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Eleventh Circuit Denies Immunity for Warrantless In-Home Arrest

By Brian S. Batterton, J.D.

On October 16, 2019, the Eleventh Circuit Court of Appeals decided *Bailey v. Swindell et al.,*[i] in which the court examined whether a deputy violated the Fourth Amendment when he arrested a person inside his residence without a warrant. The relevant facts of Bailey, taken directly from the case, are as follows:

> The argument had occurred when Bailey stopped by the couple's marital home to retrieve a package. Bailey no longer lived in the home with Rolinger and their two-year-old son, as the couple was embroiled in a contentious divorce. When Bailey rang the doorbell—seemingly more than once—he woke the boy, who started to cry. Rolinger came to the door but refused to open it and told Bailey to leave. Bailey responded that he wasn't leaving without his package, and Rolinger eventually informed him that she had put it in the mailbox. Bailey retrieved the package and departed.
>
> Rolinger went to her mother's house and called 911 to report the incident to police. In response to the call, Deputy Andrew Magdalany was dispatched to interview Rolinger, and Swindell went to talk to Bailey. At some point before Swindell reached

Bailey, he called Magdalany and gathered additional details about the encounter and the surrounding circumstances. Magdalany told Swindell, for instance, that in the three months since Bailey's separation from his wife, he had visited the marital residence repeatedly, moved items around in the house, and installed cameras without his wife's knowledge. Magdalany also explained that Rolinger was "fear[ful]" and believed that her husband had "snapped." Even so, he told Swindell that he had not determined that Bailey had committed any crime.

Armed with this information, Swindell approached Bailey's parents' home—where Bailey was living—knocked on the door, and told Bailey's mother Evelyn that he wanted to speak to Bailey. Bailey came to the door and stepped out onto the porch, accompanied by his brother Jeremy. Bailey, Evelyn, and Jeremy all remained on the porch during the encounter, although only Bailey spoke with Swindell. Swindell immediately advised Bailey that he was not under arrest. Shortly thereafter, Swindell retreated off the porch to establish what he described as a "reactionary gap" between himself and Bailey—a distance that Jeremy estimated could have been as far as 13 feet. Swindell asked Bailey to speak with him privately by his patrol car, but Bailey declined, saying that he wasn't comfortable doing so. Swindell then told Evelyn and Jeremy to go back inside so that he could talk to Bailey alone, but they, too, refused. Bailey asked Swindell why he was there, but Swindell initially didn't respond; he eventually said that he was there to investigate, although he never clarified exactly what he was investigating. Frustration growing, Swindell then repeatedly demanded—at a yell—that Evelyn and Jeremy return to the house and that Bailey talk to him by his patrol car, but no one complied.

> Bailey then announced that he was heading inside and turned back into the house. Without first announcing an intention to detain Bailey, Swindell charged after him and "tackle[d] [him] . . . into the living room," simultaneously declaring, "I am going to tase you." Importantly for our purposes, by that time Bailey was—as he, Evelyn, and Jeremy all testified—already completely inside the house. Swindell then proceeded to arrest Bailey. [ii]

Bailey filed suit in district court and alleged that Swindell violated his rights under the Fourth Amendment when he arrested him in his home without a warrant. The district court held that there was probable cause for the arrest and granted qualified immunity and summary judgment to Deputy Swindell. Bailey appealed this decision to the Eleventh Circuit Court of Appeals.

On appeal, Bailey argued that the district court, even assuming the arrest was based on probable cause, failed to address whether the arrest violated the Fourth Amendment because it was a warrantless arrest that occurred in his home without consent or exigent circumstances. Thus, the issue on appeal was whether an officer who has probable cause to arrest a person, can enter that person's home and arrest them if they were previously standing outside the home.

The court of appeals began by noting the law related to qualified immunity. When an officer is engaged in

a discretionary function, such as deciding whether to effectuate an arrest, in order to defeat the officer's qualified immunity, the plaintiff must

> show both (1) that [he] suffered a violation of a constitutional right and (2) that the right [he] claims was "clearly established" at the time of the alleged misconduct. [iii]

The plaintiff argued that (1) that Deputy Swindell lacked probable cause to arrest him and (2) Deputy Swindell impermissibly arrested him in his residence without a warrant. The court decided to assume, without holding, that the deputy had probable cause to arrest Bailey. This is because, even if the deputy had probable cause to arrest Bailey, for the arrest to not violate the Fourth Amendment, the deputy must have entered Bailey's home in a constitutionally permissible manner.

