

Identifying and Litigating Fourth Amendment Issues in the District Court: Warrantless Search and Seizure Edition

Presented by Ann Hester & Megan Hoffman

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Fourth Amendment Resources:

- Wayne R. LaFare, Search & Seizure: A Treatise on the Fourth Amendment (6th ed.)
 - Preeminent treatise on search and seizure law:
 - Updated regularly
 - Includes scholarly commentary that you might not care about
 - Available on Westlaw
- John Wesley Hall, Search and Seizure (5th ed. 2013, Lexis Law Publishing)
 - Written by practicing lawyer, former NACDL president
 - Includes checklists and practice tips
 - Also expensive, but less expensive than LaFare
 - Available on Lexis
 - Blog (updates printed volume): fourthamendment.com
- Robert L. Farb, Christopher Tyner, Jeffrey B. Welty, *Arrest, Search, and Investigation in North Carolina* (UNC School of Government, 6th ed. 2021)
 - North Carolina state law
 - Digital version is updated regularly

I. Today's Roadmap:

- Reasons to file a suppression motion
- What does the Fourth Amendment say?
- Investigating a suppression issue
- Exceptions to the warrant requirement
- Reasonable expectation of privacy
- When seizure occurs
- Probable cause and reasonable suspicion
- Scope of permissible seizure
- Exclusionary rule and exceptions to it
- Case study: why Google Maps and officer BWC videos matter

II. Reasons to file a suppression motion

- Victory may mean charges will be dismissed
- Client relations
- Contested hearing may educate client about what a trial will look like
- Aid to plea negotiations
- Make the prosecutors work for the conviction
- Challenging questionable searches is the only way to potentially change police practices that affect everyone, even the innocent.
- Even if you lose in the district court, many judges on the Fourth Circuit have favorable views on Fourth Amendment issues.

III. What does the Fourth Amendment say?

- Touchstone is reasonableness
- Reasonableness will generally be determined by analyzing totality of circumstances.
- 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.

IV. Investigating Potential 4th Am Violations

- A. Start by reviewing ALL of the police reports
 1. Identify every officer present
 2. Gather ALL of the BWC and patrol car videos
- B. Watch ALL of the videos, multiple times.
 1. Take notes, marking time stamp of most important segments for use at suppression hearing
 2. Capture helpful screen shots to use as exhibits.
- C. Talk to the client about what happened.
 1. Talk to non-police witnesses, if there are any.
 2. Investigate police assertions about facts
- D. Review Google Maps: maps, satellite images, street images of the area where stop occurred, to understand the location and surrounding area.
 1. Visit the area with an investigator and take photos if necessary.

- E. Remember: the TOTALITY of the circumstances matters in search/seizure, not just what the police describe as the basis for their suspicion or probable cause.
1. They aren't going to put helpful facts in their reports.
 2. Be prepared for surprises when officers testify. Their testimony may not be consistent with their reports or may provide helpful information that they left out of the reports. Be ready to use it.

V. When can police stop and search without a warrant?

- A. Fourth Amendment generally requires a warrant for seizures and searches.
1. A warrantless "search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382 (2014).
- B. If police search without a warrant, government has burden of demonstrating by preponderance of evidence that exception to warrant requirement applies.
- *United States v. Aigbekaen*, 943 F.3d 713, 719 (4th Cir. 2019)
 - *United States v. Davis*, 690 F.3d 226, 262 (4th Cir. 2012)
- C. Some commonly seen exceptions to warrant requirement (not a complete list)
- Terry stop and frisk: *Terry v. Ohio*, 392 U.S. 1 (1968)
 - Consent: *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)
 - Automobile exception: *California v. Carney*, 471 U.S. 386 (1985)
 - Searches incident to arrest: *Arizona v. Gant*, 556 U.S. 332 (2009)
 - Special needs - parolees and probationers: *Griffin v. Wisconsin*, 483 U.S. 868 (1987)

VI. Terry stops and protective weapons frisks: Walk-ups and traffic stops

- A. *Terry v. Ohio*, 392 U.S. 1 (1968); *Arizona v. Johnson*, 555 U.S. 323 (2009)
- Investigatory stop requires a reasonable suspicion that the person apprehended is committing or has committed a criminal offense.
 - Frisk for weapons requires both a lawful investigatory stop AND a reasonable suspicion that the person stopped is armed and dangerous.
 - Armed = dangerous under *United States v. Robinson*, 846 F.3d 694 (4th Cir. 2017) (en banc)
- B. *Arizona v. Johnson*, 555 U.S. 323 (2009)

