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Frivolous Attempts at Modifying Search Warrants and the 4th Amendment

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ABSTRACT

Since the ratification of the amendments to the United States Constitution, there have been over 11,000 attempts to make changes (Gorham, 2011). Some have passed, but the majority has not passed. This paper sheds light on some of the attempted changes, with regards to the 4th Amendment and the benefit to the criminal aspect, which also happens to hamper the abilities of law enforcement. Judges, attorneys, and professors in the criminal justice field have written numerous legal papers asserting their opinions on how to make changes to the 4th Amendment, and not one paper researched would assist law enforcement in the arrest or conviction of the suspected party.

The relevancy of this paper reveals a brief insight into the rationale used by persons to attempt to justify why changes to the 4th Amendment should be approved. However, attempts at modifying law enforcement protocols, and Supreme Court decisions regarding search warrants and the 4th Amendment, should be dismissed. Search warrants and the 4th Amendment should not be modified because of the following: it provides a legal avenue to search for evidence of a crime, it would be a detriment to law enforcement, and it allows officers to view items in vehicle in plain view while conducting a traffic stop. The information revealed showed no benefit to the law enforcement or prosecutorial branch, and, in reality, each point reviewed would either add restrictions on officers or allow more avenues for prosecution of the officer for lack of oversight or not being trained by his or hers department.

TABLE OF CONTENTS

INTRODUCTION

The Fourth Amendment of the United States Constitution guarantees, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation” (as cited in Bohm & Haley, 2005, p.115). This amendment was written to protect citizens from unreasonable search and seizure and as guidelines for law enforcement in the performance of their duties. With the increase in media attention, the actions of law enforcement are noticed more than ever. Officers are most visible when direct contact is being made with citizens, and two of these instances are traffic enforcement and serving search warrants. With this visibility, the officer’s every action is subject to scrutiny and as with the persons they contact, they, too, are accountable for violations of policies and state mandated laws. The violations committed by officers, such as civil rights violations, wrongful death allegations, and lack of training are often so severe that a court of law is needed to decide their fate. Decisions made against officers are appealed to the Court of Criminal Appeals, and even to The United States Supreme Court, and these rulings often swing the pendulum either for or against mandates regulating policies of all law enforcement. Adding additional restraints or a complete removal of a vital authority by the Supreme Court toward law enforcement would have a devastating effect on their abilities to perform their jobs efficiently. Therefore, attempts at modifying law enforcement protocols and Supreme Court decisions regarding search warrants and the 4th Amendment should be dismissed.

POSITION

The legal definition of a search is, "A search warrant is a lawful order from a court directing officers to gain entry into homes, premises, vehicles, or persons to search for property and bringing that property back before the issuing magistrate" (as cited by Bohm & Haley, 2005, p.116). Credible information has to be documented in the affidavit, which provides enough probable cause for the magistrate to allow forced entry by officers into the residence, vehicle, or person. Although there are many descriptions of a search warrant, the essential premise remains a conscious effort to identify evidence.

Search warrants and the 4th Amendment should not be modified because it provides law enforcement the legal avenue to search for evidence to a crime. The State of Texas Code of Criminal Procedure, Article 14.05, provides officers the ability, "to enter homes without a warrant under exigent circumstances, which include protection of life, protection of property, preventing destruction of evidence, and pursuing a fleeing felon" (Texas Code of Criminal Procedure, 1965, Art.14.05). If these circumstances do not exist, officers are required to obtain a warrant before entering a person's property. The ability to obtain a search warrant is not a task to be taken lightly. The officer who is attempting to obtain a search warrant must have more than reasonable suspicion a crime is being committed; it must be probable cause. Reasonable suspicion is the ability to articulate the reasons for the suspicion. Probable cause is established from a Supreme Court decision, *Carroll v. United States* (1925), which required "that a man of reasonable caution to believe that an offense has been or is being committed" (p. 267, para. 162). The items, locations, and structures officers are attempting to locate are

listed in the affidavit that is completed by the officer and signed before the magistrate under oath as being true and correct.

