THE LEGAL IMPLICATIONS OF USING

FLASH/SOUND DIVERSIONARY DEVICES

A WALK THROUGH THE U.S. CIRCUIT COURTS OF APPEAL

BY ERIC DAIGLE AND MIKE WHALEN

In a 1996 article in *The Tactical Edge*, attorney John Becker predicted that "with little precedent to guide them, trial judges and juries will be forced to use their 'instincts' to decide whether a particular use of diversionary devices is coercive, unreasonable or unjustified."[1] Fast forward to 2018, and we see just how accurate Becker's prediction was.

As with many police-related legal issues, the problem with writing this article for a national publication is that each appellate court has its own ideas on what is reasonable and what is not with respect to noise/flash diversionary device (NFDD) use. As we look across the various federal and state courts, we see that court decisions have run the spectrum in both criminal and civil cases. This article walks through some of these cases and determines whether there are common elements we can apply across the board.

Looking to the Northeast, there are several cases out of the 1st and 2nd Circuit Courts of Appeal dealing with diversion devices. In a 2006 case,[2] the issue decided by the 1st Circuit was whether evidence secured during the search should be suppressed because the use of a diversionary device was unreasonable. Here, Rochester, New Hampshire, officers executed a search warrant at Gerard Boulanger's home following an investigation of an armed robbery at a local pharmacy. Officers activated one flash bang during the entry and uncovered cash, a handgun and drugs linked to the robbery. Boulanger appealed his conviction claiming that the evidence should be suppressed because the use of a flash bang during the entry was unreasonable. The 1st Circuit Court of Appeals denied Boulanger's appeal, finding that the use of the "flash bang grenade" was appropriate where the defendant was suspected of committing an armed robbery and selling drugs out of his home, and a witness had observed a gun at the suspect's home days earlier. The court further noted that the police planned the search after determining

there were no elderly people or children in the home.

In a more recent 2014 case, the 2nd Circuit Court of Appeals conducted a comprehensive review of diversionary device cases across the country in determining that the use of such devices in a case involving "personal-use quantities" of drugs and a negligible risk of violence from the suspect was an unreasonable use of force under the Fourth Amendment.[3] In *Terebesi*, a regional SWAT team was called to execute a search warrant for drugs at Ronald Terebesi's home. The plan called for the activation of three noise/flash diversionary devices. A break and rake team would clear a rear window and toss in two devices, while an assault team knocked at the front door, entered the house, and activated a third device. As the team entered through the front door, Terebesi and his house guest were observed in a corner of the living room. While there are different accounts of what happened next, there is no dispute that the guest was shot several times and Terebesi was pinned to the floor by an officer with a shield. The guest – Gonzalo Guizan – was pronounced dead at the hospital. Terebesi and Guizan's estate brought a Section 1983 action against the various officers and their employing agencies. The defendants filed a summary judgment motion claiming they were entitled to qualified immunity. The district court denied the motion, the appellate court upheld the trial court's decision, and the case has since settled for over $4 million.

The 2nd Circuit's decision sets out clear guidelines for those officers working in agencies within its purview — New York, Connecticut and Vermont. First, the court left no doubt that Fourth Amendment guidelines concerning use of force apply to these devices. The court affirmed that, "As a threshold matter, we conclude that Fourth Amendment principles governing police use of force apply with obvious clarity to the unreasonable deployment of an explosive device in the home." The *Terebesi* court then determined that using these devices in "routine" searches is unreasonable since "People do not automatically lose their right to be free from explosive devices being thrown into their house simply because there is a valid and outstanding search warrant with respect to the property."[4] The 2nd Circuit also made it clear that not only were the officers throwing the devices liable, any officers who took part in the planning of the response could also be held liable for the constitutional violation. In other words, you don't need to be "in the stack" to be held liable. If you took part in planning the raid you don't even need to be at the scene to be included in the list of defendants.

