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Search and Seizure - The New Mexico Announcement Cases

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SEARCH AND SEIZURE— THE NEW MEXICO ANNOUNCEMENT CASES

There are numerous American cases involving the power of the police to enter private residences forcibly to execute search warrants. The central issue in such cases is often that of resolving the obvious conflict between the legitimate needs of law enforcement agencies and the fourth amendment right of all householders to be free from unreasonable searches and seizures. The so-called announcement rules attempt to reconcile these opposing interests by prescribing certain procedures which the police must follow in the absence of exceptional circumstances: in general, the police must announce their presence and the object of their visit before they may forcibly enter a residence to serve and execute a search warrant. Until recently the courts of New Mexico had not created a body of precedent dealing with the announcement issue.[1] This note will discuss the development in New Mexico of the law in this area, with special emphasis on its practical consequences to drug searches.

STATE v. SANCHEZ: THE COURT OF APPEALS AND SUPREME COURT DECISIONS

The New Mexico Supreme Court and the New Mexico Court of Appeals engaged in their most thorough treatment of the law of forcible entry in *State v. Sanchez.*[2] The facts of *Sanchez* are not atypical among announcement cases. At approximately 10:15 a.m., four armed police officers approached the rear of Sanchez's apartment with a warrant to search for heroin. One officer knocked loudly,[3] and another called out "Police officers" to the people inside. No one came to the door, but the officers saw some movement inside the apartment and heard the yell of a female and other noises.

1. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1974), was the first New Mexico case to lay down standards for forcible entry.

2. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), *rev'd,* 88 N.M. 402, 540 P.2d 1291 (1975) [hereinafter the court of appeals decision will be cited as Sanchez I and the supreme court opinion as Sanchez II].

3. There was conflicting evidence on this point. The court of appeals noted that the trier of fact had found that the knock was loud and clearly audible to everyone inside the apartment. Sanchez I, 88 N.M. at 380, 540 P.2d at 860. However, one of the officers testified that the knock was "not even as loud as a polite knock." Sanchez II, 88 N.M. at 404, 540 P.2d at 1293 (dissenting opinion).

After waiting a few seconds, the officers entered the apartment through a locked door, having been advised by an informant that Sanchez would get rid of the heroin by flushing it down a toilet if the officers did not act swiftly.[4] The officers found a woman and two children in the kitchen; Sanchez was found in the bedroom sitting at the foot of the bed. The bathroom, which was off the kitchen area, was empty. While conducting their search, the officers discovered a quantity of heroin in the top drawer of the dresser in Sanchez's room.[5]

Sanchez was convicted in district court of unlawful possession of heroin.[6] His argument on appeal was that the trial court erred in denying his motion to suppress the evidence seized from his apartment because the manner in which the officers had entered violated the guarantees against unreasonable search and seizure contained in article II, section 10 of the New Mexico Constitution[7] and the fourth amendment of the United States Constitution.[8] The court of appeals reversed Sanchez's conviction and ordered a new trial on the ground that the officers' conduct had contravened the rule for police entries which had been set out the year before in *State v. Baca*.[9] Interpreting the "reasonableness" requirement of article II, section 10 of the New Mexico Constitution,[10] the *Baca* court had concluded that an officer with a search warrant[11] must "give notice of authority and purpose and be denied admittance" prior to forcible entry.[12] The court had also qualified its rule by stating that noncompliance with the general standard would be warranted when "exigent circumstances" exist:

4. Sanchez I, 88 N.M. at 380, 540 P.2d at 860.

5. *Id.*

6. *Id.*

7. "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches . . ."

8. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ."

In Wolf v. Colorado, 338 U.S. 25 (1949), the Supreme Court held that the fourth amendment also binds the states by incorporation into the due process clause of the fourteenth amendment. Under the ruling of Mapp v. Ohio, 367 U.S. 643 (1961), state courts, as well as federal courts, must protect fourth amendment rights by excluding from evidence the fruits of unconstitutional searches.

