MARCH 2004, VOL. 47, NO. 3

ILLINOIS STATE BAR ASSOCIATION

CRIMINAL JUSTICE

The newsletter of the ISBA's Section on Criminal Justice

Waived errors: Obtaining review of issues not preserved in the trial court

By Kerry J. Bryson, Assistant Appellate Defender, Third District Appellate Defender's Office

I. Introduction

On appeal, review is limited to those matters which appear in the trial record. Accordingly, a complete record is a precursor to meaningful appellate review. In order to facilitate appellate review of trial errors then, it is important that the record be as thorough as possible. In addition to being limited to matters which appear in the trial record, appellate review is generally limited to those issues which were properly preserved in the trial court. As such, preserving issues with both a timely objection and inclusion in a post-trial motion is just as important as presenting the reviewing court with a complete record.

A recent article in the *Illinois Bar Journal*, "Making the Record: Appellate Practice Starts at Trial," addressed the necessity of making a thorough record in the trial court in order to facilitate appellate review.[1] That article detailed the importance of making a record of intangible matters; techniques for getting the best possible transcript, including exhibits, in the record; making offers of proof; preserving off-record discussions; and the effective use of written legal memoranda to thoroughly present argument. *Making the Record* is a thorough primer on the subject of preserving a complete record for appeal.

The purpose of this article is not to repeat the material that was covered in "Making the Record." Rather, this article focuses on what can be done where the record is incomplete and/or the issues have not been properly preserved for review. The instant article addresses the importance of making a complete record, preserving issues for appellate review, the means for amending an incomplete record, the consequences of a failure to properly preserve an issue for appellate review, and the methods for obtaining review of issues which have not been preserved in the trial court. This article focuses primarily on the rules and case law applicable to appellate review in criminal cases, though some discussion of civil law is included where relevant.

II. Making a complete record and preserving issues for appellate review

In Illinois, review by the appellate court is limited to evidence contained in the record on appeal.[2] Responsibility for preservation of a complete record rests on the party alleging error.[3] Generally, a question not presented by the record will not be decided on review.[4] Accordingly, it is of the utmost importance that the record be as complete and accurate as possible.

If the record is deficient in some manner, the Illinois Supreme Court Rules provide means for supplementing and correcting the record. For instance, if there was a court hearing without a court reporter present, Supreme Court Rule 323 allows for preparation of a bystander's report or an agreed statement of facts memorializing what occurred at the hearing.[5] Supreme Court Rule 329 provides a means for correcting errors in the record.[6] Supreme Court Rules 323 and 329 are contained in the rules regarding appeals in civil cases and are expressly applicable to criminal appeals pursuant to Supreme Court Rule 612(c), (g). Both rules are useful tools for ensuring meaningful appellate review.

A bystander's report may be prepared from recollection and any other available sources, including any videotape or audiotape of the proceedings.[7] The report is required certified, and Rule 323(c) provides a detailed time line for obtaining certification. First, the report must be prepared and served on all parties within 28 days after the notice of appeal is filed. Then, the parties have 14 days within which to serve proposed amendments or an alternative report of proceedings. Finally, the proposed bystander's report, any amendments, and any alternative report of proceedings must be presented to the trial judge within seven days for settlement and approval.[8] Alternatively, if the parties are in agreement as to what material should be supplemented to the record, Rule 323(d) provides that an

IN THIS ISSUE

Get the electronic version of this newsletter

See page 8 for details.

agreed statement of facts may be prepared and filed without certification.[9]

The record also may be corrected by stipulation, by the trial court, or by the reviewing court in accordance with Supreme Court Rule 329. That rule provides a means for the correction of "material omissions or inaccuracies or improper authentication."[10] An amendment will not be permitted where it would be unfair to a party.[11]

In addition to needing a complete record of what happened in the trial court, it is essential that there be both a timely objection and a written post-trial motion in order to preserve a question for appellate review.[12] Likewise, a written post-sentencing motion is required to preserve sentencing issues for appeal.[13] Further, in the case of a guilty plea, a motion to withdraw the plea or a motion to reconsider the sentence is a necessary precursor to appellate review.[14] Which post-plea motion is required is dependent on whether the plea is a negotiated plea or an "open" plea.[15]

Specificity is important when interposing objections and drafting post-trial, post-sentencing, and post-plea motions.[16] An objection should specifically detail the error that is claimed, as a general objection is usually insufficient to preserve a question for review.[17] For instance, if the alleged error involves a misstatement of law during closing arguments, a specific objection might be stated, "Objection. Counsel has misstated the law applicable to this case. The burden of proof in this case is proof beyond a reasonable doubt, not the lesser burden of a preponderance of the evidence." Simply stating, "objection, misstatement of law," may not be particular enough to preserve the issue.

