SWAT response to mental illness: Is there a middle ground?

BY ERIC DAIGLE

Over the last several issues of *The Tactical Edge*, the Legal section has fielded several articles dealing with mental health issues and the legal use of force when dealing with non-criminal subjects suffering some type of mental health episode. The purpose of this article is to review current case law across the country dealing with this issue and ask, is there a role for SWAT and crisis negotiation teams (CNT) at an incident involving a non-criminal barricaded subject suffering from some type of mental illness?

This question came up during several sessions of the Daigle Law Group's recent Use-of-Force Summit. A number of attendees were operators or team leaders on regional SWAT teams servicing multiple police agencies with less than 100 sworn personnel. In fact, many of the departments serviced by these regional teams had less than 50 sworn members. These SWAT and CNT officers argued that the agencies did not have the services in-house to practically and successfully deal with an incident where a non-criminal suspect had barricaded himself in a residence and was refusing to come out. Information gathered at the scene from family members and others led the officers to believe the subject was a danger to himself, or had made statements that he or she would seriously harm themselves or anyone who came in the house. Perhaps a mental health professional had signed a take-into-custody order, directing officers to take the subject to a health care facility. Under these circumstances, many agencies and, in some cases SWAT teams, are electing to deal with the issue with their patrol officers and not engage the services of SWAT or CNT.

Certainly, as professionals, we have a responsibility to conduct risk assessments in all areas of our policing practices and determine the appropriate and proper use of SWAT and CNT resources in various police encounters. SWAT and CNT are just two of many tools in the police toolbox. It is incumbent on all of us that we use those tools wisely and judiciously. But when faced with the types of incidents described earlier, could there be a middle-ground response of SWAT and CNT personnel, understanding that the overarching objective is to safely end the incident recognizing "safety priority" principles?

In order to answer this question, it might help to take a few minutes to review two important points: 1) whether the use of SWAT resources is, itself, considered a higher level of force, and 2) what limitations have the courts placed on an officer's use of force to control a non-criminal subject? A third question looks at the practical application of the resources SWAT and CNT teams bring to these critical and often volatile situations. With an understanding of these three important questions, we will then circle back with some policy language that might strike a balance between the practical needs of our street officers and the constitutional guidelines set by the courts.

UTILIZING THE SWAT TEAM CAN TRIGGER A FOURTH AMENDMENT REVIEW

A number of appellate courts across the country have determined that the decision to employ the SWAT team to execute a warrant can itself trigger a Fourth Amendment claim. In these cases, the courts looked at the totality of the circumstances to determine whether it was reasonable to use the higher level of force "inherent in SWAT tactics."

In a 2005 case, the Third Circuit Court of Appeals determined that "a decision to employ a SWAT-type team can constitute excessive force if it is not objectively reasonable to do so in light of the totality of the circumstances."[1] In this case, the subject was a Vietnam-era veteran suffering from PTSD, a heart condition and other mental disorders. He had a history of disturbing other neighbors, shooting his neighbor's lights out and had threatened to shoot officers at the time of the incident in question. Interestingly, in this case the appellate court broke down its decision into two parts — finding that the initial decision to call the SWAT team was reasonable but the decision to conduct a dynamic entry of the residence utilizing tear gas and flash bangs was unreasonable where the subject "did not pose a threat that was sufficiently serious and immediate as to require storming the house."[2]

In *Overdorff v Harrington*[3] the court discussed the use of a SWAT team to execute an arrest warrant for a party wanted for a minor misdemeanor. The 10th Circuit Court

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of Appeals overturned a trial court decision denying the defendant officers' qualified immunity. While the appellate court ruling was favorable to two of the defendant officers, the court made it clear that the decision to use the SWAT team to execute the warrant must be reasonable under the totality of the circumstances. Finding that a determination of reasonableness weighs, in large part, on how the seizure is carried out, the court found that "the decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force — force far greater than that normally applied in police encounters with citizens. Indeed, it is the SWAT team's extraordinary and overwhelming show of force that makes 'dynamic entry' a viable law enforcement tactic in dealing with difficult and dangerous situations."[4]

USE OF FORCE ON NON-CRIMINAL SUBJECTS

Is there a difference between a "subject" and a "suspect"? Certainly, the courts have noted a difference, and this distinction has also been highlighted in the NTOA Tactical Response and Operations Standard. We continue to see cases across the country where courts are scrutinizing an officer's use of force on non-criminal "subjects" who may be suffering from some type of mental health or serious medical condition. Our Spring 2018 article titled "Use of Force and Mental Illness" outlined a number of cases where an officer's use of force on a non-criminal "subject" was reviewed by the court. As we noted in that article, some appellate courts have fashioned new rules of engagement for use of force on non-criminal "subjects" in contrast to the well-known Graham standards we use when reviewing an officer's use of force on a criminal "suspect."[5]

In an earlier article, we reviewed case law concerning the use of flash/sound diversionary devices.[6] Several cases reviewed in that article concerned the use of SWAT teams in incidents involving non-criminal subjects. One noted case in that article was *Escobedo v Bender*, where the Seventh Circuit Court of Appeals determined that, "In 2005 it was clearly established that throwing a flash bang device blindly into an apartment where there are accelerants, without a fire extinguisher, and where the individual attempting to be seized is not an unusually dangerous individual, is not the subject of an arrest, and has not threatened to harm anyone but himself, is an unreasonable use of force."[7]