9. 87 N.M. 12, 528 P.2d 156 (Ct. App.), *cert. denied*, 87 N.M. 5, 528 P.2d 649 (1974). In *Baca* the court of appeals ruled that the defendant's constitutional right of freedom from unreasonable search and seizure was not violated when state and federal officers with a warrant knocked several times on the defendant's door, announced loudly that they were officers there for the purpose of serving a search warrant, waited between 30-45 seconds before entering, heard "some kind of commotion in the house," and finally kicked down the door. *Id.*, 87 N.M. at 13, 528 P.2d at 657.

10. *See* note 7 *supra*.

11. Dictum in *Baca* indicates that the *Baca* rule would also be applied to an officer making an arrest on probable cause. *State v. Baca*, 87 N.M. at 14, 528 P.2d at 658.

12. *Id.* at 13, 528 P.2d at 657.

> Examples, but not a catalogue, of exigent circumstances are: (1) when, prior to entry, officers in good faith believe that they or someone within are in peril of bodily harm; or (2) when prior to entry, officers in good faith believe that the person to be arrested is fleeing or attempting to destroy evidence. . . . The reasonableness of each search and seizure is to be decided upon its own facts and circumstances . . . . (Citations omitted.)[13]

Drawing on federal cases and the decisions of other states,[14] the court of appeals in *Sanchez* tried to expand and clarify some of the crucial phrases of the *Baca* rule, such as "forcible entry," "notice of authority and purpose," "denial of admittance," and "exigent circumstances." The court first determined that a "forcible entry" is merely an "unannounced intrusion" into a residence.[15] Forcible entry occurs when the police actually break open a window or door but may also occur when, as in the *Sanchez* situation, the police enter a dwelling through an open door without having first obtained permission to do so from the persons inside.[16]

The court also stated that the officers had violated the "notice of authority and purpose" provision of the *Baca* rule because, while they had knocked and identified themselves as policemen, they had failed to request permission to enter and to state their purpose for being there before they walked into the apartment.[17] Nor, in the court's view, were there any circumstances from which the officers could have inferred that the defendant had denied them admission. Such an inference is justified when the occupant is taking an unreasonable time to respond to the officer's knock or is engaged in activities clearly inconsistent with an intention to open the door. Since the time lapse in the present case was only a few seconds, the court refused to conclude that the officers had been denied admittance.[18]

Finally, the court decided that the state had not demonstrated the existence of any "exigent circumstances" which excused compliance with the general rule. The state had argued that the officers had formed a good faith belief before entering that the defendant was attempting to escape or destroy evidence. One officer had testified that in his experience an attempt is always made to get rid of narcotics before police can enter.[19] The court responded to this argument by saying that there was no *unusual* noise that would support a

13. *Id.* at 13-14, 528 P.2d at 657-658.
14. Sanchez I, 88 N.M. at 381-383, 540 P.2d at 861-863.
15. *Id.* at 381, 540 P.2d at 861.
16. *Id.*
17. *Id.*
18. *Id.* at 381-382, 540 P.2d at 861-862.
19. *Id.* at 382, 540 P.2d at 862.

reasonable belief that the defendant was about to destroy evidence or flee. It made much of the fact that the police found the defendant sitting serenely on the edge of his bed in his underwear and stated that the general knowledge that narcotics are easily disposable through plumbing systems will not create exigent circumstances unless coupled with evidence of an attempt to destroy the contraband in the particular case.[20]