Likewise, claims of error must be specifically stated in the post-trial motion.[18] In *People v. Edwards*, the defendant filed a post-trial motion claiming that the trial court erred in denying his motion to quash the search warrant and suppress illegally-seized evidence. The Illinois Supreme Court refused to consider the merits of the defendant's claim on appeal, noting that the defendant failed to indicate how the trial court had erred and failed to state any legal reasoning in support of his claim in the post-trial motion.

III. Consequences of the failure to preserve the issue

The failure to comply with both the objection and post-trial motion requirements will normally result in a finding that the issue has been waived.[19] There are important reasons for the existence of the waiver rule. Failure to raise an issue in the trial court denies that court the opportunity to correct mistakes and grant relief, if warranted, and potentially imposes an unnecessary burden upon appellate counsel for the defense and prosecution, as well as the reviewing court by leading to unnecessary appeals.[20] Also, without requiring an objection and post-trial motion to preserve questions for review, the appeal would be "open-ended."[21] Objections and post-trial motions help to define the specific issues for appeal and direct the focus of appellate counsel and the court.[22] Further, the waiver rule prevents a defendant from obtaining appellate relief where he acquiesced in the allegedly erroneous proceedings at trial.[23]

There are exceptions to the general waiver rule. For instance, a defendant may preserve an issue without making a timely objection if he files both a pre-trial motion in limine and a written post-trial motion addressing the issue.[24] Further, a constitutional challenge to a statute can be raised at any time.[25] Likewise, a reasonable doubt challenge may be raised on appeal regardless of whether it was raised in the trial court.[26] Additionally, application of the waiver rule is relaxed where the conduct of the trial judge forms the basis for the issue on appeal.[27]

Ultimately, waiver is a limitation on the parties, not the reviewing court. A court may choose to review any issue in order to achieve a just result.[28] Additionally, waiver may be excused by a reviewing court in the interest of maintaining a sound, uniform body of precedent.[29] In the event that the issue has been waived and the reviewing court is not inclined to exercise its authority to review the issue to achieve a just result or maintain sound precedent, the burden is on the defendant to establish either that the issue presents a question of plain error or that the failure to preserve the issue was the result of ineffective assistance of counsel.

IV. Plain error

In cases where an issue has not been preserved for appeal, that issue may still be reviewed as plain error. In criminal cases, the authority for plain error review is found in Supreme Court Rule 615. Rule 615 provides, in part, that

Criminal Justice Newsletter

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call (217) 525-1760

Office
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR 800-252-8908

Web site: www.isba.org

Editor
Michelle A. Vescogni
116 W. Lafayette St., Ste. 5
Ottawa 61350

Managing Editor/Production
Katie Underwood
kunderwood@isba.org

"plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."[30] A significant purpose of the plain error rule is to correct any injustices done to a defendant.[31] Other purposes include protecting against the possibility of a wrongful conviction due to an error which is obvious on the record but not preserved for review and preserving the integrity and reputation of the judicial process.[32]

Plain error is a limited and narrow exception to the waiver rule; it is not a general savings clause.[33] It may only be invoked where the evidence is closely balanced or where the error is so fundamental and of such magnitude that the defendant was denied a fair trial.[34] The second prong of the plain error exception is to be invoked only where the alleged error is so egregious that its consideration is necessary to preserve the integrity and reputation of the judicial process.[35] The plain error rule does not mandate that the reviewing court consider all errors involving substantial rights, regardless of whether they were properly preserved. Instead, the rule is a means of counteracting the harshness of strict application of the general waiver rule.[36]

In determining whether the plain error exception to the waiver rule applies to a given issue, the court should first review the record and decide whether any error occurred.[37] If there was no error, there will be no plain error. The inquiry is complete. If, however, the record shows some error, then the court must consider whether that error was plain error. Whether an error amounts to plain error depends on whether the evidence was closely balanced and the error might have affected the outcome of the case or whether the error was so fundamental and of such magnitude as to deny the defendant a fair trial and remedying the error is necessary to preserve the integrity of the judicial system.[38] If the error is found to be plain error, the court can then consider whether the error was reversible. If it is not plain error, the issue is waived and further consideration of it is not required.[39]

