



16

Arrest and Search and Seizure

You may be aware that there are many laws regulating arrest. Likewise, many laws regulate search and seizure. These laws ensure that each person is treated fairly in situations in which arrests and searches and seizures occur. In this chapter, you will discover what some of these laws are and how they protect your rights. You will also see how important it is that those making arrests or searches follow the laws. To illustrate, we will follow the Case of the Central City Drug Bust.

THE CASE OF THE CENTRAL CITY DRUG BUST

CASE STUDY

Three Central City High School sophomores went to the mall one afternoon. The three—Sandra, Alan, and Jim—were approached by a 22-year-old woman. She offered to sell them marijuana and cocaine. Jim made a purchase.

After telling his friends he'd meet them later, Jim talked with the dealer, Daisy. He asked if he could become a seller at the high school. Jim was anxious to make some money. His bike needed repairs, and he wanted to buy some stereo equipment.

Daisy suggested that they return to the “drug warehouse.” There they could discuss the possibility with her supplier, Harry. They drove to an old, converted garage. They didn't know that the police had a stakeout on the garage. A raid was planned that afternoon. Jim, Daisy and Harry were arrested. (In formal terms, Jim, as a juvenile, was “taken into custody” rather than arrested.)

ARREST

Arrests are usually made by an authorized person, such as a police officer or sheriff. These officials may arrest with a warrant or, under cer-

arrest

exclusionary rule

Miranda warning

search

seizure

warrant

tain circumstances, without one. A warrant is a document giving authority to do something—in this case, arrest.

With a Warrant

How do police obtain a warrant? First, a police officer or private citizen makes a sworn statement, an affidavit, before a judge (see figure 16-1). Georgia law requires that the affidavit identify

- the person to be arrested,
- the offense said to have been committed,
- the date and time it was committed,
- the person against whom the offense was committed, and
- the place of the offense.

These requirements enable the authorities to inform the accused of the specific charges against him or her. You may recall that one aspect of due process is notice. Persons likely to suffer loss of life, liberty, or property must be notified of the charges against them.

FIGURE 16-1

Affidavit for Arrest Warrant

Georgia, _____ County
Personally came _____, who on oath says that to the best of his knowledge and belief, _____ did on the _____ day of _____, in the year _____, in the county aforesaid, commit the offense of _____ .
The place of occurrence of said offense being _____ and against _____ .
Said offense being described as _____
_____ and this deponent makes this affidavit that a warrant may issue for his arrest. _____ (signature)
Sworn to and subscribed before me, this the _____ day of _____, 19 _____ .
_____, Judge of _____ County
Magistrate Court

Note that as a private citizen, you should not initiate criminal action against someone without strong reasons. If you wrongfully accuse someone of a crime, you could be sued.

The evidence presented in the affidavit must be convincing. The judge issuing the warrant must find probable cause to believe that the accused committed the offense. Probable cause means that there is more than a mere suspicion. There must be reasonable grounds to suspect that the person committed the crime. Consider situation 1:

SITUATION 1 It's about 10 p.m. In the apartment next to Mrs. Jones, a burglary is occurring. Mrs. Jones is looking out her window. During the next hour, in the light from the street lamp, she clearly sees the following events:

- a. Ms. Brown, the upstairs neighbor, puts several large boxes into her car. She seems uneasy, almost fearful. Finally, Ms. Brown jumps into her car and speeds away.
- b. Nick begins pacing back and forth in front of the apartment building. From time to time, he glances at his watch. Nick was arrested once before.
- c. The nephew of a friend of Mrs. Jones is climbing out the window of the burglarized apartment. He is carrying a small television set.

Do you think that a judge would find probable cause to issue a warrant for Ms. Brown, Nick, or the friend's nephew? Are there reasonable grounds to issue warrants?

A judge is not likely to issue an arrest warrant for burglary for Ms. Brown or Nick. The fact that Nick has been arrested before is not relevant. Ms. Brown has a legal right to put boxes in her car if they are hers. The judge has not been given enough information to indicate that the boxes belong to the neighbor being burglarized. Therefore, the judge would probably not find probable cause to issue a warrant for Ms. Brown. A judge is likely, however, to find probable cause in the case of the nephew.

Without a Warrant

Can arrests be made in Georgia without a warrant? State law allows a police officer to arrest someone without a warrant in only four situations. They are as follows:

1. when the offense is committed in the officer's presence or with his or her immediate knowledge
2. when an offender is attempting to escape
3. when there is probable cause to believe an act of family violence has occurred
4. for such other cause if there is likely to be a failure of justice because a judge is not available to issue a warrant

The reasons for exceptions one, two, and three are clear. In none of the situations would there be time to get a warrant. For example, suppose a police officer sees someone snatch a purse. In all likelihood, the person is not going to wait around while the officer goes to get a warrant to arrest him. The fourth exception gives the officers and the state (represented by the prosecutor) a general reason to argue that the arrest was valid without a warrant. Unless responding to one of these four exceptions, a police officer may arrest only with a warrant. Otherwise, the arrest is illegal.

