Legal's Counsel

June 2005 News and Updates from the Legal Counsel Section Vol. 7

Search Warrant Update (and more)

We're Back

After a prolonged absence, the Legal Counsel Section is pleased to offer this edition of Legal's Counsel to the MSP family, focusing this edition on search warrant case law developments from the Maryland Courts of Appeals and Special Appeals. While these cases are the subject of the Legal Update presentation during the 2004 In Service Training, we hope that this Legal's Counsel will provide an additional reference source.

As we've noted in the past, please feel free to write, call (410-653-4223) or email (lcu@mdsp.org) the LCS with any comments or suggestions for future editions of Legal's Counsel.

□□□

Davis and Adams v. State, 383 Md. 394 (October 21, 2004)

No Knock Warrants Unauthorized in Maryland, However, No Knock Entries May be Valid if Factually Supported

Baltimore City Police officers applied for and obtained a search and seizure warrant for Davis and Adams, their premises and a black Nissan Sentra alleged to be driven by them in conjunction with their suspected drug operation. The application for the warrant discussed a confidential informant and information obtained from the CI, as well as interview information with Davis and Adams.

The officer requested a "no knock" warrant. In support, he made generalizations about the relationship between narcotics, drug dealers and weapons and allegations about how weapons are used in the drug trafficking environment. The police also alleged that they needed a "no knock entry" to gain entry quickly and safely and because "if entry is stalled or delayed the controlled dangerous substance can easily and quickly be destroyed." A judge issued the warrant and while it did not specifically state that it was a "no knock" warrant, the warrant incorporated the affidavit by reference and implicitly authorized a "no knock" entry.

In executing the warrant, the police made a no knock entry and gained entry through use of force. Inside, officers recovered a large ziplock baggie containing 60 smaller baggies of suspected marijuana from a refrigerator in a second floor bedroom, together with various weapons and drug paraphernalia. Davis and Adams were arrested and later convicted.

On appeal, Davis and Adams challenged the warrant, claiming that the allegations in support of the warrant were too general but the Court of Appeals believed it didn't even need to decide this issue since it first needed to decide whether no knock warrants are valid in Maryland. It decided that there is no authority in Maryland for no knock warrants.

The Court reasoned that in Maryland, there is no statute authorizing the issuance of a "no knock" warrant. The only statute regulating search and seizure warrants in Maryland discusses the authority to issue them and the contents of the application and warrant. According to case law, it has long been the rule in Maryland, that warrants have to be "knock and announce" warrants.

In other states, courts have split on whether a statute is necessary to permit the issuance of no knock warrants. Some require a statute and others have held that judges can decide when the allegations are sufficient to justify issuing a no knock warrant. In this case, the Maryland Court of Appeals decided that a statute authorizing no knock warrants *is* required in Maryland. And Maryland had no such statute. As a result, the Court overturned the convictions of Davis and Adams.

Note, however, that the Court decided that it is still permissible to have no knock *entry* where the circumstances justify it. Whether a no knock *entry* is allowed will depend on the facts known to the officers at the time of *entry.* This approach allows for the possibility of changing circumstances between the application for the warrant and the service of the warrant.

In order to justify a no knock *entry*, the police must have a *reasonable suspicion* that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the

effective investigation of the crime by, for example, allowing the destruction of evidence. The standard is not high but the police should be required to make it whenever the reasonableness of a no knock entry is challenged.

γγγ

State v. Carroll,
383 MD. 438 (Oct. 21, 2004)

Reasonableness of no knock entry

On the same day that the Court of Appeals decided *Davis and Adams v. State,* the Court decided another search warrant case called *State v. Carroll.* The *Carroll* case decided whether a no knock entry was reasonable under the facts of that case when a traditional, knock-and-announce warrant was issued. During the investigation of Kevin Carroll for CDS related violations, the police learned from a confidential informant that Carroll was in possession of marijuana and several handguns, including a Ruger, a .45 cal, one 9 mm and 2 380 semi-automatics. (The source demonstrated a basis of knowledge regarding handguns to the satisfaction of the police). Based on this knowledge, the police obtained a search and seizure warrant of Carroll's home.

