

Who's there?

The parameters of police 'knock and talk' tactics

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WHO'S THERE?
The parameters of police 'knock and talk' tactics

"Knock and Talk" is a legitimate police tactic, but only if officers observe citizens' zones of privacy scrupulously. Otherwise they risk suppression of any evidence found. Find out where the line is drawn – what's considered a private area might surprise you.

*"Who's that knocking at my door?"
"Who's that knocking at my door?"
"Who's that knocking at my door?"
Asked the fair young maiden.
"It's only me, from Precinct Three."
Said Constable Billy Draper.*

*"I'll come down and let you in."
"I'll come down and let you in."
"I'll come down and let you in."
Said the fair young maiden.
"Well hurry before I break the door."
Said Constable Billy Draper.*

(With apologies to "Barnacle Bill the Sailor")

With increasing frequency police officers are entering homes and conducting de facto searches as part of modern "knock and talk" procedures. Essentially the officers use their implicit authority to "inquire about crime" and request entrance into the target home to "talk about it." Once inside via "consent," the officers see all manner of alleged criminal activity "in plain view" and then "freeze the scene" and secure a search warrant. Is the subsequent search "reasonable" as contemplated by the federal and state constitutions? What are the limits of the officer's right to knock on the front door in the first place? What if the dwelling is in an apartment building or a multi-story condominium? This article addresses the scope of such intrusions.

Knock and talk

It is well settled that neither probable cause nor reasonable suspicion is needed to conduct a "knock and talk." In *State v. Cothran*,^[1] the court held that it is not improper for a police officer to call at a particular house and seek admission for the purpose of investigating a complaint or conducting other official business. Naturally, it is highly significant as to where the police are standing when they do their "knocking":

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Neither the warrant nor their status as peace officers gave them any greater right to intrude onto defendant's property than any other stranger would have. Going to the front door and knocking was not a trespass. Drivers who run out of gas, Girl Scouts selling cookies, and political candidates all go to front doors of residences on a more or less regular basis. Doing so is so common in this society that, unless there are posted warnings, a fence, a moat filled with crocodiles, or other evidence of a desire to exclude casual visitors, the person living in the house has impliedly consented to the intrusion. Going to the *back* of the house is a different matter. Such an action is both less common and less acceptable in our society. There is no implied consent for a stranger to do so. '[W]e do not place things of a private nature on our front porches that we may very well entrust to the seclusion of a backyard, patio or deck.' The facts of this case do not show either an express or an implied consent for strangers to go to the back of defendant's house.[2]

While the police may walk upon a person's property if that property consists of no more than "open fields," the police may not, without a warrant, intrude upon the "curtilage," which is the land immediately surrounding and associating with the home. At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacy of life and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage and have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably can expect that an area adjacent to the home will remain private.[3]

In *State v. Harmon*,[4] the court held that a person may contest illegally seized evidence if the person can show that he or she has some interest in the property seized or the premises searched, or at least his or her right of privacy has been involved. The police do not actually have to go into the home to violate a person's constitutional rights. Intrusion within the curtilage of the home is sufficient to constitute an unlawful search given that "the curtilage is within the individual's expectation of privacy." [5]

In *State v. Bowling*,[6] which arose in Davidson County, the defendant had parked a vehicle in his garage. The garage door was open about a foot to allow the defendant's dog to enter and leave the garage. The police entered on the defendant's property and looked under the door of the garage to observe the defendant's vehicle. Based on this observation the officers then obtained a warrant to search the garage and inspect the vehicle.

Under these facts Judge Kurtz held that the initial observation of the truck was illegal and thus the subsequent search warrant was also unlawful since it was based upon the initial observation that violated the defendant's expectation of privacy. Judge Kurtz's ruling was affirmed on appeal that held that "society has recognized that the resident of a home usually has a reasonable expectation of privacy in a garage." The court found that the officer's "actions of getting on his hands and knees with his head very near to the ground and looking into the garage are not those actions which society would permit of a reasonably respectful citizen." See also *State v. Lakin*, [7] "ordinarily, officers searching occupied, fenced, private property must first obtain consent or a warrant; otherwise they proceed at the risk that evidence obtained may be suppressed." The above authorities make it crystal clear that any intrusion upon closed property violates an individual's expectation of privacy under the United States and Tennessee Constitutions.