The court then set out to examine the law regarding arrests in residences. The court of appeals first examined *the United States v. Santana.* [iv] In *Santana,* the police conducted a sting operation. They then went to Santana's home to arrest her for selling heroine. The police approached the suspect, Dominga Santana, as she was standing in her doorway holding brown paper bag. The officers, who were approximately fifteen (15) feet away, identified themselves as police and displayed identification. Santana fled into her residence, and the police followed her and arrested her inside her residence. They did not have a warrant. The Supreme Court held that the in-home warrantless arrest was legal under the Fourth Amendment because the arrest began in a public place, when she was standing on her doorway. As such, she could not retreat into a private place to defeat an arrest that was initiated in a public place. The court considered this "hot pursuit."

In the case at hand, Deputy Swindell argued that the arrest of Bailey was supported by Santana. However, the court of appeals noted that the difference was that, in Santana, the police initiated the arrest when Santana was standing in a public place (the threshold of the door), but in Bailey's case, Deputy Swindell did not initiate the arrest until Bailey had fully entered his residence. Of course, this does assume that Bailey's version of the facts are correct, but at this stage of the litigation, the court is required to credit the plaintiff's version of events.

The court of appeals also examined *Payton v. New York.* [v] Payton was a consolidated case that involved two separate incidents with the same issue. In the first case, the police had developed probable cause to believe that Theodore Payton had committed a murder. They had not obtained a warrant. Officers knocked on Payton's door and when he did not answer, they forced entry. They determined that he was not home but they also collected evidence that was used against him in court. In the second case, officers had probable cause to believe the Obie Riddick had committed robberies. They did not have a warrant. They knocked on his door and his young son opened the door. Officers saw Riddick through the open door. They entered and arrested Riddick and also obtained evidence that was used against him at trial. Ultimately, the cases went to the Supreme Court under one consolidated case. The Supreme Court held

> [A]bsent exigent circumstances"—and even assuming the existence of probable cause—the threshold of the home "may not reasonably be crossed without a warrant. Id. at 590. [vi]

The court of appeals also discussed the Eleventh Circuit precedent, *McClish v. Nugent.* [vii] In *McClish,* an officer was standing on a porch, and he reached into McClish's residence and pulled him out the door and arrested him. McClish stated that he was behind the threshold of the door completely in his residence. While this was McClish's version of events, the court was required to credit his version at this stage of the litigation. The court held that the officer violated the Fourth Amendment by entering McClish's residence to arrest him without a warrant, consent or exigent circumstance.

The court also discussed the Eleventh Circuit precedent, *Moore v. Pederson.* [viii] In *Pederson,* an officer was talking to Moore, who was standing inside the doorway of his apartment. The officer was standing outside the apartment at the doorway. The officer told Moore to turn around and put his hands behind his back, and he complied. The officer handcuffed and arrested Moore. The court held that

> *McClish* clearly established that an officer may not execute a warrantless arrest without probable cause and either consent or exigent circumstances, even if the arrestee is standing in the doorway of his home when the officers conduct the arrest. [ix]

The court of appeals, in the case at hand, then stated

> The bottom line, post-*Payton:* Unless a warrant is obtained or an exigency exists, "any physical

> invasion of the structure of the home, by even a fraction of an inch, [is] too much." *Kyllo v. United States,* 533 U.S. 27, 37 (2001) (quotation marks and citation omitted). [x]

The court of appeals then applied the precedent above to the facts of Bailey's case. The court noted that, in *Santana,* the arrest was set in motion while Santana was in a public place. Bailey's arrest, in contrast, was not set in motion until after he fully entered his residence. The court of appeals stated

> Bailey's arrest, by contrast, wasn't initiated in public, and therefore can't qualify as a "true hot pursuit." Id. at 42 (quotation marks omitted). Swindell gave no indication that he intended to arrest Bailey before he threatened to tase him and simultaneously tackled him from behind. Taken in the light most favorable to Bailey, the facts demonstrate that the threat and tackle occurred only after Bailey had retreated entirely into the house, so "hot pursuit" provides no justification for the warrantless entry here. [xi]

The court further distinguished *Santana* from Bailey's case noting that *Santana* also involved the exigent circumstance of "destruction of evidence" because Santana fled into her residence with evidence in her hand. A delay in entry could have resulted in the destruction of that evidence. In Bailey's case, there was no such threat of destruction of evidence.

