

## FOURTH AMENDMENT AND EXCLUSIONARY RULE

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### PART I

The Fourth Amendment to the United States Constitution prohibits unreasonable search and seizure of persons and places. Many cases in the pre-trial stage require an attack on evidence seized by the government that is protected under the Fourth Amendment. In an attempt to provide information concerning the Exclusionary Rule and Fourth Amendment questions it will be difficult to address every aspect of this very significant area of the law. However, it is my hope that the following information can provide insight in determining whether or not a case presents a Fourth Amendment question. This is a two part series and the second half will appear in the next issue of Prison Living Magazine.

Motions to Suppress under the protections afforded through the Fourth Amendment are pre-trial motions and must be filed with the court prior to the trial. These motions attack the question of whether your person or a place was searched illegally. If evidence is obtained illegally in a criminal case it must be excluded from use. Additionally anything that leads to other evidence against the accused that comes from the illegally seized evidence may also not be used. This is known as the fruit of the poisonous tree effect.

#### **A. Test for Suppression of Evidence**

In Katz v. United States the Supreme Court articulated a two-prong test to determine whether a warrantless search violated a defendant's legitimate expectation of privacy. To receive the protection of the Fourth Amendment, a defendant must have a subjective expectation of privacy, and that expectation of privacy must be one that society is "prepared to recognize as reasonable." See Katz v. United States, 389 U.S. 347, 361 (1967). That expectation of privacy

has been distinguished in a number of cases dealing with different types of searches. For example, in United States v. Redmon, 138 F.3d 1109, 1112 (7th Cir. 1998) (*en banc*) a warrantless search of a garbage can was upheld where a defendant had no reasonable expectation of privacy in the trash which was placed near a garage on a joint driveway, *cert. denied*, 525 U.S. 1066 (1999). When the garbage can is placed on a public curtilage or in an area of common ground then there is no expectation of privacy. If the garbage can is in your garage or near the home away from public access, there is a different question as to whether or not the garbage can be searched. The distinguishing feature here is where the garbage can is located.

Another example of search and seizure is found in United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir. 1993). Here, the canine sniff of a warehouse door that sheltered marijuana was not illegal or a warrantless search where the defendant had no legitimate expectation that a canine would not detect odor of marijuana in a warehouse that was accessible to the public. Even warrantless scans of a defendant's home with thermal imaging devices are not an infringement of a legitimate expectation of privacy. *See* United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999). *See also* United States v. Depew, 210 F.3d 1061 (9th Cir. 2000). Some of the key features of whether or not a particular search can be conducted is whether that item is on public land, public location, physically or visually accessible by the public. However, in United States v. Sandoval, 200 F.3d 659, 660 (9th Cir. 2000), a warrantless search of an unoccupied tent located on the Bureau of Land Management property, near a marijuana crop was illegal and infringed upon a legitimate expectation of privacy. This was due to the locality of the tent in an area of dense vegetation, the fact that the agents could not see into the tent, and the fact that the defendant left prescription medicine within the tent. The defendant has the burden of proving a legitimate expectation of privacy. *See* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980).

## **B. Principles of Privacy**

Three principles guide the inquiry of whether one has a legitimate expectation of privacy. First, “the Fourth Amendment protects people, not places.” See Katz, *supra*. Thus the question that must be answered is not whether a particular area is somehow private in the abstract, but whether one has a reasonable expectation of privacy therein. See Rakas v. Illinois, 439 U.S. 128, 139-43 (1978). Second, a privacy interest, in the constitutional sense, consists of a reasonable expectation that uninvited and unauthorized persons will not intrude into a particular area. One may freely admit guests of one's choosing, or be legally obliged to admit specific persons, without sacrificing one's right to expect that a space will remain secure against all others. See Stoner v. California, 376 U.S. 483, 489-90 (1964); Chapman v. United States, 365 U.S. 610, 616-17 (1961). Third, an expectation of privacy, strictly speaking, consists of a belief that uninvited people will not intrude in a particular way. A person may renounce the assumption that they are immune from one kind of invasion while retaining the belief that he is protected from others; by exposing oneself to public view, for instance, one does not relinquish one's right not to be overheard. Katz at 352.

