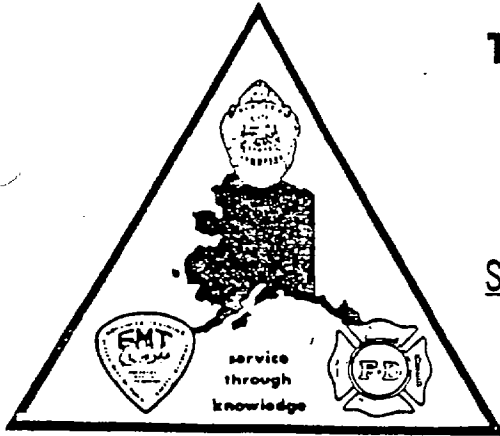


DEPARTMENT OF PUBLIC SAFETY

TRAINING ACADEMY

LEGAL BULLETIN NO. 88
August 24, 1984



SERVICE OF NIGHTTIME SEARCH WARRANT BASED ON REASONABLE CERTAINTY

Reference: Elizabeth FLEENER
v.
State of Alaska

Alaska Court of Appeals
Opinion No. 396
686 P.2d 730
August 17, 1984

FACTS:

Shortly after 5:00 a.m., a police officer in Fort Yukon received a phone call from a female who identified herself as "Betty FLEENER and/or Betty Mayo." She said she had over five pounds of marijuana in her house and wanted to turn herself into the police. She gave the officer directions to her home. According to the officer, FLEENER sounded agitated and near hysteria. The officer went to her residence in company of a second officer. After knocking on the door, the officer heard the same nearly hysterical woman reply that he "didn't want to talk and wanted them to go away." When it became apparent the woman was not going to allow them to enter, the officer who received the call left to obtain a search warrant while leaving the other officer at the scene to secure the residence.

Based on the affidavit to obtain a search warrant, the magistrate issued a warrant which allowed the officer to search the residence "at any time of day or night." The officer who filled out the affidavit checked the box on the search warrant indicating that he had "reason to believe" (not the box which indicated he was positive) that marijuana was present at FLEENER's residence. The officers went to the FLEENER residence, knocked on the door twice and waited for a response. The officer announced, "It's the police." After waiting a few minutes without response, they forced the door open. FLEENER was found laying on the floor just inside the door. Quantities of marijuana and hashish were found and seized. FLEENER was convicted; she then appealed, alleging the evidence should be suppressed because the warrant was improper and the officers violated the "knock and announce" rule (Alaska Statute 12.25.100).

ISSUE:

Was there sufficient showing on the affidavit that a nighttime warrant (requiring positive proof) was necessary?

HELD: Yes.

REASONING:

1. The word "positive" should be construed to mean reasonably certain. An

explicit statement that the affiant is positive of the whereabouts of the property (marijuana) was not required to authorize a nighttime search. (emphasis added)

2. The affidavit established that a person, who identified herself as FLEENER, called the police admitting she had marijuana in her house. The police went to the described residence and the officer heard "the same nearly hysterical woman" who had made the phone call; this corroborated the fact that the person who made the phone call admission was the same person actually in the residence.

3. There were exigent circumstances which justified the authorization of a nighttime search:

- a. The marijuana possessed by FLEENER was destructible evidence.
- b. FLEENER knew police were aware she possessed the marijuana and had staked out her residence.

4. Requirements of the "knock and announce" rule were met; more than a minute elapsed between the officers knocking and actually entering the residence.

NOTES:

You should review Legal Bulletin No. 40, where the Alaska Supreme Court defined "positive proof" as it pertains to a nighttime search warrant as "reasonable certainty." Legal Bulletin No. 86 should also be reviewed since it pertains to the "good faith exception" to the warrant requirement when the magistrate errs regarding the "form" of the warrant.

Reminder: Alaska Criminal Rule 37(a)(3)(IV) provides that any warrant served between 10:00 p.m. and 7:00 a.m. is a nighttime warrant.