Thus, since there was no hot pursuit and no exigency, the court held that the deputy violated the Fourth Amendment when he "crossed the threshold to effectuate a warrantless, in-home arrest. As such, the plaintiff met the first element he must establish in order to defeat the deputy's qualified immunity.

The second element the plaintiff must establish is that the law was "clearly established" such that another reasonable officer in the same situation would have known his conduct violated the Fourth Amendment.

Regarding this issue, the court of appeals stated that *McClish* and *Moore* both clearly established that

> [A] warrant (or exception) is always required for a home arrest "even if the arrestee is standing in the doorway of his home when the officers conduct the arrest." 806 F.3d at 1050 n.14. [xii]

Thus, the plaintiff satisfied the second element required to defeat qualified immunity. As such, the deputy was not entitled to qualified immunity in this case.

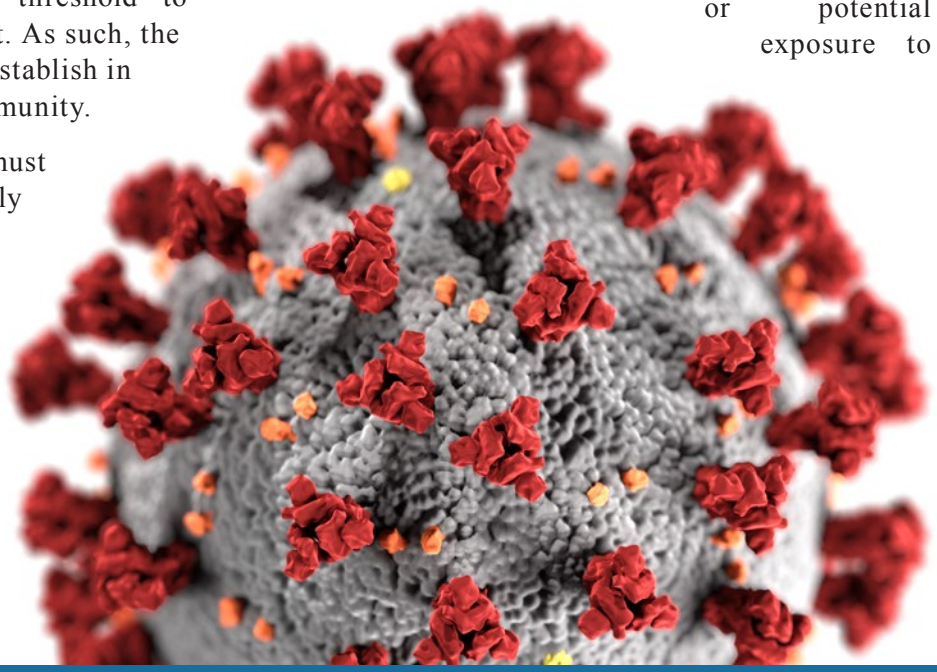
Citations

i. No. 18-13572 (11th Cir. Decided October 16, 2019)
ii. Id. at 3-6
iii. Id. at 7
iv. 427 U.S. 38 (1976)
v. 445 U.S. 573 (1980)
vi. Id. at 590
vii. 483 F. 3d 1231 (11th Cir. 2007)
viii. 806 F.3d 1036 (11th Cir. 2015)
ix. Id. at 1050, n.14 (emphasis added)
x. Bailey at 12
xi. Id. at 13
xii. Id. at 15 (emphasis added)

Georgia Limits Liability for COVID-19 Claims

By Elarbee Thompson

Georgia businesses may defeat COVID-19 claims and lawsuits if they demonstrate compliance with the Georgia COVID-19 Pandemic Business Safety Act ("Act"). The Act protects a broad range of individuals, businesses, governmental bodies, religious organizations, and educational institutions from state law claims related to the transmission of COVID-19. An Entity in compliance with the Act's requirements is not liable under Georgia law for the "transmission, infection, exposure, or potential exposure to



COVID-19" of a person on the premises of the Entity. [1]

In addition to this immunity from liability, the Act creates a rebuttable "assumption of risk" designed to protect an Entity from claims relating to COVID-19 brought by a person accessing the premises of an Entity, but only if the Entity either: (a) posts required signage at the points of entry or (b) includes specified verbiage on a ticket, wristband, receipt or other proof of purchase to enter the premises.

