The Execution of Search Warrants

by H. Patrick Furman

Discussions of search warrants generally focus on questions of probable cause or the reliability of information contained in the affidavit submitted with the application for the warrant. Less attention is focused on issues that surround the actual execution of the warrant. This article addresses some of the issues that surround the actual execution of a warrant, including the detention or search of persons who are present at the premises being searched, the interpretation of the scope of the warrant, the execution of "no knock" warrants, the right of the police to secure premises before executing warrants, and the proper documentation of affidavits and warrants.

Persons at the Scene

It is quite common that persons are either present at the premises to be searched, or arrive while the search is in progress. The question often arises whether such persons can be detained or searched as part of the execution of the search warrant for the premises. The general principle is that police officers executing a search warrant have authority to question and even detain persons who are on the premises, but that an actual search of such persons requires either a particularized suspicion or authorization in the warrant.

There are several justifications underlying the principle that the police may generally question or detain persons found at the premises. Because a magistrate has authorized a significant intrusion into privacy interests when a warrant is issued, questioning or detention of persons at the premises being searched may be viewed as an insignificant additional threat to protected privacy interests. Additionally, questioning or detention may be necessary for the safety of the officers executing the search, to prevent the destruction of evidence, or to ensure that the search takes place in an orderly fashion. In *Michigan v. Summers*,[1] the U.S. Supreme Court held that reasonable suspicion to detain an individual is created when the police are armed with a warrant to search the individual's home and encounter him or her leaving as they approach to execute the warrant. The police are entitled to detain the person while the search takes place.

A more strict analysis applies to frisks and searches of persons present at the premises, because such actions are far more significant intrusions into protected privacy interests. In *Ybarra v. Illinois*,[2] the U.S. Supreme Court held that the mere presence of a person at the place to be searched did not open him or her up to a frisk by the police. To justify a frisk, the Court held that there must be a particularized and reasonable suspicion that the person is armed or dangerous.[3] *Ybarra* remains the law,[4] but a number of subsequent cases have distinguished *Ybarra* or limited the application of its rule.

The particularized and reasonable suspicion exception is illustrated by *People v. Hughes*.[5] There, police officers executing a search warrant for drugs conducted a pat-down search of the defendant, who was neither the resident nor named in the warrant, and found a film cannister. They opened the cannister and found cocaine. The trial court suppressed the cannister. The Colorado Supreme Court reversed, holding that while *Ybarra* limits searches of people who are present during the execution of a search warrant, it does not prohibit them. Such a search must be justified under the rationale of *Terry v. Ohio*.[6] The defendant in *Hughes* generally fit the description of the alleged supplier and, even though that information was not in the warrant, it was enough to justify the pat down, particularly since the defendant made a furtive gesture. Once the cannister was lawfully seized, it could be searched; it was a "vessel" in the room and the warrant authorized the search of such vessels.

The majority of courts that have addressed searches of other persons present when a search warrant is executed have held that the propriety of such a search turns on whether there is probable cause to believe the person searched was involved in the criminal activity.[7] The scale of the illegal activity relative to the size of the structure in which it is taking place is the key factor in determining whether a search of the persons present at the scene is reasonable. Compare a dice game in a back room with an illegal lottery ticket sale in a factory. It is reasonable to assume everyone in the back room is involved in the former activity, but unreasonable to make a similar assumption with regard to all persons present in the factory. This sort of analysis will meet the constitutional mandate of specificity and avoid the dangers inherent in general warrants.

The bottom line is that there is adequate specificity when the executing officer can

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readily determine to whom the warrant applies. The probable cause requirement was met in *People v. Johnson*[8] because of the tight security around the house in which the drugs were being manufactured (no one who was not involved could get in) and the sophisticated nature of the operation. It was clear that everyone inside the home was involved and therefore reasonable to authorize a search of all those persons.