Where the defendant does not argue that the evidence was closely balanced or that the error was so severe that he was denied his fundamental right to a fair trial, he waives any argument that plain error review should be afforded.[40] Although a waiver argument can usually be anticipated and preempted by arguing plain error in the opening brief, the Illinois Supreme Court has held that plain error is not waived where it is raised for the first time in the reply brief.[41]

In cases of closely balanced evidence, plain error has been found in the giving of an erroneous jury instruction regarding eyewitness identification testimony,[42] improper closing argument,[43] improper severance,[44] and denial of a defendant's right to be personally present at a critical hearing.[45] Plain error review has been afforded where the error was so fundamental and of such magnitude that defendant was denied a fair trial in cases involving the improper admission of polygraph evidence,[46] the trial court's failure to give a mandatory definition instruction *sua sponte*,[47] reliance on an improper aggravating factor at sentencing,[48] and an improper jury waiver.[49]

In *People v. Nelson*,[50] the defendant raised an issue of prosecutorial misconduct. The State argued that defendant had waived the issue by failing to raise the argument at trial. The Supreme Court agreed to consider the issue as plain error, noting that the case satisfied both the closely balanced evidence prong and the denial of the fundamental right to a fair trial prong.[51] In finding the evidence closely balanced, the court noted that the conviction was based primarily on the victim's eyewitness identification which was supplemented by police testimony. The victim admitted being under the influence of a mild sedative at the time of the offense, and that sedative had caused "disassociation" in the past. No physical evidence was presented to link the defendant to the crime. The defendant presented three alibi witnesses. On this evidence, the court found the case closely balanced.[52] The court also noted that one of the alleged errors, improper argument to the jury, denied the defendant a fair trial, further supporting plain error review.[53]

In *People v. Smith*,[54] the defendant challenged his conviction of armed robbery as a lesser included offense of his conviction of felony murder based on armed robbery. Although the defendant had not objected to the lesser included offense conviction in the trial court, the reviewing court found that the improper conviction, and accompanying sentence, violated the defendant's substantial rights. Accordingly, the question was reviewed as a matter of plain error.[55]

On the other hand, plain error review was denied in *People v. Herrett*.[56] There, the defendant challenged the prosecutor's comments relating to the defendant's failure to testify at trial and the defendant's post-arrest silence. The court found that the prosecutor's comments were error, but refused to find the evidence closely balanced where the victim identified the defendant as the offender and testified that he was 90 percent certain of his identification. Further, the defendant was located approximately one hour after the offense at a residence with an individual matching a description of the other offender. A search of the residence resulted in the discovery of jewelry stolen during the robbery, clothing matching that described by the victim, and two rolls of duct tape similar to what was used to bind the victim. The car used during the robbery was parked outside of the residence. There was no evidence at trial to contradict the finding of guilt. Under these circumstances, the court found that the evidence was not closely balanced and declined to exercise plain error review.[57] The court also held that the second prong of the plain error rule did not apply, noting that the improper arguments were not of such character as to have denied the defendant his right to a fair trial.[58]

It is clear from these cases that whether plain error review will be granted is dependent on the specific circumstances of each case. Obviously, the facts of each individual case are relevant, especially where plain error review is sought under the first prong, that the evidence is closely balanced. Further, the nature of the alleged error is relevant, particularly as it relates to whether the defendant was denied his right to a fair trial. Each request for plain error review should be approached with these facts in mind.

Although the plain error doctrine typically arises in criminal cases, plain error review may be afforded in civil cases to the extent that the parties cannot otherwise receive a fair trial or where a deterioration of the judicial process occurs.[59] The authority for plain error review in civil cases is found in Supreme Court Rule 366, which provides, "(a) Powers. In all

appeals the reviewing court may, in its discretion, and on such terms as it deems just,...(5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief...that the case may require."[60] Plain error review is not favored in civil cases, but "the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system."[61]

