Fourth Amendment Case Law Update: Recent Activity at the United State Supreme Court

by

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Over the past half century, the Supreme Court's Fourth Amendment jurisprudence has sparked a revolution in police procedures. The Supreme Court embarked on this path when it incorporated the Fourth Amendment against the states in *Wolf v. Colorado*.[1] Since that time, the Court has applied the exclusionary rule to the states, held that local officials may be civilly liable for Fourth Amendment violations, and extended that liability to municipalities in cases where the Fourth Amendment violation derived from a local policy or practice.[2] The upshot of these decisions is that, in that half century since *Wolf*, the split-second decisions made by the officer on the street must reflect an awareness of not simply good police training but also the highly complex fabric of federal court constitutional jurisprudence.

Over fifty years have passed since *Wolf* started this revolution. Despite this passage of time, the doctrine has not settled. If anything, it has grown more nuanced. With the introduction of concepts such as "exceptions to the warrant requirement," the good faith exception (and exceptions to it), complex rules of standing and derivative evidence rules, the canon has grown more complicated and, consequently, so too have the demands on the law enforcement officer.

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1 338 U.S. 25 (1949).

2 Mapp v. Ohio, 367 U.S. 643 (1961); Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

Recent decisions by the Supreme Court have simply compounded these demands. This paper focuses on the implications of those decisions for local government.

It develops the analysis in four parts. Part I provides a primer on the Fourth Amendment to those individuals unfamiliar with the doctrine (readers already familiar with this area of the law may wish to move directly to Part II). Part II discusses four cases on the Supreme Court's docket – three of which have been decided and one of which is to be argued in October Term 2005. Part III provides nuts-and-bolts advice to IMLA members about how those decisions might affect police practices and procedures in their jurisdictions. Part IV concludes. While the paper is inevitably general (and obviously should not be construed as giving "legal advice"), I would be happy, either during the Q &A period or after the panel, to answer specific questions about the topics discussed in this paper or others related to issues of constitutional criminal procedure, police practice and municipal liability.

I. A Fourth Amendment Primer

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.

The Amendment naturally divides into two clauses. The first, the "reasonable search" clause, defines the scope of certain rights that the "people" enjoy. The second, the "Warrant" clause, sets forth certain requirements that must be fulfilled before a magistrate shall issue a

warrant. Much of the history of Fourth Amendment jurisprudence and scholarship centers around harmonizing these two clauses.[3]

For the first hundred years of the republic, the clause lay largely dormant and was not the subject of significant case law. Beginning in the late nineteenth century, the Court began to gloss the meaning of the amendment in terms that continue to shape the debate today.[4] In the seminal case of Boyd v. United States, the Court, after citing the influential writings of Lord Camden, described the Fourth Amendment in sweeping terms:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes (*sic*) of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty. and private property, where that right has never been forfeited by his conviction of some public offense,--it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment.[5]

Litigation over the Fourth Amendment really only took flight in the second half of the twentieth century as a result of several decisions summarized above. This paper cannot possibly discuss all of the nuances of the Fourth Amendment.[6] In broad terms, however, most contemporary Fourth Amendment inquiries proceed along the following lines:

- **Was there a search or seizure?** This is a threshold inquiry. For if neither a search nor a seizure occurred, the constitutional inquiry ends. In current terms,

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[3] Telford Taylor, Two Studies in Constitutional Interpretation (1969).

[4] See Boyd v. United States, 116 U.S. 616 (1886) (discussing relationship between Fourth and Fifth Amendment); Hiibel v. Sixth Judicial District Court of Nevada, 124 S. Ct. 2451 (2004) (same).

[5] 116 U.S. at 630.

[6] LaFave, Search and Seizure: A Treatise on the Fourth Amendment (2004).

the Court has defined search as an intrusion upon a subjective expectation of privacy that society is prepared to recognize as objectively reasonable.[7] A seizure is any act where, in light of the objective circumstances, a reasonable person would not have felt free to leave.[8]

- **Was there a warrant**? Assuming that a search or seizure occurred, the warrant question becomes central, for the answer to that question will drive the analysis down one of two different paths.

- **If there was a warrant, did police comply with the Fourth Amendment's warrant requirements?** The text of the Fourth Amendment sets forth several – including the requirement of probable cause,[9] an Oath or affirmation supporting the warrant, and two "particularity" requirements (including particularity of place to be searched and particularity of items to be seized). Additionally, the Court has also required that the warrant issue from a "neutral and detached magistrate."[10]

- **If there was not a warrant, was the search (or seizure) nonetheless "reasonable"?** While the Court has at times sought to reconcile the two clauses of the Fourth Amendment by expressing a presumption in favor of a search (or arrest) warrant,[11] it has never imposed an absolute requirement. Rather, the Court

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7 California v. Greenwood, 486 U.S. 35 (1988); see also Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (developing the framework eventually adopted in *Greenwood*).

