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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NOVENDER FLEMING,)
)
Plaintiff(s),)
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v.)
)
NADIA CLARK, et al.,)
)
Defendant(s).)
)
-----)
VICTOR JONES,)
)
Plaintiff(s),)
)
v.)
)
NADIA CLARK, et al.,)
)
Defendant(s).)
)
-----)

No. C09-1613 BZ

and Consolidated Case

No. C09-4757 BZ

SUMMARY JUDGMENT ORDER

This civil rights action arises out of an Oakland police investigation of suspected marijuana cultivation at the home of plaintiffs Novender Fleming and Victor Jones. Plaintiffs allege four Fourth Amendment violations: (1) the investigation was not pursuant to a warrant supported by probable cause (fifth cause of action), (2) the Oakland police did not comply with knock-and-announce requirements (first cause of action),

1 (3) the Oakland police used excessive force in detaining
2 plaintiffs (second cause of action) and (4) the Oakland police
3 unreasonably seized one of Jones' firearms (fourth cause of
4 action). Additionally, plaintiffs bring a Monell claim against
5 the City of Oakland for failing to properly train police
6 officers regarding California's medical marijuana laws (sixth
7 cause of action). Finally, plaintiffs allege a First Amendment
8 violation (third cause of action) and various state law torts
9 (seventh, eighth, ninth, tenth and eleventh causes of action).
10 For the reasons set out below, plaintiffs' motion for summary
11 judgment is **DENIED**, and defendants' motion for summary judgment
12 is **GRANTED IN PART** and **DENIED IN PART**.

13 **Statement of Facts**

14 Plaintiff Victor Jones ("Jones") is a 60 year old man with
15 gout.¹ Pursuant to California law, he received physician
16 approval to grow marijuana for medical purposes in
17 approximately 1998. Jones resides at 1078 55th Street in
18 Oakland, California. Plaintiff Novender Fleming ("Fleming")
19 was one of his visitors at the time the warrant was executed.

20 On September 2, 2008, the Oakland Police Department
21 received information from a confidential informant that
22 marijuana cultivation was taking place at Jones' residence. To
23 verify the information, Officers Clark and Boracio went to an
24 undisclosed location to view Jones' yard. From this location,
25 Officers Clark and Barocio claim they saw, with "a clear and
26 unobstructed" view of Jones' yard, two large marijuana plants

27 ¹ Unless otherwise noted, the facts are not in dispute.
28

1 and ten to fifteen small marijuana plants. Plaintiffs,
2 however, assert that there were only six marijuana plants and
3 that Officer Clark told Jones she had found six plants.

4 On September 2, Officer Clark applied for a search warrant
5 for the house and submitted an affidavit to an Alameda County
6 Superior Court Judge describing her observations of Jones'
7 residence and stating that based on her training and experience
8 she believed its occupants were illegally cultivating
9 marijuana. On September 3, the warrant issued. The warrant
10 authorized Oakland Police Officers to enter and search the
11 "rooms, attics, basements, containers and other parts of the
12 residence."

13 At approximately 4:00 p.m. on September 3, seven Oakland
14 Police Officers (Officers Clark, McMillan, Gerrans, Miller,
15 Thompson, Vergara and Sergeant Ortiz) went to Jones' residence
16 to serve the search warrant. Officer Clark announced the
17 presence of the police by knocking on the metal security gate
18 outside the residence and yelling "Oakland Police Department,
19 Search Warrant." About ten seconds after announcing their
20 presence, Officers Clark, McMillan and Gerrans heard movement
21 inside the house, but no one opened either the metal security
22 gate or an inner wooden door. At that point, Clark testified,
23 she feared that people inside the residence were arming
24 themselves or destroying evidence, so she ordered McMillan to
25 break down the metal security gate. McMillan was not able to
26 immediately break open the security gate. After a few attempts
27 Jones came to the gate from the inside of his house. Officers
28 Clark and Gerrans pointed their guns at Jones. Fleming came to

1 the door at the same time as Jones, but she was not visible to
2 the police officers. Jones yelled to the officers that he
3 could not open the security gate. Fleming attempted to open
4 the security gate, but was hit on the hand with "hook and key"
5 instruments, devices used to forcibly open doors, while
6 McMillan was trying to break it open. While Gerrans states
7 that he saw someone trying to open the security gate from the
8 inside and yelled "stand away from the door," Fleming claims
9 the police never told her to stand away from the door.
10 Eventually, McMillan broke open the door.

11 Once the police officers entered the residence, Jones and
12 Fleming were handcuffed and held at gun point while the
13 officers conducted a " cursory search" to secure the premises.
14 During the search, Officer Clark found a loaded .38 caliber
15 revolver, which she confiscated. While Officer Clark claims
16 that Jones and Fleming were released from handcuffs and not
17 held at gunpoint after the cursory search was completed in
18 about five minutes, plaintiffs claim they were handcuffed and
19 held at gunpoint for forty-five minutes to an hour.

