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Search and Seizure-Marijuana Sniffing Dogs

Robert S. Bogard

Court held in *State ex rel. McCurley v. Hanna*,[42] a companion case to *Stanhope*, that trial courts have inherent authority to adjudicate civil contempt proceedings in cases concerning nonpayment of maintenance or support. There is no apparent reason, therefore, why *Stanhope* should not be extended to proceedings not initiated pursuant to the statutory provision.

CHRISTOPHER F. JONES

SEARCH AND SEIZURE—MARIJUANA SNIFFING DOGS

United States v. *Bronstein*[1]

On July 26, 1974, two men separately purchased airline tickets from San Diego, California to Windsor, Connecticut. Each man carried two identical suitcases of approximately equal size, shape, and weight. Although the men appeared to act as strangers when buying the tickets, they were subsequently seen talking together. This behavior was observed by an airline ticket agent. The agent's suspicions being aroused, he notified the Drug Enforcement Agency (hereinafter cited as D.E.A.) in San Diego. The D.E.A. agent, "who had previous experience with the ticket agents and found them to be reliable informants . . .,"[2] called the Hartford, Connecticut office of the D.E.A. and informed them of the suspicions of the airline ticket agent. The D.E.A. office in Hartford alerted the Connecticut State Police unit at the airport. When the flight from San Diego arrived at the airport, about fifty pieces of luggage were lined up. Meisha, a "canine cannabis connoisseur",[3] nosed at the seams of two suitcases, then bit and ripped them. The defendants were each seen picking up one of these bags and both were arrested. The defendants consented to the officer's request to open their luggage. Two hundred forty pounds of marijuana were found in the luggage.

The defendants' motion to suppress the marijuana seized in the warrantless search was denied. They appealed the denial to the Second Circuit Court of Appeals contending that the use of the marijuana sniffing dog constituted an illegal search and seizure within the protection of the fourth

only in cases in which payments have been ordered to be made to the circuit court clerk. However, trial courts may at any time, upon their own motion or the motion of one of the parties, order that payments be so made.

42. 535 S.W.2d 107, 109 (Mo. En Banc 1976).

1. 521 F.2d 459 (2d Cir. 1975).
2. 529 F.2d at 460.
3. *Id.*

amendment.[4] The second circuit affirmed the conviction, holding that there was no search within the meaning of the fourth amendment.

To support its holding the court relied upon *United States* v. *Fulero*.[5] In *Fulero* the District of Columbia Circuit Court of Appeals flatly rejected the contention that the use of a marijuana sniffing dog was a search. The value of *Fulero* was limited because the court rejected the defendant's contention as being "frivolous" without discussion or citation of authority. The *Bronstein* court supplied the logic and authority that *Fulero* lacked.

The court first cited the "plain view" doctrine as support for its conclusion that the use of a marijuana sniffing dog was not a search within the meaning of the fourth amendment. The central concept of this doctrine is that if an officer sees evidence or contraband while in a place where he has a right to be, he has not conducted a search within the meaning of the fourth amendment.[6] The doctrine has been extended to "plain smell."[7] The *Bronstein* court reasoned that because the marijuana was within the dog's "plain smell," the defendant's fourth amendment rights were not violated.[8] The major conceptual problem with this conclusion is that the officers themselves could not have detected the odor of the marijuana. The court stated that if the officers had smelled the marijuana it would not have been a search. The court perceived no constitutionally significant difference in the dog's smelling of the marijuana. However, when magnometers[9] and x-ray machines are used to aid an officer in detecting objects they are held to be a search.[10] The court reasoned that if there had been no search,

4. U.S. CONST. amend. IV.

5. 498 F.2d 748 (D.C. Cir. 1974).

6. Coolidge v. New Hampshire, 403 U.S. 443, 446 (1971); Harris v. United States, 390 U.S. 234, 236 (1968).

7. Johnson v. United States, 333 U.S. 10 (1948); Taylor v. United States, 286 U.S. 1 (1932). *See also* United States v. Johnson, 497 F.2d 397 (2d Cir. 1974); United States v. Martinex-Mira-Montes, 494 F.2d 808 (9th Cir.), *cert. denied*, 419 U.S. 897 (1974).

