and Mrs. Redd and to search their house.
>
> On June 10, 2009, twelve teams of BLM and FBI agents simultaneously executed search warrants at different locations in and near Blanding, Monticello, and Moab, Utah. Each team assigned to the scattered search locations comprised between eight and twenty-one federal agents and at least one cultural specialist. Upon completing their assigned searches, agents reported to other search locations to help as needed.
>
> Team members were concerned for their safety because some local citizens had previously acted hostilely toward federal officials. Partly for that reason, each team had an operations plan identifying its target location and any expected obstacles. FBI and BLM policy required agents to wear soft body armor and to carry a firearm when executing warrants or when confronting potentially dangerous situations. For a high-risk search at one house, the FBI's Salt Lake City SWAT team furnished ten members to assist in executing that search warrant.
>
> Based on evidence seized during the searches, the agents arrested twenty-three people for allegedly possessing or trafficking stolen Native American artifacts. Sixteen of the arrestees, including Dr. and Mrs. Redd, resided in Blanding, Utah…

> The operations plan for the team assigned to search the Redds' house advised that three adults and one child lived there—Dr. and Mrs. Redd, their adult daughter Jericca Redd, and her minor son. The plan further advised that the Redds' house stood on elevated terrain, making its one-eighth-of-a-mile-long driveway visible from the house. Before arriving, the agents didn't know whether the Redds owned guns, or whether anything prevented entry onto the property or barricaded the house.
>
> Upon arriving, the agents knocked on the front door. When Mrs. Redd answered, agents arrested her without incident and took her to the kitchen. Agents took Jericca Redd to the piano room upstairs. Dr. Redd wasn't then at the house, but agents arrested him when he arrived home at 6:55 a.m. Dr. and Mrs. Redd waived their *Miranda* rights and spoke with the agents, at least intermittently, until no later than 10:34 a.m., when the agents drove the Redds to Monticello, Utah for booking. Jericca Redd drove her parents back to their house after their initial court appearances in Moab, Utah. When the Redds arrived home at about 5:00 p.m., agents were still searching the house, so the Redds waited outside for them to finish. By about 5:30 p.m., the agents had completed their search, and the Redds reentered their house. The next day, Dr. Redd committed suicide.[ii]

Dr. Redd's estate filed suit and alleged that Agent Love, the agent in charge, used excessive force in violation of the Fourth Amendment by sending a large number of heavily armed agents to execute the Redd's search warrant. The Redds alleged that, while there were initially twelve (12) agents and one (1) cultural specialist on scene at their residence for the search warrant, the number continued to grow until their were approximately sixty-nine (69) agents searching their home, wearing tactical gear and carrying weapons. Agent Love argued that, based on his sign-in log at the Redd's search warrant, there was a maximum of twenty-two (22) agents on scene. After considering the evidence presented in district court, the court found that there was a maximum of twenty-two (22) agents at the Redd's residence before the Redd's were driven away. The district court held that this did not constitute excessive force and further found that the law was not clearly established in this area; as such, Agent Love was entitled to qualified immunity. The Estate of Redd appealed to the Tenth Circuit Court of Appeals.

The issue on appeal was whether the alleged large number of heavily armed agents at the Redd's residence to execute a search warrant for a non-violent offense constituted excessive force under the Fourth Amendment.

At the outset, the court of appeals noted that the Redd's dispute the district court's finding that there were a maximum of twenty-two (22) agents presents at their residence. While they agree that initially there were twelve (12) agents and a cultural specialist and they concede that was lawful, they argue the number grew to over fifty (50) agents. However, the court of appeals examined the record, to include the sign-in log of the search warrant location and determined that there were a total of twenty-two (22) agents at the Redd's residence. When five (5) agents transported the Redd's away, there remained sixteen (16) agents at their residence. Further, not all of these agents could have been seen by Dr. Redd because some were searching various parts of his residence while he was being transported off of his property.

The legal argument put forth by the Estate of Redd was based on *Graham v. Connor*.[iii] The Estate noted the three factors to consider in a use of force analysis, particularly **(1) the severity of the crime at issue, (2) the immediate threat to the safety of the officers and others, and (3) whether the suspect is actively resisting or attempting to evade arrest by flight**, should, based on the facts of the *Estate of Redd*, establish that Agent Love's conduct was objectively unreasonable regarding the number of agents at the search warrant. Regarding this argument, the court of appeals stated

