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Search and Seizure--Police Officers Executing Search Warrants Must Announce Their Authority and Purpose and Be Refused Admittance before Even a Technical Breaking Is Allowed

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SEARCH AND SEIZURE—POLICE OFFICERS EXECUTING SEARCH WARRANTS MUST ANNOUNCE THEIR AUTHORITY AND PURPOSE AND BE REFUSED ADMITTANCE BEFORE EVEN A TECHNICAL BREAKING IS ALLOWED. *Sears v. State*, 528 P.2d 732 (Okla. Crim. App. 1974).

In Oklahoma entries by officers for the purpose of executing search warrants are restricted by the provisions of section 1228 of title 22 of the Oklahoma statutes.[1] This statute reflects the common law requirement of announcement of identity and purpose and request for admission before breaking into a house to execute a search warrant.[2] The requirement of announcement is a specific limitation on the execution of warrants, in addition to the requirement that all searches must be executed in a reasonable manner.[3]

It is interesting to note, in view of all the attention focused on no-knock searches and unannounced entries by officers during the past few years, that prior to the Oklahoma Court of Criminal Appeals' recent decision in *Sears v. State*[4] the Oklahoma courts had not had occasion to focus directly on the extent of the announcement requirements imposed by the statute. Also, considering some of the unanswered questions raised by the broad language used in *Sears*, it seems probable that the court will soon find it necessary to delineate the limits of those requirements. For this reason the facts and holding in *Sears* are worthy of some attention.

The only issue considered in *Sears* was whether the entry by the officers into the defendant's apartment was in conformance with the provisions of section 1228. The court found that the entry by officers prior to announcing their identity and purpose and requesting admittance did not comply with the statute, that the search was therefore illegal, and that defendant's motion to suppress the evidence obtained by the search should have been sustained.[5]

1. "The officer may break open an outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, if, after notice of his authority and purpose he be refused admittance." OKLA. STAT. tit. 22, § 1228 (1971).

2. For an examination of the common law requirement of announcement, see Miller v. United States, 357 U.S. 301 (1958). Also see Blakey, *The Rule of Announcement and Unlawful Entry*, 112 U. PA. L. REV. 499 (1964).

3. U.S. CONST. amend. IV; OKLA. CONST. art. II, § 30.

4. 528 P.2d 732 (Okla. Crim. App. 1974).

5. *Id.*

The facts of the case as stated by the court indicated that two officers went to the defendant's front door with a search warrant. Through a large window they observed the defendant sitting at the kitchen table. One of the officers knocked on the door. The door latch was not in the groove and the pressure from the knock caused the door to open. The officer testified that he may have had to push the door open even further to enter. The officers walked in, identified themselves to the defendant and served him with a copy of the warrant. In the search which followed the officers found marijuana and other evidence which was used at the trial. The defendant was convicted of unlawful possession of marijuana with intent to distribute.

In reversing the conviction, the court relied heavily upon the United States Supreme Court's decision in *Sabbath v. United States.*[6] In fact, a large portion of the *Sears* opinion consists of a recitation of the facts and quotations from *Sabbath.*

Sabbath involved an entry by officers to arrest without a warrant. However, the United States Supreme Court held that the officers were bound by the same criteria which are embodied in section 3109 of title 18 of the United States Code,[7] the language of which is virtually identical to that of the Oklahoma statute. In *Sabbath,* narcotics agents had knocked on the defendant's door, waited a few seconds, and when no one responded, they opened the unlocked door and entered with their guns drawn. The Supreme Court, considering whether the opening of an unlocked door required prior notice of purpose and authority under section 3109, stated:

> Congress, codifying a tradition embedded in Anglo-American law, had declared in § 3109 the reverence of the law for the individual's right of privacy in his house.[8]
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> . . . .
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> Considering the purposes of § 3109, it would indeed be a "grudging application" to hold, as the Government urges, that the use of "force" is an indispensable element of the stat-

6. 391 U.S. 585 (1968).

7. Section 3109 applies to entries for the purpose of executing a warrant and provides: "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." In Oklahoma, the restrictions on entries for an arrest without a warrant are contained in OKLA. STAT. tit. 22, § 194 and are practically identical to the restriction on execution of search warrants contained in section 1228.