8 United States v. Mendenhall, 446 U.S. 544 (1980).

9 See generally Illinois v. Gates, 462 U.S. 213 (1983).

10 Coolidge v. New Hampshire, 403 U.S. 443 (1971).

11 Payton v. New York, 445 U.S. 573, 586 (1980).

has, over time, recognized that several types of police conduct may be "reasonable" despite the absence of a warrant. These include, among others, searches incident to a lawful arrest,[12] certain searches of automobiles,[13] *Terry* stops and frisks,[14] administrative searches[15] and consent searches (the last of which will be the topic of a Supreme Court argument in the coming term).[16]

- **Was the search or seizure executed in a reasonable manner?** A number of Supreme Court cases have indicated that the Fourth Amendment's "reasonableness" provision governs not simply the authorization for the police conduct but also the manner of its execution. The most familiar example of this doctrine is the requirement that the police usually knock and announce their presence before executing a warrant.[17]

- **If a constitutional violation has occurred, must the evidence be excluded from a criminal prosecution**? *Mapp* created a presumption that evidence obtained in violation of the Fourth Amendment should be excluded from a prosecution. Yet that presumption is subject to numerous exceptions, including the "good faith" exception for evidence obtained pursuant to reasonable reliance on a warrant,[18] standing doctrine (which effectively serves as a limit on the

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12 Chimel v California, 395 U.S. 752 (1969); New York v. Belton, 453 U.S. 454 (1981); Thornton v. United States, 124 S. Ct. 2127 (2004).
13 California v. Acevedo, 500 U.S. 565 (1991); Wyoming v. Houghton, 526 U.S. 295 (1999).
14 Terry v. Ohio, 392 U.S. 1 (1968).
15 Camara v. Municipal Court, 387 U.S. 523 (1967); Vernonia School District v. Acton, 515 U.S. 646 (1995).
16 United States v. Matlock, 415 U.S. 164 (1974).
17 Wilson v. Arkansas, 514 U.S. 927 (1995).
18 United States v. Leon, 468 U.S. 987 (1984).

exclusionary rule by permitting the introduction of evidence unlawfully seized from one party against the prosecution of another),[19] and various doctrines that permit the introduction of unconstitutionally seized evidence in order to impeach a witness.[20]

- **If a constitutional violation has occurred, does civil liability attach?** This level of the inquiry covers a range of topics. For individual liability, at this point, the question usually concerns whether the public official violated a clearly established constitutional right.[21] For municipal liability, as noted above, the inquiry focuses instead on whether the unconstitutional conduct was the product of a municipal policy or practice.

This concludes the overview of Fourth Amendment case law. The next section analyzes recent Fourth Amendment cases on the Supreme Court's docket.

II. Recent Decisions

This section will review four Supreme Court cases concerning Fourth Amendment issues. Three of the cases were decided during October 2004 Term at the Supreme Court. The Supreme Court has granted certiorari on the fourth case, which will be decided in the 2005 term. The first case, Devenpeck v. Alford,[22] addressed the probable cause necessary to affect a warrantless

[19] Rakas v. Illinois, 439 U.S. 128 (1978); Minnesota v. Carter, 525 U.S. 83 (1998).
[20] United States v. Havens, 446 U.S. 620 (1980).
[21] Harlow v. Fitzgerald, 457 U.S. 800 (1978).
[22] 125 S. Ct. 588 (2004).

arrest. The second case, Illinois v. Caballes,[23] addressed whether the use of a dog to detect drugs during a lawful traffic stop violates the Fourth Amendment. The third case, Muehler v. Mena,[24] concerned the detention and questioning of an individual during a warrant execution. The last case, State v. Randolph,[25] the one not yet decided by the US Supreme Court, concerns consent searches.

Devenpeck v. Alford: Alford was pulled over due to suspicion that he had been impersonating a police officer. Upon approaching the car, the officer viewed a police scanner, handcuffs and a tape recorder which Alford was using to tape the conversation. The officer then arrested him pursuant to the Washington State Privacy Act. The charges were subsequently dismissed, but Alford proceeded to sue the officer in federal court.

In a unanimous opinion delivered by Justice Scalia (Chief Justice Rehnquist did not take part), the Court held that a criminal offense need not be "closely related" to the offense relied upon by the arresting officer to make the initial contact. The Court adhered to the common-law rule that a warrantless arrest by an officer is reasonable when there is probable cause to believe that a crime has been committed. It seems that the Court of Appeals for the Ninth Circuit felt there was a lack of probable cause due to the fact that the actual crime for which Alford was arrested was not closely related to the offense for which the officer initially pulled Alford over. The Supreme Court held that the officer did have probable cause, disagreed and remanded the case.

