

Towards an Independent State Constitutional Jurisprudence II – Arkansas Supreme Court rules state constitution requires warning prior to “Knock and Talk” searches.



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State v. Brown, ___ Ark. ___, ___ S.W.3d ___, 2004 WL 583837 (decided March 25, 2004).¹

Introduction

In recent years, the Arkansas Supreme Court’s search and seizure jurisprudence has evolved from one in which no analysis independent of United States Supreme Court Fourth Amendment case law takes place, to one in which the state court may determine for itself what is or is not an unreasonable search or seizure under the cognate search-and-seizure provision of the Arkansas Constitution,² even if the Supreme Court has reached a contrary

conclusion under the Fourth Amendment.³ The Arkansas Supreme Court has also shown a similar willingness recently to resolve other constitutional issues by looking to its state constitution, as opposed to the United States Constitution as interpreted by the Supreme Court.⁴

In *State v. Brown*, a sharply divided 4-3 decision, the Arkansas Supreme Court has ruled that prior to undertaking a search of a dwelling place based on the “knock and talk” investigative procedure, police must first warn the occupant that he or she has the right to refuse to consent to the search. The court’s conclusion, also based exclusively on the Arkansas Constitution, takes the court further down the road towards an independent state consti-

1. As of early September 2004, when this Note went to print, only the Westlaw citation was available for this case. Therefore, page citations to *Brown* appearing in this Note will only be to the Westlaw star paging system.

2. ARK. CONST., Article 2, § 15.

3. This evolution is discussed in Adelman, *Towards an Independent State Constitutional Jurisprudence or How to Disagree with the Supreme Court and How Not To*, 2002 ARK. L. NOTES 1.

4. In *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (2002), the Arkansas Supreme Court relied exclusively on the Arkansas constitution, rejecting *Bowers v. Hardwick*, 478 U.S. 186 (1986), and striking down the Arkansas sodomy statute as applied to consenting adults in their homes. The court determined that the statute, as applied, violates the state constitutional guarantees of due process (ARK. CONST., art. 2, § 8) and equal protection (ARK. CONST. art. 2, § 3), as well as the fundamental right to privacy right implicit in the State constitution. One year after *Picado* was decided, the Supreme Court reached essentially the same result in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), overruling *Bowers* and invalidating the Texas sodomy law under Fourteenth Amendment right to liberty. For a more detailed examination of this issue See Steve Sheppard, *Arkansas 1, Texas 0: Sodomy Law Reform and the Arkansas Law*, 2003 ARK. L. NOTES 87.

tutional jurisprudence, but not without a spirited dissent from three justices.⁵

This Note will discuss the “knock and talk” procedure and the concerns which led the state court to diverge from federal court jurisprudence in cases challenging the constitutionality of “knock and talk” searches.

“Knock and Talk” Prior to *Brown*

The “knock and talk” procedure is typically used by police early on in the investigative process, before probable cause exists to obtain a search warrant, in order to find a suspect, speak to a witness or possible defendant, or conduct a search for evidence of a crime. Writing for the majority in *Brown*, Justice Brown described the “knock and talk” procedure, and the constitutional controversy surrounding it, as follows:

The procedure has become fashionable as an alternative to obtaining a search warrant when police officers do not have sufficient probable cause to obtain a search warrant. What generally occurs is that several law enforcement officers accost a home dweller on the doorstep of his or her home and request consent to search that home. If an oral consent is given, the search proceeds. What is found by the officers may then form the basis of for probable cause to obtain a search warrant and result in the subsequent seizure of contraband. It is

the intimidation effect of multiple police officers appearing on a home dweller’s doorstep, sometimes in uniform and armed, and requesting consent to search without advising the home dweller of his or her right to refuse consent that presents the constitutional problem.⁶

Without the dweller’s consent, a search of a dwelling without a warrant or probable cause is likely at a minimum to result in suppression of any evidence seized initially or during any subsequent search based on the fruits of the initial search, and may also even lead to civil liability in damages against the officers. Therefore, it is essential that the officers request consent before entering a dwelling to search for evidence of crime without probable cause to do so.⁷

In *Brown*,⁸ and two years earlier in *Griffin v. State*,⁹ the Arkansas Supreme Court determined that although the United States Supreme Court has not yet addressed this issue, the clear weight of federal authority is that “knock and talk” searches are not invalid *per se* under the Fourth Amendment, provided that consent is freely and voluntarily given. The narrow constitutional question presented in *Brown*, then, was whether police must first warn the home dweller of his or her right to refuse consent before they can obtain valid consent to a “knock and talk” search. Aware that a “knock and talk” search without such prior warning could very likely be upheld under the Fourth Amendment, the court chose to decide this issue under the Arkansas Constitution’s cognate search and seizure provision,

5. Justice Brown authored the opinion of the four-justice majority. Justice Glaze, joined by Chief Justice Dickey and Justice Imber, dissented.

