

PROSECUTORIAL ISSUES PROGRAM

1. Discussion of Problem Property Issues and Administrative Search Warrants
Barbara Birkicht, City Counselor City of St. Louis-Problem Properties Unit
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2. Up-Date on Case Law
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3. General Discussion of Any Issues

MUNICIPAL SEARCH WARRANTS

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One of the largest problems facing municipalities is the issues of enforcing building, housing, and zoning issues. These can affect public safety and property values. As these are sometimes readily apparent to residents and visitors to the city, it is imperative that the city has some means of remedying the situation. If the violation is not fully apparent without entering upon the property, one cannot enter upon the property unless certain exceptions to the warrant requirements are satisfied.

If the owner or occupant of the property gives consent to inspect the property, the city may do so without any problem. However, if that consent is not given for any reason, the city must have some other solution to remedy the problem and investigate the situation. One such way is for the municipal judge to issue an administrative search warrant allowing the city officials to enter upon the property and to do an inspection. This article will trace the history and the procedures used to insure that the entry upon a person's property is done legally where the consent has not been granted.

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. Prior to 1967, it was held that ordinances authorizing the inspection and entry upon property for the purposes of enforcing code violations were legal. In 1960, the Missouri Supreme Court in St. Louis v. Evans, 337 S.W. 948, 953 (Mo. 1960), took the traditional view that inspections enforcing housing health codes were administrative and not within the purview of the Fourth Amendment. In Frank v. Maryland, 79 S. Ct. 804, 359 U.S. 523, the United States Supreme Court held that administrative searches under housing and health codes without warrant were valid. These were civil in nature and the primary purpose of this type of inspection was to correct defects and not seek evidence for a criminal prosecution.

However, in 1967, the United States Supreme Court reversed the state of the law. The two cases were Camera v. Municipal Court, and See v. City of Seattle, 87 S.Ct. 1727, 387 U.S. 523 (1967). In the Camera case, a housing inspector in San Francisco in making a routine annual inspection was informed by an apartment house manager that Camera was using a ground floor rental unit as a residence. The property was restricted for commercial use. Camera refused to allow an inspection unless a search warrant was presented. A total of three requests were made and refused. Camera was then arrested and charged with the offense of refusing to allow an inspection authorized by code. The See case was similar except that commercial premises were being inspected, not a living unit. The fire department tried to inspect the warehouse for fire hazards.

The Supreme Court held that the administrative searches involved were significant intrusions upon the interests protected by the Fourth Amendment, thereby reversing Frank v. Maryland. The decisions found that an inspection is unreasonable and impermissible under the Fourth Amendment

unless it is conducted with the owner's or occupant's consent, in an emergency situation or pursuant to a judicially authorized search warrant. The court stated that it had to pass the test of probable cause. The Court specifically stated that the probable cause for purposes of code inspections need not meet the normal criminal standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. The warrant should normally be sought only after entry is refused or cannot be obtained.

There is currently no rule or statutory authority for the issuance of warrants for health, housing or similar code type inspections. The Missouri Supreme Court in Frech v. City of Columbia, 693 SW2d 813 (Mo. banc 1983), solved the problem of the legality of administrative search warrants issued by constitutional charter cities. The city adopted pursuant to its powers under Mo. Const. Art. VI, Section 19(a) an ordinance which authorized the municipal judge to issue search warrants for administrative searches. The Supreme Court upheld the ordinance, holding that it did not conflict with the Supreme Court's authority to promulgate rules of practice and procedure of Missouri's courts or Chapter 542 RSMo governing the issuance of search warrants in criminal cases.

In regard to statutory cities, they have implied and incidental power to establish a framework for issuing search warrants, and that power may even be indispensable to declared municipal objectives. Missouri courts follow Dillon's Rule when construing the powers of municipalities. Statutory cities are creatures of the state. They possess only those powers that are (1) expressly granted by statute or (2) necessarily or fairly implied in or incidental to express grants, or (3) essential, i.e., indispensable to declared objects of the municipality. As there is no express statutory authority for third or fourth class issues the administrative search warrant. The ordinance should specify the object and necessity of the ordinance so that it might pass muster of the above exceptions. The following is an example of a municipal ordinance authorizing Search Warrants. It is the ordinance from the City of Manchester.

