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The Exigent Circumstances Exception To the Warrant Requirement

by H. Patrick Furman

The Fourth Amendment to the U.S. Constitution guarantees the right of the people to be free from unreasonable searches and seizures. Colorado Constitution Article II, § 7 makes the same guarantee in virtually identical language. Searches conducted without warrants are "per se unreasonable under the Fourth Amendment—subject only to few specifically established and well delineated exceptions."[1] One of these exceptions is the exigent circumstances exception,[2] which this article discusses.

General Principles and Procedures

A defendant, as the moving party in a suppression hearing, has the burden of proof. However, because a warrantless search and seizure is presumptively illegal, the defendant can satisfy that burden merely by establishing that the police did not have a warrant.[3] The prosecution then has the burden of establishing an exception to the warrant requirement.[4] This general rule applies with full force at hearings in which it is argued that the exigent circumstances exception applies.[5]

Proof that an exigent circumstance exists requires, first and foremost, proof that probable cause exists. An exigent circumstance is not a substitute for probable cause. It is merely an exception to the warrant requirement in a situation where probable cause already exists. The prosecution bears the burden of establishing probable cause, just as it bears the burden of establishing the exigent circumstance itself.[6]

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As with other exceptions to the warrant requirement, the exigent circumstances exception must be narrowly drawn. If doubt exists about whether the decision to search was reasonable, "such doubt must be resolved in favor of the defendant whose property was searched."[7]

The exigent circumstances exception is broken down into three main categories:

1) the *bona fide* pursuit of a fleeing suspect;
2) situations that create a risk of the immediate destruction of evidence; and
3) colorable claims of an emergency threatening the life of another.[8]

Proof that a particular set of facts falls into any of these categories suffices to meet the requirements of the exigent circumstances exception. However, it is not unusual for a particular set of facts to fall into more than one category. For example, a suspect who flees with a hostage may create a situation that falls into both the *bona fide* pursuit and the life-threatening emergency categories. The following sections discuss the three categories in detail.

Hot Pursuit

The *bona fide* pursuit of a fleeing suspect is recognized by both the U.S. and Colorado Supreme Courts as an exigent circumstance that may justify a warrantless search.[9] In *Warden v. Hayden*,[10] witnesses followed a robbery suspect from the scene of the robbery to a home. The police arrived minutes later. The U.S. Supreme Court was satisfied that the exigencies of the situation justified an entry into and a thorough search of the home. The search included such actions as looking in the washing machine and the tank of a recently flushed toilet, which were approved "as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before."[11]

As suggested above, the facts of this case fit into more than one category of exigent circumstances. The Court was concerned with both officer safety and the possibility of further flight.

An issue that may arise in the context of a claim that the "hot pursuit" exception applies to a warrantless search is whether the pursuit was *bona fide*. In *People v. Santisteven*, the Colorado Court of Appeals rejected a claim of hot pursuit when

> the police had information that the defendant was in his own home, approximately two hours after the stab-

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bing. They had no evidence that he was leaving and, indeed, the house was surrounded by six uniformed officers to prevent that eventuality.[12]

Conversely, in a similar situation, the Colorado Supreme Court found that the hot pursuit exception extended to a suspect who was surrounded hours after his offense. In *People v. Drake*,[13] the police had probable cause to believe the defendant was involved in a murder earlier in the day and that he was planning to leave town. They traced the defendant to a motel room and surrounded it. The court found that the police reasonably feared that the defendant might attempt to escape once it became dark. This danger, coupled with the seriousness of the offense and the danger that the defendant might destroy evidence in the motel room, satisfied the court that exigent circumstances existed to justify the warrantless arrest of the defendant.

It is important to note that, in *Drake*, more than one exigency existed. Both the risk of flight and the danger of destruction of evidence were present and were used to justify the warrantless arrest of the defendant and the search of his motel room.

Destruction of Evidence

A danger of the loss or destruction of evidence arises most frequently in drug cases because drugs often are easily destroyed. The principles to be applied when the prosecution seeks the application of this exception are reasonably clear.

