Garden State CLE presents:

Search & Seizure Law for the 21st Century

Lesson Plan

Introduction

"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." Amendment IV – United States Constitution.

The challenge for the Supreme Court is to interpret and implement these cherished protections in the context of a 21st century nation dominated by digital communications and storage, technology that was unheard of a decade a ago, let alone at the time of adoption of the bill of Rights.

As you will see from the following cases, the Justices demonstrate a remarkable level of familiarity with all latest technology in the digital age as well as its impact on society. As a result, the Court's rulings are simultaneously rooted in the colonial past and an unknowable digital future that will be dominated by technological advances that are unimaginable in our present era.

1. Search of digital evidence post-arrest

a.) Chimel v. California, 395 U.S. 752 (1969)

This case sets the groundwork for most of the existing search incident to arrest doctrine. Police officers in that case arrested the petitioner inside his home and proceeded to search his entire three-bedroom house, including the attic and garage. In particular rooms, they also looked through the contents of drawers.

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction….

There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

b.) United States v. Robinson, 414 U.S. 218 (1973)

Following a lawful arrest, a police officer searched the interior of a pack of cigarettes in the possession of the respondent. The Court concluded that the search of Respondent was reasonable even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that Respondent might be armed. In doing so, the Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search. It merely noted that, "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it."

A few years later, the Court clarified that this exception was limited to personal property ... immediately associated with the person of the arrestee.

See also Gustafson v. Florida, 414 US 260 (1973) (arrest for driving on the revoked list, search of cigarette pack revealing drugs); Atwater v. City of Lago Vista, 532 US 318 (2001) (custodial arrest for seat-belt use violation okay based on p/c).

c.) Arizona v. Gant, 556 U.S. 332 (2009)

Starting in 1981, the case law firmly held that police could conduct a full search of an automobile to recover evidence, weapons and implements of escape following the arrest of a recent occupant. New York v. Belton, 453 US 454 (1981).

This view became subject to withering criticism in the following decades by legal scholars and appellate courts. It was ultimately rejected on state constitutional grounds by the New Jersey Supreme Court in State v. Eckel, 185 NJ 523 (2006).

SCOTUS grudgingly decided to eliminate this categorical exception to the warrant requirement in 2009 with Arizona v. Gant.

The Justices reasoned as follows:

Gant, **like** ***Robinson,*** **recognized that the** ***Chimel*** **concerns for officer safety and evidence preservation underlie the search incident to arrest exception. As a result, the Court concluded that** ***Chimel*** **could authorize police to search a vehicle "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."** ***Gant*** **added, however, an independent exception for a warrantless search of a vehicle's passenger compartment "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." That exception stems not from** ***Chimel,*** **the Court explained, but from "circumstances unique to the vehicle context."**

d.) State v. Daniels, 393 NJ Super. 476 (App. Div. 2007)

The New Jersey view is best expressed by this case, which reaffirms the right of a police officer who has effected a lawful custodial arrest to conduct a search of the person of the arrestee in order to recover weapons, evidence and implements of escape. It does not matter if the underlying arrest is for a petty offense or even a traffic ticket.

Please note, however, that in most instances, petty offenses can be charged on a summons resulting in the on-scene release of the defendant without the need to conduct a search.

Related Cases:
State v. Dangerfield, 171 NJ 446 (2002) is clarified by the holding in Daniels.

e.) Riley v. California, 134 S. Ct. 2473 (2014)

This is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee's person.

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones.

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, (200 pound footlocker carried by the arrestee) rather than a container the size of the cigarette package in *Robinson*.

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here.

But while *Robinson* 's categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is an important working part of our machinery of government, not merely an inconvenience to be somehow weighed against the claims of police efficiency. Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient.

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment. Such exigencies could include the need to prevent the imminent destruction of evidence.

Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Note, the holding in Riley probably does not affect the New Jersey Supreme Court's ruling in State v. DeLuca, 168 NJ 626 (2001) (Search of pager numbers permitted as incident to lawful arrest when coupled with exigent circumstances.)

2. Electronic Tracking of People

a.) United States v. Jones, 132 S.Ct. 945 (2012) (Use of GPS tracking device)

The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted.

Contrast cases involving secreted tracking devices

US v. Karo, 468 U.S. 705 (1984)
US v. Knotts, 460 US 276 (1983)

b.) State v. Earls, 214 N.J. 564 (2013) (Use of cell phone tower pings)

Applying those principles here, we note that disclosure of cell-phone location information, which cell-phone users must provide to receive service, can reveal a great deal of personal information about an individual. With increasing accuracy, cell phones can now trace our daily movements and disclose not only where individuals are located at a point in time but also which shops, doctors, religious services, and political events they go to, and with whom they choose to associate. Yet people do not buy cell phones to serve as tracking devices or reasonably expect them to be used by the government in that way. We therefore find that individuals have a reasonable expectation of privacy in the location of their cell phones under the State Constitution.

We also recognize that cell-phone location information can be a powerful tool to fight crime. That data will still be available to law enforcement officers upon a showing of probable cause. To be clear, the police will be able to access cell-phone location data with a properly authorized search warrant. If the State can show that a recognized exception to the warrant requirement applies, such as exigent circumstances, then no warrant is needed.

