



ELEVENTH CIRCUIT DISCUSSES USE OF TASER AND PROTECTIVE SWEEPS

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On December 19, 2017, the Eleventh Circuit Court of Appeals decided *Brand v. Casal et al.*, in which the court examined whether the use of the Taser and a protective sweep of a residence were lawful under the Fourth Amendment. The relevant facts of *Brand*, taken directly from the case, are as follows:

THE FACTS

1. Facts Leading to the Initial Encounter

In November 2010, a Magistrate Judge in Gwinnett County, Georgia issued an arrest warrant for Wesley Brand for felony theft by taking of a motor vehicle. Four months later, Deputy Sheriff Kevin Casal was assigned to serve that warrant. The warrant described Wesley as a 27-year-old white male, and listed his address as "unknown." Deputy Casal investigated and found an address for Wesley on a Gwinnett County jail booking sheet dated about three weeks before the warrant issued for him. The booking sheet listed Wesley's address as 4179 Valley Brook Road, Snellville, Georgia.

Then on February 7, 2011, shortly after 11:00 p.m., Deputy Casal and his partner, Deputy Teresa Pardinias, arrived at 4179 Valley Brook Road to serve the warrant. Deputy Pardinias immediately went around to the back of the house while Deputy Casal stayed at the front. There was a car parked in the driveway, and Deputy Casal asked the dispatcher to run the license plate. It returned to Theotis Brand.

Deputy Casal walked up to the front porch of the house where a woman, Jayne Velazco, was smoking a cigarette. He asked Ms. Velazco if Wesley Brand was there. Ms. Velazco responded that she "would get his mother and father." She went inside and shut the door. Ms. Velazco went upstairs to get the Brands, who were in their bedroom where Mrs. Brand was nursing their 7-month-old baby. The Brands then came downstairs to speak with the officer, Mr. Brand now holding the infant. Ms. Velazco followed the Brands downstairs and sat on the stairs in the foyer as Mrs. Brand opened the door to Deputy Casal.

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2. Initial Encounter at the Brands' Front Door

As soon as Mrs. Brand opened the front door, Deputy Casal put his foot inside the doorway so the door could not close. He told Mrs. Brand "he had a warrant for Wesley Brand, a 27-year-old white male." Mrs. Brand was "totally confused" by this because that description didn't match her son. Wesley was 17 (not 27); is mixed race (not white); and had begun to live as a woman (not male). So, to clarify things, Mrs. Brand asked if he wanted "Wesley Brand" or "a 27-year-old white male." Deputy Casal repeated that he wanted "Wesley Brand, [a] 27-year-old white male." He then asked if Wesley was home. Mrs. Brand said she didn't know and called out for Wesley.

Hearing this, Wesley came up from the basement and stepped outside onto the front porch where Deputy Casal was standing. Now Deputy Casal was confused too, because Wesley looked different from the booking photo in the warrant. Unlike in the photo, Wesley now "appeared as a female, with auburn dyed hair, a lacy black blouse, 'skinny jeans' and white stiletto 'cowgirl boots.'" Deputy Casal said to Mrs. Brand, "Ma'am, I need to come inside."

Mrs. Brand refused to let Deputy Casal come into the house. She told him he couldn't come in because he didn't have a search warrant and because Wesley was already outside waiting for Deputy Casal to arrest him. But Deputy Casal insisted the arrest warrant gave him the authority to enter the house. Wesley then went back inside. Deputy Casal continued asking Mrs. Brand to let him in, but she refused and stood blocking the doorway.

Deputy Casal responded by grabbing Mrs. Brand by the shirt, trying to pull her out of the doorway. She resisted and held onto the door frame. During the tussle, Mrs. Brand's shirt ripped and Deputy Casal was knocked off balance. The front part of Mrs. Brand's shirt ripped off, leaving her stomach, chest, and parts of her back exposed. According to Mrs. Brand, "not only could individuals see through [her] bra, but because of the tear, individuals could see [her] breasts."