Citizen's Arrests

As a private citizen, you have no authority to arrest anyone with a warrant. Without a warrant, you may arrest anyone who commits a misdemeanor or a felony in your presence or with your immediate knowledge. A citizen's arrest occurs when a citizen prevents a suspect from leaving a scene. Citizen's arrest most often happens in cases like shoplifting, when the store's manager detains the suspected offender. However, as the following example shows, the manager or employee cannot make such an arrest in every case.

In *Winn Dixie Stores Inc. v. Nichols*, a Winn Dixie customer complained to management that another customer stole her wallet.¹ The court

held that the limited rights of merchants to detain or arrest a person reasonably believed to have committed a shoplifting offense do not authorize a merchant to detain or arrest individuals accused by store patrons of committing crimes against other patrons. To make the arrest, an employee would have had to actually see the criminal act committed. Therefore, it was ruled that management had no authority to arrest the alleged criminal. The court suggested that the only person who could have made the citizen's arrest was the robbed customer herself.

When making a citizen's arrest, a person may not use more force than is reasonable to make the arrest. Deadly force is limited to self-defense or to instances in which such force is necessary to prevent certain felonies.

It must be stressed that the right of private citizens to make a citizen's arrest is limited. They cannot arrest people for violating local ordinances or regulations because these violations are not technically crimes as defined by state law (see chapter 15). Therefore, as a private citizen, you would not have the authority to arrest a person who is creating a disturbance by making too much noise. In addition, a private person can only make a citizen's arrest for the purpose of bringing the suspect before a judicial officer.

CASE STUDY

CASE OF THE CENTRAL CITY DRUG BUST, *continued*

The police had been investigating this case for several months prior to the raid on the drug warehouse. During that time, several undercover narcotics officers (often referred to as narcs) had made "buys" from Daisy and her boss, Harry. Detective-Sergeant Penny had also witnessed two sales to other persons.

The police had presented this information to Judge Stern of Middle County Magistrate Court. The information had convinced the judge that there was probable cause to believe that Daisy and Harry had committed a crime, so he issued arrest and search warrants

for Daisy, Harry, and the warehouse. The arresting officers charged Daisy and Harry with several crimes. (Not all of these crimes were identified in the warrant.) They were charged with

- possession of a Schedule II drug (cocaine), with intent to sell (possession of 28 grams or more of cocaine shows intent to sell),
- sale of a Schedule II drug,
- trafficking in marijuana (possession of more than 50 pounds), and
- contributing to the delinquency of a minor.

Harry and Daisy were, to say the least, in a great deal of trouble. (Note the stiff penalties for selling a Schedule I or II drug on page 219.)

Jim was taken into custody without a warrant. Do you know which of the four exceptions (see page 230) pertains to him? Would it help if you knew that during the raid, one officer saw him trying to get rid of bags with over 50 grams of cocaine? Harry had given them to Jim to sell at school. Also, when Jim was frisked, marijuana (less than an ounce) was found on his person.

Because Jim is under the age of 17, he was “charged” as a juvenile with the “delinquent act” of possession of less than an ounce of marijuana. This act is a misdemeanor if the accused is over the age of 17.

The police also charged Jim with possession with intent to distribute (sell) the cocaine. The charge of selling a Scheduled drug is more serious than mere possession. (A Scheduled drug is considered dangerous, and it is illegal to possess a Scheduled drug without a prescription.) How could the police charge Jim with intent to distribute the cocaine? After all, they couldn’t read his mind.

The courts have held that possessing more drugs than a person can reasonably be expected to take for personal use indicates that the person intends to sell the drug. The courts also look at other factors, including

whether the accused had a large sum of cash on him or her. Another factor is whether the drugs are in individual packages at the time of the arrest. For example, 10 hits of crack cocaine might be packaged in 10 vials, each containing 1 hit.

In the case of the Central City Drug Bust, Jim had bags containing over 50 grams of cocaine in all. The amount of cocaine and the manner in which it was packaged indicated he was going to sell it. Therefore, the police charged Jim with possession with intent to distribute the drug.

The police searched Harry, Daisy, and Jim. They quickly handcuffed all three. The police then “read” them their rights. What does it mean to have read them their rights?

The Miranda Warning

Due process of law requires that, before a person in custody accused of a crime can be questioned, the arresting officer must give that person the Miranda warning. The Miranda warning (figure 16-2) is made up of a number of rights derived from the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. In the landmark case of *Miranda v. Arizona* in 1966, the U.S. Supreme Court declared the reading of these rights to be a necessary part of due process of law.²

The Miranda warning is to be given once a suspect is in custody, that is, when the suspect is detained (not free to leave), even if a formal arrest has not taken place. Most important, these rights must be read and understood by the accused before he or she can be questioned.

