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Warrantless, Police-Triggered Exigent Searches: *Kentucky v. King* in the Supreme Court

June 17, 2011

Congressional Research Service

<https://crsreports.congress.gov>

R41871

Summary

Authorities may enter and search a home without a warrant if they have probable cause and reason to believe that evidence is being destroyed within the home. So declared the United States Supreme Court in an 8-1 decision, *Kentucky v. King*, 131 S.Ct. 1849 (2011)(No. 09-1272).

The Kentucky Supreme Court had overturned King's conviction for marijuana possession and drug dealing, because the evidence upon which it was based had been secured following a warrantless search which failed to conform with that court's restrictions under its "police-created exigencies" doctrine.

The Fourth Amendment usually permits authorities to search a home only if they have both probable cause and a warrant. The warrant requirement may be excused in the presence of exigent circumstances, for instance, when it appears the occupants are attempting to flee or to destroy evidence. Leery lest authorities create exigent circumstances to avoid the warrant requirement, some state and lower federal courts had adopted one form or another of a police-created exigencies doctrine.

The Court rejected each of these and endorsed searches conducted under the exigent circumstance exception, unless authorities had created the exigency by threatening to, or engaging in, activities which themselves violated the Fourth Amendment.

In order to reach the question of limitations on police-created exigencies, the Court assumed the existence of exigent circumstances in *King*. The concerns from which the police-created exigencies doctrine emerged may now give rise to more stringent standards for what qualifies as an exigency.

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Introduction

The United States Supreme Court recently held that the police may enter and search a home without the usually required warrant if they reasonably believe steps are being taken within the home to destroy the evidence they seek, *Kentucky v. King*.¹ In doing so, the Court rejected limitations which some of the state and lower federal courts had imposed on the exigent circumstance exception to the Fourth Amendment's warrant requirement. The lone dissenter worried that her brethren may have "arm[ed] the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."²

Background

The Fourth Amendment provides that, "The right of the people to be secure in their ... houses ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...."³ The Court has explained that "the Fourth Amendment has [thus] drawn a firm line at the entrance to the house ... '[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant."⁴ "Exigent circumstances" refers to those situations, among others, "in which police action literally must be 'now or never' to preserve the evidence of the crime," and consequently those in which "it is reasonable to permit action without prior judicial evaluation."⁵

For some courts, inexcusable exigencies occurred when the police created them in order to avoid seeking a warrant.⁶ There was no consensus, however, on the test to be used to determine whether they had done so.

King was convicted in the aftermath of a Lexington, KY, "buy and bust." An informant made a street purchase of crack cocaine. A monitoring undercover officer radioed a description of the dealer to waiting uniformed officers who were to make the arrest. Before they could apprehend him, however, the dealer walked around a corner into an apartment complex breezeway. Two apartments opened onto the breezeway. The uniformed officers heard a door shut, but did not see which apartment the dealer had entered.⁷

Close to the apartment door on the left, however, they detected the strong smell of burnt marijuana. This suggested to them that the odor had drifted into the breezeway when the dealer opened and then closed the apartment on the left. They pounded on the door and shouted, "police." Hearing movement within the apartment and concluding that evidence was being destroyed, they kicked in the door. Inside they found King and two others, one of whom was smoking marijuana. A protective sweep of the apartment disclosed marijuana, cocaine, and drug

¹ 131 S.Ct. 1849, 1858 (2011)("Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed").

² *Id.* at 1864 (Ginsburg, J., dissenting).

³ U.S. CONST. Amend. IV.

⁴ *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002), quoting, *Payton v. New York*, 445 U.S. 573, 590 (1980).

⁵ *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973).

⁶ *E.g., United States v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2003)("[F]or a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves").

⁷ *Kentucky v. King*, 131 S.Ct. at 1854.

paraphernalia in plain view. The three were arrested, as was the drug dealer found later in the apartment on the right.⁸

King ultimately pleaded guilty to possession of marijuana and trafficking in a controlled substance, contingent upon his right to appeal the trial court's denial of his motion to suppress the evidence secured after the officers' warrantless entry and search. The Kentucky Court of Appeals affirmed,⁹ and the Kentucky Supreme Court reversed.¹⁰

On the question of whether exigent circumstances justified the warrantless search of the apartment, the Kentucky Supreme Court adopted a two-part test:

First, courts must determine whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement. If so, then the police cannot rely on the resulting exigency. Second, where police have not acted in bad faith, courts must determine whether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry. If so, then the exigent circumstances cannot justify the warrantless entry.¹¹

The officers in *King* failed the second test. “[I]t was reasonably foreseeable that knocking on the apartment door and announcing ‘police,’ *after* having smelled marijuana emanating from the apartment, would create the exigent circumstance relied upon, i.e. destruction of the evidence.”¹² That is, “[i]t was reasonably foreseeable that, upon hearing police announce their presence, the persons inside the apartment would proceed to destroy evidence of their crime.”¹³ On the other hand, “[b]efore police announced their presence, there would have been no reason to destroy evidence of either the marijuana which the officers had smelled, or evidence of the original drug transaction.”¹⁴

***King* in the United States Supreme Court**

The United States Supreme Court granted certiorari to consider the question of “when does lawful police action impermissibly ‘create’ exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?”¹⁵ The Court, in an opinion written by Justice Alito and joined by seven other members of the Court, noted the Court’s regular acknowledgement that exigent circumstances, such as the threatened destruction of evidence, will excuse compliance with the warrant requirement.¹⁶ Thus, the Court reasoned, where “the police did not create the exigency by engaging or threatening to engage in conduct

⁸ *Id.* at 1854-855.

