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Unreasonable Searches and Seizures - Execution of Warrants - Limitations on Officers Executing a Warrant

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which is more flexible and which can with ease resolve the problem. However, with the continuing and growing necessity for a more equitable solution to the problem in the absence of legislative action, the court, may eliminate the presumption of immunity which it has established thus following the Minnesota example.

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UNREASONABLE SEARCHES AND SEIZURES—EXECUTION OF WARRANTS—LIMITATIONS ON OFFICERS EXECUTING A WARRANT—The defendant was suspected of bookmaking. Two county detectives in plain clothes, armed with two search warrants and one arrest warrant, approached his home, knocked once on the door, waited about a minute and, after receiving no response from within, began to apply a crowbar to the door The defendant opened the door before they proceeded any further, and they were allowed a peaceable entry Subsequently the detectives identified themselves and read the warrants. Upon searching the premises they found and confiscated several blank sheets of paper and two newspapers containing horseracing forms. During this time they answered phone calls for the defendant in which the callers wished to place bets on horses. The Supreme Court of Pennsylvania, with two judges dissenting,[1] affirmed a conviction for setting up a gambling establishment and for bookmaking, while denying the defendant's contention that the evidence obtained in the search was inadmissible due to the detectives' failure to announce their purpose and authority prior to forcible entry The court said that the defendant opened the door voluntarily and entry was therefore gained peaceably Thus the ensuing search was lawful and the evidence obtained therefrom was admissible. *Commonwealth v Ametrane*, 422 Pa. 83, 221 A.2d 296 (1966)

The present case raises a question as to the extent that law enforcement officers may go and yet remain within established boundaries of lawful searches and seizures carried out under a warrant. With regard to the instant case it has been held that the execution of a warrant is lawful if entry is peaceful and there is no breaking of parts of the house.[2] The defendant here did allow the officers to enter peacefully, although the results of the ensuing

1. Eagen and Musmanno, J. Musmanno dissented strongly, stating that never before has he felt it more necessary to write a dissenting opinion. He said that entry under such condition was illegal, "as if without encountering resistance the officers had reduced the door to splinters." He went on to say that the evidence should have been suppressed not only because of illegal entry, but because the search warrants were not issued upon probable cause.

2. United States v. Bowman, 137 F.Supp. 385 (D.D.C, 1956).

search conceivably would have been different had he delayed a bit longer and the officers had proceeded to break down his door

Many jurisdictions,[3] including North Dakota,[4] have statutes which provide that an officer may break a door or window to gain entry to the premises in pursuance of executing a valid warrant only after first announcing his authority and purpose, and thereafter being denied admittance. Silence or lack of response has been held to constitute a denial.[5] A discrepancy had previously existed between those jurisdictions with such statute and those which had no provisions for announcement prior to forcible entry.[6] Before the Supreme Court's historic pronouncement in *Mapp v Ohio*[7] in 1961. This discrepancy centered around the admissibility of evidence produced by an unlawful search. Even courts in jurisdiction swith announcement statutes had at times held that such evidence was admissible,[8] and North Dakota was among these.[9]

Subsequent to the *Mapp* decision however, the courts are presumed to apply federal standards for admissible evidence in state cases when a question of the legality of seized evidence arises.[10] Thus, states such as Maryland,[11] which previously had no statute specifically covering announcement of authority and purpose, now have a standard which they should apply The federal statute[12] requires announcement prior to forcible entry in the execution of a valid warrant. Federal courts have held that failure to do so will taint the search and the evidence which is the product of that search.[13]

There are three major exceptions to the rule of announcement.[14] The first is that notice is not necessary when persons inside already know of the officer's authority and purpose.[15] The second is when officers reasonably believe that persons inside are in peril.[16] The third exists when officers have reason to believe that announcement

3. *E.g.*, CAL. PEN. CODE §§ 844, 1531 (1956) MONT. REV. CODES ANN. §§ 94-6011, 94-301-9 (1947) N.Y. CODE CRIM. PROC. § 175 (1958), § 799 (1966) S.D. CODE §§ 34.1606 (1939).

4. N.D. CENT. CODE §§ 29-06-14, 29-29-08 (1960).

5. See generally, United States v. Viale, 312 F.2d. 595 (2nd. Cir. 1963) Sykes v. United States, 312 F.2d. 232 (8th Cir. 1963), United States v. Whiting, 311 F.2d. 191 (4th Cir. 1962).

6. See Blakey, *The Rule of Announcement and Unlawful Entry Miller v. United States and Ker v. California*, 112 U. of PENN. L. REV., 560-61 (1964)

7. 367 U.S. 643 (1961).

8. *E.g.*, People v. Maddox, 46 Cal.2d 301, 294 P.2d. 6 (1965) Strader v. Commonwealth, 302 Ky. 330, 194 S.W.2d 368 (1946) Condra v. Anderson, 254 S.W.2d 528 (Tex. Civ. App. 1953).

9. State v. Fahn, 53 N.D. 203, 205 N.W 67 (1925).

10. *Supra*, note 7.

11. Frankel v. State, 178 Md. 553, 16 A.2d. 93 (1940).

12. 18 U.S.C. § 3109 (1958).

13. Miller v. United States, 357 U.S. 301, 313-14 (1958) United States *ex. rel.* Manduchi v. Tracy 350 F.2d. 658, 662 (3rd Cir. 1965), Woods v. United States, 240 F.2d. 37 (D.C. Cir. 1956).

14. Ker v. California, 374 U.S. 23, 47 (1963).

15. Miller v. United States, *supra* note 13 People v. Maddox, *supra* note 8 People v. Martin, 45 Cal.2d. 755, 290 P.2d. 855 (1965).

