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SECURITY IN URBAN RAIL MASS TRANSIT

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I. INTRODUCTION

Since the attacks of 9/11, security professionals have been analyzing ways to enhance security in urban rail mass transit systems. If the 9/11 attacks were not enough, the bombings in London, Madrid and Mumbai brought home the need to expand security in an urban rail setting. The efforts of security professionals have not come without legal challenge. This paper evaluates four types of security enhancements (security checkpoints, canine deployment, videorecording, and CBRN sensors) against the legal environment within which they operate.

II. SECURITY CHECKPOINTS[1]

A major lesson learned from the London, Madrid and Mumbai bombings is that public transit systems are vulnerable to the introduction of relatively modest amounts of explosives. The bombs used in the London, Madrid and Mumbai attacks were small enough to conceal in common backpacks. Deployment of security checkpoints is designed to primarily deter, but also to detect, this threat, MacWade v. Kelly, 460 F.3d 260 (2nd Cir. 2006), although security checkpoints may be effective in minimizing other types of threats such as small arms.

Courts have used various terms to describe security checkpoints. See American-Arab Anti-Discrimination Committee et al. v. Massachusetts Bay Transportation Authority, 2004 U.S. Dist. LEXIS 14345 (D.Mass. 2004) (term "checkpoint" used interchangeably with "security inspection" and "administrative search"). For our purposes, a security checkpoint will be defined as a fixed location which exists at the entrance to a urban rail mass transit system through which persons and packages must pass and be subject to screening prior to being permitted to access the urban rail mass transit system. Packages are broadly defined to include any container capable of concealing the anticipated threat, including briefcases, backpacks, handbags, and paper bags. The types of screening conducted could include visual searches, tactile manipulation, x-ray machines, metal detectors, explosive detection devices, bomb sniffing canines, or a combination of these methods.

Until recently, there were no reported cases dealing with security checkpoints at urban rail mass transit systems. However, recent case law has upheld the deployment of security checkpoints in the face of Constitutional challenges. These cases also set forth the requirements that a security checkpoint must meet in order to survive a Constitutional attack.

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[1] With the possible exception of videorecording devices, no security enhancement will receive as much negative reaction as does security checkpoints. There are practical, political, and financial issues to be addressed before deploying a system of security checkpoints. This paper will deal primarily with the legal issues attendant to security checkpoints and will address the other issues only tangentially.

A. MACWADE V. KELLY

The most important development has been the Second Circuit decision in MacWade v. Kelly, 460 F.3d 260 (2nd Cir. 2006). MacWade dealt with New York City's program of random[2] searches of containers carried by patrons entering the subway system. Under the program, NYPD establishes inspection checkpoints at the entrances to various subway stations. Stations are selected "in a deliberative manner that may appear random, undefined, and unpredictable". Notice to passengers is given via signs and a bullhorn providing potential passengers the opportunity to avoid the search by not entering the station. A supervising sergeant establishes a selection rate. Passengers are selected in accordance with this rate. Searching officers have no discretion as to whom to search. Only containers large enough to carry an explosive device are searched. Searches are limited to what is minimally necessary to ensure that the container does not contain an explosive device. Searching officers are prohibited from intentionally looking for other contraband, although contraband will be seized if it is inadvertently discovered. Officers may not read personal papers and may not record the passengers personal information. The preferred inspection method is to request that the passenger open his or her bag and to visually inspect the contents, manipulating the contents only if necessary. The inspection must last no longer than necessary to ensure that the container does not contain an explosive device.

The MacWade court began by recognizing the "special needs" exception to the warrant requirement. Id., p. 268, citing New Jersey v. T.L.O., 469 U.S. 325 (1985). Under this exception, warrantless searches are permitted without any suspicion of wrongdoing when there is a special need beyond normal law enforcement. Id. The court noted that special needs have been found in a variety of contexts including random airport searches, United States v. Marquez, 410 F.3d 612 (9th Cir. 2005), highway sobriety checkpoints, Michigan Dep't. of State Police v. Sitz, 496 U.S. 444 (1990), highway information gathering checkpoints, Illinois v. Lidster, 540 U.S. 419 (2004), border patrol checkpoints, United States v. Martinez-Fuerte, 428 U.S. 543 (1976), and random checkpoint stops near military installations, United States v. Green, 293 F.3d 855 (5th Cir. 2002). Id.

