

IN THE
INDIANA SUPREME COURT

No. 82S05-1007-CR-343

RICHARD L. BARNES,
Appellant (Defendant below),

v.

STATE OF INDIANA,
Appellee (Plaintiff below).

Appeal from the
Vanderburgh Superior Court,

No. 82D02-0808-CM-759,

Hon. Mary Margaret Lloyd,
Judge.

STATE'S BRIEF IN RESPONSE TO PETITION FOR REHEARING

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The police’s attempted entry into Barnes’s apartment was lawful in light of the ongoing domestic disturbance.¹ In the context of police entering homes, battery is not “reasonable” resistance, regardless of the lawfulness of the attempted entry.² These facts are not in serious dispute. The State recommends a decision in this case that is limited to those points and preserves a privilege to reasonably and non-violently resist unlawful entries into the home by police. The public interest counsels against a wholesale abrogation of the common law privilege, and recommends saving the continued viability of the privilege to another day and case where the salient facts are in dispute and the positions of all stakeholders can be heard.

¹ *Barnes v. State*, 946 N.E.2d 572, 577 (Ind. 2011) (“Here, the officers acted reasonably under the totality of the circumstances”). Under *Georgia v. Randolph*, 547 U.S. 103, 118 (2006), warrantless police entry is permissible to protect a resident from domestic violence (but not to conduct a search) even where another resident objects. See also *id.* at 126-27 (Breyer, J., concurring). Moreover, police may make a warrantless entry to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Brigham City, Utah v. Stuart*, 547 U.S. 398,403 (2006).

² *Barnes*, 946 N.E.2d at 576 (“We decline to recognize a right to batter a police officer as a part of that resistance.”). See also *Robinson v. State*, 814 N.E.2d 704, 709 (Ind. Ct. App. 2004).

ARGUMENT

The Court should limit its decision to construing the common law reasonable resistance rule to exclude battery and other violence on law enforcement.

The Court need not abrogate the common law privilege to balance the public's concern for safe confrontations between citizens and the police and the citizens' interest to be free from unlawful intrusion into their homes. *See Barnes*, 946 N.E.2d at 576 (stating the rationale for abolishing the common law right). Rather, the Court should simply hold that reasonable resistance does not include battery or other violent acts against law enforcement. Indeed, that understanding of "reasonable resistance" has long been the law in Indiana under a decades-long series of Court of Appeals' decisions culminating in *Robinson*.³

The Court's rationale for abrogating the common law privilege is that resistance to police in such situations may escalate already tense confrontations with possibly tragic results. *Barnes*, 946 N.E.2d at 576. Yet Indiana law permits citizens to peaceably resist efforts of law enforcement outside the home, so citizens should have no less a privilege within their homes. Prior decisions have deemed nonviolent, peaceful resistance to perceived unlawful attempts to enter homes to be reasonable because such actions do not inherently increase the risk of danger to the involved parties or bystanders. *Cf. Casselman v. State*, 472 N.E.2d 1310, 1317 (Ind. Ct. App. 1985). Law enforcement officers are well-trained to negotiate disputes where citizens are peacefully resisting their entreaties. The caselaw permitting nonviolent resistance to law enforcement outside of the home is well-established and has been effectively applied by the Court of Appeals (with the exception of the instant case) to such resistance within the home.

³ Therefore, *Barnes*'s due process argument (Petition for Rehearing at 4-6) lacks merit. *Barnes*'s battery-as-reasonable resistance argument was foreclosed under *Robinson* and earlier cases, so this Court's decision does not retroactively impair his defense. *See Armstrong v. State*, 848 N.E.2d 1088, 1094 (Ind. 2006).

Prohibiting non-violent resistance to illegal police conduct is unnecessary to protect the public or law enforcement.

The Connecticut Supreme Court has struck the appropriate balance, urged by the State in this case, by permitting “reasonable resistance, not rising to the level of an assault, to an unlawful entry” “made without the color of warrant.” *State v. Gallagher*, 465 A.2d 323, 328 (Conn. 1983) (quoted extensively by *Casselman*, 472 N.E.2d at 1317). Citizens have a heightened expectation of privacy in their homes⁴ and in order to preserve that expectation, the State should recognize some privilege to reasonably resist unlawful entries by its agents.⁵ Our self-defense statute recognizes the right to defend one’s home through “reasonable force” from unlawful entries into the home, at least by other private citizens.⁶ Ind. Code § 35-41-3-2(b). While forcible resistance leads to the concerns expressed by the majority in this case, “reasonable” resistance of law enforcement does not threaten the same evils.

Tense and even dangerous police-citizen encounters fit no limited pattern; reactions and decisions are made in the split second, and each incident is unique. The hindsight, after-the-fact evaluation by the judiciary is inherently a case-by-case process, but our courts have shown

⁴ See *Payton v. New York*, 445 U.S. 573, 587 (1980).

⁵ This is not to say that the federal or state constitutions bestow a right to resist unlawful warrantless entries. *Contra Barnes*, 946 N.E.2d at 580 (Rucker, J., dissenting). They do not. “Rather, [they illustrate] the continuing vitality of that expectation of privacy in the home which underlies the common law right, because the more patently unlawful the intrusion, the more excusable the resistance becomes.” *Gallagher*, 465 A.2d at 328. The federal and state constitutions do, however, protect the public from illegal searches and seizures through the exclusion of evidence in criminal prosecutions. *Barnes*’s Fourth Amendment argument (Petition for Rehearing at 1-4) lacks merit.

⁶ Despite the existence of a statutory right to defend one’s home with deadly force since at least 1905, no case has applied it to the context of resisting law enforcement’s entry into the home. So it is unsurprising that *Barnes* never relied on it as the basis for his defense, choosing instead to base his claim in the common law and the long history of cases applying it. The State cites our current statute only as further evidence of Indiana’s policy of granting citizens the ability to reasonably protect their homes.

themselves equal to the task as they strike the correct balance between safety and privacy. There has been no evidence or argument presented that the common law exposes officers to danger, or citizenry to violation. The abrogation of the common law privilege solves no problem and bestows no demonstrable benefit.

CONCLUSION

The State respectfully urges this Court to affirm Barnes's convictions on the basis that the attempted entry into the apartment was lawful and that Barnes's resistance was not reasonable under the common law privilege.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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