In practice, officers do not always read these rights to every suspect. If they have failed to formally advise the suspect of his or her Miranda rights and the suspect makes a statement while in custody, the statement can be excluded from the trial of the case. The statement can also be excluded from the trial if it is shown that the suspect did not understand his or her Miranda rights or if the suspect did not make the statement voluntarily.

FIGURE 16-2

Miranda Warning

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to an attorney and have him present with you while you are being questioned.
4. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.



Not having received a Miranda warning is not a defense for committing the crime. However, at trial the accused will certainly argue that the statements and confessions should be excluded from the evidence presented in the case. If no statement or confession is given by the defendant, then there is nothing to exclude. Therefore, no problem exists, even though Miranda rights may not have been read at the time the defendant was arrested or detained.

What happened in this famous case resulting in what everybody now knows as Miranda rights? In the *Miranda* case, a man named Ernesto Miranda was arrested and charged with kidnapping and rape. Miranda was poor, uneducated, and somewhat mentally disturbed. He was taken to the police station and identified by the victim. He was then shut in an interrogation room with several police officers. He was intensively questioned for a number of hours. Never did these police officers tell Miranda that he had the right to remain silent and not say anything that would lead toward the establishment of his guilt (in other words, that he had the right not to incriminate himself under the Fifth Amendment). Nor did they tell him he had the right to a lawyer (a right guaranteed by the Sixth Amendment). Finally, after several hours, the officers came out of the interrogation room with a written, signed confession by Miranda.

In the *Miranda* case, the U.S. Supreme Court justices made use of the exclusionary rule. The exclusionary rule says that illegally obtained evidence cannot be used to convict a person of a crime. The Supreme Court applied the rule to confessions and statements made by defendants to ensure that police officers would follow the principles laid out in their decision. Also, the court wanted to ensure that persons accused of a crime were advised of their basic rights. In the past, police officers had often questioned suspects for hours or even days until confessions were obtained (and in rare instances, even used torture).

With their ruling in the *Miranda* case, the justices wanted to prevent such behavior by the police. The court also expanded the rights of the accused to protect them from giving involuntary statements because they did not know they could remain silent. The justices did not feel that a person should be convicted of a crime on the basis of a confession illegally obtained through physical abuse or ignorance.

The courts continue to interpret the *Miranda* decision, expanding the interpretation of it in some cases and narrowing it in others. For instance, in the 1980 case of *Rhode Island v. Innis*, the Supreme Court held that the term interrogation, as used in the *Miranda* case, was not limited to express questioning by the police.³ The court

said that interrogation also included any words or actions on the part of the police (other than those that normally accompany arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

The rights spelled out in the Miranda warning can be waived by a prisoner. However, the waiver must be given voluntarily. The prisoner must understand his or her action. There must be no trickery, promises of leniency, or threats by police officers. Figure 16-3 shows how police officers might present the waiver.

How might the Miranda ruling apply in the case of the Central City Drug Bust? What if the following events had occurred?

SITUATION 2 The police tell Jim that if he confesses to selling cocaine at the high school, they'll see that he gets off easy.

SITUATION 3 Harry has told a friend about the drug warehouse. The friend testifies to this fact in court.

SITUATION 4 A number of people are in the garage when the police arrive. As soon as the police enter, Daisy says loudly, "Well, I'm caught red-handed now."

In situation 2, the Miranda ruling would apply. Any confession obtained would not be admissible. Note that the Miranda ruling applies only to confessions made to the proper author-

ities by a person in custody who is being questioned. Harry's confession in situation 3 was not made while he was in custody. It could be used in court. Daisy's statement in situation 4 could also be admitted as evidence. She was not in custody at the time, nor was she being questioned about her involvement in the crime.

Only the Facts

1. To issue an arrest warrant, should a judge be sure there is (a) an affidavit? (b) probable cause? (c) proof that the accused committed the crime?
2. Identify at least two situations in which an arrest without a warrant would be legal.
3. Can anyone besides law enforcement officers arrest people in Georgia? Explain.
4. What does the Miranda ruling require?

Think About

1. Do you think private citizens should have the right to make arrests? Why?
2. Would you allow any more exceptions to the requirement for an arrest warrant? Explain.
3. The Miranda ruling has been controversial. Give arguments for and against it.
4. How should a person behave if arrested?

FIGURE 16-3

Miranda Warning Waiver

After the warning and in order to secure a waiver, the following questions should be asked and an affirmative reply secured to each question.

1. Do you understand each of these rights I have explained to you?
2. Having these rights in mind, do you wish to talk to us now?

