



ELEVENTH CIRCUIT DISCUSSES KNOCK AND ANNOUNCE AND DEADLY FORCE

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On May 17, 2017, the Eleventh Circuit Court of Appeals decided *Santana v. Miami-Dade County et al.*, in which the court discussed the Fourth Amendment as it relates to the knock and announce requirement when executing search warrants and the use of deadly force. In summary, the initial relevant facts of *Santana* begin in February of 2012, when a confidential informant told Miami-Dade Detective Correa that marijuana was being sold at the residence of Michael Santana. Detective Correa conducted surveillance and observed activity consistent with drug activity, such as numerous cars stopping at the residence for brief periods and leaving. Detective Correa arranged for the confidential informant to attempt to purchase marijuana from the residence.

On February 29, 2012, the confidential informant purchased ten grams of marijuana from a male inside the residence. On March 1, 2012, Detective Correa completed a computer-generated search warrant information sheet and requested the assistance of the Special Response Team (SRT) in executing the search warrant scheduled for March 7, 2012. There was a section on the search warrant request for the SRT regarding “weapons, dogs, and children,” and it was marked “unknown” by Detective Correa.

On March 5, 2012, Detective Correa sent the confidential informant back to the residence where he purchased an additional ten grams of marijuana. Correa later testified that after this purchase, the confidential informant told him that male from whom he purchased the marijuana was armed with a handgun which he carried on his person.

On March 6, 2012, Detective Correa prepared a supplemental report and described the marijuana purchase but did not mention that drug dealer was armed with a handgun.

On March 7, 2012, Detective Correa obtained a search warrant and did not specifically mention that the drug dealer was observed by the informant to be armed but did include generic language referring to the “potential presence of firearms, magazines, projectiles, spent casings, ammunition, holsters, and/or any other firearm paraphernalia.”

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Later, on March 7, 2012, prior to the execution of the search warrant, Detective Correa did drive-by surveillance of the target house with the SRT sergeants. Detective Correa told the sergeants that the informant said the drug dealer was known to carry a gun on his person. After this, Detective Correa briefed all SRT officers prior to the raid regarding the fact that the drug dealer was known to carry a gun. Members of the SRT later confirmed that Detective Correa did provide this information during the briefing.

The relevant facts of the execution of the search warrant, taken directly from the case, are as follows:

[Officer] Alech and the other officers traveled to the residence immediately after the briefing and arrived there at approximately 8:20 p.m. Alech was wearing his police-department-issued uniform, which contained police insignia and logos on the chest and right and left shoulder area. In addition, Alech wore a ballistic helmet and carried a black bulletproof shield with the word "POLICE" written on it in white block lettering.

The parties dispute whether the officers knocked or announced their presence before they entered the residence. Sergeant Smith and Officer Garcia testified that they and other officers yelled the words "police" and "search warrant" as they approached the front door. However, Santana's girlfriend, Brittany Retkofsky, who was inside the residence when the officers approached, testified that she did not hear any announcement. Santana's neighbor, Rolando Valdes, similarly testified that he saw the officers approach Santana's residence but did not hear an announcement. In addition, surveillance video recordings that captured the approach suggest that the officers did not knock on the door before they entered the residence. Thus, for purposes of this appeal, we assume the officers did not announce their presence or knock prior to entering the residence.

When they reached the front door to the residence, the officers discovered it was locked. They set a pry tool in the doorframe and forcibly opened the door. Per the tactical plan, Alech was the first officer to enter the residence after the door was forced open. Upon entry, Alech encountered a running wall directly in front of him and he turned left and proceeded down a hallway created by the wall and the front entrance. Officer Garcia turned left and followed Alech down the hallway. The other officers turned right and moved down the hallway in the opposite direction.

Santana and Retkofsky were in the residence when the officers entered. As Alech walked down the hallway, he saw Santana run by with a gun in his hand. Alech momentarily lost sight of Santana as Santana passed by Alech and took cover behind a nearby wall. When Alech regained sight of Santana, Santana had assumed a crouched position that Officer Garcia, who was directly behind Alech at the time, described as "threatening." Santana was holding the gun in his hand and pointing it in Alech's direction.

As the officers entered the residence, they shouted "Get down on your knees, get down." Retkofsky complied, but Santana did not. When Alech encountered Santana, he directed Santana to drop the gun. Again, Santana did not immediately comply with this command. Alech testified that Santana never dropped the gun, causing Alech to fear for his life and ultimately to shoot Santana. Retkofsky confirmed that Santana never voluntarily got on his knees, as directed by the officers, and that he did not comply with the first command

to drop the gun. However, Retkofsky testified that when Alech gave a second command to drop the gun, Santana said "Okay, okay, okay" and his "hands went up." According to Retkofsky, she saw the gun "slide" or "fall" as Santana's hands went up, and then she saw Santana, having been shot, "hit the floor."

