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Opinion Federal appeals court criticizes SWAT teams who 'flash-bang first, ask questions later'

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The U.S. Court of Appeals for the 8th Circuit issued a somewhat surprising ruling last week, when a three-judge panel voted 2 to 1 to affirm a lower court's decision to deny qualified immunity to a SWAT team who deployed a flash-bang grenade while serving a search warrant.

In this case, police in Kansas City, Mo., were investigating a murder. But they had already arrested a suspect. The search warrant was for what police believed was the suspect's home. It turns out that the suspect hadn't lived in the home for several years, and the police did little to verify who was currently living in the house. The residents — a 24-year-old woman, two elderly women and a 2-year-old — were then subjected to a violent, forced-entry SWAT raid.

The police did not have a no-knock warrant, so under the law, they were supposed to knock, announce themselves and give sufficient time for a resident to answer and let them in. In this case, after knocking, one resident of the house came to the locked screen door and showed them her keys, indicating her intent to open the door and let them in. The SWAT team forced entry anyway, then deployed the flash-bang grenade, which lit a set of drapes on fire.

Oddly, attorneys for the SWAT team argued in court that once the woman saw them in the door, the SWAT team was "compromised" and had no choice but to engage in "dynamic entry" tactics. It's a revealing argument. The *entire point* of the knock-and-announce requirement is to give occupants of a home the time to come to the door, let the police in peacefully and avoid violence to their person and damage to their property. That is, the entire point of the knock-and-announce requirement *is to compromise* the presence of law enforcement.

The doctrine of qualified immunity shields law enforcement officers from civil lawsuits unless a plaintiff can show that the officers violated her constitutional rights *and* their actions were a violation of the Constitution under clearly established law. This is a high hurdle. It means that even if the police violate your rights, you can't even get in front of a jury unless you can show that they were "on notice" that what they did was illegal. It's all made worse by the fact that some federal judges have a habit of dismissing a case on the second point without ever addressing the first. Courts keep ruling that some police action is covered by qualified immunity because no *other* court has yet to rule the action unconstitutional; therefore, even it *is* unconstitutional, it isn't established law. But that process also ensures that it never *gets* established, either.

One of the victims in this case sued the SWAT team, the detectives who ordered the SWAT team, and the Kansas City Board of Police Commissioners. A federal judge dismissed the claims against all three entities because of qualified immunity. The 8th Circuit panel voted unanimously to dismiss the claims against the police board, voted 2 to 1 to dismiss the claims against the detectives, and voted 2 to 1 to affirm the lower court and allow the claim against the SWAT team to go forward.

The majority opinion noted the obvious carelessness and disregard for the safety of the occupants of the house. It pointed out that when the police actually identified the correct house, they simply sent some uniformed cops to search the premises, a pretty good indication that the SWAT theatrics were unnecessary to begin with. Furthermore, the police later discovered that the suspect they had arrested actually had *not* committed the murder. So they had raided the wrong house based on an assumption about the wrong suspect. When they identified a new suspect and obtained a search warrant for that suspect's residence, they didn't just send uniformed officers instead of a SWAT team, they actually notified a member of the suspect's family that the search was coming. The majority also pointed out that flash-bang grenades are inherently dangerous, that the SWAT team deployed the flash-bang grenade recklessly, and that this inflicted needless harm on the innocent people inside the house.

The dissenting judge — the one who would have granted qualified immunity to all parties — argued that at the time of the raid (2010), there was no clearly established law against tossing a flash-bang into a home without verifying that the person suspected of a violent crime actually lived there, and without giving the occupants time to answer the door, despite not having a no-knock warrant.

Even as the plaintiff will ultimately be allowed to proceed with the lawsuit, this case really illustrates the extent to which police are protected from civil liability. The utter ineptitude of law enforcement in this case ought to make a lawsuit a no-brainer. Yet city could still appeal, either to the full 8th Circuit or to the U.S. Supreme Court. And all of this is just to get in front of a jury. The jury could still rule for the police. Even if the jury rules against the police, they'll almost certainly be indemnified. The city would pay any damages. That effectively blunts any deterrent.

Finally, it's worth exploring the opinion of the one judge who would have imposed liability not just on the SWAT team, but on the detectives who asked the SWAT team to get involved. These detectives didn't participate in the raid; they merely ordered it. The other two judges decided that this wasn't enough to hold them liable for any possible violations committed by the SWAT team itself.

But Judge Jane Kelly disagreed. In a thoughtful analysis, Kelly pointed out the carelessness of ordering a SWAT team to serve a search warrant without doing much at all to verify that the address on the warrant is correct. She noted that the Kansas City police have a habit of routinely using flash-bang grenades during warrant service, with little regard to the safety of suspects or innocent people on the premises. Detectives estimated that city SWAT teams used flash-bangs somewhere between 50 percent and 90 percent of the times they served a warrant, and the city had no policy to address when the devices are and aren't appropriate.

Kelly writes:

> The court's opinion . . . asserts that the detectives "would have expected" the SWAT team officers to operate within the confines of the Fourth Amendment when conducting a search. But why would the detectives have that expectation if the evidence shows that KCPD's SWAT team routinely uses flash-bang grenades in reckless violation of the Constitution?

More refreshing still, Kelly points out that other courts have found that even without a grenade, the use of a SWAT team is in itself is "an overwhelming show of force," and ought to require more justification than a traditional search.

Typically, both state and federal courts have balked at second-guessing law enforcement's tactics for serving search warrants. As I've noted here in the past, the federal circuits are split even on whether it's reasonable under the Fourth Amendment to conduct a *regulatory* inspection with SWAT teams and SWAT tactics. To see this sort of analysis in a federal appeals court opinion — analysis that considers how these raids actually play out on the ground, in real life — even if in dissent, is encouraging.

It's worth noting that the majority opinion was written by a judge whose career experience was as Nebraska's chief deputy attorney general and at a big law firm. The judge who would have thrown the lawsuit out entirely had prior experience in politics, at a big law firm, and as a federal prosecutor. As for Kelly, the judge who took the most plaintiff-friendly view and whose analysis looked at how these tactics are actually used in Kansas City? She spent 19 years as a federal public defender. A judge's background won't always predict how they'll rule from the bench, but it seems safe to say that the more criminal defense experience we get in the judiciary, the more likely we are to get case law that's more in line with how the system actually operates on the ground, instead of how it operates on the pages of law review journals and judicial opinions.

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