20 Officer Clark found six marijuana plants in the backyard.
21 Jones told Clark he had a "current cannabis grower's permit"
22 and showed it to police officers.² Additionally, Jones told
23 Clark that the revolver was unregistered and had belonged to
24 his deceased wife. No one was arrested at the scene and no
25 charges were filed.

26 Defendants now move for summary judgment, and plaintiffs

27

28 ² Jones did not introduce a permit or marijuana
identification card into evidence.

1 cross-move for summary judgment on their excessive force claims
2 and their Monell claim against the City of Oakland.

3 **Legal Standard**

4 **QUALIFIED IMMUNITY**

5 Plaintiffs allege three discrete constitutional
6 violations, and defendants raise the defense of qualified
7 immunity to each allegation. To resolve a claim of qualified
8 immunity, a Court must determine (1) whether the plaintiff has
9 proven a violation of a constitutional right and (2) whether
10 that right was clearly established. Pearson v. Callahan, 129
11 S.Ct. 808, 818 (2009). It is within the Court's discretion to
12 begin with the first or second factor. Id. When determining
13 whether an officer's conduct violated a constitutional right,
14 the facts are viewed in the light most favorable to plaintiff.
15 Eng v. Cooley, 552 F.3d 1062, 1067 (9th Cir. 2009). The court
16 must determine "whether the preexisting law provided the
17 defendants with fair warning that their conduct was unlawful."
18 Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130,
19 1136-37 (9th Cir. 2003) (internal quotes omitted).

20 Whether the right is clearly established is judged as of
21 the date of the alleged incident and is a pure question of law.
22 Phillips v. Hust, 477 F.3d 1070, 1079 (9th Cir. 2007).

23 However, any genuine issues of material fact concerning the
24 underlying historical facts of what the officer knew or what he
25 did are questions of fact for the jury. Sinaloa Lake Owners
26 Ass'n v. City of Simi Valley, 70 F.3d 1095, 1099 (9th Cir.
27 1995).

28 **I. PROBABLE CAUSE TO INVESTIGATE MARIJUANA CULTIVATION**

1 Plaintiffs claim that the Oakland police's execution of
2 the search warrant violated the Fourth Amendment because the
3 warrant was not supported by probable cause. Specifically,
4 they claim that the application did not establish that Jones'
5 cultivation of marijuana was unlawful given that California had
6 partially legalized marijuana in the Compassionate Use Act of
7 1996 ("CUA")³ and the Medical Marijuana Program Act ("MMP").⁴

8 The parties agree that Officer Clark swears she saw
9 marijuana plants in plaintiffs' backyard prior to applying for
10 a search warrant, and that growing marijuana is illegal in
11 California unless the cultivator possesses a physician's
12 recommendation.

13 Since the Oakland police were investigating a possible
14 violation of California Law, probable cause analysis begins

15 ³ California Health and Safety Code § 11362.5(d)
16 provides that statutes prohibiting possession and cultivation
17 of marijuana, "shall not apply to a patient, or to a patient's
18 primary caregiver, who possesses or cultivates marijuana for
the personal medical purposes of the patient upon the written
or oral recommendation or approval of a physician."

19 ⁴ In 2003, the California Legislature passed the MMP,
20 which established a voluntary identification card system that
allows law enforcement officials to easily identify authorized
21 medical users. See California Health and Safety Code §
11362.71(e). In full, California Health and Safety Code §
22 11362.71(e) provides:

23 No person or designated primary caregiver in
possession of a valid identification card shall be
24 subject to arrest for possession, transportation,
delivery, or cultivation of medical marijuana in an
25 amount established pursuant to this article, unless
there is reasonable cause to believe that the
26 information contained in the card is false or
falsified, the card has been obtained by means of
27 fraud, or the person is otherwise in violation of the
provisions of this article.

28 Id.

1 with the elements of the state crime they were investigating.
2 See Brown v. Gossett, 2006 WL 213732 at *5 n.2 (N.D. Cal.
3 2006). California law treats the CUA as having established
4 nothing more than an affirmative defense to a marijuana crime.
5 See People v. Mower, 28 Cal.4th 457, 470 (2002); People v.
6 Fisher, 96 Cal.App.4th 1147, 1151-52 (2002). In People v.
7 Fisher, the Court of Appeal affirmed the validity of a search
8 conducted pursuant to a warrant issued after police had
9 observed marijuana growing in defendant's yard. Although
10 defendant had advised the police that he had a permit to grow
11 marijuana before they conducted the search, the Court ruled
12 that the possibility that the defendant might have an
13 affirmative defense were he charged did not negate probable
14 cause for issuing the warrant. Other federal courts have
15 reached similar conclusions. See Rolon v. L. A. Cnty., 2008 WL
16 4960442 (C.D. Cal. 2008); Wilson v. City of Merced, 2008 WL
17 4737159 (E.D. Cal. 2008). Such rulings are in accord with the
18 principle articulated by the United States Supreme Court in
19 Virginia v. Moore, 553 U.S. 164 (2008), that whether a search
20 is reasonable under the Fourth Amendment does not necessarily
21 turn on defenses available under state law. Id. at 170-172.

