Hells Angels v. City of San Jose et al.
(9th Cir. April 4, 2005) __ F.3d __

ISSUES

In executing search warrants at a Hells Angels clubhouse and at the homes of several members, did officers apparently violate clearly established law so that they were not entitled to qualified immunity in a civil rights lawsuit?

FACTS

In 1997, Hells Angels member Steve Tausan was charged with murdering a customer at a Santa Clara County nightclub where Tausan worked as a bouncer. The DA also alleged that Tausan was eligible for a three-year sentence enhancement per California's Criminal Street Gang statute. Such an enhancement is permitted if prosecutors can prove, among other things, that one of the organization's primary activities was the commission of certain crimes, and that the organization had a "common identifying sign or symbol."[1]

To prove the latter, investigators obtained warrants to search the local Hells Angeles clubhouse and the homes of nine members in Santa Clara and Santa Cruz counties for "[a]ny evidence of membership in affiliation with [Hells Angels]," including any indicia containing the words "Hells Angels" or Hells Angels symbols. It was decided to execute the warrants simultaneously, and that entry would be made by teams composed of officers from the San Jose Police Department. According to the court, the leaders of the entry teams "were given approximately one-week advance notice of the action in order to prepare for the searches."

SECURING THE HOMES: While making plans for the entry, officers were informed there were "large, aggressive dogs" at the homes of two members, Souza and Vieira. At Souza's, the dog was a Rottweiler who was "known to attack without provocation." The court said the officers decided to deal with this threat by "isolating" the dog and, if that didn't work, to shoot him. The court added that the officers "had no plan to use non-lethal methods of incapacitation; nor did they have a specific plan for isolating the dog or any intention of giving Souza the opportunity to isolate his Rottweiler himself."

When officers arrived at about 7 A.M., they discovered that no one was at home and that the dog was in the backyard. Nevertheless, two officers walked into the yard with automatic rifles. One of the officers testified that the Rottweiler "suddenly appeared around the corner . . . It looked at me, gave a low growl, and started advancing toward me." The officers shot and killed the dog.

Meanwhile at Vieira's house, the situation was as the officers expected. The yard was surrounded by a tall, padlocked cyclone fence, and there were three dogs "resembling Bullmastiffs" inside the fence. According to the plan, an officer would try to scare the dogs by poking them, but if that didn't work he would "engage" them. The court noted that the officer who was assigned the job of "engaging" the dogs was armed with a shotgun and did not possess "any of the variety of non-lethal 'pain compliance' weapons used by police forces, such as tasers or stun-bag shotguns."

As the officers approached, the dogs ran toward the gate, "barking and growling." When officers stuck their hands through the fence to cut the lock, one of the dogs "jumped and snapped at their hands." An officer then tried to scare the dogs away by "yelling at them" and pushing one of them with the barrel of his shotgun. When the dogs would not retreat, one of the officers shot and killed one of them. When a second dog

[1] Penal Code § 186.22(f).

would not retreat, he was shot twice and later euthanized. The third dog "retreated to a hiding place away from the officers" and was not harmed.

CONDUCTING THE SEARCHES: Shortly after the searches began, officers started phoning the lead investigator, asking whether they should seize *everything* related to the Hells Angels. The investigator reportedly said yes. As the result, officers seized "literally truckloads" of indicia, including "numerous" Harley-Davidson motorcycles on which there were Hells Angeles stickers. In fact, they seized so much "indicia" that they had to rent a storage facility to hold it all. The court also noted that the officers caused "significant damage" in seizing some of the items.

DISCUSSION

Souza, Vieira, and others whose homes were searched sued the officers in federal court claiming the killing of the dogs and the wholesale seizure of property was unreasonable and, therefore, in violation of the Fourth Amendment. The officers responded by claiming they were entitled to qualified immunity on grounds that their method of securing the premises and the massive seizure did not violate clearly established law. When the trial court refused to grant qualified immunity, the officers appealed to the Ninth Circuit.