> *Graham* itself noted that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Id*. (alteration in original) (quoting *Bell v*. *Wolfish*, 441 U.S. 520, 559 (1979)). And it noted that the Fourth Amendment reasonableness analysis always depends on whether the totality of the circumstances justified the conduct at issue. *Id*. (quoting *Garner*, 471 U.S. at 8-9).
>
> The Fourth Amendment reasonableness analysis is not limited to the three *Graham* factors. Here, an analysis based strictly on the *Graham* factors wouldn't reach all the circumstances relevant in considering the Estate's Fourth Amendment claim. *See Brosseau*, 543 U.S. at 197-99 (explaining that while *Garner*'s and *Graham*'s principles guide courts in determining whether there was a constitutional violation, excessive force claims must still be judged on an objective reasonableness standard). *Graham* involved just one defendant whom police arrested without a warrant in a public setting. 490 U.S. at 389. Because *Graham*'s circumstances differ so greatly from those in this case, its framework doesn't fit the constitutional question here.[iv]

The Estate also argued that another case, *Holland ex rel. Overdorff v. Harrington*[v]*,* supports their claim of excessive force. In *Holland,* a SWAT team was used to execute a misdemeanor arrest warrant and search warrant. The SWAT officers wore green camouflage clothing without law enforcement markings and hoods over their faces. At the residence, they pointed guns at children, held occupants at gunpoint and allegedly entered without knocking and announcing their purpose. Plaintiff's sued for excessive force under the Fourth Amendment. The Tenth Circuit held

> [W]e ultimately concluded that "**the force invoked by the *decision* to deploy" the SWAT team was not excessive under the Fourth Amendment.** *Id*. at 1191 (emphasis in original). In those particular circumstances, which presented a possibility of violence from the suspect, we concluded that deploying heavily armed SWAT deputies in unmarked gear obscuring the deputies' faces was not objectively unreasonable. *See id*. In so holding, we noted that the deputies expected to—and indeed did—find several people besides the suspect at the suspect's residence, and that they also found firearms there. *Id*. On this basis, we awarded the sheriff and deputies qualified immunity against the excessive-force claim based upon their SWAT gear. *Id*. at 1192.[vi]

The Tenth Circuit then examined the facts of the Redd's case in light of *Graham* and *Holland*. The court noted that Agent Love had good reason to deploy a large number of agents to the Redd's property for the search warrant. First, agents had ample reason to believe they were going into a hostile environment, as there was longstanding tension and a history of violence between the federal government and some residents in Blanding. Second, the Redd's have two adult sons who the agents had reason to believe were hostile toward the federal government. In fact, during the execution of the search warrant, one of the sons called the house twice and made threatening comments regarding coming to the scene. These were taken seriously and some agents were sent outside to take defensive

positions in the event the son carried out his threat. Third, Dr. Redd had been arrested in 1995 in a highly publicized case for desecrating a dead body while digging for Native American artifacts. Fourth, the fact that Dr. Redd was a physician did not eliminate any potential threat posed by him, his family or the community. Fifth, the search of the Redd's residence required searching for and sorting out over 800 Native American artifacts. The extensive amount of work at hand also justified a large number of agents.

Additionally, the court noted that the Estate has presented no cases that support the proposition that law enforcement officers committed excessive force merely by the presence of a large number of officers. Specifically, the court stated

> [W]e have located several cases in which courts have found no excessive force despite similar numbers of officers being deployed. We leave open the possibility that sending a large number of agents to execute a search warrant and arrest warrant for a nonviolent crime can amount to excessive force. But this isn't that case. Again, the Estate presents insufficient evidence about how many agents Dr. Redd even saw. And the Estate does not suggest on appeal that the agents—however many Dr. Redd saw—acted aggressively or threateningly toward him. In view of the need to search an expansive home for tiny objects, as well as a legitimate concern for officer safety, the totality of the circumstances justified the number of agents executing the search and arrest warrants at the Redds' house.[vii]

Lastly, the court of appeals also considered the Estate's allegation that Agent Love acted with excessive force in how the agents were dressed, meaning tactical gear and visible weapons. However, the court noted that the equipment worn and carried by the agents was not the decision of Agent Love; rather, the agents were acting in accordance with their respective agency's policies related to equipment required when executing a search warrant. As such, even if the agents looked intimidating, it was due to agency policy, rather than Agent Love's actions.

In conclusion, the court granted Agent Love qualified immunity from suit and held

> [**W]e see no constitutional violation. Agent Love's conduct—deploying twenty-two agents wearing soft body armor and carrying firearms in compliance with agency policy—was not objectively unreasonable under the circumstances**.[viii] [emphasis added]

---

[i] No. 16-4010 (10th Cir. Decided February 13, 2017)
[ii] Id. at 2-3
[iii] 490 U.S. 386 (1989)
[iv] Estate of Redd at 15-16
[v] 268 F.3d 1179 (10th Cir. 2001)
[vi] Estate of Redd at 17-18 (citing Holland, 268 F.3d at 1192)
[vii] Id. at 20-21
[viii] Id. at 22