Recent Case Report

U.S. v. Mowatt

(4th Cir. 2008) __ F.3d __ [2008 WL 203581]

ISSUE

Did exigent circumstances justify a warrantless entry into the defendant's apartment?

FACTS

At about 9 P.M., a security guard in an apartment building in a high-crime area in Maryland called the police and reported that he could smell the odor of marijuana coming from a certain tenth-floor apartment, and that the occupants of the apartment were causing a disturbance by playing music too loudly. Three officers were dispatched to the call.

When the officers knocked on the door, no one responded. So they "pounded" on it, at which point they heard someone moving around inside and the sound of an aerosol can discharging. Then a man inside asked, "Who's there?" An officer responded, "It's the police. Open the door. We need to investigate something." The man, later identified as Mowatt, initially refused to open the door. But when the officers "became demanding" and ordered him to do so, he opened it a few inches.

As the officers spoke with Mowatt, it appeared to them that he was holding something behind his back. So they ordered him several times to show his hands, but he refused and insisted that the officers leave because they didn't have a warrant. One of the officers then "grabbed Mowatt's right shoulder," which prompted Mowatt to "smack" the officer's hand. The officers then forced their way inside and wrestled him to the floor.

It turned out that Mowatt was not holding anything behind his back. Nevertheless, two of the officers conducted a protective sweep of the premises, during which they saw a loaded revolver on the bedroom floor. Just then, Mowatt started wrestling with the officer who was guarding him. During the struggle, the door to the refrigerator popped open, revealing a baggie containing several hundred "ecstasy" pills.

After subduing Mowatt, the officers obtained a warrant to search the premises. In addition to the pills, they found two semiautomatic assault rifles, a body armor vest, and almost $20,000 in cash. As a result, Mowatt was indicted on charges of possessing ecstasy with intent to distribute, being a felon in possession of a firearm, and being a violent felon in possession of body armor.

Mowatt filed a motion to suppress the evidence, contending that the warrantless entry was unlawful. But the court disagreed, ruling the entry was justified because of the likelihood that the marijuana would be destroyed if the officers had left to obtain a warrant. Consequently, prosecutors were permitted to introduce the evidence at Mowatt's trial, and he was found guilty on all counts.

DISCUSSION

The first issue on appeal was whether the officers' act of commanding Mowatt to open the door constituted a "search" under the Fourth Amendment. If so, it would have been an unlawful search unless the officers had sufficient justification. But if not, no justification would have been necessary, in which case the officers' entry would probably have been warranted by Mowatt's actions in keeping one hand behind his back, then "smacking" an officer's hand.

It was, however, apparent that the officers' demands did, in fact, constitute a search. This is because it is settled that a search occurs if, (1) officers commanded an occupant of a residence to open the door, (2) the occupant complied with the command, and (3) the occupant's act of opening the door permitted the officers to see inside the residence. As the court explained, a search occurs "when officers gain visual or physical access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority."[1]

The question, then, was whether the "search" was justified. The only circumstance that might have sufficed was the officers' belief that an immediate entry was necessary to prevent the destruction of evidence. Specifically, a warrantless entry based on "destruction of evidence" is permitted if, (1) officers had probable cause to believe there was destructible evidence on the premises, and (2) they reasonably believed the evidence would be destroyed if they left the premises to obtain a warrant.

The first requirement was easily satisfied because, based on the odor, the officers had probable cause to believe there was marijuana in the apartment. At first glance, the second requirement was also met because the officers could have reasonably believed that Mowatt would have destroyed the marijuana if, after ordering him to open the door, they had left the premises to seek a warrant.

There is, however, another rule that kicks in when the threat of evidence destruction was created by the officers themselves. Specifically, under the "manufactured" or "do-it-yourself" emergency rule, the courts will not permit officers to invoke the "destruction of evidence" exigent circumstance if both of the following circumstances existed: (1) the danger of destruction was created by the officers' actions, and (2) the officers had no immediate need to take those actions. As the court recently observed in *U.S.* v. *Collins*, "Many cases say that law-enforcement officers cannot be allowed to manufacture an emergency and then use the emergency to justify dispensing with the procedures ordinarily required to search a home."[2]

Not surprisingly, the court in *Mowatt* concluded that the threat to the marijuana in Mowatt's apartment had been manufactured by the officers. Said the court:

> The officers in the present case were aware of the marijuana in the apartment before they decided to alert Mowatt of their presence. [T]he officers here had the option of leaving the probable cause determination to a magistrate. They needed only to seek a warrant before confronting the apartment's occupants. By not doing so, they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes.

[1] Quoting *U.S.* v. *Connor* (8th Cir. 1997) 127 F.3d 663, 666.
[2] (7th Cir. 2007) __ F.3d __ [2007 WL 4355361]. Citations omitted.

Consequently, the court ruled the evidence should have been suppressed because, "Having created the 'exigency' themselves, for no apparent reason, the officers were foreclosed from relying on it to dispense with the warrant requirement."[3]

COMMENT

The "destruction of evidence" exigent circumstance was also the subject of a recent case decided by the California Court of Appeal. In *People* v. *Hua*[4] the court ruled that in determining whether an entry was necessary to prevent the destruction of evidence of a crime, officers and judges must consider the seriousness of the crime.[5] In *Hua*, the evidence was drugs—but it was marijuana, and it was straight possession of less than 28.5 grams. Possession of such a small amount, said the court, simply does not justify the intrusion of a warrantless entry into a residence. As the court pointed out, "California has chosen to treat the offense of possession of less than 28.5 grams of marijuana as a minor offense that is nonjailable even for repeat offenders." Consequently, the court concluded that "the crime observed by the [officers] cannot support a warrantless entry, based on exigent circumstances." POV

[3] **NOTE**: Prosecutors also argued that the evidence was admissible under the "inevitable discovery" rule. Under this rule, evidence obtained illegally will not be suppressed if officers would have obtained it inevitably by lawful means. See *Murray* v. *United States* (1988) 487 U.S. 533, 539 ["The inevitable discovery doctrine is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."]; *Nix* v. *Williams* (1984) 467 U.S. 431, 444, 447 ["[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury"]. But the court rejected this argument because "the government has never maintained that the officers would have sought a warrant absent their prior illegal discovery of the revolver and the ecstasy. Nor does any evidence even suggest that they would have sought a warrant had they known only about the marijuana."

[4] (2008) __ Cal.App.4th __ [2008 WL 108955].

[5] Citing *Welsh* v. *Wisconsin* (1984) 466 U.S. 740, 753 ["[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."]; *Illinois* v. *McArthur* (2001) 531 U.S. 326, 336; *People* v. *Thompson* (2006) 38 Cal.4th 811, 821.