For those officers working in Delaware, New Jersey and Pennsylvania, the latest summary judgment case out of the 3rd Circuit[5] involves Pennsylvania State Troopers. Robert Smith was a Vietnam veteran suffering from a number of psychological and mental disorders and was involved in a long-standing feud with his neighbors. While investigating an incident at Smith's home, one trooper noticed a red laser dot on his partner's vest and assumed Smith was targeting the officers from his house. The perimeter was secured and the SERT team was called. Officers obtained an arrest warrant and search warrant for the premises. Six hours later, after no contact could be made with Smith, the SERT team conducted a dynamic entry using NFDDs. Several guns were located, but Smith was nowhere to be found. One week later his body was found in the words behind his house and it was determined he died from a heart attack.

EACH APPELLATE COURT HAS ITS OWN IDEAS ON WHAT IS REASONABLE AND WHAT IS NOT WITH RESPECT TO NOISE/FLASH DIVERSIONARY DEVICE USE.

Between 2002 and 2005, this case went back and forth between the district court and appellate court. In its 2005 decision, the *Smith* court determined that the defendants were not entitled to qualified immunity since a jury could conclude that the dynamic entry of the house and shed and use of flash bangs was unreasonable since the threat posed by Smith over the six-hour period had lessened and the team commanders were aware

of Smith's impaired heart condition. The case was sent back to the district court and a trial was conducted during the summer of 2016. The jury issued a verdict in favor of all but one of the police defendants; a mistrial was declared in the remaining case.

THE 2ND CIRCUIT ALSO MADE IT CLEAR THAT NOT ONLY WERE THE OFFICERS THROWING THE DEVICES LIABLE, ANY OFFICERS WHO TOOK PART IN THE PLANNING OF THE RESPONSE COULD ALSO BE HELD LIABLE FOR THE CONSTITUTIONAL VIOLATION.

There are two interesting cases out of the 6th Circuit that bear further review. In *Krause v Jones*,[6] officers were attempting to serve an arrest warrant on Matthew Krause, who was wanted for felony drug charges. Krause retreated into a bedroom and threatened that he would shoot any officer who entered. One officer confirmed that Krause was holding a gun. For more than eight hours, tactical team negotiators attempted to peacefully end the incident; however, Krause refused to come out. A camera showed that Krause appeared to be sleeping in a closet and, after considering several alternatives, the team agreed on a plan to enter the room after activating an NFDD. The operators activated the flash bang (sighted delivery) and entered the room. Krause fired one round, officers returned fire and Krause was pronounced dead at the scene. In upholding the trial court's dismissal based on qualified immunity, the 6th Circuit looked at a number of factors that supported the finding that use of the NFDD was reasonable:

- The suspect was wanted on felony charges and had barricaded himself in a bedroom
- He threatened to shoot the officers and "expressed a willingness to die"
- The suspect refused to surrender peacefully and "refused all reasonable options that the officers sought to minimize risk of injury to the suspect and themselves"
- The suspect was isolated in one room, minimizing the danger to others
- The officers had a clear view of the bedroom, thus allowing the officer to deliver the device away from the closet.

The *Krause* court provides insight into the facts the court will look at when deciding whether the use of the NFDD meets the reasonableness standard under the Fourth Amendment, and a good read for operators and team commanders in Kentucky, Michigan, Ohio and Tennessee.

We know from our basic use-of-force training that each application of force must be able to stand on its own merits with regard to a court review of "reasonableness." So, can we have a case where the delivery of the first NFDD is "reasonable," but the delivery of a second device is "unreasonable?" According to the 6th Circuit's review of the trial court's summary judgment decision in the *Bing*[7] case, the answer is yes. William Bing was believed intoxicated and had fired several rounds in front of his house, allegedly to scare away a group of youths who had been bothering him. Bing retreated into his house where he refused to communicate with the police. During a lengthy standoff, officers initiated a number of attempts to force Bing out of the house, including activating an NFDD by a bedroom window and shooting gas canisters into the house. After deploying additional gas canisters with no result, the team entered the house through the front door and observed the muzzle of a gun appear through a hole in the kitchen door. Bing fired a shot and a team member returned fire with a shotgun. The team deployed a second NFDD that immediately started a fire that spread through the house. After the fire was extinguished Bing was found dead in the kitchen.