6. ___ S.W.3d at ___, 2004 WL 583837, at * 3.

7. Fans of the ubiquitous television series *Law and Order* have seen this done countless times. Detectives Briscoe and Green typically knock on the door of the apartment, and through the door, Briscoe says, “Police! Mrs. Smith, we need to talk to Freddy, may we come in?” Most of the time Mrs. Smith meekly opens the door and lets the officers in, but if she demurs, the detectives’ riposte is likely to be, “Now Mrs. Smith, let’s not make this any harder than it needs to be.” With the not-so-subtle implied message that one way or another the officers will get into the apartment to look for Freddy, Mrs. Smith almost invariably complies.

8. ___ S.W.3d at ___, 2004 WL 583837, at * 3.

9. 347 Ark. 788, 795, 67 S.W.3d 582, 586-87 (2002).

TOWARDS AN INDEPENDENT STATE CONSTITUTIONAL JURISPRUDENCE II

Art. 2, § 15. The court went on to rule that “a home dweller must be advised of his or her right to refuse consent in order to validate a consensual search under the Arkansas Constitution.”¹⁰

To some extent, the court’s opinion in *Brown* was foreshadowed by concurring opinions in two recent cases involving “knock and talk” searches. In *Griffin* and in *Scott v. State*,¹¹ the court did not have occasion to squarely rule on the legality of “knock and talk” searches under the state constitution (in *Griffin* because the court ruled that the search there was illegal even before the “knock and talk” inquiry and therefore the court didn’t need to reach the issue, and in *Scott* because the parties had only briefed and argued the constitutionality of “knock and talk” under the Fourth Amendment and therefore the state constitutional issue was not properly before the court). However, the four justices who comprise the majority in *Brown* all either wrote or endorsed concurring opinions in *Griffin* and in *Scott* which questioned the constitutionality of “knock and talk,” as it is commonly practiced, under Article 2, § 15 of the Arkansas Constitution.¹²

The *Brown* case

Drug task force officers in Russellville approached the trailer in which Jaye Brown and Michael Williams resided on the morning of August 23, 2002. The officers had received information from two anonymous sources that Brown and Williams were manufacturing and dealing drugs out of their trailer, and upon reaching the door to the trailer “they smelled a strong and familiar chemical odor.”¹³ After one of the agents knocked on the door and Brown answered, the agent told Brown that the

officers wanted to investigate information that illegal drug activity was taking place at the trailer.

The agent presented Brown with a consent-to-search form, which both Brown and the agent signed. In pertinent part, the form read:

CONSENT TO SEARCH

I give permission to the 5th Judicial District Drug Task Force to search my vehicle/residence (circle one) for contraband or illegal items.

Brown did not circle “vehicle” or “residence.”

As the officers began their search, Williams emerged from the bedroom. Agents observed evidence of methamphetamine use and manufacturing, on the basis of which they obtained a warrant to search the residence and seize any evidence of illegal drug activity. During the later warrant-based search, the agents seized evidence of meth manufacture as well as marijuana growth and possession. Brown and Williams both signed statements implicating Williams in illegal drug activity, and both Brown and Williams were later charged with manufacture of methamphetamine and marijuana and possession of methamphetamine with intent to deliver.

At a suppression hearing at which Williams specifically challenged the legality of the initial “knock and talk” search under Article 2, § 15 of the Arkansas Constitution, Brown testified that she signed the consent form “because she thought she had to do so,” that she thought she “had no choice but to sign it” and that “she did not know that she could say ‘no’ and not sign it.”¹⁴ Agents who had

10. ___ S.W.3d at ___, 2004 WL 583837, at * 1.

11. 347 Ark. 767, 67 S.W.3d 567 (2002), decided the same day as *Griffin*.

12. See, the concurring opinions of Justices Corbin, Brown, and Hannah in *Griffin* (all three justices joining in each others’ concurrences), and the concurring opinion of Justice Hannah, joined by Justice Thornton, in *Scott*. Based on these opinions, this author predicted that “a majority of the justices of the Arkansas Supreme Court now seems poised to apply its own independent search and seizure jurisprudence to the next case that challenges ‘knock and talk’ inquiries under the Arkansas Constitution.” Adelman, note 3, *supra*, 2002 ARK. L. NOTES at 8.

