SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

Senate Bill 23 (Substitute S-3 as reported)
Sponsor: Senator Nick Smith
Committee: Judiciary

Date Completed: 10-4-89

RATIONALE

Public Act 189 of 1966, which regulates the use of search warrants, allows a law enforcement officer with a search warrant to "break any outer or inner door or window of a house or building, or anything therein" only if admittance is refused after the officer gives notice of his or her authority and purpose, or if necessary to liberate himself or herself or any assistant. While the courts have established that refusal of admittance is not limited to affirmative denials and that certain exigent circumstances excuse an officer from complying with the "knock-and-announce" requirement, the judgment of whether there is a silent refusal or if exigent circumstances exist remains with the officer(s) executing the warrant. Some people contend that, in some situations, this position can leave law enforcement officers vulnerable to physical attack, allow suspects an opportunity to destroy or hide evidence, or open the possibility of legal challenges to the execution of the search warrant. They argue that, in order to protect the officers, secure the evidence being sought, and ensure the legality of the search warrant's execution, magistrates and judges should be permitted to authorize officers to enter a building without notice, if the collection of evidence or the safety of an officer could be jeopardized by a delay. (See BACKGROUND for a discussion of relevant case law.)

CONTENT

The bill would amend Public Act 189 of 1966 to allow a law enforcement officer, or anyone assisting the officer, to break any part or contents of a house or building in executing a search warrant, without giving notice of his or her purpose or waiting until admittance was refused, if the magistrate who issued the warrant authorized such action. The magistrate could include such a direction in the warrant if he or she determined from the affidavit that the safety of the officer or another person or the collection of evidence would be jeopardized by any delay in the warrant's execution.

The bill would retain provisions that allow an officer, or anyone assisting him or her, to "break any outer or inner door or window of a house or building, or anything therein" if admittance is refused after the officer gives notice of his or her authority and purpose, or if necessary to liberate himself or herself or any assistant.

MCL 780.656

BACKGROUND

Several court cases have established that refusal of admittance to an officer executing a search warrant is not limited to "affirmative denials" (i.e., a period of silence or attempts to escape can be interpreted as refusal of admittance) and that there are "exigent circumstances" that excuse failure to comply with the Act's knock-and-announce requirement. A more detailed discussion of two cases follows.

S.B. 23 (10-4-89)

People v Humphrey (150 Mich App 806 (1986))

Officers of the Wayne County Sheriff's Department arrested Clarence Humphrey for possession of cocaine, possession of heroin with intent to deliver, and a felony-firearm violation after conducting a search pursuant to a search warrant. Humphrey moved to quash the warrant and suppress the evidence on several grounds, including that the warrant was executed unlawfully "because the officers did not provide the occupants with a reasonable time in which to respond to their demand for admittance".

In overturning the trial court's order granting Humphrey's motion, the Court of Appeals cited the standard set by People v Harvey (38 Mich App 39): "[i]n a hard drug case, where the officer...waited long enough for the inhabitants to reach the door from the room farthest away, and then began to kick in the door, the statute is complied with". The Humphrey Court held that the knock-and-announce requirement was satisfied and admittance denied since the officers waited 20 to 30 seconds before they broke down the door and entered the premises.

People v Slater (151 Mich App 432 (1986))

The Recorder's Court ruled that "the officers...had not substantially complied with the knock-and-announce statute" because they had "entered the premises prior to allowing a sufficient time for a reply to their announcements of identity and purpose" when they arrested Mary Slater for possession of less than 50 grams of cocaine with intent to deliver. According to testimony, in executing a search warrant, the arresting officers announced their presence and their possession of a search warrant. The officers then entered the house immediately after seeing someone run past the door toward the stairs, assuming he was attempting to dispose of narcotics. One of the officers testified that "it took only two seconds to open the screen door and walk into the house".

The Court of Appeals overturned the Recorder's Court's ruling, citing two cases that establish that "refusal of admittance is not limited to affirmative denials" (People v Doane (33 Mich App 579) and People v Harvey (38 Mich App 39)). The Court also cited two United States Court of Appeals cases (Stamps v United States (436 F2d 1059) and McClure v United States (332 F2d 19)) that interpreted the corresponding Federal knock-and-announce statute (18 USC 3109). In both Federal cases, the Ninth Circuit ruled that the officers' hearing footsteps running away from the door constituted refusal of admittance and justified forcible entry.

In light of these precedents, the Slater Court held that "when the officers...observed the young male run towards the stairs...they had a reasonable basis to believe that they were being denied admittance and that they were justified in forcing entry". Further, the Slater Court commented that even if the officers had failed to comply with the knock-and-announce requirement, the failure was excused because the officers "reasonably believed that any delay in their entry would...[provide] an opportunity to dispose of the narcotics". In so commenting, the Court said that, "Many federal courts have held that the existence of such an exigent circumstance excuses noncompliance" with the Federal knock-and-announce statute.

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS

Supporting Argument

Reportedly, eight law enforcement officers nationwide were shot and killed while executing search warrants in 1988 and seven of those were in knock-required situations. Since officers executing a search warrant must announce their identity and purpose and wait for admittance or refusal of admittance before entering a building, the delay can give the occupants an opportunity to prepare an ambush of the officers. Indeed, such a situation occurred in Ingham County in 1986, when an East Lansing police officer attached to the Tri-County Metro Narcotics Squad was shot in the head and leg upon entering a house after she and other officers had announced their identity and purpose. The delay caused by the legal requirement to wait for refusal of admittance, she claims, allowed the suspect to arm himself and prepare to shoot her.