8. 521 F.2d at 461. The court cited no case law to support this view. "Since the dogs have not yet at least been trained to talk, their response to the presence of the drug is conveyed by nosing along the seams . . . and then ripping and biting at the bags . . . [I]t cannot be sensibly characterized as a search or seizure." 521 F.2d at 462.

9. A magnometer is a device used to determine the presence of metal. It is commonly used in airport searches.

10. *See, e.g.*, United States v. Palazzo, 488 F.2d 942, 946 (5th Cir. 1974); United States v. Slocum, 464 F.2d 1180, 1182 (3rd Cir. 1972); United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972).

The *Bronstein* court purports to distinguish the search by a magnometer from that of a marijuana sniffing dog. Meisha, it points out, has never falsely identified a substance whereas the magnometer will be set off by the presence of any metal and will "willy nilly lead to the body or bag search." The constitutional basis of the court's logic is unclear. Is it suggesting that because a method of search is accurate or reliable it is no longer a search? The constitutional violation is in the search, *not in the finding or failure to find.*

there could be no violation of defendants' fourth amendment rights.[11]

The court further supported its view by analogy to cases in which evidence seen by an officer with the aid of a flashlight or binoculars is held to be within his "plain view."[12] The analogy is not convincing because these cases have been limited to their facts.[13] Furthermore, the use of a dog's sense of smell would seem more analogous to the use of a magnometer than to a flashlight or binoculars.

The question of whether a person has fourth amendment rights in a particular situation depends upon whether there is a "reasonable expectation of privacy."[14] The test is not simply a subjective one of an individual knowing that someone is observing him. Rather, the test of "reasonable expectation" must involve judicial evaluations of society's view of what circumstances entitle an individual to a reasonable expectation of privacy. Thus, a person talking on a public phone has a reasonable expectation that his conversation is not being monitored. If that same individual was shooting heroin in the phone booth he would not have the same reasonable expectation of privacy.[15]

The use of a flashlight and binoculars had been held to be within the "plain view" doctrine before the *Katz v. United States* formulation of a reasonable expectation of privacy.[16] Continued acceptance since *Katz*[17]

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11. An issue not dealt with herein was defendant's argument that Meisha was not sufficiently accurate to allow a search utilizing the dog's sense of smell. Defendants argued that Meisha was only 50% accurate because she had missed two of their bags which also contained marijuana. The court pointed out that it is not constitutionally significant that Meisha missed bags, but that it might have been significant if Meisha had identified bags as containing marijuana which in fact did not.

Even if the defendants could have shown false identifications by Meisha, their impact on the prosecution's case is doubtful in light of the magnometer cases. A search by a magnometer is justified because of the danger of passengers carrying concealed weapons and yet by design it will be set off by any metal object. *See* cases cited footnote 10 *supra*.

12. The court's analogy seems to be that these are common items used by the public, and their use is not considered a search. *See* United States v. Lee, 274 U.S. 559, 563 (1927); United States v. Hood, 493 F.2d 677, 680 (9th Cir. 1973), *cert. denied*, 419 U.S. 852 (1974); United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Cobb v. Wyrick, 379 F. Supp. 1287, 1292 n.3 (W.D. Mo. 1974).

13. *Id.* Note also that the magnometer and x-ray case cited in note 10 *supra* hold that the use of these devices are a search within the fourth amendment. It follows that these cases hold that the use of the magnometer or x-ray machine is not within the plain view doctrine. This suggests a refusal by the courts to expand the plain view doctrine to allow it to cover situations where an officer has a "view" of some evidence only with the aid of an external instrumentality.

14. Katz v. United States, 389 U.S. 347 (1967). If an individual has a reasonable expectation of privacy then the use of a device to bring something within the view of the officer will not be in his plain view.

15. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L.R. 349 (1974) in which these concepts and this analogy are fully developed.

16. United States v. Lee, 274 U.S. 559, 563 (1927). *See also* Katz v. United States, 389 U.S. 437 (1967).

17. *See* cases cited note 11 *supra*.

indicates a judgment by the courts that if evidence can be seen with the use of a light or binoculars, one is not entitled to a reasonable expectation of privacy.[18]

The cases which have held there is a reasonable expectation of privacy can be distinguished from those holding to the contrary. There is a reasonable expectation of privacy when the individual places himself in a situation where a physical barrier protects the object searched or seized from perception. To entitle a person to a reasonable expectation of privacy, the barrier has to be capable of shielding the object from normal sense perception.[19] Under this analysis, the use of a marijuana sniffing dog would seem to be a search. There was no contention in *Bronstein* that the officers smelled the marijuana through the walls of the suitcase. The use of a dog is not just a case of an accepted or commonplace amplification of the officer's own sense of smell. The use of Meisha properly would seem to be a search within the guidelines of *Katz*.

The court's contention that the use of the dog was not a search raises startling implications. If detection of the odor of marijuana by a dog is within "plain view," then law enforcement agencies can use the dog's sense of smell indiscriminately without any fourth amendment limitations as to reasonableness, so long as the officer is in a place where he has a right to be. The *Bronstein* court purports to deny this implication. It stated that under the circumstances presented, the use of Meisha posed no justifiable constitutional concern.[20] The limitation imposed by the court was that the officers had "ample cause"[21] to use Meisha. The constitutional basis of this limit is unclear. The fourth amendment requires reasonableness or probable cause for a search or seizure. However, the *Bronstein* court held that the use of a marijuana sniffing dog was not a search.[22] This being the case, the fourth amendment would seem to provide no protection.

The *Bronstein* court further justified its conclusion that the use of a marijuana sniffing dog was not a search on the ground that there "can be no reasonable expectation of privacy when one transports luggage by plane . . . ."[23] The court relied upon *Katz*. The Supreme Court stated in *Katz* that, "What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected."[24] The *Bronstein* court's assertion that one who consigns his luggage to a common carrier has no expectation of

18. Cobb v. Wyrick, 379 F. Supp. 1287, 1292 n.3 (W.D. Mo. 1974).

19. This principle is no more than an empirical synthesis of the cases decided. In the final analysis, each case represents a separate evaluation.

20. 521 F.2d at 463.

21. *Id.* at 461.

22. *Id.* at 462.

23. *Id.*

24. Katz v. United States, 389 U.S. 347, 351 (1967). Note that this is in essence a restatement of the plain view doctrine.

privacy is doubtful.[25] In *United States* v. *Edwards*[26] the court stated that anti-skyjacking searches must be "reasonable" within the boundaries of the fourth amendment. Thus, *Edwards* must have found that a passenger has some expectation of privacy with respect to his checked luggage.[27]

The better reasoned view is that the use of a marijuana sniffing dog is a search within the meaning of the fourth amendment. This does not solve the problem in *Bronstein* because the fourth amendment only prohibits "unreasonable searches and seizures." Cases agree that the reasonableness of a warrantless search[28] implies the use of a balancing process.[29] The disagreement is the manner in which the balancing is to take place.

Katz[30] involved the use by police of a hearing device attached to the outside of a public telephone booth. After determining that this constituted a search within the protection of the fourth amendment, "the Court proceeded to require the same justification for the surveillance as would be required before an officer could go barging into Katz's bedroom."[31] If such an approach were taken in *Bronstein* the validity of a search would be doubtful.[32]

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25. *See, e.g.*, United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973); United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973), *cert. denied*, 415 U.S. 902 (1974).

26. 498 F.2d 496 (2d Cir. 1974).

27. *Id.* at 500.

