



SECOND CIRCUIT REVIEW

Expert Analysis

Limiting the Scope of Warrantless Searches

This month, we discuss *Harris v. O'Hare*,¹ in which the U.S. Court of Appeals for the Second Circuit, in a decision written by Judge Rosemary S. Pooler and joined by Judge Barrington D. Parker and Judge Richard C. Wesley, held that the evidence presented at trial did not support application of the exigent circumstances exception to the Fourth Amendment and that defendants were not entitled to qualified immunity. Accordingly, the court reversed the district court judgment and remanded the case for a trial on damages and other proceedings consistent with its opinion.

Background

On Dec. 20, 2006, City of Hartford police officers O'Hara and Laureano were on patrol in the vicinity of plaintiffs' home. While on patrol, they saw a recently paroled, high-ranking gang member, George Hemingway, drop what appeared to be "little plastic sleeves," which the officers suspected to contain illegal drugs.² The officers placed Hemingway under arrest and put him in their patrol car. While in the patrol car with officer Laureano, Hemingway told the officer that "he could get [them] some guns" with the hope that his cooperation would provide some "consideration" from the prosecutors for the impending drug charges.³

After making a call on his cell phone, Hemingway told officer Laureano that there were two guns under the seat of a grey Nissan Maxima parked in the rear yard of 297 Enfield Street. Officer Laureano relayed this information to officers O'Hare and Pia, who immediately went to 297 Enfield Street in order to locate and secure the illegal firearms.

O'Hare and Pia arrived at 297 Enfield Street,



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which was a single-family residence with front and rear yards surrounded by a chain-link fence. Without knocking on the front door or surveying the area for a grey Nissan Maxima, O'Hare and Pia entered the property through the front gate. Both officers walked along the side of the house with their service weapons drawn. As they approached the rear yard, plaintiffs' dog, a St. Bernard named Seven, appeared around the back corner of the home where it had been playing with plaintiff K., who was 12 at the time. Seven took several steps toward Pia, at which point O'Hare told Pia to run. Pia turned and ran out of the front yard the way he had entered. O'Hare, believing that he was being chased by the dog, ran back to the front yard, turned, and fired three shots at the dog, killing it. The officers did not locate a grey Nissan Maxima or any guns on the premises.

Prior Proceedings

In 2008, the homeowner, Harris, and K., through her guardian, filed a complaint against O'Hare, Pia, and the City of Hartford for damages resulting from entry onto his property and the killing of his dog. The complaint alleged violations of plaintiffs' Fourth and Fourteenth Amendment rights under 42 U.S.C. §1983 and six state-law claims, including trespass, conversion, and intentional infliction of emotional distress.

Defendants moved for summary judgment on the ground that they were entitled to quali-

fied immunity from civil suit stemming from their actions taken as government officials. The district court denied that motion. Until shortly before trial, defendants maintained the position that the entry onto plaintiffs' property was not a Fourth Amendment search because the officers did not enter an area of the property that would be considered curtilage, which is considered an extension of the home and therefore protected under the Fourth Amendment. Weeks before trial, however, defendants amended their affirmative defenses to justify the search of the property under the exigent circumstances and community caretaking exceptions to the Fourth Amendment. Over plaintiffs' objections, the district court permitted evidence to be introduced regarding these defenses and instructed the jury on these defenses.

The exigent circumstances exception cannot be permitted to swallow the rule requiring a warrant.

The jury found for defendants on all counts. The court submitted two specific verdict interrogatories to the jury asking whether defendants had intruded into an area of the property that was curtilage and whether the exigent circumstances exception applied to defendants' entry onto the property. The jury did not provide an explicit answer as to whether the officers entered the property's curtilage, but found that the entry onto the property was permissible under the exigent circumstances exception to the Fourth Amendment's warrant requirement.

After trial, plaintiffs moved under Federal Rules of Civil Procedure 50 and 59 that the district court erroneously permitted the exigency defense only weeks before trial and that there was insufficient evidence to support the jury's

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finding of exigent circumstances. Defendants moved under Rule 50 that they were entitled to qualified immunity.

The district court denied plaintiffs' motions, holding that the officers' testimony that there was an "urgent need to take action to seize the guns before a warrant was obtained" and that "there was no reasonable alternative to entering the property to seize the guns" constituted sufficient evidence to support the jury's finding of exigent circumstances.⁴ The district court further held that a new trial was unwarranted because the jury's verdict was not against the weight of the evidence. Defendants' motion for qualified immunity accordingly was denied as moot.

Plaintiffs appealed the district court's denial of their motions under Rules 50 and 59 as to their Fourth Amendment claims.

The Second Circuit's Decision

The Second Circuit reviewed de novo the denial of plaintiffs' motion for judgment as a matter of law under Rule 50 and reviewed the denial of plaintiffs' motion for a new trial under Rule 59 for abuse of discretion.

The Warrantless Search. The court began its analysis by noting that "warrantless searches of a home are presumptively unreasonable."⁵ As a threshold matter, the court held that the jury's special verdict finding that the exigent circumstances exception applied to the officers' conduct necessarily meant that the jury found that the area entered by officers was curtilage. Accordingly, the court determined that the officers required either a warrant or probable cause coupled with exigent circumstances to justify their search of plaintiffs' property.