Illinois v. Caballes: Caballes was stopped for speeding, and an officer was in the process of writing a warning when a second officer arrived. The second officer had a drug detection dog which conducted a "sniff" of Caballes' automobile. The dog then alerted on respondent's trunk

[23] 125 S. Ct. 834 (2005).
[24] 125 S. Ct. 1465 (2005).
[25] 604 S.E.2d 835 (Ga. 2004).

where marijuana was found. Respondent was convicted and sentenced to 12 years in jail. The Illinois Supreme Court reversed the conviction due to the fact that noting supported the officer's suspicion of drug activity and that the scope of the traffic stop was unlawfully enlarged.

In an opinion by Justice Stevens and joined by everyone except Justices Souter and Ginsburg, the Supreme Court reversed. (Again, Chief Justice Rehnquist took no part in the decision.) Contrary to the Illinois Supreme Court, the majority believed that the use of the canine did not change the nature of stop or broaden it into a drug investigation. Another main assertion by the Court was that the "sniff" did not implicate a privacy interest. Because a dog is trained solely for the detection of drugs and no other material or substance, it cannot affect one's legitimate privacy interests.

Justice Souter dissented. His dissent focused on two facts. First, Caballes was pulled over for speeding so any other search not related to the speeding offense (including the dog sniff) was "unreasonable". Second, dogs cannot be right all the time. This "fallibility" of the dog would lead to the discovery of intimate information and infringe a suspect's privacy.

Justice Ginsburg also dissented. She trained on the issue that no facts were present to indicate that the respondent was involved in transporting drugs. She highlighted the two-part test that the Supreme Court of Illinois used in determining the dog sniff to be illegal. Prong one: Was the officer's action from the inception justified? Prong two: Was it reasonably related in scope to circumstances which justified the interference in the first place? Justice Ginsburg asserted that this case failed the test's second prong. Performing a "dog sniff," absent any evidence to suggest that Caballes was transporting drugs, unduly broadened the investigation and rendered it "unreasonable."

Muehler v. Mena: Gang related activity and drive by shootings occurred at regular intervals at the home where Petitioner Mena was suspected to reside. Consequently, police organized a S.W.A.T. team to conduct a search. Police also suspected that illegal immigrants resided at the home, so an INS agent accompanied them. As it turns out, Mena was the only one in the house and the three remaining detainees lived out back. Mena was placed in handcuffs for roughly three hours while the house was searched and while she was questioned. The Ninth Circuit held that this conduct violated the Fourth Amendment.

In an opinion by Chief Justice Rehnquist, the Supreme Court reversed. The majority announced three major holdings. First, the majority held that the use of the handcuffs did not violate the Fourth Amendment. Handcuffing detainees is a categorical authority available to all law enforcement officers. Michigan v. Summers[26] showed the main reasons to allow handcuffing: 1) to prevent flight, 2) to minimize the risk to law enforcement officers and 3) to effect an orderly completion of the search. Second, the majority held that the duration of Mena's handcuffing – three hours – was reasonable. Third, the majority held that questioning Mena about her immigration did not violate the Fourth Amendment. Under a prior decision, "mere police questioning does not constitute a seizure."[27] Consequently, in the majority's view, the questioning in this case took place during the time period necessary to effect the original, lawful search and, thus, did not violate the Fourth Amendment.

Justice Kennedy concurred. His concurrence sought to "ensure that police handcuffing during searches becomes neither routine nor unduly prolonged." In this case, Justice Kennedy found the use of handcuffs "objectively reasonable" because the detainees outnumbered the officers and the use of further officers to oversee the detainees would have frustrated the search.

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[26] 452 U.S. 692, 702-703 (1981).

[27] Florida v. Bostick, 501 U.S. 429 (1991).

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, concurred in the judgment. Justice Stevens' opinion first took issue with Justice Kennedy's concurrence. In Justice Stevens' view, a 5'2'' tall woman does not pose a threat, even if she resides in what is thought to be a gang-related house. Justice Stevens then addressed the majority's categorical approval of the handcuffing. He argued that the handcuffing must have some factual basis and, in this case, Mena did nothing threatening, or even illegal.

The last case, State v. Randolph from the Georgia Supreme Court, is on the Supreme Court's docket this fall. This case concerns the "reasonableness" of a search when joint occupants of a home do not agree on whether to consent to it. In the case, Randolph's wife did agree to let officers search her home, but he patently refused. Officers acted on her words alone, disregarded Randolph's refusal, and searched the house.

