GLOSY

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US Constitutional Restraints on Police Officers (The Fourth Amendment Guarantees)

1. Overview

Several provisions of the United States Constitution's Bill of Rights (the first 10 amendments ratified by the states in 1791) and the Fourteenth amendment place limits on the scope of the power that police have over individuals. The Fourth Amendment prohibits unreasonable searches and seizures and generally requires a warrant based upon probable cause before the police may conduct a search. The Fifth Amendment prohibits the police from compelling a person to incriminate himself or depriving a person of his liberty without due process of law. The Sixth Amendment guarantees a person the right to lawyer in a criminal case that cannot be infringed upon by the police. The Bill of Rights restricts the authority of only federal officers; in 1868, the Fourteenth Amendment was ratified and it has been interpreted by the Supreme Court to apply virtually all of the Bill of Rights protections to actions of state and local law enforcement officers, not just to actions of federal officers.

There are several different ways that courts have addressed the rights of individuals claiming that the police have acted in an unconstitutional manner:

1) A criminal defendant may claim that the evidence used against him by the prosecutor was obtained by the police in violation of his constitutional rights (Fourth Amendment, Fifth Amendment, etc.) and therefore the evidence should be excluded in the case against him. Known as the exclusionary rule, it is the most common way the Supreme Court has developed its constitutional regulation of the police. Under the doctrine of "fruits of the poisonous tree", the Court will exclude not only the illegally obtained evidence, for example, a confession obtained from the suspect by coercive questioning, but also evidence derived from that confession, such as the evidence of the crime the police found because of the confession.
2) An individual who claims that the police used excessive force in arresting him may sue the officer as well as the police department for damages under a federal statute, 42 USC Sec. 1983.
3) The US Department of Justice (DOJ) may criminally prosecute the officer under 18 USC Secs. 241 and 242 for violation of the individual's constitutional rights to be free from unreasonable searches and seizures.
4) DOJ may bring a civil case against the police department claiming that the department has a pattern and practice of unconstitutional policing, under 42 USC Sec. 14141.

This article will discuss only U.S. Constitutional law. State law may also provide remedies, such as a civil damage claim that a police officer trespassed into a person's home; state prosecutors may file a criminal case under state law for such crimes as manslaughter or murder; and most states have professional licensing statutes that provide for revoking the license of a police officer in the same way a doctor's medical license may be revoked.

2. Fourth Amendment – its scope and content

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

> cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

There are two clauses in the amendment: the reasonableness clause and the warrant clause. The question is whether a search is unreasonable unless there is a warrant issued based on probable cause. Traditionally, the Supreme Court has held that there is presumption that a warrant is needed but in recent years, the Court has been willing to uphold many searches without a warrant and instead focuses on whether the search is reasonable.

The Court usually requires that a search or arrest cannot be made without probable cause. The precise meaning of the term is unclear and in recent years, the Court has watered down what constitutes probable cause.

The Fourth Amendment as well as the other provisions of the Bill of Rights applies only to governmental officials, not to private individuals who might be involved in a search. And it has applied not just to police officers – any governmental officer who conducts a search is subject to the Bill of Rights although usually the Court will give more leeway to such officials, such as a school principal who searches a student's locker.

One of the most controversial questions arising in Fourth Amendment cases that involve criminal defendants is what is the proper remedy for a violation The justices are divided on the appropriateness of the exclusionary rule as a remedy since it results in a guilty person going free if there is no other evidence than what was found after an unconstitutional search. But if the evidence isn't excluded, what incentive will the police have to obey the Fourth Amendment in future cases?

3. Reasonable Expectation of Privacy

3.1. Katz v. United States (1967)

What constitutes a search or seizure to trigger Fourth Amendment protection? In the Katz case, the police attached an electronic listening device to the outside of a phone booth and overheard the conversation of a person placing illegal bets. There was no warrant issued by a judge permitting

the officers to attach the device. The government argued that the phone booth did not belong to the suspect and therefore it wasn't a protected premise, like a house. Prior cases had focused on whether the police trespassed on defendant's property. But the Court held that the defendant intended his conversation to be private and thus a warrant was needed.

The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Today, the Katz test can be summarized as follows: the Fourth Amendment is violated by the police if a person has an actual, subjective expectation of privacy and that expectation is one that society is prepared to recognize as reasonable.

3.2. Developments of the Reasonable Expectation of Privacy Test

a) Trespass

Despite the primary focus on invasion of privacy, the Court may also rely on property concepts as in United States v. Jones (2012) where the police attached a GPS tracking device to the suspect's car and monitored his movement for 11 days without a warrant. The government argued that there was no invasion of privacy since the police weren't listening in on private conversations. But the Court found this was a search since there was a trespass for the purpose of obtaining information and there was no need to separately ask whether there was an invasion of privacy.

b) Electronic Surveillance

In Katz, neither party knew that the agents were listening to their conversation but if one party was recording the conversation and turns it over to the police, there is no Fourth Amendment protection since a party takes the risk the other person will reveal the contents of the conversation to the authorities or may even be a government agent himself (United States v. White, 1971).

c) Open Fields

Subsequent to the Katz decision, the Court refused to find a that a homeowner had a reasonable expectation of privacy from police entering open fields surrounding his home even though no trespassing signs were posted to keep it private, relying on the "houses, papers and effects" language of the Fourth Amendment. The Court did say that the curtilage – the property next to the house such as a garden – is protected but not open fields (Oliver v United States, 1984).

d) Third Party Access to Information

Several cases have held that one loses his reasonable expectation of privacy where he gives access to a third party to information. For example, since an individual knows that his checks and deposit slips will be seen by bank employees, there is no requirement for the government to get a warrant to get those documents from the bank (United States v. Miller, 1976).