On review, the New Mexico Supreme Court acknowledged *State v. Baca* to be the proper statement of the New Mexico announcement standard but reversed the court of appeals decision on a finding of exigent circumstances.[21] The court did not expressly accept the court of appeals' definitions of "forcible entry," "notice of authority and purpose," and "denial of admittance," but it apparently agreed that the conduct of the officers did not conform to the general announcement standard. The supreme court declared that exigent circumstances and good faith belief in the existence of exigent circumstances are questions of fact which depend on practical considerations. Moreover, the exigency of a given set of circumstances is to be evaluated from the viewpoint of a "prudent, cautious and trained police officer."[22] The court found that the following factors supported the officers' conclusion of exigent circumstances: (1) the officers involved were not shown to be anything other than prudent and cautious; (2) the officers had probable cause to believe that the defendant had heroin in his home (presumably based on the same facts and circumstances which enabled the finding of probable cause necessary for the issuance of the search warrant); (3) experienced officers, as these were, knew that there is ordinarily an attempt to destroy heroin before the police enter; (4) an informant had told the officers that the heroin would be flushed down the toilet if they did not move quickly; and (5) the woman's scream and the moving about of persons inside the apartment suggested that someone was being alerted to do something.[23]

THE ORIGINS OF THE ANNOUNCEMENT-BEFORE-ENTRY RULE

The *Baca* rule can trace its lineage back to a venerable common-law doctrine.[24] The classic statement of the rule appeared as dictum

20. *Id.* at 382-383, 540 P.2d at 862-863.
21. Sanchez II, 88 N.M. at 404, 540 P.2d at 1293.
22. *Id.* at 403, 540 P.2d at 1292.
23. *Id.* at 404, 540 P.2d at 1293.
24. For a history of announcement requirements, *see* Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California,* 112 U. Pa. L. Rev. 499, 500-508 (1964).

in *Semayne's Case*,[25] a case which actually involved the execution of a civil writ:

> In all cases where 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 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.[26]

The *Semayne* notice requirement has been widely applied by American courts in regard to both searches and arrests.[27] Furthermore, since the turn of the century, the federal government[28] and many states have embodied the common-law principles in statutes relating to the execution of search warrants.[29] The purpose of these statutes and judicially-developed rules of announcement has been variously stated: they protect the privacy of householders by requiring officers to make a request to enter;[30] they also safeguard the officers, who might otherwise be mistaken for prowlers and attacked by the occupants of the house.[31]

While most statutes prescribing announcement are absolute on their faces, state courts have recognized certain exceptions to the notice requirement.[32] In *Ker v. California*,[33] the United States Supreme Court considered the constitutional dimensions of announcement statutes and their judicial exceptions. This case involved a California statute which required an arresting officer before entering a house to demand admittance and explain the purpose for which admittance was desired.[34] A series of California cases had authorized noncompliance with the rule when exigent circumstances, such as the

25. 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603).

26. *Id.* at 91b, 77 Eng. Rep. at 195.

27. *See, e.g.*, State v. Dudgeon, 13 Ariz. App. 464, 477 P.2d 750 (1970); State v. Williams, 49 Utah 320, 163 P. 1104 (1917). For a brief treatment of the American case law, *see* Blakey, *supra* note 24, at 504-509.

28. The federal act, 18 U.S.C. §3109 (1970), popularly known as the Search Warrant Act, provides that:

> The officer may break open any outer 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.

29. For an analysis of the state knock-and-announce statutes, *see* Blakey, *supra* note 24; Sonnenreich & Ebner, *No-Knock and Non-Sense, An Alleged Constitutional Problem*, 44 St. John's L. Rev. 626 (1970).

30. Miller v. United States, 357 U.S. 301, 308 (1958).

31. *Id.* at 313.

32. *See* Note, *No-Knock and the Constitution: The District of Columbia Reform and Criminal Procedure Act of 1970*, 55 Minn. L. Rev. 871, 876-881 (1971).

33. 374 U.S. 23 (1963) (5-4 decision).