22 Additionally, accepting plaintiffs' argument would place a
23 heavy burden on law enforcement. While plaintiffs argue that
24 defendants should have somehow "checked" whether they were
25 authorized to cultivate marijuana prior to getting a search
26 warrant, plaintiffs did not explain in either their papers or
27 in open court how defendants would perform this check. At oral
28 argument, counsel for plaintiffs suggested that the police

1 should have asked Jones whether he had physician's approval to
2 grow marijuana prior to applying for a search warrant. This
3 strategy, however, would be counterproductive if their suspect
4 was not growing marijuana legally. At argument, defendants
5 asserted and plaintiffs did not dispute, that there is no
6 method of checking for a medical marijuana permit by name or
7 address and that the creation of such a process could raise
8 medical privacy issues. See generally, Guidelines for the
9 Security and Non-Diversion of Marijuana Grown for Medical Use
10 at 6, available at: [http://www.ag.ca.gov/cms_attachments/press/pdfs/
11 n1601_medicalmarijuanaquidelines.pdf](http://www.ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaquidelines.pdf).

12 Accordingly, the Court **GRANTS** defendants' summary judgment
13 motion on plaintiffs' claim that their residence was searched
14 pursuant to a warrant not supported by probable cause.
15 Moreover, since plaintiffs' improper search warrant claim was
16 the basis for their Monell claim, the Court also **GRANTS**
17 Oakland's motion for summary judgment on plaintiffs' Monell
18 claim.

19 **II. EXCESSIVE FORCE CLAIMS**

20 Plaintiffs bring two Fourth Amendment excessive force
21 claims. Plaintiffs first argue that the Oakland police waited
22 an unreasonably short time between knocking and announcing and
23 breaking Jones' security gate. Fleming's hand was injured
24 while Oakland police were breaking open the gate. Second,
25 Plaintiffs argue that they were unreasonably held in handcuffs
26 at gunpoint for approximately one hour. In response,
27 defendants claim that plaintiffs were only held in handcuffs at
28 gunpoint during a five minute cursory search during which the

1 police secured the residence, and that after the cursory search
2 the plaintiffs were released.

3 **A. IMPROPER KNOCK AND ANNOUNCE**

4 In determining whether the execution of a search warrant
5 meets the Fourth Amendment's reasonableness standard, the
6 Supreme Court has "consistently eschewed bright-line rules,
7 instead emphasizing the fact-specific nature of the
8 reasonableness inquiry." Ohio v. Robinette, 519 U.S. 33, 39
9 (1996); see also United States v. Banks, 540 U.S. 31, 35-36
10 (2003). One requirement incorporated into the Fourth Amendment
11 reasonableness standard, though, is the common law requirement
12 that officers knock and announce their presence and then wait
13 either to be refused entry into a residence or until exigent
14 circumstances arise. Wilson v. Ark., 514 U.S. 927, 934 (1995).
15 Exigent circumstances include the risk that evidence of a crime
16 will be destroyed while officers wait. See Banks, 540 U.S. at
17 38.

18 This is one of those cases where the issue of whether the
19 police waited a reasonable period of time before breaking down
20 the door, given the totality of the circumstances, is
21 appropriate for jury disposition. Howell v. Polk, 532 F.3d
22 1025, 1026 (9th Cir. 2008). Unlike Banks, in which the Court
23 found a 15-20 second wait period to be reasonable where the
24 officers were investigating the sale of cocaine, here the
25 officers had only established probable cause to believe that
26 marijuana was being grown illegally. The facts in Officer
27 Clark's affidavit do not establish probable cause to believe
28 that defendants were engaged in the sale of drugs. Moreover,

1 cocaine is easily flushed down a drain, while marijuana plants
2 are not. See United States v. Maher, 185 F.Supp.2d 826, 832
3 (W.D.Mich. 2001) (marijuana plants not easily disposable). See
4 also Banks, 540 U.S. at 41 ("police seeking a stolen piano may
5 be able to spend more time to make sure they really need the
6 battering ram."). There is also a dispute over whether the
7 noises defendants heard sounded as though the plaintiffs were
8 arming themselves or trying to dispose of evidence or whether
9 they sounded as though the plaintiffs were coming to the door.
10 Finally, there is a dispute over whether plaintiffs approached
11 the door while it was being broken down after being ordered to
12 do so, as plaintiffs claim, or whether defendants told
13 plaintiffs to back away from the door.