Retkofsky initially indicated that she did not know if Santana was still holding the gun at the time of the shooting. She later stated that Santana did not have the gun in his hands when he was shot. Construing the facts in favor of Plaintiff, and assuming that Santana was no longer holding the gun at the precise moment he was shot, it is evident from Retkofsky's testimony that the shooting occurred within a split second of the gun "falling" or "sliding" out of Santana's hands. Indeed, the parties agree that the entire encounter—from when the officers entered the residence until Santana was shot—only lasted five to ten seconds. Defendants asserted in their statement of undisputed material facts that the encounter between Alech and Santana "occurred within a matter of seconds." In support of that assertion, Defendants cited the testimony of Sergeant Smith, who stated that the first gunshot was fired within five to ten seconds of Alech's entry into the house. Plaintiff admitted this fact, which is not controverted by any evidence in the record. In addition, Plaintiff affirmatively asserted in his own statement of facts that the shooting occurred "less than six seconds from the moment" the police entered the house.

Alech fired three shots at Santana, killing him on the scene. After the shooting, Alech continued his search of the residence. During the search, Alech recovered an additional handgun and an AR-15 submachine gun from Santana's bedroom.ⁱⁱ

Hector Santana, as personal representative of the Estate of Michael Santana, filed suit against Miami-Dade County and Officer Alech and alleged that the county and officer violated Santana's Fourth Amendment rights when they entered his residence without knocking and announcing and shot and killed Santana. The district court dismissed the suit against the county and Officer Alech. Santana appealed to the Eleventh Circuit Court of Appeals. [Note: The state law claims will not be discussed in this article.]

At the outset, it is important to note that at this stage of civil litigation, the court must construe disputed facts in favor of the non-moving party, in this instance the plaintiff, Santana. In other words, unless the plaintiff's version of events is clearly contradicted by evidence to the contrary, the plaintiff receives the benefit of the doubt.

The first issue on appeal was whether it was a violation of the Fourth Amendment for the SRT officers to enter Santana's residence to execute the search warrant without first knocking and announcing their purpose, and affording the residents a reasonable time open the door.

While the officers state that they did knock and announce, there is evidence to lend some support to the plaintiff's allegation that the officers did not do so. Thus, the court, construing the evidence in favor of the non-moving party (the plaintiff) will proceed as if the officers did not knock and announce prior to entering Santana's residence.

The court first noted the legal principles related to execution of search warrants and the knock and announce requirement. The court stated

The Fourth Amendment, which protects against unreasonable searches and seizures, ordinarily requires that an officer knock and announce his purpose before forcibly entering a home to execute a search warrant. See *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). The requirement does not apply, however, where the officer executing the warrant has "a reasonable suspicion that knocking and announcing [his] presence . . . would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). In the qualified immunity context, the relevant inquiry is whether the officer had "arguable reasonable suspicion" that a sufficient exigency existed to justify a no-knock entry. *Whittier v. Kobayashi*, 581 F.3d 1304, 1308 (11th Cir. 2009) (internal quotation marks omitted). "In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry." *Id.* The required showing is "not high." *Richards*, 520 U.S. at 394. See also *Hudson v. Michigan*, 547 U.S. 586, 590 (2006) ("We require only that police have a reasonable suspicion . . . under the particular circumstances that one of these grounds for failing to knock and announce exists, and we have acknowledged that [the] showing is not high.") (internal quotation marks omitted); *United States v. Segura-Baltazar*, 448 F.3d 1281, 1290 (11th Cir. 2006) (noting the Supreme Court's "observation that the officer's burden 'is not high'" to justify a no-knock entry).ⁱⁱⁱ [emphasis added]

The court then examined the facts of Santana's case relevant to the issue. The court noted that it was "undisputed" that officers on the SRT were told that the subject was a drug dealer with access to a firearm. This meant that the officers had reason to believe that the subject of the search warrant was armed and the court stated that this was therefore "***an exigency that we have held justifies a no-knock entry.***"^{iv} The court stated that there was no evidence to refute Detective Correa's testimony that he informed members of the SRT about the presence of a gun prior to the raid; additionally, officers also testified that they received this information.

The plaintiff argued that it was not listed in the electronic form completed by the detective regarding weapons on March 1st. However, the detective did not learn this information until March 5th. Further, the plaintiff argued that the information was not listed on the March 6th supplemental report or the search warrant affidavit; the detective stated that he only wrote about the actual crime being investigated (drug dealing) in the supplemental report on that date. Lastly, the plaintiff argued that the fact that the officers wrote reports stating that they knocked and announced, showed that they believed it was necessary. The court stated that the Fourth Amendment is based on objective reasonableness, not the subjective beliefs of the officers. Since, the officers had reasonable suspicion that the subject of the search warrant was armed with a handgun, it was not necessary for them to knock and announce. [Authors Note: When possible, the best practice is to tell the magistrate issuing the search warrant and have a "no knock" provision added to the warrant by the judge.]

