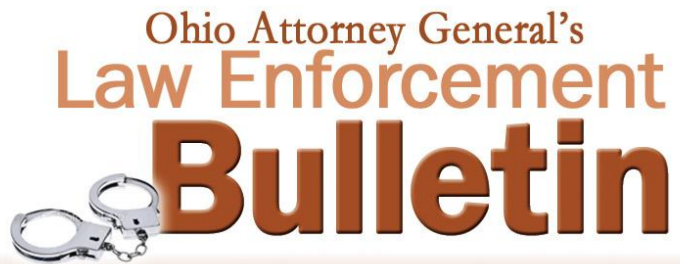

February 2015

Search & Seizure (Warrantless Search, Locked Basement, Owner Without Key): ***State of Ohio v. Norman***

Question: Can a property owner give consent to law enforcement to search a room or area of his home that he rents to another? What if the property owner is on probation and is subject to home searches?

Quick Answer: When a homeowner-landlord rents out a room, he retains the right to consent to a search of common areas shared by all residents. If the owner is on probation, the warrantless probation search must be limited to the common areas the probationer is known to occupy or have joint control over.

State of Ohio v. Norman, **Twelfth Appellate District, Warren County, Nov. 17, 2014**

Facts: Bradley Andre was visited by two probation officers and local law enforcement after reports that Andre had violated his probation by having firearms and marijuana plants in his home. After consent to search the home was given, the main and upper floors were searched. Even though officers detected a strong odor of marijuana, they found none on those floors. Officers then went to the basement door to search, but it was locked by key and a number-pad activated bolt lock. Andre informed them that he was renting the basement to Brandyn Norman and another individual, claiming he did not have a key or know the combination. He admitted to keeping "stuff" in the basement, including a gun safe. During the discussion the second renter came in. He admitted that marijuana was in the basement, but refused to give consent or open the door. Officers eventually decided to take the door off the hinges to gain access. Inside they found a marijuana-grow operation, seizing more than 100 plants.

Importance: When a homeowner-landlord rents out a room in his residence, he retains the right to consent to a search of the common areas shared by all residents. And where a co-tenant who is not on probation shares a residence with a probationer, the warrantless probation search of the residence must be limited to the common areas the probationer is known to occupy or have joint control over. So was the basement common? In this case it was not, despite it being part of the home, not having a separate entrance or house number, and storage for Andre's personal items. Because Andre did not have a key or know the combination to the bolt lock, he had no access. The renters had exclusive control over the basement; therefore officers, both probation and law enforcement, had to obtain their consent or a warrant to conduct the search. Additionally, Andre's statements that he had rented out the basement and could not open the locks to the basement door, combined with his production of a written lease and the presence of one of the co-tenants on the scene, created a reason to doubt Andre's authority to consent to a search of the basement. No reasonable officer under the circumstances could rely upon the consent.

Keep in mind: Officers argued that exigent circumstances existed for them to conduct a warrantless search of the basement. To apply, there must be probable cause and a real likelihood the evidence will be moved or destroyed before a warrant can be obtained. In this case, there was probable cause, however, based on testimony it was unlikely there was a real danger the evidence would be destroyed. One probation officer testified, I "didn't really think that there was anyone in the basement, just for the fact that the door was locked on the outside. I just figured it was locked, so how could somebody get out if it was locked, you know, to myself, I didn't think anybody was down there."

More on Search and Seizure of Property

First, get warrant, and second, take marijuana: You are part of a marijuana eradication team and based on aerial surveillance of a property, you receive information that marijuana is growing in the back yard of a residence that is surrounded by a fence on three sides. You knock on the door, but no one answers. You then walk to the back door, to find other officers on your team removing marijuana plants from their pots, which were in plain view in the backyard. While in the back, you also notice a ventilation system and the odor of marijuana. Based on these facts, a search warrant is obtained, and the home is searched. You find firearms and equipment to grow marijuana. Was the seizure of the potted marijuana plants proper? The court in *Littell* said no. While probable cause existed for the warrant because of the aerial surveillance and plants sitting outside, there was no authority to unlawfully trespass to seize the marijuana without a warrant. Remember, plain view means you can plainly see the object, and you have a lawful right of access to the object. Because the plain view exception did not apply, there must be an exigent circumstance to enter the property. In this case, the officers provided none. The court determined the officers acted unreasonably when entering the back yard, sending this case back for further review. *State v. Littell,* Ninth District Court of Appeals, Summit County, Oct. 22, 2014.

