SMU | Dedman School of Law

SMU Law Review

Volume 65 | Issue 1 Article 8

January 2012

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THE FOURTH AMENDMENT—THE BURDEN OF PROOF FOR EXIGENT CIRCUMSTANCES IN A WARRANTLESS SEARCH CIVIL ACTION

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IN *Bogan v. City of Chicago*, the Seventh Circuit held that in § 1983 civil actions for unreasonable search, the plaintiff bears the burden of proving the absence of exigent circumstances.[1] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures and no Warrants shall issue, but upon probable cause."[2] In *Kentucky v. King*, the Supreme Court maintained the long-recognized notion that warrantless searches within a home are "presumptively unreasonable," but that presumption can be overcome by the existence of exigent circumstances.[3] The Court has identified certain circumstances that qualify as "exigent."[4] Though declining to define the scope of exigent circumstances, the Court stressed that exceptions to warrantless searches should be "few in number and carefully delineated."[5] While lower courts have respected this limitation by placing a high burden on the government to prove the existence of exigent circumstances at the time of the search,[6] the Seventh Circuit recently held in *Bogan v. City of Chicago* that the standard should be shifted in civil cases, placing the burden of proof on the plaintiff to prove the absence of exigent circumstances.[7] This burden shift effectively widens the intentionally narrow exception to warrantless

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1. Bogan v. City of Chicago, 644 F.3d 563, 570 (7th Cir. 2011).
2. U.S. CONST. amend. IV.
3. Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).
4. *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978) (fire); United States v. Santana, 427 U.S. 38, 42–43 (1976) (hot pursuit of a felon); Schmerber v. California, 384 U.S. 757, 770–71 (1966) (destruction of evidence).
5. Welsh v. Wisconsin, 466 U.S. 740, 749 (1984).
6. *See* Armijo *ex rel.* Armijo Sanchez v. Peterson, 601 F.3d 1065, 1070 (10th Cir. 2010); Hopkins v. Bonvicino, 573 F.3d 752, 764 (9th Cir. 2009); Hardesty v. Hamburg Twp., 461 F.3d 646, 655 (6th Cir. 2006).
7. Bogan v. City of Chicago, 644 F.3d 563, 570 (7th Cir. 2011).

searches and could lead to plaintiffs' inability to seek redress after apparent Fourth Amendment violations.

On May 9, 2009, two Chicago police officers, Breen and Langley, responded to a domestic battery call at an apartment building.[8] Upon arriving at the apartment, they followed the sound of a woman's screams to the roof of the building where they found a woman in distress.[9] "She explained that her boyfriend, Antonio Pearson, . . . had beaten and choked her."[10] While trying to find a way into the apartment, where they believed Pearson to be, they spotted and made eye contact with an African-American male who immediately fled from the bedroom to the back of the apartment.[11] The officers entered the apartment through the window, but, while searching, received a message that there was a black male on the back porch of the building.[12] The officers left the apartment and proceeded across the hall to a closed door.[13] Finding the door locked, they tried to kick the door down before Ms. Bogan opened it.[14] By the time Bogan had opened the door, there were already ten to twelve officers in her apartment who had apparently entered through the back door.[15] The officers conducted a search but did not find Pearson.[16]

Ms. Bogan filed an action alleging that the officers "violated her Fourth Amendment rights by entering and searching her apartment without a warrant."[17] The district court clarified that, although violations of Fourth Amendment rights are governed by an objective standard, subjective evidence (concerning the officer's subjective beliefs about the suspect) is still relevant.[18] At the close of evidence, the district court gave the jury instructions on the hot pursuit exception, stating that "a police officer may enter a person's home if, under all circumstances, a reasonable officer would believe that the entry is necessary to prevent the escape of a person who is suspected of a crime and there is insufficient time to obtain a search warrant."[19] The court further instructed that it was Ms. Bogan's responsibility to "prove by a preponderance of the evidence that a reasonable officer in the defendant's position would not have believed that a crime suspect was in Ms. Bogan's home."[20]

The jury returned a verdict for the police officers and the district court entered judgment for the officers after denying Bogan's motion for judgment as a matter of law.[21] Bogan appealed, maintaining that the district

8. *Id.* at 565–66.
9. *Id.* at 566.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 567.
19. *Id.*
20. *Id.*
21. *Id.*

court's jury instructions constituted reversible error because she did not have the burden of proving the absence of exigent circumstances but, instead, the officers had the burden to prove the existence of such circumstances.[22]

