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EMERGENCY SEARCHES AND EXIGENT CIRCUMSTANCES: SIMILAR BUT NOT THE SAME

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INTRODUCTION

Lawyers sometimes use emergency and exigency interchangeably but the two exceptions to the warrant requirement, while similar, involve different police functions and have different requirements that must be met to overcome the general presumption that warrantless entries into and searches (especially of one's dwelling place) are unreasonable (*Katz v United States*, 445 US 573 [1987], *People v McBride*, 14 NY3d 440 [2010], *People v Molnar*, p8 NY2d 328 [2002]).

As the Court of Appeals noted in *People v Sivertson* (29 NY3d 1006 [2017]), "a person's home is a place of safety, security and uninterrupted respite from the demands of the external world." Hence, warrantless entries are deemed presumptively unreasonable and subject only to certain well delineated exceptions (citing, inter alia, *People v McBride*, supra).

EMERGENCY EXCEPTION

While people commonly think of the police as investigators of criminal activity who enforce the law by arresting perpetrators and searching for and seizing incriminating evidence to secure convictions, they also perform certain public safety functions to protect the welfare and safeguard the wellbeing of citizens who may be in distress or under threat of physical harm that requires swift intervention by law enforcement.

As noted in *People v Ormanian*, (2016 NY Slip Op 26456 [Gloversville City Ct 11/9/16]), "courts have long recognized an emergency exception which permits the police to enter (premises) WITHOUT A WARRANT OR PROBABLE CAUSE to arrest in order to search for a person who MAY BE IN DANGER or whom they REASONABLY BELIEVE may be in DISTRESS (citing *People v Krom*, 61 NY2d 187 [1984]; "The Fourth Amendment does not require the police to delay in the course of an investigation when it would gravely endanger the lives of others").

The court further remarked that state and federal courts have sanctioned the right of police to enter and investigate in an emergency as "INHERENT IN THE VERY NATURE OF THEIR DUTIES AS PEACE OFFICERS" (citing *United States v Barone*, 330 F2d 543 [2nd Cir 1964]). Under emergency circumstances, the police need not, as noted above, have PROBABLE CAUSE to believe a crime has been committed nor must there be independent evidence of the emergency because the need for a prompt response creates not just the right but the duty to act in the interest of preserving life and safety (See *People v Calhoun*, 49 NY2d 398 [1980]).

In *People v Ormanian*, (supra), the court upheld the legal sufficiency of an information charging the defendant with Obstructing Governmental Administration, Resisting Arrest, Attempted Assault and Attempted Escape based on allegations that the police, responding to an anonymous report that the defendant's daughter had threatened suicide, were met with physical resistance (blocking the doorway, pushing and shoving) by the defendant at her home. (The defendant also lied about the daughter's whereabouts).

The court was also satisfied that the allegations were sufficient to establish that the police properly entered the dwelling to locate the reportedly suicidal daughter and make sure that she was alright. In the court's view, the police were acting under a "heightened sense of apprehension" that the daughter may be injured or worse, and under the circumstances, their duty to conduct an immediate investigation did not end at the front door.

Consequently, since they had REASONABLE GROUNDS to believe that there was an emergency at hand, that their immediate assistance was required, and there was some reasonable basis (approximating probable cause) to associate the emergency with the place to be searched, the police were justified in making a warrantless entry into the home (citing *People v Mitchell*, 39 NY2d 173 [1976]).

In *Mitchell*, the Court set forth a three-prong test for emergency searches as follows:

1. The police must have REASONABLE GROUNDS to believe there is an emergency and an IMMEDIATE NEED for their assistance for the PROTECTION OF LIFE OR PROPERTY.
2. The search must NOT BE PRIMARILY MOTIVATED by an INTENT TO MAKE AN ARREST OR SEARCH FOR EVIDENCE, and
3. There must some REASONABLE BASIS, (i.e., objective facts), approximating probable cause to ASSOCIATE THE EMERGENCY with the PLACE TO BE SEARCHED.

So, while the possibility of a criminal agency may always be in the back of an officer's mind when responding to an emergency call, in order to enter a dwelling to investigate, their PRIMARY MOTIVATION in doing so must be to rescue or otherwise render prompt assistance to someone whom they reasonably believe, based on available information, may be in danger or distress.