At the outset it is important to understand that the issue here was not whether the officers actually violated the plaintiff's civil rights. The only issue was whether the case should go to trial. Furthermore, in making this determination, the court was required to consider the evidence in the light most favorable to the plaintiffs.

Shooting the dogs

It is settled that an officer's act of killing a dog is a serious intrusion under the Fourth Amendment and will support a civil rights action if it was not reasonably necessary.[2] Were the killings reasonably necessary? Apparently not, said the court. It noted that Souza and Vieira were not suspects in the murder, and that their homes were being searched merely for indicia to support a sentencing enhancement on Tausan. More importantly, the officers knew about the dogs one week before the warrants were executed but apparently did not develop any realistic non-lethal plan for dealing with them. As the district court observed, "[T]he officers created an entry plan designed to bring them into proximity of the dogs without providing themselves with any non-lethal means for controlling the dogs. The officers, in effect, left themselves without any option but to kill the dogs in the event they—quite predictably—attempted to guard the home from invasion." The Ninth Circuit agreed with this assessment, adding:

> While the governmental interest of safety might have provided a sound justification for the intrusion had the officers been surprised by the presence of the dogs, the same reasoning is less convincing given the undisputed fact that the officers knew about the dogs a week before they served the search warrants. The officers had substantial time to develop strategies for immobilizing the dogs.[3]

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[2] See *Graham* v. *Connor* (1989) 490 U.S. 386, 396; *Robinson* v. *Solano County* (9th Cir. 1994) 36 F.3d 65, 68; *Liston* v. *County of Riverside* (9th Cir. 1997) 120 F.3d 965, 979; *Fuller* v. *Vines* (9th Cir. 1994) 36 F.3d 65, 68.

[3] **NOTE**: The court rejected the argument that it was necessary to shoot the dogs "to preserve stealth." Said the court, "If [the officer] truly feared that continued barking would 'alert the residents and possibly jeopardize the mission,' it was an unreasonable response—indeed, an utterly irrational one—to fire four shotgun blasts to 'engage' the dogs."

Consequently, the court ruled the officers were not entitled to qualified immunity for killing the dogs

Seizing "truckloads" of indicia

Although the search warrants authorized the officers to seize "any" Hells Angels indicia, the plaintiffs argued that the seizure of so much property was unreasonable and, therefore, violated the Fourth Amendment. The court noted that in determining whether a seizure was unreasonable the test is whether the need for the evidence justified the degree of intrusion.

As for need, the court concluded there wasn't much, pointing out the seized property "was not evidence of a crime; rather, the justification for seizing the indicia evidence was to support a sentencing enhancement." In addition, there was simply no need to seize everything because, as the Eighth Circuit noted in a similar Hells Angeles case, "While additional evidence would usually show the breadth of criminal activity, in the instant case additional evidence would at some point have no additional probative value in determining membership."[4]

Not only was there little need for all the seized evidence, the court pointed out that some of it could only be obtained by damaging it or other property. For example, officers "jack-hammered and removed" a piece of the sidewalk in front of the Hells Angels clubhouse because some of the members' names were written on it. The officers also removed the door to the clubhouse refrigerator because it had a Hells Angels decal on it. Said the court, "The unreasonable nature of the [lead investigator's] instructions to seize all evidence of indicia is highlighted by the destruction of property caused by the seizures."

The lead investigator claimed he was required to seize everything because the warrant ordered him to seize "any" of the listed evidence. The court responded that the word "any" does not mean "all," and that officers are required to exercise judgment in determining how much duplicative evidence to seize. Said the court:

> [A] search warrant gives an officer the "power" to seize the items specified in the warrant. While an officer generally does not have the power to seize anything not specified in the warrant, he retains discretion over the execution of the search and, as is implicit in the word "power," can exercise discretion to leave items that may arguably come within the literal terms of the search warrant.

For these reasons, the court ruled the trial judge was correct in refusing to grant the officers qualified immunity.

[4] *U.S.* v. *Apker* (8th Cir. 1983) 705 F.2d 293, 302.