Violating the guidelines of a search warrant, whether intentional or by accident, are unacceptable and are dealt with strongly, especially when it is learned violations of the Fourth Amendment have occurred. In the preparation of the search warrant, the affiant (or officer) prepares a legal document that is supported by his observations or those from a confidential informant. The magistrate reviews the affidavit to ensure the legal requirements are met and then signs the document. Many times, officers fail to provide the correct information in the affidavit, which results in any evidence found to become inadmissible. In Kearney, Nebraska in 2000, a 16-year old female was strip searched by officers after execution of a search warrant of her parent's residence; the parents of Liner were not searched by officers, only Holly Liner (American Civil Liberties Union, 2003, para. 4,5,6). However, as Stuckey (1979) explained, "Officers are not allowed to use any more force than reasonable force to seize evidence after executing a warrant, and may not go as far as an act which will "shock the conscience" of the community" (Stuckey, 1979, p.212). In this case, officers exceeded the boundaries of the search warrant. The search warrant was issued for the residence and vehicles, but not for a search of the human body. An additional search warrant needed to be prepared based on additional information that Liner had concealed narcotics inside of her body (Regini, 1999). The execution of this type of warrant can only be performed by medical professionals, in a medical facility, and not by law enforcement officers.

The blatant violations of policy, procedure, and law have to be recognized and those involved have to be held accountable for their actions. Many times, the

department head is named as the person responsible for the occurrence, as well as the officers involved. These actions assist with the ability of releasing liability toward the agency whose actions are being placed under the microscope.

Modifications of the requirements would be a detriment to law enforcement. The grounds for issuing a search warrant are precisely written and apply to not only the law enforcement officers but also for the magistrates who sign the document. The justification and limitations cover each and every aspect, except for human error. Few instances of guilt fall on the shoulders of the judges who read and sign the documents; however, the same cannot be said for officers for preparing and executing the warrants. Training and the provision of oversight by upper management is the obvious and most beneficial resolution to law enforcement and the general public. Those in and out of law enforcement try to remedy problems by examining policies before actions lead to an appearance in a court on the allegations of inadequate training of personnel.

Also searches incident to an arrest and voluntary consent should not be modified because it allows law enforcement additional avenues to legally intrude into an area protected under the Fourth Amendment. Prior to 1969, when officers arrested a suspect, they could search the entire location where the arrest was conducted; however, the United States Supreme Court changed this standard of practice after ruling in *Chimel v. California* (Bohm & Haley, 2005). In this ruling, under the search incident to arrest clause, limitations were placed on law enforcement as to where they could search the area, which was in the immediate control of the suspect. However, Stuckey (1979) explained that, "Voluntary consent must be given freely and without coercion, by a person of sound mind, who has control of the premises, and is of legal

age to give the consent to officers" (p. 204). Searches will be discussed in regards to traffic enforcement stops and the ability of officers to search the vehicles.

The officer may make a complete search of the person and anything he has in his possession, such as weapons and any evidence that might be destroyed (Stuckey, 1979). Each officer has the requirement to meet the continuum of the standards of proof, which, when articulated, shows justification for contact with the person. Mere suspicion and reasonable suspicion have to be in place before an officer has probable cause to search and or arrest a person. Mere suspicion is a feeling something is not right. This feeling may be from prior experiences and his training, but, by itself, it does not allow for a person to be stopped. Officers targeting persons based on race is illegal and not an acceptable action. Reasonable suspicion is more than a just a feeling a person is or has been involved in criminal activity. Once an officer attains this level of the standard of proof, it allows for the officer to stop and frisk a person. This authority was derived from *Terry v. Ohio* (1968), which stated, “When a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger,” the officer is authorized to check the person (as cited in O’Hara & O’ Hara, 1981, p. 863). Officers have to articulate their justification for contacts with persons based on what they see, smell, or touch.

After a lawful arrest, law enforcement officers are allowed to make a complete search of the person and anything he has in his possession, such as weapons and evidence that might be destroyed. This can be completed under the search incident to an arrest exception (Stuckey, 1979). An attempt was made in California in 1997, when the *People v. Superior Court* heard testimony regarding the ability to perform a

warrantless search of a vehicle after a lawful arrest. The ruling in this case did not allow officers to search a vehicle in an ordinary traffic stop, and a pat down could not be performed unless “specific facts or circumstances gave the officer reasonable grounds to believe a weapon is secreted on the motorist’s person” (Capps, 1973, p. 483). Under *Terry v. Ohio* (1968), the Supreme Court issued a ruling that stated, “for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him" (*Terry v. Ohio*, 1968, p. 30). This ruling was based on a traffic stop conducted by officers who removed the driver and passenger from the vehicle. The officers searched the immediate area where both were located and found dynamite and a detonator (Ashman, 1979). The ruling in the California case, and several others, prompted the belief that the Supreme Court’s opinion toward searching a vehicle incident to an arrest is becoming more liberal. Riggs (2009) stated," Requiring police officers to state reasons for seizing an individual will ensure judicial scrutiny of police actions, and prevent the police from using the laws in a discriminatory, arbitrary manner" (p. 984).