For the majority, the case turned on the proper interpretation of the Supreme Court's prior decision in United States v. Matlock.[28] In Matlock, the Supreme Court upheld a consent search based on a co-occupant's consent where the suspect was not at home. The majority of the Georgia Supreme Court distinguished Matlock on the ground that, in this case, the co-occupant was present. While the absent occupant "assumes the risk" that a co-occupant may consent to a search, a present occupant does not. His refusal should be effective and respected by police.

The dissent interpreted Matlock differently. In the dissent's view, Matlock stands for the principle that third-party consent is valid even in the face of a refusal. The dissent believes that an occupant of a home assumes the risk of a co-occupant's consent when he is present, as well as when he is absent.

[28] 415 U.S. 164 (1974).

This part has analyzed the major Fourth Amendment cases on the Supreme Court's docket. The next part draws practical lessons from this jurisprudence for IMLA members.

III. Lessons for the IMLA Member

Lawyers who regularly must apply the Court's Fourth Amendment jurisprudence to municipal practices and police policies may draw several lessons from these recent decisions. Here are several of the most important:

1. Detention and handcuffing during warrant execution will be reasonable but has its limits. Muehler is an important decision. A majority of the Court signed onto a rather categorical rule, extending the Supreme Court's prior decision in Summers, to allow handcuffing of suspects present during a warrant execution regardless of whether particular facts and circumstances support the detention. This signals another attempt by the Supreme Court to provide law enforcement some relatively clear bright-line rules so as to avoid second-guessing of judgments that officers must make in the field.

Nonetheless, a word of caution is in order. It bears emphasis that Justice Kennedy's concurrence expressed some misgivings about the use of handcuffs. His focus on "objective reasonableness" certainly leaves open the possibility of a different result in a case presenting a set of facts that less clearly justifies the use of handcuffs (such as where the officers outnumber the detainees or where additional officers could oversee the detainees without detracting from the ongoing search). Four other justices (Stevens Souter, Ginsburg and Breyer) obviously wish to push the doctrine away from the bright-line rules favored by the majority and in a direction placing greater weight on the factual basis supporting a law enforcement action. A case presenting a more egregious set of facts might enable this bloc of four to peel Justice Kennedy

away from the Muehler majority. Thus, even after Muehler, the use of handcuffs to detain non-arrestees should be assessed in light of underlying circumstances supporting their use.

2. Follow the probable cause: Devenpeck represents another chapter in the Court's effort to minimize the importance of the "subjective" awareness of a law enforcement officer during an encounter with a citizen. Its rejection of the "closely related" requirement effectively allows police officers to arrest someone for reasons unrelated to the reasons why the officer originally stopped the suspect so long as probable cause supported the stop and the arrest. In my view, this builds on the Court's prior decision in *Whren v. United States* that similarly accorded no importance to an officer's subjective motivations for effecting a traffic stop provided that "probable cause" supported it. Adequate training of law enforcement officials in the nuances of probable cause can help to ensure that stops and arrests will pass constitutional muster.

3. Decoupling the relationship between the scope of the search or seizure and the reasons giving rise to it – Muehler and Caballes share a common theme that warrants comment. A number of earlier Supreme Court decisions had suggested that, as part of the Fourth Amendment's "reasonableness" requirement, the scope of a search or seizure is tied to the reasons giving rise to it. That argument was used to support Caballes' claim that the dog sniff was unreasonable. It also was used to support Mena's claim that the handcuffing and questioning were unreasonable. In each case, the Supreme Court rejected the argument. The upshot of the cases appears to be that, so long as the initial police conduct (the traffic stop or the search warrant) is justified, the Court is prepared to tolerate marginal additional intrusions (the dog sniff, the handcuffing, the questioning) provided that some law enforcement purpose supports the intrusion and that the added intrusion does not unreasonably extend the initial search or seizure. For lawyers who have to litigate these "reasonableness" issues, whether in the

context of suppression motions or municipal liability cases, it is worth paying close attention to the continued decline of this principle.

IV. Conclusion

The Fourth Amendment decisions on the Supreme Court's recent docket demonstrate that the topic remains one of great interest to the justices. These decisions illustrate that, despite the explosion of litigation over the last half-century, debates over the Fourth Amendment, the meaning of "reasonableness" and the relationship between the "reasonableness" clause and the Warrant clause will continue. While these cases generally demonstrate that the Court will defer to law enforcement and is reluctant to impose civil liability, close attention to police practices nonetheless remains essential for the municipal lawyer. The Court occasionally still will find against the State in a Fourth Amendment case or even impose municipal liability.[29] Thus, municipalities should regularly review their police practices to ensure that they continue to comply with the Court's Fourth Amendment jurisprudence.

[29] See, e.g., Groh v. Ramirez, 124 S. Ct. 1284 (2004); Knowles v. Iowa, 525 U.S. 113 (1998).