The 6th Circuit agreed with the trial court that the use of "pepper gas" and the first NFDD was reasonable under the circumstances. Using the *Graham*[8] factors — severity

of the crime, whether the suspect poses an immediate threat and active resistance or attempt to escape — the court determined that the police interests in this case "outweighed Bing's interest in not having force used against him."[9] However, with regard to the second NFDD, the court determined that "under the *Graham* standards it is objectively unreasonable for the police to employ a flashbang device with the full knowledge that the presence of highly flammable accelerants (tear gas) would likely ignite accelerants and cause a fire."[10] Despite its ruling, the court affirmed the summary judgment decision with regard to the second NFDD because at the time of the incident it would not have been clear to a reasonable officer that deploying the second NFDD was a constitutional violation. I would suggest that the *Bing* case has now clearly established that each deployment of an NFDD must be able to stand on its own merits.

Finally, in a 2013 unpublished case,[11] the 6th Circuit affirmed dismissal of a lawsuit finding that the use of the NFDD was reasonable where the officers deployed the device outside of the bedroom to reduce risk to persons and property. The deployment was in conformance with the team's risk assessment matrix and operational plan.

Three cases of interest in the 7th Circuit (Illinois, Indiana and Wisconsin) each deal with a different variant with regard to NFDDs. The *Escobedo*[12] case involved a suicidal subject with mental health issues and illustrated many of the points made by attorney Eric Daigle in his recent article in *The Tactical Edge*.[13] The *Milan*[14] court determined that the use of NFDDs during execution of a search warrant related to an internet threat was unreasonable. And, in *Flournoy v. Chicago*,[15] the court upheld a defendant's jury verdict where the plaintiff was seriously injured as a result of an NFDD deployment.

WE KNOW FROM OUR BASIC USE-OF-FORCE TRAINING THAT EACH APPLICATION OF FORCE MUST BE ABLE TO STAND ON ITS OWN MERITS WITH REGARD TO A COURT REVIEW OF "REASONABLENESS."

The *Escobedo* case made its way from the trial court to the appellate court, back to the trial court, and ultimately back to the 7th Circuit in 2012, where the court affirmed a jury verdict clearing the team commanders of any liability. Setting aside the fact that this case finally ended in a defendant's verdict, the court's discussion concerning the use of NFDDs bears review. By way of background, the incident began after Rudy Escobedo called 911 and claimed he was high on cocaine, had a gun, and was going to kill himself. Police responded and Escobedo told them he was not going hurt anyone, he just wanted help. Four hours after the initial 911 call, and following hours of negotiations and multiple applications of chemical munitions, the tactical team breached the apartment and located Escobedo in a bedroom. The team deployed an NFDD and entered the room where Escobedo had a revolver pointed at his head. Seconds later, believing that Escobedo was moving the gun toward them, officers shot Escobedo and he died. Officers later learned that the NFDD had exploded by Escobedo's head.

In *Escobedo* 1,[16] the 7th Circuit affirmed the trial court's denial of summary judgment finding that, among other activities, the use of flash-bang devices within the tear-gas-filled room and the throwing of the device into a darkened room with no knowledge of the location of the individual inside the room was a clear violation. After reviewing other NFDD cases from the 7th Circuit and other appellate courts, the court stated the following:

"In 2005 it was clearly established that throwing a flash bang device blindly into an apartment where there are accelerants, without a fire extinguisher, and where the individual attempting to be seized is not an unusually dangerous individual, is not the subject of an arrest, and has not threatened to harm anyone but himself, is an unreasonable use of force. Therefore, taking the facts as presented to us from the district court, the Defendants are not entitled to qualified immunity and the issue

of the officers' decisions must be presented to a jury."

Following a long and stressful court process, this case resulted in a "win" for the defendant officers,[17] but the court's comprehensive review of NFDD use leaves no doubt how it will rule in future cases. Operators, team leaders and commanders should review this case as guidance for policy and SOP development.