Hale (2004) stated, "When officers make legal arrests, they are allowed to conduct a thorough search of the suspect for evidence or contraband for the offense associated with which they had been arrested" (p. 212). Each state interprets the amendments of the United States Constitution and their respective state laws differently. In 1970, a subject was stopped on a legal traffic stop and arrested for not having a valid license, and subsequent to that arrest, he was checked for weapons and narcotics, and located in his front pants pocket were narcotics (Capps, 1973). The

California Superior Court was divided on whether the search of the pockets of a person arrested is justified for any other reason than to search for weapons. For a search incident to an arrest to be valid, it must meet the following: "1. The arrest must be lawful; 2. Only certain articles may be seized; 3. The search must be made contemporaneously with the arrest; 4. The arrest must be in good faith" (Stuckey, 1979, p. 220).

Lastly, searches and the 4th Amendment should not be modified because part of the training an officer receives is to look at the not only the person or persons in the vehicle but also any and all items in plain view in the vehicle while conducting a traffic stop. Bohm and Haley (2005) stated, "Under the Plain View Doctrine, if the officer has a legitimate presence in place where he sees and seizes evidence or contraband, and the item seized is immediately recognizable as evidence or contraband, he may seize the item" (p. 119). The contraband observed in plain view of the officer allows him immediate access to the contraband, to place the owner under arrest, and provides probable cause to secure a warrant for the search of the vehicle (Chilcoat, 2000).

Related to the concept of the plain view, is the plain sniff conducted by a certified police canine. The idea is that no one in a vehicle has the right of privacy and to conceal contraband. The American Civil Liberties Union was a deciding factor in a United States Supreme Court case. The *City of Indianapolis v. James Edmond* case was affirmed on appeal by a decision made by the United States Court of Appeals for the Seventh District (American Civil Liberties Union, 2000). The decision was based on roadblocks set in place by the City of Indianapolis, Indiana, which were used to stop those who were carrying illegal narcotics or who were intoxicated and were not of the

legal age. The information revealed in the decision indicated that the amount of officers conducting the stops and the presence of police canines was too much of an intrusion on the public (American Civil Liberties Union, 2005, para. 2, 3, 5). However, the Supreme Court affirmed a decision made by a lower court after hearing *Illinois v. Caballes*, "which allows law enforcement officers to use a police canine to search the outside of a vehicle did not violate the 4th Amendment" (*Illinois v. Caballes*, (2005). This tool in law enforcement allows the officer to perform a free air search of the outside of the vehicle that is legally being detained. If the canine indicates (scratches, sits, or barks) in the presence or odor of a narcotic in the vehicle, the courts have ruled this allows officers probable cause to enter and search the vehicle without a warrant.

In 1925, the United States Supreme Court ruled in *Carroll v. United States*, 267, U.S. 132 that, "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant" (*Carroll v. United States,* 1925, p. 267, para. 154). This decision was made by the United States Supreme Court after evaluation of the Carroll case and based on the expectation of privacy in a vehicle being much less and the mobility of a vehicle having greater opportunity to destroy evidence. This area is a very fine lined area, and officers have to realize stepping out of the boundaries under this exception will jeopardize any evidence located. When there is an issue with illegal evidence, Stuckey (1979) explained, “Illegally obtained evidence will be excluded from use in a criminal trial” (p. 193). This is also referred to as the exclusionary rule, or fruit-of-the-poisonous-tree doctrine, which originally was set up for federal officers under, but was amended and made applicable to all states, *Mapp v. Ohio* in 1961 (Bohm & Haley, 2005). The

exclusionary rule is not a law that has no viable exceptions. If the prosecution can show the evidence would have ultimately been found from another source, the evidence may be admissible. Under these circumstances, the evidence can be used for prosecution. However, the ability to search a vehicle on reasonable suspicion is not permitted.

COUNTER POSITION

The first counter position in favor of modifying search warrants and the 4th Amendment is the lack of accountability when violations occur. In an article published in the *Arizona State Law Journal*, Misner (1997) stated, “The time has come to move the evolutionary process of the Fourth Amendment beyond the exclusivity of the exclusionary rule" (p. 806). Misner (1997) proposed massive changes to the federal grand jury procedures to include viewing all evidence, including unconstitutionally obtained evidence. Misner (1997) further stated, “The current use of the exclusionary rule permits prosecutors and defense counsel to conclude that societal interests are best served if misconduct of the police results in no observable response other than to lessen the punishment of the defendant" (Misner, 1997, p. 860). The belief is that law enforcement officers are getting away with violations of the 4th Amendment and not being punished for the violations, whether they are intentional or accidental. Misner (1997) leaned toward allowing grand juries to be having more powers than at present on any 4th Amendment violations.

