

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1329
Judiciary

(Delegates Glass and Anderson)

Search Warrants - Mistake in Execution - Remedies

This bill establishes provisions that relate to the execution of a search warrant in error. Specifically, if a search warrant is executed on the wrong property or if the search warrant lists the name of a person not associated with the property on which the search warrant is executed, the owner of the property on which the search warrant is executed must receive (1) from either the individual who signed the affidavit in support of the search warrant or one of the law enforcement officers executing the search warrant, an apology in person for the mistaken execution and (2) from the law enforcement agency that employs the law enforcement officers executing the search warrant, \$10,000. Each law enforcement agency in the State must establish procedures to implement the bill's requirements.

Fiscal Summary

State Effect: Potential increase in special fund expenditures if the bill results in higher payments from the State Insurance Trust Fund (SITF) for claims filed under the Maryland Tort Claims Act (MTCA) or increased litigation of MTCA cases. General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from MTCA payments or if agencies need to employ additional legal staff to litigate MTCA cases filed as a result of the bill's provisions. The magnitude of the increase depends on additional cases brought under the bill, which cannot be reliably estimated at this time.

Local Effect: Potential increase in expenditures for local governments to pay judgments awarded in cases under the bill and pay increased insurance premiums for liability coverage against Local Government Tort Claims Act (LGTCA) claims.

Small Business Effect: Potential meaningful.

Analysis

Current Law:

Search Warrants

A circuit court judge or a District Court judge may issue a search warrant whenever it is made to appear to the judge that there is probable cause to believe that (1) a misdemeanor or felony is being committed by a person or in a building, apartment, premises, place, or thing within the territorial jurisdiction of the judge or (2) property subject to seizure is on the person or in or on the building, apartment, premises, place, or thing.

An application for a search warrant must be (1) in writing; (2) signed, dated, and sworn to by the applicant; and (3) accompanied by an affidavit that sets forth the basis for probable cause and contains facts within the personal knowledge of the affiant that there is probable cause.

An application for a search warrant may be submitted to a judge (1) by in-person delivery of the application, the affidavit, and a proposed search warrant; (2) by secure fax, if complete and printable images of the application, the affidavit, and a proposed search warrant are submitted; or (3) by secure electronic mail, if complete and printable images of the application, the affidavit, and a proposed search warrant are submitted.

The applicant and the judge may converse about the search warrant application in person, via telephone, or via video. The judge may issue the search warrant by (1) signing the search warrant, indicating the date and time of issuance on the search warrant, and physically delivering the signed and dated search warrant, the application, and the affidavit to the applicant; (2) signing the search warrant, writing the date and time of issuance on the search warrant, and sending complete and printable images of the signed and dated search warrant, the application, and the affidavit to the applicant by secure fax; or (3) signing the search warrant, either electronically or in writing, indicating the date and time of issuance on the search warrant, and sending complete and printable images of the signed and dated search warrant, the application, and the affidavit to the applicant by secure electronic mail.

An application for a search warrant may contain a request that the search warrant authorize the executing law enforcement officer to enter the building, apartment, premises, place, or thing to be searched without giving notice of the officer's authority or purpose. To execute such a warrant (also referred to as a "no-knock" warrant), the officer must have reasonable suspicion that, without the authorization, the property subject to seizure may be destroyed, disposed of, or secreted or the life or safety of the executing officer or another person may be endangered. This warrant authorizes the executing law enforcement officer to enter the

building, apartment, premises, place, or thing to be searched without giving notice of the officer's authority or purpose.

A judge who issues a search warrant must file a copy of the signed and dated search warrant, the application, and the affidavit with the court. Any search and seizure under the authority of a search warrant must be made within 15 calendar days after the day that the search warrant is issued. A search warrant is void after the expiration of the 15-day period.

