Law Enforcement Digest

March 2016

Law enforcement officers: Thank you for your service, protection and sacrifice.

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CIVIL RIGHTS LAWSUIT: CIVIL RIGHTS LAWSUIT: OFFICERS MUST KNOCK AND RE-ANNOUNCE THEIR PRESENCE WHEN THEY KNOW OR SHOULD REASONABLY KNOW THAT AN AREA WITHIN THE CURTILAGE OF A HOME IS A SEPARATE RESIDENCE FROM THE MAIN HOUSE.

Mendez v. County of Los Angeles, __ F.3d __, 2016 WL 805719 (March 2, 2016).

Several officers responded to a dispatch that a fugitive was seen at a grocery store. A confidential informant then provided a tip to the police that "a man fitting the description" of the fugitive was seen "riding a bicycle in front of" Paula Hughes' home.

The officers went to Hughes' home. The officers did not have a search warrant for her home. "The officers were told that a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)." The officers went to Hughes' front door and asked her to let them in. She refused to let them in. The officers "then heard someone running inside the residence." The officers thought that the person making the noise was the fugitive and prepared to force the door open. Before the officers forced open the door, Hughes opened the door. The officers handcuffed Hughes and placed her in a patrol car. There was no one else inside the house.

Two officers then walked through the residence's backyard. While in the backyard:

> [The officers observed] a 7' x 7' x 7' shack made of wood and plywood. The shack was surrounded by an air conditioning unit, electric cord, water hose, clothes locker (which may have been open), clothes, and other belongings. The [officers] did not knock and announce their presence at the shack, and [the officer] did not feel threatened. Approaching the shack from the side, [the officer] opened the wooden door and pulled back a blue blanket used as a curtain to insulate the shack. The [officers] then saw the silhouette of an adult male holding what appeared to be a rifle pointed at them. [One of the officers] yelled "Gun!" and both [officers] fired fifteen shots in total.

The weapon held by Mendez was a BB gun. Both Mendez and his wife suffered injuries from the gun shots. They filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the officers alleging violations of their Fourth Amendment rights. The district court denied qualified immunity to the officers on several grounds. For the most part, the Ninth Circuit Court of Appeals agreed with the district court. However, the Ninth Circuit found that it was not "clearly established," at the time of the incident, that an officer must knock and announce an entry for every separate residence (i.e., the shack in the backyard) within the main residence's curtilage. The Ninth Circuit ruled that the law is now clearly established that an officer must knock and announce entry for a separate residence within the main residence's curtilage.

Under the Fourth Amendment, the knock and announce rule requires police officers to announce their presence before they enter a home. An exception to this rule is "when circumstances present a threat of violence." The officers argued that they complied with the knock and announce rule when they knocked on Hughes' front door and announced their presence. The officers further argued that the knock and announce rule does not require an officer to knock and announce on every door to every separate residence within a home or its curtilage.

The Ninth Circuit agreed that at the time of the incident the law was not clearly established that the officers "needed to announce their presence again before entering the shack in the curtilage." However, the Ninth Circuit took this opportunity to "clearly establish the law going forward." The new "clearly established" rule is that:

> **[O]fficers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.**

The Ninth Circuit reasoned that a purpose of the knock and announce rule is to prevent "violent confrontations that may occur if occupants of the home mistake law enforcement for intruders." In this case, if the officers had announced their presence before entering the shack, then that announcement "would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door."

LED EDITORIAL NOTE: **For Washington officers, this case means that if an officer wants to enter a structure within the main residence's curtilage, and there is a reason to believe that structure is a residence for another person, then the officer should knock and announce before entering that structure. Examples of such structures may include shacks (such as the situation in this case), tents, or other structures where the officer has a reason to believe it is being used as a residence by another party. Reasons to believe that a structure within a residence's curtilage could serve as a residence for another person include: (1) the main resident or neighbors stating that another person uses that structure as a residence; (2) personal effects such as laundry near the structure; or (3) utilities (e.g., a power cord) hooked up to the structure. As always, officers are encouraged to discuss these issues with their agency's legal advisors.**

Apart from establishing new law that the knock and announce rule applies to other residences within the main residence's curtilage, the Ninth Circuit found that the warrantless entry into the shack violated clearly established law. First, the Ninth Circuit found that the officers' entry into the shack was a search and unsupported by the hot pursuit exception. Hot pursuit of a fugitive may justify a warrantless entry into a home where "police officers begin an arrest in a public place but the suspect then escapes to a private place." In deciding whether the officers were in "hot pursuit," courts evaluate whether there was an "immediate or continuous pursuit" of the fugitive from the scene. In this case, the Ninth Circuit rejected the offices' hot pursuit argument because "there was no immediate or continuous pursuit of the [fugitive] from the scene of the crime."