V. Ineffective assistance of counsel

Another means of attacking an issue that has been waived procedurally is through a challenge to counsel's performance in the trial court. The Sixth Amendment to the United States Constitution guarantees a defendant the right to assistance of counsel in his defense.[62] The right to counsel entails more than mere representation by an attorney, it includes the right to *effective* assistance of counsel.[63] In *Strickland v. Washington*,[64] the United States Supreme Court established a two-part test for evaluating the performance of counsel. To establish that counsel was ineffective, there must be a showing that counsel provided deficient representation and that defendant suffered prejudice as a result.[65] The reviewing court need not evaluate these two prongs in any particular order. In other words, if the defendant suffered no prejudice, the court does not have to determine whether counsel provided substandard representation.[66] The *Strickland* test was adopted by the Illinois Supreme Court in *People v. Albanese*.[67]

Waiver of a meritorious issue at trial may be overcome on appeal if trial counsel was ineffective in failing to preserve the issue. For instance, ineffective assistance of counsel may be found where counsel fails to request a discharge on speedy trial grounds,[68] fails to object and seek a mistrial where a police officer testifies about defendant's post-arrest silence,[69] neglects to pursue a meritorious suppression issue,[70] fails to challenge unconstitutional jury instructions,[71] or fails to object to improper comments in closing arguments.[72] If deficient representation is clear from the record, a claim of ineffective assistance of counsel on direct appeal may save meritorious issues which otherwise might have escaped review. If the record is not clear, however, a defendant may need to resort to collateral proceedings to obtain review of alleged errors.

VI. Collateral proceedings

If substantive review of an alleged error cannot be had on direct appeal, it is sometimes possible to obtain review through collateral proceedings. The most common means of seeking collateral review in a criminal case is a post-conviction petition. Post-conviction petition requirements are set out in the Illinois Post-Conviction Hearing Act.[73] Although direct appeal is typically the quickest and most effective method for obtaining relief in a criminal case, a post-conviction petition can be a useful tool for seeking relief where the alleged error does not appear on the record. Likewise, where the claimed error is in the trial record, but was neglected by appellate counsel on direct appeal, a post-conviction claim of ineffective assistance of appellate counsel may lead to substantive review of that error. Of course, it is important to recognize that post-conviction petition claims are limited to deprivations of constitutional rights.[74]

A second method of obtaining collateral review is a petition for relief from judgment, commonly referred to as a "2-1401 petition." A 2-1401 petition takes its name from the section of the Code of Civil Procedure upon which it is based.[75] Though civil in nature, this section is applied in criminal cases to correct errors of fact which, if known at the time of the conviction or sentence, would have prevented entry of judgment against defendant.[76] As with a post-conviction petition, a 2-1401 petition is not a means of obtaining review of matters which could have been presented on direct appeal.[77]

Another vehicle for seeking collateral review is a petition for writ of habeas corpus.[78] The scope of habeas corpus relief is limited to void judgments or cases where something has happened since defendant's conviction and incarceration to entitle defendant to immediate release.[79] Habeas corpus is not a substitute to direct appeal.[80]

VII. Conclusion

Obviously, on appeal, it is preferable to have a complete record of the trial court proceedings, including copies of every document and exhibit involved and transcripts of every word that was said in court, in chambers, and at sidebar. Likewise, it is desirable to have a record rife with specific timely objections and detailed post-trial motions setting forth each and every claim of error. Unfortunately, appeals are like life. You do not always get what you want.

Despite deficiencies in the record or the failure to properly preserve errors, however, meaningful appellate review is not foreclosed. The record may be corrected or supplemented. Some issues may not be waived regardless of whether there was a timely objection or post-trial motion. If waiver is applicable, plain error review may be appropriate or trial counsel may be found ineffective for failing to preserve the issue. Finally, if all else fails, collateral review may be available. Thus, even if you do not get what you want from the record, you may be able to get what you need to obtain relief for your client by pursuing relief through the means discussed here.