28. A question not to be dealt with here is whether the D.E.A. agents should have obtained a warrant. In United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974) the court held that even where agents had what might have been probable cause to believe that a passenger on an airplane was carrying illegal drugs, the agent "should have impounded the luggage and presented his facts to a magistrate." Query as to the validity of this holding in light of Chambers v. Maroney, 399 U.S. 42 (1970), in which the Supreme Court approved a warrantless search of an automobile where the alternative was impounding the car. In United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975) the court held that the use of a marijuana sniffing dog was a search within the fourth amendment, and that the officers should have obtained a search warrant first.

It should be noted that the flight time from San Diego to Connecticut is approximately 9 hours. This would be sufficient time to appear before a magistrate without having to impound the luggage.

29. This is the reasoning process used in justifying anti-skyjacking devices. *See* United States v. Edwards, 498 F.2d 496 (2d Cir. 1974); United States v. Albardo, 495 F.2d 799 (2d Cir. 1974); United States v. Slocum, 464 F.2d 1180 (3rd Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972). For a general overview of the area *see* Note, *The Antiskyjack System: A Matter of Search or Seizure*, 48 NOTRE DAME LAWYER 1261 (June 1973).

30. 389 U.S. 347 (1967).

31. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L.R. 349, 388 (1974).

32. In this respect recall that the ticket agent and the D.E.A. men had no evidence that a particular crime had been committed. The record does not show that the defendants were known drug sellers or users. All that was known about the two men was that they bought tickets from San Diego to Connecticut separately, were later seen talking together, and each carried two suitcases of approximately

In contrast to the approach in *Katz* is the line of cases beginning with *Terry v. Ohio*.[33] Whereas Katz suggested a single threshold fourth amendment standard, *Terry* suggested a sliding scale.[34] The Supreme Court in *Terry* stated that the need to search should be balanced against the extent of invasion. In making the assessment of whether a search is unreasonable, the standard is to be an objective one. "[W]ould the facts available to the officer at the moment of the . . . search warrant a man of reasonable caution in the belief that the action taken was appropriate."[35] Such an approach allows the definition of "reasonable" to change as the seriousness of the intrusion and society's interest change. The skyjacking cases are decided precisely upon this analysis.[36] All passengers are searched by the magnometer before they board, irrespective of probable cause. Such a procedure could not stand up under a fourth amendment approach which allowed one standard of reasonableness. The procedure has been approved because the prevention of skyjacking is an extremely important societal interest[37] and a limited degree of intrusion is involved in such searches.

In determining the reasonableness of a search, there is a significant difference between a magnometer search and the search involved in *Bronstein*. In *Bronstein* the search was made after arrival of the airplane at its destination. The marijuana in *Bronstein* was found in a search for drugs and was not incidental to a search to prevent skyjacking. Thus, the repeatedly emphasized justification of preventing a skyjacking was not involved in *Bronstein*. On the other hand it is at least arguable that the degree of intrusion is greater in a magnometer search because it is less selective than the use of a marijuana sniffing dog.

Judge Mansfield adopted a balancing approach in his concurring opinion in *Bronstein*. In balancing society's interest against the individual's interest, Judge Mansfield saw two factors as being important: (1) the defendants had consigned their baggage to a common carrier and therefore their reasonable expectation of privacy was reduced; and (2) the D.E.A. agent had some "reasonable grounds to suspect the presence of contraband." Therefore, Mansfield said it was not unreasonable "to permit use of external method or device to determine whether the baggage . . ." contained contraband.[38]

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equal size, weight and shape. These facts would seem too commonplace to warrant a full search and/or seizure.

33. Terry v. Ohio, 392 U.S. 1 (1968).

34. *Id.* at 21-22. Note that Amsterdam, in his article, *Perspectives on the Fourth Amendment*, 58 MINN. L.R. 349, 390-95 (1974), discusses this interpretation of *Terry*, but ultimately rejects the conclusion that it is the law today.

35. Katz v. United States, 389 U.S. 347 (1967).

36. *See, e.g.*, United States v. Alsando, 495 F.2d 799 (2d Cir. 1974); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972).

37. *Id.*

38. 521 F.2d at 464.