United States v. Banks
(December 2, 2003) 540 US __

ISSUE

Did officers violate the knock-notice rule when they entered Banks' apartment?

FACTS

On a Wednesday afternoon at 2 o'clock, FBI agents and officers with the North Las Vegas Police Department arrived at Banks' two-bedroom apartment to execute a warrant to search for cocaine and evidence of cocaine sales. An officer knocked on the front door and shouted "Police, search warrant." Although the officer knocked so loudly it was heard by officers posted in back, there was no response from inside. The officers waited 15 to 20 seconds then, having received no response, broke open the door and entered.

It turned out that Banks was in the shower when the officers entered, and he testified he did not hear the knock or announcement. In any event, the search was productive: officers found weapons, crack cocaine, and evidence of drug sales.

DISCUSSION

Banks contended the evidence should have been suppressed because the officers did not comply with the knock-notice rule before entering. Under this rule, officers who have knocked and given notice of their authority and purpose may not enter until it becomes reasonably apparent they are being refused entry.[1] The most common type of refusal is a refusal implied by an occupant's failure to admit the officers within a reasonable time after they knocked and announced.[2]

What's a reasonable time? This was the issue in *Banks*. Banks contended 15 to 20 seconds was not enough. The United States Supreme Court disagreed.

It is important to understand there is no minimum or maximum amount of time officers must wait before entering. Instead, whether inaction constitutes a refusal depends on the surrounding circumstances, especially the following.

SIZE AND LAYOUT: Based on the size and layout of the residence, how much time should it take to get to the front door? Discussing this, the Court described Banks' two-bedroom apartment as "small," noting that "a man may walk the length of today's small apartment in 15 seconds."

TIME OF DAY: Did the entry occur late at night or early in the morning when a delay could be expected because the occupants were probably sleeping? In *Banks*, as noted, it was mid-afternoon.

REASON FOR DELAY? Were the officers aware of any innocent reasons that could account for the occupants' delay in responding? In *Banks*, there were none.

DESTRUCTIBILITY OF THE EVIDENCE: Can the evidence officers are seeking be destroyed quickly and, if so, how much time will it take to start destroying it? In *Banks*, it was cocaine which, as the Court noted, can be destroyed quickly and easily:

> [W]hat matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone

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[1] See *Jeter* v. *Superior Court* (1983) 138 Cal.App.3d 934, 936; *People* v. *Neer* (1986) 177 Cal.App.3d 991, 996; *People* v. *Montenegro* (1985) 173 Cal.App.3d 983, 989.

[2] See *People* v. *Hobbs* (1987) 192 Cal.App.3d 959, 964; *People* v. *Trujillo* (1990) 217 Cal.App.3d 1219, 1225; *U.S.* v. *Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 980 ["Officers can infer a constructive refusal to admit from silence, but only after a significant amount of time. There is no established time that the police must wait; instead, the time lapse must be reasonable considering the particular circumstances of the situation."]; *People* v. *Rabadeux* (2003) 112 Cal.App.4th 1611.

> inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain.

This is a significant statement. The Court was pointing out that it may not take a drug dealer very long to get into position to destroy drugs—often much less time than it would take to get to the front door. Consequently, where officers reasonably believe the occupants will destroy drugs after an announcement is made, they may not always need to wait for the amount of time it would take the occupants to get to the front door. Again, quoting the Court:

> [W]hen circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the residents of a bungalow, or an apartment like Banks's.

Based on all of these considerations, the Court ruled that, although it was a "close call," the officers "could fairly suspect that cocaine would be gone if they were reticent any longer." Consequently, the court ruled the entry was lawful.[3]

DA's COMMENT

In *Banks*, a unanimous United States Supreme Court reversed a divided panel of the Ninth Circuit and, in the process, made it clear it is losing—or has lost—patience with judges who misapply or ignore the Court's clear instructions.

According to the two Ninth Circuit judges who ruled the entry in *Banks* was unlawful—Henry Politz[4] and William Fletcher—compliance with the knock-notice rule depends largely on how the surrounding circumstances fit in a categorical structure they either invented or embraced.[5] In this structure, a critical factor is whether the officers' entry was "forced or non-forced," and whether there were exigent circumstances apart from the apparent destruction of evidence (as if one exigent circumstance is not enough). Applying the facts against their analytical structure, they ruled the entry was unlawful.