Similarly, since a customer knows that the telephone company records the phone numbers the customer dials, there is no Fourth Amendment violation when the company turns those numbers over to the police (Smith v. Maryland, 1979).

Although there was no constitutional violation under Smith and Miller, Congress enacted statutes to give more protection to the customers' privacy than the Court gave under the Fourth Amendment.

The Court has upheld a warrantless search of trash bags that were left on the curb and turned over by the trash collector to the police who found incriminating information. The Court reasoned that since the bags could be opened by animals, children and others, society wouldn't accept a claim that it was reasonable for the home owner to expect privacy in them, despite the fact that he placed the trash in opaque trash bags (California v. Greenwood, 1988).

The Court distinguished Greenwood when it held there was a reasonable expectation of privacy when the trash was placed on the homeowner's own driveway (Collins v. Virginia, 2018).

4. Probable Cause

Although "probable" would seem to mean that it is more likely than not that the person to be seized has committed a crime, the Court has never said that. Instead probable cause as means, "there is a substantial chance" or "there are reasonable grounds to believe" there has been criminal activity.

In the context of an arrest, there must be probable cause to believe that a crime has occurred and the person sought has committed it.

For a search, there must be probable cause to believe the items sought are related to a crime and the place to be searched presently contains those items.

Although the Court has permitted searches based on probable cause even in the absence of a warrant, it prefers that the police officer first obtains a warrant from a judge because a neutral judicial official is more likely than a police officer to be an objective decision-maker and therefore, in close cases of whether or not there was probable cause, the fact a warrant was obtained will be a factor in upholding the police action. Being arrested or having one's home searched is a significant deprivation of one's liberty and the Fourth Amendment, by requiring a judge to make the decision on probable cause, serves as a check on the officer's zeal to arrest and search.

The Court has held that the magistrate must be neutral and detached and therefore a prosecutor cannot be neutral since he's part of the law enforcement team. And the Court has said that a judge who gets paid only if he issues the warrant also is not neutral. The Court has held that the person issuing the warrant needn't be a lawyer or a judge and has permitted a court clerk to do issue the warrant.

The most problematic cases in finding probable cause are those where the information comes from an informant, often a person who is himself involved in crime. In informant cases, the police will have to establish that the information satisfies probable cause by, first, showing that the informant is an honest person. This can be accomplished by showing that the informant had given reliable information in past cases. The second hurdle is to show that the informant got his information in a reliable way,

for example, that he was involved in the crime and that he personally observed the defendant's sale of illegal drugs.

5. The Warrant

The text of the Fourth Amendment requires that a warrant must be issued by a magistrate based on probable cause; it must particularly describe the place to be searched so that the discretion of the officers is constrained to search just those places set forth in the warrant; and it must particularly describe the persons or things to be seized so that officers cannot rummage through the house looking under beds, drawers, etc. but only in places where the items could be present. This was to avoid the problems during colonial times when the English officials issued general warrants that were not so limited.

5.1. Executing the Warrant

Even though there is nothing in the text of the Fourth Amendment that requires the police to knock and announce their presence, the Court held that historically, that has been the practice. So even though the police have a warrant, they must knock and announce, for two reasons: first, it protects the dignity and privacy of the homeowner and second, if the police barged into the home in the middle of the night, the homeowner might think it is an intruder and might try to harm him. Also, breaking down the door might cause unnecessary property damage. Thus, in Wilson v. Arkansas (1995), the Court held a no-knock entry makes the search unreasonable. And in Richards v. Wisconsin (1997), the Court said there would be an exception if the police had reasonable suspicion that knocking would be dangerous or futile or would inhibit the effective investigation of crime, that is, the evidence would be destroyed.

