



1998

Recent Developments: *Kostelec v. State*: Present Tense Language of Search Warrant Statute Does Not Permit Issuance of Anticipatory Search Warrant Based on Future Evidence of a Criminal Act

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Recommended Citation

Magee, John (1998) "Recent Developments: *Kostelec v. State*: Present Tense Language of Search Warrant Statute Does Not Permit Issuance of Anticipatory Search Warrant Based on Future Evidence of a Criminal Act," *University of Baltimore Law Forum*: Vol. 28 : No. 2 , Article 11.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol28/iss2/11>

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Kostelec v. State:

The Court of Appeals of Maryland in *Kostelec v. State*, 348 Md. 230, 703 A.2d 160 (1997), held that Md. Ann. Code art. 27, section 551(a) (1996 Repl. Vol.), which authorizes search warrants, does not permit the issuance of anticipatory search warrants. In so holding, the court implied that it was the duty of the legislature to amend the statute to validate search warrants based upon probable cause that sometime in the future evidence of a crime would be found at a specified location.

In April of 1995, Howard County Police seized a Federal Express package containing approximately forty ounces of liquid phencyclidine ("PCP"). Howard County Police made a controlled delivery of the package to the Baltimore address and arrested Randal Lucabaugh ("Lucabaugh"). Lucabaugh was arrested when he attempted to leave with the package. He stated that part of the package belonged to Roarke Boulton ("Boulton") who lived in Elkridge, Maryland. Police later determined that Boulton lived with Joseph Kostelec ("Kostelec"), the owner of the residence. Lucabaugh cooperated with the authorities and telephoned Boulton to assure him that a friend would deliver the package.

Howard County Police obtained an anticipatory search

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By John Magee

and seizure warrant based upon a supporting affidavit. The affidavit stated the police would only execute the warrant if: 1) a member of the Howard County Police Department presented the package for delivery; 2) someone inside the residence accepted the package; 3) the police observed the individual carry the package into the residence; and 4) the police conducted constant surveillance of the residence. On April 5, 1995, Kostelec accepted the package on behalf of Boulton. An electronic device alerted the police that the package was opened and the police made a no-knock entry. Kostelec was arrested and charged with several drug related offenses.

Kostelec challenged the search warrant, contending that the affidavit failed to allege facts presently in existence which indicated a crime was being committed. The Circuit Court for Howard County denied Kostelec's motion to suppress

on the grounds that the anticipatory search warrant did not violate Kostelec's constitutional rights. Kostelec was convicted of various charges and sentenced to five years without parole. The Court of Special Appeals of Maryland affirmed the decision and held that the language of section 551(a) could be read to allow the requisite probable cause finding at the time the warrant was executed. The Court of Appeals of Maryland granted certiorari to determine: 1) whether section 551(a) permitted anticipatory search warrants; 2) whether anticipatory search warrants were constitutional; and 3) whether suppression of the evidence was the appropriate remedy.

The court began its analysis by reviewing the language of section 551(a). *Kostelec* at 236-37, 703 A.2d at 163. To issue a search warrant the statute requires "that there is probable cause . . . to believe that any misdemeanor or felony is being committed . . . or that any property subject to seizure . . . is situated or located . . . in or on any such building . . ." *Id.* at 236, 703 A.2d at 163 (quoting section 551(a)). The court disagreed with the intermediate court's interpretation and emphasized that the present tense language of the statute referred to the

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time when the police applied for the warrant, not when the warrant was executed. *Id.*

The court next examined prior case law on the subject of anticipatory search warrants. *Id.* at 237, 703 A.2d at 163-64. In a previous decision, the court of special appeals examined section 551(a) and concluded that probable cause to support a search warrant must be based on facts that the evidence of the crime is upon the person or premises to be searched. *Id.* at 237, 703 A.2d at 163 (citing *Salmon v. State*, 2 Md. App. 513, 235 A.2d 758 (1967)). Furthermore, the court of appeals earlier held that section 551(a) required probable cause that a crime has been or "is being committed . . . and . . . is located upon" the person or premises to be searched. *Id.* at 237, 703 A.2d at 163-64 (quoting *State v. Intercontinental, Ltd.*, 302 Md. 132, 486 A.2d 174 (1985)). The court determined the literal meaning of the statute was that evidence must be present at the time the judge issues the warrant. *Id.* at 236, 703 A.2d at 163. The court concluded that the search warrant was not authorized because section 551(a) does not permit anticipatory search warrants based on future evidence of a crime. *Id.* at 238, 703 A.2d at 164.

Next, the court examined the constitutionality of anticipatory search warrants. *Id.* The State argued that the majority of states with statutes similar to section 551(a) have concluded anticipatory search warrants are constitutional. *Id.* The court, however, avoided addressing those states which permitted anticipatory search warrants, and examined Alabama, Colorado and Iowa case law which supported the proposition that legislative intent precluded issuance of anticipatory search warrants. *Id.* at 238-40, 703 A.2d at 164-65. The court noted that in 1990, the present tense language of Federal Rules of Criminal Procedure 41(a)(1), which governs federal search warrants, was specifically omitted to permit anticipatory search warrants. *Id.* at 239, 703 A.2d at 164-65. Accordingly, the court concluded that the search warrant issued in the case at bar was not authorized by section 551(a) because the present tense language was still contained in the Maryland statute. *Id.* at 240, 703 A.2d at 165.

Having decided upon the invalidity of the search warrant, the court next addressed the issue of whether suppression was the appropriate remedy. *Id.* at 240-41, 703 A.2d at 165.

The court of appeals standard of review is limited to only those issues raised in the petition for certiorari or any cross-petition for certiorari. *Id.* at 242, 703 A.2d at 166. Kostelec argued suppression was the appropriate remedy throughout the appeals process. *Id.* at 241, 703 A.2d at 165. Noting that the State failed to address the issue of suppression until its brief to the court of appeals, the court held that because both parties assumed suppression was the appropriate remedy in the event of a section 551(a) violation, Kostelec's motion to suppress should be granted. *Id.* at 242-43, 703 A.2d at 166.

In *Kostelec v. State*, the court held that Maryland law did not authorize the issuance of anticipatory search warrants. The refusal to recognize anticipatory search warrants severely impairs the investigatory power of law enforcement officials in Maryland. In deciding this case of statutory construction, the court intimated that it was up to the legislature to create the appropriate language to permit anticipatory search warrants. Because a controlled delivery is an important law enforcement tool, it is imperative that the legislature amend the statute to allow the issuance of anticipatory search warrants.