14 Finding that defendants as a matter of law could knock
15 down the front door once they heard movement inside the house,
16 as defendants suggest, could eviscerate the knock and announce
17 requirement. Since police ordinarily are required to announce
18 their entry and ask the occupants to open the door, if every
19 movement inside the house allows the police to infer that
20 evidence is being disposed of or that the occupants are arming
21 themselves, the door could be broken down in virtually ever
22 instance. Clearly, that is not what the Supreme Court had in
23 mind when it ruled in Banks.

24 Accordingly, the Court **DENIES** defendants' motion for
25 summary judgment on plaintiffs' first cause of action.

26 **B. UNREASONABLE USE OF HANDCUFFS AND GUNS**

27 To determine whether the Oakland police's use of force was
28 reasonable under the circumstances, this Court must balance

1 "the nature and quality of the intrusion on a person's liberty
2 with the countervailing governmental interests at stake."
3 Davis v. City of Las Vegas, 478 F.3d 1048, 1054 (9th Cir. 2007)
4 (citations omitted). In performing this calculus, the court
5 must "assess the quantum of force used" and then "measure the
6 governmental interests at stake" by considering "(1) the
7 severity of the crime at issue, (2) whether the suspect poses
8 an immediate threat to the safety of the officers or others,
9 and (3) whether he is actively resisting arrest or attempting
10 to evade arrest by flight." Id. (citations omitted). Because
11 cases involving police misconduct almost always involve
12 disputed factual contentions and turn on credibility
13 determinations, the Ninth Circuit has "held on many occasions
14 that summary judgment or judgment as a matter of law in
15 excessive force cases should be granted sparingly." Drummond
16 v. City of Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003) (citing
17 Liston v. Cnty. of Riverside, 120 F.3d 965, 976 n.10 (9th Cir.
18 1997) (citing several cases)); see also Davis, 478 F.3d at
19 1054-55 (stating that these "cases almost always turn on a
20 jury's credibility determinations").

21 Here, there is not much evidence to support defendants'
22 position. Seven armed officers were investigating the
23 cultivation of 6-10 marijuana plants, which cultivation might
24 be legal in California. There is no suggestion that the
25 officers believed the occupants of the building posed a threat
26 to officer safety or that they would actively resist arrest or
27 attempt to flee. And the facts of what happened inside the
28 house are materially in dispute. Plaintiffs claim that they

1 were handcuffed and held at gunpoint for forty-five minutes to
2 an hour. Defendants claim that the search took only five
3 minutes and that the handcuffs were then removed. Plaintiff
4 Jones asserts that he was forced into signing an affidavit that
5 he had 3 illegal plants because he was being held handcuffed
6 and at gunpoint. Defendants assert that Jones was not
7 handcuffed or being held at gunpoint at the time he was being
8 questioned and that the statement only contained the
9 information he gave them.

10 Since there are several disputed issues of fact regarding
11 the length of the search, the use of handcuffs and the use of
12 guns, the Court finds this issue inappropriate for disposition
13 on summary judgment and therefore **DENIES** plaintiffs' and
14 defendants' motions.

15 **III. First Amendment Claim**

16 Defendants moved for summary judgment on plaintiffs' First
17 Amendment claim summarily arguing that the claim is unclear and
18 barred by qualified immunity. Plaintiffs declined to respond
19 to defendants argument or defend their third cause of action.
20 The Court agrees that the claim is entirely unclear and
21 defendants' motion for summary judgment on this claim is
22 **GRANTED**.

23 **IV. State Torts**

24 At the hearing, plaintiffs announced that they had
25 dismissed their claim for conversion. Since plaintiffs did not
26 oppose defendants' motion for summary judgment as to their
27 eighth, ninth, and tenth causes of action, the motion on those
28 causes of action is **GRANTED**. Plaintiffs articulated at the

1 hearing that their negligence claim essentially dovetails with
2 their claim for excessive force and unlawful entry under
3 Section 1983. As I have found that those claims survive
4 summary judgment, defendants' motion as to plaintiffs' eleventh
5 cause of action is **DENIED**.

6 **Conclusion**

7 **IT IS THEREFORE ORDERED AS FOLLOWS:**

8 1. Plaintiffs' motion for summary adjudication is **DENIED**.

9 2. Defendants' motion for summary judgment is **GRANTED** as
10 to plaintiffs' **THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH,**
11 **NINTH, and TENTH** causes of action.

12 3. The Court finds that the search of Plaintiff Jones's
13 home was supported by probable cause.

14 4. Defendants' motion for summary judgment is **DENIED** as
15 to plaintiffs' **FIRST, SECOND, and ELEVENTH** causes of action.

16 DATED: September 8, 2010

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18 _____
Bernard Zimmerman
United States Magistrate Judge

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