Topic:
CIVIL PROCESS

This issue distributed to:
Sheriffs, deputy sheriffs in charge of civil process, county attorneys.

ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

JANUARY 1978 03/78

THE AUTHORITY OF A SHERIFF TO BREAK AND ENTER WHEN EXECUTING CIVIL PROCESS

Joan G. Brannon

This memorandum discusses the law on the sheriff's authority to break and enter when executing civil process. All the court cases in the area are old, and as the reader will see, the Attorney General's office and I disagree about some aspects of the law in this area. Each sheriff must determine what procedures he wishes his deputies to follow in executing process.

At the common law, it was unlawful for a sheriff to break and enter a dwelling to serve a civil writ or process.[1] The rule is based on the premise that every man's home is his castle and fortress, to protect him against injury and violence and to provide him with a place for repose. His home is his castle for the protection of him, his family, and his property.[2] In the absence of a statute to the contrary, the common law rule still prevails. Several North Carolina cases decided in the nineteenth century apply the common law rule in North Carolina.[3] In the leading case, State v. Armfield,[4] a constable was attempting to serve a writ of execution. A member of the judgment debtor's family saw the constable approaching the house, ran inside, and tried to shut the door to keep him from entering. Before the door was completely closed, the constable pushed it open and entered the house. The Court upheld the constable's conviction for breaking and entering, stating that "an officer cannot break open an outward door or window in order to execute process in a civil suit; if he doth, he is a trespasser." The Court held that the rule extends to shutting the door when an officer

1. Seymane's Case, 77 Eng. Rep. 194 (K.B. 1604).

2. State v. Whitaker, 107 N.C. 802, 804 (1890). See also N.C.G.S. § 4-1.

3. State v. Armfield, 9 N.C. 246 (1822); Frost v. Etheridge, 12 N.C. 30 (1826); Sutton v. Allison, 47 N.C. 339 (1855); State v. Whitaker, 107 N.C. 802 (1890).

4. 9 N.C. 246 (1822).

This publication is issued occasionally by the Institute of Government. An issue is distributed to those of the following groups to whom its subject is of interest: sheriffs, general law enforcement officers, special-purpose law enforcement officers, police attorneys, judges, clerks, district attorneys, public defenders, adult correction officers, juvenile correction personnel, jailers, and criminal justice trainers. The upper left-hand corner lists those to whom this issue was distributed and indicates a topic heading for this issue, to be used in filing. Comments, suggestions for future issues, and additions or changes to the mailing lists should be sent to: Editor, Administration of Justice Memoranda, Institute of Government, P.O. Box 990, Chapel Hill, N.C. 27514.

approaches; if the officer cannot enter peaceably before the door is shut, he may not attempt to enter.

Two exceptions to the general rule prohibiting an officer from breaking into a dwelling to execute civil process are found in North Carolina. First, even at common law the rule against breaking never applied to possession of real property. A sheriff has always been authorized to break and enter and to use force to execute a writ of possession of real property or order of ejectment. These writs are issued after a judgment to evict a tenant from property or an action to quiet title (action to determine who owns the land). After the judgment on which the writ was issued, the house is no longer considered as the dwelling of the person in possession. Entry of judgment terminates the right to possession of the house and premises. Another reason for the exception is that it is delivery of the residence itself that is called for in the writ. North Carolina follows the common law exception in this area. In State v. Ferguson[5] a sheriff was ordered to evict a man and his family from their dwelling pursuant to an order of ejectment. When the sheriff asked the man to vacate the premises, he refused to leave and forbade the sheriff to evict him. The sheriff returned later in the day with some deputies and moved the family out. The man secured a warrant against the sheriff for forcible trespass. A jury found the sheriff guilty, but the judge set aside the verdict and entered a not-guilty verdict. Although the question on appeal was whether the sheriff could be convicted of forcible trespass when he acted under a writ that was valid on its face but should not have been issued (the answer was no), it is clear from the case that a sheriff, acting under a writ of possession of real property or order of ejectment, may use force and break and enter to carry out the writ.

A second exception to the general rule prohibiting the sheriff from breaking and entering to execute civil process is found in G.S. 1-480, which provides that in executing a claim and delivery order of seizure, if the property is concealed in a building or enclosure, the sheriff must publicly demand its delivery, and if it is not delivered, he must break into the building or enclosure and take the property into his possession. Since North Carolina courts have not interpreted this statute, it is not entirely clear what circumstances would require a sheriff to break into a building to seize property under a claim and delivery order of seizure. One problem is how much knowledge is needed before entering a building. Need the sheriff only have reasonable grounds to believe the property will be found in the building before breaking, or must he have stronger proof that the property listed in the order of seizure is concealed in the building before breaking in (such as, he saw the property when he looked in the window, or the judgment debtor may have told him the property was located in the building)? No case answers that question. A second problem is the meaning given to the word concealed: Does it mean that the property must be hidden or secreted in the building? In State v. Pope[6] the Washington State Supreme Court, interpreting a statute identical to North Carolina's, held that property is concealed if the sheriff made demand for its delivery and delivery was refused even though the property was in its customary place within the building. In that case the property

5. 67 N.C. 219 (1872).
6. 4 Wash.2d 394, 103 P.2d 1089 (1940).

sought--a stove and refrigerator--was found in the kitchen of the judgment debtor's house. In Pope, the sheriff knew the goods were in the house because when he knocked on the door to inform the judgment debtor why he was there, the judgment debtor said that he had possession of the goods.

