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Constitutional Law - Search and Seizure - Court Authorized, Unannounced, Breaking and Entering to Install Electronic Surveillance Device Found to Be Constitutional

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The effect of the decision in *Hampton* may be to hasten legislatures[60] into adopting entrapment statutes.[61] The advantage of an entrapment statute is that it "can organize and define the subject of all entrapment without regard to the specific factual circumstances that often restrict the generality of a judicial opinion."[62]

The controversy concerning entrapment which began with the Court's opinion in *Sorrells* is still prevelant today. Although it is generally agreed that "criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer,"[63] there is still dispute as to when stealth and strategy become the "manufacturing of crime."[64]

BRUCE QUICK

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—COURT AUTHORIZED, UNANNOUNCED, BREAKING AND ENTERING TO INSTALL ELECTRONIC SURVEILLANCE DEVICE FOUND TO BE CONSTITUTIONAL.

Pursuant to court authorization,[1] federal officers made an unannounced forcible intrusion into Salvatore Agrusa's place of business,[2] while it was vacant and closed to the public. The federal officers entered for the purpose of installing an electronic surveillance device. Upon termination of the court authorized surveillance,[3] the officers again forcibly entered the vacant premises, this time to remove the device. The evidence secured in this fashion was subsequently admitted at trial and aided in Agrusa's conviction for violation of the federal firearms statute.[4] On appeal, Agrusa contended

60. The Court noted in *United States v. Russell*, 411 U.S. 423 (1973) that "since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." *Id.* at 433.

61. Despite support from the commentators, only a few states have adopted the minority approach. *See* Park, *supra* note 17, at 167n.3.

62. WORKING PAPERS, *supra* note 6, at 304.

63. Sherman v. United States, 356 U.S. 369, 372 (1958).

64. *Id.*

1. The government's application for authorization to conduct electronic surveillance was submitted to the Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri on February 28, 1974.

2. Agrusa operated an auto body shop in Independence, Missouri.

3. The authorization was issued by Judge Hunter the same day as applied for, February 28, 1974. The authorization was issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1971).

4. 18 U.S.C. § 922(a)(1) (1971), dealing in firearms without a license, however, is not one of the offenses for which the court may authorize electronic interception of oral communications under 18 U.S.C. § 2516 (1971). The application for authorization to conduct electronic surveillance was made stating that probable cause existed that Agrusa was, in fact, in violation of 18 U.S.C. §§ 659, 2315, and 371 (1971) for which 18 U.S.C. § 2516 (1971) authorized the admission of evidence obtained through court authorized electronic surveillance. The government obtained a supplemental order, required under 18 U.S.C. § 2517 (1971), which authorized the use of the intercepted communications before the grand

that the trial court erred in not granting his motion for suppression of the evidence acquired as a result of this unannounced breaking and entering.[5] In addressing a question of first instance, the United States Court of Appeals for the Eighth Circuit[6] *held* the breaking and entering, authorized by the United States District Court, to be reasonable under the fourth amendment to the United States Constitution[7] and lawful under the applicable statute.[8] *United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976).

The court in *Agrusa* examined the breaking and entering of Agrusa's place of business to determine whether it was within the scope of the United States Constitution, and whether it was in compliance with federal statutory law. The court examined the constitutional aspect first.

The fourth amendment to the Constitution imposes a standard of reasonableness for lawful searches and seizures.[9] That reasonableness requirement has been held to include the requirements of announcement and prior identification before forcible entry onto a premises can be made for the purpose of conducting a search and seizure.[10]

Recognized exceptions to the strict fourth amendment rule against unannounced police intrusion into private homes include:

> (1) where the persons within already know of the officer's authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.[11]

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jury and at the trial in this case. The appellant did not raise any question of impropriety concerning the supplemental order in his appeal. United States v. Agrusa, 541 F.2d 690, 693 (8th Cir. 1976).