The burden of proving the applicability of the loss or destruction exception rests on the prosecution. In *People v. Garcia*, the Colorado Supreme Court stated:

> The threat of immediate destruction or removel of evidence constitutes an exigent circumstance if the prosecution can demonstrate that the police had an articulable basis to justify a reasonable belief that evidence was about to be removed or destroyed.[14]

A reasonable belief that evidence is about to be removed or destroyed has been proved to the satisfaction of the Colorado Supreme Court by evidence that the suspects actually have observed police surveillance.[15] Evidence that the suspects may be alerted to the presence of the police by the fact that one of their confederates has been arrested also may serve to establish a reasonable fear of destruction of evidence.[16] Evidence of the arrest of a person leaving a house that is under surveillance is not an exigent circumstance in the absence of some evidence that those in the house would be alarmed by that person's absence.[17]

The danger of loss or destruction must be more than speculative. As the Colorado Supreme Court stated in *People v. Turner*,

> [t]o justify a warrantless entry and seizure on the basis of destruction of evidence, the perceived danger must be real and immediate.[18]

The simple fact that the evidence involved can be destroyed easily (like most drugs) does not, by itself, amount to proof that a real danger of loss or destruction exists.[19]

> "A danger of the loss or destruction of evidence arises most frequently in drug cases, because drugs often are easily destroyed."

The question of whether this exigent circumstance exists must be evaluated in light of the principle that the police should obtain a warrant whenever feasible. According to the *Turner* court:

> The question is whether there is a real or substantial likelihood that the contraband or known evidence on the premises might be removed or destroyed before a warrant could be obtained.[20]

The loss or destruction exception also arises in situations where the evidence itself is transitory. The alcohol in a driver's blood is the most common example of this type of evidence. The Colorado Supreme Court has held that evidence of the amount of alcohol in a driver's blood can be admitted in a vehicular homicide prosecution, even when it has been obtained over the driver's objection. It is admissible as long as:

1) there is probable cause to arrest the driver on an alcohol-related traffic offense;
2) there is a clear indication that a blood test will provide useful evidence;
3) there are exigent circumstances that make it impractical to obtain a warrant; and
4) the test is reasonable and is conducted in a reasonable manner.[21]

The court held that the necessary exigent circumstance was provided by the fact that alcohol in the blood begins to diminish shortly after the drinking stops, regardless of what the police or the suspect does.[22]

Emergency Exception

In the 1983 case of *People v. Clements*, the Colorado Supreme Court stated that "a bona fide public emergency is a variant of the exigent circumstances exception to the warrant requirement."[23] The court, having previously recognized the existence of the emergency doctrine, first approved the application of the doctrine in a 1977 case, *People v. Amato*.[24]

In *Amato*, police, fire and ambulance personnel were dispatched on an emergency call concerning a possible drug overdose. They were directed to the bathroom of an apartment, where they found the defendant suffering an apparent drug overdose. Drug paraphernalia were observed in plain view on a toilet in the bathroom by a fireman, who pointed them out to a policeman. More paraphernalia were found on the defendant's person during a cursory search by the police at the hospital. The trial court found that no emergency justified these warrantless searches and suppressed the items. The Colorado Supreme Court reversed.

The court did not engage in a detailed analysis of the emergency exception. Rather, the court simply noted that the police and fire personnel were at the apartment in response to an emergency call with the primary purpose of rendering assistance. They were not searching for evidence. They found it in plain view in the bathroom. The court found that these acts fit within even the "strictest possible formulation of the emergency rule."[25]

In *People v. Martin*,[26] the Court of Appeals ruled on an emergency situation that occurred when the defendant was injured in a fall from a balcony at the home where she worked. The police and ambulance were called. As the defendant was being transported to the hospital, she expressed concern about a coat she had left in the home. The police went to get the coat and noticed some cash, which belonged to the defendant, lying on a counter. They decided to put the money in her coat. Before putting it in the coat pocket, a policeman looked in the pocket, allegedly to make sure there were no sharp objects in the pocket that might hurt him. Inside the pocket, he

saw a bindle. The bindle was found to contain cocaine.

The trial court denied the motion to suppress, holding that the search of the coat pocket fell within the emergency exception. The Court of Appeals affirmed, rejecting the argument that any emergency ended once the defendant was in the ambulance on the way to the hospital. The court held that emergency follow-up procedures fall within the scope of the emergency and that the decision to put the money in the coat pocket was not unreasonable. The court further found that, in light of the police officer's training and experience, his decisions to check the pocket first and to seize and search the bindle were not unreasonable.

The Colorado Supreme Court recently noted some limits on the emergency doctrine. In *People v. Wright*,[27] the defendant was in an automobile accident. Paramedics gave her purse to a police officer, who brought it to the hospital where the paramedics had taken the defendant. The defendant was coherent and under the care of hospital personnel when the officer decided to look in her purse for evidence of identification so that he could complete his reports. He found drugs and drug paraphernalia.

