



ELEVENTH CIRCUIT DISCUSSES USE OF FORCE DURING EXECUTION OF SEARCH WARRANT

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On November 6, 2017, the Eleventh Circuit Court of Appeals decided *Pena v. Marcus et al.*, which serves as an excellent review regarding the use of force during the execution of a search warrant. The relevant facts of *Pena*, taken directly from the case, are as follows:

In March 2013, the Sheriff's Office received a tip concerning narcotics and gang activity at 945 Vista Palm Way, which was owned by sixty-seven-year-old Pena. The deputies conducted a "trash pull" at the house and found a residue that tested presumptively positive for cannabis. They also observed Daniel Santiago, Pena's grandson and a suspected CRIPS gang member, enter the home. When Pena invited deputies into the house, they saw mail, covered in gang symbols, addressed to Santiago.

Availing their belief that Santiago resided at 945 Vista Palm Way and that firearms and controlled substances were present, the deputies sought a warrant to search the residence. A state court judge issued a warrant to search the home for drugs and firearms. The parties agree that the warrant is facially valid.

The Special Weapons and Tactical Unit (SWAT) and Gang Enforcement Unit of the Sheriff's Office executed the search warrant on April 12, 2013. Pena was home at the time with her disabled adult daughter. As to the events leading up to the deputies' entry into the home, Pena's version of those events has not been consistent. In her Second Amended Complaint, filed in June of 2015, Pena alleges that the deputies knocked on her front door, announced that they were with the Sheriff's Office, and commanded her to open the door. According to the Complaint, Pena complied with this order and opened the door, at which point, without any warning, the group of deputies kicked or shoved the door into Pena, causing her to fall to the floor, after which they entered the home and then struck Pena as she lay on the floor.

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In her deposition, Pena described a somewhat different version of events. Specifically, she testified that while cooking in her kitchen, she saw men dressed like soldiers and heard them saying something through a megaphone. She heard "a noise" that sounded "like a voice" through a megaphone but "did not hear what they were saying correctly." Two to three minutes passed between when Pena first saw a uniformed man and when she made her way to the front door to open it. At the same moment that Pena went to open her front door and was unlocking it, the SWAT team rammed the door open and Pena was knocked to the ground. As she was lying on the floor, Pena felt something strike her foot. She was unsure whether it was the falling door that hit her or instead whether one of the entering deputies had stepped on her, but thought someone had stepped on her foot. Pena tried to stand up to go to her daughter, but a SWAT team member hit her in the shoulder with a rifle to keep her on the ground.

At any rate, notwithstanding any inconsistencies in Pena's description of the entry, she agrees that the deputies "knocked and announced their authority to enter and conduct a search of the home before entering Plaintiff's residence."

As a result of the deputies' actions, Pena's foot was fractured and she had to wear a cast for several weeks. Her shoulder was bruised and required surgery. In addition, the search damaged Pena's home. Specifically, the SWAT officers broke the front and interior doors, damaged the walls, shattered a window in order to deploy a flash-bang device, and "generally left the house in a sta[te] of disrepair and disarray."ⁱⁱ

Pena filed suit against the deputies in their individual capacities and argued that they violated her rights under the Fourth Amendment and committed various torts under Florida state law. This article will only examine the Fourth Amendment claims. There were two claims under the Fourth Amendment. First, Pena claimed the deputies violated the Fourth Amendment when they forced entry into her residence and caused various damage to her home during the entry and subsequent search. Second, she claims that the deputies used excessive force when they forced entry while she was at the door, and thus caused her injury and when one officer struck her with a weapon to prevent her from standing up from the floor after being told to stay down. The district court granted qualified immunity for the deputies on all claims. Pena then appealed to the Eleventh Circuit Court of Appeals.

The two issues on appeal were as follows:

- Whether the deputies violated the Fourth Amendment when they forced entry into Pena's residence and caused damage to her residence during the execution of the search warrant?
- Whether the deputies violated the Fourth Amendment by using excessive force in entering Pena's residence while she was standing behind the door and when a deputy used his rifle to push her back to the floor when she tried to stand up after being told to stay on the floor.

The Eleventh Circuit first noted that officers are eligible for qualified immunity from suit when they are performing a discretionary function. Further, the execution of a valid search warrant is considered a discretionary function. As such, the burden falls on Pena to show that the deputies are not entitled to qualified immunity. The court then stated

To meet her burden, **Pena must show that (1) the official violated a constitutional right and (2) the constitutional right was clearly established at the time of the incident.** *Pearson*, 555 U.S. at 232, 242. **A right is clearly established if an officer had "fair warning" that his conduct was unconstitutional.** *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). **There are three ways for a plaintiff to prove that a right is clearly established: "(1) case law with indistinguishable facts clearly establishing the constitutional right, (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law."** *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291-92 (11th Cir. 2009) (citations omitted).ⁱⁱⁱ [emphasis added]

With the standard clear, the court of appeals set out to examine the first issue, particularly, whether the deputies violated the Fourth Amendment when they forced entry into Pena's residence and caused damage to her residence during the execution of the search warrant. At the outset, it was noted that Pena agreed that the search warrant was supported by probable cause and acknowledged that the deputies did, in fact, knock and announce their presence and request entry.

