

SEARCH & SEIZURE IN NEW MEXICO

ONLINE

**SEARCH WARRANTS: PART TWO
(Execution)**

PRESENTED BY:

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Date: _____

INTRODUCTION

In Part I we discussed establishing probable cause in a search warrant. We will now discuss, in Part II, the following:

- Issues involved in serving or executing a search warrant.
- What officers need to do after serving or executing a search warrant.

Preliminary matters prior to serving or executing a search warrant

- ADA Approval
It is recommended that you get approval from an ADA that works the type of crime that your search warrant is most concerned with: narcotics, gangs, violent crimes, domestic violence, etc.

- Judge Approval
The Judge will sign the warrant and the affidavit. In Bernalillo County Judges have agreed to sign warrants as follows:

- Metro - Arrest warrants
- District - Search warrant

Advantages of District Court Judge signing a search warrant:

- 1) Warrant can be served or executed statewide
- 2) Since most search warrants are for felony offenses, it is less likely that one district court Judge will overrule another.

- Oath
Make sure you're sworn in before you sign the search warrant affidavit. What you're swearing to is what is contained in the body of the affidavit, not what you told the Judge in response to questions.

- Night time authorization
Search warrants are generally served between 0600 and 2200 hours **If you're going to serve a warrant between 10:00 p.m. and 0600 the Judge must authorize it.** You must explain in the affidavit why you need a night time search warrant. Example: possible destruction of evidence, etc.

FACTS:

A district judge signed a search warrant for Albuquerque Police at 8:54 p.m. There was no authorization for a nighttime search. Entry was made prior to 10:00 p.m. but the search began after 10:00 p.m. A shell casing in the residence linked Defendant with a homicide that occurred a year before. Will the evidence be admissible? (yes) State v. Santiago (2010).

ANSWER:

Supreme Court held the search complied with District Court Rule of Criminal Procedure 5-211. The focus is when officers first breach the privacy of a household, not what happens afterwards. Service of a warrant occurs “once an officer crosses the threshold for the purpose of beginning the search or for securing the residence for a later search.”

Fax machine search warrants have been approved

- Rules of Criminal Procedure 5-211 states that “a warrant shall issue only on a sworn written statement of the facts showing probable cause for issuing the warrant,” and that the issuing court “**may** require the affiant to appear personally” for examination under oath.”
- The first requirement, a valid warrant **must** be supported by a sworn, written statement – an affidavit – is mandatory. But the second requirement is permissive; the court **may** require the physical presence of the affiant. In a case from Catron County, the Court of Appeals held the state’s facsimile warrant was proper. State v. Balenquah (2009).

Telephonic search warrants have not been approved

News item: Dogfighting Evidence Suppressed

A judge has ruled a search warrant invalid in the trial of El Paso brothers who face animal cruelty and dogfighting charges. The judge suppressed all evidence obtained with the search warrant.

The search warrant was challenged because it was approved via telephone, said Susan Riedel, chief deputy district attorney. She said there is no state law allowing that procedure. Albuquerque Journal, February 27, 2009.

ISSUES INVOLVED IN SERVING OR EXECUTING A WARRANT

It helpful to know the main differences between probable cause to search and probable cause to arrest:

Probable Cause to Search

A crime has been committed.
There is evidence of a crime.
The evidence can be found in a particular location.

Probable Cause to Arrest

A crime has been committed.
Defendant committed the crime.

- The third element of probable cause to search can create problems. Because

physical evidence may be moved or destroyed, the police officer must have probable cause to believe the evidence is currently in a particular place.

- Once a warrant is approved, it must be executed within **ten days**. Rules of Criminal Procedure for District Court, Rule 5-211.
- Although officers usually serve a warrant quickly, sometimes there is a delay. In narcotics cases, there may also be a desire to protect the identity of the confidential informant. The result may be information used for a warrant becoming “stale” even though served within ten days.