5. In his appeal, Agrusa alleged six points of reversible error at the trial court level. The court, on appeal, found little reason to deal at any length with any of those contentions except the legality and constitutionality of the breaking and entering. United States v. Agrusa, 541 F.2d 690, 693 (8th Cir. 1976).

6. Senior Circuit Judge Van Oosterhaut wrote for a three judge panel consisting of himself, and Circuit Judges Lay and Webster. *Id.* at 692.

7. U.S. CONST. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

8. 18 U.S.C. § 3109 (1971), provides:

> The officer may break open any outer door or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

9. Terry v. Ohio, 392 U.S. 1, 9 (1968); Gurleski v. United States, 405 F.2d 253, 257 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969).

10. Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968).

11. Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting).

These recognized exceptions, however, are not considered to be exhaustive of all possible future exceptions to an unannounced forcible entry into a dwelling.[12]

The fourth amendment's announcement requirement has been held to apply only to occupied dwellings; and non-dwellings and vacant premises have been held to be somewhat less protected under that amendment's privacy guarantees.[13]

The leading case, to date, defining what constitutes a set of circumstances which warrants exception to the prior identificaion requirement is *Ker v. California*.[14] Writing for the Supreme Court, Justice Clark found the exigencies of potential evidence destruction and possible knowledge of impending arrest compelling enough to warrant a constitutional no-knock forcible entry of the Ker dwelling place.[15]

Although there was no majority opinion in *Ker*, a majority of justices did find the forcible entry of the Ker residence, without announcement, to have been reasonable, and within the boundaries of the fourth amendment.[16]

In a strong dissent, Justice Brennan appealed to the sanctity of a "man's castle" in pointing out that, barring qualification under the three accepted exceptions to the announcement requirement,[17] the forcible entry of the Ker dwelling constituted unreasonable search and seizure under the fourth amendment.[18]

The breaking and entering in *Agrusa* occurred in a vacant business place, rather than an inhabited dwelling.[19] The forcible entry was made pursuant to court authorization, based on probable cause, and in all other ways met the criteria prescribed by the federal wire tap statutes.[20]

The exigencies found to be so uniquely present in *Ker*[21] were also present in *Agrusa*.[22] A prior announcement to Agrusa concerning the intentions of the federal officers could only be self-defeating. The evidence sought by the officers was the incriminating communica-

12. *See* United States v. Bustamante-Gamez, 488 F.2d 4, 10 (9th Cir. 1973).
13. See v. Seattle, 387 U.S. 541, 545-46 (1967); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963).
14. 374 U.S. 23 (1963).
15. *Id.* at 40. Although entry was made by the use of a pass key, it was considered to be equivalent to a breaking for constitutional purposes. *Id.* at 38.
16. Justice Clark wrote for the Court, joined by Justices Black, Stewart, and White. Justice Harlan concurred in the result.
17. *See* text accompanying note 11 *supra*.
18. Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting).
19. United States v. Agrusa, 541 F.2d 680, 693 (8th Cir. 1976). The *Ker* breaking and entering was of an inhabited dwelling place and was not pursuant to a warrant. Ker v. California, 374 U.S. 23, 24-25 (1963).
20. 18 U.S.C. § 2518 (1971) prescribes the procedure for interception of wire or oral communications.
21. 374 U.S. 23, 40 (1963).
22. 541 F.2d 690, 697 (8th Cir. 1976).

tions Agrusa might have with possible accomplices; to require prior announcement would be to invite destruction of that evidence.[23] Relying on *Katz v. United States*,[24] the court in *Agrusa* recognized that no announcement of purpose was necessary for an otherwise authorized electronic surveillance.[25] Although *Katz* involved no breaking or entering to install such a device, the difference between *Katz* and *Agrusa* was felt to be, for constitutional purposes, one of degree rather than kind.[26]

The court, in *Agrusa*, concluded that the authorized breaking and entering of a vacant business premises pursuant to a court order, for the purpose of installing an electronic surveillance device did not run afoul of the fourth amendment shield against unreasonable searches and seizures.[27] The exigencies of the situation, the type of building entered, and the strict compliance with statutory procedure were enough to qualify the act under an exception to the prior announcement requirement of the fourth amendment.[28]

The court next directed its attention to whether forcible entry of the premises in question was lawful under existing federal statutes.

