



REASONABLENESS OF ENTRY AS FORCE WHEN THERE IS A USE OF FLASH BANGS AS PART OF ENTRY

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In *Milan v. City of Evansville*¹ the United States District Court for the Southern District of Indiana reviewed a SWAT entry that involved the use of two flash bangs and provided a detailed analysis of the factors that should be considered when using these distraction devices.

The case itself involved an investigation into serious threats made over the internet with respect to targeting police officers and their families, including the Chief of Police for murder on a website, Topix.com. Through an investigation, it was determined that the posts were being made through an Internet connection at 616 East Powell Avenue in Evansville, Indiana. It is noted that it turned out that the particular IP address/connection was unsecured and thus could be accessed by persons outside the address identified. During the investigation, officers conducting surveillance observed a gang member known to officers at a residence two houses away from the residence that was the focus of the investigation. This gang member had a prior conviction for intimidating a police officer and had spray-painted "187" (the code for murder) on an officer's garage.

Following a one-day investigation, investigators obtained a warrant for 616 East Powell, the Milan residence. With respect to this residence, the court noted:

About this time, Detective Todd Seibert discovered that Milan's stepson, Anthony Milan, Sr., was a registered sex offender and had previously been arrested on drug and assault charges. His son, Anthony Milan, Jr., also had several recorded run-ins with police, some involving allegations of violence. Once Milan, Jr., became a potential suspect, Officers searched his Facebook page and found a photograph of him pointing a gun and using gang signs. Although the officers were aware that Milan, Sr., and Milan, Jr., did not live with Milan, her address was identified in the EPD's records management system as a previous known location (approximately four years earlier) for Milan, Sr. Detective Seibert also considered a

¹ *Milan v. City of Evansville*, 2015 U.S. Dist. LEXIS 750 (S.D. Ind. Jan. 6, 2015)

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possible familial relationship between Milan and LA Zombies gang member Marc Milan, due to their shared last name. Marc's record included arrests on drug and weapons charges, and he was also known to associate with Murray. During the short period of surveillance, however, officers never saw any of these individuals enter or leave Milan's residence.

Based upon the nature of this investigation, a threat assessment matrix was done prior to execution of the warrant to determine if the warrant should be executed by the SWAT team. The court outlined the pre-execution steps as follows:

Before executing the warrant, Lt. David Molinet completed a routine threat assessment worksheet to gauge the potential danger associated with serving the warrant at Milan's home. According to Lt. Molinet, "[t]he threat assessment considered the . . . issues relating to the threats of assault on officers, the references to explosives and armor piercing bullets, and pictures of Anthony Milan, Jr., with a handgun." Based on the outcome of the threat assessment worksheet, Lt. Molinet concluded that the SWAT team was necessary to execute the warrant at Milan's home.

Thereafter, due to the nature of the threats and taking into account Milan, Jr.'s, photograph with a gun, Officer Mike Gray, the SWAT team leader, decided that, for officer safety, distraction devices (also known as "*flash bangs*" or "stun grenades") would be used to make entry into Milan's home. This decision was made, and ultimately carried out, despite the fact that Murray—and not Milan or her relatives—was identified during the "pre-raid briefing" as likely being "ultimately responsible" for the threats. Officer Gray's SWAT plan was subsequently approved by Lt. Molinet. According to Chief Bolin, although he generally has authority over the SWAT team, he did not specifically approve or disapprove of the SWAT plan or the use of distraction devices in this case. The SWAT team After-Action Report, however, identified Chief Bolin as being responsible for the "call-out" of the SWAT team. Chief Bolin was also present at Milan's home when the SWAT team executed the search warrant.

Additionally, before officers executed the warrant, Chief Bolin instructed Sergeant Jason Collum to contact the local news media about the raid. He felt that the EPD should "repay the favor" to the news reporter who had notified the EPD about the threats. As a result, a news crew followed the SWAT team to Milan's home and videotaped the raid.

The court also detailed the execution of the raid:

Once at Milan's home, the SWAT team officers rushed to the front of her house. Immediately after they announced their presence, officers broke through Milan's front door and a nearby window and deployed two distraction devices into her home. Thereafter, SWAT team members rushed into the house and cleared the residence. Milan and Stephanie, although physically unhurt, were ordered to the ground at gunpoint and escorted from the home in handcuffs. The entire ordeal was filmed by the news crew (from outside Milan's home) and was the lead story on the news that night. After questioning the women for approximately twenty minutes, however, the officers determined that they were not responsible for the

threats and released them. Officers also quickly determined that Milan's WAP was the unsecured WAP that Detective Brown had discovered the prior day.

The court noted that during the raid at Milan's home, the officers observed Murray on his mother's porch two houses away. Further investigation that included subpoenaing records from Murray's Facebook account led to the conclusion that it was Murray who had accessed the Milan's unsecured wireless network and had posted the threats. Murray subsequently pled to a federal offense related to the threats.

The court also noted that in addition to paying for repairs of the damage caused during the raid and assisting Mrs. Milan in securing her wireless internet, the chief wrote a letter of apology to Milan.

In the lawsuit that followed the court dismissed, by way of summary judgment claims related to an improper search and seizure based on what was alleged to be a defective warrant, and a claim alleging false arrest/unreasonable detainment.