Noting that courts have traditionally considered special the need to prevent and discover latent or hidden hazards on mass transportation systems, citing Nat'l. Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), the court held: "We have no doubt that concealed explosives are a hidden hazard, that the [container search] Program's purpose is prophylactic, and that the nation's busiest subway system implicates the public's safety. Accordingly, preventing a terrorist from bombing the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation". Id., p. 270.

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[2] As the following discussion will make clear, the term "random" is not used in the sense of "lacking a definite plan, purpose or pattern". Webster's Seventh Collegiate Dictionary, p 708. To the contrary, the term "random" is used in the sense of statistically random having "a definite probability of occurring within a specific frequency". Id.

The court went on to weigh the government interest against the level of intrusion. It held that the interest in preventing an attack on a mass transit system is "paramount", notwithstanding that there has been no specific threat to the New York City subway system. Id. p. 272. The court further held that the level of intrusion inherent in the NYPD search program is minimal. In doing so the court noted several aspects of the NYPD program which demonstrate that the program is narrowly tailored to achieve its purpose: (1) passengers receive notice sufficiently in advance so that they may avoid the search by not entering the subway, (2) only those containers capable of concealing explosives are searched, (3) searches are done only to look for explosives, (4) searches are done visually unless it is necessary to manipulate the contents of the container in order to ascertain whether explosives are present, (5) printed material is not read, (6) personal information is not requested, and (7) there is no discretion given to the officers in selecting whom to search.

Relying heavily on the expert testimony provided in the District Court, the court concluded that NYPD's program of container searches was reasonably effective both to deter and detect an attack on the subway system.

B. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE V. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

For security during the Democratic National Convention, MBTA set up perimeters, both above and below ground in the vicinity of the Fleet Center where the Convention was held. All passengers on all buses and all trains entering this security zone were subject to search. Advanced notice was given so that persons not wishing to be searched could avoid the search by not riding a bus or train that would enter the perimeter. The procedure was limited in duration from July 26 through July 29, 2004, the dates the Convention was in session.

In American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority, 2004 WL 1682859 (D.Mass. 2004), plaintiffs sought a preliminary injunction against the procedure used by MBTA. Drawing support from the existing airport security cases, the trial court denied the preliminary injunction, ruling that there was a special need for the searches and that the interests of security outweighed the admittedly serious intrusion on privacy.

The intrusion on privacy was mitigated by various aspects of MBTA's plan which were similar to the mitigation used by NYPD: notice to riders that their packages may be subject to search, the limited nature (both in scope and duration) of the procedures, and the lack of discretion afforded the officers conducting the searches.

The procedure terminated when the convention ended. Therefore, the appeal was mooted. Consequently, we have no appellate holding relating to this procedure.

C. CASSIDY v. CHERTOFF

The final recent case is Cassidy v. Chertoff, 471 F.3d 67 (2d Cir. 2006). Cassidy involved searches of passengers and vehicles upon entry to a ferry. Again, the Second Circuit found a special need and that the governmental interest outweighed the privacy concerns. The additional factor in this case was that, unlike New York and Boston, passengers who chose to forego the search by not boarding the ferry did not have readily available transportation alternatives. A decision to forego the search came with a substantial cost, an additional two hour commute. The court held that, notwithstanding this inconvenience, the searches passed Constitutional muster

D. AIRPORT CASES

Despite the development of recent, more applicable precedent relating to subway systems, cases dealing with searches at airports remain instructive. See United States v. McKennon, 814 F.2d 1539 (11th Cir., 1987) (when a airline passenger presents him or herself at an airport security checkpoint, his or her luggage may be searched without a warrant or any kind of individualized suspicion in order to determine whether the luggage contains materials which would endanger the flight); United States v. $124,570 U.S. Currency, 873 F.2d 1240 (9th Cir., 1989) (warrantless search at airport security checkpoint valid because governmental interest is assuring air traffic safety is compelling while intrusion into passenger's privacy is limited to satisfaction of that interest); United States v. Davis, 482 F.2d 893 (9th Cir., 1973) (same); United States v. Pulido-Baquerizo, 800 F.2d 899 (9th Cir., 1986) (passenger must be able to avoid the search by electing not to board the plane); United States v. Doe, 61 F.3d 107 (1st Cir., 1995).[3] The courts in American-Arab Anti-Discrimination Committee, MacWade, and Cassidy all analogized airport security checkpoints to checkpoints established at other forms of mass transit.