SEARCH AND SEIZURE

The Fourth Amendment of the U.S. Constitution protects people from unreasonable searches and seizures (see page 225). Generally, the police must first have obtained a search warrant from a judge. Some searches are legal without a warrant, but what constitutes an illegal search can be very confusing and complicated. Only an experienced attorney can accurately explain whether a particular search is legal.

The method for obtaining a search warrant is very similar to that for obtaining an arrest warrant. To issue a search warrant, the judge must be given facts under oath. These facts must show probable cause to believe that certain illegal items will be found in the place to be searched. The items and the place that is to be searched must be specifically described. An affidavit for a search warrant is shown in figure 16-4. Figure 16-5 shows a search warrant.

In the execution of the search warrant, the officer executing it may reasonably detain and “pat-down” any person in the place at the time in order to protect him- or herself from attack or prevent the disposal or concealment of any instruments, articles, or things described in the search warrant. A pat-down involves the patting down of a person’s outer clothing to discover a potential weapon or other object that could cause harm.

Exceptions to a Search Warrant

Although the Fourth Amendment declares the need for a search warrant, there are a number of general exceptions to the requirement. These exceptions relate to searches and seizures that occur

1. incident to (related to) a lawful arrest.
2. when an officer observes, in “plain view,” property that has been reported stolen or is contraband or otherwise illegal. (Contraband is something a private citizen cannot legally possess.)
3. when an officer has to take immediate action (referred to as “exigent circumstances”).
4. when an individual consents to the search.

Exception 1. In this exception, the search must occur in conjunction with a lawful arrest.

FIGURE 16-4

Affidavit and Complaint for Search Warrant

Georgia, _____ County CITY OF _____, GEORGIA

Before _____ (Name and Title of Person before whom affidavit is made)

The undersigned being duly sworn deposes and on oath says he has reason and probable cause to believe that certain property, namely _____

_____ is now being unlawfully concealed in and upon the premises known as _____

located in the City of _____, _____ County, Georgia, in the custody or control of _____

and that deponent does verily believe and has probable cause to believe from facts within his knowledge as set out herein that the property heretofore described is kept and concealed in and upon said premises in violation of the laws of the State of Georgia and for the purpose of violating the same. The facts tending to establish affiant’s reason for belief and probable cause for belief are as follows:

_____ This affidavit and complaint is made for the purpose of authorizing the issuance of a search warrant for the person or premises described above.

Sworn to before me and subscribed in my presence this _____ day of _____, 20 _____

Signature of Affiant

Signature and Title of Officer before whom affidavit is made _____

The arresting officer can then search the person and the immediate area around him or her. The reasons for this exception are obvious. The police officer needs to know that the person is not armed. Furthermore, it is important that any evidence concealed on that person be seized to prevent it from being destroyed. However, if the arrest turns out to be unlawful, then a search under this exception will also be considered illegal.

Exception 2. This exception arises when a police officer sees an item or items that are illegal, such as stolen goods, in plain view. This exception is based on the notion that there is no intentional search if the officer has accidentally discovered the illegal item among other items visible to him or her. The officer must also have a legal right to be in the place where the search or seizure occurs. The items must be obviously illegal.

Considering these criteria, do you think the following examples would be exceptions to the requirement for a warrant?

SITUATION 5 A police officer stops a car for a traffic violation. The driver is 16. The officer sees opened beer cans on the car floor.

SITUATION 6 A person is stopped for speeding. The officer then asks the driver for a registration slip and proof of insurance. The driver opens the glove compartment to get the information. The officer sees several unusual rings and bracelets inside. She recognizes them as jewelry reported stolen by a local celebrity.

SITUATION 7 A traffic officer stops a driver for running a red light. The officer notices a strong smell of marijuana in the car. He searches the car and finds marijuana in the trunk.

If a vehicle is stopped by the police for a valid reason, then whatever the officer sees while conducting official business can be seized. This seizure is part of the plain view doctrine. In situation 5, the officer could seize the beer. He could take the underage driver into custody for possessing it.

FIGURE 16-5

Search Warrant

GEORGIA, _____ COUNTY

To _____
(name of Peace Officer making complaint)

and to all and singular the Peace Officers of the State of Georgia, "GREETINGS":

The foregoing affidavit and complaint having been duly made before me and the same, together with the facts submitted under oath contained therein having satisfied me that there is probable cause to believe that the property described therein is being unlawfully concealed in and upon the premises described therein of

YOU ARE HEREBY COMMANDED to enter and search said described premises, serving this warrant, and if the property described or any portion of it be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within 10 days of this date or some other judicial officer, as required by law.

Given under my hand and seal this _____ day of _____, 20 ____ at _____ o'clock ____ M.

Signature and Title of Officer Issuing Search Warrant

In situation 6, the traffic officer had the right to stop a vehicle and ask to see proof of registration and insurance. The jewelry was not in plain view. It was only visible after the driver opened the glove compartment. However, the courts have approved this type of seizure, too, because stopping the car was lawful. Further, it was the driver who opened the glove compartment, not the officer, and he did so on his own accord, not at the request of the officer.