The American common law seemed to require no announcement prior to breaking into a non-dwelling for reasons of search.[29] Historically, less protection against the invasion of privacy has been afforded vacant buildings,[30] and especially vacant business premises.[31] Over three hundred seventy years ago, the first shadow of what was to become the federal prior announcement statute[32] made its appearance.

> In all cases when the King is [a] 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 [King'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 [the] doors.[33]

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23. As the court stated in Lopez v. United States, 373 U.S. 427, 463 (1963): "The usefulness of electronic surveillance depends on lack of notice to the suspect."

24. 389 U.S. 347, 355n.16 (1967).

25. 541 F.2d 690, 698 (8th Cir. 1976).

26. *Id.*

27. *Id.* at 697-98.

28. *Id.* As the Court recognized in Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931): "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Id.* at 357.

29. *See, e.g.*, United States v. Johns, 466 F.2d 1364, 1365 (5th Cir. 1972); Fields v. United States, 355 F.2d 543 (5th Cir. 1966).

30. Payne v. United States, 508 F.2d 1391, 1394 (5th Cir. 1975), *cert. denied*, 423 U.S. 933 (1975); United States v. Gervato, 474 F.2d 40 (3d Cir. 1973), *vacating*, 340 F. Supp. 454 (E.D. Pa. 1972), *cert. denied*, 414 U.S. 864 (1973).

31. *See* United States v. Hassell, 336 F.2d 684, 686 (6th Cir. 1964), *cert. denied*, 380 U.S. 965 (1965).

32. 18 U.S.C. § 3109 (1971).

33. Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1603).

That the federal prior announcement statute represents the modern codification of the common law development of rules pertaining to search and seizure seems fairly well settled.[34] As such, that statute is not to be read strictly and applied "woodenly,"[35] for any exception recognized under the common law pertaining to search and seizure must be recognized under the statute which codifies it.[36]

The Supreme Court, while recognizing the common law underpinnings of the federal prior announcement statute, has been slow in recognizing the exigent circumstances which may justify noncompliance with the statute.[37]

In *Sabbath v. United States*[38] the Court approached the conclusion that exigent circumstances may justify noncompliance, but only in dictum.[39]

In *Salvador v. United States*[40] the Eighth Circuit took notice of the effect that exigent circumstances have on compliance with the federal prior announcement statute.[41]

The circumstances presented in *Agrusa* could possibly have justified noncompliance with the letter of the federal prior announcement statute,[42] since the exigencies were compelling. To notify Agrusa of the agents' intentions prior to their surrepticious entry of his place of business would serve to render that entry and subsequent electronic surveillance a "useless gesture."[43] The court, therefore, felt the exigencies present at the time of the breaking and entering warranted an exception to the prior announcement requirement of the federal prior announcement statute.[44]

The court's interpretations of the fourth amendment and the federal statute requiring prior announcement resulted in a very narrow holding in *Agrusa*. The court in *Agrusa* held that

> law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement, break and enter business premises which are vacant at

34. United States v. Gervato, 340 F. Supp. 454 (E.D. Pa. 1972). *See generally* Sonnenreich & Ebner, *No Knock and Nonsense*, 44 ST. JOHN'S L. REV. 626 (1970).
35. United States v. Agrusa, 541 F.2d 690, 699 (8th Cir. 1976).
36. Sabbath v. United States, 391 U.S. 585 (1968).
37. *See* Ker v. California, 374 U.S. 23, 40 (1963); Wong Sun v. United States, 371 U.S. 471, 483-84 (1963); Miller v. United States, 357 U.S. 301, 309 (1958).
38. 391 U.S. 585 (1968).
39. *Id.* at 591n.8. Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, *see* Ker v. California, 347 U.S. 23, 47 (1963) (Brennan, J., dissenting), and there is little reason why those limited exceptions might not also apply to 18 U.S.C. § 3109 (1971), since they existed at common law, and the statute is a codification of common law.
40. 505 F.2d 1348, 1352 (8th Cir. 1974).
41. 18 U.S.C. § 3109 (1971).
42. 18 U.S.C. § 3109 (1971) may not, in fact, apply to vacant business premises, but neither party raised the question of its applicability so the court assumed without deciding that it was controlling in this situation. United States v. Agrusa, 541 F.2d 690, 699 (8th Cir. 1976).
43. Miller v. United States, 357 U.S. 301, 310 (1958).
44. United States v. Agrusa, 541 F.2d 690, 701 (8th Cir. 1976).