E. ROADBLOCK CASES.

The roadblock cases also remain valuable. Delaware v. Prouse, 440 U.S. 648 (1979) (roving spot checks for license and registration struck down absent standards, guidelines or procedures); Brown v. Texas, 443 U.S. 47 (1979) (court considers three factors: (1) gravity of public concerns served by the seizure, (2) degree to which seizure advances the public interest, and (3) the severity of the interference with individual liberty); Michigan State Police v. Sitz, 496 U.S. 444 (1990) (police roadblock constitutes a seizure but permissible where guidelines exist which limit officer's discretion).

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[3] The Ninth Circuit recently addressed conflicting decisions from that Circuit which dealt with the issue of whether the Constitutionality of airport searches was justified under an implied consent rationale. In United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc), the Ninth Circuit squarely held that the Constitutionality of airport security checkpoints was not grounded on implied consent and overruled cases which held to the contrary. The significance of Aukai is that, since consent is not a factor, an individual cannot avoid a search by withdrawing consent after the search has begun.

F. SECONDARY SOURCES

Within the past three years, two papers were developed which deal with the issue of container searches in a mass transit environment. *The Case for Searches on Public Transportation*, Jocelyn Waite, Transit Cooperative Research Program, Transportation Research Board, National Research Council, Legal Research Digest 22, October 2005, outlines the legal guidelines which must be followed for a container search program to be lawful. This document is especially useful for determining whether local state law imposes additional restrictions on security checkpoints. *Selective Screening of Rail Passengers*, Brian Michael Jenkins and Bruce R. Butterworth, Mineta Transportation Institute, February 2007 sets forth the practical aspects of a container search program. Both documents stress the importance of such programs.

G. REQUIREMENTS FOR THE ESTABLISHMENT OF SECURITY CHECKPOINTS

From the decided cases, it is clear that several requirements must be met before a security checkpoint is Constitutionally permissible.

1. THE CHECKPOINT MUST BE FIXED.

A fixed checkpoint gives notice to all patrons that they must pass through security before entering the system. A fixed checkpoint is a prerequisite to the random selection process as it will be impossible to determine which packages meet the selected number unless all persons are funneled through a fixed location. Moreover, fixed checkpoints minimize the potential for attack under Delaware v. Prouse, supra.

2. THERE MUST BE SUFFICIENT NOTICE TO THE PUBLIC.

There must be adequate notice to the public. MacWade, supra. At a minimum, this would require signs posted at all effected entrances. The signs must be placed sufficiently in advance of the checkpoint to permit patrons to choose to avoid the checkpoint by electing not to enter the system. Pulido-Baquerizo, supra; Davis, supra. In addition, in the interest of public relations, an advertising campaign can be conducted in advance of the establishment of the checkpoints, although this would not be Constitutionally required.

3. THE SELECTION OF STATIONS AND DATES MUST BE NON-DISCRIMINATORY.

The selection of which stations and on which days to employ the checkpoints must be non-discriminatory. MacWade, supra. This must be done at the command level. Id. The problem with the procedures employed in Prouse and Brown was that the individual officer on the street was given discretion regarding whom to stop. What distinguished Sitz from these cases is that in Sitz the decision where to employ the roadblocks was made according to non-discriminatory guidelines established by high level officials.

Non-discriminatory guidelines could include the amount of traffic at a station or information that terrorists plan to strike at a certain location. As long as the guidelines do not discriminate on race, gender, religion, or ethnic origin, they will be Constitutionally permissible. A rotation among various stations could be established, although any discernable pattern could be observed by terrorists thereby reducing the effectiveness of the procedure. A system of priorities could be established among stations, as long as this cannot be viewed as discriminating against a particular race, religion, gender, or ethnicity.

4. PASSENGERS MUST BE GIVEN THE OPTION TO AVOID THE CHECKPOINT BY DECLINING TO ENTER THE SYSTEM

Under the decided cases, the patron must be given room to elect not to enter the system. Davis, supra. This would require that the checkpoint be established at least before the patron pays his or her fare and, better still, before the patron purchases fare media.