In *Milan*[18], officers were investigating threats made against officers over the internet. The investigators secured a warrant for an apartment occupied by 68-year-old Louise Milan and her 18-year-old daughter. The SWAT team executed the search warrant, deploying at least two NFDDs. Shortly after the entry it was apparent that Mrs. Milan and her daughter were not involved in emailing the threats. The women brought suit claiming, in part, that the use of NFDDs was excessive. Repeating its continuing concern over the use of NFDDs, the court noted,

"These are explosive devices, similar to but a good deal less lethal than military hand grenades, that are intended to stun and disorient persons, thus rendering them harmless, by emitting blinding flashes of light and deafening sounds. They can kill if they land on a person, especially a child. The police call them 'distraction devices,' an absurd euphemism; we called them 'bombs.'"[19]

The *Milan* court affirmed the trial court's denial of summary judgment and sent the case back to the trial court for a jury trial. After the Supreme Court declined to hear the case, it settled in 2016.

In *Flournoy v City of Chicago*,[20] the SWAT team executed a drug warrant that called for a "break and rake" team to cause a diversion at a rear window and for the entry team to deploy an NFDD upon entry. The officer did not see anyone when he deployed the device; however, the device stuck Donna Flournoy's knee, causing a severe burn. The trial court denied summary judgment and, following a jury trial, the jury returned a verdict in favor of the officers. Flournoy appealed and the 7th Circuit upheld the jury's decision, finding that the officers only deployed one device and it was reasonable for the jury to believe the officer's testimony that he only delivered the device after checking the hallway and did not see any occupants in harm's way.

As the South Dakota District Court noted in an unreported case,[21] "Eighth Circuit case law on when an officer may constitutionally use a flashbang is sparse." However, in *Tuchez*, officers deployed a device during the course of an entry following an investigation of a large-scale methamphetamine operation. The device activated just as Adonias Tuchez walked into the room, injuring his leg. The trial court granted summary judgment, finding that the officer's actions were reasonable and that the agency's policy and procedure and training regarding the use of NFDDs was appropriate.

The 9th Circuit (California, Washington, Oregon, Arizona, Alaska, Hawaii, Idaho, Nevada and Montana) reviewed a case[22] involving the deployment of an NFDD during a search for a robbery suspect in a home where there were a number of other occupants in the apartment. Kristianne Boyd was sleeping on the floor in a dark hallway when the officers deployed the device without first checking the area. Boyd sustained burns to her arm. The *Boyd* court granted the officers summary judgment finding that it was not clearly established at the time of the incident that the officer's actions under the facts presented would be a constitutional violation. The court, however, left no doubt that, going forward, the unsighted delivery of an NFDD in a dark apartment where people may be sleeping would be considered unreasonable.

LIKE EVERY TOOL IN OUR SWAT TOOL BOX, NFDDS HAVE THEIR PLACE AND CERTAINLY CAN BE INSTRUMENTAL IN PREVENTING INJURY TO OFFICERS, SUSPECTS AND OCCUPANTS.

The 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) has gone back and forth on the reasonableness of deploying NFDDs. In earlier cases, the 10th Circuit approved the use of NFDDs where the subject was involved in felony-level drug dealing and had been convicted of a

fire bombing incident;[23] and a case where the subject had firearms, had threatened to kill officers, and was involved in drug trafficking.[24] In both *Kirk* and *Myers*, the court cautioned that "officers who adopt commando style tactics as a standard operating procedure run the risk of violating the Fourth Amendment."[25]

However, in a more recent case, the District Court for the District of Colorado denied the defendant officers' motion for summary judgment finding that the use of the NFDD under the facts presented was unreasonable. In *Santistevan v City of Colorado Springs*[26] the SWAT team executed a search warrant as part of a larger investigation into drug activities. During the entry one device was activated outside the home. No drugs or weapons were recovered and Rose Santistevan, a 69-year-old occupant in the home, brought suit. Finding that the use of the NFDD was unreasonable, the court noted that the officers knew there was a possibility that children and elderly citizens may be in the home, at least one senior citizen was on oxygen, and the principal suspect and other suspects had already been located at another address.

