

Time for High Tech Reasoning When There is Low Tech Law

By: Lance M. Hester; Oct 2005

Cops carry cell phones. They also are adorned with two way radios. And many, if not most, of their patrol vehicles are equipped with laptop computers.

No surprise. After all, this is the 21st century. Even my 91-year-old grandmother carried a cell phone.

When it comes to warrantless searches, communication technology shouldn't be overlooked. What follows is a summary of the related law, and my take on what technology ought to do to the so-called "exigencies" that oftentimes allow law enforcement to enter dwellings without a warrant.

In State v. Rathbun, Division II pointed out the important presumptions while examining a warrantless search. State v. Rathbun, 124 Wn.App 372 (2004). The Rathbun court pointed out that "warrantless searches are per se unreasonable, and exceptions to the warrant requirement have been narrowly and jealously drawn." Id. The court premised this declaration on the Fourth Amendment to the US Constitution, and Article 1, Section 7 of the Washington State Constitution.

Several cases have concluded, of course, that "exigencies" may exist that are exceptions to the warrant requirement. In State v. Bessette, 105 Wn.App 793 (2001), Division III ruled against an officer who made a warrantless entry into the home of a juvenile whom he observed in possession of a bottle of beer and taking refuge in his home. The State cited "hot pursuit" in its argument against suppression. The court disagreed, and in so doing, outlined the law in this area as follows:

Our Supreme Court has articulated six factors to determine whether police entry into a home without a warrant is justified: (1) a grave offense, particularly a crime of violence; (2) a suspect who is reasonably believed to be armed; (3) trustworthy information that the suspect is guilty; (4) strong reason to believe that the suspect is on the premises; (5) likelihood of escape if the suspect is not swiftly apprehended; and (6) entry can be made peaceably. State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). These six elements supplement the five different exigent circumstances: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or the public; (4) mo-

bility of a vehicle; and (5) mobility or destruction of the evidence. Ramiriz, 49 Wn.App. at 819n.4,746 P.2d 344.

Id. at 798.

The whole idea of upholding a warrantless search as an approved exigency is premised on insufficient time for an officer to obtain a warrant. In Bessette the court recognized this as well. It noted:

The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant. See State v. Leuppa, 96 Wn.App. 324, 330, 980 P.2d 765 (1999) ("[e]xigent circumstances are present where it may be impractical to obtain a search warrant"), review denied, 139 Wn.2d 1018,994 P.2d849 (2000). They must then show reasons why it is impractical, or unsafe, to take the time to acquire a warrant or why a warrant would, other than for constitutional reasons, be unavailable.

Id.

Telephonic search warrants are allowed in Washington. See CrR 2.3. And, they are occasionally used by law enforcement. But despite existing technology and the fact that virtually every officer out on the pavement carries a cell phone, they are not used nearly as often as one would expect. See "Telephonic and Electronic Search Warrants: A Fine Tonic for an Ailing Fourth Amendment Part One," Champion, Sept./Oct 2005, John Henry Hingson, III.

If insufficient time is the premise for approving an exigency, defense attorneys need to explore the technology available to each officer involved in a warrantless search each and every time a warrantless search is challenged.

In most counties there is a judge who is designated each night as the judge who will take calls requesting telephone warrants. The defense's discovery plan should include obtaining official records as to whom the judge was and the number available at that time for contacting the judge. Assuming law enforcement made no efforts to contact the designated judge for a warrant, a focus on available communication technology (i.e. a cell phone or radio dispatcher) should be emphasized in situations in which even only a small amount of time existed for officers to act on a suspect. If the officers involved in the search failed to attempt the telephonic/oral warrant, then grounds exist for challenging the warrantless search.

End

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