University of Dayton Law Review

Volume 2 | Number 1 Article 14

January 1977

Search and Seizure: The Detection of Marijuana by Trained Dogs

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SEARCH AND SEIZURE: THE DETECTION OF MARIJUANA BY TRAINED DOGS—*United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1121 (1976).

Our society has witnessed, in recent years, the growing menace of drug abuse in the United States.[1] In an effort to curb the distribution and sale of controlled substances such as marijuana, police have resorted to novel means of ferreting out concealed drug caches. The use of specially-trained animals to detect odoriferous drugs among the personal effects of suspicious persons is currently favored by both courts and law enforcement agencies. Recently, in *United States v. Bronstein*,[2] the United States Court of Appeals for the Second Circuit held that the use of specially-trained dogs to detect odors emanating from personal baggage consigned to a public carrier is not a search constitutionally protected by the fourth amendment.

I. FACTS

The defendants in *Bronstein* purchased tickets at the San Diego, California airport as strangers, but were later seen talking together as if they were old friends. An observant airline employee regarded this as suspicious behavior and notified Drug Enforcement Agency (DEA) personnel, who dispatched agents to the defendants' destination, the Windsor, Connecticut terminal. One agent was accompanied by Meisha, a German shepherd specially trained to detect marijuana odors. As the baggage was placed on the conveyor belt, Meisha reacted positively to two pieces of baggage among fifty other pieces. The dog sniffed vigorously and nipped and bit, but did not otherwise alter the baggage. When the defendants claimed the baggage, they were placed under arrest, and only then did they freely and voluntarily consent to a search of their suitcases. Inside each suitcase the agents found about sixty pounds of marijuana.[3]

On appeal, the defendants contended that the use of a trained dog to inspect baggage was a search within the protection of the fourth amendment, and that in their own case this action constituted a warrantless search and seizure without probable cause,

1. 1970 U.S. CODE CONG. & AD. NEWS 4567.

2. 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1121 (1976).

3. This case involved two instances or procedures which may have constituted a search. The first is the employment of Meisha to detect any odor of marijuana emanating from the luggage. The second instance is the search incident to the apprehension of defendants by DEA agents. This second search will not be considered as the appellate court's holding is based upon findings of fact which were not "clearly erroneous." Also, the consent doctrine, or "incident to lawful arrest" doctrine, are not the focus of this casenote.

requiring exclusion of the evidence seized. Affirming the lower court's holding, the Court of Appeals for the Second Circuit rejected the contention that use of a canine's senses to detect odors is violative of the search and seizure provision of the fourth amendment. The court found, *inter alia*, that the sniffing, nipping and biting at the luggage by Meisha was not tantamount to a search and mentioned that the contention had been described as "nonsense" in the lower court[4] and "frivolous" in the Circuit Court for the District of Columbia.[5] The opinion by Judge Mulligan stated that detection of odoriferous drugs by the use of canine senses is not different in kind from the use of police officers' own olfactory senses and, while perhaps a technical trespass, Meisha's biting at the baggage did not expose the contents of the bag and could not sensibly be characterized as a search or seizure. The court disagreed with the contention that police are limited to their own individual senses, noting that the use of "sense-enhancing" instruments to aid efforts to detect contraband does not constitute an impermissible fourth amendment search.[6] Implicit in the majority's reasoning was a "plain smell" theory[7] analogous to the open view doctrine.[8] Finally, the court found that the defendants could have no reasonable expectation of privacy where they transported baggage by plane, because public safety precautions compel continual scrutiny of passengers and their effects.[9]

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4. 521 F.2d at 461.

5. United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974) (per curiam).

6. 521 F.2d at 462.

7. *See* Comment, 13 SAN DIEGO L. REV. 410, 422-27 (1976).

8. The "open view" doctrine holds that objects discovered in open view from a lawfully occupied vantage point are not "searched" and may be seized upon a valid warrant or on exigent circumstances justifying the failure to obtain a warrant arising from inadvertent discovery. *See* Annot., 29 L. Ed. 2d 1067 (1971).

