

Qualified Immunity: Reading the Tea Leaves in *Messerschmidt v. Millender*

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> *[N]ow we are asking whether a reasonable police officer who is not a lawyer and certainly is not a judge should have been able to see that this call that was made by a judge was not only wrong but so wrong that ... you couldn't reasonably think that the judge might be correct.* — Justice Alito, in oral argument in *Messerschmidt v. Millender.*

Shelly Kelly sought police protection because her boyfriend, Jerry Ray Bowen, had a violent temper and had physically assaulted her. She told police that he had tried to restrain her from leaving him by shooting at her using a black sawed-off shotgun with a pistol grip. She advised Officer Messerschmidt (a "gang specialist") that Bowen could be found at 2234 E. 120th St., Los Angeles, the home of Bowen's foster mother, Augusta Millender. The officers identified Bowen as gang member with an extensive criminal background, and confirmed that he had, at some point, listed Millender's address as his address. Messerschmidt applied for an arrest warrant for Bowen at the 120th St. address, and for a warrant to search and seize specified property in connection with the assault, namely: all firearms and ammunition, and articles of evidence showing gang membership or affiliation with any gang. He admitted, however, there was no evidence that Bowen's domestic assault on Kelly was in any way gang-related, and the affidavit did not mention Bowen's prior criminal record and felony convictions.

Before Messerschmidt's warrants and affidavit were submitted to the magistrate, they were reviewed by his supervisors (including Sergeant Lawrence), and a deputy district attorney signed the search warrant, indicating that she had reviewed it for probable cause and approved it. Both warrants and the night service were subsequently approved by the magistrate. At 5:00 a.m., the SWAT team broke open Millender's front door to enter and search the house. The occupants were 73-year-old Mrs. Millender, her 47-year-old daughter, Brenda, and Brenda's 20-year-old son. The officers seized Mrs. Millender's personal shotgun and .45 caliber ammunition, and a State of California letter addressed to Bowen, but neither Bowen nor his weapon were found. Messerschmidt and Lawrence did not participate in the search but were present.

The Millenders filed a Section 1983 lawsuit against Los Angeles County, the County Sheriff's Department, and the individual officers. The district court held that the arrest warrant was facially valid, and granted the defendants' motion for summary judgment on this issue and on the issue of the search warrant, with the exception of the warrant's authorization to search for and seize all firearms, and all firearm- and gang-related items. This portion of the warrant, the court held, was overbroad. The individual officers were not entitled to qualified immunity because their actions were not objectively reasonable.

The qualified immunity test in the Fourth Amendment context was based on *United States v. Leon*, 468 U.S. 897, 920, 923 (1984), and *Malley v. Briggs*, 475 U.S. 335, 345 (1986), where the Supreme Court ruled that qualified immunity was lost only when "a reasonably well-trained officer in [the defendant officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Officers could not claim that they had acted reasonably by seeking a warrant merely because a neutral magistrate approved their application; rather, officers were required to exercise their own reasonable professional judgment.

On appeal, a divided U.S. Court of Appeals for the Ninth Circuit (en banc) affirmed the denial of qualified immunity, finding that "the challenged sections of the [search] warrant were 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" The affidavit did not provide any evidence to indicate that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millender residence. Accordingly, "regardless of Bowen's history or the inherent dangerousness of firearms," there was no basis for concluding there was probable cause to search for or seize the "generic class of firearms and firearm-related materials" listed in the warrant, and probable cause did not exist to seize all items of those particular types. Similarly, in the absence of any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence was likewise invalid. Based on *Malley*, the officers were not entitled to qualified immunity because it was obvious that neither the affidavit nor the warrant established probable cause that the broad categories (all firearms, firearm-related material, and gang-related material) described in the warrant were contraband or evidence of a crime. The affidavit indicated exactly which item was the evidence of a crime (the black, sawed-off shotgun with a pistol grip), and reasonable officers would know they could not undertake a general, exploratory search for other items without additional probable cause. The fact that others signed off on the warrant made no difference because the