Generally, a search warrant must (1) be directed to a duly constituted police officer, the State Fire Marshal, or a full-time investigative and inspection assistant of the Office of the State Fire Marshal and authorize the police officer, the State Fire Marshal, or a full-time investigative and inspection assistant of the Office of the State Fire Marshal to search the suspected person, building, apartment, premises, place, or thing and to seize any property found subject to seizure under the criminal laws of the State and (2) name or describe, with reasonable particularity the person, building, apartment, premises, place, or thing to be searched, the grounds for the search, and the name of the applicant on whose application the search warrant was issued.

The executing law enforcement officer must give a copy of the search warrant, the application, and the affidavit to an authorized occupant of the premises searched or leave a copy of the search warrant, the application, and the affidavit at the premises searched. In addition, the executing law enforcement officer must (1) prepare a detailed search warrant return that must include the date and time of the execution of the search warrant; (2) give a copy of the search warrant return to an authorized occupant of the premises searched or leave a copy of the return at the premises searched; and (3) file a copy of the search warrant return with the court in person, by secure fax, or by secure electronic mail.

For property taken under a search warrant, a circuit court judge or District Court judge must order the return of the property to the person from whom it was taken if it appears that (1) the property taken is not the same as that described in the search warrant; (2) there is no probable cause for believing the existence of the grounds on which the search warrant was issued; (3) the property was taken under a search warrant issued more than 15 calendar days before the seizure; or (4) the property, although rightfully taken under a search warrant, is being wrongfully withheld after the retention of the property is necessary. If these conditions are alleged, the judge may receive an oral motion made in open court at any time making application for the return of seized property. If the judge grants the oral motion, the order of the court must be in writing and a copy sent to the State's Attorney. Court costs may not be assessed against the person from whom the property was taken if the judge denies the oral motion and requires the person from whom the property was taken to proceed for return of the seized property by petition and an order to show cause to the police authority seizing the property, and it is later ordered that the property be restored to the person from whom it was taken.

If the judge finds that the property taken is the same as that described in the search warrant and that there is probable cause for believing the existence of the grounds on which the search warrant was issued, the judge must order the property to be retained in the custody of the police authority seizing it or to be otherwise disposed of according to law.

Except for contraband or other property prohibited from being recoverable, property seized under a search warrant may be returned to the person to whom the property belongs without the necessity of that person bringing an action for replevin or any other proceeding against the unit with custody of the property if the criminal case in which the property was seized is disposed of because of a *nolle prosequi*, dismissal, or acquittal; the State does not appeal the criminal case in which the property was seized; or the time for appeal has expired.

Notwithstanding any provision of the Maryland Rules, a circuit court judge or a District Court judge, on a finding of good cause, may order that an affidavit presented in support of a search and seizure warrant be sealed for a period not exceeding 30 days. A finding of good cause is established by evidence that the criminal investigation to which the affidavit is related is of a continuing nature and likely to yield further information that could be of use in prosecuting alleged criminal activities, and the failure to maintain the confidentiality of the investigation would (1) jeopardize the use of information already obtained in the investigation; (2) impair the continuation of the investigation; or (3) jeopardize the safety of a source of information.

A court may grant one 30-day extension of the time that an affidavit presented in support of a search and seizure warrant is to remain sealed if law enforcement provides continued evidence, and the court makes a finding of good cause based on the evidence. After the order sealing the affidavit expires, the affidavit must be unsealed and delivered within 15 days to the person from whom the property was taken or, if that person is not on the premises at the time of delivery, to the person apparently in charge of the premises from which the property was taken.

Local Government Tort Claims Act

LGTCa defines local government to include counties, municipal corporations, Baltimore City, and various agencies and authorities of local governments such as community colleges, county public libraries, special taxing districts, nonprofit community service corporations, sanitary districts, housing authorities, and commercial district management authorities. The Baltimore City Police Department is included in the definition of “local government,” as are employees of a county or municipal police department.

LGTCa limits the liability of a local government to \$400,000 per individual claim and \$800,000 per total claims that arise from the same occurrence for damages from tortious

acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts of its employees.