5.2. Exceptions to the Warrant Clause

Although the Fourth Amendment could be read to mean that a search or seizure is unreasonable unless a warrant is issued based upon probable cause, it has never been read in that way. Instead, the Supreme Court

has developed many exceptions. As will be seen, in some cases there is no need for a warrant, in others, there is no need for probable cause. In the past, the Court has described these exceptions to the warrant clause as being limited and narrow, but in fact, there are so many exceptions that they cannot truly be described as limited and narrow.

a) Arrests

An arrest of a person is a "seizure" under the Fourth Amendment. It results in a person being taken to jail, booked, often remaining in jail for an extended period of time. Especially if the arrest takes place in public, in front of friends and colleagues, it can be highly embarrassing. For these reasons, there are strong arguments for requiring that decision to be made by a neutral judge rather than a crime-fighting police officer, particularly where there is time to get the warrant. Yet the Court has held that even where there is time, and even if the arrest is for a very minor crime, like not wearing a seat belt, the Fourth Amendment does not require a warrant, it is up to the officer in his own discretion whether to arrest a person or issue a summons, so long as there is probable to believe the suspect has committed a crime and the arrest takes place in public, not in the suspect's home. That had been the common law rule prior to the Constitution and the Court did not believe the Fourth Amendment was meant to alter the common law (United States v. Watson, 1976, felony committed outside the officer's presence; Atwater v. Lago Vista, 2001, minor crimes). However, if a person is detained in jail without a warrant, there must be a prompt determination by a judge that there is probable cause to hold him, Gerstein v. Pugh (1975), and that generally means within 48 hours of arrest, County of Riverside v. McLaughlin (1991).

For arrests in the home, the Court held these are such serious invasions of privacy that an arrest warrant issued by a magistrate is required, unless there are exigent circumstances. Furthermore, only if the police have reason to believe the suspect is in the home may they execute the warrant, Payton v. New York (1980). The Court also relied on the history prior to the enactment of the Fourth Amendment, which distinguished arrests in public from those in the home.

Where the police have reason to believe a suspect is in the home of a third party, they may not enter the home without obtaining a search

warrant from a judge to enter the home and arrest the suspect, Steagald v. United States (1981). A search warrant is more protective than an arrest warrant because in the former, the judge must find the person to arrest or thing to be seized is currently in the home; there is no such finding by a judge in issuing an arrest warrant although the police officer must believe the suspect is there to execute the arrest.

b) Use of Deadly and Excessive Force

Probably the most controversial Fourth Amendment cases involve police use of deadly force in cases where the suspect is physically resisting arrest or fleeing from the officer. The use of deadly force is considered a "seizure" of the person. Obviously, there would be no time to get a warrant so the question arises whether the force used by the officer was reasonable. Since these cases do not typically involve the seizure of evidence, they do not arise in the context of application of the exclusionary rule but rather in a civil rights suit under Sec. 1983 by the suspect or the suspect's family.

In the landmark case of Tennessee v. Garner (1985) the Supreme Court held unconstitutional a state statute that permitted the police to use deadly force to prevent the escape of all fleeing felons, stating that this was an unreasonable seizure of person in violation of the Fourth Amendment. The suspect, a 15-year old, was fleeing from a non-violent burglary of a house, the officer did not believe he was armed, but shot and killed him as he tried to escape over a fence. The Court held that an officer may not use deadly force to prevent escape unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others".

Where the force in effectuating an arrest is not deadly, the test is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. And the benefit of the doubt should be given to the officer on the scene rather than with the 20/20 vision of hindsight. Among the factors to consider whether the force was unreasonable are the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight (Graham v. Connor, 1989).

A common scenario in which claims of excessive force have reached the Supreme Court involves high-speed car chases of criminal suspects by police. In the first such case to reach the Court, the police pursued the suspect to arrest him for speeding; when he sped away, the police car rammed into the suspect's car forcing him off the road and causing him to be paralyzed. The Court held that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. (Scott v. Harris, 2007).

c) Stop and Frisk: Terry v. Ohio

Until 1968, the Supreme Court had never decided a case involving a brief detention of a person, short of an arrest, where there was suspicion, but not probable because, to believe the person was carrying gun. The argument against the constitutionality of a stop and frisk was that the Fourth Amendment requires a warrant based on probable cause and clearly a stop and frisk does not comply with the warrant clause. The state argued that the Fourth Amendment is more flexible and that if the police conduct was less intrusive than an arrest, the warrant and probable cause requirements should be relaxed and the action should be considered reasonable under the Amendment. And as a practical matter, the police, in order to protect themselves, would stop a person they suspected of carrying a weapon regardless of what the Supreme Court said.

In the case of Terry v. Ohio, the Court recognized the limitations of the exclusionary rule in a stop and frisk case where the police are more interested in self-protection than in introducing evidence of a crime and also the likelihood that permitting stop and frisks would likely lead to stop and frisk of members of racial minorities, which indeed has turned out to be the case. But the Court rejected the argument of the state that conduct of the police short of an arrest and full-scale search was merely a petty indignity; instead, it said the police action was a serious intrusion upon the sanctity of a person, which might inflict great indignity and cause strong resentment.

The Court noted that voluntary interactions between citizens and police do not implicate the Fourth Amendment. A seizure occurs "only

when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen".

Unlike previous Supreme Court cases that looked to the Warrant Clause of the Fourth Amendment, Terry focused on the Reasonableness Clause of the Fourth Amendment by balancing the government's need to search against the privacy interest of the individual. The important question for future cases is when will the Court use the traditional Warrant Clause approach and when will it use the Terry balancing test.

In Terry, the Court held that there is no need for the police to have probable cause to briefly detain a person but they need more than a mere hunch the person is involved in criminal activity. In order to stop the suspect, "the police officer must be able to point to specific and articulable facts which, taken together with natural inferences from the facts, reasonably warrant the intrusion".