⁹ *King v. Commonwealth*, 2006-CA-0020330MR, 2008 WL 697629 (Ky.App. Mar. 14, 2008).

¹⁰ *King v. Commonwealth*, 302 S.W.3d 649 (Ky. 2010).

¹¹ *Id.* at 656 (internal citations and quotation marks omitted).

¹² *Id.* (emphasis in the original).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Kentucky v. King*, 131 S.Ct. 61 (2010); *Brief for the Commonwealth of Kentucky*, at i (No. 09-1272).

¹⁶ *Kentucky v. King*, 131 S.Ct. at 1856.

that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”¹⁷

It then proceeded to explain why it found unpersuasive the various lower court justifications for a restriction of the exigent circumstance exception: bad faith, reasonable foreseeability, sufficient time to secure a warrant, deviation from standard police procedures, the threat of imminent police entry, and Court precedent.

The Court rejected the argument that the exigent circumstance exception should be unavailable when the officers created the exigency in bad faith in order to avoid the warrant requirement. It observed that, “we have never held, outside limited contexts ... ‘that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment.’”¹⁸ The reasonable foreseeability test favored by the Kentucky Supreme Court would “introduce an unacceptable degree of unpredictability.”¹⁹ The “deviation from the preferred police practice” standard would produce yet another unclear test, the Court thought.²⁰

It gave no credence to the suggestion that the exception should be unavailable if officers had sufficient probable cause and time to secure a warrant. In the mind of the Court, there are many acceptable reasons why officers might “knock and talk” or engage in other investigative techniques rather than seeking a search warrant as soon as some minimal level of probable cause exists.²¹ “Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.”²²

King argued that “law enforcement officers impermissibly create an exigency when they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable. In [his] view, relevant factors include the officers’ tone of voice in announcing their presence and the forcefulness of their knocks.”²³ The Court dismissed this with the observation that “the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.”²⁴

Finally, the Court denied its decision was controlled by *Johnson v. United States*. The Court in *Johnson* found a violation of the Fourth Amendment when police entered a hotel room after hearing shuffling within the room.²⁵ Like *King*, *Johnson* involved a warrantless arrest and search occurring after officers smelled burnt drugs, knocked, and heard movement within the premises.²⁶ Unlike *King*, however, the officers did not claim that exigent circumstances—movement suggesting evidence was being destroyed—justified the warrantless entry and search.²⁷

¹⁷ *Id.* at 1858.

¹⁸ *Id.* at 1859, quoting, *Whren v. United States*, 517 U.S. 806, 812 (1996).

¹⁹ *Id.*

²⁰ *Id.* at 1861.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Johnson v. United States*, 333 U.S. 10, 11, 17 (1948).

²⁶ *Id.* at 11.

²⁷ *Id.* at 1861 n.5.

The Kentucky Supreme Court had incorrectly held that the Fourth Amendment imposed a “foreseeability” limitation on warrantless searches conducted under exigent circumstances. The United States Supreme Court therefore reversed and remanded.²⁸

Justice Ginsburg dissented.²⁹ She “would not allow an expedient knock to override the warrant requirement.”³⁰ Rather, she would “accord that core requirement of the Fourth Amendment full respect.”³¹ From her perspective, there was “every reason to conclude that securing a warrant was entirely feasible ... and no reason to contract the Fourth Amendment’s dominion.”³²

The Court did not address whether sufficient exigent circumstances really existed in the case before it.³³ Certiorari had been granted on the question of the permissible limits, if any, on police-created exigencies.³⁴ The existence of a police-created exigency was assumed by both the Kentucky Supreme Court and the United States Supreme Court.³⁵ The concern that gave rise to the “police-created exigency” doctrine in the lower courts may lead to a more demanding threshold of exigency in the future.

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²⁸ *Id.* at 1862-864.

²⁹ *Kentucky v. King*, 131 S.Ct. 1849, 1864 (Ginsburg, J., dissenting).

³⁰ *Id.* at 1866.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1862.

³⁴ *Kentucky v. King*, 131 S.Ct. 61 (2010); *Brief for the Commonwealth of Kentucky*, at i (No. 09-1272).

³⁵ *Kentucky v. King*, 131 S.Ct. at 1862.