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Constitutional Law-Search and Seizure-No Knock Entry Held Reasonable in Virginia When Exigencies Present

Constitutional Law—Search and Seizure—No Knock Entry Held Reasonable in Virginia When Exigencies Present—*Johnson v. Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972).

The fourth amendment to the United States Constitution, an express proclamation of the citizens' indefeasible right against unreasonable searches and seizures, has now been held fully applicable to state searches and seizures through the due process clause of the fourteenth amendment.[1] Neither the fourth amendment to the United States Constitution nor any law in Virginia[2] expressly requires those persons performing a search to "announce"[3] their presence, identity, or purpose prior to making their entry for a valid search. Despite the absence of an express requirement of announcement before entry, the early common law in England[4] and subsequent case law in the United States[5] have indicated that a rule of announcement or notice was so generally enforced that it was highly probable that the draftsmen of the fourth amendment felt that it was an implicit requirement for a reasonable search and seizure.[6] However, until the recent case of *Johnson v. Commonwealth*,[7] a case of first impression, the Virginia Supreme Court had never made a determination of whether an unannounced or "no knock" entry could ever be reasonable within the meaning of the fourth amendment.[8]

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[1] *See* Mapp v. Ohio, 367 U.S. 643, 655-60 (1961). The Court makes it clear that not only is the fourth amendment applicable to the states, but that it will be enforced against the states by means of exclusion, which is the same means of enforcement used against the federal government.

[2] The Va. Const. art. I, § 10 prohibits general warrants, but it does not specifically deal with manner of entry:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

The Va. Code Ann. §§ 19.1-83 to -89 (Cum. Supp. 1972) contains provisions relating to search warrants. However, it contains no stipulations concerning entry procedure.

[3] *See* Note, *Announcement in Police Entries*, 80 Yale L. J. 139, 147 (1970). Announcement is generally construed to mean notice of presence, authority and purpose, and not just a mere knocking on the door.

[4] *See, e.g.*, Seymayne's Case, 77 Eng. Rep. 194 (K.B. 1603), fully discussed note 9 *infra*.

[5] Sonnenreich and Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. J. L. Rev. 626, 629 (1970). *See* Oystead v. Shed, 13 Mass. 520 (1816).

[6] *See* Note, *Announcement in Police Entries, supra* note 3 at 145.

[7] 213 Va. 102, 189 S.E. 2d 678 (1972).

[8] Insofar as it deals with what is a reasonable search, the determination made by the *Johnson* court was properly considered as a judicial matter, taking into account all the circumstances and basic common law principles. McClannan v. Chaplain, 136 Va. 1, 116 S.E. 495 (1923).

In *Johnson*, city police officers armed with a search warrant made a completely unnanounced and forceful entry into the defendant's apartment. Thereafter, the police found several bags of marijuana, one in the defendant's possession and others plainly visible in the room. The defendant asserted the search was unlawful, and that the bag of marijuana were improperly admitted into evidence because of the failure of the officers to follow the common law rule of notice before entry.[9] After determining the police had sufficient reason to believe the drugs were present, and that the defendant could have easily disposed of the drugs in a nearby commode upon announcement, the court held the method of entry was constitutionally reasonable in light of the exigent circumstances.[10]

The modern trend in America, to allow evasion of the notice rule when certain exigent circumstances are present, has manifested itself in the enact-

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[9] The common law rule of notice before entry was first declared in the often cited Seymayne's Case, 77 Eng. Rep. 194 (K.B. 1603), and it has been incorporated by statute in a large number of states. The case involved an unannounced breaking by the Sheriff in order to execute a civil writ:

> In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; and that appears well by the stat. of Westm. 1. c. 17. (which is but an affirmance of the common law) . . . for the law without a default in the owner abhors the destruction or breaking of any house . . . by which great damage and inconvenience might ensue to the party, . . . for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . . . *Id.* at 195, 196.

The general enforcement of the *Seymayne's* rule of announcement was occasionally excused in a few early cases in the United States, such as in Read v. Case, 4 Conn. 166 (1822), where the officers believed someone was in danger of great bodily harm. As these exceptions to the rule began to appear in the various states, many states passed statutes to preserve the requirement in *Seymayne's Case* before it eroded away. *See* Sonnenreich and Ebner, *supra* note 5 at 654-59 for a listing of the states which adopted the *Seymayne's* rule by statute and those which adopted it through the common law.

The *Johnson* court recognized somewhat reluctantly the import of the *Seymayne's* rule, but noted that several jurisdictions have formulated various judicial exceptions to this rule when certain "exigent circumstances" are present. The opinion sets out these circumstances as follows: "where the facts make it evident that the officer's purpose is known, or where announcement might frustrate the arrest, increase the peril of the arresting officer or permit the destuction of evidence." 213 Va. at 104, 189 S.E.2d at 680.