The trial court suppressed this evidence, and the Supreme Court affirmed, rejecting the argument that this search was justified under the medical emergency exception to the warrant requirement. The court found that there was no medical emergency because the defendant already was receiving appropriate treatment, and the officer was not looking for information to help in the treatment.

Another type of emergency situation that falls within the exigent circumstances exception involves general threats to public safety. In *People v. Higbee*,[28] the Colorado Supreme Court reversed a trial court order suppressing physical evidence seized during a search of the defendant's apartment. The search was based on the statement of a police informant—who had purchased a controlled drug from the defendant—that the defendant had what appeared to be dynamite rigged to a switch in his car. The informant stated that the defendant bragged about how he could explode the dynamite either with the switch or by a timing device. The police later observed the defendant carrying items from his car into his apartment. They arrested him and searched his car.

During the car search, the police found the switch described by the informant, but they did not find any dynamite. The police cleared the area, called the bomb squad and searched the defendant's apartment. The search revealed narcotics, not explosives. Based on this and other information, the police obtained a warrant to search the apartment. The trial court found no emergency and suppressed the use of the evidence obtained in the search. However, the Colorado Supreme Court reversed the order.

The court was satisfied that there was probable cause to believe an explosive device was located in the defendant's apartment and that the possible presence of the device gave rise to exigent circumstances that justified the warrantless search. The court notes that the trial court should review the totality of the circumstances, including the time necessary to obtain a warrant, the character of the investigation and the risk posed by delay. The dynamite had great explosive force; a number of people already had been evacuated from the area (an apartment complex); there was the danger of an explosion delayed by the timing device about which the defendant had bragged; and a warrant might take two to three hours to obtain. Based on all these factors, the Supreme Court stated, "We believe that an emergency situation justifying the warrantless entry was adequately established under the standards articulated in *Malczewski*."[29]

People v. Malczewski had involved the safety of a baby in an apartment.[30] A police officer on routine patrol was told by the defendant's wife that the defendant had the couple's baby in the family apartment. She was concerned about the safety of the baby because the defendant had been drinking. The officer went to the apartment and knocked on the door. The defendant came to the door, but did not open it. As the parties spoke through a window, the officer could hear a baby crying in the background. After a while, the defendant brought the baby to the door. Eventually, the defendant began fighting with the officer while still holding the baby. When a second officer arrived, the defendant was subdued.

In *Malczewski*, the Colorado Supreme Court held that the emergency exception justified the warrantless entry into the defendant's apartment. The court described the emergency exception in

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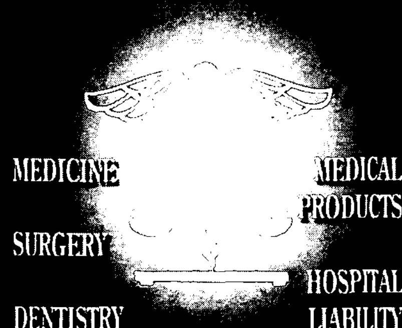

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terms somewhat broader than it used in other cases:

> The emergency variant of the exigent circumstances exception requires a showing of an immediate crisis inside the home and the probability that police assistance will be helpful in alleviating that crisis.[31]

The court also reiterated that the trial court should examine the totality of the circumstances as they appeared to the police officer at the time of the warrantless entry.

A public emergency also was found to exist in *Clements*.[32] The emergency arose when a police officer smelled ether in the trunk of a car in an apartment complex parking lot. Expert testimony established that ether, when allowed to stand, is unstable, spontaneously combustible and highly explosive. The police searched the car under the supervision of hazardous materials experts and found, in addition to the ether, controlled substances and other incriminating evidence.

The trial court found that there was a colorable claim of emergency but also found that the police had "used the potential emergency as a pretext for entering the trunk." The court further found that the police could have alleviated the emergency in a less intrusive manner.[33] Based on this finding, the trial court concluded that the discovery of the drugs in the trunk was not inadvertent. Thus, the court found that the discovery was not covered by the plain-view exception. The trial court suppressed the evidence seized from the trunk.

The Supreme Court reversed the suppression order, holding that the trial court finding that an emergency existed was well founded and that the police actions to neutralize the danger were reasonable and narrowly tailored. The court specifically held that the entry into the trunk was reasonable and the resulting discovery and seizure of the drugs was constitutionally permissible. The mere fact that the police suspected there was criminal activity afoot did not turn their actions into a pretext for an unconstitutional criminal investigation.

