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You Can't Just Walk In A House!

Without a Warrant, Consent, or Exigent Circumstances it is a Constitutional Violation.



By Gene King, LEAF Coordinator

Every cop that has gone through a police academy received training in citizens' rights under the Fourth Amendment regarding search and seizure. Because of the Amendment's legal complexity, the analysis of officers' actions during a search and seizure is one of the most contentiously argued issues in a resulting criminal or civil case. This edition of the LEAF newsletter outlines the issues and intricacies of officers' actions involving the ability to enter places where a person has a reasonable expectation of privacy. The August, 2011 LEAF Newsletter, *Dispatch Told Me, So It Must Be True! An Officer's Responsibility When Dispatched to an Incident* discussed what an officer must consider when analyzing information they obtained after being dispatched to an incident. This Newsletter goes to the next step to discuss some of the pitfalls officers face when making decisions regarding entry and search.

Court Decisions Set The Stage!

The Fourth Amendment is very specific in its intent to ensure that government's police powers to intrude into citizens' "personal effects" are regulated. There is a great volume of case law in which the courts interpret the Fourth Amendment

to try and apply to substantially unpredictable real life situations. Dealing with those real life situations is where officers often get into trouble.

When deciding a case, the court generally goes into a detailed explanation of the reasoning behind its decision. The idea is that the explanation will give law enforcement guidance and provide the tools to apply the court's reasoning in the field. Other courts will often follow the same reasoning when hearing any factually similar Fourth Amendment that may arise in their jurisdiction. The rulings of the higher courts make the lower courts responsible for applying more consistent practices across the country when performing this level of intrusion into the personal lives of citizens.

There are those that claim that complying with the spirit of the Fourth Amendment is not rocket science. In fact it is very simple. An officer develops probable cause that evidence is in a specific location. An affidavit is presented and sworn to before a judge or magistrate and then the officer goes to the location and serves the search warrant and finds and seizes the evidence. Pretty simple!

Legal Advisor Thinks It Is Not That Simple.

Audrey Forbush, Plunkett Cooney, LEAF Legal Advisor, opines that most situations that officers face are not that cut and dried and that the Fourth Amendment does not specifically address the complications that arise as result of rapidly changing society. To provide guidance, Forbush said the courts have dealt with the complications by establishing exceptions to the warrant requirement. However, Forbush notes that the courts have remained absolute on the core of the Fourth Amendment which is, that barring exigent circumstances or consent, a search warrant is mandatory before searching a person's home. As an example, she points to the U.S. Supreme Court landmark case of *Katz v United States*, 389 US 347 (1967), in which the judges ruled that only "reasonable" searches are permitted under the Fourth Amendment, and, in the absence of one of the judicially recognized exceptions to the warrant requirement, searches conducted without a warrant are, per se, unreasonable. If the government enters an individual's home without having previously secured a warrant, the entry will be considered "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980).

What In The World Are Exigent Circumstances?

The police may not enter a private residence without a warrant unless both probable cause plus exigent circumstances exist. *Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S. Ct. 2458, 153 L.Ed.2d 599 (2002). The exigent circumstances, which will permit police to make a warrantless entry into and search of a home, generally fall into four categories: (1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) the need to prevent a suspect's escape; and (4) a risk of danger to the police or others. *United States v. Rohrig*, 98 F.3d 1506, 1515 (6th Cir. 1996).

LEAF has included the following definition in the Sample Procedure for Search and Seizure, found in the MML's LEAF Manual for Law Enforcement Risk Control (found under the Insurance tab at www.mml.org).

Exigent Circumstances are those that demand immediate action and generally justify entry into a dwelling or building without a warrant. They include the following:

1. The probability that entry would prevent the destruction of evidence.
2. A threat of injury to the officer or others exists.
3. Without entry, a felon would escape.
4. There is a crime in progress.
5. Emergency aid circumstances exist.
6. Officers are in hot pursuit of a felon.