- In traffic-stop setting, *Terry* stop is justified “whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation.”
- C. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Arizona v. Johnson*, 555 U.S. 323 (2009)
 - Police may order persons out of an automobile during a traffic stop. And they may frisk any of them for weapons if there’s a reasonable belief the person frisked is armed and dangerous, so long as traffic stop is justified.
- D. *Michigan v. Long*, 463 U.S. 1032 (1982)
 - Extends *Terry* principles to passenger compartment of automobile.
 - Limited to areas in which a weapon may be placed or hidden.
 - Requires reasonable suspicion that suspect is dangerous and may gain immediate control of weapons.

VII. Searches by Consent

- A. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)
 - Consent is an exception to warrant requirement.
 - Government has burden of proving consent was freely and voluntarily given.
 - Whether consent to search was voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.
 - 4th and 14th Amendments require that consent not be coerced by explicit or implicit means, by implied threat or covert force.
 - Consent cannot be “granted only in submission to a claim of lawful authority.”
- B. “A law enforcement officer need not always ‘display an intimidating demeanor or use coercive language’ for a suspect to believe he cannot decline an officer’s requests. . . .” *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018)).
- C. Existence and scope of consent is based on what a “typical reasonable person” would have “understood by the exchange between the officer and the suspect.” *Florida v. Jimeno*, 500 U.S. 248 (1991); *United States v. Neely*, 564 F.3d 346 (4th Cir. 2009).

VIII. Automobile Exception

- A. Established in *Carroll v. United States*, 267 U.S. 132 (1925).
 - If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search it without a warrant. *Maryland v. Dyson*, 527 U.S. 465 (1999).
- B. Applies to containers located in cars.
 - Police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained. *California v. Acevedo*, 500 U.S. 565 (1991).
- C. Does not apply when vehicle is parked within the curtilage of a home. *Collins v. Virginia*, 584 U.S. 586 (2018).
 - Scope of automobile exception extends no further than automobile itself.

IX. Searches Incident to Arrest: Automobiles & Homes

- A. Automobile search incident to arrest
 - *Arizona v. Gant*, 556 U.S. 332 (2009)
 - Police may search a vehicle incident to a recent occupant's arrest only if:
 - Arrestee is within reaching distance of the passenger compartment at the time of the search, OR
 - It is reasonable to believe the vehicle contains evidence of the offense of arrest.
- B. Protective sweep of home
 - *Maryland v. Buie*, 494 U.S. 325 (1990)
 - Applies when officers arrest a suspect in his home with an arrest warrant.
 - Officers must have a reasonable belief, based on specific articulable facts, that the area swept harbored an individual posing a danger to the officers or others present at the scene.

X. Special Needs: Probationers and Parolees

- *Griffin v. Wisconsin*, 483 U.S. 868 (1987)
 - Warrantless search of probationer by probation officers, under authority of administrative regulation permitting warrantless searches of state probationers with “reasonable grounds” to believe contraband is present.

- State's operation of probation system presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.
- Probationers and parolees only enjoy conditional liberty, not the absolute liberty of ordinary citizens.
- Probation search satisfies 4th Am requirements if carried out pursuant to a regulation that itself satisfies 4th Am reasonableness requirement.

XI. Reasonable Expectation of Privacy

- A. To possess a cognizable, Fourth Amendment interest in area searched, a person must have a legitimate, or reasonable, expectation of privacy.
 - *Rakas v. Illinois*, 439 U.S. 128 (1978).
- B. Defendant has burden of showing that he has a legitimate expectation of privacy in the area searched.
 - *Rawlings v. Kentucky*, 448 U.S. 98 (1980).
- C. Legitimate expectation of privacy requires two things:
 - A subjective expectation of privacy, which
 - Must be objectively reasonable; it must be an expectation that society is willing to recognize as reasonable.
 - *See U.S. v. Castellanos*, 716 F.3d 828 (4th Cir. 2013)
- D. Unless on probation or supervised release, a person will generally have a reasonable expectation of privacy in his own person, his automobile, and his own home.
- E. Problem areas:
 1. Passengers in another person's automobile
 - *Rakas v. Illinois*, 439 U.S. 128 (1978)
 - Fourth Amendment rights are personal rights which may not be vicariously asserted.
 - Fact that a person is in the car with owner's permission isn't enough to establish legitimate expectation of privacy the car.
 - Defendants can't show legitimate expectation of privacy where they asserted neither a property nor a possessory interest in the car, nor an expectation of privacy in the

glove box or area under the seat, nor an interest in the property seized.