3. Deputy Pardinias Joins In and Tases Mrs. Brand

At some point during these events, Deputy Pardinias radioed Deputy Casal, but he did not respond. Because he wasn't responding, she thought something must be wrong, so she walked around to the front of the house. Both Mrs. Brand and Wesley were in the foyer when Deputy Pardinias walked in through the front door. Mr. Brand was there as well, still holding the baby, and Ms. Velazco remained sitting on the stairs. Deputy Pardinias explained they had an arrest warrant, then turned to Wesley and confirmed that he was Wesley Brand, the subject of the warrant. Mrs. Brand was by now "extremely upset, agitated," and again told the officers to "get out of my house."

Mrs. Brand then turned to Ms. Velazco and asked for a phone so she could call 911. Ms. Velazco handed Mrs. Brand the home phone. Deputy Pardinias ordered Mrs. Brand to "drop the phone," but she did not. Instead she announced she was dialing 911. Mrs. Brand

began dialing when suddenly and without warning, Deputy Pardinias tased her. The tase caused Mrs. Brand to fall to the floor in "[h]orrible, excruciating" pain.

Deputy Pardinias ordered Mrs. Brand to lie flat on her stomach. Deputy Pardinias began "punching [her] back," striking Mrs. Brand about three times in an attempt to get her to lie on her stomach. Mrs. Brand said she couldn't lie flat because she was pregnant. She kept one of her legs "elbowed out" to protect her stomach. Deputy Pardinias kicked Mrs. Brand's leg several times to get her into a fully prone position.

4. The Protective Sweep and Other Developments

Soon after Mrs. Brand was tased, other officers who had been called to the scene began to arrive and file into the Brands' home. There were eight or nine officers in total. Deputy Casal was the "primary officer" that night and "directed [the officers] to certain places" in the Brands' home to conduct a "security sweep." Deputy Casal "pointed" them "to go to different areas of the house and search the house." According to Mr. Brand, the officers went through "pretty much everything" in "[a]ll the rooms in the house," even "going through drawers." Deputy Casal and Deputy Pardinias personally searched only areas of the home that were adjacent to the foyer.

According to Mrs. Brand, after Deputy Pardinias removed the taser probes from her body, Deputy Pardinias "took no steps to rearrange" Mrs. Brand's shirt, which had been "ripped open" by Deputy Casal. As a result, Mrs. Brand's "entire left breast" and "entire stomach" were exposed. Mrs. Brand repeatedly asked the defendants for a shirt, and Mr. Brand even asked if he could give his wife his own shirt off his back. The defendants refused. The other group of officers also refused Mrs. Brand's requests that they cover her. The officers laughed at her and told her to "[s]hut the fuck up." As a result, Mrs. Brand was left exposed for the entire time the eight or nine officers were in the Brands' home, which was approximately one hour. She remained exposed while the defendants took her and Wesley to jail for booking.

Mrs. Brand was charged with two Georgia criminal offenses. She was charged with obstructing a law enforcement officer (for allegedly swinging her arms at Deputy Casal when he tried to enter her home), and with cruelty to children in the third degree (for allegedly performing a "violent act" in front of her infant child). She stood trial on these charges, and the jury acquitted her of all.ⁱⁱ

It is important to note that, at this stage of litigation, the court is required to view the facts in a light most favorable to the plaintiff. As such, the actual factual facts, as determined by a jury at a later time, could be different in some aspects that those described above.

The Brand's filed a suit in federal court and brought Fourth Amendment claims and parallel claims under the Georgia Constitution. This article will only discuss the Fourth Amendment claims. The Fourth Amendment claims were (1) unlawful entry against Deputy's Casal and Pardinias for into the residence (2) excessive force against Deputy Pardinias for the tasing, (3) an unlawful protective sweep against Deputy Casal, and (4) a violation of Ms. Brand's bodily privacy. The district court qualified immunity for the deputies on all counts and the deputies appealed to the Eleventh Circuit Court of Appeals.