Staleness: Serving a warrant on a motel:

One way to challenge a search warrant affidavit, particularly in drug cases, is to raise the issue of staleness. Drugs may be present when a CI enters a motel room, for example, but will they be there when we serve the warrant? Evidence of ongoing, continuous criminal activity must be shown in the affidavit or it will fail.

A motel room - information in affidavit stale – evidence suppressed

The affidavit indicated that the defendant had been selling marijuana from a motel room within the previous 48 hours. Court noted the following: 48 hours had gone by, drugs are quickly sold, and drugs in a motel room, by its transient nature, might not be there. Most importantly, there was no evidence of on-going sales. Evidence suppressed. State v. Whitley (1999).

Another motel room - and the states loses again

Affidavit was insufficient to establish probable cause when a CI made a controlled buy of heroin from a motel room within 72 hours. There was no information concerning the amount of heroin involved in the sale and whether there was any additional heroin or illegal drugs in the room. In short, the affidavit did not show criminal activity of an ongoing, continuous nature. Evidence suppressed. State v. Lovato (1994).

Third time is a charm - the state wins one!

Hobbs PD prepared a search warrant. Affidavit said CI had been in the residence within the past 48 hours and saw a large amount of cocaine and also a man with a gun in front of his pants. The state won because the CI noted there was a “large” amount of cocaine (as opposed to a small amount that could be rapidly consumed or sold) and a man carrying a gun. This suggested the cocaine would still be there. State v. Rubio (2001).

Lesson learned:

Always address the issue of “staleness” in a search warrant affidavit.

- The serving or executing of a warrant must be done by a full-time salaried police officer. If you’re serving a warrant in another jurisdiction it’s advisable to contact the local authorities.

The legal challenges to a search warrant fall into two categories:

- 1) Entry, and
- 2) The search within the premises.

ENTRY

Knock and announce

- Officers who serve search warrants must comply with the “knock and announce” rule. This rule requires that officers announce their identity and purpose and be denied entry prior to making a forcible entry. There is no bright-line rule for how long to wait; only a review of a number of cases will give us an idea of how long to wait.
Is the following a proper entry?

FACTS

Clovis Police Department SWAT went to defendant’s residence at 0600 on a Saturday morning to serve a search warrant. Police had included the following information in the affidavit: that defendant had been convicted of weapon and drug charges in the past, possessed a large amount of weapons, and had threatened police officers.

An officer knocked on the front door and said, “Police officer, search warrant.” After waiting ten to fifteen seconds for a response, officers forced the door open and entered. Was this enough time? Did this comply with the knock and announce rule? State v. Attaway (1994).

Answer:

The time interval, while short, was held to be sufficient given the highly specific facts that defendant posed a menace to police officers executing the warrant. Supreme Court affirmed conviction.

FACTS:

It’s 0615 on a Saturday morning and Bernalillo County deputies are ready to execute a search warrant. Standing outside a motel room, they knock on the door and announce their presence. Ten seconds go by, no response. Out comes the battering ram. They enter and find a meth lab. Defendant is standing just inside the door. State v. Johnson (2006).

Answer:

Since every situation is different, courts are reluctant to provide a bright line rule to determine how long officers must wait after knocking and announcing before forcibly entering. The answer is to look at the totality of circumstances.

Here, we had a room no larger than twelve by twelve feet with a bed within three or four feet of the door. Given the small size of the motel room and Defendant’s non-response, Supreme Court held that ten seconds was a reasonable amount of time for officers to believe they were

being denied entry.

FACTS:

It's mid-afternoon in Lincoln County and a mobile home gets an unexpected visit from local police officers. Serving a search warrant, they knock, announce, and wait just three seconds before entering. Looking for drugs, and expecting to find two to four people inside, they were concerned that the occupants had firearms to include "fully automatic Mini-14's and sawed off shotguns." Both drugs and firearms were recovered. State v. Lopez (2005).