In order to frisk the person, there must be a reasonable belief that the person whose suspicious behavior he's investigating is armed and presently dangerous to the officer or to others.

And the scope of the frisk is limited to that which is necessary to the discovery of weapons, not to look for other evidence of the crime. That is, only a pat down of the suspect is permitted, not a full-scale search of the person, which would be permitted if there was an arrest rather than a stop. Thus, if the police officer feels something in a pat down but knows it is not a weapon, he's not permitted to squeeze it to determine what it is since that is a search for which he needs probable cause. Under Terry, the only justification for a pat down is to remove a weapon, not to search for evidence of a crime (Minnesota v. Dickerson, 1993). And in the context of a car stop, if the police have reasonable suspicion to believe the driver is dangerous, they may look in the car in places where a weapon might be (Michigan v. Long, 1983).

Terry is important because for the first time, the Court didn't require probable cause to stop and search a person: it permitted the police to stop and frisk for weapons where there is reasonable suspicion the person is armed and dangerous and criminal activity may be afoot. Prior to Terry, there was a requirement that there was probable cause a crime had been committed: under Terry, stops are now permitted for purposes of crime prevention not just crime detection.

d) Expansion of Terry v. Ohio

The balancing test of Terry has been used frequently in the context of stops of automobiles on the highway and the Court has upheld the following police actions for suspected traffic violations:

1) ordering the driver out of the car without any fear the person is dangerous to the officer, which was requirement to frisk in Terry;
2) ordering the passenger out of the car, not just the driver, without fear the passenger was dangerous;
3) frisking the driver or passenger where reasonable suspicion the person is armed and dangerous even though no suspicion crime is afoot as in Terry;
4) entering the car to make sure the Vehicle Identification Number on the dashboard is visible to the officer looking inside the car.

Terry has also been extended to permit the police to detain a person leaving his premises that had just been subject to a search by police who had a search warrant. Unlike Terry, there was no frisk of the person since there was no suspicion he was involved in crime or was armed and dangerous. The Court found the action was reasonable since he could be taking evidence with him, it was likely he was evading arrest by leaving or there could be possible violence against the police (Michigan v. Summers, 1981).

However, the Court refused to uphold the detention of a homeowner when he was a mile away from his apartment when it was searched (Bailey v. United States, 2013).

Where a person is arrested in his home, may the police look for possible accomplices who might be armed? In Maryland v. Buie (1990) the Court held the police may look for accomplices in the vicinity of the arrest without the need for any suspicion but to look elsewhere in the house the must have reasonable suspicion to believe the area to be swept contains accomplices posing a danger to the officers and only a cursory inspection is permitted, not a full-scale search of containers, drawers, etc.

e) What is a Fourth Amendment Seizure?

Obviously, where the police physically restrain the suspect there is a seizure under the Fourth Amendment. But a mere encounter with an officer is not: the test is whether a reasonable person believes he is free to leave. If evidence is uncovered by the police but there was no seizure, it will

be admitted against the defendant. A common scenario occurs in narcotics cases in airports where federal narcotics agents approach travellers and ask to see their identification and tickets. If the agents keep the tickets and IDs and tell the passengers to accompany them to a room, that would be considered a seizure; if the agents do not retain the materials, that's an indication the passengers are free to go and there is no seizure. In other contexts, these actions of police would lead a court to find there was a seizure: brandishing a gun; threatening the suspect; isolation in a police station; intimidating movements.

In order for there to be a Fourth Amendment seizure, there must be intent on the part of the officers to seize the person. For example, when the police set up a roadblock to stop a suspect fleeing in a car is an example of intent, even though the police thought the person would stop before crashing into the barrier.

Is there a seizure where the officers attempt to stop the person but he continues to flee? In California v. Hodari D (1991), the suspect sees a police car and runs away, dropping an object that turns out to be illegal drugs. There was no reasonable suspicion to believe the suspect was carrying drugs at the time he dropped them. But even though there was a show of authority when the police were in pursuit, since the defendant didn't submit to he show of authority, there was no seizure and thus the Fourth Amendment wasn't implicated. Only if the police actually touched the person or he submitted to authority is there a seizure.

f) What is Reasonable Suspicion to Justify a Stop?

The Court has defined reasonable suspicion as "a particularized and objective basis to suspect a particular person is or is about to be engaged in criminal activity". There is an emphasis on common sense, not technicalities, with deference to the expertise of law enforcement officers. For probable cause to arrest, there must be a fair **probability** the person has committed a crime. For reasonable suspicion, there must be a fair **possibility** the suspect is planning to commit a crime or be in the process of committing a crime. Later cases have extended Terry to reasonable suspicion the suspect has committed a crime, United States v. Hensley, 1985. The fact a person's actions conform to the profile of a drug courier smuggling drugs on his person doesn't detract from

an agent's finding of reasonable suspicion so long as he can articulate under Terry his reasons for finding reasonable suspicion, United States v. Sokolow (1989).