Prior to examining the issues, the court of appeals discussed the analysis used to determine if an officer or deputy is entitled to qualified immunity. This is a two-part analysis. First, the court determines whether a constitutional violation occurred. If not, the deputies received summary judgment or qualified immunity, and the case is dismissed. If the court determines that a constitutional violation did occur, the court must determine if the law was clearly established at the time of the violation such that a reasonable officer in the same situation would have had fair warning that the conduct was unlawful. Clearly established law is case law from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or in this case, the Supreme Court of Georgia.

Thus, for each issue, the court conducted the above analysis for qualified immunity.

The first issue examined by the court was whether Deputy Casal and Deputy Pardinias violated the Fourth Amendment when they entered the Brand's residence with an arrest warrant for Wesley, but no search warrant. The district court granted qualified immunity for Deputy Pardinias, but denied Deputy Casal.

The court first examined the law pertaining to entering private residences under the authority of an arrest warrant. The court stated

Even with no search warrant, an arrest warrant authorizes an officer to enter a person's home when a two-part test is met. See Payton v. New York, 445 U.S. 573, 603, 100 S. Ct. 1371, 1388 (1980). **The officer must have "a reasonable belief [1] that the location to be searched is the suspect's dwelling, and [2] that the suspect is within the residence at the time of entry."** United States v. Magluta, 44 F.3d 1530, 1533, 1535 (11th Cir. 1995) (describing the "two-part inquiry" established in Payton). Applying the Payton test to these facts, we conclude that Deputy Casal's entry was justified and therefore there was no constitutional violation.ⁱⁱⁱ [emphasis added]

Thus, the court had to first determine if Deputy Casal reasonably believed that this was Wesley's residence. The court of appeals held that Deputy Casal had a reasonable belief because (1) the deputy found a book-in record from four months prior where Wesley used that as his address, (2) Ms. Velazco, who was on the Brand's front porch said she could get Wesley's parents when they asked for Wesley, and (3) there was a car registered to Theotis Brand in the driveway.

The court then examined whether Deputy Casal had a reasonable belief that Wesley was home at the time of the entry. The court held that Deputy Casal did possess a reasonable belief because the deputy came to his residence after 11:00pm, a time when it's reasonable to presume someone would be home. Regarding this, the court stated

Under this Court's precedent, "officers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule." Id. at 1535. In Bervaldi, we applied this presumption when officers approached the suspect's house at 6:00 a.m. See 226 F.3d at 1267; see also United States v. Beck, 729 F.2d 1329, 1331-32 (11th Cir. 1984) (per curiam) (finding it "reasonable to believe that one would be at home at 7:30 a.m. and be sound asleep"). **If "early morning raids" afford a presumption that the**

suspect is home, Magluta, 44 F.3d at 1538 n.17, we think it also reasonable for the officers to presume here that a person will be in their home at 11:00 p.m., especially on a cold February night.^{iv} [emphasis added]

Therefore, because Deputy Casal's entry into the Brand's residence was permitted under Supreme Court case law, the entry did not violate the Fourth Amendment and the deputy is entitled to qualified immunity on this claim.

The second issue was whether Deputy Pardinias used excessive force in violation of the Fourth Amendment when she tased Ms. Brand. Regarding the legal standard on reasonable force, the court stated

An officer's use of force is excessive under the Fourth Amendment if the use of force was "objectively [un]reasonable in light of the facts and circumstances confronting" the officer. Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1989) (quotation omitted). The use of force is reasonable only if it was "necessary in the situation at hand." Lee, 284 F.3d at 1197 (quotation omitted). We evaluate whether force was constitutionally necessary by examining several factors, including: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396, 109 S. Ct. at 1872; see also Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002) ("To balance the necessity of the use of force used against the arrestee's constitutional rights, a court must evaluate [the Graham] factors.")^v