Regarding the first issue, the Eleventh Circuit then held

Assuming there were objectively reasonable grounds to believe the subject in the residence was an armed and dangerous drug dealer, a no-knock entry was

justified. See *id.* Undisputed testimony establishes that Alech had objectively reasonable grounds for such a belief and, consequently, that Alech is entitled to qualified immunity on Plaintiff's illegal entry claim.^v [emphasis added]

The court next set out to examine the second Fourth Amendment issue, particularly, whether Officer Alech violated the Fourth Amendment by way of excessive force when he shot Santana.

The court first examined the legal principles applicable to this issue. The court stated

Plaintiff's excessive force claim is analyzed under the "objective reasonableness" standard of the Fourth Amendment. *Plumhoff v. Richard*, 134 S. Ct. 2012, 2020 (2014) (citing *Graham v. Connor*, 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985)). Reasonableness in this context depends on all the circumstances relevant to an officer's decision to use force and the amount of force used. See *id.* We view the circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (internal quotation marks omitted). And we allow for the fact that officers are often required to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* (internal quotation marks omitted).

It is reasonable, and therefore constitutionally permissible, for an officer to use deadly force against a subject who poses an imminent threat of serious physical harm to the officer or others. See *Singletary v. Vargas*, 804 F.3d 1174, 1181 (11th Cir. 2015) ("We have held that it is reasonable, and therefore constitutionally permissible, for an officer to use deadly force when he has probable cause to believe that his own life is in peril.") ... The relevant inquiry in the qualified immunity context is whether an officer in the defendant's position reasonably could have perceived the subject to pose such a threat. See *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1246 (11th Cir. 2003) (finding no constitutional violation where the defendant officer shot a suspect he "could reasonably [have] perceive[d]" to pose "an imminent threat of violence to the officer and other bystanders"). The officer is entitled to qualified immunity unless "every reasonable officer" in his position "inevitably" would conclude that deadly force was unnecessary and thus unlawful under the circumstances. See *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993).^{vi} [emphasis added]

The court then set out to apply the facts of this case to the rules above. First, the court noted that some of the officer's testimony and Retkofsky's (the witness for Santana) testimony agree. Particularly, both agree that the officers entered and Santana, gun in hand ran, refused the first command to "get down on your knees" and refused the second command to "get down." Both also said that Santana remained standing against the wall, hold a gun in both hands pointed toward the officers. Both parties also agree that the entire confrontation lasted a mere 5-10 seconds.

Where the parties disagree is that Retkofsky's stated that after the command to drop the gun (the third command), Santana said "okay, okay, okay" and put his hands up, as the gun "slid or fell" to the floor. It was at this point that Retkofsky says the officer shot Santana.

The court then stated

[W]e cannot over-emphasize that the parties agree, and that both parties affirmatively assert, that the entire encounter—from when Alech entered the residence until Santana was shot—lasted only five to ten seconds. During that short period of time, it is undisputed that Santana, a suspected drug dealer, ran through the residence with a gun in his hand, ignored multiple commands to get on his knees and at least one command to drop the gun he was holding, and assumed a crouching position that Officer Garcia described as "threatening" while pointing the gun in Alech's direction. **Crediting Retkofsky's testimony and assuming that Santana said "okay" and began to move his hands up after he was directed a second time to drop the gun, Alech was forced in that moment to make a split-second decision whether to employ deadly force in the "tense and dangerous situation" that confronted him. To defeat qualified immunity, Plaintiff would have to persuade us that "every reasonable officer" would have concluded that deadly force was unnecessary and thus unlawful under the circumstances. We are not persuaded.** See *Long v. Slaton*, 508 F.3d 576, 580 (11th Cir. 2007) (noting that we are "loath to second-guess" an officer's "split-second" decision that is necessitated by a "tense, uncertain, and rapidly evolving" situation in the field); *Garczynski v. Bradshaw*, 573 F.3d 1158, 1166-70 (11th Cir. 2009) (concluding that the defendant officers reasonably reacted with deadly force to the imminent threat posed by a suicidal man who was ignoring their commands to drop the gun he was holding and to show his hands).^{vii} [emphasis added]

Thus, the court held that Officer Alech did not violate the Fourth Amendment when he shot Santana.

However, the Eleventh Circuit also noted that, even if they assumed that there was a Fourth Amendment violation, the plaintiff still did not show that the officer violated clearly established law in shooting Santana in these circumstances. In other words, there was no factually similar case law that would put a reasonable officer on notice that shooting Santana would be unconstitutional under these facts. As such, Officer Alech would still be entitled to qualified immunity.

Thus, the court of appeals affirmed the grant of summary judgment and qualified immunity to the county and the officer in this case.

ⁱ No. 15-14338 (11th Cir. Decided May 17, 2017 Unpublished)

ⁱⁱ Id. at 6-8

ⁱⁱⁱ Id. at 11-12

^{iv} Id. at 12

^v Id. at 16

^{vi} Id. at 16-17

^{vii} Id. at 21-22