Where a suspect fled from police officers who were patrolling in a high-crime area known for drug dealing and he was stopped by the police who found a gun after a pat down, the Court upheld the stop and frisk finding there was reasonable suspicion in the context of this case, Illinois v. Wardlow (2000). Were it not a high crime area, flight alone upon seeing the police might not constitute reasonable suspicion.

g) The Difference between a Stop and an Arrest

Under Terry, a stop is a brief detention, a matter of a few seconds, and only reasonable suspicion is required. But at some point, if the officers detain the person for an extended period of time, there is now an arrest for which probable cause is needed. In Florida v. Royer (1983), four members of the Court wrote that the detention must be brief and necessary to effectuate the purpose of the stop and the methods used must be the least intrusive available to verify the suspicion. The actions of the police in Royer did not meet the test for a stop according to the four-justice plurality, it was an arrest since the suspect was taken to a small police room when he consented to his luggage being searched; it would have been less intrusive to have the search in a public place. The dissent thought the test should be whether the police acted reasonably and since it was only 15 minutes in length, it was a stop. Note also that Royer is a case involving a stop in order to investigate drug smuggling rather than a stop and frisk for weapons as in Terry. The Court has upheld under Terry a 30–40 minute detention of a suspect in order to confirm the officer's suspicion, United States v. Sharpe (1985), even though in Terry itself, the stop was for only a few seconds while the officer conducted the pat down and frisk. The Court has permitted the detention of property for one day in order to obtain a warrant where there was reasonable suspicion the packages contained illegal drugs, noting that detention of a person is more invasive than detaining a package, United States v. Van Leeuwen (1970).

h) Stops for Purposes other than a Frisk

The Court has upheld the authority of the police to stop a person about whom there is reasonable suspicion to believe he was involved in criminal activity, specifically assaulting his companion. In Hiibel v. Sixth Judicial District Court of Nevada (2004), a state law required a person to identify himself to a police officer under penalty of a fine. Relying on the Terry balancing test, the Court found that getting the name of such a person serves important governmental interests such as determining if the person is wanted for another crime, has a mental disorder, a violent past or it could possibly clear his name. The Court did say that asking a person to identify himself is permissible only if the request is reasonably related to the purpose of the stop. It noted that in some cases identifying oneself could result in a compelled confession in violation of the Fifth Amendment, but there was no such danger in this case.

What if a person is stopped and asked to go to the police station to answer questions about a crime as opposed to Hiible where the question was limited to asking the person to identify himself? In Dunaway v. New York (1979) the Court held that probable cause, not merely reasonable suspicion, is required to question the person about a crime at the police station. And the Court also disallowed the fingerprinting of a suspect at the police station where there was no probable cause to arrest him, Davis v. Mississippi (1969).

Terry has been extended to permit the warrantless search of the house of person on probation where there was reasonable suspicion he had committed the crime of vandalism. The Court reasoned that a person on probation has less of an expectation of privacy than a law-abiding citizen and therefore there was no need for a warrant or probable cause, United States v. Knights (2001). And the Court upheld the search of a parolee without the need for reasonable suspicion. He had signed an agreement he could be subject to a search at any time and since he had been previously convicted, the Court said he was more likely to engage in further criminal activity, Samson v. California (2006).

i) Future Growth of Terry

Terry's balancing test weighs the government's interest in crime control versus the individual interest in privacy under the Fourth Amendment. Although it has grown rapidly since it was decided in 1967 to permit a wide variety of ever more intrusive searches and seizures, the Court continues to say that the Fourth Amendment requires probable cause and a warrant, with narrow exceptions, the topic we now turn to.

6. Warrantless Searches

6.1. Searches Incident to Arrest

a) Arrest in the Home

Where the police have a warrant to arrest a person in his home, do they also have the ability to search the person as well as the home? In Chimel v. California (1969), the Court held that the police may search the person for weapons as well as evidence on his person. In addition, they may search the area within the arrestee's immediate control from which he could grab a weapon or evidence. However, the police may not search the house to look for evidence or persons who might be confederates of his unless the police have a search warrant. The Court has permitted the search of the person to take place immediately before the arrest to prevent the person from grabbing a gun or destroying evidence. The search must be contemporaneous with the arrest – once the person is in custody and no longer near the property, the police may no search it. However, if the property is taken to the jail, it may be searched under an exception for inventorying property while a person is in custody.

b) Searches of Persons Arrested in or Near a Car

Where a person is arrested for a traffic violation, the Court has upheld the search of the person for evidence and for weapons, even in the absence of any suspicion he possesses a weapon or evidence of a crime, United States v. Robinson (1973). Recall in Terry, the scope of the search was limited to a pat down for a weapon. The Court distinguished Terry by noting that in Robinson, it was a full custody arrest, the suspect would be transported to jail in a patrol car and would be in the presence

of the officer for a long period of time, whereas in Terry, it was a brief stop and the suspect would be free to go if no gun was found. The Court said it not want to make case by case adjudications after the fact, police have to make quick ad hoc judgments and held that once there is a lawful custodial arrest, there is no additional justification needed to search a person incident to the arrest.