The court then applied the facts of the Brand's case, viewed in a light most favor to Brands, to the law above. As to the first prong, the severity of the crime at issue, Ms. Brand was not a suspect in any crime at the time she was tased. While she was arrested and charged with obstruction and cruelty to children under Georgia statute, Deputy Pardinias was not around when the acts that were used as the basis for the charges occurred. As to the second prong, whether Ms. Brand posed a threat, according to her version of events she was never violent or aggressive to deputies. She did admittedly refuse to hang up her phone when she was calling 911. However, the court did not believe this to constitute a sufficient threat to the deputies. As to the third prong, whether Brand was actively resisting or fleeing, the court said that she was not told she was under arrest at the time she was tased. She was not fleeing and not actively resisting. Therefore, the court held that Deputy Pardinias used "force that was plainly excessive, wholly unnecessary, and indeed, grossly disproportionate under *Graham*."^{vi} This satisfied the first prong of the qualified immunity analysis. The court also determined that the law was clearly established such that a reasonable officer would have had fair warning that it was unlawful to tase Ms. Brand under the circumstances of this case.^{vii}

The third issue was whether Deputy Casal violated the Fourth Amendment when he conducted a protective sweep of the residence and, as a supervisor, directed other deputies to do so. The court discussed the law pertaining to protective sweeps and stated

In Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093 (1990), the Supreme Court held that officers are permitted, in the context of a valid arrest, to conduct a "protective sweep" of a residence for the purpose of ensuring the officers' safety. Id. at 333-35,

110 S. Ct. at 1097-99. **The "protective sweep" is justified if the "officer possessed a reasonable belief based on specific and articulable facts . . . that the area swept harbored an individual posing a danger to the officer or others."** Id. at 327, 110 S. Ct. at 1095 (quotation and citation omitted and alteration adopted); see also United States v. Tobin, 923 F.2d 1506, 1513 (11th Cir. 1991) (en banc) (finding a protective sweep justified following a drug-related arrest where multiple vehicles were present at a house and occupants had lied about the number of people present, thus "[giving] rise to a reasonable belief that someone else could be hiding in the house"); United States v. Caraballo, 595 F.3d 1214, 1225 (11th Cir. 2010) (approving a post-arrest sweep based on "inconsistent" answers from suspects who "appeared extremely nervous").^{viii}

The court then applied the facts of the Brand's case to the law above and held that a protective sweep was reasonable under the Fourth Amendment in this case. They noted that Ms. Velazco's presence, Deputy Pardinas radioing that she saw a male at the rear of the residence, and the violent confrontation with Ms. Brand, regardless of who initiated that confrontation. This is because the elevated tensions in the residence created a risk. The court stated that "it was not unreasonable for an officer to believe that others in the house might seek a violent confrontation."^{ix}

Having determined that it was lawful to conduct a protective sweep, the court of appeals also examined whether Deputy Casal exceeded the permissible scope of the protective sweep. Regarding the scope of a protective sweep, the court stated

A protective sweep "may extend only to a cursory inspection of those spaces where a person may be found," and can extend "no more than necessary to protect the officer[s] from harm." Id. at 333, 335, 110 S. Ct. at 1098, 1099.^x [emphasis added]

In this case, the evidence shows that Deputy Casal only personally conducted a protective sweep of areas adjacent to the foyer, where the arrest occurred. As such, he did not exceed the permissible scope or violate the Fourth Amendment.

The Brands also try to impose liability on Deputy Casal as a supervisor for directing other deputies to conduct a sweep. The court stated

They seek to hold Deputy Casal liable for the actions of those other officers. **Searching through drawers plainly goes beyond what is allowed for a protective sweep. See id. As a supervising official, Deputy Casal can be held liable for that violation only if "there is a causal connection between [his actions] . . . and the alleged constitutional deprivation."** Braddy v. Fla. Dep't of Labor & Emp't Sec., 133 F.3d 797, 802 (11th Cir. 1998) (quotation omitted). **"A causal connection can [] be established by facts which support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so."** Gonzalez, 325 F.3d at 1235. **Because the initial protective sweep was not unconstitutional, in order to impose liability on Deputy Casal the Brands would need to establish a causal link between Deputy Casal and the unlawful portions of the sweep.**^{xi} [emphasis added]

While Deputy Casal did instruct other deputies to conduct a protective sweep, he did not instruct them to search through drawers or otherwise exceed the permissible scope of the lawful protective sweep. As such, he is entitled to qualified immunity on this claim.