5. THERE MUST BE GUIDELINES FOR THE CONDUCT OF THE OFFICERS WHO ARE MANNING THE CHECKPOINT

The conduct of the officers conducting the checkpoint must be governed by non-discriminatory standards. Sitz, supra. This has several components.

a. Non-discriminatory selection of which packages to search.

If (as will most likely be the case for logistical reasons) a decision is made to search something less than all of the packages entering at the chosen station, guidelines must be established regarding which packages to search. The best non-discriminatory way to do this is to pre-select a number in advance and search accordingly. For example, every fifth package could be searched. Alternatively, the complexity of the selection rate could be increased. For example, every third backpack, every fourth briefcase, and every ninth gym bag, could be searched. The number could be modified at given intervals. For example, in the first hour, every other pocketbook, every fifth backpack, and every twelfth paper bag could be selected for search. The next fifteen minutes every tenth pocketbook, every third backpack, and every seventh briefcase, could be searched leaving paper bags alone. The following half hour a third system could be employed. The important thing is that these decisions are not made by the officers who are conducting the searches. Id. The officers should be given a protocol and ordered to follow it. The protocol should be changed at regular intervals so that terrorists are unable to discern a pattern. The MacWade court stressed the unpredictability of the procedure as a key point in its effectiveness.

b. Instruction on how to conduct the searches.

The officers must also be told how to conduct the searches. Id. It is imperative that the searches be limited to the governmental interest which justifies the search. MacWade, supra. In the case of security checkpoints at entrances to urban rail mass transit facilities, that means

searching for explosives and, to a lesser extent, weapons. These searches are not intended to look for drugs, although if drugs or other contraband are observed in plain view, they may be seized and the possessor may be arrested. Horton v. California, 496 U.S. 128 (1990). The searches are not intended to look for fugitives. Since the main concern is explosives, normally the search will consist of the patron opening up his or her package and allowing the officer to look inside. There will be little need for a general rummaging of the contents of the package. Most searches will take a few seconds. There is no reason to read printed material or to ask the patron for identifying information.

As noted above, explosives have bulk. That fact will eliminate the need to search many packages. In fact, officials may want to instruct the officers to only search packages bigger than a certain set of dimensions. For example, the officers could be instructed to search every fifth package larger than two feet square, but to leave all other packages unsearched.

Explosives also have weight. It may be that on many occasions the searching officer will be able to discern that a packages does not contain explosives merely by holding the package and assessing its weight. On many other occasions, the search will consist of the patron opening up his or her package and allowing the officer to look inside for a second or two. Minimizing the level of intrusion and inconvenience to patrons will lessen the impact on ridership and assure that our procedures are Constitutionally acceptable.

c. Individualized articulable suspicion determined while conducting systematic searches.

The officers may search any package that they have reasonable articulable suspicion to believe contains an explosive or weapon regardless of whether that package is selected for random search. Adams v. Williams, 407 U.S. 143 (1972). In determining whether articulable suspicion exists, the officer may consider all facts available to the officer including the threat level, any intelligence received from other law enforcement agencies, and the officer's observations on the scene. For example, if every tenth package is being searched and the eighth person in line has a heavy bag with wires sticking out of it and which is emitting a ticking sound, that bag can be searched even though it is not the tenth one in line.

III. CANINES

Police dogs have been around for a long time. They are effective in discovering explosives. They are relatively unintrusive. Canines can be used in conjunction with security checkpoints or independently. Their use does not impede the flow of traffic in urban rail mass transit systems. A canine and handler can be deployed anywhere in the urban rail mass transit system, not just at entrances. Plus, in contrast to security checkpoints, most people like dogs. Importantly, the case law is well defined in this area.

Having a canine sniff the exterior of a container in a public place does not implicate the Fourth Amendment. United States v. Place, 462 U.S. 696 (1983). Therefore, the sniff can occur

without probable cause or even reasonable suspicion provided that neither the container or its possessor is forcibly detained. Id. Likewise, having a canine sniff the exterior of a validly detained vehicle, container or person does not implicate the Fourth Amendment, Illinois v. Caballes, 543 U.S. 405 (2005), provided that the detention is not extended beyond the reason for the original stop. United States v. Garcia-Garcia, 319 F.3d 726 (5th Cir. 2003). An alert by a trained and reliable canine gives rise to probable cause to search the vehicle, person or container. United States v. Mendoza, 468 F.3d 1256 (10th Cir. 2006).