Situation 7 brings up the "automobile exception" to the general requirement for a warrant to search private property. This exception exists because an auto, unlike a house, can be moved out of reach of the law fairly easily. The courts have long said that when a vehicle is stopped

for a legal reason, the police can search the area within arm's range of the driver without a warrant, provided there is probable cause and not just a hunch that further wrongdoing is suspected (for example, that drugs are involved) or if the driver is arrested so that the search is incident to a lawful arrest. In Situation 7, the trunk could not be searched under the circumstances unless the officers were given express permission. However, there is one caveat. If the car had to be impounded, the trunk could be searched for the purpose of conducting an inventory of the contents of the car.

Even closed containers found within a car can be searched. However, a general rule applies to all searches regardless of the circumstances. The size of the place or thing that the police search must be able to contain what they are looking for. For instance, if the police are looking in a van for illegal aliens, they cannot seize a briefcase and search it.

Exception 3. The following situation illustrates this exception:

SITUATION 8 An officer sees an armed robber holding up a drugstore, taking money and drugs. The robber leaves by foot. The officer initiates a chase. Bolting around a corner, the robber disappears into an old house.

Will the officer have to get a search warrant? If so, won't the robber have time to destroy or hide the evidence?

The third exception to the warrantless search and seizure involves "exigent circumstances" (emergency situations). Exigent circumstances occur when there is not time for the officer to obtain a warrant, as when there is a bomb threat, or as in situation 8, when police are chasing someone who has just committed a crime.

Exception 4. This exception occurs when an individual consents to a warrantless search or seizure. Consent searches are valid, but the state must prove that consent was freely and voluntarily given. To make this determination,



Is this gun in "plain view"? What if the glove compartment were closed?

the court looks at the entire circumstances surrounding the consent, including the age, education, intelligence, and length of detention of the accused; whether the accused was advised of his or her constitutional rights; the nature of questioning, especially when it is prolonged; and the use of physical punishment, if any. The psychological effect that these factors may have had are examined as well.

Let's look at some examples to understand this fourth exception. In *State v. Westmoreland*, the defendant had agreed to a search after asking if the officer had a search warrant and being told that one was not necessary.⁴ The court found that this situation did not constitute voluntary consent.

In another case, *Springsteen v. State*, the court held that consent may be limited to what the consenting party wishes.⁵ The search may not exceed its reasonably understood limits. Also, the consenting suspect does not need to "call a halt" when the search goes beyond the limits that were set. It is up to the state to prove that the officer did not exceed the permission that was given. However, in *McNeil v. State*, the court found that the defendant's consent for po-

lice officers to search his person for weapons and needles permitted the officers to turn his pants pockets inside out.⁶ The court concluded that this search did not exceed the permission granted by the defendant.

The case of *State v. Corley* involved the search of a truck by a police officer.⁷ The officer had obtained the owner's consent to search. In the course of the search, the officer opened a closed drawstring bag lying on the front seat. The court found that this action had exceeded the scope of the consent.

Consent by minors has also been an issue in some cases. The court has held that a minor's consent is not automatically invalid. A determination of validity is made by considering the circumstances under which consent is given. The court must look at whether a minor was old enough to use minimal discretion. Also, did the police act reasonably in deciding that the minor had control enough over the premises to give the consent?

In *Davis v. State*, a 10-year-old boy gave consent for police to search his parents' bedroom.⁸ The youth was routinely home alone after school, with instructions not to invite friends over during those hours. The court looked at his level of maturity and understanding of consequences. It determined that his regular access to the house did not give the boy sufficient authority for the consent. The court held that young children are not able to understand and waive their own rights. How can they then understand and waive those of their parents? The boy clearly did not know the consequences of his actions in allowing the warrantless bedroom search. In *Rainwater v. State*, however, the court found that a 15-year-old could give valid consent to search.⁹ In this case, the teenager called the police, saying that her brother and parents used and sold narcotics at their residence. The teen gave a police officer permission to search the yard of the family home, where a bag of marijuana was found. In upholding the search, the court found that the teen's age, almost 16, coupled with the fact that she had called the police and was a resident of

the home, permitted her to give valid consent to search the yard.

In the following situations, would you consider that valid consent has been given?

SITUATION 9 A policeman asks a suspect if he can search the trunk of the car. The suspect doesn't respond verbally, but she gives the officer the key.

SITUATION 10 A police officer arrests a suspect outside a bar. The officer asks if the police can search the suspect's apartment. The suspect, thinking he must comply, says, "Yes."

SITUATION 11 Joe, a suspect, is 16. The police ask his father if they can search his car. It is parked in the father's driveway. The father says, "Yes."

