**United States Court of Appeals for 11th Circuit**

**Throwing Flashbang without Line of Sight was Constitutional Violation**

**BUT**

**Law was Not Clear When Officer Threw Flashbang so Case Against him Dismissed on Qualified Immunity**

In *Dukes v. Deaton*,[[1]](#footnote-1) the United States Court of Appeals viewed the constitutionality of flashbang use, or more particularly the manner in which the device was used. The court outlined the facts as follows:

On July 19, 2010, a special agent with the Narcotics Unit of Clayton County, Georgia,obtained a warrant to search Jason Ward's apartment. The application for the warrant stated that a confidential informant had observed a "small quantity of a green leafy substance suspected to be marijuana" in the possession of Ward. The application also stated that Ward had several arrests for possession of marijuana, sold narcotics from his apartment, and was known to carry a silver nine-millimeter handgun. The **application sought a "no-knock" provision** because "drug dealers commonly utilize weapons, dogs, and barricades to hinder law enforcement in the execution of their duties." **A magistrate judge approved the no-knock provision.**

Ward resided in a two-bedroom apartment on the first floor of an apartment complex. The front door to the apartment lay halfway down a short hallway. A window in Ward's bedroom faced an outdoor courtyard. Adjacent to Ward's bedroom, a living room with sliding glass doors opened onto a small balcony overlooking the courtyard.

To execute the search warrant, Stephen Branham, the commander of the county SWAT team, **prepared an operational plan** with four teams: Alpha, Bravo, Charlie, and Delta. Alpha was the "entry team." Its job was to breach the main door to Ward's apartment and secure the persons inside. Bravo was the support team. Its job was to wait outside and enter the apartment through the sliding glass door if help was needed. Deaton was a member of Bravo team. Charlie was a **diversion team**. Its job was to divert Ward's attention by performing a **"break and rake"** on his bedroom window. A break and rake is a tactic in which an officer breaks and clears out all of the glass in a window. This tactic is used to cover a room until the rest of the officers make entry. It is also used as a diversionary tactic. Delta team, composed of only Officer **Suzanne Bennett, was also a diversion team. Bennett's job was to deploy a "bang-pole," a stick with a flashbang on the end of it, on the outside wall of the apartment.**

The **flashbang manual** used by the county SWAT team explains that police use flashbangs in "high-risk warrant service" to "minimize the risk to all parties through the temporary distraction or disorientation of potentially violent or dangerous subjects." The manual classifies flashbangs as explosives that can generate heat in "excess of 2,000 degrees centigrade," a flash of light up to 80 times brighter than the flashbulb of a camera, and over 150 decibels of noise for less than one half of a second. **Because flashbangs have the potential to cause "serious bodily injury," Deaton and Branham testified that they received official instruction to visually inspect an area first before deploying a flashbang.** **The operational plan contemplated the use of two flashbangs**——one thrown by Officer Scott Malette through the front door, the other deployed by Officer Bennett with the bang-pole. But **the plan vested all SWAT team members with the authority to use more flashbangs if needed.**

At 5:00 a.m. on July 21, the SWAT team members met to review the operational plan. Half an hour later, the SWAT team executed the warrant. Ward and his girlfriend, Treneshia Dukes, were asleep in the bedroom of Ward's apartment. Ward was awakened by a "boom" and then heard his "window break and shattering." Next, he remembered "Treneshia screaming," telling "her to get down," then grabbing the "pistol up under my head — up under my pillow," and "kicking into the hallway." Ward never discharged his gun. Dukes heard a "boom, and then [heard] the window like rattling and shattering . . . , and like as I'm waking up I just seen an object coming towards me." Dukes did not see who threw the object because she "was asleep." After the object hit her and exploded, Dukes ran into the bathroom where she was detained by the police.

The **SWAT team detonated three flashbangs** during the search. Bennett and Mallette deployed their flashbangs as the operational plan prescribed. **Deaton deployed the third flashbang. He was the only officer outside the window with a flashbang and testified that he threw his flashbang outside the window.**

Although Deaton argues that his flashbang detonated outside the apartment, we construe the facts and draw all inferences from the evidence in the light most favorable to the non-movant, Dukes. Viewed in that light, Deaton threw the flashbang through the bedroom window where it landed near Dukes. Dukes testified that an object came through the window; that she was under a comforter; that the object landed on her right thigh; that the object "flashed" and "exploded"; that the explosion "blinded" her; and that the sound from the object "discombobulated" her, causing her run "into the [bedroom] wall." Several witnesses who saw the bedroom after the search testified that the walls were covered in black residue consistentwith an explosion. For example, Andrea Ward, who was asleep in the second bedroom of the apartment the morning of the raid, testified that "the bedroom looked like it had been on fire, the window was busted out. The room was a mess and there was a black something, smoke and stuff on the walls, black smoke was on the walls in the hallway also."