Hold on…let me call your parole officer: You receive a tip of potential drug trafficking at a residence. After a few spot checks, you determine that you have no legal justification to enter the home. During surveillance, however, you do note a female coming and going from the home on several occasions and know she is on post-release control. Part of her post-release control is that her residence may be searched at any time—which is supposed to be with her mother. You obtain the rental agreement and find the female's name on it. A call is made to the APA, who then sets up surveillance of the property to determine if the female is living there in violation of her parole. When you and the APA observe the female drive up to the house, you get out of your car and approach her on the sidewalk. The APA tells her that the "gig is up" and that he knows she is living at this residence, not with her mother. He also says the residence must be searched. You follow her and the APA into the home to find a male preparing to roll a joint—he is arrested. The male does not give consent for the house to be searched, but the female admits to violating her probation and using marijuana. The APA does a parole search and finds a firearm and controlled substances. Is the warrantless search proper? The court in *Payne* said yes. Based on a totality of the circumstances, there was probable cause to believe the female was in violation of her parole. At that time, the APA properly performed a search of the residence. The court also threw out the argument that the APA was acting as a "stalking horse" for a police investigation. Remember, while it is permissible for law enforcement and probation officers to work together and share information, it is not permissible to use the probation system to evade the Fourth Amendment warrant requirement in your investigations. *U.S.A. v. Payne,* 6th Cir., S.D. Ohio, Oct. 24, 2014.

Attention Third District: Retrieving Medical Records from Hospital: Michael Little was involved in a single car crash and was transported to the local hospital where he admitted to consuming four beers. A blood sample was taken and sent to the police lab for testing. The hospital also took a blood sample for diagnostic purposes. Little filed a motion to suppress arguing the blood taken for the police lab was done without a warrant. After the motion was filed, the officer issued a request for hospital records to obtain the results of their blood draw under R.C. 2317.02 and 2317.022, which he received. Little filed a second motion to suppress saying R.C. 2317.02 and 2317.022 are unconstitutional and required the issuance of a warrant to obtain the results. R.C. 2317.02(B)(2)(a) allows a health care provider to waive its ikprivilege and share medical records showing the amount of alcohol, drugs, or controlled substances in an individual's system when law enforcement have an official criminal investigation. The Third District has determined that while the statute allows you to obtain the confidential information, it doesn't strip an OVI suspect of his right to privacy. So if you work in the Third District, know that the court has said these statutes do not authorize warrantless search and seizure of patient records. *State of Ohio v. Little,* Third Appellate District, Auglaize County, Nov. 3, 2014.

Proper Protocol (Knock and Talk): ***Carroll v. Carman***

Question: Does a knock and talk have to begin at the front door of a residence?

Quick Answer: Although the question was not directly answered by the court, the opinion seems to give you the ability to make the determination about whether a door is one that is primarily used by the general public. If you are able to make that determination, you should probably get a warrant.

Carroll v. Carman, **United States Supreme Court, 3rd Cir., Nov. 10, 2014**

Facts: Police received a report that Michael Zita had stolen a car with two loaded handguns and was hiding at the home of Andrew and Karen Carman. Officer Jeremy Carroll and a second officer arrived separately to the Carman's home, which sat on a corner lot. Parking was not available in the front of the house, so both officers parked on a gravel parking area on the side of the property. They exited their cars and first came upon a small structure with an open door and light on inside. No one was inside so they walked toward the house, stepped onto a ground-level deck, and approached a glass sliding door—which they knocked on. Mr. Carman came out of the house in an aggressive manner. Carroll explained they were looking for Zita, and Mr. Carman refused to answer. Instead he reached for his waist. Carroll grabbed his right arm, and Mr. Carman twisted away, causing him to lose balance and fall into the yard. Mrs. Carman then came out, identified herself and her husband. Carroll asked her if Zita was there, and she said no. The officers then asked for permission to search the home. Mrs. Carman consented. Zita was not in the home, and the Carmans were not charged with any crimes.

The Carmans sued Carroll under 42 U.S.C. 1983 for violating their Fourth Amendment by entering the backyard and deck without a warrant. Carroll argued that the knock and talk exception to the warrant requirement allowed him to approach the door. The Carmans disagreed arguing that the sliding door was not one the general public would use. Instead, they said the officers should have knocked on the front door.

Importance: The question the officer specifically asked the U.S. Supreme Court to answer was whether there was a front door rule—meaning do you have to start at the front door. The court does not actually answer this question. Instead, it held that Carroll was entitled to qualified immunity because he believed

the side door was one used by the general public. What the court did do was examine other cases when officers started the knock and talk at a secondary door. These examples seem to support the ability of the officer to make her own determination about whether a door is accessible to the public.

- In *Estate of Smith v. Marasco*, the court held that an unsuccessful knock and talk at the front door does not automatically allow officers to go onto other parts of the property. But, it did not say that knocking on the front door is required before officers go onto other parts of the property that are open to visitors.