Point of Entry Signage Method

For signage at the point of entry to trigger assumption of risk by those entering, the Entity must post the following statement in at least one-inch Arial font at each point of entry and apart from other signage:

WARNING
Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.

Proof of Purchase Method

For the "proof of purchase" method to trigger assumption of risk, the following statement must be printed apart from other text in at least ten-point Arial font on a proof of purchase (e.g., ticket, wristband, or purchase receipt):

Any person entering the premises waives all civil liability against this premises owner and operator for any injuries caused by the inherent risk associated with contracting COVID-19 at public gatherings, except for gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm, by the individual or entity of the premises.

Points of Caution

First, the Georgia Act only applies to causes of action accruing on or before July 14, 2021. Second, the Act will not protect an Entity from liability if an injured individual proves that the Entity was grossly negligent, engaged in willful and wanton misconduct, recklessly inflicted harm, or intentionally inflicted harm on the individual. To rely upon the protections of the Act, an Entity should follow social distancing, disinfection and other safety protocols outlined by public health officials, including but not limited to industry-specific guidelines from the Centers for Disease Control ("CDC"). Third, the Act specifically provides that it will not conflict with the state's Workers' Compensation Act, and the Act also does not affect any federal protections for workers, such as those mandated by the Occupational Safety and Health Act ("OSHA"). As such, employees have alternative routes for seeking compensation or other redress related to COVID-19 injuries.

Other States' Legislation

Georgia is not alone in protecting entities from litigation related to COVID-19. To date, Alabama, Alaska, Arkansas, Iowa, Kansas, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Utah, and Wyoming have enacted similar legislation or issued executive orders with various protections. In addition, nine other states have proposed similar legislation. If you have a business in Georgia or multi-state businesses, we are here to help guide you through the requirements of each of these state statutes/executive orders.

Federal Legislation

Employers should also monitor the recent bill proposed by Senators Mitch McConnell and John Cornyn. If passed in its present form, this bill would require claimants alleging injuries due to COVID-19 against businesses, nonprofits, schools, and government agencies to proceed in federal court and would allow liability only for acts of gross negligence or intentional misconduct.

Please call for specific advice on these situations or other unique scenarios which you encounter because these laws are complicated, and every situation is different.

1. "Entity" means any association, institution, corporation, company, trust, limited liability company, partnership, religious or educational organization, political subdivision, county, municipality, other governmental office or governmental body, department, division, bureau, volunteer organization; including trustees, partners, limited partners, managers, officers, directors, employees, contractors, independent contractors, vendors, officials, and agents thereof, as well as any other organization other than a healthcare facility.

This informational alert provides an overview of a specific and developing situation. It is not intended to be, and should not be construed as, legal advice for any particular situation, person, or entity.

Protests . . . Coming to a City Near You?

By Natalie Sellers, LGRMS Law Enforcement Risk Consultant

The following is a summary of information obtained in a recent webinar: Emerging Legal Trends – Policing Demonstrations, Protests, and Civil Unrest, hosted by Legal Liability Risk Management Institute. The presenter was Jack Ryan, LLRMI Co-Director, Captain (Ret) Providence, RI Police Department, Attorney.

Jack Ryan is an Attorney in Rhode Island, a graduate Juris Doctorate, Cum Laude at Suffolk University Law School and has 20 years of law enforcement experience as a police officer with the Providence Police Department, Providence, Rhode Island.

Jack's law degree and experience as a police officer gives him the unique perspective of public safety legal and liability issues. Jack is a former adjunct faculty member at Salve Regina University and lectures frequently throughout the United States. He has authored several legal publications, including the LLRMI best-selling "Legal Guide for Law Enforcement Officers and Supervisors," an annually-updated quick-reference guide to U.S. Supreme Court case law impacting law enforcement policies and procedures. Jack has authored "Law Enforcement Best Practices – 5th Edition", "Jail and Best Practices" and "Emerging Legal Trends for SWAT, Tactical and Emergency Response Operations". Jack has written policies and procedures that have been adopted by over 1,000 law enforcement and corrections agencies across the United States.