In Robinson, the traffic violation carried with it the possibility of getting sentenced to jail. Does the scope of the search incident to arrest differ where the offense was so minor that the punishment could be a fine, not jail? The Court answered in the negative in Lago Vista v. Atwater (2001), holding that a person who failed to wear a seatbelt, an offense for which she could not be arrested under state law, was subject to a search incident to arrest. However, if the person isn't arrested but merely issued a summons to appear in court, she is not subject to a search, Knowles v. Iowa (1998).

Unlike the search in the home, where the scope of the search is limited to the area within the arrestee's immediate control, the Court held in New York v. Belton (1981) that the police may search contemporaneously with the arrest of a person in his car the entire passenger compartment of the car as well containers in the car and the glove compartment but not the trunk since the arrestee couldn't reach into it. The search of the car took place after the suspect exited the car but he was next to it so could possibly reach in. And even if the suspect is arrested after he parks his car and has left it (in Belton, he was stopped while driving his car) the police may search the suspect's car. The Court limited its holding to cases where the suspect is a "recent occupant" of his car, Thornton v. United States (2004).

Arizona v. Gant (2009) addressed the question of when it is permissible to search a recent occupant's car incident to his arrest when he is not in his car at the time of the search. The Court held that the search was permissible in two situations: 1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search (the facts of Belton) or 2) if he is secured in the police car, as in Gant, his car can be searched only if there is reason to believe that evidence related to the crime of arrest may be found in his vehicle.

c) Searches of Phones Incident to Arrest

In two 2014 cases, United States v. Wurie and Riley v. California, the Court had to decide whether flip phones and smart phones could be searched incident to arrest without a warrant. The government argued that under cases like Chimel and Gant, the phones could be searched and the digital evidence could be seized without a warrant. But the Court disagreed in unanimous opinions because the digital data couldn't be used as weapons although the phone itself might be a weapon or could conceal a weapon so for that limited purpose, the phone could be examined. As to the argument that the data could be destroyed by wiping it away or by encryption, the Court found there was no evidence these were real problems since the police could take steps to prevent this from happening. The earlier cases, which permitted searches of wallets and purses, were distinguished because the amount of information on cell phones is so much more extensive than the physical evidence involved in the previous case. The Court thus held that searches of cell phones do not come within the search incident to search exception unless there were exigent circumstances such as child abduction.

d) Pretextual arrests

Suppose the police arrest a person for a minor traffic violation whom they suspect, but don't have probable cause to believe, is involved in a more serious crime such as drug possession? These are termed pretextual arrests. The Court held in Whren v. United States (1996) that the subjective beliefs of the police are irrelevant; so long as there is probable cause to arrest for the traffic violations, the arrest and subsequent search does not violate the Fourth Amendment. However, if the arrests are based on the race of the driver, that would violate the Equal Protection Clause of the Fourteenth Amendment.

6.2. Plain View Searches

Another exception to the requirement of a search warrant is that the police have the right to seize evidence, even if it isn't particularly described in the warrant, so long as they have a legitimate right to be in the place when they come upon the evidence, Horton v. California (1990) and so long

as it is immediately apparent that the item seized is incriminating, Arizona v. Hicks (1987).

6.3. The Automobile Search Exception

a) Search of the Car

One of the first exceptions to the requirement of a search warrant was decided by the Court in 1925, Carroll v. United States, which held that if the police stop a car because they have probable cause to believe there is criminal evidence in the car, they may do so without a search warrant. There is no requirement that the driver be arrested and searched incident to arrest. The car itself as well as compartments in the car such as the glove compartment or the trunk may be searched. Note that this would not be the case in the context of the search of a home; to search the home that would normally require a search warrant. But the Court said that a car is different: if the police officer had to obtain a warrant from a magistrate, by the time he returned, the driver would likely have driven away. If the police stop the car and take it to the police station and search it there rather than on the side of the road as in Carroll, the Court held there was no need to obtain a warrant, Chambers v. Maroney (1970). And even where the police search a car that was already stopped, similar to entering a home, the Court held no warrant was needed since there is less of an expectation of privacy in a vehicle than in a home, California v. Carney (1985), because cars typically have windows that can be looked into and because cars, unlike homes, are subject to state licensing and regulation. Carney involved a motor home but it was mobile; the Court held that the result might be different if the car was not mobile, for example, if it was resting on blocks and hooked up to utilities.

b) Search of Containers in the Car

In United States v. Ross (1982), the Court permitted the warrantless search of containers in the car that could have held the evidence for which the police had probable cause to believe were in the car. There was no need to take them to the magistrate to get a warrant to search them. But what if the police have probable cause that the seizable evidence was in a single

container rather than in multiple containers as in Ross? May they open that container or must they take it to the magistrate and obtain a search warrant? The Court held that police may search that one container, overruling a prior case that held they must first obtain a warrant, California v. Acevedo (1991).