Under the Exclusionary Rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. Mapp v. Ohio, 367 U.S. 643, 654 (1961). This includes the “fruit” of such illegal conduct. See Wong Sum v. United States, 371 U.S. 471, 487-88 (1963). The Exclusionary Rule is a judicially

created remedy designed to deter law enforcement misconduct. Therefore, the application of the rule has been restricted to those areas where its remedial objectives are thought to be served.<sup>1</sup>

### **C. Standing**

The fundamental inquiry regarding a person who has standing to challenge an illegal search or seizure is whether the conduct which the defendant wants to put in issue, involved an intrusion into his or her reasonable expectation of privacy. *See* United States v. Padilla, 508 U.S. 77 (1993) and Rakas v. Illinois, *supra*. Under current case law, defendants charged with crimes of possession may only claim the benefit of the exclusionary rule if their own Fourth Amendment rights have, in fact, been violated. *See* United States v. Salbucci, 448 U.S. 83 (1980). Search and seizures can also involve a personal stop, stop of an automobile, the use of arrest warrants, consent to search, search subsequent to arrest, searches of homes and attached or unattached structures, inventory searches, bus searches, private searches, searches of motor homes and houseboats, and protective sweep searches. There are many other types of searches that have been discussed in the law but they are too numerous to address in this brief article.

### **D. Unauthorized Consent**

Some good cases on unauthorized consent searches can be found in United States v. Jacobsen, 466 U.S. 109 (1984) where an employee of a private delivery service cannot consent to the search of packages in transit. Be cognizant however of the fact that searches of packages can be conducted by the postal inspectors as well as other individuals who own companies such as Federal Express, DHL and UPS. If they believe the package contains contraband or some other illegal substance they can alert the appropriate authorities to have the package scanned or

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<sup>1</sup> *See* Defending a Federal Criminal Case 2001 Edition, Federal Defenders of San Diego, Inc.

searched depending on what is identifiable as probable cause. Probable cause is often a prerequisite to searches particularly as it relates to the issuance of a search warrant.

In Stoner v. California, 376 U.S. 483 (1964) a hotel clerk cannot consent to a search of a guest's room. A landlord cannot consent to the search of a tenant's home. See Chapman v. United States, 365 U.S. 610 (1961). A resident does not have actual authority to grant a consent to allow police officers to search another individual's closed, zipped suitcase. See United States v. Waller, 426 F.3d 838 (6th Cir. 2005). A homeowner does not have express or apparent authority to consent to the search of a defendant's boxes that were stored in her garage. See United States v. Fultz, 146 F.3d 1102 (9th Cir. 1998). A search of a passenger's luggage in the trunk of a car could not be supported by consent of the driver. See United States v. Jaras, 86 F.3d 383 (5th Cir. 1996), *Reh-g denied*, 96 F.3d 764 (5th Cir. 1996). A lessor cannot agree to a search of an area leased exclusively to a tenant, even if the tenant is occupying the room after checkout time. See United States v. Owens, 782 F.2d 146 (10th Cir. 1986). Another interesting case that can be expanded in its use under the Fourth Amendment is United States v. Bennett, 709 F.2d 803 (2nd Cir. 1983). This case was remanded from the Second Circuit Court of Appeals on appeal to determine if an informant had permission to use the bathroom where contraband was found, and second, if the informant was acting as a government agent.

Part two of this article will appear in next month's issue of Prison Living. Remember that the information contained in this article is general in nature and not meant to address any specific case issues or facts. We hope it will be helpful information when addressing Fourth Amendment issues.

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### PART II

As we discussed in last months issue of Prison Living the Fourth Amendment presents significant areas of the law that affect many cases where a search was conducted of a home, business, automobile or other locations and containers. The following additional considerations may arise when addressing the constitutional right to be free of unreasonable searches and seizures.

#### **E. Good Faith Exception**

The good faith exception to unreasonable searches and seizures applies to mistakes of facts or technical errors however it does not apply to mistakes of a basic point of established law. In United States v. Whaley, 781 F.2d 417 (5th Cir.), the Fifth Circuit stated that a marijuana seed in plain view, did not alone justify the initial intrusion.

#### **F. Inevitable Discovery**

When evidence could not have been discovered without a subsequent search, no exception to the warrant requirement applies. No warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search therefore the

inevitable discovery doctrine has no place. *See* United States v. Allen, 159 F.3d 832 (4th Cir. 1998).

### **G. Dog Sniff Searches**

A ninety minute detention of luggage while awaiting the arrival of a trained narcotics-detection dog based upon less than probable cause, violated the Fourth Amendment. *See* United States v. Place, 462 U.S. 696 (1983); Moya v. United States, 762 F.2d 322 (7th Cir. 1984); United States v. Puglisi, 723 F.2d 779 (11th Cir. 1984).

The police officer's reasonable suspicion that the defendant was carrying narcotics was dispelled at the scene of the traffic stop when the drug dog failed to alert on the vehicle. Delaying the defendant an additional hour in order to get a second examination by another dog was unreasonable seizure. *See* United States v. Davis, 430 F.3d 345 (6th Cir. 2005).

A drug dog's casting (where he temporarily stops and temporarily pays attention) is not the same as an alert (where he stops and scratches or bites at the object) and will not support a subsequent search, even at the border. *See* United States v. Rivas, 153 F.3d 364 (5th Cir. 1998).