The castle walls

It has been said many times that a person's home is his or her castle. An officer need not intrude only into a person's bedroom to violate that person's constitutional rights: intrusion past the locked gate is sufficient to intrude upon the expectation of privacy. What happens when the defendant shares a locked gate with other individuals? May the police sneak past the locked gate to roam within the castle at will? As we shall see, the courts have held that police intrusion upon the locked common areas of an apartment violate the expectation of privacy of the residents even before the officers get to the front door of the individual apartments.

What is the law when the gate is unlocked? There are many cases that hold that unlocked and unsecured common areas of apartments are not places where a person can expect constitutional privacy. In *State v. Taylor*, [8] the police obtained information for a subsequent search warrant by standing in the hallway of an apartment and hearing the telephone inside ringing when that number was called by another officer. The defendant attacked the search warrant by contending that the means by which the location of the defendant's telephone within the apartment was confirmed constituted an unlawful search. The court held that there was no justified expectation of privacy in the hallway and therefore it was not a constitutionally protected area. The court found that the apartment shared a common hallway with several other units. Significantly "the doors to the hallway were not locked and entrance into the hallway was not limited or guarded." Given that the hallway was readily accessible to the general public there was no expectation of privacy in the hallway and thus the initial intrusion was not unlawful.

In *State v. Matthews*[9] the officers entered the premises through a common driveway and found drugs lying on the ground along the edge of the parking lot to the apartment. The officers also found a larger quantity of drugs just inside the opening to the foundation of the apartment building. The court held that:

[The defendant] did not have standing to challenge the seizure of either the packet of cocaine or the larger quantity of cocaine found inside the opening of the foundation. The fact that the [defendant] was a co-owner of the property did not, standing alone, establish a reasonable expectation of privacy in the premises. Also, society is not willing to accept an expectation of privacy in a parking lot which is provided for the use of tenants and their guests or an area under a rooming house which *does not have a door or other means to secure the area* and is not being used either by the owner or tenants to store personal property. The tenants, their guests and strangers had access to the parking lot as well as the area inside the opening contained in the foundation.

The leading case regarding intrusion into a *locked* common area is *United States v. Carriger*,[10] where the officers went to the defendant's apartment building which had a locked front entrance to the common area. The doors to both the front and the back of the building were locked and could only be opened by key or by someone within activating a buzzer system. The officer waited until a workman walked out through the door and, before the door closed, the officer slipped into the building. The officers then went up to the defendant's apartment. A search warrant was later obtained. The District Court found that the officers' entry into the building and their search for the defendant in the common area of the building did not violate the defendant's reasonable expectation of privacy. The appellate court reversed:

Whether the officer entered forcibly through a landlady's window or by guile through a normally locked entrance door, there can be no difference in the tenant's subjective expectation of privacy, and no difference in the degree of privacy that the Fourth Amendment protects. A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers Under the circumstances, we believe that the government agent violated the Fourth Amendment by entering an apartment building, and that entry was not legally permissible because probable cause did not exist for the arrest of [the defendant].

Carriger is by no means an isolated opinion. Many other courts have held that where the door to an apartment building is locked, the residents have a reasonable expectation of privacy in the common areas of the apartment building.[11]

A reasonable expectation of privacy

It should be clear that residents of an apartment building have a reasonable expectation of privacy in the locked common areas of the apartment building. In *State v. Ross*, [12] the Tennessee Supreme Court listed the various factors relevant to the expectation of privacy inquiry. These include whether the defendant has the right to exclude others from that place, whether he or she has exhibited a subjective expectation that the place would remain free from government invasion, and whether he or she took normal precautions to maintain his or her privacy. Whether a defendant's expectation of privacy was legitimate has two components: (1) whether the defendant had a subjective expectation of privacy; and (2) whether that expectation is one that society is prepared to recognize is reasonable.

When the front door to an apartment or condominium is locked, the front door, from all appearances, is the personal front door of all the occupants. That one shares the locked front door does not diminish the occupants' expectations of privacy.