However, modifications would prevent law enforcement from properly conducting their job. According to Oaks (1970)," the exclusionary rule "handcuffing" the police should be abandoned. If this is a negative effect, then it is an effect of the constitutional rules, not an effect of the exclusionary rule as the means chosen for their enforcement"

(p. 754). Oaks (1970) proclaimed his affirmation as a proponent for the 4th Amendment in his last comment. Additionally, Oaks (1970) further stated about the opponents, "They attribute far greater effect to the exclusionary rule than the evidence warrants, they are also in the untenable position of urging that the sanction be abolished so that they can continue to violate the [constitutional] rules with impunity" (p. 754).

In addition, a second counterpoint supports the change in protocol of the federal grand jury. Wilkey (1982) professed, "Most emphatically, I say there are several alternative choices for enforcing the fourth amendment protection against unreasonable searches and seizures" (p. 537). Wilkey (1982) continued his stance for diminishing the accountability of the 4th Amendment by saying, "Repealing the fourth amendment would be the best option, however, due to the political suicide this would unleash, the next best option would be the government disciplining their own and civil tort remedy" (p. 539). Wilkey (1982) was very vocal and opinionated in his beliefs that the United States Supreme Court does not utilize the exclusionary rule in all proceedings, only criminal proceedings.

Furthermore, law enforcement gained somewhat of a reprieve after a long battle in the legal system on their abilities to search a vehicle. Over a thirty-year span, the courts have broadened and adopted a number of new expectations to the automobile exception (Adams, 1999). Adams (1999) stated two items that are somewhat the basis of law enforcement intruding into a vehicle: "1. The impact illicit drug distribution had in American culture; 2. The danger to police officers due in part to America's love affair with the handgun" (p. 836).

Lastly, modifications to the 4th Amendment would provide steeper penalties for

police who violate the 4th Amendment. Some believe that police officers who violate the 4th Amendment are not punished enough under the articles to the exclusionary rule. Davies (2000), Associate Professor of Law at Ohio University, feels there has to be sanctions as well as penalties for law enforcement who violate the 4th Amendment. Davies (2000) wanted to add additional penalties to law enforcement officers, which would include monetary judgments.

However, the exclusionary rule, to this day, affects how police officers act. Kamisar (1978) stated, "But more recent and more comprehensive studies and analyses have cast grave doubt on conclusions about the rule's inefficacy in affecting police behavior" (p. 70). This is, in part, due to the court system allowing different degrees of violations. As stated, there was a belief that adding stiffer penalties to violations of the 4th Amendment by law enforcement officers would make a difference on how officers conduct their duties. However, these efforts have been to no avail in trying to change the 4th Amendment; therefore, no changes are necessary to the 4th Amendment, only complete enforcement of the amendment that are already in place.

RECOMMENDATION

Search warrants and the 4th Amendment should not be modified because it provides law enforcement the legal avenue to search for evidence to a crime. In addition, attempting to modify the requirements for obtaining a search warrant, or depriving law enforcement the ability to arrest on contraband items located in plain view, will benefit the criminal aspect and eventually harm the general public. These modifications would be a detriment to law enforcement. Searches incident to an arrest and voluntary consent should not be modified because it allows law enforcement

additional avenues to legally intrude into an area protected under the Fourth Amendment. Lastly, searches and the 4th Amendment should not be modified because part of the training an officer receives is to look at the not only the person or persons in the vehicle but also any and all items in plain view in the vehicle while conducting a traffic stop. Opponents of no modifications feel there are no legal ramifications for officers who violate the 4th Amendment. However, these changes would hamper the abilities of law enforcement to properly conduct their job. In addition, others have pushed for changes in the federal grand jury procedure by adding an additional grand jury against the officer during the same time as the case is being heard. This would shift the justice system to favor the criminals and not the officer.

The United States Constitution remains intact since its inception in 1787, with minor changes being added. This remains the focal point for the judicial branch, law enforcement, and even the suspects. *Mapp v. Ohio* (1961) stated, "After all, nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence" (p. 660). The remedy is to ensure mandated training for law enforcement officers is completed and possibly increased. Holding the chiefs of police and the sheriffs accountable for their officers is a more realistic avenue, as well as teaching those who maintain their affiliation with law enforcement to do the right thing, at the right time, for the right reason.

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