The Fourth Amendment requires the presence of a warrant, obtained with proof of probable cause, before searches and seizures of private property can occur.[23] Absent probable cause and exigent circumstances, a warrantless search is a violation of the Fourth Amendment.[24] The Supreme Court has not defined the scope of the exigent circumstances exception, specifying only that exceptions should be "few in number and carefully delineated," but has recognized a few emergency situations where the exception applies.[25] Among these "hot pursuit" exceptions are pursuit of a felon, destruction of evidence, and ongoing fire.[26] The exigency exception derives largely from the police investigatory process, allowing police to enter without a warrant when they have "probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'"[27] The Court consistently places paramount importance on the protection of privacy provided by the Fourth Amendment and has held "that searches and seizures inside a home without a warrant are presumptively unreasonable."[28] In criminal cases, courts require the government to bear the "heavy burden" of proving the existence of exigent circumstances that allow the police to enter and search without a warrant.[29] Of the few civil cases that present this issue, most have respected the limited nature of the exception and held that the government still bears this "heavy burden."[30]

The Seventh Circuit in *Bogan v. City of Chicago* held that in a § 1983 civil action for warrantless searches in which the defendants claim that exigent circumstances justify the warrantless search, the plaintiff has the burden to prove the *absence* of exigent circumstances.[31] The court looked to its previous decision in *Valance v. Wisel*, which held that the plaintiff bears the burden of proof in civil warrantless search actions when the defendants claim that consent gave them justification for a war-

22. *Id.* at 568.

23. U.S. CONST. amend. IV.

24. Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

25. Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984).

26. *Id.* at 750.

27. Hopkins v. Bonvicino, 573 F.3d 752, 763 (9th Cir. 2009) (alteration in original) (quoting United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc)).

28. *King*, 131 S. Ct. at 1856. *See generally* Boyd v. United States, 116 U.S. 616, 630–33 (1886).

29. *Welsh*, 466 U.S. at 749–50.

30. *See* Armijo *ex rel.* Armijo Sanchez v. Peterson, 601 F.3d 1065, 1070 (10th Cir. 2010); Hopkins, 573 F.3d at 766–67, 769; Hardesty v. Hamburg Twp., 461 F.3d 646, 655 (6th Cir. 2006); Parkhurst v. Trapp, 77 F.3d 707, 711 (3d Cir. 1996).

31. Bogan v. City of Chicago, 644 F.3d 563, 570 (7th Cir. 2011).

rantless search.[32] In coming to that conclusion, the court followed a Second Circuit decision which placed the burden on the plaintiffs because it was in line with the nature of civil cases in which the burden of persuasion "must remain squarely on the plaintiff in accordance with established principles governing civil trials."[33] The Seventh Circuit focused on the procedural aspects of civil cases, recognizing that warrantless searches are "presumptively unreasonable," but that the presumption only requires the defendant to raise some evidence of the existence of exigent circumstances in order to move forward.[34] The court reasoned that the presumption does not shift the burden to the defendant to disprove an element of the plaintiff's case.[35]

The issue of burden of proof in civil warrantless search actions where the defendant justifies the search by claiming the existence of exigent circumstances was a matter of first impression for the Seventh Circuit.[36] The court had previously considered the burden of proof issue in warrantless searches only when the defendant asserted that the searched party consented to the search (an exception different and separate from the exigent circumstances exception).[37] Ms. Bogan distinguished exigent circumstances cases from *Valance*, a consent case, by pointing out that plaintiffs in a consent case have knowledge of whether consent was given freely or as a result of duress or coercion.[38] In exigent circumstances cases, the knowledge of exigent circumstances is "uniquely within the knowledge of the pursuing officers."[39] The Seventh Circuit was not persuaded by her reasoning, noting that its reasoning in *Valance* did not rely on whether knowledge was uniquely available to one party.[40] The court also looked to other Fourth Amendment cases, which held that the plaintiff bears the burden to prove the absence of *probable cause* if he believes the arresting officers did not have probable cause to arrest him.[41] The court likened that situation to this one because the existence of probable cause "is wholly dependent upon the facts *known to the officer*," just as the facts of exigent circumstances should be known only to the officer.[42]

Bogan then argued that extending the rationale used in *Valance* to this case would create a split among the circuits.[43] The court acknowledged the split among the circuits, but quickly dismissed the argument by stating that the split already existed before *Valance*, so a divisive decision in this

32. *Id.* at 568; Valence v. Wisel, 110 F.3d 1269, 1279 (7th Cir. 1997).
33. *Valance*, 110 F.3d at 1278 (citing Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2d Cir. 1991)).
34. *Bogan*, 644 F.3d at 568.
35. *Id.* at 569.
36. *Id.* at 568.
37. *Id.* (referring to *Valance*, 110 F.3d at 1278).
38. *Id.* at 569.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* (citing McBride v. Grice, 576 F.3d 703, 706 (7th Cir. 2009) (per curiam)).
43. *Id.*

case would not create any new split.[44] The court then tossed aside Bogan's supporting cases by stating that even though those courts held that the government bears the burden to prove the existence of exigent circumstances, they did so without discussion of their reasoning and, therefore, were not persuasive.[45]