- In *United States v. Titemore*, a police officer approached a house that had two doors. The first was a traditional door that opened onto a driveway; the second was a sliding glass door that opened onto a small porch. The officer chose to knock on the glass door. On appeal, the defendant argued that the officer had unlawfully entered his property without a warrant in violation of the Fourth Amendment. The Second Circuit rejected the appeal, finding the sliding glass door was a primary entrance visible to and used by the public.

- In *United States v. James,* police officers approached a duplex with multiple entrances. Bypassing the front door, the officers used a paved walkway along the side of the duplex leading to the rear side door. On appeal, the defendant argued that the officers violated his Fourth Amendment rights when they went to the rear side door. The Seventh Circuit rejected that argument, explaining that the rear side door was accessible to the general public and was commonly used for entering the duplex from the nearby alley. In situations where the back door of a residence is readily accessible to the general public, the Fourth Amendment is not implicated when police officers approach that door in the reasonable belief that it is a principal means of access to the dwelling.

Keep in mind: In practice, it may be best to start at the front door. If you can't determine where the front door is, or are met with multiple doors that could generally be accessed by the public, you can get a warrant or, if there is no time, document why you chose the door you did. For example, stating you followed a path from the sidewalk to a door on the side of the home gives more detail about the conditions that led to your choice. A path from the sidewalk seems like it invites visitors to that door rather than if you walk through the grass and onto a deck to knock on a rear door.

More on Proper Protocol

***Miranda* and a 9-year-old:** You respond to a call in a nearby apartment complex. Once you arrive you find a 9-year-old who has been accused by his aunt of raping his mentally and physically disabled adult cousin. His parents claim the aunt assaulted the 9-year-old. Because many people had gathered and it was a sensitive topic, you motion for the child to come talk to you privately. The child says yes and you look to the mother, who gestures in a manner indicating consent. You walk a short distance away, about 20 feet, and stand in front of your cruiser. You speak to the child for 30 minutes and do not handcuff him or place him inside the cruiser. He tells you what happened, giving inconsistent stories, then says he cannot remember much of the time he was alone with the cousin in the apartment. You release the child to his mother's custody. Did you violate the child's rights by not giving *Miranda?* The court in *In re R.L.* said no. There was no basis to conclude that the child had been taken into custody or otherwise deprived of his freedom during the conversation. Additionally, his mother was a few feet away and gave consent. *In re R.L.,* Second Appellate District, Montgomery County, Nov. 14, 2014

BAC and tobacco: You arrest a suspect for OVI and take him to the jail for a breath test. Prior to giving the test you ask the suspect to remove tobacco from his mouth. Unknown to you, he only spits part of it out and leaves the rest in his mouth, swallowing some of the tobacco juice. After 20 minutes, you perform the test. Are the results valid? The court in *Shockey* said yes. Although Douglas Shockey decided to keep some of the tobacco in his mouth and swallow juices during the 20-minute period, the officers sustainably complied with the law. They asked him to remove the material, saw him remove material, and during the 20-minute period did not observe him place anything into his mouth. Shockey never informed the officers that the tobacco was in his mouth and did not provide any evidence that the tobacco impacted the test results. Even though the results were considered good, as a best practice it may be wise to look into the suspect's mouth to verify they have all of the substance out before starting the 20-minute clock. *State of Ohio v. Shockey,* Third Appellate District, Marion County, Nov. 10, 2014

Out of Virginia—Fingerprint scans and Smart Phones: A Virginia Circuit Court judge ruled that police officers cannot force criminal suspects to divulge cellphone passwords, but they can force them to unlock the phone with a fingerprint scanner. The court said that a fingerprint is more like providing a DNA or handwriting sample, or an actual key, which the law permits. A passcode, though, requires the defendant to divulge knowledge, which the law protects against. If applied by other courts, the ruling could become important as more device makers incorporate fingerprint readers that can be used as alternatives to passwords. For example, Apple introduced fingerprint technology last year in its iPhone 5S and Samsung included it in its Galaxy S5. To read the opinion and news article, click here.

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The Ohio Attorney General's Ohio Peace Officer Training Academy (OPOTA) provides specialized training for peace officers in areas such as Firearms and Specialty Munitions, Human Relations, Investigations, Management and Advanced Driving. In addition to these topics, OPOTA's Advanced Training staff also conducts Instructor Level courses for numerous topics. You can find OPOTA's complete course catalog online at http://www.OhioAttorneyGeneral.gov/Law-Enforcement/Ohio-Peace-Officer-Training-Academy/Course-Catalog.aspx

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