Tenth Circuit

Legal Advisor

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Under what circumstances can law enforcement officers enter a residence without knocking and announcing their intentions?

"No Knock" executions of search warrants and arrests are detailed by SAO Felony Intake's Joe Williams in July Legal Advisor.

Investigative Procedures

By Joe Williams

Officers: Be careful if you're dropping "knock and announce" during search warrant executions

When securing a search warrant, a law enforcement officer must first have it approved by the State Attorney or one of his designated assistants.

A question during the procurement process often arises regarding the securing of a "No Knock" entry provision.

First, a reading of F.S. 933.09 is in order. This statute states: "The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of his authority and purpose he is refused admittance to said house or access to anything therein."

Since this statute specifically addresses incidents where a break-in occurs, it is the law enforcement officer's responsibility to comply with the "knock and announce" requirement, especially when it appears that a break-in could precede the announcement during the execution of the search warrant.

This "knock and announce" requirement is violated by an unannounced entry into any building, including private residences.

However, as with most areas of law, there is an exception to the "knock and announce" rule of entry.

In State v. Kelley, 287 So 2d 13 the court interpreted F.S. 933.09 as allowing an unannounced right of entry in Florida where certain exigent circumstances exist.

We usually associate exigent (emergency-like) circumstances with warrantless searches or arrests.

They also apply, however, to unannounced entry situations on search warrants.

In departing from the "knock and announce" requirement, when the warrant has already been secured, the issue is whether exigent circumstances exist which would justify a no-knock entry.

In other words, any unannounced search is presumed illegal unless there are exigent circumstances.

Statutes governing the requirements for purposes of executing a search warrant, and statutes which control entry for warrantless arrests impose similar legal requirements and policy considerations.

Therefore, cases decided under either rule are persuasive authority for application of the other.

Warrantless entry, or "no-knock" entry if one has secured a warrant, is excused only on the basis of exigent circumstances existing at the time the law enforcement officer approaches a scene to make an arrest or execute a search warrant

Some believe that a magistrate can grant the "no-knock" right of entry when the law enforcement officer's probable cause affidavit sets forth a proper factual foundation for it.

However, a magistrate may not grant a "no-knock" provision in a search warrant absent a statutory provision.

A small number of states have adopted legislation permitting magistrates to issue search warrants without the prior announcement upon a sufficient showing in the law enforcement officer's affidavit.

This is not the law in Florida.

The leading case in Florida is State v. Price, 564 So 2d 1239, where the court stated in pertinent part: "....a no-knock exception is always a factual question for the officers at the scene....the overwhelming consensus has been that the issuing magistrate cannot

waive the knock and announce requirement in advance and that it is a determination which the executing officer must make at the scene and be prepared to justify later....".

The law enforcement officer should be aware of circumstances which may constitute an emergency and would therefore justify a departure from the legal requirements.

In an effort to provide additional information on what would constitute exigent circumstances, the following sample of Florida cases were reviewed.

In Wike v. State, 596 So 2d 1020, the Florida Supreme Court cited United States v. Standridge, 107 S. Ct. 2468, in defining exigent circumstances: "Factors which indicate exigent circumstances include: 1. the gravity or violent nature of the offense with which the suspect is to be charged; 2. a reasonable belief that the suspect is armed; ....5. a likelihood that delay could cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public."

In State v. Robinson, 565 So 2d 730, the court held that the opening of an unlocked screen door is "breaking" which invokes the knock and announce requirement and that there was no sufficient evidence presented that law enforcement officers reasonably believed that a person, who previously disappeared into the house, would destroy evidence or become violent.

Also, the court held that vague references to the possibility of guns in the house did not provide sufficient evidence that law enforcement officers believed the search would be substantially more dangerous if they announced their purpose and waited for a response.

Therefore, exigent circumstances did not exist.

Another case of interest is State v. Bamber, 592 So 2d 1129, where the court held that a good-faith belief to enter home without

"knocking and announcing" by the police did not justify an exception to announcement requirement where no exigent circumstances existed.

The court further stated that the existence of normal plumbing does not, in itself constitute exigent circumstances nor dispense with the "knock and announce" requirement, when searching for small quantities of cocaine pursuant to a warrant.

The court held that law enforcement must be able to provide a specific explanation that caused them to reasonably believe that the destruction of evidence was likely.