The trained and reliable caveat is important. Some courts are beginning to treat canines like police informants. Just as it is insufficient for police to rely upon an informant unless that informant has proven reliable, it is, in some jurisdictions, insufficient for police to rely upon an alert from a canine unless that canine has been trained to detect the relevant substance and has proven reliable (or at least not unreliable) in the past. Compare United States v. Hill, 195 F.3d 258 (6th Cir. 1999) (proof of training and reliability needed) and United States v. Sundby, 186 F.3d 873 (8th Cir. 1999) (same) with United States v. Williams, 69 F.3d 27 (5th Cir. 1995) (proof of training and reliability not required).

IV. VIDEORECORDING DEVICES

Videorecording devices are a relatively new security enhancement. Therefore, the law is not altogether clear regarding all ramifications and permutations.

What is clear is that videotaping, *per se*, in a public area does not violate the Constitution. United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991); United States v. Taketa, 923 F.2d 665 (9th Cir. 1991). Beyond that, little else is certain.

Videotaping combined with audio recording may violate local wiretap laws. Compare Ann. Code of Md. CJ sec. 10-401 et seq. (interception of oral communication unlawful unless "all of the parties to the communication have given prior consent to the interception") with D.C. Code sec. 23-542(b)(2) (interception of oral communication unlawful unless "one of the parties to the communication has given prior consent to such interception"). Also, merely because a conversation occurs in a public place, does not mean that there is no reasonable expectation of privacy in the conversation.

Moreover, videorecording technology is rapidly advancing. Face recognition and even retinal recognition software may soon be available at prices government agencies can afford. Videorecording a person in a public place does not constitute an illegal search and seizure. After all, a videocamera is nothing more than a pair of eyes viewing what persons have voluntarily exposed to the public. However, when an image of a person in a public place is combined with an involuntary identification of the person through facial or retinal recognition technology, different concerns arise. A person may have voluntarily exposed his person to the public at large but may not wish to have the public at large know who he is. Use of facial or retinal recognition can reasonably be viewed as tantamount to reaching into the person's wallet and pulling out his identification. If a court viewed such technology in this way, it would likely hold that it was an

illegal search and seizure.[4]

Placement of the cameras may also be problematic, especially where the cameras are not fixed and the placement is not permanent. Title VII challenges can be mounted if the camera location is perceived to be discriminatory. For example, if cameras are placed in rail stations frequented by members of a protected class and not placed in stations frequented by persons not belonging to that class, a Title VII claim might be made out. A claim under 18 U.S.C. sec. 1983 could be made out if the cameras recorded activities protected under the First Amendment. Therefore, it is important that placement of the cameras be justified by a non-discriminatory reason (high crime rate, volume of traffic, specific intelligence) and care must be taken when cameras are deployed at demonstrations.

Finally, there is the issue of what to do with the recorded images. This is a very difficult and unsettled issue. Local Freedom of Information Acts may mandate disclosure in certain circumstances. On the other hand, local Privacy Acts may forbid disclosure in certain circumstances. Various local jurisdictions have dealt with this issue by statute, regulation and/or general order.

V. CBRN SENSORS

Sensors able to detect chemical, biological, radiological, and nuclear threats have been extant for less time than even videorecording devices. Although the Supreme Court has held, in a somewhat analogous context, that the use of thermal imaging to detect heat emanating from a home requires a warrant, Kyllo v. United States, 533 U.S. 27 (2001), it is doubtful that a successful challenge can be mounted to the placement and use of CBRN sensors in a public mass transit setting.

VI. CONCLUSION

With the continuing threat of terrorist attacks, security professionals must look to new and innovative ways to combat this threat. Some of these ways will surely include new techniques and technologies. Others will involve the application of existing techniques and technologies to novel situations. In either event, security professionals must be versed in current legal precedent and must adapt their actions accordingly.

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[4] One way to avoid this problem is to record the image but not use the recognition technology. Then, obtain a warrant for use of the recognition technology. Whether exigent circumstances might justify a warrantless use of recognition technology is another matter currently unclear.