In *People v Mitchell* (supra), a police detective responded to a missing person call involving a hotel maid who reported to work at 9:00 a.m. and was last seen getting off the elevator on the sixth floor (where she was assigned to clean up vacated rooms). Her street clothes and partially eaten lunch were later located on the sixth floor, and a guest reported that the maid (whose bloody body was later found stuffed in the closet of the defendant's sixth-floor room) had not returned with fresh lined as she had promised. An earlier, less thorough search of all the rooms by patrol officers came up empty.

When the detective entered the defendant's room, he noticed apparent blood stains on the bedding. He then looked inside the closet and saw the victim's legs sticking out of a clothing bin. He also found a hatchet. After *Miranda* warnings, the defendant admitted to killing her. He moved to suppress the evidence as being illegally obtained without a warrant. He further claimed that his inculpatory statement was the fruit of the poisonous tree (citing *People v Martinez*, 37 NY2d 662 [1975]).

The trial court denied suppression in the entirety and the defendant was convicted of Murder 2nd degree. The Appellate Division affirmed.

The Court of Appeals followed suit, holding that the detective properly entered and searched the defendant's hotel room, not to make an arrest or to look for evidence of a crime (the defendant wasn't even a suspect and no one knew whether a crime had been committed), but to search for the maid who had vanished under suspicious circumstances and whose wellbeing was in serious question (citing, *inter alia*, *People v Gallmon*, 19 NY2d 389 [1967]).

As the Court observed, "the constitutional guarantees of privacy and sanctions against their transgression do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life" (citing *Warden v Hayden*, 387 US 294 [1967]).

The Court concluded, therefore, that the police, under these circumstances, did not abuse the LIMITED PRIVILEGE afforded by the emergency doctrine such that the search and seizure did not violate the Fourth Amendment's protection against unreasonable searches seizures.

The Court cautioned, however, that the privilege to search does NOT give the police carte blanche to rummage for evidence, and there must be a direct relationship between the emergency at hand and the place to be searched (citing *United States v Goldenstein*, 456 F2d 1006 [8th Cir. 1972]).

EXIGENT CIRCUMSTANCES

Absent an arrest warrant or exigent circumstances, police cannot enter a suspect's home to make a routine felony arrest (*Payton v New York*, 445 US 573 [1980]). While exigent circumstances can and often do involve emergencies (e.g., threats of serious harm to police or others), they commonly encompass situations where there is an imminent risk of disposal or destruction of evidence (e.g., flushing drugs, ditching a weapon) or escape out a back window. And, unlike the emergency exception, exigent circumstances presume that the police are acting in their law enforcement role and otherwise have probable cause to act.

In *People v McBride*, (14 NY3d 447 [2010]), the police went to the defendant's apartment, banged on the door (some ran up the fire escape with guns drawn) and demanded entry. Officers on the escape observed a man lying on the floor and heard footsteps running. (Three days earlier, the defendant, a parolee, and former restaurant employee, was identified from a photo array as having robbed that restaurant at gunpoint with two accomplices).

The defendant's girlfriend opened the door and appeared to be crying and hyperventilating. She was unresponsive to questioning whereupon the police, fearing a life-threatening situation, barreled in and apprehended the defendant.

After denial of his motion to suppress, the defendant was convicted of Attempted Robbery 2nd degree, and the Appellate Division affirmed. The defendant argued (unsuccessfully) to the Court of Appeals that there was no emergency, that any alleged exigency was created by several armed officers storming his dwelling (citing *People v Levan*, 62 NY2d 139 [1984]), and the photo array was unduly suggestive. (The defendant was the only person depicted in a hoodie similar to that described by a restaurant employee).

The Court held there was no dispute as to the existence of probable cause, and the trial court's conclusion as to exigent circumstances drew sufficient support from the record, in particular the nature

of the crime committed and the suspicious and potentially dangerous circumstances with which the police were confronted when they arrived at the premises.