Protests . . . Coming to a City Near You?

Events across this nation have increasingly set the scene for opportunities of peaceful protests and civil unrest. Law enforcement agencies are consequently challenged with handling such events. Yet, as with all other risks in law enforcement, a little planning goes a long way. Herein are just a few risk management strategies to help mitigate issues with protest events, as well as the protesters.

Everyone in the community must be prepared. City Hall, law enforcement, fire, EMS, and communications, as well as state and federal partners, need to be ready for any protest event. Substandard planning can lead to substandard performance. Even the most peaceful protests can turn into riots. If you are not prepared for such an event, it could have disastrous consequences for everyone involved.

Plan – Plan – Plan

Every City should have a permitting process in place, which requires each group to obtain a permit prior to the protest event. Designate a period to review the application before granting the permit. Decide if there will be a fee for the permit that considers the manpower hours (overtime) and coordination of the event. It should also take into consideration time and place restrictions, as well as weapons restrictions of the protesters. Permitting can be precarious, so always consult with the city/county attorney. However, noteworthy areas to consider are: 1. Content neutral, 2. No government overboard discretion about what is being protested, 3. Narrowly tailored, and finally, 4. Open ample alternative means for the event. All four conditions must be met in order to avoid liability. This entails a huge balancing act with the First and Fourth Amendment rights, rights of the stakeholders, rights of the citizens, and rights of the

counter protesters. Legal advisors on scene can also help minimize liability during the protest.

Intelligence Gathering

Intelligence gathering involves substantial time and effort before, during, and after the event. Protesters will use social media to mobilize participants. This will give insight into the actions being suggested and whether their intent is violent or nonviolent. Likewise, it will give insight into prior types of demonstrations they have had in other locations. Plainclothes officers within the crowds will also assist in intelligence gathering. Provide mutual aid and expedite resources if not readily available. Remember that innocent people can be in the crowd too, such as reporters, children, or onlookers. Once gathered, consider making a threat assessment. Look for potential areas of disorderly conduct, including threats to property, statues or monuments, buildings, cars, and animals (K-9s or horses). Assess the likelihood of violence from past protests. If there is violence, establish beforehand who will deal with it and how the victims will be treated.

Training

Determine if any training is needed by making an honest assessment of your staff. Who will be in command during the protest? Do you have proper communication? Has everyone completed NIMS training? Could there be a bomb threat and if so, how do you handle it? Should you conduct a mock exercise? Do you need snipers? Could there be a chance of mass casualty and if so, are the hospitals prepared to handle it? Are your officers up to date on constitutional laws, riot statues, and laws of the State of Georgia regarding peaceful protests? Are there plenty of areas of egress? Have your officers been properly trained on special munitions, such as tear gas, projectiles, shields and barricades, flex cuffs, etc.? Will you need SWAT or SERT and if so, where can they stage conveniently out of sight? What type of special equipment will be needed—bolt cutters, buses for mass arrests, flex cuffs and cutters, PA system, barricades, helmets, knee pads, shields? Have you considered multijurisdictional assistance and planning? Do your officers know they may be filmed and/or baited?

And due to this, supervisors need to be trained to watch their officers for signs of fatiguing and emotional control. Train your officers to be on the lookout for protesters trying to bait them into "contempt of cop". Finally, make sure they are familiar with policies regarding arrest procedures during mass arrests. The New York City Police Department developed BOSAR (Behavioral, Observation, Suspicious Activity Recognition) to help identify suspicious objects, behaviors, and activities before they happen to help keep the community and employees safe.

Final Thoughts and Case Law

Protests, even peaceful protests, can be a massive undertaking for any agency. Minimize your department's liability and officers' exposure to injury by using proper risk management principles to plan the protest.

Case law regarding protests/protesters:

Campbell vs. City of Oakland
Don't Shoot Portland vs. City of Portland
Black Lives Matter Seattle vs. King County, Seattle
Graham vs. Connor
Jones vs. Parmley
Cantwell vs. Connecticut
Houston vs. Hill
Heckler's Veto
Schenck vs. United States

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This Issue . . .

In-Home Arrests

COVID-19 Liability

Peaceful Protests

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