The following example indicates the odd situation created by G.S. 1-480. John Jones buys on credit a refrigerator from Appliance Store and signs a security agreement that the refrigerator will be collateral for payment of the debt. Jones defaults on his payments and Appliance Store files suit to recover possession of the refrigerator. At the same time he files his suit, Appliance Store files an affidavit for claim and delivery. Claim and delivery is an ancillary remedy allowing the plaintiff to hold the property only until the court renders a judgment in the action to recover possession. In Store's case the clerk issues an order of seizure after a claim and delivery hearing ordering the sheriff to seize the refrigerator and turn it over to Appliance Store until the main action is heard. The sheriff must break and enter if the property is concealed. But what if Appliance Store had chosen not to seek the ancillary remedy of claim and delivery. Appliance Store files its action to recover possession and waits until trial. At the trial, Appliance Store wins, and a judgment is entered in its favor. The clerk issues a writ of possession ordering the sheriff to seize the refrigerator. In this case the sheriff may not break and enter to execute the writ.

The common law rule prohibiting an officer from breaking and entering to execute civil process applied to breaking into a dwelling only.[7] An officer could break into a store or other nondwelling to execute process. The traditional practice of sheriffs in this state has been to extend the common law rule to all buildings--whether a dwelling or not. However, the actual case law does not prevent a sheriff from breaking into a nondwelling to execute civil process. The basis behind the common law rule--a man's home is his castle--does not carry over to a nondwelling. Although no North Carolina cases exist in which an officer broke into a nondwelling to execute civil process, there are cases from other states.[8] A sheriff might want to consult his county attorney before changing practices in regard to breaking and entering a nondwelling to execute process.

What authority does the sheriff have if he is attempting to execute civil process (other than an order of ejectment or a claim and delivery order of seizure) and the person against whom the writ has issued or someone else refuses to let the sheriff enter the house? The sheriff can inform the person that he could be held in contempt of court for willful disobedience of or resistance to a court's lawful process and that he could be fined and imprisoned for 30 days.[9] A person can be found in contempt each time the sheriff makes an effort to carry out the writ and the person refuses to let him enter. Apparently, some district court judges have found a

---

7. Penton v. Brown, 83 Eng. Report, 1193 (K.B. 1664).

8. See, e.g., Silverman v. Stein, 242 Mich. 64, 217 N.W. 785 (1928); Haggerty v. Wilber, 16 Johns. 287 (N.Y. 1819).

9. Under the present law [G.S. 5-1(4), (5)], the maximum fine is $250. Effective July 1, 1978, G.S. 5-1 will be replaced by G.S. 5A-11(a)(3), which provides that a person can be held in contempt and punished by a $500 fine and 30 days imprisonment for willful disobedience of, resistance to, or interference with the execution of a court's lawful process.

person guilty of violating G.S. 14-233 (resisting, obstructing an officer in discharging a duty of his office) in this situation. However, in my opinion, this would be an improper charge under these circumstances. It would be unlawful for the sheriff to break and enter the dwelling, and thus preventing him from entering would not be resisting, delaying, or obstructing the officer in the lawful performance of his duty.

What is the sheriff's authority once he has entered the dwelling peaceably? For example, a sheriff is given a writ of possession to seize a nineteen-inch Zenith television set from John Jones at 1541 Smith Place. He goes to Mr. Jones' house, knocks on the door, and tells Mr. Jones that he has a writ to pick up the television. Mr. Jones lets the sheriff in the house but when the sheriff starts to pick up the television, he steps in front of it and says, "You can't take it." A recent Attorney General's opinion said that if the judgment debtor forcibly resists the officer's attempts to carry out the writ, the officer cannot use force to get possession of the debtor's personal property.[10] According to the Attorney General, the officer should tell the debtor that he can be held in contempt of court and then leave if the debtor still refuses to allow the officer to take the property. I disagree with the Attorney General's opinion because it differs from the common law rule and from early North Carolina case law. The common law rule prohibiting breaking and entering applied only to the outer door. Once inside a house, an officer could use reasonable force in carying out the writ, including breaking in inner doors.[11] A recent Michigan case, Vanden Bogert v. May,[12] held that the sheriff acted lawfully when he entered a home with the owner's permission to execute a writ of possession but used physical force when the owner tried to stop him from making a levy. One North Carolina case,[13] although it did not occur inside a dwelling, upholds the authority of the sheriff to use force in executing civil process. The action was brought against the constable's bond for failure to levy and collect on an execution. The judgment debtor was riding on his horse and would not get down when the constable asked him to dismount. The constable did not levy on the horse because the debtor would not get off it voluntarily. The court upheld the forfeiture of the bond stating that a man's house protects him and his property if it can be obtained only by breaking in. But nothing exempts an article from seizure while its owner is using it if it could be seized if it were merely in his presence. The judgment debtor had a duty to surrender the horse whether he was riding on it or had just dismounted, and the officer could have used such force as was needed to execute the process. Thus, in my opinion, whether once inside a dwelling with a writ or outside a dwelling with a writ, if the judgment debtor refuses to surrender the property, the sheriff may use reasonable nondeadly force to take it. If the judgment debtor interferes, he can be arrested for violating G.S. 14-233--obstructing and delaying an officer discharging a duty of his office.

---

10. N.C. Attorney General's Opinion, issued January 13, 1977, to Mr. C. E. Drum, Jr.

11. Stearns v. Vincent, 50 Mich. 209, 15 N.W. 86 (1883).

12. 334 Mich. 606, 55 N.W.2d 115 (1952).

13. State ex rel. Rogers v. Dillard, 25 N.C. 102 (1842).