8. 391 U.S. at 589, *quoting from* Miller v. United States, 357 U.S. 301, 313 (1958).

> ute. To be sure, the statute uses the phrase "break open" and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law.[9]

The above language from *Sabbath* was quoted in the *Sears* opinion.[10]

The Oklahoma court was quite emphatic in holding that the announcement restrictions contained in section 1228 are to be strictly observed. The opinion does not, however, indicate the degree of emphasis placed by the court on the presence of a technical breaking in determining that the entry of the officers in *Sears* fell within the meaning of the statute. It is apparent that at the very least the restrictions apply to entries which constitute a breaking in common law burglary, such as "lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing a closed door of entrance to the house—even a closed screen door."[11] It is not clear whether the court intends to apply the restrictions to entries into houses in the absence of even a technical breaking.

Considering the importance the Oklahoma court placed on the statutory restrictions as a protection of the individual's right of privacy in his home, it seems reasonable to anticipate that the restrictions will be applied to all entries into dwellings by police officers which would amount to trespasses by private citizens. A similar interpretation of the federal statute was adopted by the United States Court of Appeals for the District of Columbia Circuit in dicta in *Keiningham v. United States*:[12]

> We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) is governed by something more than the fortuitous circumstance of an unlocked door, and that the word "break," as used in 18 U.S.C. § 3109 means "enter without permission." We think that a "peaceful" entry which does not violate the provisions of § 3109 must be a permissive one, and not merely one which does not result in breaking parts of the house.[13]

Another aspect of the *Sears* opinion which deserves attention is the reference to exigent circumstances which would justify noncom-

9. 391 U.S. at 589.
10. 528 P.2d at 734.
11. 528 P.2d at 734, *quoting from* Sabbath v. U.S., 391 U.S. at 590 n.5.
12. 287 F.2d 126 (D.C. Cir. 1960).
13 *Id.* at 130. *See also* Hair v. United States, 289 F.2d 894, 896, 897 (D.C. Cir. 1961) in which the court adopted the same interpretation of the federal statute.

pliance with the statute. The court specifically referred to circumstances in which "the officers are aware that the occupants of a house are armed and dangerous and strict compliance with the statute would expose the officers to great peril, injury, or death."[14]

Several exceptions to the requirement of announcement existed at common law and have been recognized by the United States Supreme Court as applying to any constitutional rules relating to announcement and entry.[15] These exceptions are (1) where the officer's authority and purpose is already known by the persons within, (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where officers are justified in believing that those within are engaged in an escape or the destruction of evidence.[16] The *Sabbath* opinion indicates that these exceptions might also apply to the provisions of the federal statute.[17]

Sears leaves open the question of whether all the exceptions will be recognized in applying the Oklahoma statute. Nevertheless, the court's opinion is helpful in anticipating the direction of future decisions. For example, the case of *Kelso v. State*,[18] which was cited in *Sears* as requiring strict compliance with the restrictions of section 1228, upheld a forcible entry by officers without prior announcement of identity or purpose. The entry which was attacked could have fallen within the common law exception where the occupants are aware of the identity and purpose of the officers or where they are attempting to destroy evidence; however, this was not discussed in *Sears*. Instead, *Kelso* was distinguished from *Sears* by virtue of the fact that in *Kelso* the "issue [of the validity of the search] was not preserved by timely motion and the petitioner's allegations were not sustained by the evidence." The court, in *Sears*, praised the Oklahoma legislature for refusing to implement the "once popular, and now discredited, 'no-knock' entrance procedure,"[19] and, in referring to an exigent circumstance which would justify an exception to the statute, they limited their example to a situation in which compliance would result in exposure of officers to great peril, injury, or death.

It appears, from an analysis of the approach taken by the court in the *Sears* opinion, that future interpretations of section 1228 will

14. 528 P.2d at 735.
15. Ker v. California, 374 U.S. 23 (1963).
16. *Id.* at 47 (opinion of Brennan, J.).
17. 391 U.S. at 591 n.8.
18. 260 P.2d 864 (Okla. Crim. App. 1953).
19. 528 P.2d at 735.