

**OP. NO. 03-064**

**CRIMINAL PROCEDURE: ARREST.**

**Law-enforcement officer may not enter dwelling without warrant or consent of dwelling owner for purpose of serving misdemeanor summons.**

The Honorable Gary W. Waters  
Sheriff for the City of Portsmouth  
September 16, 2003

### **Issue Presented**

You ask whether law-enforcement officers have authority to enter a dwelling without a warrant for the purpose of serving a summons for a misdemeanor, if they know the individual they are seeking to serve is within the dwelling.

### **Response**

It is my opinion that a law-enforcement officer may not enter a dwelling without a warrant or consent of the dwelling owner for the purpose of serving a summons for a misdemeanor.

### **Background**

You relate that a deputy sheriff charged with serving a summons on an individual for failure to pay child support observed the individual inside the dwelling, opened the door, and served the summons.

### **Applicable Law and Discussion**

Section 19.2-76 requires that "[a] warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally." Section 19.2-77 provides that, "whenever a person shall flee from an officer attempting to arrest him, such officer, with or without a warrant, may pursue such person anywhere in the Commonwealth and, when actually in close pursuit,<sup>[1]</sup> may arrest him wherever he is found." Because the General Assembly made the close pursuit statute applicable only to an officer attempting to arrest a suspect, § 19.2-77 does not encompass the effort to execute a summons.

The Supreme Court of the United States and courts in Virginia consistently have recognized that, under the Fourth Amendment,<sup>2</sup> a

firm line is drawn at the threshold of a home, which may not be crossed without a warrant, absent exigent circumstances.<sup>3</sup> These courts have recognized that close pursuit is an exigent circumstance that may permit an officer to pursue a suspect into a residence where he otherwise would not be permitted to go.<sup>4</sup>

A 1980 opinion of the Attorney General concludes that, absent exigent circumstances, an arrest warrant must be obtained as a prerequisite to entering the home of an accused to effectuate a felony arrest.<sup>5</sup> Under the facts you present, a summons was issued instead of an arrest warrant. Although such a summons, if served, would commence misdemeanor proceedings against the person served, the summons is not, for all purposes, an adequate substitute for an arrest or a search warrant. The issuance of a misdemeanor summons does not constitute a judicial determination that the right of privacy in a home is required to yield to an officer's purpose.<sup>6</sup>

Although the question you ask has not been answered directly by Virginia's courts under the facts you present, other courts considering similar cases have reached the conclusion that, absent exigency, an officer may not enter private premises without a warrant in order to arrest on a charging instrument or to serve papers.<sup>7</sup>

## Conclusion

The officer's duty to serve a misdemeanor summons does not create an exigency similar to those considered by the federal and state courts in circumstances where they have approved warrantless entry to effectuate a felony arrest. Accordingly, absent consent of a dwelling owner, a law-enforcement officer must obtain a warrant before entering a dwelling for the purpose of serving a summons for a misdemeanor.

<sup>1</sup>"Close pursuit' is a relative term and has reference to time or distance, or both, depending on the facts of the case." *Callands v. Commonwealth*, 208 Va. 340, 342-43, 157 S.E.2d 198, 201 (1967), *cited in* *Neiss v. Commonwealth*, 16 Va. App. 807, 810, 433 S.E.2d 262, 264 (1993).

<sup>2</sup>The Fourth Amendment to the Constitution of the United States, made applicable to states by the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

<sup>3</sup>See *Payton v. New York*, 445 U.S. 573, 590 (1980); *Jones v. Commonwealth*, 29 Va. App. 363, 368, 512 S.E.2d 165, 167 (1999).

<sup>4</sup>See, e.g., *United States v. Santana*, 427 U.S. 38 (1976) (officers in hot pursuit of respondent suspected of possessing marked money used to buy heroine); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (officers in hot pursuit of armed robbery suspect), *cited in* *Lugar v. Commonwealth*, 214 Va. 609, 629,

202 S.E.2d 894, 909 (1974); Commonwealth v. Talbert, 23 Va. App. 552, 478 S.E.2d 331 (1996) (officer in hot pursuit of defendant suspected of having rock of crack cocaine).

<sup>5</sup>1980-1981 Op. Va. Att'y Gen. 15, 16.

<sup>6</sup>See Johnson v. United States, 333 U.S. 10, 14 (1948).

<sup>7</sup>See, e.g., United States v. Bradley, 922 F.2d 1290, 1295 (6th Cir. 1991) (holding that warrantless arrest of defendant in his home on felony indictment was unconstitutional), overruled on other grounds, United States v. McGlockin, 8 F.3d 1037 (1993); Gateway 2000, Inc. v. Limoges, 552 N.W.2d 591 (S.D. 1996) (ruling that corporation had justifiable expectation of privacy in nonpublic employee work areas, and was entitled to injunction against officers entering nonpublic employee areas to serve papers on employees); In re: Walters, 229 N.C. 111, 47 S.E.2d 709 (1948) (holding that respondent did not commit contempt of court in refusing to permit officers to enter home without search warrant for purpose of serving civil process on third party).

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