### **H. Wiretaps and Telephone Warrants**

The fact that the government adequately exhausted traditional investigative techniques before seeking an order to tap one suspect's telephone was inadequate to support wiretaps of the other suspect's phone. *See* United States v. Blackman, 273 F.3d 1204 (9th Cir. 2001). One of the key features of telephone warrants and wiretaps is that the government has to exhaust traditional investigative techniques in order to apply for a wiretap. This condition also exists when second and subsequent wiretaps and telephone warrants are applied for. In other words, after the expiration of one set of wiretaps and telephone warrants, before they can get a second one, additional traditional means of investigation should occur. Additional application for wiretap was

insufficient since it did not contain the necessary requirement that other procedures were either dangerous or unlikely to succeed and did not refer to first application. A wiretap would be suppressed where it did not state the other investigative procedures that had been tried and why such other procedures would be dangerous or unlikely to succeed. *See* United States v. Mondragon, 52 F.3d 291 (10th Cir. 1995).

## **I. Traffic Stops**

Frequently, Fourth Amendment questions are challenged when an individual is pulled over for a minor traffic violation or no violation at all, just based on suspicion of an officer that drugs may be found in a suspicious looking vehicle (e.g. out of state license). The officer may engage in conversation with the person driving and/or passenger while the ticket is being written to elicit information that might prove conflicting as to the vehicles owner or where the occupants are going to or coming from. This procedure can develop suspicion if the occupants' stories are inconsistent or if information does not seem to be connected to the vehicle being driven. This may motivate the officer to ask for consent to search the vehicle. Frequently drivers and passengers who feel they have done nothing wrong believe that giving consent is of no moment. However, consent is a Fourth Amendment right. You do not have to consent to a search of your vehicle if you are stopped for a traffic violation. Consent allows the officer the authority to reasonably search the vehicle but not items in the vehicle. For example, the stop of a vehicle with Georgia license plate solely because of dark, tinted glass, which would only be a violation of law if the vehicle were registered in South Carolina, violated the Fourth Amendment. *See* United States v. Johnson, 256 F.3d 214, 215-17 (4th Cir. 2001) and United States v. Wilson, 205 F.3d 220, 223-24 (4th Cir. 2000). The stop of a vehicle solely because it had a temporary tag and the officer could not read the expiration date violated the Fourth Amendment. At least one court has

rejected the pretextual stop defense in favor of an objective test. *See* United States v. Hassan-El, 5 F.3d 726 (4th Cir. 1993). An officer's reliance on a "mere hunch" is not sufficient to warrant suspicion of any kind. *See generally* United States v. Arvizu, 544 U.S. 266 (2002). A vehicle stop based on an uncorroborated anonymous tip was held unconstitutional, the evidence suppressed and the conviction vacated in United States v. Jones, 242 F.3d 215, 218-19 (4th Cir. 2001). Reasonable suspicion must include particularized evidence that criminal activity is afoot. *See* United States v. Sprinkle, 106 F.3d 613, 618-19 (4th Cir. 1997).

These are just a few of the many, many cases available that discuss search and seizure questions.

#### **J. Challenging Illegal searches in post conviction proceedings**

In post conviction proceedings pursuant to a federal habeas corpus petition under 28 U.S.C. § 2255 (for state prisoners challenging state law interpretations that run afoul of Federal Constitutional questions are filed pursuant to 28 U.S.C. 2254), if an attorney did not raise a suppression issue during the pretrial stages of your case, you may attack that issue on a claim of ineffective assistance of counsel in a Habeas petition. However, you have to prove that you did not have an adequate and independent review of the suppression issue in the lower court and that counsel's failure to bring up the issue was based on ineffective assistance of counsel. You also have to prove that but for that mistake a different result would have occurred. Thus, you would have to prove that you could have won the suppression hearing in order to succeed on any post-conviction habeas corpus motion for a claim of ineffective assistance of counsel for failing to pursue a suppression matter. *See* United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579 (1982); United States v. Cook, 997 F.2d 1312 (10th Cir. 1993). The key is whether you had a full and fair litigation of the claim at pretrial, trial or on direct appeal. If you did, then you cannot raise

the issue, even if a claim of ineffective assistance of counsel is made, that your attorney inadequately raised the issue or failed to raise a particular question within the issue. Once it is heard in the lower court it cannot be reviewed in the habeas court. However, if it has not been heard and you think you have a legitimate basis for a complaint that your Fourth Amendment rights were violated, you would have to meet the standards necessary to have the matter heard in post-conviction capacity. It is best to raise these issues in pre trial proceedings if applicable.

Always get the advice of a good attorney when challenging any legal issue in a criminal case. This article is for information purposes and is not intended to provide any specific legal advice on any particular case.