---

1. Charles P. Golbert, *Making the Record: Appellate Practice Starts at Trial*, 90 Ill Bar J 195 (2002).
2. *People v. Boyer*, 305 Ill App 3d 374, 378, 713 NE2d 655, 658 (3d D 1999), *citing Thomas v. Powell*, 289 Ill App 3d 143, 147, 681 NE2d 145, 147 (1st D 1997).
3. *People v. Benford*, 31 Ill App 3d 892, 894, 335 NE2d 106, 108 (1st D 1975).
4. *People v. Rose*, 19 Ill 2d 292, 296, 166 NE2d 566, 568 (1960).
5. Supreme Court Rule 323(c), (d).
6. Supreme Court Rule 329.
7. Supreme Court Rule 323(c).
8. Id.
9. Supreme Court Rule 323(d).
10. Supreme Court Rule 329.
11. *Denniston v. Skelly Oil Co.*, 47 Ill App 3d 1054, 1070, 362 NE2d 712, 724 (3d D 1977).
12. *People v. Enoch*, 122 Ill 2d 176, 186, 522 NE2d 1124, 1130 (1988). 725 ILCS 5/116-1 (West 2003) (written post-trial motion requirement).
13. 730 ILCS 5/5-8-1(c) (West 2003); *People v. Reed*, 177 Ill 2d 389, 393, 686 NE2d 584, 586 (1997).
14. Supreme Court Rules 604(d) and 605(b), (c).
15. Id. Since guilty plea appeals present a wide range of issues in and of themselves, they will not be discussed further in this article.
16. For purposes of this article, these motions will be collectively referred to as post-trial motions.
17. *People ex rel Walker v. Pate*, 53 Ill 2d 485, 500, 292 NE2d 387, 396 (1973); *People v. Thomas*, 278 Ill App 3d 276,