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Two recent cases reviewed the use of force on non-criminal subjects with differing results. In *Cole v Carson*,[8] the case centered around the shooting of a suicidal subject who had been found by officers in the woods and was holding a gun to his own head. This case has had a tortuous history. The trial court denied summary judgment finding that the plaintiff did not pose an "immediate threat" to the officers and, therefore, use of deadly force was unreasonable under the Fourth Amendment standard. The Fifth Circuit Court of Appeals affirmed and the case went to the U.S. Supreme Court, where SCOTUS vacated the ruling and directed the appellate court to reevaluate the qualified immunity issue in light of the court's ruling in *Mullenix v Luna*.[9]

In 2018, the Fifth Circuit issued a decision denying qualified immunity, finding that the issue was clearly established at the time that force was applied. Pointing to several other Fifth Circuit cases the court determined that a subject who was not wanted for a criminal matter, was not threatening anyone other than himself and was holding a gun to his own head, did not create an "immediate threat" and, therefore, the use of deadly force was unreasonable. The case will now presumably go to trial and the matter ultimately determined by a jury.

In *Sanzone v Gray*,[10] police and EMS were dispatched to Keith Koster's home on a well-being check. As officers were entering the house EMS personnel ran by them claiming Koster was lying in bed, had a gun and was threatening to shoot them. Officers backed out to the hallway, set up a perimeter and called for SWAT and CNT resources. SWAT officers relieved the patrol officers inside the hallway and negotiations commenced. At one point during the negotiations, Koster yelled to the officers that he was going to fire a warning shot and lifted his arm holding the gun. One SWAT officer fired a bean bag round while the other SWAT officer fired three rounds that struck Koster in the head and killed him.

The trial court granted summary judgment and dismissed the case against the officer firing the bean bag round but denied qualified immu-

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nity to the officer firing the lethal rounds. The Seventh Circuit reversed, finding that the officer firing the lethal rounds was entitled to qualified immunity. The court determined that at the point Koster raised the gun and pointed it at the officers, the incident had changed from a non-criminal matter to a criminal one and officers were entitled to protect themselves from the imminent use of deadly force. As the court noted, "While the Estate contends that Koster's warning shot would have been fired straight up in the air, we will not assume that. Koster could easily have meant that he intended to attempt firing a bullet that would whiz past (Officer James) Gray's ear. Gray did not need to wait and hope that Koster was a skilled marksman before taking action to shut down Koster's threat."[11]

RESOURCES OFFERED BY SWAT AND CNT

We can expect that larger police agencies have the resources to deal with these types of situations without necessarily requiring the resources of SWAT and CNT. However, national statistics tell us that more than 88 percent of police agencies across the country employ 50 or less sworn personnel, and almost half (48 percent) of police agencies employ fewer than 10 officers.[12] Clearly, amassing the manpower and technical resources necessary to successfully conclude an incident involving a non-criminal barricaded subject incident can be an insurmountable task for these smaller agencies.

We know that SWAT and CNT teams bring with them both staffing and technical resources that can play an important role in controlling the scene and negotiating a successful conclusion to the incident. The training and discipline instilled in SWAT operators can ensure a controlled environment to support CNT efforts.

Recent changes to the NTOA's Tactical Response and Operations Standard (TROS) highlight the need for SWAT teams to:

- Adhere to the "Safety Priorities Model"
- Determine the criminal offenses involved, if any
- Determine whether the subject or suspect is suffering from mental illness

The latest TROS has now dedicated a full chapter (Chapter 5) to crisis negotiation teams (CNT). The standards include recommendations for:

- Basic levels of training, to include dealing with mental health issues
- Training with the SWAT component to assure a cohesive response
- Including qualified mental health professionals to advise on mental health issues and coordinate information gathering from health care professionals.

As stated in the TROS, the objectives of CNT include the ability to calm the situation, build rapport with the subject and buy time for a negotiated conclusion. Through the efforts of the NTOA and other training and research venues, we see an increased sensitivity to dealing with the non-criminal subject and a stronger leaning toward negotiation and de-escalation as opposed to immediate entry.

ENDNOTES

1. *Smith v Marsaco,* 430 F 3d 140 (3rd Cir 2005)
2. Ibid
3. *Holland Overdorff v Harrington,* 268 F3d 1179 (10th Cir 2001)
4. Ibid
5. *Graham v. Connor,* 490 U.S. 386 (1989)
6. "The Legal Implications of Using Flash/Sound Diversionary Devices," *The Tactical Edge,* Eric Daigle/Mike Whalen (Summer 2018)
7. *Escobedo v Bender,* 600 F3d 770 (7th Cir 2010)
8. *Cole v Carson,* 802 F.3d 752 (5th Cir 2018)
9. *Mullenix v Luna,* 136 S.Ct. 205 (2015)
10. *Sanzone v Gray,* 884 F.3d 736 (7th Cir 2018)
11. Ibid.
12. BJS Survey "Local Police Departments, 2013 Personnel Policies and Practices", Brian A Reaves, U.S. Department of Justice, Bureau of Justice Statistics (May 2015)

ABOUT THE AUTHOR

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