13. The facts of the case are set out at ___ S.W.3d at ___, 2004 WL 583837, at * 1.

14. *Id.*, at ___, * 2.

conducted the initial search testified that they did not advise Brown that she was not required to sign the consent form and could refuse to do so, and also testified that it was not Drug Task Force policy to advise occupants that they did not have to consent to a search.¹⁵

The Pope County Circuit Court, John S. Patterson, J., granted both defendants' motions to suppress the evidence seized, noting that "it is undisputed that the officers did not have probable cause for a search warrant at the time a consent to search was obtained," and opining that:

The "knock and talk" procedure used in this case is simply a way to avoid the burden placed on law enforcement officers in obtaining a search warrant. . . . This Court feels that a "knock and talk" policy of police officers can survive a constitutional challenge only if the right to refuse consent is in writing or is explained before consent is obtained. Based on the above factors, this Court feels that the consent to search obtained in this case was not valid; therefore, the motions to suppress . . . should be granted.

On appeal, the closely divided Arkansas Supreme Court affirmed.

The majority opinion acknowledged that the Fourth Amendment does not require a home dweller's "knowledge of the right to refuse consent [to a search by police] as a prerequisite to a showing of voluntary consent."¹⁶ However, relying on *Picado*¹⁷ and *Griffin*,¹⁸ and on *Arkansas v. Sullivan*,¹⁹ the court emphasized that despite the similar wording of Article 2, § 15 and the Fourth Amendment, "we are not bound by the federal interpretation of the Fourth Amendment when interpreting our own law."²⁰

Although the majority acknowledged a legitimate concern "about deviating too much from federal precedent based solely on our state constitution,"²¹ the court found that "this state's constitutional history and preexisting state law regarding the privacy rights of a home dweller in his or her home combine to support our decision to discard federal precedent and adopt an interpretation of our state constitution compatible with state law."²² Here we see a bolder, more confident Arkansas Supreme Court (or at least a slim majority thereof), flexing its recently discovered independent state constitutional muscles.

The majority also looked to state supreme court decisions in Washington, Mississippi, and New Jersey, which have held, under their own cognate search-and-seizure constitutional provisions, that a home dweller's knowledge of the right to refuse consent is an essential element of any voluntary con-

15. *Id.*

16. *Id.*, ___, at * 3, citing *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

17. Note 4, *supra*.

18. Note 9, *supra*.

19. 532 U.S. 769 (2001), discussed at greater length in Adelman, note 3, *supra*.

20. ___ S.W.3d ___, 2004 WL 583837 at *3, quoting from *Griffin*, 347 Ark. at 792, 67 S.W.3d at 584: "we do have the authority to impose greater restrictions on police activities in our state based upon our own state law than those the Supreme Court holds to be necessary based upon federal constitutional standards."

21. ___ S.W.3d at ___, 2004 WL 583837, at * 4.

22. *Id.*, at * 5. Examples noted by the court, *Id.*, at * 4, of such heightened solicitude for the sanctity of the home under Arkansas law throughout the state's history include the greater degree of protection against nighttime intrusions into homes under the Arkansas Rules of Criminal Procedure (which require a particularized justification for the issuance of a nighttime search warrant), and the greater protection afforded to citizens in the privacy of their bedrooms under *Picado*.

TOWARDS AN INDEPENDENT STATE CONSTITUTIONAL JURISPRUDENCE II

sent to a search.²³ An appellate court in a fourth state, Indiana, stopped short of requiring such police warnings, but noted that it would be the “better practice . . . for the officer to identify himself and advise the occupant of his right to deny entry.”²⁴

In order to reach a result which provides greater protection to Arkansas citizens under the state constitution than under the Fourth Amendment, the Arkansas Supreme Court needed not only to disavow *Schneekloth v. Bustamonte*²⁵ for state constitutional purposes, it also needed to overrule its own prior holding in *King v. State*,²⁶ which had adhered to the *Bustamonte* standard under Article 2, § 15.²⁷ In response to the objection of the dissenting justices that the court was refusing, without justification, to follow the *King* precedent, the majority noted the “regularity” with which the United States Supreme Court overrules its own precedents, and expressed its own willingness to “break with precedent when the result is so patently wrong and so manifestly unjust that a break becomes unavoidable. . . . We conclude that Arkansas’ strong policy in favor of privacy in one’s home warrants today’s opinion and our overruling of *King v. State*.”²⁸