283, 662 NE2d 516, 521 (3d D 1996).
18. *People v. Edwards*, 144 Ill 2d 108, 133, 579 NE2d 336, 344-345 (1991).
19. Id.
20. *People v. Caballero*, 102 Ill 2d 23, 31, 464 NE2d 223, 227 (1984).
21. Id.
22. *People v. Irwin*, 32 Ill 2d 441, 443-444, 207 NE2d 76, 78 (1965).
23. *People v. Hammond*, 48 Ill App 3d 707, 708-709, 362 NE2d 1361, 1362 (5th D 1977).
24. *People v. Hudson*, 157 Ill 2d 401, 434, 626 NE2d 161, 175 (1993).
25. *People v. Bryant*, 128 Ill 2d 448, 453-454, 539 NE2d 1221, 1223-1224 (1990).
26. *People v. McGee*, 326 Ill App 3d 165, 168, 761 NE2d 741, 743 (3d D 2001).
27. *People v. Dameron*, 196 Ill 2d 156, 171, 751 NE2d 1111, 1120 (2001).
28. *People v. Hoskins*, 101 Ill 2d 209, 219, 461 NE2d 941, 946 (1984).
29. *People v. Wilson*, 155 Ill 2d 374, 379, 614 NE2d 1227, 1229 (1993).
30. Supreme Court Rule 615(a).
31. *People v. Johnson*, 159 Ill 2d 97, 120, 636 NE2d 485, 495 (1994); *People v. Burns*, 144 Ill App 3d 345, 347, 494 NE2d 872, 875 (4th D 1986).
32. *People v. Williams*, 193 Ill 2d 306, 348, 739 NE2d 455, 477 (2000); *People v. Vargas*, 174 Ill 2d 355, 363, 673 NE2d 1037, 1041 (1996).
33. *People v. Lofton*, 194 Ill 2d 40, 73, 740 NE2d 782, 800 (2000).
34. *People v. Herrett*, 137 Ill 2d 195, 209-210, 561 NE2d 1, 7-8 (1990).
35. *People v. Kuntu*, 196 Ill 2d 105, 128, 752 NE2d 380, 394 (2001).
36. *People v. Pickett*, 54 Ill 2d 280, 282, 296 NE2d 856, 858 (1972).
37. *People v. Bradley*, 336 Ill App 3d 62, 66, 782 NE2d 825, 829 (1st D 2002).
38. Id.
39. Id.
40. *People v. Greer*, 336 Ill App 3d 965, 981, 785 NE2d 181, 194 (5th D 2003).
41. *People v. Williams*, 193 Ill 2d 306, 347-348, 739 NE2d 455, 477 (2000).
42. *People v. Saraceno*, Ill App 3d , 791 NE2d 1239 (1st D 2003) (evidence closely balanced and instruction at issue misstated the law). But see *People v. Tisley*, Ill App 3d, 793 NE2d 181, 186-187 (1st D 2003) (same issue as in *Saraceno* held not to be plain error; court found no error and went on to state that even if there were error, it did not affect the "fairness, integrity or public reputation of judicial proceedings").
43. *People v. Mullen*, 141 Ill 2d 394, 506 NE2d 222 (1990) (court also found issue reviewable under second prong, improper argument denied the defendant his right to a fair and impartial trial).
44. *People v. Bradley*, 30 Ill 2d 597, 198 NE2d 809 (1964).
45. *People v. Lofton*, 194 Ill 2d 40, 740 NE2d 632 (2000).
46. *People v. Jackson*, 202 Ill 2d 361, 781 NE2d 278 (2002).
47. *People v. Hopp*, 336 Ill App 3d 523, 783 NE2d 1055 (3d D 2002).
48. *People v. Kopczick*, 312 Ill App 3d 843, 728 NE2d 107 (3d D 2000).
49. *People v. Owens*, 336 Ill App 3d 807, 784 NE2d 339 (1st D 2002).
50. 193 Ill 2d 216, 737 NE2d 632 (2000).
51. Id., 193 Ill 2d at 221-222, 737 NE2d at 635-636.
52. Id., 193 Ill 2d at 222-223, 737 NE2d at 636.
53. Id., 193 Ill 2d 223.
54. 183 Ill 2d 425, 701 NE2d 1097 (1998).
55. Id., 183 Ill 2d at 430, 701 NE2d at 1099.
56. 137 Ill 2d 195, 561 NE2d 1 (1990).
57. Id., 137 Ill 2d at 210, 561 NE2d at 8.
58. Id., 137 Ill 2d at 215-216, 561 NE2d at 10-11.
59. *Allison v. Statler*, 251 Ill App 3d 127, 131, 621 NE2d 977, 979 (4th D 1993); *Collins Oil Co. v. Dept. of Revenue*, 119 Ill App 3d 808, 814, 457 NE2d 118, 121 (2d D 1983).
60. Supreme Court Rule 366(a)(5).
61. *Hux v. Raben*, 38 Ill 2d 223, 225, 230 NE2d 831, 832 (1965).
62. US Const, Amend VI.
63. *McMann v. Richardson*, 397 US 759, 771, 90 S Ct 1441, 1449, 25 L Ed 2d 763, 773 (1970).
64. 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).
65. Id., 466 US at 687, 104 S Ct at 2064, 80 L Ed 2d at 693.
66. Id., 466 US at 697, 104 S Ct at 2069, 80 L Ed 2d at 699.
67. 104 Ill 2d 504, 526, 473 NE2d 1246, 1255 (1984).
68. *People v. Stanley*, 266 Ill App 3d 307, 311, 641 NE2d 1224, 1227 (3d D 1994) (post-conviction proceeding).
69. *People v. Moore*, 279 Ill App 3d 152, 157, 663 NE2d 490, 495 (5th D 1996).
70. *People v. McPhee*, 256 Ill App 3d 102, 110, 628 NE2d 523, 529 (1st D 1993).
71. *People v. Salazar*, 162 Ill 2d 513, 522, 643 NE2d 698, 703 (1994) (post-conviction proceeding).
72. *People v Rogers*, 172 Ill App 3d 471, 478-479, 526 NE2d 655, 661 (2d D 1988).
73. 725 ILCS 5/122-1, et seq. (West 2003).
74. For a detailed discussion of the Illinois Post-Conviction Hearing Act see Kerry J. Bryson, "A Guide to the Illinois Post-Conviction Hearing Act," 91 *Ill Bar J* 248 (2003).
75. 735 ILCS 5/2-1401 (West 2003).
76. *People v. Mahaffey*, 194 Ill 2d 154, 181, 742 NE2d 251, 266 (2000).
77. *People v. Mamolella*, 42 Ill 2d 69, 72, 245 NE2d 485, 486 (1969).
78. 735 ILCS 5/10-101, et seq. (West 2003).
79. *People ex rel Bright v Twomey*, 4 Ill App 3d 365, 367, 279 NE2d 538, 539 (3d D 1972).
80. *Baker v Dept. of Corrections*, 106 Ill 2d 100, 106, 477 NE2d 686, 689 (1985).

