Recent Case Report

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Millender v. County of Los Angeles

(9th Cir. 2010) __ F.3d __ [2010 WL 3307491]

Issue

Was a search warrant invalid on grounds that it was overbroad?

Facts

In the course of a domestic dispute, Jerry Bowen pointed a shotgun at Shelly Kelly and shouted, "If you try to leave, I'll kill you, bitch." Kelly was able to get into her car but, as she sped off, Bowen fired five shots at her. She was not hit, although one of the shots blew out a tire.

Kelly immediately reported the crime to Los Angeles County sheriff's deputies, and she described Bowen's weapon as a "black sawed-off shotgun with a pistol grip." She also said that Bowen had ties to the Mona Park Crips; the deputy confirmed this through the CALGANG database.

Based on this information, the deputy applied for a warrant to search Bowen's home in Los Angeles for, among other things, the following:

- "All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition."
- "Articles of evidence showing street gang membership."

The warrant, for which night service was authorized, was executed at 5 A.M. by members of LASD's SWAT team. After making a forcible entry, the deputies conducted a protective sweep and located ten people who were ordered to exit the premises. Two of those people were Augusta and Brenda Millender. A search for Bowen and his shotgun was unproductive. The deputies did, however, find another shotgun which they seized, although the court said it "did not resemble the firearm described by Kelly." Bowen was arrested two weeks later.

The Millenders later filed a federal civil rights lawsuit against LASD and certain deputies claiming the search warrant was invalid and, therefore, they were subjected to an unreasonable search in violation of the Fourth Amendment. When the federal district court rejected the deputies' contention that they were entitled to qualified immunity, they appealed to the Ninth Circuit.

Discussion

When officers are executing a search warrant, they are carrying out an order of the court and, thus, they will ordinarily not be subject to liability if it turns out the warrant was invalid for one reason or another. There is, however, an exception to this rule: Officers may be liable if they execute a warrant that was invalid "on its face," meaning that any reasonable officer would have known that the affidavit or the warrant contained a fatal flaw.

In *Millender*, it was apparent that the affidavit had established probable cause to search the house for the shotgun that Bowen fired at Kelly. But, as noted, the warrant authorized a search for every firearm on the premises. Thus, the issue was whether this rendered the warrant fatally overbroad.

Before going further, it is necessary to distinguish two terms that are used (and often confused) in the context of search warrants: "particularity" and "breadth." The term "particularity" refers to the requirement that the warrant clearly describe the things that may be seized so that officers will know exactly what they are looking for.[1] Two classic examples of unparticular warrants are those that authorize a search for "stolen property" and those that permit the seizure of photographs or other matter that is "obscene," as the former provides absolutely no clue as to what may be seized, and the latter is too subjective. Particularity was not, however, a problem in *Millender* because the descriptions (quoted above) provided the officers with enough detail to determine exactly what evidence they were authorized to search for and seize.

The other term—"breadth"—refers to the requirement that the affidavit demonstrate probable cause to seize each of the particularly-described items of evidence.[2] To put it another way, there must have been a "fair probability" that each of the described items (1) was evidence of a crime, and (2) was now located on the premises to be searched.[3] And here there was a problem; actually, two problems.

First, while the warrant authorized the deputies to search for "[a]ll handguns, rifles, or shotguns" on the premises, the affidavit did not establish probable cause to believe that all handguns, rifles, or shotguns on the premises were evidence of the assault on Kelly. In fact, the only weapon that had any evidentiary value was a black sawed-off shotgun with a pistol grip. Consequently, the warrant was overbroad and invalid, at least the part that authorized a search for all firearms. As the court explained:

> [T]he deputies had probable cause to search for a single, identified weapon, whether assembled or disassembled. They had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant.

The second problem was that the warrant authorized a search for "evidence showing street gang membership." This part of the warrant was also overbroad because, as the court pointed out, the deputies "failed to establish any link between gang-related materials and a crime."

Finally, the deputies argued that, even if the warrant was overbroad, they should not be held accountable because a deputy district attorney had approved it and a judge had signed it. It is true that a civil rights lawsuit based on an invalid search warrant cannot stand if "a reasonably well-trained officer" would not have been aware of the defect.[4] But in this case the court concluded that the defects were so "glaring" that any reasonable officer would have spotted them. Accordingly, it affirmed the ruling that the deputies were not entitled to qualified immunity, which means the case may go to trial.

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[1] See *U.S.* v. *SDI Future Health, Inc* (9th Cir. 2009) 568 F.3d 684, 702 ["Particularity means that the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize."].

[2] See *U.S.* v. *SDI Future Health, Inc* (9th Cir. 2009) 568 F.3d 684, 702 ["Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based."]; *US* v. *Banks* (9C 2009) 556 F3 967, 972 ["Specificity has two aspects: particularity and breadth."].

[3] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 238 [probable cause to search exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"].

[4] See *Malley* v. *Briggs* (1986) 475 U.S. 335, 345.

Comment

Although the warrant in *Millender* was invalid when it was issued in 2003, six years later the California Legislature amended the Penal Code to permit the issuance of a search warrant for any firearm that is under the control of a person who has been arrested "in connection with a domestic violence incident involving a threat to human life or a physical assault."[5] Thus, the search warrant in *Millender* would be upheld today if the affiant sought the warrant for the purpose of removing all firearms from the suspect's home.

It should also be noted that, although the deputies were aware that Bowen had several felony convictions, and that possession of any firearm by a felon is a crime in California, a warrant authorizing a search for all weapons on the premises could not be upheld because (1) the affidavit did not include information that Bowen was a felon; and (2) there was nothing in the affidavit to indicate there were any firearms on the premises, other than Bowen's sawed off shotgun.

One last thing. The warrant in *Millender* also authorized a search for indicia of ownership and control of the shotgun, "such as receipts or compatible ammunition." It also authorized a search for disassembled parts of a black sawed off shotgun with a pistol grip. Because the court acknowledged that these sections of the warrant were valid, it essentially ruled that the deputies were authorized to conduct a search that was every bit as intrusive as the one they conducted. Furthermore, the district court ruled that the information in the affidavit provided sufficient grounds for night service. Thus, if this case goes to trial, the only "harm" for which the Millenders might be compensated was that a shotgun was temporarily removed from the premises.[6] POV

[5] Pen. Code § 1524(a)(9).

[6] **NOTE**: It is also possible that the seizure of the shotgun could be upheld under the plain view rule because the officers were aware that Bowen was a felon, which meant that they might have had a right to seize the shotgun if there was sufficient reason to believe that Bowen possessed it. The court did not address this issue because it was not raised in the district court.