Conclusion

The exigent circumstances exception to the warrant requirements is a flexible exception and has been applied in a variety of situations. However, practitioners should remember that this exception, like any other exception to the warrant requirement, should be narrowly tailored. The state and federal constitutions, and the opinions interpreting those constitutions, express unambiguous support for the principle that warrants should be obtained whenever feasible. Exigent circumstances may justify violating this principle, but claims of such exigencies always should be examined with care.

NOTES

1. *Katz v. United States*, 389 U.S. 347, 357 (1967); *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

2. Other exceptions currently recognized could arguably be said to include abandonment, *People in the Interest of D.E.J.*, 686 P.2d 794 (Colo. 1984); consent, *People v. Lowe*, 616 P.2d 118 (Colo. 1980); drug screens in connection with "sensitive" jobs, *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989); good faith mistake, *Illinois v. Krull*, 480 U.S. 340 (1987); searches incident to arrest, *Maryland v. Buie*, 110 S.Ct. 1093 (1990); inventory searches, *People v. Inman*, 765 P.2d 577 (Colo. 1988); plain view discovery, *Horton v. California*, 110 S.Ct. 2301 (1990); and roadblocks, *People v. Rister*, 803 P.2d 483 (Colo. 1990). Additionally, the probable cause and warrant requirements are significantly modified in cases involving schoolchildren, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); probationers, *Griffin v. Wisconsin*, 483 U.S. 868 (1987); automobiles, *California v. Carney*, 471 U.S. 386 (1985), *People v. Cagle*, 688 P.2d 718 (Colo. 1984); and bank records, *United States v. Miller*, 425 U.S. 435 (1976), *People v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980).

3. *People v. Jansen*, 713 P.2d 907 (Colo. 1986).

4. *People v. Amato*, 562 P.2d 422, 423 (Colo. 1977).

5. *Jansen*, *supra*, note 3; *McCall v. People*, 623 P.2d 397 (Colo. 1981).

6. *Jansen*, *supra*, note 3.

7. *Id.* at 911-12; *citing*, *Robinson v. State*, 388 So.2d 286 (Fla.App. 1980).

8. *People v. Miller*, 773 P.2d 1053 (Colo. 1989); *McCall*, *supra*, note 5.

9. *Warden v. Hayden*, 387 U.S. 294 (1967); *Miller*, *supra*, note 8.

10. *Warden*, *supra*, note 9.

11. *Id.* at 299.

12. 693 P.2d 1008, 1012 (Colo.App. 1984).

13. 785 P.2d 1257 (Colo. 1990).

14. *Garcia*, *supra*, note 1 at 581.

15. *People v. Gomez*, 632 P.2d 538 (Colo. 1981).

16. *People v. Bustam*, 641 P.2d 968 (Colo. 1982).

17. *People v. Turner*, 660 P.2d 1284 (Colo. 1983).

18. *Id.* at 1288.

19. *Id.*; *Vale v. Louisiana*, 399 U.S. 30 (1970).

20. *Turner*, *supra*, note 17 at 1288.

21. *People v. Sutherland*, 683 P.2d 1192 (Colo. 1984).

22. *Schmerber v. California*, 384 U.S. 757 (1966).

23. *People v. Clements*, 661 P.2d 267 (Colo. 1983).

24. *Supra*, note 4.

25. *Id.* at 424.

26. 19 Colo.Law. 2488 (Dec. 1990) (App.No. 88CA1130, *annc'd* 10/11/90).

27. 20 Colo.Law. 801 (April 1991) (S.Ct.No. 90SA403, *annc'd* 2/11/91).

28. 802 P.2d 1085 (Colo. 1990).

29. *Id.* at 1091.

30. 744 P.2d 62 (Colo. 1987).

31. *Id.* at 66.

32. *Supra*, note 23.

33. *Id.* at 270.

Former CBA Employee Wins National Award

Linda Kennerly, practice development administrator for Rothgerber, Appel, Powers & Johnson and former employee in the CBA communications department, has won a first place award in a national communications contest for her work on the CBA's Colorado Pledge project. She will receive the award from the National Federation of Press Women ("NFPW") in the category of "Information to the Media: Media Kit" at the NFPW's annual convention in Orlando, Florida.

The award is for the materials written, compiled and distributed to news reporters at the Colorado Pledge project news conference in October, which was hosted by CBA President Jerry Conover. The announcement received national publicity, with broadcast coverage on the *NBC Nightly News*, CNN and local channels 2, 4, 7 and 9. Radio coverage included all stations on the CNN Business Network and local stations, with a highlight on Paul Harvey's radio program. The story was carried by newspapers across the U.S., including *The Wall Street Journal*.