



## **MAY POLICE OFFICERS SHOOT A DOG IF THE DOG BARKS OR MOVES WHEN THE OFFICERS ENTER A HOME IN ORDER TO EXECUTE A WARRANT? THE SIXTH CIRCUIT SAYS, “YES” IF THE RIGHT CIRCUMSTANCES EXIST**



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In *Brown v. Battle Creek Police Dept.*, \_\_\_ F.3d \_\_\_ 2016 WL 7336612 (6<sup>th</sup> Cir. Dec. 19, 2016), the Plaintiffs Mark and Cheryl Brown sued the Battle Creek Michigan Police Department, the City of Battle Creek, Michigan, and certain Battle Creek Police officers for unlawfully seizing their property in violation of their Fourth Amendment rights when the officers shot and killed their two pit bulls while executing a search warrant at the house where they were staying. The District Court entered summary judgment in Defendants’ favor, and the Browns appealed. On appeal, the United States Court of Appeals for the Sixth Circuit held, as a matter of first impression, that there is a constitutional right under the Fourth Amendment to not have one’s dog unreasonably seized; however, the Sixth Circuit determined that the officers acted reasonably under the circumstances.

On April 16, 2013, officers from the Battle Creek Police Department conducted a trash pull at the residence of Danielle Nesbitt (“the residence”). The trash pull recovered baggies with residue of marijuana and cocaine, a small amount of loose marijuana, and mail addressed to the Browns and to Vincent Jones, the father of Ms. Nesbitt’s child. On April 17, 2013, officers obtained a warrant to search the residence. The evidence recovered from the trash pull and the information from a confidential informant were the bases for the search warrant. The affiant stated that he had received information indicating that Vincent Jones lived at the residence and was distributing controlled substances from inside the residence. Ms. Nesbitt, the daughter of Cheryl Brown, owned the home and allowed her mother and Mark Brown to stay in the basement of the residence. That same day, the officers executed the search warrant. Prior to execution of the warrant, the officers and members of the City’s Emergency Response Team (“ERT”) met to discuss the details related to the case, including Jones’ criminal history, Jones’ known gang affiliations and gang associates, whether there were children or dogs present at the residence, and any other issues or concerns they may have had prior to the search. Defendants decided to involve the ERT for this search because of the threat the subject, Vincent Jones, posed given his criminal history, known gang affiliations, possession and use of firearms, and possible possession of cocaine and heroin he was alleged to be distributing out of the residence. Officer Case testified that Vincent Jones was a member of the north side gang in

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Battle Creek and that this gang was one of the reasons why they created the gang unit. The officers were informed during the briefing that Vincent Jones had just been released from prison after maxing out his time at state prison a month prior to the raid. During the briefing, the officers and ERT had no information about whether there were dogs in the residence.

After the briefing, the officers and the ERT headed to the residence. On the way to the residence, the officers received information that Vincent Jones had left the residence and had been detained by police with heroin on his person. They were also informed that there was a dog in the backyard and another subject in the residence, later identified as Mark Brown. Mark Brown testified that he came to the residence during his lunch break that day to let the dogs out around 1:00 p.m., and was on his way out of the residence around 2:00 p.m. to go back to work when he was detained by Officer Sutherland. Mark Brown was walking on the front lawn of the residence toward his car, which was parked on the street, when Officer Sutherland pulled up behind Mark Brown's car. Officer Sutherland placed Mark Brown in handcuffs and informed him that officers would soon be executing a search warrant for the residence. Mark Brown was standing behind his car with a view of the residence's front door and front window.

A few minutes after Mark Brown was detained, the officers and the ERT pulled up to the residence. Officers Klein and Case testified that this was when they first saw the "Beware of Dog" sign outside the residence. The officers, with the exception of Officer Case, proceeded directly to the front door. Mark Brown testified that when the officers and ERT arrived, he told Officer Sutherland that he had a key to the front door, that there was no one else in the residence, and that his two dogs were in the residence. Officer Sutherland tried telling the officers this information before they breached the front door, but Officer Klein testified that he did not hear about Mark Brown's comments to Officer Sutherland prior to breaching the front door.

Officer Klein led the group of officers and ERT to the front door where he saw two dogs through the front window standing on a couch. Officer Klein testified that, as the officers approached the front door, he could see the dogs barking aggressively, "digging and pawing," and "jumping" at the window. The first dog was a large, brown pit bull, weighing about 97 pounds, and the second dog was a smaller white pit bull, weighing about 53 pounds. Officer Klein knocked on the front door, announced their presence, and "less than fifteen seconds" later, breached the door with a ram, which is a large metal object used by law enforcement to open doors. After the door was breached, Officer Klein was the first of the search warrant team to enter the residence. Mark Brown testified that he was able to see the two dogs in the window standing on the couch before the door was breached. Mark Brown testified that, as the officers were approaching the residence, the dogs were not barking. Mark Brown also stated that the second dog did not bark at all and that he had the second dog almost a year at that point and "she [had] never barked a day in her life."