- But it is possible for passengers to establish a reasonable expectation of privacy. *See Byrd v. United States*, 584 U.S. 395 (2018).
- Some possibilities: passenger's bag is searched; passenger sometimes drives car; passenger has familial relationship with driver

2. Rental-car drivers or passengers not named in rental contract.

- *Byrd v. United States*, 584 U.S. 395 (2018)
 - The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.
 - Reasonable expectation of privacy comes from the right to exclude others from the property.
 - A car thief would not have a reasonable expectation of privacy in a stolen car no matter the degree of possession and control.
 - Driver will have to **produce evidence of** “lawful possession or control” to establish reasonable expectation of privacy when not listed on rental contract. *See United States v. Daniels*, 41 F.4th 412 (4th Cir. 2022).

3. Non-overnight guests in a residence

- Overnight guests in a home have a reasonable expectation of privacy. *Minnesota v. Olson*, 495 U.S. 91 (1990).
- Defendants who were guests in apartment for a short time, solely for purpose of bagging cocaine, had no legitimate expectation of privacy in apartment. *Minnesota v. Carter*, 525 U.S. 83 (1998).
 - Distinguishes business guests from social guests (and considers drug-related guests to be business guests)
 - One merely “legitimately on premises” may not claim Fourth Amendment protections.
 - Relevant considerations: length of time on premises, relationship between defendant and householder, reason for being on premises.

- Visiting an elderly neighbor frequently to offer assistance establishes reasonable expectation of privacy. *Bonner v. Anderson*, 81 F.3d 472 (4th Cir. 1996)

4. Probationers/parolees

a. Probationers: *United States v. Knights*, 534 U.S. 112 (2001)

- Knights' probation order clearly set out search condition required by state law, and Knights was clearly informed of it, significantly diminishing his expectation of privacy.
- Police suspected that he had been involved in criminal activity and searched his apartment.
- When officer has reasonable suspicion that probationer subject to a search condition is engaged in criminal activity, an intrusion on the probationer's significantly diminished privacy interests is reasonable.

b. Parolees: *Samson v. California*, 547 U.S. 843 (2006)

- Parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is.
- Conditions of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment.
- Determining whether supervisee retains reasonable expectation of privacy requires court to assess:
 - Whether the supervisee was subject to a condition that reduced his expectation of privacy in the area searched, and
 - Whether the condition was "clearly expressed" to the supervisee.
 - To remove a reasonable expectation of privacy, search condition must be "clear and unambiguous."

c. TAKEAWAY: Look carefully at conditions of probation, post-release supervision, or supervised release to determine whether a client under supervision retains a reasonable expectation of privacy in the area searched.

F. How do I establish reasonable expectation of privacy?

1. Can attempt to establish with client's affidavit.
 - Rules of Evidence do not apply at suppression hearing. Fed. R. Evid. 104; *United States v. Matlock*, 415 U.S. 164 (1974).
 - Testimony given by defendant to establish reasonable expectation is not admissible against him at trial on question of guilt or innocence, at least in government's case-in-chief. *Simmons v. United States*, 390 U.S. 377 (1968); *United States v. Salvucci*, 448 U.S. 83 (1980).
 - Defendant's testimony in suppression *may* be admissible for impeachment purposes; 4th Cir. hasn't weighed in on it, but several circuits allow it. *United States v. Jaswal*, 47 F.3d 539, 543 (2d Cir. 1995) (per curiam); *United States v. Beltran-Gutierrez*, 19 F.3d 1287 (9th Cir. 1994); *United States v. Quessada-Rosadal*, 685 F.2d 1281, 1283 (11th Cir. 1982).
2. Can try to establish with 3rd party testimony as well.
 - But it may be difficult to establish subjective expectation of privacy with third party.