- Three seconds? Is that long enough? (yes)

Answer:

Three seconds doesn't seem like a long time but if you're an officer on one side of a door, and there is an armed drug dealer on the other side, it's a very long time. Previously, officers had to give a suspect time to get up and answer the door. Supreme Court adopted a new standard. Waiting will be measured, in cases like these, by how long it takes suspects to arm themselves. Conviction affirmed.

Lesson learned:

Some officers believe there is such a thing as a "no knock" search warrant. But as this case indicates, even in a high risk situation, the officers still must knock and announce their presence.

If there is any indication that serving a warrant may result in danger to officers, this **must** be noted in the affidavit. This will help justify a shorter waiting time.

FACTS:

In Luna County, New Mexico, agents executed a search warrant for a camping trailer (eight by twenty-one feet) on Defendant's property. The time was 0715 hours. A CI told them Defendant was a heavy meth dealer who kept a gun in his trailer or on his person.

They knocked and announced their presence for ten to twenty seconds. They heard movement within the trailer but could not hear movement towards the door or a verbal response. Forcible entry was made and officers found a working meth lab. Nearby was a handgun. State v. Hand (2008).

- Did officers wait a reasonable time to determine if consent to enter had been denied? (yes)

Answer:

Supreme Court noted the trailer was a small space and that defendant was not responsive in coming to the door. Possible use of a handgun was noted in the affidavit. Given these factors, ten to twenty seconds was a reasonable time for officers to infer they were being denied entry to enter. Conviction affirmed.

FACTS

Chavez County Sheriff's Department received information of heroin being sold at a residence where defendant lived. Three different confidential informants (CI's) warned that

evidence would be destroyed if occupants of the house knew police were coming. This information was included in the search warrant.

Officers arrived and children in the front yard began yelling “Cops!” “Cops!” and one child ran inside the house, warning the others. An officer followed and entered the house, without knocking or announcing his presence. He saw defendant drop a bag on the couch and rush for the back door. Heroin was found near where the defendant had been sitting.

New Mexico has a “knock and announce” rule for search warrants. Is this a good entry? State v. Ortega (1994).

Answer:

Supreme Court held that an officer can make an unannounced entry into a person’s residence if he or she has good reason to believe evidence will be destroyed (exigent circumstances).

Lesson learned:

Note that the exigent circumstances must arise when officers are at the scene.

FACTS:

In San Miguel County, officers arrested Defendant for drug trafficking. Armed with a search warrant, they went to his house at about 10:00 p.m. They knew only his seventy-nine-year old grandfather would be there. It was a big house. They knocked and announced, waited ten to twelve seconds, and forced entry. The grandfather, on the other side of the door, was injured. Drugs were found inside.

Officers said they followed a ten second rule in deciding how long to wait. Will the evidence (drugs) be admissible? (no) State v. Ulibarri (2010).

Answer:

Court of Appeals noted there is no such thing as a ten second rule. The waiting time is based upon a case by case basis. A number of factors need to be considered: the size of the house, the identity of the people likely to be there, concern for firearms or destruction of evidence, etc. Ten to twelve seconds might have been sufficient for a small house or trailer but not given the facts of this case. Evidence was suppressed.

FACTS:

This involves a bench warrant, not a search warrant, but the issues are similar. Armed with a bench warrant, Las Cruces police officers waited just outside Defendant’s apartment door. A male voice was heard inside. One officer was getting ready to knock when the Defendant opened the door. The officer said, “hey bro’, how ya doing?” Surprised, the Defendant exclaimed, “Oh s---!” and tried to shut the door. Although they announced their presence, they entered without knocking. Good entry? State v. Vargas (2008)

Answer:

There is an exception to knocking and announcing, similar to exigent circumstances, called the futility exception. Supreme Court applied that exception here. It would have been futile – meaningless – to knock and announce when Defendant had already opened the door and saw they were police officers. Conviction affirmed.