[10] 213 Va. at 106, 189 S.E.2d at 681. *See also Seymayne's Case, supra* note 9; Note, *Announcement in Police Entries, supra* note 3, at 140-42, for some of the traditional reasons given for the rule of notice before entry, including the high regard for privacy in one's home, the avoidance of the needless violence that may occur if the surprised dweller resorts to self-help measures to ward off his invaders, and the prevention of actual physical damage to the dwelling caused by the breaking.

ment of new statutes allowing no knock entries[11] and in recent case decisions[12] recognizing a limited no knock entry. In light of the practicalities involved in a narcotics search, such as the disposable nature of the narcotic substances and the development of indoor plumbing, some relaxation of the common law rule of announcement has become inevitable.[13] As a result, it appears that the general rule has acquired a generally recognized exception in cases where strict compliance would facilitate the destruction of evidence and thus frustrate a police officer's purpose.[14]

However, the various cases and statutes that have recognized the destruction of evidence exception along with certain other exceptions have not concurred as to who is qualified to make the determination that the requisite exigencies are present.[15] More important, with respect to *Johnson*, views have also differed on the required degree of certainty that the person making the determination should have concerning the actual existence of the exigent circumstances.[16] It appears that the more strictness and particularity that is present in the determination of the exigencies, the greater the likelihood of an entry being termed constitutionally reasonable. Likewise, if a search

[11] *See, e.g.*, Controlled Substances Act, 21 U.S.C. § 879 (1970); District of Columbia Court Reform and Criminal Procedure Act of 1970 (Pub. L. No. 91-358).

[12] *See, e.g.*, Ker v. California, 374 U.S. 23 (1963); State v. Mendoza, 104 Ariz. 395, 454 P.2d 140 (1969); People v. De Santiago, 71 Cal.2d 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969); People v. Rosale, 68 Cal.2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968); People v. Maddox, 46 Cal.2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956); People v. Lujan, 484 P.2d 1238 (Colo. 1971); State v. Clarke, 242 So.2d 791 (Fla. 1971); Benefield v. State, 160 So.2d 706 (Fla. 1964); Scull v. State, 122 Ga. App. 696, 178 S.E.2d 720 (1970); Henson v. State, 236 Md. 518, 204 A.2d 516 (1964); State v. Linder, 291 Minn. 217, 190 N.W.2d 91 (1971).

[13] *See* Kaplan, *Search and Seizure, A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 502 (1961). The author of this article questions whether the rule of announcement has any place in modern law despite its historical presence. However, if one does consider the announcement rule as a fundamental guarantee, the author submits that the allowance of exceptions would have the effect of practically swallowing up the rule.

[14] 5 AM. JUR. 2d *Arrests* § 93 (1962).

[15] The Controlled Substances Act, 21 U.S.C. § 879 (1970), requires a magistrate to issue a warrant for all no knock entries. This requirement is reflective of the strong desire in this country to have an impartial judicial officer make the probable cause determination in searches and seizures whenever possible. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967). However, the great majority of states that have allowed no knock entries have also allowed the officer conducting the search to determine if the requisite circumstances are present, whether it be a search with or without a warrant.

[16] *See* Ker v. California, 374 U.S. 23 (1963), fully discussed note 18 *infra*, where those members of the Court who felt the federal constitutional standards of reasonableness were to be followed in state searches, split (4-4) on the degree of objectivity required by the officer who determines the presence of the exigent circumstances.

does not exhibit a high degree of specificity and particularity in a determination of exigent circumstances, a no knock entry may risk being termed unreasonable in a judicial inquiry.[17] Ironically, the jurisdiction that led the no knock movement with a widely cited case, which actually did not show that the officers had any particular knowledge that the defendants would destroy the evidence,[18] has recently held that not only must an officer have

[17] If a high degree of particularity is not required in the officer's determination, it will be based on the officer's beliefs, which in turn may be founded to a great degree on his general experience in police work and not the facts in his particular case. This generalized approach amounts to no more than a blanket rule facilitating noncompliance with the notice rule whenever an officer, while acting in good faith on a general assumption, believes that exigent circumstances exist. This blanket approach to no knock entry was upheld in Justice Clark's opinion (writing for only four members of the Court concerning this matter) in Ker v. California, 374 U.S. 23, 34-43 (1963). However, unannounced entry on a blanket basis has been expressly rejected in some jurisdictions. In People v. Gastelo, 67 Cal.2d 586, 432 P.2d 706, 708, 63 Cal. Rptr. 10 (1967) the court stated:

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is itself a serious disturbance of that security and cannot be justified on a blanket basis.

Even if a jurisdiction requires a specific showing of particular facts from which the exigent circumstances must arise, the question still remains of how specific the showing must be before it can be termed reasonable. In People v. Santiago, 71 Cal.2d 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969), the court stated that if an officer based his unannounced entry on the fact that the suspect had resorted to trickery to avoid arrest in an earlier encounter, that this fact alone was not specific enough to warrant the unannounced entry. In *Gastelo*, the officer's mere reasonable belief that disposable narcotics were involved was held not to excuse compliance with the notice rule. There must be an accompanying reasonable belief that the suspect, based on the particular facts involved, will actually dispose of the narcotics. Therefore, a general propensity on the part of persons to destroy narcotics when the presence of police is anticipated is no more than a general assumption, and it does not of itself justify a no knock entry.