XII. Time of Seizure

- A. Why does it matter?
 1. Police are required to have reasonable suspicion *before* they seize someone. Post-seizure events can't be considered in reasonable suspicion analysis. *United States v. Black*, 707 F.3d 531 (4th Cir. 2013).
 2. The more time police have to observe our clients, the more evidence they will have to support reasonable suspicion or probable cause.
- B. When does a seizure occur?
 1. A seizure occurs when the police conduct would make a reasonable person believe he is not free to leave.
 - *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Black*, 707 F.3d 531 (4th Cir. 2013).
 2. Requires consideration of totality of the circumstances.
 3. What are some relevant considerations?
 - Number of police officers present/ show of authority
 - Whether officers were in uniform and displayed weapons
 - Whether officers touched, blocked, or restrained defendant
 - Use of language or tone indicating compliance required
 - Officers indicated they suspected defendant of crime

- If officers took identification, did they return it?

XIII. What justification is required for a warrantless seizure and search?

- A. Reasonable suspicion for stop and frisk; probable cause for warrantless search or arrest
 1. Definitions of reasonable suspicion and probable cause are intentionally slippery and cannot be “reduced to a neat set of legal rules.” *United States v. Sokolow*, 490 U.S. 1 (1989).
- B. Totality of the circumstances, again.
 - Courts must review totality of the circumstances to determine reasonable suspicion and probable cause. This includes circumstances that tend to dispel reasonable suspicion.
 - “In order to sustain reasonable suspicion, officers must consider the totality of the circumstances and, in doing so, must not overlook facts that tend to dispel reasonable suspicion.” *United States v. Drakeford*, 992 F.3d 255 (4th Cir. 2021); *see also Kansas v. Glover*, 140 S. Ct. 1183 (2020).
 - Probable cause also requires a totality-of-the-circumstances analysis. *United States v. Gondres-Medrano*, 3 F.4th 708 (4th Cir. 2021); *Illinois v. Gates*, 462 U.S. 213 (1983).
- B. What is probable cause?
 - Police officer has probable cause to search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present. *Florida v. Harris*, 568 U.S. 237 (2013)
 - Requires a “fair probability” on which “reasonable and prudent people, not legal technicians, act.” *Florida v. Harris*.
 - “[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized to the person to be searched or seized.” *Maryland v. Pringle*, 540 U.S. 366 (2003) (citations omitted)
- C. What is a reasonable suspicion?
 - A *Terry* stop must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *United States v. Black*, 707 F.3d 531 (4th Cir. 2013); *Reid v. Georgia*, 448 U.S. 438 (1980).

- Reasonable suspicion requires a “particularized and objective basis for suspecting the particular person stopped of criminal activity,” and it requires an officer to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Black*.
- Facts in their totality must “eliminate a substantial portion of innocent travelers.” *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018)
- **Less** than a preponderance of the evidence, less than probable cause. *United States v. Sokolow*, 490 U.S. 1 (1989).
- **More** than an “inchoate and unparticularized suspicion or hunch.” *Sokolow*.

D. These definitions are so abstract. How do I argue no reasonable suspicion or no probable cause?

- Compare facts in your cases to facts in cases where courts have found no reasonable suspicion or no probable cause.
- Begin by arguing each factor individually; look for cases with similar fact patterns.
 - Some commonly asserted, rejected factors: nervousness, eye movements, furtive movements.
- You can also make common-sense arguments, or arguments based on available data, that a particular fact isn’t suspicious.
 - Examples: the road that the officer says is a drug-trafficking thoroughfare is one of only two highways in the county; the “alley” where officers encountered your client is actually a well-traveled cut-through in a busy area; your client had a lot of cash in his pocket because he was on his way to pay his rent.
- Then, argue that the factors together – including any additional factors that may dispel reasonable suspicion – don’t amount to reasonable suspicion or probable cause.
- While inquiry must account for totality of the circumstances, court will separately address each factor before evaluating them together with the totality of the circumstances. *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018).