3. The search warrant application process using digital communications technology.

a.) Missouri v. McNeely, 133 S. Ct. 1552 (2013).

The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. The Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone. See 91 Stat. 319. As amended, the law now allows a federal magistrate judge to consider "information communicated by telephone or other reliable electronic means." States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.

[A]dopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.

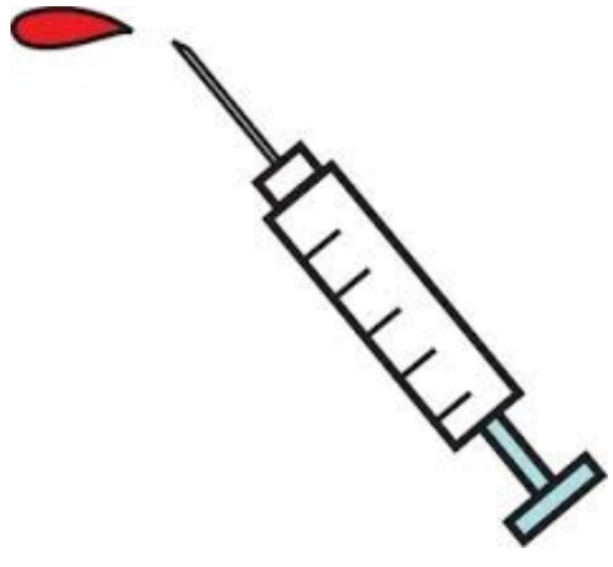
4. Securing DNA evidence from arrestees

a.) Maryland v. King, 133 S. Ct. 1958 (2013).

When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

The framework for deciding the issue presented is well established. Using a buccal swab inside a person's cheek to obtain a DNA sample is a search under the Fourth Amendment. And the fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable, the ultimate measure of the constitutionality of a governmental search. Because the need for a warrant is greatly diminished when the arrestee is already in valid police custody for a serious offense supported by probable cause, the search is analyzed by reference to reasonableness, not individualized suspicion. Reasonableness is determined by weighing the promotion of legitimate governmental interests against the degree to which [the search] intrudes upon an individual's privacy

In this balance of reasonableness, great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification's unmatched potential to serve that interest.



5. Access to electronically-stored records

a.) The federal view is that there can be no expectation of privacy in records that are voluntarily placed in the possession of a third party – Smith v. Maryland, 442 US 735, 743-44 (1979); US v. Miller, 425 US 435, 442-443 (1976) (Banking records)

b.) The New Jersey view accords a substantial expectation of privacy in electronically stored records in possession of a third party. As a result, unless there has been a voluntary consent or some demonstrable exigency, police will need some form of advance judicial authority in order to obtain these records in the form of a search warrant, grand jury subpoena or criminal action order. See generally:

State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (telephone long distance billing records maintained by a third party telephone company);

State v. McAllister, 184 N.J. 17, 875 A.2d 866 (2005) (expectation of privacy in personal banking records in possession of the bank);

State v. Domicz, 188 N.J. 285, 907 A.2d 395 (2006) (expectation of privacy in billing records related to electricity use in possession of a utility company).

State v. Reid, 194 N.J. 386, 945 A.2d 26 (2008) (Internet subscriber information).

State v. Earls, 214 N.J. 564 (2013) (Cell phone tower tracking)

But see State v. Sloane, 193 N.J. 423, 939 A.2d 796 (2008) where the Court held that there is no expectation of privacy in NCIC database records and no requirement for law enforcement to act reasonably in searching them.

6. Workplace computers

a.) State v. M.A., 402 N.J.Super. 353 (App. Div. 2008).

We conclude that defendant had no reasonable expectation of privacy in the personal information stored in his workplace computer. His employer owned the computers and kept them in company's office; The employer advised the defendant at the inception of his employment that all company computers were company property; the tower was connected to company's network system, and the laptop contained business software; The employer had equal access to the computers, and a co-worker had access to the laptop; and defendant's private office was never closed or locked.

b.) Corporate access - Doe v. XYZ Corp., 382 NJ Super. 122 (App. Div. 2005) (Privacy interests by an employee in the personal data stored on his workplace computer are subordinate to employers right to monitor computer content and use.

c.) Attorney/Client privilege - Stengart v. Loving Care Agency, 201 NJ 300 (2010) (E-mail communications on company lap-top to attorney protected by attorney/client privilege.)

d. No expectation of privacy in workplace computer - Accord federal circuit and district court cases on this topic:

United States v. Angevine, 281 F.3d 1130, 1133-35 (10th Cir.) (no reasonable expectation of privacy in contents of workplace computer which was part of employer's network

United States v. Simons, 206 F.3d 392, 398 (4th Cir.2000) (no legitimate expectation of privacy in contents of workplace computer where the employer had notified its employees that their computer activities could be monitored);

United States v. Bailey, 272 F.Supp.2d 822, 830-32, 836-37 (D.Neb.2003) (no reasonable expectation of privacy in the contents of workplace computer where employee did not own it, and was provided passwords to access the employee's network and company data).

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