The court then proceeded to examine the evidence presented at trial in support of probable cause for a search of plaintiffs' property. The evidence before the jury was that the tipster, Hemingway, was identified as a high-level member of a gang that had been associated with homicides in the neighborhood. Officer Laureano testified before the jury that several members of that gang were suspects in local shootings. Additionally, Hemingway stated that illegal guns could be found stashed under the seat of a grey Nissan Maxima in the rear yard of 297 Enfield Street.

The officers also testified at trial that Hemingway was deemed a reliable source of information because he was an active gang member with a prior gun conviction and was associated with gang members who also had been arrested with guns. Hemingway's tip was even more credible, O'Hare explained, because of the circumstances under which it was provided. Hemingway, under arrest in the back seat of a police cruiser, was in a "position of self preservation" and it would have been to his detriment to provide false information.⁶

Based on this testimony, the Second Circuit held that the jury's inference that the officers

believed Hemingway's tip to be sound was supported by evidence in the record and that therefore constituted probable cause for the officers to act on that tip by conducting a search for illegal firearms at 297 Enfield Street.

The court then examined whether the exigent circumstances exception to the Fourth Amendment's warrant requirement was supported by the evidence presented at trial. Typically, the court employs a six-factor test to determine if the conduct and threat posed by a suspect warrants application of the exigent circumstances exception. In this case, however, because the officers' search was based upon recovering specific property rather than pursuing or arresting a particular suspect, the court analyzed whether "quick action [was] necessary to prevent the destruction of evidence."⁷

The court noted that its refusal to consider the presence of a firearm as a sufficient condition for the exigent circumstances exception was in line with precedent in other circuit courts.

The court explained that an exigent circumstances analysis turns on "whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action."⁸ Under this standard, the court rejected defendants' argument that the officers' testimony about the presence of illegal weapons and gang violence in Hartford created the urgency required to support application of the exigent circumstances exception.

The court concluded that the officers failed to take reasonable alternative steps prior to entering the property. Although much of the property was visible from the street, for example, the officers failed to drive around the property or otherwise attempt to observe whether there was a grey Maxima parked on the property before entering.

The court explained that "mere suspicion or probable cause for belief of the presence of a firearm does not, on its own, create urgency."⁹ The court reasoned that prior cases in which it had upheld the application of the exigent circumstances exception considered the suspected presence of a firearm as only one of multiple factors that generated the urgency required for the exception's application. The court noted that its refusal to consider the presence of a firearm as a sufficient condition for the exigent circumstances exception was in line with precedent in other circuit courts. Accordingly, because there were no urgent circumstances, the officers' entry into the curtilage of plaintiffs' property

constituted a violation of plaintiffs' Fourth Amendment rights.

Qualified Immunity. Upon holding that the officers had violated plaintiffs' Fourth Amendment rights, the Second Circuit then analyzed whether the defendants were entitled to qualified immunity. This protection is warranted where it was objectively reasonable for an official to believe that his or her actions did not violate an individual's rights.

The court explained that the officers would not be entitled to qualified immunity if the right in question was "clearly established" at the time of the incident.¹⁰ The court stated that it was settled doctrine that the search of a home or its curtilage required either a warrant or an applicable exception to the Fourth Amendment's warrant requirement. It was also clearly established, the court held, that a fenced-in area of property directly abutting a single-family residence constitutes curtilage. Reiterating its earlier discussion, the court explained that its prior precedent "makes it abundantly clear" that a firearm, on its own, does not create the exigency required for a warrantless search.

Accordingly, the court held that no reasonable officer would have believed that he could enter the fenced-in property without a warrant to recover illegal firearms. Defendants, therefore, were not entitled to qualified immunity.

Conclusion

The Second Circuit's opinion in *Harris* makes clear that the presence of illegal firearms in a high-crime area does not, on its own, justify a warrantless search of people and property protected by the Fourth Amendment. Despite the genuine concerns of officers that illegal firearms pose a serious threat to communities and can quickly be transported from one location to another, the exigent circumstances exception cannot be permitted to swallow the rule requiring a warrant.¹¹ While removing illegal weapons from dangerous areas may be considered urgent from a policy standpoint, it is not sufficiently urgent to override the Fourth Amendment.

1. *Harris v. O'Hare*, 770 F.3d 224 (2d Cir. 2014).

2. *Id.* at 227.

3. *Id.*

4. *Harris v. O'Hare*, No. 3:08-CV-1644 (RNC), 2012 WL 4471245, at *2 (D. Conn. Sept. 27, 2012).

5. *Harris*, 770 F.3d at 231 (quoting *United States v. Simmons*, 661 F.3d 151, 156-57 (2d Cir. 2011)).

6. *Id.* at 233.

7. *Id.* at 234-35 (quoting *U.S. v. Moreno*, 701 F.3d 64, 73 (2d Cir. 2012) cert. denied, 133 S.Ct. 2797 (2013)).

8. *Id.* at 235 (quoting *Simmons*, 661 F.3d at 157).

9. *Id.* at 236.

10. *Id.* at 239 (quoting *Reuland v. Hynes*, 460 F.3d 409, 419 (2d Cir. 2006)).

11. *Id.* at 237.