A recent Colorado case illustrating these principles is *People v. Ornelas*,[9] in which the Colorado Court of Appeals held that it was permissible for the police, while executing a search warrant of the defendant's home, to detain him in handcuffs and then, after cocaine was discovered in the home, arrest him. The court held that the detention was not a full-blown arrest, but more akin to a *Stone-Terry* detention.[10] The detention was based on the fact that a neutral magistrate had already authorized the significant intrusion of a search of the home, and justified by the need to ensure officer safety, guard against destruction of evidence, and promote the orderly execution of the warrant.[11]

Another exception to the *Ybarra* rule may be created if the warrant itself authorizes the search of persons present when the warrant is executed. The warrant issued in *Johnson*[12] authorized a search of the home and "all persons found within or in the immediate vicinity of the residence," and was based on probable cause to believe that drug manufacturing and selling were taking place in the home. The defendant was found inside when the warrant was executed and was arrested after $950 was found in his sock. The Court of Appeals affirmed the trial court's denial of the defendant's motion to suppress. *Ybarra* was distinguished because the search in that case took place in a public place and because the warrant issued in that case did not authorize searches of persons.

Similarly, the Court of Appeals has held that a no-knock search warrant that authorized the search of an apartment and the persons found therein for implements related to the manufacture and storage of marijuana and LSD authorized the search of the purse of a nonresident who was in the apartment.[13] The occupants were handcuffed and the purse seized from a bedroom. The police inquired as to ownership, and a nonresident juvenile claimed ownership. The police found drugs in the purse. The court suppressed the juvenile's response to the question because the police should not have questioned the juvenile in the absence of a parent or guardian, but permitted the introduction of the contents of the purse.

Scope of the Search Warrant

The Fourth Amendment requires that a warrant "particularly describ[e] the place to be searched." Article II, § 7 of the Colorado Constitution requires that a warrant "describ[e] the place to be searched . . . as near as may be." These requirements are designed to prevent general searches[14] but, like other constitutional commands, are to be interpreted in a practical fashion.[15]

> "Even property with seemingly little connection to the fixed premises may fall within the scope of a search warrant."

In *United States v. Ross*,[16] the U.S. Supreme Court made it clear that a warrant that authorizes the search of fixed premises generally authorizes the search of every part of the premises in which the object of the search may be located, even if such a search involves additional openings and entries. Thus, the police may search cabinets and drawers in a search for drugs that might be secreted therein.

Some parts of the premises have less connection to the "fixed premises" than others. The affidavit in support of the search warrant issued in *People v. Muniz*[17] established probable cause to believe that the shotgun being sought was located in the defendant's home. The warrant itself authorized a search of "the premises above described." The police executing the search found nothing in the defendant's home, so they searched a small, unattached storage shed located approximately thirty feet from the home in an enclosed area to which the defendant had ready access. The shotgun was found in the shed. The trial court suppressed the shotgun because the word "premises" did not appear in the affidavit and because the affidavit itself indicated that the shotgun would be found in "the house."

The Colorado Supreme Court reversed, first noting that the trial court erred in its reading of the affidavit, which, in fact, twice used the word "premises." More importantly, the court held that the trial court's interpretation was "a hypertechnical construction" of a sort that has been condemned by the U.S. Supreme Court.[18] The court noted that affidavits are often drafted by nonlawyers in the haste of a criminal investigation and that over-reliance on technicalities of the sort required by common law pleadings may discourage the police from seeking judicial approval before acting.

However, the court declined to adopt a *per se* rule that all of the buildings at a location to be searched are automatically included within the terms of the warrant. The detective executing the search in this case first searched the home, where he found other items specified in the warrant, and ended the search of the shed once he found the shotgun. Therefore, there was little danger of an improper exploratory search. The court also warned against over-reliance on printed forms and reiterated that every affidavit and warrant "should be carefully prepared to fit the requirements of the particular case."[19]

In *United States v. Percival*,[20] the Seventh Circuit held that a search warrant authorizing the search of a home also authorized the search of a car found in the garage, even though the car belonged to a third party. A car has less connection to premises than does, say, furniture. However, the defendant's use of the car, coupled with the fact that the car was locked in the defendant's garage and the defendant was in possession of the keys, established that the defendant had dominion and control over the car sufficient to justify including the car in the scope of the warrant. The court noted that the better practice would be to include a description of the car in the warrant, but holds that such practice is not required by the Fourth Amendment. Other courts have reached the same general conclusion.[21]

Even property with seemingly little connection to the fixed premises may fall within the scope of a search warrant. In *People v. Tufts*,[22] the police obtained a warrant to search the defendant's home after validly arresting the defendant and others following a controlled buy of narcotics. During the search, the police found a vinyl bag that apparently belonged to a defendant who did not live in the home but had been arrested in connection with the buy. The Colorado Supreme Court held

that the search of the bag was authorized by the warrant, particularly in light of the fact that probable cause already existed to arrest the defendant.