The ultimate test of course is whether the subjective expectation of privacy in the locked entrance to an apartment or condominium is one that society is prepared to recognize as reasonable. We live in an urban society. A large percentage of our population lives in gated communities or locked condominiums that permit access only from afar. Do we really want police officers to physically trespass within private, limited-access buildings in hopes of finding contraband or other evidence of wrongdoing? The privacy and security interests an individual enjoys in those areas close to the home do not vanish simply because that person lives in an apartment complex.

Another way to resolve the policy question of the limits of expectations of privacy is by looking at the implicit invitation one extends by having a path to one's front door. In *State v. Harris*, [13] the court found that a sidewalk, pathway or similar passage leading from a public sidewalk or road to the front door of a dwelling represents an implied invitation to the general public to use the walkways for purposes of legitimate or social or business interests and, within this rule, police officers conducting official business are considered members of the general public and what the officer sees from his or her point of view along the way is not protected by the Fourth Amendment or the Tennessee Constitution. However, those constitutional provisions are violated once the officer walks around the exterior of the dwelling or attempts to look into the window.

In *Harris* the officers went beyond the fenced area of the dwelling and observed some marijuana plants some 100 yards from the house. The court found that this intrusion was unlawful and the police had no authority to "prowl around private, occupied, fenced property." The court cited multiple cases that prohibited police entry upon private, occupied, fenced land without a warrant.

Where apartments have open and unsecured common areas the police should be able to use these walkways precisely as they may use the path to the front door of a single, family residence. However, when the police come upon a locked, secured front door leading to a common area of a condominium then this is no different than the secured, fenced-in area of a residence or farm. Society is prepared to accept as reasonable the owner's expectation of privacy in the closed area whether it is a single family dwelling or a multiple family condominium protected by a locked, secured door and, in some instances, even protected by a burglar alarm to guard against unauthorized entry.

Unlawful consent

Suppose the police gain entrance by ruse or unlawfully entering the closed common area. Does the consent of the occupant to enter the dwelling justify any subsequent search?

The answer is whether the police were standing in a place they had the right to be at the time they ask for entry into the interior premises. As noted in *Horton v. California*,^[14] to constitute a plain view seizure the officer must not have violated the Fourth Amendment in arriving at the place from which the evidence could be "plainly viewed."

Another Sixth Circuit case is instructive as the impact of the "consent." In *United States v. Heath*,^[15] the police improperly obtained a key to enter a locked apartment building so as to access the entryway into the common areas. The officers then went upstairs to the apartment in question and knocked on the door. An occupant answered the door and the police asked if they could come inside and the occupant allowed them in. The officers then asked if the occupant had any marijuana and the occupant produced a small quantity of drugs. The occupant executed a search consent form and the officers searched the apartment. The police then arrested Mr. Heath who was also a resident of this apartment as well.

The court found that the consent to enter, even *if* consent were proper, was the product of the unlawful, initial intrusion into the common area of the apartment and thus the evidence against Mr. Heath was inadmissible:

Assuming, arguendo, that these officers could somehow arrive at the outer gate to Horton's apartment building without violating Heath's Fourth Amendment rights, their entry into the building would still be barred. In *United States v. Carriger*, we held that when "an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed." ...

We believe that the holding of *Carriger* is applicable here. The officers in the instant matter entered a locked building without utilizing the proper procedure and, therefore, the ensuing search was violative of defendants' subjective expectation of privacy. The government contends that *Carriger* is distinguishable, arguing that the police in this case used "a key lawfully seized from Heath to enter the building." However, the mere possession of a key will not transform an illegal entry into a valid one. It is the authority to enter, not the manner of entry, that provides the legality for the officers' conduct; the most casual reading of *Carriger* reveals that any entry into a locked apartment building without permission, exigency or a warrant is prohibited.

As noted earlier, the government argues that Horton's consent to the search was an "intervening act of free will" which "purged [the entry] of its taint." However, it was the officers' illegal entry into the common areas of the building that led them to Ms. Horton's door. Consequently, the consent for the ensuing search and the illegal drugs must be suppressed because they were "gained as a result of [the officers'] presence in the common areas of the building." Accordingly, we hold that the taint of the illegal arrest and entry into the apartment building was not purged by Horton's intervening consent to the search and, thus, the fruits of the consent should have been suppressed as to both defendants.