SECTION 130.140 SEARCH WARRANTS

- A. The Municipal Judge of the City shall have the authority is issue search warrants for searches or inspections to determine the existence of violations of any ordinance or provision of the Code of Ordinances of the City of Manchester relating to the various zoning classification ordinances of the City and ordinances establishing minimum building standards in the City which violation would be punishable by fine or imprisonment or both.
- B. Warrants and searches or inspections made pursuant to a search warrant issued under Subsection (A) above shall conform to and be governed by the following provisions:
 1. Any Police Officer, City Attorney
 2. The application shall:
 - a. Be in writing;
 - b. State the time and date of the making of the application;
 - c. Identify the property or places to be searched in sufficient detail and particularity that the officer executing the warrant can readily ascertain it;

- d. State sufficient facts to show probable cause for the issuance of a search warrant to search for violations of any ordinance or provision of the Code of Ordinances of the City specified in the application;
 - e. Be verified by oath or affirmation of the applicant; and
 - f. Be filed with the Municipal Court of the City.
3. The application shall be supplemented by written affidavit(s) verified by oath or affirmation. Such affidavit(s) shall be considered in determining whether there is probable cause for the issuance of a search warrant and in filling out any deficiencies in the description of the property or places to be searched. Oral testimony shall not be considered.
4. The Municipal Judges shall hold a non-adversarial hearing to determine whether sufficient facts have been stated to justify the issuance of a search warrant. If it appears from the application and any supporting affidavit(s) that there is probable cause to inspect or search for violations of any specified provision of the ordinances or provision of the Code of Ordinances of the City, a search warrant shall immediately be issued by the Municipal Judge to search for such violations. The warrant shall be issued in the form of an original and two (2) copies.
5. The application and any supporting affidavit(s) and a copy of the warrant shall be retained in the permanent records of the Court.
6. The search warrant shall:
 - a. Be in writing and in the name of the issuing authority;
 - b. Be directed to any City Police Officer;
 - c. State the time and date the warrant is issued;
 - d. Identify the property or places to be searched in sufficient detail and particularity that the officer executing the warrant can readily ascertain it;
 - e. Command that the described property or places be searched and that any photographs of violations found thereof or therein be brought, within ten (10) days after filing of the application, to the Municipal Judge to be dealt with according to law; and
 - f. Be signed and dated by the Municipal Judge with his/her title of the office indicated.
7. A search warrant issued under this Section may only be executed by a Police Officer of the City. The warrant shall be executed by conducting the search command.
8. A search warrant shall be executed as soon as practicable and shall expire if it is not executed and the return made within ten (10) days after the date of the making of the application for same. Execution shall include delivery of a copy of such warrant to the person receiving same.
9. After execution of the search warrant, the warrant, with a return thereon signed by the officer making the search, shall be delivered to the Municipal Judge. The return shall show the date and manner of execution and the name of the possessor and of the owner of the property or places searched, when he/she is not the same person, if known.
10. A search warrant shall be deemed invalid:
 - a. If it was not signed by a Municipal Judge of the City;
 - b. If it was issued without a written application having been filed and verified;
 - c. If it was issued without probable cause;

- d. If it was not issued with respect to property or places within the jurisdiction of the Chapter on which the violation was based;
- e. If it does not describe the property or places to be searched with sufficient certainty;
- f. If it was not executed within ten (10) days after the date upon which the application thereof was made.

It is imperative that the ordinance be followed exactly in the preparation, execution and return of the search warrant. If that does not happen, the warrant through a Motion to Suppress Evidence will have the results suppressed and quashed. The above ordinance is patterned after Chapter 542 of the Revised Statutes.

In my over twenty-eight years on the bench, I have issued a total of two search warrants. Both of them occurred last year. It is obviously a rare occurrence and should only be utilized if there is sufficient information to support a finding of probable cause. If your prosecutor or city attorney has had little experience in drafting the information for the affidavit and application for the search warrant, I would suggest that you have them review it with a detective or other experienced police officer who has gone through the search warrant application process previously. The requirements for making and executing a valid search warrant are exacting and unforgiving. As you are dealing with Fourth Amendment rights, make sure that all requirements are followed precisely.