16. *Supra* note 14.

would enable susptects to destroy or dispose of sought-after evidence.[17] Evidence produced by the search will usually be admissible in the courts if one of these exceptions has presented itself.[18]

Courts have purposely avoided attempts to define the constituent elements of an unreasonable search by stating that each case will be decided with regard to the facts and circumstances particular to it.[19] The North Dakota policy seems to be this.[20] Decisions have provided some guidelines, however, as to which objects seized will or will not be admissible as evidence. "Mere evidence" is not substantial in itself.[21] It must appear that the article seized played a significant role in the alleged crime,[22] although what would be called "mere evidence" has been termed by at least one court as "instrumentality" and thus the lawful object of a search.[23]

It has also been held that evidence will be inadmissible if a warrant has not been issued upon "probable cause."[24] North Dakota has a statute requiring probable cause as a prerequisite to the issuance of a valid warrant.[25] This has been further clarified by the court by stating that even though officers have a valid warrant for arrest, it may not be used as a mere pretext to search for evidence.[26]

The boundaries within which officers executing a warrant in North Dakota are confined to has been fairly integrated into the above discussion. Evidence which prior to the *Mapp* decision would have been admissible in North Dakota courts, but inadmissible ac-

17. United States v. Fair, 176 F.Supp. 571, 574 (D.D.C. 1959) People v. Hammond, 9 Cal. Rptr. 238, 357 P.2d 289, 294 (1960), People v. Russell, 223 Cal. App.2d 733, 36 Cal. Rptr. 27 (1964).

18. *Supra* notes 15, 16, 17. It is worthy to note here that New York amended their announcement statute for the execution of search warrants in 1964 to provide that entry may be made forcefully "without notice of his authority and purpose if the judge, justice, or magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge, justice, or magistrate may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice were to be given." N.Y. CODE CRIM. PROC. § 799(b) (1966). Such a provision deserves legislative consideration in North Dakota, for it would ease somewhat the present restrictions on officers with regard to this area of the law.

19. Jones v. United States, 362 U.S. 257 (1960) Kelly v. United States, 197 F.2d 162 (5th Cir. 1952).

20. State v. Chaussee, 138 N.W.2d 788, 792 (N.D. 1965).

21. Gouled v. United States, 255 U.S. 298 (1921), despite criticism to the contrary (*infra*, note 23) the appellate jurisdictions follow this decision as excluding mere evidence. See, Gilbert v. United States, 366 F.2d 923, 932 (9th Cir. 1966), Golliher v. United States, 362 F.2d 594, 600 (8th Cir. 1966). In *Golliher* the court countered such criticism by stating that there is a very narrow and hazy line between that which is "mere evidence" and that which is an "instrumentality" and that continued stretching of the word "instrumentality" could reach the level of absurdity. It did however, recognize some of the criticism as valid.

22. United States v. Stern, 225 F.Supp. 187, 192 (S.D.N.Y. 1964).

23. People v. Thayer, 47 Cal. Rptr. 780, 408 P.2d 108 (1965). Justice Traynor here surveys the mere evidence rule and concludes that it is not a federal and constitutional standard and says further that even if it were it would not require the exclusion from evidence of medical records involved in this case because they were clearly instruments of the crime.

24. Goodman v. State, 178 Md. 1, 11 A.2d 635 (1940).

25. N.D. CENT. CODE § 29-29-03 (1960).

26. State v. Govan, 123 N.W.2d 110 (N.D. 1963).

cording to federal standards,[27] now must be the product of a lawful search. This was articulated recently in *State v Manning*.[28] Thus, North Dakota has at present reasonably defined the procedure for the lawful execution of a warrant and the admissibility of evidence obtained therefrom by means of statutes and court decisions. Strict guidelines have not been formally pronounced, since our courts are in accord with other jurisdictions, which hold that each case will be decided on its particular facts[29] subsequent to conformity with the essential statutory requirements.

ROBERT BRADY

BASTARDY—PRESUMPTION OF LEGITIMACY—SUFFICIENCY—EXCLUSIONARY BLOOD TESTS—Petitioner was seeking support for her three children. Defendant denied responsibility for support of the youngest child on the grounds that he was not the father, and requested a blood grouping test pursuant to section 418 of The Family Court Act. Petitioner, respondent and the child were tested. The results indicated that the respondent should be excluded as the father of the child. Petitioner's attorney conceded that the doctor who conducted the test was one of the foremost serologists and hematologists in the country and an expert in blood grouping tests. The court pointed out that in questions of paternity an exclusion is convincing proof that the respondant is not the father of the child born out of wedlock. But, when a child is born in wedlock the presumption of legitimacy is one of the strongest presumptions in law and requires more than a fair preponderance of evidence to overcome the presumption. The court must be entirely satisfied that the alleged father is not a parent of the child. *Held,* the presumption of legitimacy of a child born in wedlock had been overcome by the exclusionary results of the blood grouping test. *Crouse v Crouse,* 273 N.Y.S. 2d 595 (1966)

The presumption that a child born in wedlock is legitimate is a strong presumption founded in early common law [1] Early English law said that if the husband, not physically incapable, was within

27. Elkins v. United States, 364 U.S. 206 (1960) Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court excluded from consideration by federal courts of any and all evidence illegally seized by federal officers.

28. 134 N.W.2d 91 (N.D. 1965).

29. Gouled v. United States, *supra* note 21 McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950).

1. Bayne v. Willard, 261 N.Y.S.2d 793, 796 (1965) Feazel v. Feazel, 222 La. 113, 62 So.2d 119, 121 (1952) Holder v. Holder, 9 Utah 2d 163, 340 P.2d 761-62 (1959) *In re* Findlay, 170 N.E. 471-72 (Ct. App. 1930) Hargrave v. Hargrave, 9 Bev. 555, 50 Eng. Rep. 457, 458 (1864).