IXX. Is there a limit to how long an authorized seizure can last?

- A. A traffic stop may become unlawful when extended beyond the time needed to complete the mission of the traffic stop.
 - *Rodriguez v. United States*, 575 U.S. 348 (2015)
 - *Illinois v. Caballes*, 543 U.S. 405 (2005)
 - *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018)
- B. Authority for seizure ends when tasks tied to traffic infraction are, or reasonably should have been, completed.
- C. Unrelated investigation is permitted, but only if it doesn't lengthen the roadside detention.
- D. Even a *de minimis* extension of the traffic stop is unlawful absent reasonable suspicion or consent.
 - Officers are not permitted to "slow walk" a traffic stop in order to get a drug dog on scene.
 - See *United States v. Podbielski*, 2023 WL 4888866 (4th Cir. 2023).
- E. Tasks that are ordinarily part of the traffic stop:
 - Inspecting ID and license, verifying registration and insurance, determining whether there are outstanding warrants.
- F. Not ordinarily part of a traffic stop:
 - Dog sniff
 - Questioning driver or passengers on topics other than traffic infraction
 - Conducting computer research not related to traffic stop

XX. Exclusionary rule & fruit of the poisonous tree.

- A. *Mapp v. Ohio*, 367 U.S. 643 (1961)
 - For reasons based in deterrence, "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments"; "a federal prosecutor may make no use of evidence illegally seized."
- B. *Wong Sun v. United States*, 371 U.S. 471 (1963)
 - Exclusionary rule applies to evidence that was the indirect product or "fruit" of unlawful police conduct; doctrine applies if evidence has been come at by exploitation of primary illegality, as opposed to being obtained by means sufficiently distinguishable to be purged of the primary taint.
- C. Exceptions to the exclusionary rule.

1. Inevitable discovery: *Nix v. Williams*, 467 US 431 (1984)
 - Government bears the burden of establishing by preponderance of evidence that information inevitably would have been discovered by lawful means.
 - Comes up frequently in context of impounded vehicles. In that context, government must establish that circumstances reasonably justified impoundment, that officers have a standard inventory procedure pertaining to all impounded vehicles, and officers would have inevitably discovered evidence by conducting an inventory search under standard procedures. *United States v. Bullette*, 854 F.3d 261 (4th Cir. 2017).
2. Independent source: *Murray v. United States*, 487 US 533 (1988)
 - Allows admission of evidence discovered by means wholly independent of any constitutional violation.
3. “Good Faith” exception - scenarios
 - Objectively reasonable reliance on binding appellate precedent: *Davis v. United States*, 564 U.S. 229 (2011)
 - Evidence obtained by officers acting in reasonable reliance on a search warrant ultimately found invalid: *United States v. Leon*, 468 U.S. 897 (1984)
 - Reliance on police recordkeeping error or clerical errors of court employees: *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1 (1995).

XXI. Case study: Don’t believe everything you read in a police report.

- A. Reasons to doubt a police report
 1. Officers sometimes make things up.
 2. Police report is their most favorable version of events.
 3. Officers usually aren’t great at communicating via written word.
 4. There’s a time lag between events and written reports, and officers’ recollections of stressful events are imperfect.
 5. Even seemingly innocuous inconsistencies with videos are a red flag that officer’s report is inaccurate in other ways.
- B. You can file a suppression motion without knowing all of the facts. Use what you do have.

1. Officer's obvious reliance on a factor that you know is invalid: a different person's flight.
 2. Observable facts in video that back up client's version of events: he was in the area to get food, he kept saying he was waiting for his food, there were food vendors in the area.
- C. Pay attention to any helpful new information that comes out in officer's testimony at suppression hearing, and use it to your advantage.
1. Make sure you know going into the hearing what facts are going to be important, so you can tailor your cross-examination accordingly.
 - See cross-examination re: this wasn't a routine contact with citizen on the street.
 2. But know when to stop asking questions if the government has the burden and isn't getting the necessary information out of their officer.
 - Officer's testimony that informant told him "two individuals," without mentioning any other identifying information.
- D. If court asks for post-hearing briefing on particular issues, also tell the court what *you* think is important.
- E. In a totality-of-the-circumstances evaluation, setting the scene visually for the court can be important. Use screen shots, Google maps, and aerial views when available, if that helps to undercut the government's argument for reasonable suspicion.
1. If the court has given you restrictive page-limit requirements, then attach them as exhibits instead of incorporating them in the text.

Contact Us:

Megan Hoffman, First Assistant AFD, WDNC
Megan_Hoffman@fd.org
704-374-0720

Ann Hester, AFD, WDNC
Ann_Hester@fd.org
704-374-0720