The generally broad interpretation of the scope of a search warrant is not without limits. In *United States v. Stanley*,[23] the Fourth Circuit held that a warrant authorizing a search of the defendant's mobile home did not authorize a search of the defendant's car when that car was parked in a parking lot used by several residents of the mobile home park. The car was near the mobile home, but was not within the general enclosure surrounding the mobile home.

Information in the affidavit or warrant may expand the permissible scope of a search. The Colorado Supreme Court has approved language in a warrant authorizing a search of a home and "all vehicles" on the property,[24] rejecting a claim that such language was impermissibly broad. The court also has held that information in an affidavit relating to the possibility of blood evidence justified the seizure of items, such as bedding, which might reasonably contain blood evidence, even when no blood was visible at the time of the seizure. The same analysis justified the seizure of hair samples found on a shirt at the scene of the search because the victim of the offense had been hit on, and bled from, his head.[25]

Scope of the Search Itself

Obviously, the law enforcement personnel executing the search warrant are generally confined to the terms of the warrant. However, a good-faith mistake that is understandable and objectively reasonable may bring an otherwise overbroad search within constitutional bounds. In *Maryland v. Garrison*,[26] police obtained and executed a warrant to search "the premises known as 2036 Park Avenue third floor apartment." They believed the entire third floor was one apartment, and the mistake was not discovered until they had already discovered incriminating evidence in the second apartment on the third floor. The U.S. Supreme Court, by a 6-3 vote, reasoned that both the warrant and the execution thereof were proper because the mistaken information in the affidavit and the mistake in the actual execution were both objectively reasonable.

A flagrant disregard of the limits of a search warrant may result in the suppression of all items seized in the search, including those items that were within the scope of the warrant.[27] In *United States v.*

Foster,[28] police officers executing a valid search warrant seized, pursuant to their standard policy, virtually everything of value in the home, including items that were neither contraband nor linked to any illegal activity. The court found that the officers acted "in flagrant disregard for the terms of the warrant,"[29] and suppressed all of the items seized in the search, including the weapons that were the object of the search. On appeal, the Tenth Circuit affirmed,[30] holding that the trial court's findings were amply supported by the record and that this remedy, while extreme, was justified in cases of flagrant disregard of the warrant.

The Knock and Announce Rule

People v. Lujan[31] is a good starting point for a discussion of the general requirement that the police knock and announce their presence before entering premises to execute a warrant. In *Lujan*, the Colorado Supreme Court noted that the rule of prior notice dates back to a 1603 English decision.[32] While no English cases created exceptions to this rule, exceptions did develop in American decisions. *Ker v. United States*[33] made it clear that the federal constitution is not offended by the creation of reasonable exceptions to the rule.

The *Lujan* decision expressly approved two exceptions to the prior announcement rule. The first exception exists when the warrant expressly authorizes forced entry without announcement. The second exception exists when circumstances unknown at the time of the application for the warrant, but learned before entry, give the police probable cause to believe that giving notice is likely (1) to result in the destruction of evidence, (2) to endanger life or safety, (3) to enable a party to be arrested to escape, or (4) to be a futile gesture. The court approved of the police breaking down the door to Lujan's home with a sledgehammer when, armed with a valid search warrant, they noticed a light burning in a rear room of the residence, knocked on the door, waited about a minute, then knocked again and still received no reply.[34]

As recently as 1995, the U.S. Supreme Court noted the continued vitality of the principle that the police generally must knock and announce their presence before entering. In *Wilson v. Arkansas*,[35] the Court held that the common law "knock and announce" rule is part of the reasonableness requirement of the Fourth Amendment. A failure to knock and announce is not automatically unreasonable, as the risk of danger to the officers or of destruction of evidence may justify a no-knock entrance, but the Court reiterated that there is a presumption in favor of announcement.[36]

Securing the Premises

Law enforcement officials are sometimes allowed to "secure the premises" prior to the execution of a search warrant. In *People v. Gillis*,[37] police arrived at the defendant's home and conducted a brief security search of the home before discovering that the address on the warrant was incorrect. They told the defendant to wait outside while they obtained a proper warrant. During the wait, the defendant consented to a search of his home, and eventually led the police to the property they were seeking.