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State v. Norfolk, SC92252 (Mo. 2011). The Missouri Supreme Court held in this case that a police officer had probable cause to stop and search a man she suspected of possessing a gun because of the way he hitched up his pants. The Missouri Court of Appeals originally held that the search and seizure was illegal but the admission of the evidence was harmless because the defendant admitted under cross-examination that he had the gun and drugs in question. In a unanimous opinion, the Court looked to the suppression hearing and trial testimony. According to the police officer's testimony, police were heavily patrolling a certain neighborhood in North St. Louis due to a spate of armed robberies in the area. The officer testified that she sees a black male standing on the corner during which time, they made eye contact. The individual adjusted his pants in a manner which the officer believed would conceal a weapon. The Supreme Court indicated that under Terry v. Ohio, the officer had probable cause to stop and search Norfolk.

State v. Jones, SD31291 (Mo.App.S.D. 2012). The Court of Appeals reviewed the question of when Miranda warnings were required. A law enforcement officer may warn an individual of the individual's rights under Miranda at any time, but the officer has no legal duty to warn the individual of those rights until the individual is "in custody" even when the officer's investigation has focused on the individual and the officer would like to question the individual. The determination of whether an individual is in custody is based on "an examination of the totality of the circumstances."

State v. Kerns, 389 S.W.3d 244 (Mo.App.S.D. 2012). This case summarizes in great detail the present status of the law regarding constructive possession.

State v. Jackson, SC92532 (Mo. Banc 2012). The Supreme Court in this case upheld the use of cash-only bail. The Court held that judges can require some criminal defendants to post the full amount of their bail, rather than using a bail bonding company.

State v. Aguilar & Bruce, 385 S.W.3d 509 (Mo.App.SD 2012). Bond forfeiture procedures require giving surety notice and opportunity to show why judgment should not be entered against him.

State v. Foster, SD32181 (Mo.App.SD 32181 2013). This case examines when an officer may enter a home to investigate a suspected DWI without a warrant or consent.

Phelps-Roper v. City of Manchester, No. 10-3197 (8th Cir. 2012). This case upheld the ordinance banning funeral protestors. It held that the ordinance did not violate the First Amendment.

Florida v. Jardines, 1332 S.Ct. 995 (2013). Trained police dogs investigating a home and its immediate surroundings are part of a search within the meaning of the Fourth Amendment.

Shollmeyer v. State of Missouri, ED98614 (Mo.App.ED 2013). This case examines when a defendant may be eligible to receive an expungement under Chapter 610.

State v. McNeely, No. 11-1425 (S.Ct. 2013). This case was appealed by the State of Missouri from the Missouri Supreme Court which indicated that a warrantless blood draw violated a person's Fourth Amendment Rights. This case involved a routine DWI investigation where no factors other than the natural dissipation of blood alcohol suggested there was an emergency. The nonconsensual warrantless test violated defendant's right to be free from unreasonable searches of his person.

Discussion of Padilla v. Kentucky, 130 S.Ct. 1473 (2010). Revision of plea forms and rights that must be given to defendants.

State v. Reed. SD32465 (Mo.AppSD 2013). Metabolism of alcohol does not alone, constitute an exception to Fourth Amendment's warrant requirements for searches and seizures. Other facts found by circuit court show no exigency existed.

State v. Gittemeier, ED98399 (Mo.AppED 5/14/13). All terrain vehicle is a motor vehicle. Privately maintained road is a public highway.

City of Columbia v. Henderson, WD75559 (Mo.AppWD 5/21/13) Defendant was charged with two counts of the dangerous exotic animal ordinance, by having two alligators. He alleged that the ordinance was unconstitutionally vague and overbroad. The Circuit Court, on de novo, dismissed the case as alligators were not within the definition of exotic animals. This case involves ordinance interpretation.

Morgan v. City of St. Louis, ED98263 (Mo.App.ED 6/11/13). Red light camera tickets revisited.