SITUATION 12 The principal has reason to suspect that a student has contraband in her locker. He searches the locker.

Regarding situation 9, Georgia courts have held that a person does not have to verbally agree to a search. Agreement can be made through actions alone.

The police do not have to inform individuals of the Fourth Amendment right to refuse a search. This determination differs from what is required under the *Miranda* ruling. The search in situation 10 would be valid.

Can a suspect's father (situation 11) consent to a search of the suspect's car? Yes, according to the Georgia courts. If a suspect's car is parked in his father's driveway, his father can authorize the search. What if the police thought the authorizing person was the suspect's father but he wasn't? A 1990 Supreme Court case suggests the search would still be valid. Recent court decisions have tended to give police more range in making decisions in searches.

Situation 12 poses a difficult question. A number of courts have ruled that if a school official calls in the police, then due process requirements must be met. What if school officials conduct the search? In 1985, the U.S. Supreme Court held that school officials may conduct warrantless

searches, but only if they have “reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order.”¹⁰

Individualized Suspicion

In the previous situations, the officers have had some suspicion that a particular person (or persons) was involved in some illegal activity. But what of the situations that follow? Are these searches legal?

SITUATION 13 A woman is flying to California. Before reaching the airplane gate, she, her purse, and her hand luggage must be inspected by a metal detector.

SITUATION 14 A man is returning to the United States from Panama. His luggage is searched at the airport when he arrives. Unknown to him, it is also “inspected” by a drug-searching beagle.

SITUATION 15 A woman is driving to a party. On the way, she is stopped at a police roadblock set up to find DUI drivers. The woman has not taken alcohol or drugs, but on the seat beside her is a box of fireworks, which are illegal.

Protection against searches without “individualized suspicion” is seen as being at the heart of the Fourth Amendment. However, in the searches in situations 13, 14, and 15, there is no evidence of suspicion.

Situation 13 illustrates enforcement of laws permitting airport searches of persons and luggage for possible weapons. The public has generally accepted this intrusion on its right to privacy in the interest of safety. This search would be legal.

The right of customs officials to examine persons and luggage entering the country for contraband is long-standing (situation 14). Courts have also upheld the “warrantless” searches of luggage for drugs by trained dogs at airports.

The search in situation 15 would also be legal. In 1990, the U.S. Supreme Court expanded the range of “suspicionless searches” by approving the police use of “sobriety checkpoints.”¹¹ These checkpoints are roadblocks that the police can establish to halt traffic to discover if drivers are using alcohol or drugs. In such a stop, the police can legally search the area controlled by the driver.

Many people object to suspicionless searches such as sobriety checkpoints and drug testing (chapter 7). They argue that few people are caught and that their Fourth Amendment rights



Courts have upheld the searches of luggage for drugs by trained dogs at airports.

are violated. Those in favor say tests and checkpoints deter people from abusing drugs and alcohol. What do you think?

Wiretaps (Electronic Eavesdropping)

Should a search warrant be required to overhear an oral conversation? Is a conversation the same as an illegal drug, a gun, or a document? These three items can be seized physically. That is, they are tangible objects. A conversation is only made tangible by having it recorded.

Look at the question another way. How would you feel if government officers, without your knowledge and without a search warrant, listened in on and recorded your private telephone conversation? Would this action be a physical intrusion into your home? Should the Fourth Amendment protect you from such an activity?

For many years, the U.S. Supreme Court held that there was no need for a warrant as long as there was no physical intrusion. For example, a warrant would not be needed if a public telephone booth was bugged by a device (that is, a wiretap) attached to its back wall. The warrant would be unnecessary because there would be no physical intrusion into the inside of the booth. The landmark decision of *Katz v. U.S.* readdressed this issue in 1967.¹² In it, the U.S. Supreme Court declared that the Fourth Amendment protects people (and their conversations), not just the places where they are. This interpretation means that the Fourth Amendment generally protects people from the interception and recording of any oral statements. An exception would be if one party to a conversation consented to the interception. Another would be if the conversation were held where there was no reasonable expectation of privacy.

SITUATION 16 In the case of the Central City Drug Bust, the police needed more evidence against Harry and Daisy. Without obtaining a warrant, the police put “bugging,” or listening, devices on Harry’s and Daisy’s phones.

Would their conversations be legal evidence?

SITUATION 17 A narcotics agent overhears Harry talking to Daisy in a crowded bus. Harry said Daisy “really should work on the high school kids because sales are falling off.” The agent was carrying a small recording device. She managed to tape some of their conversation. The agent, of course, had no warrant.

Could her recollection of the conversation be used as evidence in a trial? Could the tape?

SITUATION 18 Harry and Daisy were talking quietly in the office of the warehouse. They were not aware that a police sergeant was listening outside the window.

Would the overheard conversation be admissible as evidence in a trial?