Further, evidence, especially in drug cases, can be destroyed in the amount of time necessary to constitute refusal of admittance. Some estimates of the amount of drugs destroyed, and therefore evidence lost, in the execution of search warrants are as high as 30%. Small amounts of drugs can be disposed of quickly simply by flushing them down a toilet or washing them down a drain; larger amounts of drugs reportedly can be burned instantly using sulfuric acid. Police officers have been frustrated by such loss of evidence as well as the potential for physical danger due to the knock-and-announce requirements. While the notice and refusal of admittance requirements should apply generally, the law should permit authorization of no-knock search warrants in situations in which officers' safety or the collection of evidence could be in jeopardy.

Response: Far from ensuring the safety of officers, the bill could place them in unnecessary and great danger. If officers were to break into a building unannounced, the occupants could very likely mistake them for illegal intruders, whom they could be justified in shooting.

Supporting Argument

The bill's proposed process for seeking, issuing, and executing a no-knock warrant is one that has been considered carefully. There is nothing in the bill that would require the use of a no-knock warrant in any situation. In fact, there would be three levels of discretion built into the bill. First, the officers would have to ask specifically for a no-knock authorization in the affidavit laying out probable cause for a search warrant. Second, the magistrate issuing the warrant would have to determine from the affidavit that the collection of evidence or the safety of an officer or other person would be jeopardized by a delay in the warrant's execution. Third, the authorization for entering without notice would not require such an action, but would have to specify that an officer may enter without notice, which would allow the officer to exercise his or her discretion at the scene and determine whether a no-knock entry was appropriate. These safeguards would be sufficient to protect against abuses in using no-knock warrants, ensure civil liberties, and provide a degree of safety to the executing officers.

Opposing Argument

Law enforcement officers executing a search warrant are given sufficient discretion under current law to enter a premises without direct refusal of admittance, and if exigent circumstances (such as danger to officers or collection of evidence) exist, to enter immediately upon identifying themselves. The Humphrey and Slater cases (see BACKGROUND) clearly extend to officers adequate authority to enter a building without affirmative denial or when they suspect that the collection of evidence may be jeopardized. It is, and should continue to be, left to the officers themselves to recognize those situations in which the knock-and-announce requirement must be met or when exigent circumstance exist to excuse noncompliance. The bill would allow a no-knock authorization in a search warrant in the same exigent circumstances under which case law has established that officers already may enter immediately. Such an action is unnecessary, and placing that discretion in the hands of a judge or magistrate who is away from the action, rather than in the hands of the officers on the scene, would be ill-advised. The knock-and-announce statute should not be altered, and officers still could continue to use their best judgment, given specific circumstances, as to when they can enter.

Response: Placing the discretion to determine when the standards of compliance have been met or when exigent circumstances for failure to comply exist can leave the executing officers vulnerable to legal challenge. If the officers use the discretion granted to them by case law and their decisions are challenged successfully, any evidence gathered in the search would have to be suppressed. To ensure the legality of the search warrant's execution and the admissibility of evidence gathered in a search, it would be prudent to have entry without notice specifically authorized in the warrant. In addition, the bill would not address the exigent circumstances excuse for failure to comply that has been established in case law; officers would retain that discretionary tool.

Opposing Argument

Permitting law enforcement officers to break into a house or building without notice of identity or purpose is in complete contrast to the tradition of American law, which has

revered the individual's right to privacy. Indeed, in Miller v United States (357 US 301 (1958)), the United State Supreme Court held that an express announcement of purpose is necessary before officers may break into a home. In handing down that decision, the Court expressed the law's traditional respect of an individual's right to privacy when it opined: "[T]he history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application." (Quoted in People v Charles Brown (43 Mich App 74 (1972))).

Opposing Argument

An affidavit seeking to obtain a search warrant must convey probable cause that a crime has been committed. Although the bill would require that a magistrate determine from the affidavit that the collection of evidence or the safety of an officer would be jeopardized by delay, the affidavit would not have to show probable cause of those exigent circumstances. As written, the bill could allow nothing more than a simple statement in the affidavit that those conditions might exist.

Response: The Fourth Amendment to the U.S. Constitution, requiring probable cause for a search warrant, does not extend to a finding of probable cause to believe that exigent circumstances exist.

Opposing Argument

As originally drafted, the bill specified that when an officer damaged a building or its contents, the employing governmental agency would be liable for that damage, if the owner had no prior knowledge of, nor had consented to, the crime for which the search warrant was issued. The bill also was tie-barred to Senate Bill 22, which would amend the governmental immunity law to specify that it would not grant immunity from liability to the agency for such damages. As reported from committee, however, the tie-bar and all liability provisions were deleted. The bill should carry specific liability provisions.

Response: Liability provisions are not needed. Under the law, officers can be fined up to $1,000 and imprisoned for up to one year for exceeding their authority in executing a warrant; this should deter unnecessary damage.

Opposing Argument

Incidents of officers' going to the wrong house are far from unheard of, and allowing them to enter without knocking would increase the danger to innocent neighbors.

Legislative Analyst: P. Affholter
Fiscal Analyst: M. Hansen

A8990\S23A