The Colorado Supreme Court held that the brief security search was appropriate in order to secure the safety of the officers.[38] The court also held that the voluntariness of the consent to search was not affected by the fact that police told the defendant that he had to wait outside, that another warrant would be obtained, and that the police would remain at the premises until that occurred; these comments did not amount to improper threats or coercion because they were simply descriptions of permissible police actions.

The "protective sweep" rule has limits. In *People v. Griffin*,[39] police developed probable cause to believe the defendant had marijuana for sale in his home. Some officers went to obtain a warrant, while two others went to the defendant's home to "secure the premises" and take other "precautions" with the occupants. The officers who went to the home went inside and observed drug paraphernalia inside. The Colorado Supreme Court affirmed the suppression of the paraphernalia, ruling that the entry could not be justified as a protective sweep. The court upheld the admissibility of the drugs seized pursuant to the warrant because the warrant was not based on any information received from the officers who conducted the illegal entry.

A similar limitation was noted in *People v. Gifford*,[40] where the police obtained information that the defendant was buying stolen goods and prepared an affidavit for a search warrant. Before receiving the warrant, several officers went to the defendant's home, told three people on the porch that a warrant was on the way, and then entered without knocking. The trial court found that the officers had violated the knock and announce rule and that the fact that they had told the three unidentified persons they were going in did not alter that violation. The trial court also found that the appropriate remedy was suppression.

The Colorado Supreme Court affirmed, noting that a forcible entry need not be accompanied by physical violence[41] and that the purpose underlying the ban on such entries is to spare the residents the shock of unannounced entries and to protect both the residents and the police from the dangers that attend to unannounced entries. There was no showing that the subsequent seizure of the evidence was independent of the initial illegal entry, so suppression was the appropriate remedy.

Paperwork

Several cases have addressed questions concerning the documents that must be present at the time of the request for the warrant or the time of actual search. In *People v. Donahue*,[42] the Colorado Supreme Court held that the failure of the affiant to attach to the search warrant the document specifying the items to be seized rendered the search warrant constitutionally defective.

Recently, in *People v. Staton*,[43] the Colorado Supreme Court held that an affidavit may be used to satisfy the Fourth Amendment's particularity requirement if (1) the otherwise defective warrant incorporates the affidavit by reference, (2) both the warrant and the affidavit are presented to the magistrate issuing the warrant, and (3) the affidavit accompanies the warrant during the execution of the warrant. The third requirement may be met if the police officer who is the affiant controls and supervises the execution.

Some of the requirements relating to the execution of a search warrant are based in the rules or statutes, rather than in the Constitution. In *People v. McKinstry*,[44] the Colorado Supreme Court reversed a district court suppression order that had been based on the absence of the affiant's name in the warrant. A police officer filed an affidavit and obtained a warrant from a judge. Rather than writing the name of the affiant in the space provided on the warrant, the judge caused the warrant to read "any officer." The judge signed the warrant and initialed the affidavit and the attachment listing the property to be seized. The warrant itself referred to the

attachment, but not to the affidavit. A copy of the affidavit was not left at the premises searched. The affidavit was returned to the court with the executed warrant, but the documents were not stapled together.

The trial court held that strict compliance with the requirements of Crim.P. 41 (d) and CRS § 16-3-304 was required because the rule and statute were designed to give effect to the right protected by the Fourth Amendment. The Colorado Supreme Court reversed, holding that only two of the four requirements of the rule and statute—that the warrant itself contain an adequate description of the place to be searched and an adequate description of the items to be seized—are required by the Fourth Amendment. Thus, there is no constitutional violation. However, there clearly was a violation of the rule and the statute because the warrant did not contain the name of the affiant. The trial court held that excusing the failure to comply with this requirement violated the express mandate of the legislature. A four-person majority of the Supreme Court found this analysis to be overly technical, and held that the defendant was not prejudiced by the absence of the affiant's name on the warrant because he later gained complete access to the affidavit.