Under the precedent set in the *Katz* decision, evidence obtained in situations 16 and 18

FIGURE 16-6

Investigative Warrants

Requirements

- Must be issued by a superior court judge.
- District attorney must apply for the warrant in writing.
- Judge must find probable cause that crime is being or has been committed.
- Judge must find that all less intrusive means have been tried.

Descriptions the warrant must include

- Place and time when eavesdropping will take place.
- Device to be used.
- Types of conversations to be recorded.
- Who is to be intercepted.

Duration of warrant (20 days)

- After information has been obtained, the police must report results of their efforts to the judge.
- The district attorney may apply for a 20-day extension if there is probable cause.

would be ruled illegal. The evidence obtained would be legal only if the police had warrants. However, in situation 17, the conversation between Daisy and Harry could probably be used in court. Daisy and Harry could not reasonably expect privacy on a crowded bus. Therefore, no search warrant would be necessary to “seize” this conversation.

Generally when the police want to use a wiretap, a warrant must be obtained. In Georgia, electronic surveillance warrants are frequently called investigative warrants. The requirements for obtaining these warrants are shown in figure 16-6.

CASE STUDY

**CASE OF THE CENTRAL CITY
DRUG BUST, *concluded***

The police had a search warrant that permitted them to search the warehouse and Harry’s and Daisy’s persons. It was based upon the sworn affidavit of Detective-Sergeant Penny, who had been posing as a drug buyer. Visits to the warehouse gave Sergeant Penny precise details about what type of drugs would be there. This information was given to Judge Stern in the affidavit.

In this case, the arresting officers had neither an arrest nor search warrant citing Jim. Did they have the legal authority to search Jim? This question is not easy to answer, and it is one that is often the subject of litigation in appellate courts. Generally, a person who is merely visiting premises that happen to be the subject of a search warrant cannot be searched unless the officer conducting the search believes he or she is armed and dangerous. In addition, the visitor’s personal belongings (such as a backpack or a purse) cannot be searched if it is shown that the items belong to the visitor and the person is in fact merely a visitor as opposed to a party to the crime. However, in this case, if the drugs were in open view and in close proximity to where the visitor (Jim) was standing, the officers, upon executing the warrant, may determine that Jim is more than a visitor and is a party to the crime. If he is ar-

rested as a party to the crime, he can certainly be searched.

In the case of the Central City Drug Bust, the police had worked very hard to break up this illegal drug-selling operation. They were especially concerned because the drugs were being “pushed” to students in the local middle and high schools. The police wanted to be sure to make their arrests and searches in a lawful manner. They did not want these offenders to get off because of a legal technicality later on at the trial. However, it is important to remember that what some people consider to be a technicality, others see as a constitutional safeguard.

Only the Facts

1. Are the following searches legal without a warrant? If they are legal, explain under what circumstances.
 - a. A police officer searches someone’s locked closets.
 - b. A police officer searches the back seat of a stopped car.
 - c. A police officer “bugs” a telephone to record conversations.
2. Define the following:
 - a. probable cause
 - b. exigent circumstances
 - c. hot pursuit
 - d. investigative warrant

Think About

1. Do you find it difficult to precisely define the following three terms from search and seizure laws? Explain your answer.
 - a. immediate area
 - b. plain view
 - c. exigent circumstances
2. List arguments for and against general searches of school lockers by drug-sniffing dogs.

3. Why should requirements for electronic surveillance be stricter than for other searches? Do you think they are strict enough? Explain.

RESULTS OF ILLEGAL ARRESTS AND SEARCHES AND SEIZURES

The exclusionary rule was defined by the U.S. Supreme Court in the 1961 case of *Mapp v. Ohio*.¹³ You have seen how the rule applies to illegally obtained confessions. It applies with equal force to illegally arrested persons and any evidence that is discovered incident to an illegal arrest. In short, it applies to any evidence seized in an illegal manner.

What can happen when the exclusionary rule is applied? A good example would be a case that the Georgia Court of Appeals decided in 1975, called here the Case of the Sleeping Drunk.¹⁴

CASE STUDY CASE OF THE SLEEPING DRUNK

A man was passed out at an all-night restaurant. He was sleeping soundly on a stool. His face was buried in his folded arms on the counter. At his feet lay a half-empty bottle of rum. He smelled strongly of alcohol.

The police came into the restaurant. Seeing the man, they quickly decided he was drunk and should be arrested. They charged him with being a “public drunk,” a misdemeanor in Georgia. During a brief search following the arrest, the police discovered two small plastic bags of cocaine, a Schedule II drug, in his pants pocket.

The man did not resist arrest. He was very cooperative. However, he insisted that he did not own the cocaine or know how it got in his pocket. Nonetheless, the police charged him with possession of a Schedule II drug.

In the trial, the man’s attorney filed a “motion to suppress” the bags of cocaine as evidence. The attorney felt that the cocaine

had been illegally obtained by the police. The attorney also sought to have the charge of public drunkenness dismissed.