LGTCA specifies that an action for unliquidated damages may not be brought unless notice of the claim is given within one year after the injury. The notice must be in writing and must state the time, place, and cause of the injury. The notice must also be given in person or by certified mail, return receipt requested, bearing a postmark from the U.S. Postal Service, by the claimant or the representative of the claimant.

Maryland Tort Claims Act

In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under MTCA, the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by “State personnel” performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Sheriffs and deputy sheriffs of a county or Baltimore City are included in the definition of “State personnel” as are employees of the Department of State Police.

However, MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident. (Chapter 132 of 2015 increased the liability limit under MTCA from \$200,000 to \$400,000 for causes of action arising on or after October 1, 2015.)

In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State’s color of authority or sovereign immunity and may be held personally liable.

MTCA also contains specific notice and procedural requirements. A claimant is prohibited from instituting an action under MTCA unless (1) the claimant submits a written claim to the State Treasurer or the Treasurer’s designee within one year after the injury to person or property that is the basis of the claim; (2) the State Treasurer/designee denies the claim finally; and (3) the action is filed within three years after the cause of action arises.

State Expenditures: Special fund expenditures increase if the bill results in higher payments from SITF for claims filed under MTCA, increased claim volume, or increased litigation costs for MTCA cases. General fund expenditures increase for State agencies subject to higher SITF premiums/assessments if SITF incurs losses from MTCA payments as a result of the bill or if agencies have to employ additional Attorneys General to handle applicable MTCA cases.

State Insurance Trust Fund: Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. The Treasurer's Insurance Division handles approximately 5,000 MTCA claims each year. SITF paid the following amounts in tort claims under MTCA: \$5.8 million in fiscal 2014, \$7.3 million in fiscal 2015, \$8.5 million in fiscal 2016 (estimated), and \$9.0 million in fiscal 2017 (projected). The Governor's proposed fiscal 2017 budget includes a \$10.5 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF.

Agencies pay premiums to SITF that are comprised of an assessment for each employee covered and SITF payments for torts committed by the agency's employees. The portion of the assessment attributable to losses is allocated over five years. The Treasurer is charged with setting premiums "so as to produce funds that approximate the payments from the fund." (See Md. State Fin. & Proc. Code Ann. § 9-106(b).) The actuary assesses SITF's reserves and each agency's loss experience for the various risk categories, which include tort claims and constitutional claims. An agency's loss history, consisting of settlements and judgments incurred since the last budget cycle, comprises part of the agency's annual premium. That amount is electronically transferred to SITF from the appropriations in an agency's budget.

Litigation Costs: Assistant Attorneys General assigned to State agencies and a supervising tort assistant Attorney General in the Treasurer's Office litigate MTCA cases. Agencies pay the salaries of their assistant Attorneys General. The salary of the supervising tort assistant Attorney General and all other litigation costs (*e.g.*, depositions, experts, etc.) are paid out of SITF.

Local Expenditures: The bill may result in an increase in expenditures for local governments to litigate an increased volume of LGTCA lawsuits brought as a result of the bill, pay judgments awarded in those cases, and pay increased insurance premiums for coverage of LGTCA claims. Some local governments covered under LGTCA obtain insurance coverage through the Local Government Insurance Trust (LGIT), a self-insurer that is wholly owned by its member local governments. LGIT assesses premiums based on the projected claims and losses of its members.

Small Business Effect: Small business law firms that litigate cases affected by the bill may benefit from an increase in the demand for their services.

Additional Comments: The bill requires that the owner of property on which a search warrant was mistakenly executed must receive an apology and \$10,000, but does not provide a remedy for other occupants of an owner-occupied property or an occupant of a rental property.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Charles and Montgomery counties, Comptroller's Office, Judiciary (Administrative Office of the Courts), Department of General Services, Department of Natural Resources, Department of State Police, Maryland Department of Transportation, Department of Legislative Services

Fiscal Note History: First Reader - March 9, 2016
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