The court would not dismiss the use of force claim related to the use of the flash bangs during this raid. Thus, that part of the case was allowed to go forward.

In doing so, the court outlined various rulings by the United States Court of Appeals for the Seventh Circuit on the use of flash bangs:

We have previously indicated that the use of flash bang devices should be limited and is not appropriate in most cases. In Molina v. Cooper, 325 F.3d 963 (7th Cir. 2003), while we found that the officers' use of flash bang devices during the execution of a "high risk" search warrant—which was obtained for Molina's home on suspicion of drug activity—was reasonable because Molina had a criminal history that included aggravated assault, was alleged to be the head of a drug distribution organization, was associated with gangs, was home and had access to a stash of weapons, we expressly stated that "we in no way suggest that the use of flash bang devices is appropriate in every case (or even most cases)." Id. at 966 n. 1, 973. In finding that the officers' deployment of flash bang devices was reasonable, we emphasized that the officers had a significant reason to be concerned about their personal safety and we expressly limited our holding to the circumstances presented in that case. See id. at 973. In United States v. Folks, 236 F.3d 384 (7th Cir. 2001), we discussed, in dicta, the potentially serious injuries that may arise from the use of a flash bang device during a search. We suggested that a sufficiently careful (or perhaps reasonable) use of a flash bang device occurs when officers take a moment to look inside a residence or a room to ensure that no one would be injured by the device before tossing it and where officers carry a fire extinguisher to quickly extinguish any fires resulting from deployment of the device. Id. at 388 n. 2. We also, in no uncertain terms, pointed out that the use of a flash bang device is justified when "potentially *violent* people [can] be found in [a] house," as opposed to individuals who pose no threat to the police or others. Id. at 388 n. 2 (emphasis added). We noted that if the government does not use discretion in when and how they use flash bang devices, [*18] they "may [] risk significant damage claims from the careless

deployment of *flash-bang* devices." *Id.* In *United States v. Morris*, 349 F.3d 1009 (7th Cir. 2003), we explicitly stated that this Court has "often emphasized the dangerous nature of *flash-bang* devices and has cautioned that the use of such devices *in close proximity to suspects may not be reasonable.*" *Id.* at 1012. (Emphasis added). We suggested, also in dicta, that the use of a *flash bang* grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher. See *id.* at 1012 n. 1.

We also discussed the appropriateness of using *flash bang* devices in *United States v. Jones*, 214 F.3d 836, 837-38 (7th Cir. 2000). In *Jones*, we were disturbed by the officers' use of *flash bang* devices and stated that while the district court found their conduct to be reasonable, we were less certain. *Id.* Specifically, we unambiguously stated that "police cannot automatically throw bombs into drug dealers' houses, even if the bomb goes by the euphemism '*flash-bang* device,'" particularly where they do not believe the drug dealer [*19] is an unusually dangerous individual. *Id.* We found this to be true even though guns are normally used in the drug trade and even where a drug dealer has a prior weapons offense. *Id.* Lastly, while *Jones* was a criminal case that discussed the use of *flash bangs* in the context of suppressing evidence, we specifically stated that "[i]f this were a damages action seeking compensation for injury to the occupants or to the door, the claim would be a serious one." *Id.*

Other circuits have similarly considered the constitutional limits of using a *flash bang* device. See, e.g., *Boyd v. Benton County*, 374 F.3d 773, 777-79 (9th Cir. 2004) (use of *flash bang* device unconstitutional use of excessive force where police deployed it without either looking or sounding a warning when there were innocent individuals in a room as well as suspected robbers).

Bottom Line Observations of the Seventh Circuit as cited in this case:

- **Flash bang should only be used where officers had a significant reason to be concerned about their personal safety**
- **A sufficiently careful (or perhaps reasonable) use of a *flash bang* device occurs when officers take a moment to look inside a residence or a room to ensure that no one would be injured by the device before tossing it into the room/house.**
- **An officer should be assigned to carry a fire extinguisher to quickly extinguish any fires resulting from deployment of the device.**

- The use of a flash bang device is justified when "potentially *violent* people [can] be found in [a] house," as opposed to individuals who pose no threat to the police or others
- The use of flash bangs may be unreasonable if the law enforcement does not use discretion in when and how they are used. flash bang devices, "may risk significant damage claims from the careless deployment of flash-bang devices."
- Flash Bangs are dangerous and officers are cautioned that the use of such devices *in close proximity to suspects may not be reasonable*.
- The Seventh Circuit suggests that the use of a flash bang grenade is reasonable only
 - When there is a dangerous suspect and
 - A dangerous entry point for the police, and
 - When the police have checked to see if innocent individuals are around before deploying the device, and
 - When the police have visually inspected the area where the device will be used and
 - When the police carry a fire extinguisher.
- The Seventh Circuit has "unambiguously stated that "police cannot automatically throw **bombs** into drug dealers' houses, even if the **bomb** goes by the euphemism 'flash-bang device,'" particularly where they do not believe the drug dealer is an unusually dangerous individual. *Id.* We found this to be true even though guns are normally used in the drug trade and even where a drug dealer has a prior weapons offense. *Id.*