A search warrant that orders the seizure of a stolen gun cannot, without more, constitute an exigent circumstance. See Rodriguez v. State, 484 So 2d 1297.

Courts also consider whether multiple factors are present in deciding if exigent circumstances exist, as in State v. Price, supra, where the court held that:

1. knowledge existed that defendant had been in possession of an automatic weapon, 2. that defendant's brother, who lived with defendant, had 17 arrests within four years, including battery on a law enforcement oficer and carrying concealed weapons, 3. Officers had heard screams of slang for police at scene, and 4. police had received tips about buys of cocaine.

Based on all four elements the court held that exigent circumstances existed.

After a review of the above cases, it appears that a common theme may be present and it may be obtained from a review of the words themselves: "exigent circumstances" (plural).

This plural form may indicate that the emergency-like situation should include multiple factors.

The law enforcement officer who gives multiple (emergency-like) reasons existing in a factual incident is in a stronger position to have the court hold in his favor.

However, each factor must be a definite emergency situation, and a good faith belief which is erroneous will not substitute for reality.

CAVEAT: Today, a law enforcement officer must be prepared to carry a heavy burden in showing the court that non-compliance with the announcement statute was justified under the circumstances. It should be noted that Florida courts have held that in deciding whether law enforcement officers have violated the "knock and announce" requirement is a factual issue for the court to decide at a motion to suppress.

In summation, in Florida, where no statutory exception to the knock and announce requirement exists, it is a factual question for officers at the scene, at the time of the search warrant's execution, whether to depart from the statutory requirement of "knock and announce" and employ a "no knock" entry based upon exigent circumstances. It is not a question to be decided by the magistrate who previously issued the warrant.

The following circumstances have been held to be an exception to the "knock and announce " statute: 1. Where the person within already knows of the law enforcement officer's authority and purpose; 2. Where the person(s) within are in imminent danger; 3. Where the law enforcement officer can show his personal danger would have increased had he demanded entrance and stated the purpose; 4. Where an escape or destruction of evidence is being attempted.

The officer must have specific information supporting these circumstances to justify the exception.

FROM THE COURTS

Edited by Chip Thullbery

Lewd act statute constitutional

The defendants were charged with lewd act on a child and filed motions to dismiss.

In their motions they alleged that they had consentual sexual relations with 14-year-old girls. They asserted that the provision in section 800.04 that consent is not a defense to the crime lewd act on a child was unconstitutional.

A trial court granted the motions to dismiss and another court denied the motion in a separate case.

On appeal, The Fifth District reversed the orders granting the motion, holding that section 800.04 does not violate Florida's constitutional provisions concerning right of privacy. Jones v. State, 18 FLW D1375 (Fla. 5th DCA June 3, 1993).

Carrying unloaded concealed firearm no crime if no ammo present

The defendant was charged with carrying a concealed firearm and filed a motion to dismiss asserting that the State could not establish a prima facie case.

The facts on which the motion was based were that the defendant was stopped for speeding and then arrested. While conducting a search incident to arrest, an offficer discovered an unloaded firearm under the right front passenger seat. No ammunition was found in the vehicle.

The Supreme Court affirmed, holding that an unloaded firearm carried in a private vehicle is not readily accessible for immediate use where there is no ammunition in the vehicle.

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"Firearm"

The court went on to hold that if there is ammunition in a vehicle, a firearm could be readily accessible depending on the proximity of the ammunition to it. Ashley v. State, 18 FLWS315 (Fla. June 3, 1993).

Consent to search vehicles extends to unsecured containers

The defendant was charged with trafficking in cocaine and filed a motion to suppress

The evidence on the motion showed that after an officer lawfully stopped a motor vehicle he asked the driver for consent to search the vehicle.

The driver gave consent and during the search the officer looked into a brown paper bag which folded over but not sealed. There was cocaine in the paper bag.

The trial court denied the motion to suppress, and the defendant was convicted as charged.

On appeal, the Supreme Court affirmed, holding that consent to search a motor vehicle extends to unsecured containers which are within the vehicle. State v. Hester, 18 FLW S308 (Fla. May 27, 1993).

Tip from named informant justified stop of defendant

The defendant was charged with dealing in stolen property and filed a motion to suppress evidence.