In Acevedo, the police saw the defendant leave his house and put the container that they believed contained drugs in his car. It was that container they searched. But could the police have seized the package before it was placed in the car and searched it without a warrant? The Court did not go that far, that is, they haven't permitted a "mobile package exception" to the warrant requirement. Only if the container is placed in the car so that it comes under the Auto Search Exception would the Court permit the package to be searched. The Exception permits the search of a passenger's container so long as there is probable cause to believe it contains evidence of the crime, Wyoming v. Houghton (1999), but the search of the passenger himself might not be permissible in the absence of a warrant.

6.4. Hot Pursuit

Where the police are notified of a robbery, the defendant is seen entering a building and the police arrive minutes later, they may enter the building without a warrant to search for the person and any weapons, Warden v. Hayden (1967).

6.5. Emergency

It is obvious that in true emergencies such as a fire or a serious crime like kidnapping, police need not obtain a warrant to enter a home to respond to the emergency. But in recent years, the Court has upheld warrantless entries into homes in less serious situations such as there was an o reason to believe a person needed medical assistance was in danger. The Court has said that judges should defer to the assessment of the police rather than second-guess them.

6.6. Evidence in the Process of Destruction or Removal

The Court has stated in dicta that if a suspect is in the process of destroying or removing evidence, the police may enter the home without a warrant, Vale v. Louisiana (1970). But if the offense is not considered a serious one by the state, the police are not permitted to enter, even though the evidence would be gone by the time the police returned with a warrant, Welsh v. Wisconsin (1984). And the Court held that the police may not always undertake a warrantless blood test after arresting a person for driving while intoxicated since today warrants can often be obtained electronically, Missouri v. McNeely (2013).

The Fourth Amendment requires the police to knock and announce their presence, even if they have a warrant to search. But may they go to a home without a warrant, knowing that their knocking will cause the homeowner to attempt to destroy the evidence and then enter the home to stop the destruction? In Kentucky v. King (2011), the Court upheld the warrantless search by the police in this situation.

6.7. Administrative Searches

Up to now, the cases have involved persons suspected of crime. Does the Fourth Amendment apply to searches for other purposes? The first case to apply the Fourth Amendment to administrative searches was Camara v. Municipal Court (1967), which involved a warrantless inspection of a home to determine if there were fire, health or safety violations. The Court held that such searches constituted a significant intrusion of the home and thus a warrant is needed, for three reasons: 1) it would establish that there is a city code authorizing such entries; 2) the warrant would establish the limits on the scope of the inspection and 3) the warrant would give notice to the homeowner that the inspector has authority from the judge to carry out the inspection. The Court did note that these warrants differ from the typical warrant, which focuses on a single home. For administrative warrants, an area-wide warrant is permissible. As in Terry, decided the next year, the Court balanced the government's need versus the intrusion into the homeowner's privacy. In a case decided the same day as Camara, See v. Seattle, the Court required a warrant

in the context of an administrative search of a business, but indicated that it would be easier to have a warrantless search of a business than of a home where the privacy interest of the homeowner is higher.

6.8. Administrative Searches based on Reasonable Suspicion

Recall that in Terry v. Ohio, the Court permitted the police to stop and frisk a person where there was reasonable suspicion that the person was about to commit a crime and was armed and dangerous. In New Jersey v. TLO (1985), the Court upheld a warrantless search of a student's purse where a school official, not a police officer, had reasonable suspicion the student was breaking the law or violating school rules by carrying cigarettes in her purse. However, where the search by school officials was more intrusive – a strip search of a 13 year old female student's underwear – the Court held that more than reasonable suspicion was needed because the privacy invasion was greater than the searches of her backpack and outer clothing, which the Court upheld based on reasonable suspicion, Safford v. Unified School District v. Redding (2009).

6.9. Administrative Searches without Probable Cause or Reasonable Suspicion

A urine test was given to all employees involved in a railroad accident even though there was no suspicion a particular employee was using drugs. The purpose was not to gather criminal evidence but for reasons of safety in a dangerous job like driving a railroad locomotive. The Court upheld the testing, Skinner v. Railway Labor Executives (1989). Similarly, the Court upheld suspicionless urine tests of all border drug agents as well as agents who were carrying firearms. Again, the purpose was to ensure they were drug free on the job, not to prosecute them criminally, National Treasury Employees v. Von Raab (1989).

The Court has upheld random drug testing of students in two cases. The first involved testing of high school student athletes involved in interscholastic competition where a who student was on drugs could be hurt, Vernonia School District 47J v. Acton (1995). The second, Board of Education of Independent School District No. 2 v. Earls (2002), involved

drug testing of students involved in any interscholastic competition such as debate, band and athletics. The Court noted the special responsibility a school has as the custodian of the students, its teaching responsibility and the difficulty teachers might have in detecting whether there was reasonable suspicion. If a student tested positive, he was not turned over to the police.

In contrast to the above administrative cases, the Court struck down a state law that required drug testing of persons running for high office in Georgia, Chandler v. Mill (1997). The Court noted that there was no evidence that there was a real drug problem for candidates, it was purely hypothetical.