Last but not least, those of you in Alabama, Georgia and Florida have a new 2017 case out of the 11th Circuit where the court dismissed a case against officers, determining it was not clearly established that the unsighted delivery of a NFDD into an occupied bedroom where occupants were sleeping was a Fourth Amendment violation.[27] However, the *Dukes* court made it clear that an officer acting under similar circumstances would not have a qualified immunity defense available in future cases. In this case, , officers were serving a search warrant for drugs and the suspect was believed to be in possession of at least one handgun. Three devices were deployed during the entry. Treneshia Dukes was asleep in the bedroom when she was struck by a NFDD thrown through a

window. She suffered serious injuries to her arms and legs. Going forward, the unsighted delivery of an NFDD into a darkened bedroom occupied by sleeping individuals, absent other circumstances, will most likely be construed by the 11th Circuit as a Fourth Amendment violation.

SUMMING UP

Like every tool in our SWAT tool box, NFDDs have their place and certainly can be instrumental in preventing injury to officers, suspects and occupants. But, when not properly deployed, they can seriously injure officers, suspects and occupants. We need look no further than the sad case in Georgia where a 19-month-old was seriously injured by a deployed device, resulting in the need for the child to endure multiple surgeries and the involved agencies to pay out over $3 million in damages.

So, what common themes can we take away from the many differing cases covered in this article? Earlier *Tactical Edge* articles on NFDDs provide a comprehensive review of the proper deployment, care and maintenance of these devices. The cases covered today, however, should form the basis for development of sound policies and operational plans for your team. The following are a few of the common themes in these cases:

- Unless an officer is able to articulate specific officer safety concerns, devices should only be delivered after the deploying officer has checked the area.
- Pre-planning activities should identify high-risk occupants in the home, specifically, children and the elderly. If these people are present, there needs to be an analysis balancing the safety of these high-risk individuals against the benefits of deploying the device.
- Not every call-out necessitates the need for deployment of NFDDs. After-action reports should document both instances, where they are used and not used, to provide a paper trail for later litigation.

• Proper training and certification records should be maintained and updated as necessary. Training should include a review of the case law in your jurisdiction concerning the use of these devices.

ENDNOTES

1. Becker, John. 1996. The Legal Aspects of Using Diversionary Devices. *The Tactical Edge*, Spring 1996, P. 49
2. *U.S v. Boulanger*, 444 F.3d 76 (1st Cir. 2006)
3. *Terebesi v. Torreso, etal*, 764 F.3d 217 (2nd Cir. 2014)
4. *Terebesi v. Torreso, etal*, 764 F.3d 217, 228 (2nd Cir. 2014)
5. *Estate of Smith v Marasco*, 430 F.3d 140 (3rd Cir. 2005)
6. *Krause v Jones*, 765 F.3d 675 (6th Cir. 2014)
7. *Estate of Bing v City of Whitehall*, 456 F.3d 555 (6th Cir. 2009)
8. *Graham v Connor*, 490 U.S. 386 (1989)
9. *Bing* at p. 569
10. *Bing* at p. 570
11. *Ramage v Louisville*, 520 F. Appx. 341 (6th Cir. 2013)
12. *Escobedo v Bender*, 600 F.3d 770 (7th Cir 2010)
13. Daigle, Eric, 2018, Use of Force and Mental Illness, *The Tactical Edge*, Spring 2018 p. 56
14. *Milan v Bolin*, 795 F.3d 726 (7th Cir. 2015)
15. *Flournoy v Chicago*, 829 F.3d 869 (7th Cir. 2016)
16. *Escobedo v Bender*, 600 F.3d 770 (7th Cir. 2010)
17. *Escobedo v Bender*, 702 F.3d 388 (7th Cir. 2012)
18. *Milan v. Bolin*, 795 F.3d 726 (7th Cir 2015)
19. *Milan* at p. 729
20. *Flournoy v City of Chicago*, 829 F.3d 869 (7th Cir. 2016)
21. *Tuchez v. City of Sioux Falls*, 2012 WL 2524979
22. *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004)
23. *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997)
24. *Kirk v Watkins*, 1999 WL381119 (10th Cir. 1999)
25. *Kirk* at p. 4
26. *Santistevan v City of Colorado Springs*, 983 F.Supp. 2nd 1295 (D. Col. 2013)
27. *Dukes v. Deaton*, 852 F.3d 1035 (11 Cir. 2017)
28. Sgt. Don Whitson, Sgt. Jim Clark; Flash Sound Diversionary Devices – A Comprehensive Review; *The Tactical Edge* Summer 2011 p. 14

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