The *Heath* decision is by no means an isolated opinion. In *State v. Trecroci*, [16] the court held that the owner's consent to search his apartment, given after the police made a warrantless entry into the locked common area, was tainted by the prior unlawful entry and thus the subsequent search was illegal notwithstanding the consent.

Assuming the officers go further and obtain a search warrant, the fruits of any subsequent searches are clearly unlawful because the information contained in the search warrant invariably originated as a result of an initial intrusion. Thus, like a line of dominos, the subsequent searches fall since they are the fruits of the initial poison tree contaminated by the official entry into the home, apartment building or condominium.[17]

Conclusion

“Knock and talk” may be a legitimate police tactic if the officers scrupulously observe our zones of privacy. The fact that many of our citizens choose to live in an urban environment does not detract from the notion that the curtilage to one’s living premises includes a common hallway that may be shared with other owners of the building. We do not yet live in a police state where our locked, private halls are open to the government to roam at will to see what turns up. Our Tennessee Supreme Court has cautioned that: “In their zeal to preserve and protect, however, our police officers must respect the fundamental constitutional rights of those they are sworn to serve.” [18]

The so-called “knock and talk” procedures may result in the suppression of evidence where officers fail to adhere to the “reasonableness” requirements of the federal and state constitutions.[19] Our homes are our castles whether they are traditional single family dwellings or modern condominiums.

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Notes

1. 115 S.W.3d 513 (Tenn. Crim. App. 2003).
2. *See State v. Somfleth*, 8 P.3d 221 (Or. App. 2000).
3. *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).
4. 775 S.W.2d 583 (Tenn. 1989).
5. *State v. Prier*, 725 S.W.2d 667 (Tenn. 1987).
6. 867 S.W.2d 338 (Tenn. Crim. App. 1993).
7. 588 S.W.2d 544 (Tenn. 1979).
8. 763 S.W.2d 756 (Tenn. Crim. App. 1988).
9. 805 S.W.2d 776 (Tenn. Crim. App. 1990).
10. 541 F.2d 545 (6th Cir. 1976) .
11. *See People v. Trull*, 64 Ill.App.3d 385, 20 Ill.Dec. 960, 380 N.E.2d 1169 (1978) (holding “that the common entries and hallways of a locked apartment building are protected by the Fourth Amendment”); *State v. Di Bartolo*, 276 So.2d 291 (La.1973) (“apparently the building was kept locked and only tenants who had keys and guests whom they admitted could gain entrance to the building”); *Garrison v. State*, 28 Md.App. 257, 345 A.2d 86 (1975) (“the entrance door was kept locked and only tenants and management personnel had keys to the door,”

- and the “only way one visiting a tenant could gain entrance was by telephoning a tenant who ‘would come down’ and unlock the door”); and *People v. Beachman*, 98 Mich.App. 544, 296 N.W.2d 305 (1980) (Fourth Amendment protections extend to lobby of locked residential hotel).
12. 49 S.W.3d 833 (Tenn. 2001).
 13. 919 S.W.2d 619 (Tenn. Crim. App. 1995).
 14. 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).
 15. 259 F.3d 522 (6th Cir. 2001).
 16. 630 N.W.2d 555 (Wis. App. 2001).
 17. See *Hughes v. State*, 588 S.W.2d 296 (Tenn. 1979) (initial illegal stop “tainted the entire episode culminating in the confrontation with Hughes and the search of the automobile”) and *State v. Wert*, 550 S.W.2d 1 (Tenn. Crim. App. 1977) (initial intrusion on defendant’s land was illegal and so was the subsequent search with a warrant which was based on the initial illegal entry).
 18. *State v. Hayes*, 188 S.W.3d 505, 518 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated driver’s right to be free of unreasonable seizures under the Fourth Amendment, where goal of checkpoint was to reduce crime, exclude trespassers, to decrease crime and drug use).
 19. The Fourth Amendment to the United States Constitution provides, in part, that the “right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated... .” Article I, Section 7 of the Tennessee Constitution provides, in part, that “the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures... .”

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