Before executing warrant, the Tactical Section of the Howard County Police Department learned that Carroll had a prior arrest for a crime of violence using a weapon, prior arrests for possession of marijuana and robbery, was reputed to associate with an individual with prior arrests for first degree assault, robberies and CDS offenses and was believed to be carrying a handgun. Sgt. Bender, of the Tactical Section, concluded, based on his prior experience with 500-600 warrants plus his investigation of Carroll and known confederates, that knocking and announcing before entry with the search warrant could expose the officers to significant harm. Accordingly, when serving the warrant, a no knock entry was made. Carroll was arrested in connection with drugs found in his premises.

The Court of Appeals made clear that a no knock entry was to be judged based on whether the facts known to the police at the time of the entry even if the facts known at the time of the entry are the same as those that existed at the time that the warrant was obtained.

In evaluating the legality of the entry, the critical issue was whether sufficient facts were known to the officers executing the warrant, at the time of the *entry*, to establish a reasonable suspicion that the circumstances justified a stealthy entry -- **reasonable suspicion of exigency does not require showing to an absolute certainty that safety is in jeopardy or that evidence unquestionably will be destroyed – only *some* articulable reason why the preference for knocking and announcing would not be appropriate in that case.**

In Carroll, the Court concluded that there was a sufficient showing of exigency (info regarding weapons and marijuana, prior arrest, association with a person with prior arrests for violent crimes and believed to be in possession of a weapon) to justify the no knock entry.

###

Archie v. State
CSA, February 14, 2005

Timing of forcible entry following knock and announcement

This case involved a challenge to a knock and announce entry where officers waited only a very brief period of time (without any refusal of admittance) before forcing an entry into the apartment to be searched. The Court held the entry to be reasonable in this case based on the following:

The Washington County Narcotics Task Force and Hagerstown PD executed a search and seizure warrant on an apartment on May 8, 2002. During a pre-raid briefing, members of the entry team were told they would be executing a knock and announce warrant. The entry team, consisting of about 8 members in full SWAT uniforms, knocked, announced, waited briefly and then forced the entry with battering ram. When the officers entered, Archie was lying on bathroom floor, directly in front of the toilet and his arm was wet "up to his elbow." Significant quantity of drugs were found throughout the apartment.

The Court of Special Appeals was asked to decide whether the entry was reasonable when it was made only shortly after the officers knocked and announced their purpose and before the officers were denied entry into the apartment.

Historically, officers were required to knock and announce their presence and purpose, and forcible entry is prohibited until the request was refused. The Court held, however, that this rule is not without exceptions to take into account countervailing law enforcement interests such as destruction of evidence and officer danger, etc.

Accordingly, once officers executing a search warrant have knocked and announced their purpose and authority, how long they must wait before making a forced entry depends on: 1) the size of the place to be searched and 2) how easy it would be for someone inside to destroy the evidence described in the warrant.

The Court of Special Appeals concluded that when

the evidence is easily destroyed or disposed of, the place to be searched is a one bedroom apartment, the officers assigned to execute the warrant know that the suspect is in the apartment, and they have announced their purpose and authority, the officers may make a forcible entry into the apartment when they do not receive a prompt response to their announcement.

GGG

HB 577

House Bill 577 was introduced before the Maryland General Assembly this past session to provide statutory authority for the issuance of no knock search and seizure warrants. Signed into law by the Governor, it will take effect on October 1, 2005 and will amend the Criminal Procedure Article, § 1-203 and permit no knock warrants to be issued when the issuing judge finds a reasonable suspicion of the destruction of evidence or endangerment to the life or safety of a law enforcement officer or another person.

□□□

PRACTICE NOTE: SEARCH WARRANTS AFTER HB 577 TAKES EFFECT

The cases discussed above were decided prior to the effective date of the new "no knock warrant" law. When the law takes effect, no knock entries should not be attempted when the warrants are "knock and announce" warrants *unless* a showing can be made of significantly changed circumstances (from the time of warrant application) that would justify a no knock entry under the standards set forth in *Carroll v. State*. In *Carroll*, the Court was not concerned that the HCPD did not apply for a no knock warrant since at that time, there was no authority for the judge to issue a no knock warrant. After October 1, 2005, a Court might consider a no knock entry to be done in bad faith if the warrant is a traditional knock and announce and the circumstances have not significantly changed after the warrant is obtained.