[18] Ker v. California, 374 U.S. 23 (1963). Since *Ker*, practically every case in the United States that has approved of no knock entries based on exigent circumstances has cited it as supporting authority, and the *Johnson* decision is no exception. In *Ker*, the Supreme Court was called on to decide if a state search carried out under state laws must also pass federal constitutional standards of reasonableness. On this point the court ruled (8-1) that the standards of the fourth amendment as applied through the fourteenth amendment must not be violated in state searches. Justice Harlan however, felt that state searches should not be judged by the same constitutional standards that apply to the federal system, but should be judged by "concepts of fundamental fairness."

The remaining issue that had to be decided by the *Ker* Court was whether the actual no knock entry in question was unreasonable under fourth amendment standards. Of the eight justices that felt the fourth amendment was the proper standard, four members, represented by Justice Clark, were content to hold the method of entry reasonable despite the lack of factual particularity possessed by the entering officers. The other

sufficient probable cause to even enter one's home, but he also "must have some particular reason to enter in the manner chosen." [19] In contrast, certain other jurisdictions hold that if an officer merely has sufficient reason to warrant a search for disposable drugs, then his conclusion that exigent circumstances are present is valid, even though he has no further factual basis.[20] Therefore, merely an officer's general experience in drug matters, not his experience in each factual situation, is required for the no knock entry.

It is difficult to determine from *Johnson* exactly what degree of specific knowledge a Virginia officer must have of the actual circumstances before he can validly determine that the requisite exigent circumstances are present. Apparently, the *Johnson* court is content to allow each individual officer to make this determination based on his own experience in other narcotics cases and his general knowledge of the defendant's dwelling.[21] It is submitted, therefore, that the Virginia Supreme Court has followed those juris-

four justices, represented by Justice Brennan, felt that the federal requirement of reasonableness in the fourth amendment was violated in this case because the particular facts were not sufficient to show the requisite circumstances for an unannounced entry. They felt that in questions of reasonableness under the fourth amendment, the police have always been required to establish that their action was based on an objective inquiry into the facts, whether it be done by themselves or by a magistrate. Therefore, Justice Brennan saw no reason why the police should be allowed to resort to a subjective determination in cases involving possible no knock entries.

The deciding vote in Ker was cast by Justice Harlan who felt the method of entry was reasonable. However, his standard of reasonableness was completely different from the other eight justices who were proceeding under the fourth amendment standard. Therefore, while many cases upholding no knock entries have correctly looked to *Ker* as authority supporting the entry when exigent circumstances were present, they have been incorrect in their assumption that the Supreme Court has ruled that such entries have been authorized by a blanket rule. *See* People v. Gastelo, 67 Cal.2d 586, 432 P.2d 706 (1967).

[19] *Id.* at —, 67 Cal. 2d at —, 432 P.2d at 708.

[20] People v. Lujan, 484 P.2d 1238 (Colo. 1971); State v. Clarke, 242 S.2d 791 (Fla. 1971). In *Lujan* the court noted that in every case involving a narcotics search, the police have reasonable cause to believe that the giving of notice would result in a destruction of the evidence. The *Clarke* court presented a similar view, but it felt that there must be evidence of narcotics in small quantities before it would be reasonable for the police to assume it would be destroyed upon their announcement.

[21] Johnson v. Commonwealth, 213 Va. 102, 189 S.E.2d 678 (1972). The *Johnson* court states that there was "abundant" evidence to establish the existence of the exigent circumstances. However, the only evidence it noted was the officers' experience and their knowledge that the drugs were dispensed in a kitchen three to four feet from a bathroom where the evidence "could" be destroyed. The fact that the kitchen was located next to the bathroom does not appear to be relevant without some particular evidence that the defendants were inclined to use the bathroom to dispose of the narcotics.

dictions[22] which hold that the presence of probable cause that disposable narcotics are present in a dwelling equipped with a means of disposing of the narcotics is an exigency sufficient to warrant an unannounced search. Moreover, the court seems obviously concerned with the burgeoning drug traffic problem in Virginia, such that it has decided that the type of no knock entry set forth in *Johnson* is necessary if law enforcement officials are to be effective in dealing with the illegal drug problem. In achieving this beneficial end, the court has shown itself willing to abrogate some of the safeguards previously enjoyed by private citizens against unannounced invasion of their homes.[23] Unfortunately, by this approval of the generalized approach to no knock, the citizenry may have lost an excessive degree of this right to be secure in their homes. It is submitted that a proper balance could be struck by the passage of rational no knock legislation requiring a certain degree of particularity in the probable cause determination for an unannounced entry.[24]

R.C.B.

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[22] *See* note 20 *supra.*

[23] The *Johnson* court did not expressly discuss the balancing of individual rights against stronger law enforcement, but it was content to limit its discussion in this area to the general question of reasonableness.

[24] *See generally* Sonnenreich and Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem, supra* note 5, at 648-53, for a discussion of some new approaches to no knock.