The attorney argued to the court that the police had illegally arrested his client. The reason was that his client had not committed the offense of public drunkenness in their presence. Georgia law states that the person accused of the crime of public drunkenness must be loud, profane, and boisterous toward other people. The man was not showing any of these essential elements of the crime. Therefore his attorney claimed that he was illegally arrested.

Of course, if this charge were dismissed, the more serious charges of drug possession would also have to be dismissed because the drugs would then have been discovered in a search during an illegal arrest. In other words, if the arrest were declared illegal, the search would also be illegal. If the search were illegal—under the exclusionary rule—the evidence of the drugs could not be admitted. However, the trial court judge denied the motion to suppress the evidence. The man was found guilty of both charges.

On appeal, the Georgia Court of Appeals agreed with the defendant’s attorney. It reversed the trial court’s denial of the motion to suppress, agreeing with the defense that the arrest of a person under these circumstances was illegal. Therefore the search was also illegal. Both the public drunkenness and drug charges were dismissed. The man escaped serious felony prosecution because of the exclusionary rule.

Do you think the exclusionary rule is needed, or do you agree with those who claim that the rule makes it difficult to obtain convictions? Do you think it is too hard to follow the law as precisely as the exclusionary rule requires?

Based on what you have learned, would the following evidence be suppressed under the exclusionary rule?

SITUATION 19 A search warrant authorizes the search of a barn for a stolen auto. While looking around the barn, an officer opens a drawer in an old chest. In it, he finds plates for counterfeiting money.

SITUATION 20 The police are investigating a murder case. They interview a woman at her home. She seems uneasy, and one officer gets a hunch. Although he has neither a warrant nor consent, he pulls open a drawer in a table. He finds and seizes several vials of crack cocaine.

SITUATION 21 The same situation as 20, except the drawer is open, and the drugs are in plain view.

The evidence of counterfeiting found in situation 19 would be illegally obtained. The object of the warrant was a car, not the contents of the drawer. The officer had no right to open the drawer.

All evidence from a warrantless search that does not fit into one of the recognized exceptions would be excluded from a trial. It would be considered illegally seized. The evidence in situation 20 would have to be excluded. The officers did not have a search warrant. Situation 21 is different. The woman gave them permission to enter, and the drugs were in plain view; therefore the drugs were properly discovered and seized and would be admissible at trial. Cases in which an illegal arrest or search occurs may be dismissed. The police could then be sued by the person who has been subjected to the illegal action.

Suits of this kind can be tort actions for recovery of damages, or they may be civil rights actions. Such lawsuits would be based on a federal statute passed to protect people from unreasonable governmental actions. They are called “1983” suits because this law is found in section 1983 of title 42 of the United States Code. Police officers need to be very familiar with the law before making arrests and searches and seizures.

Only the Facts

1. What is the exclusionary rule?
2. Why is it important for police officers to be technically correct when making arrests or conducting searches?

Think About

1. How do the laws and rules regarding arrest and search and seizure protect your rights? For example, how are you protected by the requirements for different types of warrants? How are you protected by the Miranda ruling?
2. A 1984 Supreme Court ruling allowed evidence gathered as the result of an illegal search (because of a faulty warrant) to be used in court. The reasoning was that the officers had acted in “good faith.” Can you think of arguments for and against the ruling?

SUMMING UP

The conflict between the need to enforce criminal laws and protect individual rights emerges clearly in the areas of arrest and search and seizure, as this chapter has shown. The U.S. Supreme Court has sometimes seemed to favor individual rights (as in decisions based on cases from the 1960s, for example). Other times, the court seems to have been more concerned about achieving greater efficiency in law enforcement, as in rulings from the 1970s and 1980s. How to balance the need to protect society and individual rights is a question that may never be entirely resolved. Perhaps maintaining a balance is itself most important. What do you think about this issue?

Notes

1. 205 Ga. App. 308, 422 S.E. 2d 209 (1992).
2. 384 U.S. 346 (1966).

3. 446 U.S. 297 (1980).
4. 204 Ga. App. 312, 418 S.E.2d 822 (1992).
5. 206 Ga. App. 150, 424 S.E.2d 832 (1992).
6. 248 Ga. App. 70 (2001).
7. 201 Ga. App. 320, 411 S.E.2d 324 (1991).
8. 262 Ga. 578, 422 S.E.2d 546 (1992).
9. 240 Ga. App. 370 (2000).
10. *New Jersey, Petitioner v. T.L.O.*, 105 S. Ct. 733 (1985).
11. *Michigan v. Rick Sitz*, 110 S. Ct. 2481 (1990).
12. 389 U.S. 347 (1967).
13. 367 U.S. 643 (1961).
14. *Peoples v. State*, 216 S.E. 2d 604 (1975).