The evidence on which the motion was based showed that police officers received a tip from an informant who gave his name, and told them that a man whom he described by age, race, and clothing was selling stolen guns out of an automobile which he

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"Tip"

described by make, color, year, and license plate.

The man further told police where the car would be located in thirty minutes.

When officers went to the location at the time suggested, they found the defendant and his vehicle as described. They asked the defendant for permission to search his trunk, and he agreed. Upon doing so they found stolen guns.

The trial court denied the motion to suppress, and the defendant pled no contest reserving his right to appeal.

On appeal, the First District affirmed, holding that the tip gave them a founded suspicion of criminal activity which justified the temporary detention of the defendant. Oliver v. State, 18 FLW D1336 (Fla. 1st DCA May 28, 1993).

Property owned by a school might not comprise a school

In this Polk County case, the defendant was charged with purchase of cocaine within 1,000 feet of a school.

At his trial, the evidence showed that he purchased cocaine from undercover police officers within 1.000 feet of a parking lot owned by a school.

He was convicted as charged, but on appeal, the Second District reversed and reduced the conviction to a simple purchase of cocaine, holding that the State failed to establish that the parking lot was not merely owned by the school but comprised a part of the school. Stamps v. State, 18 FLW D 1351 (Fla. 2nd DCA May 28, 1993).

Drug enforcement officer's stop of car for speeding wasn't pretextual

The defendants were charged with drug related crimes and filed a motion to suppress evidence.

The evidence on the motion showed that an officer was patrolling I-75 at 10 P.M. with a drug-sniffing dog in his car. He clocked the defendant's vehicle at 73 miles an hour in a 65 mile an hour zone and stopped it.

During the stop, drugs were located. The trial court granted the motion to suppress finding that the officer's stop was pretextual.

On appeal, the First District reversed, holding that the stop was lawful because the defendants were speeding and that the stop was not rendered invalid because the officer was also seeking to apprehend drug carriers. State v. Barrio, 18 FLW D1343 (Fla. 1st DCS May 28, 1993).

Probable cause gave officers right to search vehicle without warrant

The defendant was charged with first degree murder and filed a motion to suppress evidence.

The facts on which the motion was based were that the nude body of the victim was found in an open field. An examination of the body showed that the victim had been strangled.

Approximately 10 months later the body of another victim was found in similar circumstances. At that time police made a plaster cast of a set of tire tracks found within 19 feet of the body. In addition they found a witness who had seen the deceased enter a truck on the night of her murder.

One of the police officers recognized that the witness' description matched the defendant's truck. The witness subsequently identified the truck from a photo pack. The police then seized the truck on a public street without a

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Search"

warrant and searched it. Inside they discovered a restraining device, a hair, and the victim's drivers' license.

The trial court denied the motion to suppress and the defendant was convicted as charged.

On appeal, the Supreme Court affirmed, holding that because the facts known to the police officers gave them probable cause to search the defendant's vehicle, they could do so without obtaining a warrant. Crump v. State, 18 FLW S331 (Fla. June 10, 1993).

Minor may consent to search of parent's home only under certain conditions

The defendant was charged with burglary, armed kidnapping, and three counts of sexual battery and filed a motion to suppress evidence.

The evidence on the motion showed that after the victim called police and told them she had been kidnapped and raped by a neighbor, an officer went to the neighbor's house and knocked on the back door at approximately 3:00 A.M..

The 15-year-old son of the defendant answered the door, and the police officer identified himself and told the boy that he needed to speak to an adult. The boy then gave him permission to enter the house.

Upon entering the home the officer arrested the defendant and searched the residence finding soiled clothing.

The trial court denied the motion to suppress, and the defendant was convicted as charged.

On appeal, the Supreme Court held that a minor may provide valid third party consent to a warrantless entry into a home if the State can

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show that the minor shares the home with an absent non-consenting parent, that the police officer conducting the entry into the home reasonably believes based on articulatable facts that the minor shares common authority with the parent to allow entry into the home and by clear and convincing evidence that the minor's consent was freely and voluntarily given under the totality of the circumstances.

Based on this holding, the Court should have granted the motion to suppress because the State did not show that the officer reasonably believed the minor shared common authority with the defendant to allow entry into the home.

However, the Court found that the error was harmless and thus affirmed the defendant's conviction. Saavedra v. State, 18 FLW S317 (Fla. June 3, 1993).

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