34. Cal. Penal Code §844 (West 1969).

imminent destruction of the contraband, exist. In *Ker,* police officers watched a suspect as he made an apparent purchase of marijuana and drove away. The officers followed but lost the suspect when he made a sudden U-turn in the middle of a block. They found his apartment by tracing his license number and gained entry noiselessly with a passkey obtained from the building manager. They did not demand admittance or notify Ker of their authority and purpose before entering. The Court found that the officers' entry was within the destruction of the evidence exception to the general announcement rule because the officers believed that the defendant was in possession of narcotics, an easily disposable substance. Moreover, the defendant's furtive conduct before arrest (the U-turn) was ground for the belief that he was expecting the police. The Court held that under these circumstances entering without notice did not offend the fourth amendment reasonableness standard.[35]

The United States Supreme Court has not had occasion to hold that any other exception to a general notice rule is constitutionally acceptable. However, in *Miller v. United States,*[36] a pre-*Ker* decision, the Court recognized with approval an entire list of state-created exceptions to notice rules even though it was not deciding an issue of exigent circumstances.[37] The *Miller* list of exigent circumstances is identical to that which the New Mexico Court of Appeals adopted in *State v. Baca.*[38]

THE "BLANKET" EXCEPTION TO ANNOUNCEMENT

Thus far, all the New Mexico cases which have ruled on the announcement issue have involved searches for narcotics. In three of the four current decisions, the destruction of the evidence exception was applied to excuse announcement.[39] In the fourth case, the fleeing defendant exception was applied.[40]

The disagreement in *Sanchez* between the supreme court and the court of appeals over the type of facts necessary to make out an instance of exigent circumstances reflects a similar split in the authorities on the manner of applying the destruction of the evidence exception in drug cases. The so-called "blanket rule" states that exi-

35. Ker v. California, 374 U.S. at 40.

36. 357 U.S. 301, 307 (1958). In *Miller* the court was determining how the District of Columbia's judicially-created announcement rule applied to a warrantless arrest.

37. *Id.* at 309. *See also* Sabbath v. United States, 391 U.S. 585 (1968).

38. State v. Baca, 87 N.M. at 14, 528 P.2d at 658.

39. In addition to *Baca* and *Sanchez,* the destruction of the evidence exception was applied in State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

40. State v. Kenard, 88 N.M. 107, 537 P.2d 1003 (Ct. App. 1975).

gent circumstances are always present in searches for narcotics because narcotics are easily disposed of.[41] One commentator suggests that with the development of indoor plumbing, the rules derived from *Semayne's Case* have become anachronistic and unduly hamper the police.[42] Under the other view of exigent circumstances, more than the readily destructible nature of the contraband must be shown to excuse an entry without announcement. The officers must become aware of exigent circumstances at the time they arrive for the search; particular information, such as activity within the house, must reasonably lead to the conclusion that the occupants are preparing to destroy evidence.[43]

In *Sanchez,* the court of appeals expressly rejected a blanket exception to announcement: "Exigent circumstances do not exist where the only fact known to the police is the readily disposable nature of the contraband that is the object of the search."[44] The supreme court opinion, on the other hand, strongly suggests that it was applying a blanket rule. The supreme court curiously cited cases both advocating and repudiating a blanket rule to support its decision, but it emphasized that the exigency of circumstances is to be judged by "practical circumstances."[45] It stated that the foremost of these practical considerations is the experience of a prudent, trained officer who knows that narcotics suspects ordinarily try to jettison the evidence before the police can seize it. It is true that the court noted some particular facts (the woman's scream and the other noise within) which would be necessary to a finding of exigent circumstances under a nonblanket rule,[46] but it nowhere indicated that particular facts were required in all cases to excuse compliance with the announcement rule. The court also relied on the informant's statement that Sanchez would destroy the evidence to justify the entrance into Sanchez's apartment. Under a nonblanket rule, the statements of an informant cannot create exigent circumstances; exigent circumstances must be perceived by the officers at the time they appear to execute the search warrant.[47]

41. People v. Arnold, 186 Colo. 372, 527 P.2d 806 (1974). For a history of California's adoption and subsequent repudiation of a blanket rule, *see* Note, *Announcement in Police Entries,* 80 Yale L.J. 139, 160-162 (1970).

42. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 Calif. L. Rev. 474, 502 (1961).

43. Ker v. California, 374 U.S. at 62-63 (separate opinion of Justice Brennan); Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (1974); People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967).

44. Sanchez I, 88 N.M. at 383, 540 P.2d at 863.

45. Sanchez II, 88 N.M. at 403, 540 P.2d at 1292.

46. *Id.* at 404, 540 P.2d at 1293.

47. *See* cases cited note 43 *supra.*

State v. Anaya,[48] a court of appeals case decided after *Sanchez*, is an even stronger indication than the *Sanchez* supreme court decision that New Mexico has adopted a blanket rule. In *Anaya* officers armed with a search warrant crawled stealthily under the defendant's trailer at approximately 6:30 a.m. and sawed through the sewer pipe leading from the bathrooms in order to recover any narcotics which might be flushed away. Only after the severing of the sewer pipe did any of the officers knock and identify themselves at the front door of the trailer.[49] The court conceded that entry into the crawl space was an unannounced intrusion which violated the *Baca* standard, but it found with almost no discussion that the intrusion was justified by exigent circumstances. There was no testimony that the officers had perceived any particular facts that would tend to establish that Anaya was contemplating the destruction of the evidence before they entered into the crawl space. The court relied solely on testimony that heroin is generally disposed of by flushing it down a toilet and the testimony of an officer in the search party who said that he had prevented the defendant from disposing of evidence in this manner during an arrest on a prior narcotics charge.[50]

CONCLUSION

If, as *State v. Anaya* and the *Sanchez* supreme court decision seem to indicate, the New Mexico courts have adopted a blanket exception to announcement in all cases involving drug searches, they have provided the police with a formidable tool. In *Sanchez* the court of appeals was deeply concerned with the possibility of abusing such a tool and conjured up pictures of local officers battering down doors like totalitarian police. Another concern elicited by a blanket rule is that it undermines the accused's presumption of innocence by assuming that, if the officer first makes known his presence and demands admittance, the suspect will refuse to admit him and attempt to destroy any incriminating evidence in his possession.[51]

Given the dearth of United States Supreme Court decisions regarding the exceptions to announcement rules, it is unclear whether a blanket rule is constitutionally permissible. The *Ker* decision[52] can arguably be read to support either a blanket or non-blanket view of the destruction of the evidence exception.[53] Justice Clark's majority

48. 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).
49. *Id.* at 303, 551 P.2d at 993.
50. *Id.*
51. Ker v. California, 374 U.S. at 56.
52. 374 U.S. 23 (1963).
53. People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967), takes the view that the *Ker* majority did not authorize unannounced entries by a blanket rule based

opinion in *Ker* stated that the unannounced entry into Ker's apartment was not unreasonable under the fourth amendment but noted both the easily destructible nature of the evidence and Ker's apparent effort to elude the police while he was driving to his apartment.[54] It can be argued that *Ker* rejects a blanket rule if Ker's attempt to elude the police is viewed as enough particular information to have reasonably raised the inference in the officers' minds that Ker was expecting them at his apartment and was therefore preparing to destroy the evidence. The alternate argument is that, even granting that Ker was expecting an imminent visit from the police, the officers did not see or hear any particular activity *within* the apartment which indicated that Ker was actually attempting to destroy the evidence. The police merely assumed that Ker would destroy the evidence on the basis of their experience with other narcotics offenders. Regardless of the objections to a blanket rule, New Mexico courts can apparently feel free to administer a blanket exception to announcement until the Supreme Court dispels the ambiguity created by *Ker*.

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on the nature of the crime or contraband involved. For the opposite view, *see* Note, *Announcement in Police Entries*, *supra* note 41, at 160.

54. 374 U.S. at 40.