ιιι

STATE POLICE VICTORIES

KNUSSMAN V. MSP - THE FINAL CHAPTER

This should be the last update to this 10 year old case which was originally filed in April 1995. The media labeled the case that of Trooper Dad for the plaintiff trooper who alleged that the MSP denied him leave following the birth of this child. We experienced an 11 day trial in early 1999 which resulted in an unfavorable jury verdict award of $375,000 to Mr. Knussman. On our motion attacking the validity of the award, the court agreed with us that all of the defendants were entitled to immunity from damages, however, it disagreed as to one defendant and refused to lower the award amount. The decision was appealed to the U.S. Court of Appeals for the 4th Circuit. That court found that Mr. Knussman had failed to establish a factual basis to support the large award, struck the award and remanded the case back to the trial court. This resulted in the award being reduced to $40,000 on August 26, 2002.

The next battle went to the issue of compensation to the plaintiff's attorneys. The trial court, on August 26, 2002, found plaintiff to have been a prevailing party and awarded his counsel $693,531.47 in fees and expenses. We immediately appealed the award to the 4th Circuit. We argued that the amount of attorney hours spent on the case was unreasonable and that the award amount should be commensurate with the damages award. On August 27, 2003, the 4th Circuit issued a decision which agreed with us, struck the award of fees and costs and remanded with instructions to the trial court to make an appropriate award.

The trial court encouraged the parties to mediate, however, the parties were too far apart on what each believed to be reasonable. The court then had the parties submit memoranda in support of their respective positions. In their memorandum, Plaintiff's attorneys sought $455,950.62 in fees and $56,353.66 in costs. On the other hand, we provided alternate theories for Plaintiff's attorneys to receive significantly less. After holding the matter for several months, the court issued an opinion on March 11, 2005 wherein it awarded Plaintiff's counsel fees of $220,000 and costs of $24,500. On April 27, 2005, the Board of Public Works approved payment of these fees and costs.

Considering the history and overall exposure in this case, we believe this result was favorable to the Defendants. In the nearly 10 years that this case has run, the court issued significant opinions, most of which were published. The case was appealed twice and, on both occasions, the Defendants were very successful. The total amount awarded to Plaintiff for damages and his attorneys is substantially less than the original verdict on February 1999 of $375,000 which was for damages alone. We note that when the Board of Public Works agreed to pay the original verdict amount in 1999, it anticipated receiving an additional request for attorneys fees which could

have cost the State of Maryland nearly $1,000,000. Instead, the State will be required to pay less than a third of that.

The Legal Counsel Section extends a thank you to all of you who assisted us in any large or small way during this litigation epic.

∀∀∀

STATE POLICE VICTORIES!!

CONGRATULATIONS to Donald Hoffman, who scored victories in the following matters:

AAG Don Hoffman skillfully defended the interests of the State of Maryland and 2 individual trooper defendants in the civil case of *Anthony Gray v. Maryland State Police.* The case was filed in federal court. Plaintiff Anthony Gray who sought damages from the defendants after he served an 8-year period of incarceration following his confession to and conviction for 1st degree murder and rape. While serving his sentence, the state identified another suspect for the same crimes based on DNA evidence and convicted the second suspect for the crimes. In a post conviction relief proceeding, Plaintiff was granted a new trial, however, the State's Attorney refused to retry Plaintiff.

In the civil action, Plaintiff pursued 12 claims. The defendants were ultimately granted summary judgment by Judge Catherine Blake in September 2004 based on qualified immunity and other defenses.

Don also successfully defended *Litzinger v. McGuirk*, a federal civil rights case brought against a trooper by a plaintiff alleging false arrest, excessive force, and fail to render aid in a motor vehicle collision. Summary judgment was granted for trooper in October, 2004.

The same results were obtained by Don in *Dodson v. Merson*, another federal civil rights case brought against a State Trooper by plaintiff's alleging involuntary, lengthy detention at the scene of a search and seizure warrant. Summary judgment was granted for trooper in March, 2005.