Forbush pointedly remarked that under these circumstances – after establishing probable cause – officers may enter a home or other location without a warrant. However, they may only take steps to end the emergency that created the exigent circumstances and to stabilize the situation. If officers observe anything in plain view that officers have probable cause to believe is connected with criminal activity, they may seize it. The officers, however, may go no further without a search warrant.

Getting Consent Means Obtaining An Affirmative Response That Officers Can Interpret and Document As Meaning Yes!

Out of all the exceptions to the warrant requirement, obtaining consent seems to cause the most problems for officers. Forbush has found that officers often think that officer safety is a legitimate reason to enter an individual's home, without an invitation, if the person is not in custody.

Forbush said the courts have been very clear about an officer's ability to enter a home absent a warrant or exigent circumstances. Officers must have consent to enter a place where a person has a reasonable expectation of privacy. They also

must leave if the person revokes consent. She went on to say that in *United States v. Worley*, 193 F.3d 380, 386 (6th Cir.1999), the Sixth Circuit Court of Appeals ruled “Moreover, we note that not any type of consent will suffice, but instead, only consent that is “unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion.” Whether the consent was valid is a fact-specific inquiry that must be determined by the totality of the circumstances. In conducting such an inquiry, the court should examine the following factors: “the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of the detention; and the use of coercive or punishing conduct by the police.”




According to Forbush, this means that the courts have determined that officers may not intimidate a person into giving consent, they may not obtain consent by just stepping into an entryway, or by pointing into the home and then entering with the demand that “I want to talk to you.” Officers must also remember that if they are talking to an individual while that person is entering the residence, they may not enter the home. The person simply walking away into the home does not imply tacit consent for the officer to enter. The officer must seek permission before entering, which is as simple as asking “Mind if I come in?”

To illustrate her point, Forbush points to a recent unpublished opinion. The Sixth Circuit Court of Appeals in *US v Little*, 431 Fed. Appx. 417, 2011 WL 2518674 (CA 6, Tenn) said “While this circuit has not considered whether the totality of the circumstances can ever support a finding of implied consent in the absence of an explicit request for permission, the Eleventh Circuit has held that consent cannot be inferred by the simple act of disengaging from conversation with an officer and walking into the house. *Bashir v. Rockdale Cnty., Ga.*, 445 F.3d 1323, 1329 (11th Cir. 2006). As explained earlier, we agree with this approach.”

The court went on to say that the officer could enter the residence in compliance with the Fourth Amendment by obtaining a search warrant or requesting and obtaining consent from the defendant. He did neither, and, therefore, his entry violated the Fourth Amendment and the evidence acquired as a result of that unlawful entry – defendant’s cell phone and his subsequent written statements based upon possession of the cell phone – must be suppressed.

Forbush added that *Little* stands as a reaffirmation of the court’s position on the Fourth Amendment. She added that the case makes it even more important that officers ensure they have a positive response to a request to enter a home or other location where there is an expectation of privacy. Officers should know that they bear the burden of showing, by a preponderance of the evidence, that the totality of the circumstances supports a conclusion that consent was given voluntarily. *U.S. v Mendenhall*, 446 U.S. 544 (1980).

Forbush cites the following as situations where officers can get in trouble because they do **NOT** meet the courts’ requirements for consent or any of the exceptions to getting a warrant:

-  Assuming that because the person did not object when the officer followed them into the house or
-  Entering because the officer wants to continue investigating or
-  Entering to ensure that the person does not do something that might threaten officer safety.

Forbush further stresses that officers should always get a verbal confirmation of consent to enter and, if practical, get it in writing. Officers may not enter a home if they are planning to execute a protective sweep upon entry without consent to enter and search. If they do not have specific consent to search, the courts will often rule that consent to enter was not “knowing and intelligent”.

She also cautioned that when officers rely on a third person's consent as justification for entry or a search, they must be able to show that the officers had reason to believe that the person had both the authority to give consent and had actual authority to permit the search. This is very important when officers ask roommates, guests, or family members for consent to enter or search.