Thus, the sole point of contention is that the deputies were unreasonable when they forced entry because Pena was about to open the door and unreasonable in the damage they caused during the search. The court noted the relevant legal principles and stated

Under the Fourth Amendment, police may forcibly enter a residence if there is an exigency. *United States v. Banks*, 540 U.S. 31, 40 (2003) ("[T]he exigent need of law enforcement trumps a resident's interest in avoiding all property damage."). **Courts determine exigency by conducting a totality of the circumstances analysis based on the facts that the police knew at the time of the search.** *Id.* at 39-41; *see generally United States v. Collins*, 510 F.3d 697 (7th Cir. 2007). **Police must wait a reasonable amount of time before forcibly entering a home.** *Banks*, 540 U.S. at 39-41. **The amount of time that is reasonable depends on the exigency, not on how long it would take for an individual to open the door.** *Id.* at 40. **Depending on the situation, mere seconds between knocking and forcibly entering the house can be reasonable.** *Id.* at 38-40 (holding that it was reasonable for police to wait 15-20 seconds when they were concerned that the defendant would destroy cocaine); *United States v. Crippen*, 371 F.3d 842, 846 (D.C. Cir. 2004) (holding that it was reasonable for police to wait 4 seconds when they believed that the defendant had a high-powered rocket launcher). **Courts do not hold officers to a higher standard when their entry destroys property, but the need for and extent of property damage is relevant to determining the reasonableness of the entry.** *Banks*, 540 U.S. at 41; *United States v. Ramirez*, 523 U.S. 65, 68 (1998).^{iv} [emphasis added]

The court then examined the facts of the case that are relevant to the issue at hand. The court observed that this incident involved service of a valid search warrant for drugs and guns where a known CRIPS gang member resided. The court also noted that the deputies knocked on the front door ten times and made two amplified announcements. Further, Pena admitted that the deputies were there 2-3 minutes

prior to making entry. Thus, the court held that it was reasonable under the Fourth Amendment for the deputies to force entry under those circumstances, even if Pena was about to open the door, since the deputies would have had no way to know this.

Pena also claimed other damage caused by the deputies during the search violated the Fourth Amendment. Specifically, the deputies forced open some interior doors during the search. The court noted

Under the Fourth Amendment, officers have discretion in executing a search warrant. *Dalia v. United States*, 441 U.S. 238, 257 (1979). **They may not cause "excessive or unnecessary destruction of property,"** *Ramirez*, 523 U.S. at 71, **but courts recognize that "officers executing search warrants on occasion must damage property in order to perform their duty."** *Dalia*, 441 U.S. at 258. *See also United States v. Andreu*, 715 F.2d 1497, 1499-1501 (11th Cir. 1983). **To determine whether officers damaged property in violation of the Fourth Amendment, courts examine the reasonableness of the officers' actions.** *Ramirez*, 523 U.S. at 71-72.^v

In Pena's case, the deputies reasonably believed they were entering the residence of a known, armed gang member. As such, it was reasonable for them to quickly enter and search the residence, even though damage resulted from the search. Therefore, the court held the deputies did not violate the Fourth Amendment by forcing entry and subsequently damaging Pena's property during the execution of the valid search warrant.

However, the court also noted that, even if they assume that the conduct did violate the Fourth Amendment, Pena was unable to point to any case law that would have given the deputies fair warning that their actions in this case violated the Fourth Amendment. As such, the deputies would be entitled to qualified immunity.

The court of appeals then examined the second Fourth Amendment issue in this case, particularly, whether the deputies violated the Fourth Amendment by using excessive force in entering Pena's residence while she was standing behind the door and when a deputy used his rifle to push her back to the floor when she tried to stand up after being told to stay on the floor.

The court first noted

Courts apply an objective reasonableness standard to determine whether an officer used excessive force in violation of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989). **Courts judge reasonableness "from the perspective of a reasonable officer on the scene" and must keep in mind that "police officers are often forced to make split-second judgments [] in circumstances that are tense, uncertain, and rapidly evolving."** *Id.* at 396-97. **Even if the amount of force used was not necessary, the force is constitutional if it was reasonable.** *Croom v. Balkwill*, 645 F.3d 1240, 1251-53 (11th Cir. 2011) ("Though we are skeptical that the force alleged was truly necessary under the circumstances, we cannot find a constitutional violation based on its usage.").^{vi}

First, the court noted that injury to Pena's foot was caused by the falling door or by an officer stepping on her foot as he was entering through the door. There is no evidence that the deputies knew Pena was at the door or even intended to make contact with her. Thus, this did not violate the Fourth Amendment.

Second, the court noted that a deputy used his rifle to "forcefully poke" Pena to keep her on the floor when she tried to stand up after being told not to move. The court, noting previous court precedent, stated

[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted (footnote omitted); *Muehler v. Mena*, 544 U.S. 93, 98-100 (2005) ("Inherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."). *Cf. Croom*, 645 F.3d at 1251-53 (although "skeptical that the force alleged was truly necessary," holding that officers did not use excessive force during the course of detaining a sixty-three year old occupant of a home being searched by pushing her to the ground and holding her there with a foot to her back for ten minutes).^{vii} [emphasis added]

The court then stated that even if they assume that this use of force violated the Fourth Amendment, Pena did not cite any case law that would provide the officers fair warning in this incident. It is noted that the court did not hold that this violated the Fourth Amendment, but was only assuming for the sake of the qualified immunity analysis. As such, the court held that the deputies were entitled to qualified immunity on the excessive force claim.

As such, the court affirmed the district court's granted of qualified immunity for the deputies on both Fourth Amendment issues.

ⁱ No. 16-17635 (11th Cir. Decided November 6, 2017 Unpublished)

ⁱⁱ *Id.* at 2-4

ⁱⁱⁱ *Id.* at 7

^{iv} *Id.* at 8-9

^v *Id.* at 11

^{vi} *Id.* at 13

^{vii} *Id.* at 13-14