The fourth issue was whether Deputy Casal and Deputy Pardinias violated the Fourth Amendment by refusing to cover Ms. Brand's exposed breasts as she sat handcuffed in the foyer and when she was transported to the jail. This is the "bodily privacy claim."

The court stated

A "seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." Illinois v. Caballes, 543 U.S. 405, 407, 125 S. Ct. 834, 837 (2005); see also United States v. Place, 462 U.S. 696, 707-08, 103 S. Ct. 2637, 2645 (1983) ("[T]he manner in which the seizure was conducted is, of course, as vital a part of the inquiry as whether it was warranted at all." (quotation omitted and alterations adopted)). The seizure of a person can be rendered unconstitutional when officers unreasonably infringe on the person's "right to bodily privacy." Fortner v. Thomas, 983 F.2d 1024, 1026 (11th Cir. 1993); see, e.g., May v. City of Nahunta, 846 F.3d 1320, 1331 (11th Cir. 2017) (holding that "the manner in which [the officer] conducted the seizure violated [the plaintiff's] Fourth Amendment right" where the officer "lock[ed] himself in a room with [the plaintiff] in a state of undress"). As this Court has said, "people have a protected privacy interest in avoiding . . . exposure of their naked bodies." Padgett v. Donald, 401 F.3d 1273, 1281 (11th Cir. 2005).^{xii}

There was testimony that people on the scene could see both of Mrs. Brand's breasts and that her left breast was "totally out." Despite offers from others on the scene to help cover her, the deputies refused to do so. The court cited a 2007 Supreme Court case that clearly established that the deputy's conduct violated clearly established law. Specifically, the court stated

In Los Angeles Cty. v. Rettele, 550 U.S. 609, 127 S. Ct. 1989 (2007) (per curiam), the Supreme Court set out the standard for deciding whether an officer violates the Fourth Amendment when he forces a suspect to expose herself during the course of an otherwise lawful search or seizure. In Rettele, officers entered the plaintiffs' home with a valid search warrant, ordered the plaintiffs—who were naked—out of bed, and did not allow them to "retrieve clothing or to cover themselves with the sheets." 550 U.S. at 611, 615, 127 S. Ct. at 1991, 1993. After two minutes, the officers allowed the plaintiffs to dress. Id. The Court held that, on those facts, the Fourth Amendment was not violated. Id. at 616, 127 S. Ct. at 1994. However, the Court explained that the officers' conduct did not violate the Fourth Amendment because:

[T]here is no allegation that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety. Sadler was unclothed for no more than two minutes, and Rettele for only slightly more time than that. Sadler testified that once the police were satisfied that no immediate threat was presented, "they wanted us to get dressed and they were pressing us really fast to hurry up and get some clothes on."

Id. at 615, 127 S. Ct. at 1993 (emphasis added). The Supreme Court recognized the plaintiffs' Fourth Amendment interest in avoiding the "frustration, embarrassment, and humiliation" of having officers enter their home while they were "engaged in private activity" and then forcing them to stand nude. Id. at 615-16, 127 S. Ct. at 1993. But on the record in Rettele, the Court concluded that the officers were "act[ing] in a reasonable manner to protect themselves from harm, [so] the Fourth Amendment is not violated." Id. at 616, 127 S. Ct. at 1993-94.

The court applied the above precedent to Brand's case and stated that there was no safety concern that prevented the officers from covering Ms. Brand after she was under control. Therefore, the deputies are not entitled to qualified immunity on this claim.

ⁱ No. 16-10256 (11th Cir. Decided December 19, 2017)

ⁱⁱ Id. at 3-8

ⁱⁱⁱ Id. at 11

^{iv} Id. at 12-13

^v Id. at 14

^{vi} Id. at 16

^{vii} Id. at 17

^{viii} Id. at 19-20

^{ix} Id. at 20

^x Id. at 21

^{xi} Id. at 21-22

^{xii} Id. at 23-24

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