Officer Klein testified that when he entered the house, the first dog jumped off the couch, was aggressively barking at the officers, and lunged at him. He also noted that when the officers entered the residence, the second pit bull jumped off the couch, went through the kitchen and down into the basement. He further testified that when the first pit bull lunged at him in the entryway, he fired his first shot. Officer Klein explained that the first pit bull "had only moved a few inches" between the time when he entered the residence and when he shot her, and that this movement was what he considered to be a "lunge." Klein testified that he "hit" the first dog with a non-lethal shot but that he was "aiming at its head."

Officer Klein stated that after he struck the first pit bull in the entryway, the dog moved away from the officers and towards the kitchen, then down the stairs and into the basement. Officer Klein noted that this first dog was not running, as it “look[ed]” injured. As the officers were descending the stairs to clear the basement, they noted that the first pit bull was at the bottom of the stairs. Klein testified that the first pit bull obstructed the path to the basement and that he “did not feel [the officers] could safely clear the basement with those dogs down there.” The officers’ “priority was to secure the basement if there were any people down there.” When the officers were halfway down the stairs, the first dog, who was at the bottom of the staircase, turned towards them and started barking again. From the staircase, Officer Klein fired two fatal rounds at the first pit bull. When the officers got down to the basement, Officer Case noted that the “basement was loaded. You’ve gotta look under beds, you’ve gotta do everything, and the dogs basically prevented us from doing that, and they were protecting that basement.” Officer Klein testified that after he shot and killed the first dog, he noticed the second dog standing about halfway across the basement. The second dog was not moving towards the officers when they discovered her in the basement, but rather, she was “just standing there,” barking and was turned sideways to the officers. Klein then fired the first two rounds at the second dog. After being shot by Officer Klein, the second dog ran to the back corner of the basement. The second pit bull was in this corner when Officer Young, who was also clearing the basement, shot her because she was “moving” out of the corner and in his direction. After being shot by Officers Klein and Young, the second pit bull ran to the back of the furnace in the back corner of the basement. Officer Case saw that “[t]here was blood coming out of numerous holes in the dog, and . . . [he] didn’t want to see it suffer” so he put her out of her misery and fired the last shot.

Thereafter, the Browns sued for monetary damages alleging that the Defendants violated their Constitutional rights when they shot and killed their two pit bulls. Specifically, the Browns claimed that the officers violated their Fourth Amendment rights when they unconstitutionally seized their dogs and unreasonably forced entry into the residence. The District Court rejected the Browns’ claims and granted summary judgment in Defendants’ favor.

On appeal, the Sixth Circuit affirmed the District Court’s judgment in Defendants’ favor. Specifically, the Sixth Circuit agreed that the Defendants were entitled to summary judgment based upon the doctrine of qualified immunity given the Brown’s failure to show the existence of a genuine issue of material fact as to the unreasonableness of the officers’ seizures.

The Sixth Circuit began by explaining that “[t]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)(internal quotation omitted). Qualified immunity provides government officials “breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.” *Messerschmidt v. Millender*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1235, 1244. “[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action . . . assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.” *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

To determine whether a police officer is entitled to qualified immunity, a two-prong test applies: “(1) whether the facts, when taken in the light most favorable to the party asserting the injury, show the officer’s conduct violated a constitutional right; and (2) whether the right violated was clearly

established such that a reasonable official would understand that what he is doing violates that right.” *Mullins*, 805 F.3d at 765.

Here, as for the first prong of the qualified immunity test, the Sixth Circuit found that the Browns did possess a constitutional right under the Fourth Amendment not to have their dogs unreasonably seized. *Brown*, 2016 WL 7336612, at \* 6. As for the second prong of the test, the Sixth Circuit determined that Defendants had reasonable notice that unreasonably shooting the Browns’ dogs would constitute a seizure with the meaning of the Fourth Amendment. *Id.*

However, the Sixth Circuit concluded that the officers acted reasonably in shooting the dogs under the circumstances: “the standard we set out today is that a police officer’s use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the Fourth Amendment when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer’s safety.” *Id.* at \* 7.

After reviewing all of the evidence, the Sixth Circuit agreed that the material facts were undisputed and that those facts showed that the officers acted reasonably in shooting the Browns’ dogs because the dogs posed an imminent threat to the officers’ safety based upon the dogs’ actions towards them. The Sixth Circuit concluded by agreeing with the District Court that the City of Battle Creek did not maintain a policy, practice, or procedure of needlessly killing animals, and therefore, the City was not liable to the Browns. The Sixth Circuit also agreed that the officers did not use excessive force in breaching the residence’s front door.

In short, an officer must always act reasonably in executing a warrant. If the right circumstances exist, an officer may be found to have acted reasonably in shooting an animal if that animal poses an imminent threat of danger to the officer’s safety.

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**Note:** *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*