Finally, the majority opinion stops short of holding “that the Arkansas Constitution requires execution of a *written* [emphasis added] consent form which contains a statement that the home dweller has the right to refuse consent.”²⁹ However, the

majority stated that “this would undoubtedly be the better practice for law enforcement to follow.”³⁰

The *Brown* dissenters, as noted above, would continue to follow *Bustamonte* for state constitutional purposes, and would also continue to adhere to the formulation set out in *King* and other Arkansas cases for determining the voluntariness of a home dweller’s consent to a search:

Arkansas case law has predictably and repeatedly adhered to the general rule set forth in [Bustamonte] that “voluntariness of consent” is a question of fact to be determined from *all* the circumstances, and while the subject’s knowledge of a *right to refuse consent* is a factor to be taken into account, the prosecution *is not* required to demonstrate such knowledge as a *sole prerequisite to establishing a voluntary consent* [emphases in original].³¹

Further, in the view of the dissenters, the majority opinion intrudes inappropriately into the policy-making domain of the Arkansas General Assembly:

[T]his court has held repeatedly that the determination of this state’s public policy “lies almost exclusively in

23. *State v. Ferrier*, 136 Wash. 2d 103, 960 P.2d 927 (1998); *Graves v. State*, 708 So. 2d 858 (Miss. 1997); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975). The Washington and Mississippi cases specifically require that police first warn home dwellers of their right to refuse consent to a “knock and talk” search in order for consent to be effective.

24. *Hayes v. State*, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003).

25. Note 16, *supra*.

26. 262 Ark. 342, 557 S.W.2d 386 (1977).

27. “We now depart from our holding in *King* and overrule that case to the extent it stands for the proposition that a homeowner need not be apprised of his or her right to refuse consent to a search as a prerequisite to a valid consent to search that home.” *Brown*, 2004 WL 583837, at * 6.

28. *Id.*

29. *Id.*

30. *Id.*

31. ___ S.W.3d at ___, 2004 WL 583837, at * 8 (Justice Glaze, joined by Chief Justice Dickey and Justice Imber, dissenting).

the legislative domain. . . . Here, however, the majority takes it upon itself to declare, essentially, by judicial fiat, that it knows better than the General Assembly what our public policy should be.”³²

Conclusion

The author of the majority opinion, Justice Brown, unabashedly acknowledges that the Arkansas Supreme Court has recently “embrac[ed] the new judicial federalism with a commitment and panache not previously seen in Arkansas jurisprudence.”³³ Under the “new judicial federalism” embraced by Justice Brown and other state court jurists, “departure from federal precedent can be seen as a matter of duty”³⁴ of a state court to approach its constitution as a truly independent document as part of a dual-sovereignty relationship

between the federal government and the states.

Even the *Brown* dissenters would probably acknowledge the power of the state court to “carve out its own constitutional path and speak in its own voice.”³⁵ However, the extent, frequency, and circumstances in which state courts *should* disavow federal, especially Supreme Court, constitutional precedent, remains a subject for reasoned disagreement. In *Brown*, the majority of the Arkansas Supreme Court has found compelling reasons in history, policy, and jurisprudence to do so.

So what will Detective Lenny Briscoe (and his brother and sister officers in Arkansas) have to do or say differently now in light of the *Brown* requirement that officers warn home dwellers prior to conducting a consensual “knock and talk” search? Probably not very much: “Now, you know you don’t have to let us in,” Briscoe will tell Mrs. Smith, “but we REALLY need to talk to Freddy!”³⁶

32. *Id.* at ___, 2004 WL 583837 * 10 (citations omitted).

33. Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows The Way*, 4 J.APP.PAC.& PROCESS 499 (2002). Justice Brown’s chosen title is somewhat (perhaps intentionally?) ironic, since as discussed more fully in Adelman, note 3, *supra*, the Supreme Court’s *per curiam* reversal of the Arkansas Supreme Court in *Arkansas v. Sullivan*, 532 U.S. 769 (2001) was basically a back-of-the-hand lesson in the way a state court should *not* go about disagreeing with the High Court.

34. *Id.* at 501-04, citing with approval the views of Justice William J. Brennan and other leading exponents of independent state constitutional jurisprudence such as former Oregon Supreme Court Justice Hans Linde and former California Supreme Court Justice Joseph R. Grodin. *See, especially*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), aptly described by Justice Brown as the “clarion call.”

35. Adelman, note 3, *supra*, at 10.

36. Apologies, and *bon chance*, to Jerry Orbach, who gave us Det. Briscoe’s cynical and trenchantly funny seen-it-all persona for so many seasons. See you in the reruns Lenny!