Dukes suffered severe burns across both thighs and her right arm that Deaton testified were consistent with the detonation of a flashbang. She was admitted to the hospital for three days after the raid. Ward was arrested and later convicted of being a felon in possession of a firearm. **[Emphasis Added on some Key Point related to High Risk Entry Liabillity]**

At the outset it is important to note that when considering the officer’s request to be dismissed from the lawsuit based on summary judgment or qualified immunity, the court must look at the facts as reported by the person suing the officer and cannot consider the officer’s version of events. This case serves as a good example because Officer Deaton reported that he detonated the flashbang outside, but Ms. Dukes reported that the flashbang was thrown into the bedroomon top of her. The court must consider whether the officer’s actions were proper if he threw the flashbang into the room without line of sight/inspection as reported by Ms. Duke.

Ms. Dukes sued Officer Deaton for a use of excessive for as well as state law claims for assault and battery, and she sued Commander Branham based on supervisory liability or more simply stated a failure to properly supervise Deaton.

The court found that Officer Deaton Deaton’s deployment of the flashbang was a violation of the 4th Amendment. The court outlined a number of factors in reaching this conclusion:

The facts construed in the light most favorable to Dukes establish that Deaton used excessive force. Deaton's conduct posed a significant risk of harm. He threw a flashbang that can generate heat in excess of 2,000 degrees Celsius into a dark room in which the occupants were asleep. He also failed to inspect the room, as he was trained to do, to determine whether bystanders, such as Dukes, occupied the room or if other hazards existed. And there existed minimal need for Deaton's use of force. True, the warrant stated that an informant advised law enforcement that Ward kept a handgun on his person, and the applying officer attested that drug dealers are known to be violent. Perhaps this record could have supported the use of the two flashbangs contemplated by the operational plan to disorient the occupants of the apartment. We need not decide that question. Even if the record supports the use of the first two flashbangs, these earlier flashbangs made Deaton's deployment gratuitous. The break and rake and the detonation of the flashbang on the exterior wall diverted the attention of Ward and Dukes before Deaton deployed his flashbang. There is no evidence that Deaton was aware that Ward had drawn his gun or that Dukes or Ward resisted the officers. And the suspected crime that prompted the search was possession and sale of marijuana. Deaton deployed a dangerous device into a dark room for a de minimis return.

The court also noted that the 7th and 9th Circuits have also concluded that throwing a flashbang without making a visual inspection cuts against the reasonableness of the flashbang’s use.[[2]](#footnote-2)

Having concluded that Deaton violated the 4th Amendment by throwing the flashbang without making a visual inspection, he court then considered whether the law was clearly established at the time Deaton threw the flashbang such that an officer in his position would know that the conduct was unconstitutional.

The 11th Circuit noted that there would be two ways to conclude that the law was clearly established. The first would be if the United States Supreme Court, the 11th Circuit, or the Georgia Supreme Court had addressed the constitutionality of flashbangs. Where there is no such precedent the court can determine that a general constitutional rule already identified in a prior decision applies with “obvious clarity” to the officer’s conduct. Under this second analysis the court wrote: “To satisfy this narrow exception, official conduct must be **so egregious that "every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law.”**

Simply stated there are two ways in which an officer will be denied qualified immunity. First, if a court with jurisdiction over the officer has already decided in a similar case that the conduct is unconstitutional or if the officer’s conduct is so bad, that every reasonable officer would know that you cannot do it. The court noted that in applying this second analysis [the so egregious analysis] all but the plainly incompetent officer will be entitled to qualified immunity.

Because there was no precedent in the 11th Circuit or Georgia on the use of flashbangs, the court used the second analysis to determine whether Officer Deaton’s use of the flashbang was so bad [egregious] that every officer would know that you should not do it.

The court noted that there was no evidence that Deaton intentionally threw the flashbang for any purpose other than as a distraction as contemplated by the operational plan. Additionally, there was information that one of the occupants, Ward, carried a handgun. The court asserted that Deaton should have followed the training by conducting a visual inspection of the bedroom before throwing the flashbang.

In conclusion, the court decided that although Officer Deaton’s use of the flashbang was unconstitutional, there was no clear precedent in the 11th Circuit, the Supreme Court, or the Georgia Supreme Court at the time and Deaton’s conduct was not so bad [egregious] that every reasonable officer would know that you should not throw a flashbang in the manner that Deaton did.

On the supervisory claim, the court held that “a supervisor cannot be held liable for the constitutional violation of his subordinate, if the constitutional violation was not then clearly established.”

It is noted that the court also determined that since there was no evidence that Deaton intentionally threw the flashbang at Dukes, he was entitled to immunity under Georgia Law.

**Bottom Line:**

1. **11th Circuit determined that throwing flashbang into bedroom without first making an inspection for occupants violated the 4th Amendment.**
2. **The law was not clearly established at the time this event occurred, thus the officer got qualified immunity.**
3. **Officers using flashbang should deploy flashbangs consistently with manufacturer’s warnings/instructions and the training the officers are provided.**

1. *Dukes v. Deaton*, 2017 U.S. App. LEXIS 1367 (11th Cir. 2017). [↑](#footnote-ref-1)
2. *Estate of Escobedo v. Bender,* 600 F.3d 770, 785 (7th Cir. 2010), *Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir. 2004). [↑](#footnote-ref-2)