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Recent Developments: State v. Johnson: Conviction for Conspiracy Will Stand despite the Acquittal of All of Co-Conspirators in Prior Trial. The Rule of Consistency Is Inapplicable in Separate Trials

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Scott v. State:
The Police "Knock and Talk" Procedure Is Valid When the Consent to Search Is Voluntary

By Havalah Neboschick

In a case of first impression, the Court of Appeals of Maryland upheld the validity of a motel room search pursuant to a police procedure termed "knock and talk" during which police officers randomly knock on motel room doors in hopes that the occupants will allow the police to enter and consent to a search. *Scott v. State*, 366 Md. 123, 782 A.2d 862 (2001). In so holding, the court determined that the knock and talk procedure does not violate the Fourth Amendment to the U.S. Constitution when an occupant is not unlawfully seized, yet voluntarily consents to a search. *Id.*

On May 19, 2000, Aaron Scott ("Scott") rented a room at the Regal Inn Motel in Baltimore County. Shortly after 11:30 p.m., a Baltimore County detective, accompanied by five or six other police officers, visited the motel without a warrant. Although the officers did not have reasonable, articulable suspicion or probable cause to believe illegal activity was occurring at the motel, the police had previously received complaints concerning prostitution, drug use, and drug distribution in the area.

Pursuant to the knock and talk procedure, plain-clothed police officers with their police badges displayed and holstered handguns visible, knocked on Scott's motel room door. After Scott opened the door, the officers informed him of the problems plaguing the area and asked if they could enter the room in order to talk to him. Scott invited the officers into his room. Detective Schwanke ("Schwanke") noticed the odor of burning marijuana upon entering the room; however, he first questioned Scott as to whether Scott had any knowledge of illegal activity in the area and whether Scott possessed any illegal narcotics. Schwanke requested permission to search the room and Scott voluntarily consented. The police recovered marijuana, crack cocaine, cocaine, and drug paraphernalia, indicating an intent to distribute.

At the pre-trial conference, Scott sought to suppress evidence obtained from the knock and talk, arguing that the search and seizure was unlawful and there was no valid consent. The Circuit Court for Baltimore County, finding the procedure did not violate the U.S. Constitution, refused to suppress evidence based on Scott's voluntary consent to the search. Scott was convicted of possession with intent to distribute cocaine. Scott, a repeat offender, was sentenced to a prison term of ten years without parole.

Two issues were before the court of appeals. First, was whether the knock and talk procedure violates the Fourth Amendment to the U.S. Constitution and Article 26 of the Maryland Declaration of Rights, which are read in *pari materia*, when carried out in absence of reasonable, articulable suspicion or probable cause. *Id.* at 124, 782 A.2d at 864. The second issue was whether Scott voluntarily consented to the search of his motel room.

The court began its constitutional analysis by examining whether the procedure constitutes a seizure. "A 'seizure' occurs when a person is restrained by the police, and that must be judged from the interaction between the individual and the police, not by the level of suspicion, if any, in the officer's mind." *Id.* at 132, 782 A.2d at 869. Moreover, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Scott*, 366 Md. at 132, 782 A.2d at 869(quoting *Fla. v. Bostick*, 501 U.S. 429, 434 (1991)).

Courts examine several supplementary factors, including where and when a knock and talk investigation occurs, to determine the totality of the circumstances. *Id.* at 137, 782 A.2d at 871-72. It is well established that, "absent a clear expression by the owner to the contrary, police officers, in the course of official business, are permitted to approach one's dwelling and seek

permission to question an occupant." *Id.* at 130, 782 A.2d at 867-868. The legitimate official business requirement is a low threshold and does not require a particular level of incriminating information. *Id.* at 131, 782 A.2d at 868. The court determined that Schwanke and his fellow police officers, while monitoring prospective criminal activity as well as seeking information regarding illegal activity, were on official police business at the Regal Motel. *Id.* at 133, 782 A.2d at 869.

Many courts have given great weight to the time of day a knock and talk occurs. *Id.* While some courts have found late night encounters at a person's residence troubling, none have found a seizure based on this factor alone. *Scott*, 366 Md. at 133, 782 A.2d at 869. Here, the knock and talk took place at 11:30 p.m. at a motel room while Scott was still awake. Even though late night encounters with police in individual's homes should be limited as a matter of public policy, it is more likely that a motel room will not be occupied until the evening. *Id.* at 139, 782 A.2d at 872.

Based on the totality of the circumstances, the court determined that there was no Fourth Amendment seizure in this case. The court stated, "[w]e are not prepared, alone among courts and in contravention of the principles announced in *Bostick*, to find every late-night 'knock and talk' encounter a Fourth Amendment seizure, without regard to all other relevant circumstances." *Id.* at 138, 782 A.2d at 872-73.

While the knock and talk procedure does not amount to a Fourth Amendment seizure, courts cautiously examine consents obtained by police to enter and search a room and may invalidate searches when consent is not voluntary. *Id.* at 139-140, 782 A.2d at 873. Whether the consent to search was voluntarily obtained is a question of fact to be determined from the totality of the circumstances. *Id.* at 141, 782 A.2d at 875 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). Relevant factors include "the number of officers present, the age, maturity, intelligence, and experience of the consenting party, the officers' conduct," and the time, location, and duration of the encounter. *Id.* at 142, 782 A.2d at 875.

In the case at hand, the court concluded Scott voluntarily consented to the search of his motel room. *Scott*, 366 Md. at 143, 782 A.2d at 875. Specifically, the police officers were not overbearing, the encounter lasted only two to three minutes from knock to the completion of the search, and Scott was not inexperienced. *Id.* Furthermore, Maryland law does not require police to advise a person in advance that he has the right to refuse or limit consent. *Id.* at 142, 782 A.2d at 874-75. "[W]hile the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Id.* at 141-42, 782 A.2d at 874 (quoting *Schneckloth v. Bustamonte*, 412 U.S. at 248-49). Thus, the trial court did not commit any error of law or fact in deciding that Scott consented to the search of his motel room and that his consent was voluntary. *Id.* at 143, 782 A.2d at 875.

In recent years, the knock and talk procedure has become increasingly popular with law enforcement agencies across the country, creating several constitutional issues for the judiciary and the legislature to explore. Overall, courts have upheld the procedure by applying well-established case law to a new technique.

Nonetheless, the implementation of the procedure raises public policy concerns. While a majority of states, including Maryland, do not require police officers to advise a person in advance of the right to refuse or limit consent, some state legislatures have enacted statutes requiring notice in order to vindicate individual rights. More often than not, suspects with contraband, even those who are considered experienced criminals, consent to searches out of fear that refusal would give police probable cause to then obtain a search warrant anyway. Perhaps requiring police officers to provide limited information on refusal may alleviate some of the confusion occupants have regarding searches. It is not clear whether such notice lessens the seemingly coercive nature of the procedure, yet the right to refuse remains a factor used to determine whether consent is voluntary regardless of a notice requirement.

Various courts have suggested that non-emergency knock and talk encounters, especially late-night intrusions into people's homes, should

be tightly controlled or limited as a matter of public policy. While knock and talk encounters occur at homes as well as hotels and motels, hotels and motels are typically not occupied until the evening. On the other hand, per se rules for knock and talk encounters are ineffective and contrary to established case law that demands a case-by-case analysis taking into account the totality of the circumstances. As more knock and talk encounters are challenged, state legislatures are beginning to weigh competing policy considerations in order to protect constitutional rights in addition to combat crime.

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