

**SMITH, RODGERS & STRICKLAND, PLLC**

**ANTICIPATORY SEARCH WARRANTS  
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**BY**

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**The Cases:**

*State v. Smith*\*, 124 N.C. App. 565, 478 S.E.2d 237 (1997); *State v. Phillips*, North Carolina Court of Appeals, COA02-1509, October 7, 2003; and *State v. Baldwin*, North Carolina Court of Appeals, COA02-1594, December 2, 2003

**And an Anticipatory Search Warrant is:**

This is a search warrant “issued in advance of the receipt of particular property at the premises designated in the warrant.” That is, “the search warrant is not based on present probable cause, but on the expectancy that, at some point in the future probable cause will exist.” More clearly, I think, it is this: suppose you have probable cause to believe controlled substances will be delivered later today to a certain address in your jurisdiction. You have two options for the issuance of a search warrant for those substances. One is to wait until the drugs are delivered and then approach a judicial official for a search warrant. The other option is to secure the search warrant now in **anticipation** of the delivery, hold it, and execute it only after the drugs have been delivered. This second option is an example of an **anticipatory search warrant**.

**Well, it sounds pretty good, doesn't it? But personally I don't like them a'tall.**

First, the warrant must be narrowly drawn in a certain, specified way, with certain specific language included, or the warrant is simply and specifically invalid. And secondly, if the drugs are not delivered, the warrant must be returned unserved. A returned civil or criminal process is generally a public record – anyone can read it, including your suspect. And that is almost like allowing him to read your investigative file. He will gain much valuable intelligence information from you, not the least of which is that he is presently an object of your attention. Then you might as well check the weather report. When you see a cold day in Hell in the forecast, you'll know drugs are once again being delivered to your suspect at the address indicated. And not one minute sooner.

**Okay. So it's a pain. But still I hear you saying that you might want to use one some day.**

I know what you're thinking. Tactically speaking, it can be very effective to secure the warrant in advance, and then hit the premises as soon as the drugs arrive. Well, if that is the case, go the **anticipatory route**. **If you are not able to execute the warrant and must return it unserved, consider having your assistant district attorney approach a district court judge and move to have the search warrant sealed for 30 days “in the best interests of justice.”** The Clerk of Superior Court will keep it in the sealed envelope for that period of time. I believe that 30 days is reasonable and should give you time enough to establish probable cause once again for another search warrant at that same address. **If you cannot establish probable cause within that 30-day period, well – you tried. Maybe the court will give you an extension, but of course there is no guarantee.**

**AND YOU ARE PROBABLY WONDERING ABOUT THAT SPECIFIC AND TECHNICAL LANGUAGE NECESSARY FOR A VALID ANTICIPATORY SEARCH WARRANT:**

Here is the exact quote from *Smith*\* setting forth the requirements necessary for such a warrant:

1. The anticipatory warrant must set out, on its face, explicit, clear, and narrowly drawn triggering events which must occur before execution may take place;
2. Those triggering events, from which probable cause arises must be
  - a. ascertainable, and
  - b. preordained, meaning that the property is on a sure and irreversible course to its destination; and finally
3. No search may occur unless and until the property does, in fact, arrive, at that destination.

Well, as they say where I come from, that's a sumbitch, ain't it? Tell the truth now, an officer, assistant DA and superior court judge *together* failed to get the search warrant in *Smith* written to meet the above stated requirements. Tough! Of course, they did not have the benefit of a previous North Carolina appellate case to guide them, and we do.

**THE FACTS OF *STATE v. BALDWIN* BEING CONVOLUTED, FOR WHICH YOU MUST TAKE MY WORD, AND *STATE V. SMITH*\* BEING A CASE WITH A FLAWED SEARCH WARRANT, LET'S TAKE A PEEK AT THE FACTS OF *STATE V. PHILLIPS*:**

A mostly direct quote from the case: Two years ago last January, Detective James Anders was working with the Guilford County Sheriff's Office interdiction drug unit at a Federal Express facility in Greensboro. On that day he scanned packages coming into the area by means of parcel company services in an attempt to isolate those containing narcotics.

When a parcel from California exhibited several characteristics indicating the possible presence of drugs, Detective Anders had a K-9 unit inspect the parcel. The K-9 indicated the presence of narcotics. A search warrant was obtained, executed, and the package was found to contain approximately 1,000 grams of crack cocaine. Detective Anders obtained a second search warrant for the address to which the package was to be delivered based on the discovery of the narcotics, and then arranged a controlled delivery of the re-sealed package. The package itself was addressed to Sonya Moore at 1412 Hamlet Place, Greensboro, North Carolina. The pertinent part of the search warrant stated:

*On this date, this applicant and other officers will attempt to make a controlled delivery of the Federal Express Package addressed to Sonya Moore, 1412 Hamlet Pl., Greensboro, N.C. If this Federal Express Package is delivered to said residence within the forty-eight hours of the Issuance of this Warrant, this search warrant will be executed shortly thereafter.*

The controlled delivery took place that same day shortly before 11 o'clock in the morning. Since there was no answer and the label indicated a signature release, allowing the package to be left at the destination if no one was home to sign for its receipt, the officer attempting the delivery left the package on the porch. A few minutes later, defendant opened the front door from the inside of the house and retrieved the package. Approximately twenty minutes later, Detective Anders executed the search warrant and forced entry into defendant's residence when no one answered the door. Detective Anders found defendant in the bathroom, using his body to prevent entry and flushing crack cocaine down the commode. FYI – the defendant was subsequently indicted for trafficking by possession of 400 grams or more of cocaine and maintaining a dwelling for the purpose of keeping controlled substances. The trial court sentenced defendant to 175 months **(over 14 years) to 219 months' (over 18 years) imprisonment. Under structured sentencing, the defendant must serve every day of the minimum sentence. So he is eligible for release around 2016.**

## **THE LEGAL DECISION OF PHILLIPS:**

The Court of Appeals held that the three-pronged test of *Smith*\* had been met, and the search was constitutionally and legally sound. As to the first prong, that of the triggering events, Detective Anders had no discretion to decide whether or not those events had occurred. There was only one triggering event, the successful controlled delivery of the Federal Express package to the address. Once delivery occurred, the warrant could be executed.

As to the second prong, the sure and irreversible course to destination prong, the Court held that anticipatory warrants executed after a controlled delivery of a package sent to a listed address have been overwhelmingly approved by the courts of other jurisdictions, and the facts here (the controlled delivery to the specific address) were sufficient to satisfy the second prong.

As to the third prong, time of search, any search must await the arrival of the contraband to the destination. It was undisputed that the package was delivered to the specific address and taken inside. Nothing more is required of the third prong.

## **THE CLIENTS OF SMITH, RODGERS & STRICKLAND:**

Should call us if there is a need to draft an **anticipatory search warrant**. **All others should sit down with their legal advisor or assistant DA and discuss the facts, write the warrant, and have it reviewed before presenting it to a judicial official.**

**The SR&S Team Tip:** with anticipatory search warrants, the judicial official approached should be a judge, district or superior. We believe the issuing official should be a judicial official with knowledge of the three cases cited in this Roll Call bulletin. That way, if necessary, corrections can be made *before* execution. You just cannot correct one of these babies *after* you have kicked in the door, oh no, no, no.

\*SMITH The Smith surname in the case of the same name belongs to a Smith unrelated to Kevin or any reasonably distant members of his fine family. I'd say Kevin has pretty much pruned his genealogical tree of all rotten branches, Kevin himself actually being the weakest link. I'm sorry, limb. All in favor say Aye; all opposed say No. The Ayes have it. Move along folks, nothing more to be seen here.