The Court cited the following factors in evaluating whether exigent circumstances authorize the intrusion:

1. The gravity/violent nature of the offense.
2. Whether the suspect is believed to be armed.
3. A clear showing of PROBABLE CAUSE to believe the suspect committed the crime charged.
4. Strong reason to believe that the defendant was on the premises. (Defendant's parole officer provided his address).
5. A likelihood the suspect will escape if not apprehended.
6. The peaceful circumstances of the entry.

While the Court conceded that obtaining an arrest warrant would have been the better way to go, in the end, the factors supporting exigency were enough to carry the day for the People.

The dissenting judge, (Hon. Eugene F. Pigott Jr), argued that there was no evidence of urgency given that the police had three days to get an arrest warrant, and the exigency was of their own making. Hence, he would have reversed the defendant's conviction and remitted the case to the trial court for a hearing to determine whether the defendant's statements to police post *Miranda* were sufficiently attenuated from the unlawful entry into the defendant's dwelling.

Similarly, in *People v Sivertson*, (*supra*) the Court determined that there was sufficient record support for the trial court's determination, affirmed by the Fourth Department (129 AD3d 1467 [4th Dept 2015]) that BPD's warrantless entry into and apprehension of the defendant, a robbery suspect, in his apartment was supported by exigent circumstances. Hence, the matter was deemed beyond review.

In this case, the police, acting on information from a witness who reportedly observed a man fitting the description of a man who robbed a 711 store near the University at Buffalo (i.e., white male 50's, wearing a cap, scarf, gloves, and wielding a small knife) enter the rear apartment of a building where he had earlier been seen sitting on a stoop.

The police surrounded the place and some of them looked into a window where they observed the defendant lying in bed in what they described to be an apparent stupor. When they called out to him, he opened and then closed his eyes but otherwise did not respond. The police could also see gloves on a table.

The police forcibly entered the small apartment and seized the defendant along with a knit hat, gloves, a scarf and three knives. Some of the items not found in plain view were suppressed.

The dissenting judge (Hon Jenny Rivera) concluded that there was no exigency that justified the warrantless entry and seizure because the defendant presented no threat of violence (i.e., he laid there passively) and there was no chance of escape from a building that was completely surrounded.

In the dissenter's view, it was not enough that the police may have had probable cause since that alone did not create the urgency required to go in and apprehend the defendant in his dwelling without court approval. She stressed that the exigency exception must be **NARROWLY CONSTRUED** so that the police conduct is strictly limited by the necessities of the circumstances in which it occurs (citing *People v Knapp*, 52 NY2d 689 [1981]).

As the dissenter observed, "the People have a heavy burden to show an urgent need that might justify warrantless searches or arrests... and demonstrate that the exigencies of the situation made the course imperative" (citing *Harris v O'Hare*, 70 F3d 228 [2d Cir. 2014] and *Matter of Kwok T*, 43 NY2d 213 [1977]).

Exigent circumstances, the dissenter continued, are those that would cause a reasonable person to believe that entry was **NECESSARY TO PREVENT PHYSICAL HARM TO THE OFFICERS OR OTHERS, THE DESTRUCTION OF EVIDENCE, THE SUSPECT'S ESCAPE** or some other consequence that impeded legitimate law enforcement efforts (citing *Kentucky v King*, 563 US 452 [2011]). None of these factors existed here.

Unlike *McBride*, supra where the police observed a man on the apartment floor, heard frantic footsteps and encountered an unresponsive woman in distress, there were no facts, in the dissenter's view, that created an urgent need for immediate action that made it impossible or impractical to obtain a warrant.

In contrast, see *People v Hill*, (70 AD3d 1487 [4th Dept 2006]) where the warrantless entry was justified after the police encountered the victim bleeding from the head and there was reason to believe that the defendant was inside his apartment with a claw hammer.

FINAL THOUGHT

When addressing matters of warrantless entry into dwellings, counsel should be mindful of the Fourth Amendment's strong preference for warrants due to the heightened expectation of privacy in one's home. Counsel should also make sure that the People don't argue emergency when they mean exigency (or vice versa), and that the exigency meets the *McBride* factors and was not manufactured by police overreaction to a situation that could and should have been handled with a warrant.