Use of a ruse to gain entry

FACTS

Search warrant for drugs in a mobile home in Albuquerque. Officers knew the porch near the door was too small to hold the entire team so they came up with a plan. The idea was to use a ruse to get the defendant to open the door. Two officers in work clothes would announce they were there to service the air conditioning. Remaining officers, dressed in full assault gear, would remain hidden in a nearby unmarked van until the door was opened.

The ruse worked perfectly; execution was flawless. Defendant was standing by the open door when remaining officers ran to the door, yelling “Police!” When defendant attempted to pull the door shut, the lead plainclothes officer put his foot in the doorway and remaining officers entered. Cocaine was found. State v. Reynaga (2000). Is this a good entry? (no)

Answer:

Evidence suppressed because of failure to comply with the knock-and-announce rule. To be constitutional, the State must show that at the time of executing the warrant, the police had reasonable suspicion, based upon particular circumstances, that exigent circumstances existed.

Lesson learned:

- Unless exigent circumstances develop when serving a warrant, the knock-and-announce rule must be complied with.
- How long to wait for a person to open a door will depend on the totality of circumstances.
- If the person is armed or dangerous, or had told others of their intention to destroy contraband, this needs to be noted in the search warrant.

THE SEARCH WITHIN THE PREMISES

FACTS

Entry has been gained and we’re now inside the residence. Defendant, a non-resident, was present when Albuquerque Police narcotics executed a search warrant. While sitting on a couch and handcuffed from behind, he was observed squirming and trying to get into his front pocket. Police searched the pocket, found cocaine, and arrested him. The subject had been detained for at least thirty minutes prior to his arrest. State v. Graves (1994). Good search?

Answer:

Court of Appeals held that the detention was illegal. “Mere presence” does not justify detention of a person, other than a resident, at a residence being searched.

It adopted a “presence plus” standard for a non-resident. Police must quickly determine if there is a reasonable basis to believe that a non-resident has a connection to the premises or to criminal activity to justify a detention. Example: close proximity to drugs out in the open.

FACTS

An undercover officer bought cocaine at a bar. The bar was well known for drugs and violence. Albuquerque police officers got a search warrant for the bar and three specifically named individuals. Officers entered the bar which was filled with customers. Officers, concerned for their safety, given the reputation of the bar for violence, detained the customers and did pat-downs. Good decision? The answer to this question follows:

News item: Bar Patrons Settle Police Raid Suits

A bar on Coors SW was raided about 11:30 p.m. Police detained the customers, did pat-downs, and had them lie on the floor for nearly an hour and a half. Most of the customers were having a beer after a city league basketball game. The customers got about \$6,000 each plus attorney fees. Albuquerque Journal, December 19, 1995.

Lesson learned:

Supreme Court of United States held an officer may not frisk patrons of a commercial establishment where officers are executing a search warrant unless the officers have individualized reasonable suspicion to believe that the person to be frisked is armed and poses a danger to the officers. Ybarra v. Illinois (1979).

Evidence collection and inventory

- As evidence is collected, note who gave it to you and where they found it. The next form that you will do, while at the residence, is called Return and Inventory.
- The inventory should be made in the presence of the person from whom the property is being taken, if they are present. If the person is not present then the inventory should be made in the presence of at least one other “credible” person - usually another officer.

WHAT OFFICERS NEED TO DO AFTER SERVING A SEARCH WARRANT

- A copy of the warrant, affidavit, and inventory is left at the residence.
- The warrant, affidavit and inventory should be filed promptly with the clerk’s office at the District Court. It should be filed even if nothing is seized or the warrant is never executed. Rules of Criminal Procedure for District Court, Rule 5-211.

- Order to seal Search Warrant
Need a court order signed by the Judge.
Reasons to seal the warrant should be noted in the order.
Will be used when there is danger to lives of witnesses or potential destruction of evidence.

CONCLUSION

A search warrant is one of the most important requirements of the Constitution. Unless we have an exception, we must get a search warrant. This class has discussed exceptions to a search warrant, how to establish probable cause in a search warrant, and issues involved in executing a search warrant.