The court incorrectly held that the burden of proof in a § 1983 warrantless search action in which the defendants claim the existence of exigent circumstances as a defense belongs to the plaintiff, because the court erroneously relied on cases with fact patterns distinguishable from the case at issue and the holding is inconsistent with the reasoning behind the restriction of warrantless search exceptions. The court incorrectly relied on *Valance* for support because *Valance* required a plaintiff to bear the burden of proof using facts that he had within his knowledge, a situation inapposite to the case at bar.[46] The court's dismissal of Bogan's argument was simply based on the fact that the court in *Valance* did not discuss which party had access to the facts needed to prove consent[47]—implying that if a court foregoes discussion of an issue in one case, that issue must be irrelevant in later cases. Though consent is one of the warrantless search exceptions,[48] it is not the same as the exigent circumstances exception. Just because knowledge of facts was not discussed in a case examining the consent exception does not make it irrelevant to the exigent circumstances situation. Ironically, this absent-discussion argument that the court relies on to bolster support is the same argument it uses to undermine the cases Bogan uses as support. The court summarily dismissed cases that required the government to bear the burden of proving the existence of exigent circumstances simply because the courts did not provide discussion to back up the decisions.[49] This decision is inconsistent with the analysis the court used in *Valance.*

The Seventh Circuit also wrongly used *McBride v. Grice*, a case that assigned the burden to prove the absence of *probable cause* to the plaintiff, to support its argument that the burden to prove the absence of *exigent circumstances* should be on the plaintiff.[50] That case looked at the allegedly wrongful arrest of a storeowner after he physically removed an employee from his store.[51] The Supreme Court's primary reason for restricting the exigent circumstances exception, namely that "physical entry of the home is the chief evil against which . . . the wording of the Fourth Amendment is directed,"[52] is not even relevant to the *McBride* case. The court also wrongly discounted civil cases that use criminal cases as sup-

44. *Id.*
45. *Id.* at 569–70.
46. *Id.* at 569.
47. *Id.*
48. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).
49. *Bogan*, 644 F.3d at 569–70.
50. *Id.* at 569.
51. McBride v. Grice, 576 F.3d 703, 708 (7th Cir. 2009).
52. Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (Ginsburg, J., dissenting).

port.[53] The Supreme Court has consistently held that "warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances."[54] The Supreme Court does not distinguish homes of felons from homes of innocent civilians. If potential felons have the privilege to protect the sanctity of their homes (absent the government's ability to reach the high burden of proving the existence of exigent circumstances), there is no reason to support the conclusion that civilians do not have the same protection. Furthermore, the Seventh Circuit's recognition of the circuit split in regard to "the burden of proof applicable to § 1983 unconstitutional false arrest claims"[55] ignores the fact that the cited circuit-splitting cases concern different elements of a false arrest claim. The cases that split the circuit opinions deal with issues of consent (an exception under the control of the homeowner)[56] or deal with only probable cause,[57] and therefore, should not be relied upon to determine issues regarding exigent circumstances.[58]

The Seventh Circuit's holding is inconsistent with the Supreme Court's motivation to limit the situations where exigent circumstances make warrantless searches reasonable because it could lead to a situation where a plaintiff alleging violation of his civil rights is left without the ability to prove his case and, in effect, defend those civil rights. The spirit of the Fourth Amendment is to give protective rights to citizens. If a plaintiff has no access to the facts used to justify warrantless entry, he is left with no means to protect his basic Fourth Amendment rights. Accordingly, knowing that a resident often has no knowledge of the facts used by a police officer to justify entrance to the home, a police officer could then enter the home knowing that the resident has little means of redress. The narrowly-defined exigent circumstances exception should be viewed as a recognition of the rare circumstances that *could* permit warrantless entry into a home, not as a broad right given to the government to enter homes without warrant. Supreme Court Justice Bradley's admonition on the preservation of constitutional rights over a century ago best illustrates the importance of protecting the high standard to prove exigent circumstances:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound

53. *See Bogan*, 644 F.3d at 570.
54. Welsh v. Wisconsin, 466 U.S. 740, 749 (1984).
55. *Bogan*, 644 F.3d at 569.
56. *See* Truluck v. Frech, 275 F.3d 391, 401 (4th Cir. 2001).
57. *See* Davis v. Rodriguez, 364 F.3d 424, 432–33 (2d Cir. 2004).
58. Parkhurst v. Trapp, 77 F.3d 707, 711 (1996).

> than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[59]

The Seventh Circuit's literal construction of burdens of proof in civil cases is exactly the type of silent approach that leads to the "gradual depreciation of the right" that Justice Bradley speaks of.[60]

The Seventh Circuit's holding in *Bogan v. City of Chicago* could lead to diminished constitutional rights for plaintiffs who have been subjected to warrantless searches of their homes without the presence of exigent circumstances. The court relies solely on traditional civil procedure notions without regard to constitutional rights and relies on cases that are only tangentially relevant to the case at issue to make its decision. The burden to prove the existence of exigent circumstances to justify a warrantless search should remain with the government in order to preserve the individual protections provided by the Fourth Amendment.

59. Boyd v. United States, 116 U.S. 616, 635 (1886).
60. *See id.*