> the time of entry, in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause, and otherwise in compliance with Title III. . . .[45]

Article 1, section 18 of the North Dakota Constitution[46] is for all practical purposes identical to the fourth amendment to the United States Constitution.[47] In addition, section 18 and the statutes of the State of North Dakota are subject to the reasonableness standard of the fourth amendment as applied to the states through the fourteenth amendment.[48]

The North Dakota Century Code includes two sections authorizing the issuance and carrying out of search warrants.[49] Section 29-29-08 is a general statute dealing with the issuance of all search warrants,[50] whereas section 19-03.1-32 was enacted in 1971 as a part of the Uniform Controlled Substance Act.[51] The applicable statutes of the North Dakota Century Code go one step further than the federal prior announcement statute[52] or the California statute[53] cited in *Ker v. California*.[54] The North Dakota statutes include express exceptions that are included in the federal and California statutes only through reference to the common law. The North Dakota statutes[55] refer to the seizure of tangible evidence only, and it remains to be seen whether that description will be interpreted to include intercepted oral communications.

The federal wire tap statute authorizes the states to enact legislation allowing electronic surveillance and allowing the proper authorities to apply for and carry out that surveillance.[56] North Dakota has

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45. *Id.* Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1971), court-approved electronic eavesdropping by federal or state law enforcement officers is permissible for specified offenses.
46. N.D. CONST. art. I, § 18 states:
> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.
47. U.S. CONST. amend. IV, *quoted in* note 7 *supra*.
48. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
49. N.D. CENT. CODE § 29-29-08 (1974); *id.* § 19-03.1-32 (1971).
50. *See* State v. Loucks, 209 N.W.2d 772, 776 (N.D. 1973).
51. *Id.*
52. 18 U.S.C. § 3109 (1971).
53. CAL. PENAL CODE § 844 (West 1970).
54. 377 U.S. 23, 37 (1963).
55. N.D. CENT. CODE § 29-29-08 (1974); *id.* § 19-03.1-32 (1971).
56. 18 U.S.C. § 2516(2) (1970), provides:
> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made.

no statute authorizing electronic surveillance and interception of oral communications.[57]

The North Dakota Supreme Court has recognized the variance in the amount of constitutional protection against invasion of privacy afforded differing classes of buildings.[58] The reasonableness of any search is measured by the nature of the building searched, balanced against the methods used in the search.[59] It appears that an inhabited dwelling place is afforded the greatest degree of protection and that such protection diminishes for a vacant outbuilding, depending on its status as part of the curtilage.[60]

Thus, it would not seem to be an unwarranted interpretation of the holding in *Agrusa*, given the constitution and statutes of North Dakota, to speculate that it would be lawful in North Dakota, pursuant to court authorization, to carry out an unannounced breaking and entering of an uninhabited building, not within the curtilage, for the purpose of securing evidence, which would almost certainly be destroyed prior to seizure were the owner of that building notified of the impending search.

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57. North Dakota has, in fact, two statutes providing for penalties for unlawfully intercepting communications and for doing business in the same. N.D. CENT. CODE §§ 12.1-15-02 to 03 (1976).
58. State v. Manning, 134 N.W.2d 91 (N.D. 1965).
59. *Id.* at 96.
60. *Id.*