Second, the Ninth Circuit found that the warrantless search was unsupported by exigency (based on officer safety concerns) because the officers testified they did not fear imminent violence at the time of the entry.

Third, the Ninth Circuit rejected the officers' arguments that the entry into the shack was a lawful protective sweep. "To justify a protective sweep, police must identify specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." In this case, there were no facts that the shack harbored a person posing a danger to the officers.

SEARCH AND SEIZURE: KNOCK AND TALK EXCEPTION TO WARRANT REQUIREMENT DOES NOT APPLY WHEN OFFICERS KNOCKED ON A SUSPECT'S FRONT DOOR AT 4 A.M. WITH THE INTENT TO ARREST THE SUSPECT. U.S. v. Lundin, __ F.3d __, 2016 WL 1104851 (March, 22 2016).

Shortly after midnight, a sheriff's deputy was dispatched to interview an elderly woman who claimed that she had been kidnapped. The woman told the deputy that about four hours earlier, Eric Lundin had knocked on the door to her home. When she opened the door, "Lundin grabbed her by the neck, forced his way inside, and accused [her son] of stealing marijuana from him."

During the incident, Lundin displayed two firearms and forced her to ingest methadone pills with the purpose of causing her to overdose. Lundin also broke her television with one his handguns. Lundin pressed the gun against her head and forced her to call her son to tell him to come home. Lundin then forced her into a truck and drove past her son. While driving past her son, Lundin told the elderly woman "wave good-bye to your son. You'll never see him again." Lundin again forced the woman to ingest more methadone pills, "and pointed out locations

where he could safely dispose of her body." Lundin then spoke with her son on a cell phone. At that point, Lundin decided that he no longer thought her son had stolen his marijuana, and he returned her to her home.

After the interview, the deputy went to the woman's home and observed damage consistent with her statements. At this point, the deputy "asked dispatch to issue a 'Be On the Look Out' (BOLO) for Lundin." After receiving the BOLO, another police officer reviewed vehicle registration files to locate Lundin's address. The officer then drove to Lundin's residence and arrived there just before 4:00 a.m.

Three officers went onto Lundin's front porch and, without identifying themselves as police officers, knocked loudly on the front door, "waited thirty seconds, and then knocked more loudly." At this point, "the officers heard several loud crashing noises coming from the back of the house. The officers ran to the back of the house and heard someone moving around in the backyard." Once in the backyard, the officers told Lundin that they were police officers and ordered him "to put his hands in the air and come out slowly." Lundin complied and the officers placed him under arrest.

After arresting Lundin, the officers searched the backyard and patio. While searching the patio, an officer saw "in open view and within arm's reach of a common walkway, a clear plastic freezer bag containing a silver revolver and a black semiautomatic." Lundin was subsequently charged with being a felon in possession of a firearm and ammunition. Before trial, he moved to suppress the evidence, and argued that the officer's search of the patio was an unconstitutional warrantless search. The trial court and Ninth Circuit Court of Appeals agreed.

The Ninth Circuit concluded that the officers conducted an improper knock and talk when they knocked on Lundin's front door at 4:00 a.m. with the intent of arresting him. The improper knock and talk created the exigency of Lundin fleeing into the backyard.

A knock and talk involves an officer entering a residence's curtilage and knocking on the front door. The Ninth Circuit reasoned that a knock and talk is limited to the officer "doing no more than any private citizen might do." In other words, the knock and talk is limited to the "customary license" of how a private citizen may enter a residence's curtilage to knock on the front door and engage the residence's occupants in conversation.