Conclusion

A thorough analysis of searches conducted pursuant to warrants does not end with an analysis of the affidavit that was filed in support of the request for the warrant. The actual execution of a search warrant is the point at which our constitutional rights come face-to-face with the power and authority of the government. Prosecutors and law enforcement officials must take care to ensure that warrants are executed in a constitutional manner, and defense counsel must challenge those searches that are not so conducted.

NOTES

1. 452 U.S. 692 (1981).
2. 444 U.S. 85 (1979).
3. *See U.S. v. Ward*, 682 F.2d 876 (10th Cir. 1982).
4. *People v. Johnson*, 805 P.2d 1156 (Colo. App. 1990).
5. 767 P.2d 1201 (Colo. 1989).
6. 392 U.S. 1 (1968).
7. *People v. Lujan*, 484 P.2d 1238 (Colo. 1971); *Johnson*, *supra*, note 4.
8. *Supra*, note 4.
9. 937 P.2d 867 (Colo.App. 1996).
10. *Stone v. People*, 485 P.2d 495 (Colo. 1971); *Terry*, *supra*, note 6.
11. *Summers*, *supra*, note 1.
12. *Supra*, note 4.
13. *People in the Interest of D.F.L.*, 931 P.2d 448 (Colo. 1997).
14. *Maryland v. Garrison*, 480 U.S. 79 (1987).
15. *United States v. Ventresca*, 380 U.S. 102 (1965); *People v. Muniz*, 597 P.2d 580 (Colo. 1979).
16. 456 U.S. 798 (1982).
17. 597 P.2d 580 (Colo. 1979).
18. *Ventresca*, *supra*, note 15.
19. *Muniz*, *supra*, note 15 at 582.
20. 756 F.2d 600 (7th Cir. 1985).
21. *See United States v. Duque*, 62 F.3d 1146 (9th Cir. 1995); *United States v. Gottschalk*, 915 F.2d 1459 (10th Cir. 1990); *United States v. Bulgatz*, 693 F.2d 728 (8th Cir. 1982); *United States v. Freeman*, 685 F.2d 942 (5th Cir. 1982); *United States v. Napoli*, 530 F.2d 1198 (5th Cir. 1976).
22. 717 P.2d 485 (Colo. 1986).
23. 597 F.2d 866 (4th Cir. 1979).
24. *People v. Juarez*, 770 P.2d 1286 (Colo. 1989).
25. *People v. Staton*, 924 P.2d 127 (Colo. 1996).
26. *Supra*, note 14.
27. *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988).
28. 897 F.Supp. 526 (E.D.Okla. 1995).
29. *Id.* at 531.
30. *United States v. Foster*, 100 F.3d 846 (10th Cir. 1996).
31. *Supra*, note 7.
32. *Semayne's Case*, 5 Coke's Reports 91, 77 Eng. Rep. 194 (1603).
33. 374 U.S. 23 (1962).
34. The U.S. Supreme Court recently rejected a legislative effort to create a blanket exception to the knock and announce rule in every narcotics case. *Richards v. Wisconsin*, 117 S.Ct. 1416 (1997).
35. 115 S.Ct. 1914 (1995).
36. *See* "Fourth Amendment—Must Police Knock and Announce Themselves Before Kicking in the Door of a Home?" 86 *J. Crim. L. & Criminology* 1229 (Summer 1996).
37. 883 P.2d 554 (Colo.App. 1994).
38. The court cited *People v. Bueno*, 475 P.2d 702 (Colo. 1970), for this proposition, although *Bueno* did not involve the execution of a warrant.
39. 727 P.2d 55 (Colo. 1986).
40. 782 P.2d 795 (Colo. 1989).
41. *United States v. Sabbath*, 391 U.S. 585 (1968); *People v. Godinas*, 490 P.2d 945 (Colo. 1971).
42. 750 P.2d 921 (Colo. 1988).
43. 924 P.2d 127 (Colo. 1996).
44. 852 P.2d 467 (Colo. 1993).

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Notice from Supreme Court Board of Law Examiners

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Community Housing Service Offers Guide On Landlord/Tenant Rights

Community Housing Services, a nonprofit agency in Denver, recently published the second edition of *Know Your Rights: The Colorado Law Guide for Landlords and Tenants*. This book answers questions specific to Colorado landlord/tenant laws, which can save money, aggravation, and time in court.

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