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17, 21 (1993) (a sexually hostile work environment exists where "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.").
8. Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995).
9. *See, e.g.,* Broderick v. Ruder, 685 F. Supp. 1269, 1280 (D.D.C. 1988).
10. Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002).
11. 807 F.2d 304 (2d Cir 1986), *cert. denied*, 484 U.S. 965 (1987).
12. *Id.* at 308.
13. *Id.*
14. *Id.* at 306.
15. 397 F.3d 539 (7th Cir. 2005).
16. *Id.* at 541.
17. *See, e.g.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990); Becerra v. Dalton, 94 F.3d 145, 149-50 (4th Cir. 1996); Wilson v. Delta State Univ., 143 Fed. Appx. 611, 614 (5th Cir. 2005); Tenge v. Phillips Modern AG Co., 446 F.3d 903, 907 (8th Cir. 2006); Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366, 1369-70 (10th Cir. 1997); Womack v. Runyon, 147 F.3d 1298, 1300 (11th Cir. 1998). *But see* King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985) ("unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination'") (citations omitted).
18. EEOC Notice No. 915-048 (Jan. 12, 1990), available at http://www.eeoc.gov/policy/docs/sexualfavor.html (hereinafter "Policy Guidance"). Supreme Court Justice Clarence Thomas signed the 1990 Policy Guidance in his capacity as the EEOC Chairman.
19. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing the 1980 EEOC policy guidelines).
20. Policy Guidance, *supra* note 18.
21. *Id.* (favoritism based upon coerced sexual conduct may constitute quid pro quo harassment, and widespread favoritism may constitute hostile environment harassment).
22. 570 F. Supp. 1197 (D. Del. 1983).
23. *Id.* at 1199, quoting 29 C.F.R. § 1604.11(g).
24. 634 F. Supp. 571 (N.D. Cal. 1986).
25. *Id.* at 581.
26. *Id.* at 582.
27. Policy Guidance, *supra* note 18, *but see* Leibovitz v. New York City Transit Auth., 252 F.3d 179, 185 (2d Cir. 2001) (female manager distraught over the sexual harassment of other women in workplace had standing to bring suit under Title VII, but was denied recovery because she did not witness such harassment).
28. Policy Guidance, *supra* note 18.
29. 685 F. Supp. 1269 (D.D.C. 1988).
30. *Id.* at 1280.
31. *Id.* at 1278.
32. *Id.* at 1280. *Cf.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990) (co-worker's claim of sexually hostile environment denied absent evidence that boss and paramour "flaunted" their sexual relationship, or that such relationships were "prevalent" in the workplace).
33. 36 Cal. 4th 446 (Cal. 2005).
34. *Id.* at 471-72.
35. *Id.* at 471.
36. *Compare* McGinnis v. Union Pac. Ry., 496 F.3d 868, 874 (8th Cir. 2007) (male dispatcher failed to allege claim for widespread sexual favoritism in the workplace where supervisor had sexual affair with female subordinate, treated women more favorably than men in terms of job opportunities and work shifts, and protected females who violated company rules).
37. 680 F. Supp. 2d 502 (S.D.N.Y. 2010).
38. *Id.* at 514.
39. *Id.* at 515.
40. 716 F.2d 1167 (7th Cir. 1983).
41. *Id.* at 1172.
42. Keppler v. Hinsdale Township High School Dist. 86, 715 F. Supp. 862 (N.D. Ill. 1989).
43. *Id.* at 869. *See also* Succar v. Dade County School Bd., 229 F.3d 1343, 1345 (11th Cir. 2000) (harassment of male teacher by coworker, a female teacher, was motivated by "contempt" following their failed relationship, not by gender).
44. 511 F.3d 225 (1st Cir. 2007).
45. *Id.* at 229.
46. 488 F.3d 739 (7th Cir. 2007).
47. *Id.* at 746.
48. *Id.* at 746-47. *See also* In re C.F. Smith & Assocs., Inc., 235 B.R. 153, 165 (D. Mass. 1999) (former paramour may recover against boss for sexual harassment in wake of soured relationship). ML

"...Hands Off the Monkey!"

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constitutional warrantless entry at the time of the fire).
28. Jones v. Wildgen, 244 Fed. Appx. 859, 864 (10th Cir. 2007).
29. City of Canton v. Harris, 489 U.S. 378, 388 (1989).
30. *See* Elkins v. District of Columbia, 527 F. Supp.2d 36, 47 (D.D.C. 2007) ("Punitive damages, however, are available against the [officers] where their conduct was 'motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others,'" quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). ML

Supreme Court

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officers had a responsibility to exercise their own reasonable professional judgment.

The questions in this appeal are whether, under *Malley,* the officers were entitled to qualified immunity where they obtained a facially valid warrant, a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search. Second, whether the *Malley/Leon* standards should be reconsidered or clarified in light of the lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in the imposition of liability on officers for good-faith conduct and the improper exclusion of evidence in criminal cases.

The NRA and the ACLU have filed *amicus* briefs in support of the Millenders. The Court heard oral argument on December 05, 2011, with few clues as to how far it will go in allowing courts to second-guess probable cause determinations in this context. We'll know by June whether the Court will revise the existing standard. ML