In this case, the officers' knock and talk exceeded what a private citizen might do:

> First, unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours. This does not mean that the "knock and talk" exception never applies when officers knock on the door of a home early in the morning. In some circumstances, an early morning visit may be consistent with an attempt to initiate consensual contact with the occupants of the home.
> . . .
> Second, the scope of a license is often limited to a specific purpose, . . . and the customary license to approach a home is generally limited to the purpose of asking questions of the occupants. Officers who knock on the door of a home for other purposes generally exceed the scope of the customarily license and therefore do not qualify for the "knock and talk" exception.
> . . .
> The "knock and talk" exception to the warrant requirement does not apply when officers encroach upon the curtilage of a home with the intent to arrest the occupant.

In this case, since the officers' intent was to arrest Lundin, they exceeded the bounds of the knock and talk. Accordingly, the subsequent search of the porch violated the Fourth Amendment, and the trial court properly suppressed the guns from evidence.

LED EDITORIAL NOTE: **Based on the Ninth Circuit's reasoning, it appears that these situations may exceed the scope of a constitutional knock and talk: (1) knocking on a person's door at an unusual hour of the day (e.g., 4 a.m.) unless the officers have reason to believe that the residence's occupant usually receives visitors at that hour; or (2) conducting a knock and talk for the sole purpose of arresting the occupant.**

The Ninth Circuit noted that the officers in this case could have applied for and obtained a warrant to arrest Lundin rather than conducting a knock and talk at 4:00 a.m. with the purpose of arresting him. When the sole purpose of a knock and talk is to arrest the residence's occupant, a prudent approach is to apply for a warrant unless there are circumstances that make obtaining the warrant impracticable. As always, officers are encouraged to discuss these issues with their agencies' legal advisors and local prosecutors.

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WASHINGTON STATE COURT OF APPEALS

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SUFFICIENCY OF EVIDENCE: AFTER CONSUMING A MEAL, RESTAURANT PATRON THREATENING THE RESTAURANT OWNER WITH A KNIFE WHEN THE OWNER DEMANDED PAYMENT FOR THE MEAL IS SUFFICIENT EVIDENCE OF FIRST DEGREE ROBBERY. State v. Thomas, __ Wn. App. __, __ P.3d __, 2016 WL 1039228 (March 15, 2016).

Adam P. Thomas went to dinner at a restaurant in Vancouver, Washington. After ordering a salad and a beverage, he went outside to smoke a cigarette. After being served with the meal, Thomas continued to leave the table, go outside, and then come back to his table. The restaurant owner noticed Thomas repeatedly leaving the table to go outside.

When Thomas had finished half of his meal, he took his backpack and went outside to smoke. The restaurant owner was concerned that Thomas was leaving, and followed Thomas outside to ask for him to pay for the meal. Thomas handed the owner a credit card, which was declined. The restaurant owner went back outside and asked Thomas for another form of payment. In response, Thomas said, "I sure do," and displayed an unfolded pocket knife. Thomas ran off, and the owner went back inside the restaurant and called 911. The police later arrested Thomas.

Thomas was charged with first degree robbery with a deadly weapon enhancement. Thomas moved to dismiss the charge by arguing that since he had finished his meal before threatening the owner and leaving the restaurant, "there was insufficient evidence that he used force to obtain or retain possession of the meal." The trial court denied the motion, and Thomas was convicted. The Court of Appeals agreed with the trial court.

To convict a person "of first degree robbery, the State [must] prove beyond a reasonable doubt that he (1) unlawfully took personal property from the person of another, (2) by the use or threatened use of immediate force, and (3) during the commission of the robbery was (i) armed with a deadly weapon, (ii) displayed what appeared to be a deadly weapon, or (iii) inflicted bodily injury." The Court of Appeals rejected Thomas' argument "that because he had

consumed the meal and left the restaurant before displaying a weapon, the evidence was insufficient to support his robbery conviction." The Court reasoned:

> Thomas's use of force was employed to overcome [the owner's] resistance to his taking of a meal for which he did not intend to pay. . . . Thomas did not abandon the personal property of another (the meal) when he consumed it. Rather, Thomas's act of consuming the meal converted the personal property for his own use. This conversion, or taking of the personal property then became unlawful when Thomas attempted to leave the restaurant without paying for the meal. Because the State presented evidence that Thomas displayed a knife while trying to prevent [the owner's] resistance to his taking of the meal without paying for it, sufficient evidence supported the jury's verdict finding Thomas guilty of first degree robbery.

As a result, Thomas' conviction for first degree robbery stands.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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