In Ferguson v. City of Charleston (2001), women were subjected to drug testing in the hospital if there was reasonable suspicion they were cocaine users and thus the drug would be passed on to the unborn child. Unlike the above cases, the test results were turned over to the police without the women's consent. The Court held that the testing was not an administrative scheme but rather the immediate purpose was for criminal law enforcement and therefore a search warrant would be needed to comply with the Fourth Amendment.

In Florence v. Board of Chosen Freeholders of County of Burlington (2011), all persons who were admitted to the general jail population were subject to a visual strip search, no matter how minor the crime and even in the absence of any suspicion the person might be hiding contraband in a body cavity. The Court upheld the policy noting than only a blanket policy would be effective.

6.10. Administrative Stops of Cars

The police may not stop a car to check the driver's license and registration without reasonable suspicion because of the possibility that such unbound discretion might lead to stops based on the officer's prejudice, Delaware v. Prouse (1979). However, the Court has upheld suspicionless stops at fixed checkpoints near the border, United States v. Martinez-Fuerte (1976), to check on the status of aliens. It has also uphold sobriety checkpoints without reasonable suspicion for the administrative purpose of stopping

drunk driving, Michigan Department of Public Safety v. Sitz (1990). However, in City of Indianapolis v. Edmond (2000), the Court disapproved of drug interdiction checkpoints because the primary purpose was to find drugs, a criminal rather than an administrative purpose.

6.11. DNA Testing

The Court has upheld the collection of DNA evidence of persons arrested for serious crimes when brought to jail without the need for a warrant or any suspicion that they were involved in other crimes. The Court concluded that DNA identification is part of the routine booking of arrestees, Maryland v. King (2013).

6.12. Inventory Searches

When cars are impounded, they are often searched without any suspicion or warrant. The justification is threefold: to protect the owner's property while in the hands of the police; to protect the police against disputes over the property; and to protect the police from danger, in case someone broke into the car and found a gun. In South Dakota v. Opperman (1976), the police discovered marijuana in the glove compartment of the car and that evidence was used to convict the defendant. The Court upheld the search since the reasons for the search were administrative, not criminal.

Inventory searches are also common at jails after a person is arrested and detained and the Court upheld the search of the arrestee's backpack, which turned up incriminating evidence, Illinois v. Lafayette (1983).

In Colorado v. Bertine (1987), the Court upheld the search of containers in the impounded car, which turned up incriminating evidence.

Where there is no established policy that limits the discretion of the police in opening containers, however, the Court has disapproved inventory searches, because it gives unfettered discretion to the police whether or not to open a container, Florida v. Wells (1990).

6.13. Searches at the Border

The oldest exception to the need for a warrant based on probable cause is the ability of the government to stop and search persons because of the interest in national self-protection and sovereignty. The accepted rule is that every person as well as his effects and vehicle can be searched without any reason at all. And that includes the search of mail coming from a foreign country, United States v. Ramsey (1977). If the search of a person coming into the country is intrusive, like a strip search, reasonable suspicion is necessary, United States v. Montoya de Hernandez (1985), but non-routine searches of property, such as disassembling and reassembling gas tanks, do not require reasonable suspicion, at least in the absence of destruction of the property, United States v. Flores-Montano (2004).

6.14. Consent Searches

If a police officer asks for permission to search and the person consents, there is no requirement that the officer have a warrant, probable cause or reasonable suspicion. The test the Court has established is that the state must show that the person's consent was voluntary under the totality of circumstances, Schneckloth v. Bustamonte (1973). If consent was coerced by the police by explicit means, by an implied threat or covert force, it is not voluntary. One factor upholding a consent search is that the police told the person that he has the right to refuse to consent to the search. In contrast, a confession obtained by the police violates the self incrimination clause of the Fifth Amendment is invalid unless the suspect is told he has a right to remain silent. No other factors need to be considered.

Several cases have reached the Supreme Court raising the question whether a person can give consent to the search of another person's property, so-called third party consent cases. The Court has upheld these searches so long as the third party 1. voluntarily consents and 2. has the authority to consent.

There are two ways that the Court has found the third party has authority: first, the third party has the ability to actually consent, for example, she shared the house with the defendant and therefore has the authority to consent to the search of the house, United States v. Matlock (1974). Second, even if there is no actual authority, if the police reasonably believed the third party had the authority, that is, she had apparent authority, the search is constitutional, Illinois v. Rodriguez (1990).

If two occupants of a house are present when the police arrive and seek consent to search, may they do so if one of the occupants consents to the search but the other refuses to give consent? In Georgia v. Randolph (2006), the Court held that it is unreasonable for the police to enter a shared dwelling when a physically present resident expressly refuses to consent on the basis the co-resident given consent. However, consent is valid if the objecting co-resident is not present when the police seek to search the home, even though they knew he had earlier objected to the search, Fernandez v. California (2014).

Summary

The Fourth Amendment to the U.S. Constitution prohibits police from conducting unreasonable searches and seizures in order to protect the individual's right to privacy. This article discusses U.S. Supreme Court cases interpreting that amendment.

Keywords: the United States, constitution, the Fourth Amendment, Police, rule of law, Supreme Court of the United States

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