Another trooper was dismissed from the Circuit Court case of *Saucedo v. Krickler* upon a motion filed by Don. This case is a negligence action pending in State court concerning a motor vehicle accident. The trooper was granted immunity in April of 2005. The case continues against the State of Maryland only.

KUDOS also to AAG H. Scott Curtis who retained the authority of Maryland law enforcement to coordinate forfeitures through the federal Drug Enforcement Administration. The case of *DeSantis v. MSP* arose out of the seizure of $20,000 from an intoxicated driver following his arrest. The cash was seized as illicit proceeds of drug trafficking and transferred to the DEA under a program. Under the program, if the state determines that it will not seek forfeiture of the money, the DEA may "adopt" the case, and administratively forfeits the money and returns a substantial portion of the money to the state.

DeSantis, with the aid of (former AAG) Leo Ottey, filed a complaint against the State after the money seized from him was forfeited under this DEA process. The action was filed in the Circuit Court for Baltimore County alleging that the State Police unlawfully had deprived him of $20,000. The Circuit Court granted the State's motion for summary judgment. DeSantis appealed to the Court of Special Appeals. The Court of Appeals granted certiorari on its own initiative to consider whether the State Police may deliver custody of such seized property to the DEA without first obtaining an order from a Maryland court.

The Court of Appeals held that the Attorney General of Maryland has the authority to request federal adoption and to deliver custody of the seized property to the federal government. The State is not required to obtain a court order. The Court reasoned that the Maryland forfeiture statute permits either a court or an official such as the Attorney General to authorize adoption; the statute mandates that the seized property remain in the seizing agency's custody "subject only to the orders, judgments, and decrees of the court or the official having jurisdiction thereof."

CONGRATULATIONS, as well, to AAG Mark Bowen in defending the State Police action in *Scherr v. Handgun Permit Review Board*. This case, argued on March 9, 2005, arose out of the denial of Mr. Scherr's application to the Maryland State Police to obtain a permit to carry a handgun. Scherr, an attorney, initially claimed in his 2002 application, that he needed to carry a gun due to apprehension over his physical safety arising out of his employment as a divorce attorney and as a part-time radio talk show host. The Handgun Permit Review Board affirmed the Department's determination that Scherr, who had no documented attacks or threats, had failed to establish "good and substantial reason" to carry a handgun as required by statute.

On appeal to the Circuit Court of Baltimore County, Judge Bollinger raised the issue of whether Scherr should be entitled to a permit due to his prior employment as a prosecutor. The matter was remanded to the Board which, after a second hearing, again affirmed the denial of Scherr's application, noting that Scherr's two year stint as a prosecutor 26 years ago

neither subjectively nor objectively constituted a “good and substantial reason.” On the second appeal to the Circuit Court, Judge Kahl rejected Scherr’s argument that he had a Second Amendment right to obtain a handgun carry permit and affirmed the decision of the Board. MSP is awaiting a final decision from the Court of Special Appeals.

γγγ

And Now For Something Different . . .

4th Amendment Word Puzzle

Find these words below:

Knock and announce
Whren Stop
Probable Cause
Canine
RAS
MSP
Detention
Fourth
No Knock
Flexible

w	u	j	f	l	e	x	i	b	l	e	n	b	f	v	q
e	h	r	t	y	u	i	o	p	l	k	j	o	h	c	f
d	b	r	v	c	m	s	p	x	z	a	u	s	d	a	g
e	w	e	e	r	t	y	u	i	o	r	p	a	s	n	s
t	s	d	d	n	f	g	h	j	t	y	h	k	n	i	c
e	p	e	b	h	s	u	z	h	t	z	x	c	e	n	y
n	d	f	s	g	y	t	x	c	v	g	u	o	r	e	h
t	c	d	h	f	r	b	o	t	n	m	e	n	f	t	g
i	w	t	f	a	f	v	s	p	w	q	b	k	g	g	f
o	e	h	s	u	j	c	t	h	d	u	i	o	t	d	r
n	e	r	t	s	d	d	f	d	s	e	f	n	g	r	y
b	f	p	r	o	b	a	b	l	e	c	a	u	s	e	u
e	c	n	u	o	n	n	a	d	n	a	k	c	o	n	k