The knock and announce requirement in search warrants

By John A. Wasilewski, Associate Judge, Cook County

In Illinois, there is no statutory provision for the execution of a search warrant. In fact, the legislature has sought to excuse case law imposed knock and announce requirements by enacting legislation that would excuse the requirement with prior judicial approval. The Illinois Supreme Court for a variety of reasons has held these attempts unconstitutional. For history see *People v. Wright*, 183 Ill.2d 16 (1998). The requirement imposed by the United States Supreme Court and the Illinois Supreme Court is that a warrant be executed in a "reasonable" manner. *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995). There is no rigid requirement that the police knock and announce in all situations. However, the Illinois Supreme has indicated that a police officer should knock on a residential entry door and announce his office and that his purpose is to execute a search warrant. The rationale is that this would prevent violence because the occupant might think his/her home was being invaded by intruders. In addition, the occupant may open the door, thus preventing damage by forcibly entering the house. Finally, it gives some time for the occupant to prepare to protect his/her privacy. *People v. Krueger*, 175 Ill.2d 60, 66 (1996).

However, "knock and announce" is not "required" in all situations. If the police have exigent circumstances such as the immediate destruction of contraband, the real and immediate

circumstance of threatened violence to the officers or some other immediate circumstance that would endanger others, the officers can force entry without knocking and announcing their purpose. *Krueger, supra.* Also, if no one is home and the officers know that, no knock and announce is required. *People v. Handcock*, 301 Ill.App.3d 786 (1998). Illinois case law has also permitted the luring of the target individual of the search warrant out of the house on a ruse and then entering the house without knocking after informing the target individual of the existence of the search warrant. *People v. Sunday*, 109 Ill. App.3d 960 (1982); *People v. Witherspoon*, 216 Ill.App.3d 323 (1991). Other cases have permitted entry into the home by informing other non-target individuals of the existence of the warrant and entering into the home without knocking. *People v. Woods*, 308 Ill.App.3d 930 (1999); *People v. Van Matre*, 164 Ill.App.3d 201 (1988).

The whole crux of the "knock and announce" analysis is the reasonableness of the law enforcement officers' actions and each case merits individual examination. *People v. Ouellette*, 78 Ill.2d 511 (1979). Some of the factors include the time of the day the warrant is being executed, *People v. Kalomas*, 65 Ill.App.3d 1041, 1044 (1978); *People v. Saechao*, 129 Ill.2d 522 (1989); whether there is a forcible entry causing damage *Sunday, supra*; *Witherspoon, supra; Hancock*, *supra*; and whether it was clear to the occupants that the people executing the warrant were police officers. *Woods, supra*; *Van Matre, supra*. There is no rigid requirement in executing the warrant. If it is clear that the people executing the warrant are police officers, it is sufficient that they receive no response to knocking before forced entry. *People v. Wolgemuth*, 69 Ill.2d 154 (1977). The officers are not required to announce their purpose so long as they announce their office. *Saechao, supra*. Although opening an unlocked or partially open door is an entry that generally requires a preceding announcement, *People v. Rogers*, 59 Ill.App.3d 396 (1978), the opening of an unlocked door is considered a peaceable entry. *People v. Garcia*, 296 Ill.App.3d 769, 779 n1 (1998); *Kalomas, supra*; *Saechao*, *supra*.

In *People v. Polito*, 42 Ill.App.3d 372 (1976), the Illinois Appellate Court, First District applied the "knock and announce" rule to the execution of an arrest warrant which was being used as a substitute for a search warrant. The concealed police waited until the defendant was in a certain area in order to execute the arrest warrant without knocking and announcing their office. The evidence recovered, including "iridescent" powder on the defendant's hands, was suppressed.

Standing issues in "knock and announce" cases have not been directly addressed by the Illinois courts. However, numerous federal and state courts have addressed whether a person present in the residence would have standing to contest the search on the basis of failure to "knock and announce." In *Artis v. United States*, 802 A.2d 959, 969-972 (2002), U.S. Court of Appeals for the District of Columbia outlined the requirements in order to claim standing to contest a failure to "knock and announce." Generally, it held that a person who could have admitted police to the residence and is within "earshot and eyeshot" of the residence has standing to contest a "no knock" entry. Otherwise, an absent resident with no ownership interest in the property or an absent owner where no damage occurs to the residence does not have standing to contest a "no knock" entry. *Artis* has a good discussion of the interests involved and how other jurisdictions have treated standing.

Lawyers handling cases involving execution of search warrants should be familiar with the "knock and announce" requirement. It is a technical issue that could lead to suppression of otherwise legally seized evidence.

Who's entitled to what from whom?