Furthermore, officers must remember that the individual has the right to revoke the consent to enter and they must stop searching and leave the location promptly. Similarly, the individual may limit the search to search specific places and items, and revoke that consent at any time.

Officer Safety Is Not a Reason to Enter, But . . .

Often officers will cite "officer safety" as the reason they entered a premise without consent or a warrant. Though officers think this is reasonable, the U.S. Supreme Court does not agree and neither does the Sixth Circuit. The Supreme Court first identified the "protective sweep" as an exception to the warrant requirement of the Fourth Amendment in *Maryland v. Buie*, 494 U.S. 325, 334 (1990). Specifically, the Court described two circumstances where the police, to ensure their own safety without unnecessarily intruding on the Fourth Amendment rights of a criminal defendant, could engage in a "quick and limited" "visual inspection of those places in which a person might be hiding" in a premises.

First, officers, "*as an incident to the arrest*" **and** "*as a precautionary matter and without probable cause or reasonable suspicion,*" may "look in closets and other spaces *immediately adjoining the place of arrest* from which an attack could be immediately launched." Second, the search may extend beyond the parameters of the **first type** of protective sweep if "*articulable facts which, taken together with the rational inferences from those facts,* would lead a reasonably prudent officer to believe that the area to be swept harbors an individual posing a danger" (Emphasis Added).

Forbush was very clear to say that the court is not giving officers a green light to enter a premise just because there could or might be the possibility of a threat. In *United States v. Archibald*, 589 F.3d 289 (6th Cir. 2009) *a protective search of the residence required a custodial situation* and "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing the area to be swept harbors an individual possessing a danger to those on the arrest scene."

The Court has ruled that the officers must be able to articulate the threat clearly and assure that their actions result from a reasoned and sensible judgment given the facts. She adds that the threat is only one part. Officers must also be able to explain their reasonable suspicion that another person is on the premises, and that this individual constitutes a threat. Examples of reasonable suspicion can arise from seeing movement in a window, hearing voices or sounds of movement, having another reliable person tell the officer that others are in the building, multiple cars in the driveway, or the person the officers have contact with shouting out a warning to another. *United States v. Colbert*, 76 F.3d 773 (6th Cir. 1996) and *United States v. Archibald*, 589 F.3d 289 (6th Cir. 2009).

Forbush also pointed to *U.S. v. Harness*, 453 F.3d 752 (2006, 6th Cir.). In this case, the court ruled that **once officers have arrested a defendant**, they may accompany the defendant into his house when he desires to obtain personal items before being taken away. The court emphasized that the officers' right to enter the home did not rely on defendant's consent, but instead the officers' inherent authority to guard an arrested defendant.

The Bottom Line

Officers must understand the scope of the rules that apply to search and seizure. They must recognize the parameters of each of the components. When faced with exigent circumstances, officers have significant discretion to enter an area to resolve the situation that

caused the emergency in the first place. The key is for the officers to ensure that the reason for the entry is truly an exigent circumstance.

Officers must understand that obtaining consent to enter is merely a function of asking. To avoid controversy about the actual consent, especially if the intent is to ask consent to search upon entry, officers should record the approval either through audio or by having the individual sign a document giving consent. If the person says no, then the officers cannot go in, and, if they believe there a situation that may affect officer safety, they should disengage and retreat to a place of safety and formulate another plan to engage the person.

To preserve the integrity of the purpose of entry and to ensure the admissibility of evidence,

Forbush reminds officers that they may only seize anything as evidence that is in plain view if they reasonably suspect criminal behavior. During entry if officers observe something that leads them to believe that criminal behavior exists, they may secure the location and seek a search warrant.

As Forbush says, the bottom-line is that without a warrant, consent, or exigent circumstances, officers may not enter places where a person has a reasonable expectation of privacy and that the courts will likely exclude any evidence that officers seize. When this happens, it is likely that the officers and the department will be a party in a Civil Rights litigation alleging violation of the Fourth Amendment.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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