It did not seem to matter to them that the entry occurred in mid-afternoon when most people are awake (and long out of the shower), that the apartment was small, that the officers heard nothing to indicate someone in the apartment was en route to answer the door, or that drug dealers pride themselves on their ability to destroy their drugs the moment they think they are going to be searched or arrested.

Not much needs to be said about Politz' and Fletcher's "forced entry" factor—it is simply nonsense. As the Supreme Court pointed out, virtually all entries in knock-notice

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[3] NOTES: The Court also noted that "Courts of Appeals have, indeed, routinely held similar wait times to be reasonable in drug cases with similar facts including easily disposable evidence (and some courts have found even shorter ones to be reasonable enough."

[4] NOTE: Judge Politz was a Senior Circuit Judge for the Fifth Circuit Court of Appeals sitting on the Ninth Circuit by designation. Judge William Fisher filed a dissenting opinion.

[5] The judges said, "Entries may be classified into four basic categories, consistent with the interests served by 18 U.S.C. § 3109:(1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time. The action at bar falls into the final category because no exigent circumstances existed and the entry required destruction of property--i.e., the door to Banks' apartment."

cases are "forced" because "most people keep their doors locked." Thus, said the Court, it is "a circumstance too common to require a heightened justification when a reasonable suspicion of exigency already justified an unwarned entry."

The Court also rejected the judges' rather complex analytical scheme. It referred to it as "a set of sub-rules as the Ninth Circuit has been inclined to do,"[6] and a "categorical scheme on the general reasonableness analysis [which] threatens to distort the totality of circumstances principle, by replacing a stress on revealing facts with resort to pigeonholes."

The Court also seemed at a loss to understand how Politz and Fletcher could fail to understand the Court's plain teaching that judges must not determine the reasonableness of a search by resorting to templates, categories, or protocols. Said the Court:

> [W]e have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.

Finally, the Court noted that Politz' and Fletcher's determination that the entry was unlawful was based in part on the fact that Banks was in the shower when the officers knocked and announced, and therefore there was a good reason for his delay. It is instructive to read Politz' and Fletcher's analysis of this factor and watch how they attempted to portray Banks as a *victim*:

> [P]ausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door *being forced open*, and *stumbled* into the hallway concerned that his apartment was being *invaded*. Upon entering, the officers found Banks *naked*, wet, and soapy from his shower. [Emphasis added.]

First, the officers did not "invade" Banks' apartment. To invade is to "enter for conquest or plunder."[7] While the judges' use of the word was out-of-line, it was instructive as it spoke volumes as to their mindset. Second, Banks is a convicted trafficker in crack cocaine. The fact that his shower was interrupted, that he "stumbled" into the hallway, or was embarrassed when the officers saw him naked when they entered pursuant to a indisputably valid search warrant is inconsequential.

More to the point, whether Banks was in the shower, naked, wet, soapy, sound asleep, listening to music with headphones, or stoned out of his mind is irrelevant. What counts are the objective facts known to the officers at the moment they entered; i.e., Did they have reason to believe Banks was in the shower or otherwise indisposed? As the Supreme Court put it:

> As for the shower, it is enough to say that the facts known to the police are what count in judging reasonable waiting time, and there is no indication that the police knew that Banks was in the shower and thus unaware of an impending search . . .

Although *Banks* is just one more reversal of a Ninth Circuit opinion, it is impossible to read the Supreme Court's opinion without sensing its frustration with some of the judges in the Ninth Circuit (a minority, we think) who will not, or are unable to, follow the law.

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[6] See, for example, *U.S.* v. *Arvizu* (9th Cir. 2000) 232 F.3d 1241 [overruled in *United States* v. *Arvizu* (2002) 534 US 255]. In discussing *Arvizu*, the Court in *Banks* said, "Nor did the [Ninth Circuit in *Banks*] cite [*Arvizu*]. There, we recently disapproved a framework for making reasonable suspicion determinations that attempted to reduce what the Circuit described as 'troubling . . . uncertainty' in reasonableness analysis, by 'describing and clearly delimiting' an officer's consideration of certain factors."].

[7] Merriam-Webster's Collegiate Dictionary (11th Edition, 2003) p. 658.