By Matt Maloney, Attorney at Law

Recent decisions from the Illinois Supreme Court have recounted difficulties emanating from discovery problems. Most of the commentaries deal with complaints of non-compliance in death penalty cases. Discovery agenda across the state take on different forms in different venues. Many prosecutors work from an "open file" perspective that allows you access to what you need as soon as you enter an appearance. Others operate from a court-ordered calendar with fixed schedules for discovery exchange. No matter which procedure is used, the Supreme Court discovery rules should function the same way in each county. But does it always happen that way?

Reading *People v. Hood*, 799 N.E.2d 974, 279 Ill.Dec. 171 (4th Dist. 2003) will give you some current thoughts on the scope and extent of the discovery process. Hood was charged in Macoupin County with reckless homicide, aggravated DUI, illegal transportation of alcohol, and failure to yield to a pedestrian in a crosswalk. No detailed recitation of the facts is necessary, since you should be able to figure out what happened.

The defense stipulated to the qualifications of the prosecutor's expert witness, a forensic pathologist. That witness testified to the cause of death. When asked, this witness also testified that he had been qualified as a witness in the area of how alcohol is metabolized. Defense counsel made a preemptive objection to any line of questioning in this topic area, as there had been no prior disclosure of any testing done on blood samples. That objection was sustained. Two police officers testified to the defendant's appearance, demeanor, odor of alcohol and all of what you would expect in this type of prosecution. None of that testimony appeared out of the ordinary or unusual. The defense offered the testimony of several witnesses who claimed to have personal knowledge of the defendant's alcohol consumption that day. The defendant testified as well. The defense witnesses and defendant offered the opinion that the

defendant was not intoxicated at the time of the accident. The prosecution and defense stipulated that a blood test was taken and that the result showed a 0.077 BAC. Sounds like a typical case, doesn't it?

Justice John W. Turner, writing for the 2-1 majority which reversed the reckless homicide conviction, offered the following analysis. The court initially decided that the defense forfeited its right to complain about the state's failure to qualify the expert in the area of reverse extrapolation by neglecting to raise this in a post-trial motion; however, the court agreed that prejudice resulted due to the failure of the state to *disclose* the doctor as an expert. The opinion goes through an in-depth review of case law which interprets Supreme Court Rule 412. Justice Turner analyzes the differences between civil and criminal discovery rules. The central theme to this part of the analysis is simple—just because you call it rebuttal testimony doesn't make it so. Justice Turner succinctly pointed out how this "rebuttal" testimony led to the foundational jury instruction regarding the presumption of intoxication.

In his dissent, Justice Bob Cook took a different approach to analyzing the problems. He agreed that the trial judge was correct in prohibiting the reverse extrapolation testimony during the case in chief but would have allowed it in rebuttal. He further opined that the defense should have anticipated that this type of evidence might be offered in the case. Justice Cook concluded that Supreme Court Rule 412 does not require disclosure of the doctor's calculations from the perspective that the rule simply does not require that disclosure. One of the more interesting observations at the close of his dissent was that a jury could conclude, based upon common experiences, that defendant's BAC was higher at the time of the accident.

Our rules tell us that the 2-1 majority "wins" this one but both sides present a problem that might be more prevalent than we know. How do you cure this and make sure it doesn't happen to you? No matter what side you represent, complete disclosure will never get you into trouble.

Do yourself a favor

Say goodbye to paper and get this newsletter electronically

Why?

You'll get it faster. Opt for the electronic version and bypass the ISBA print shop and the post office. We'll send you an e-mail message with a link to the latest issue as soon as it's posted on the Web, which means you'll get it days, even weeks, earlier than you would in print.

You'll save space. Because newsletters are archived on the ISBA Web site, you needn't worry about storing back issues.

You'll help keep section fees low. At $20/year, section membership is a tremendous value. But paper and postage costs continue to rise. By choosing the electronic over the paper version, you help us keep our costs—and yours—down.

How?

Send an e-mail to jlyman@isba.org with "Criminal Justice newsletter" in the subject header. In the body of your message, include your name (first and last), your office address, the e-mail address at which you want to receive the newsletter, and say (in so many words) "please sign me up for e-mail delivery of the Criminal Justice newsletter."

Criminal Justice
Illinois Bar Center
Springfield, Illinois 62701-1779
March 2004
Vol. 47, No. 3

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820