9. 521 F.2d at 462. Circuit Judge Mansfield submitted a concurring opinion which distinguished use of sensitive animals to detect slight odors, from cases which sanction the enhancement of human senses by the use of instruments such as binoculars. He compared the majority's opinion of Meisha's inspection to that of "plain view," Coolidge v. New Hampshire, 403 U.S. 443, 465-68 (1971), rather than that of a search, stating at 464,

> [The police agents'] own senses were replaced by the more sensitive nose of the dog in the same manner that a police officer's ears are replaced by a hidden microphone in areas where he could not otherwise hear because of the inaudibility of the sounds. The illegality of the latter practice in the absence of a search warrant or special circumstances has long been established. (citation omitted).

Further, Judge Mansfield could not distinguish the effect of Meisha's search from that of a magnetometer. "[E]ach detects hidden objects without actual entry and without the enhancement of human senses. . . . [T]he important factor is . . . the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search." He noted that marijuana does not present the danger found to justify searches of boarding airline passengers.

II. Definition of a Search

Generally speaking, a "search" is a matter of invasion and quest and involves an examination or inspection of a person, his property, or his effects.[10] However, the determination of whether an act constitutes an unreasonable search must stand or fall on the facts of each case.[11] No literal or mechanical approach should be adopted in determining what may constitute a search and seizure.[12] Traditionally, an unconstitutional search had been held to occur when a constitutionally protected area was invaded by an agent of the state without a warrant.[13] The landmark case of *Katz v. United States*[14] superseded this line of authority, holding that the "trespass" doctrine was no longer controlling. *Katz* enunciated the principle that:

> the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[15]

Thus, the location of a container is immaterial if its owner justifiably expects the enclosure to be free from governmental intrusion. For example, even in the absence of physical intrusion or technical trespass into a given enclosure, fourth amendment protection extends to the recording of overheard oral statements.[16] Detection of the odor emanating from the defendants' suitcases in *Bronstein* can easily be analogized to the amplification of Katz's voice inside the telephone booth. On that basis, then, the Second Circuit could have found a search within the meaning of the fourth amendment.

Furthermore, cases involving use of a magnetometer to detect metal had previously held that use of such an instrument, which does not enhance the senses, is a search.[17] In *Bronstein*, the Second

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Judge Mansfield based his opinion on his belief that "one who consigns luggage to the common baggage area of a public carrier . . . cannot expect to enjoy as much privacy with respect to his person or property carried by him personally into, on or from the carrier or facility." He concluded that the court should strictly limit a search to cases where there is probable cause similar to or stronger than in the instant case.

10. Hale v. Henkel, 201 U.S. 43 (1905).

11. United States v. Lewis, 274 F. Supp. 184 (S.D.N.Y. 1967).

12. Lanza v. New York, 370 U.S. 139 (1962).

13. *See* Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1940).

14. 389 U.S. 347 (1967).

15. *Id.* at 351.

16. *Id.* at 353.

17. State v. Damon, 18 Ariz. App. 421, 423, 502 P.2d 1360, 1362 (1972):

Circuit found the use of X-ray machines or magnetometers to be searches within the meaning of the fourth amendment.[18] Nevertheless, Judge Mulligan distinguished the use of police dogs and magnetometers,[19] by reasoning that the magnetometer has been used as an indiscriminate device against all passengers without probable cause, and discloses metal items upon the person where there is a normal expectation of privacy. Meisha, by contrast, detected marijuana pursuant to a surveillance of baggage undertaken only upon reliable information. This analysis, however, did not address the threshold question of whether a search had occurred.

III. The Plain View and Open View Doctrines

The *Bronstein* court relied upon an apposite line of authority to support the finding that canine assistance was not a search.[20] Those cases held that where certain sense-enhancing instruments were used to aid in the detection of contraband, their use did not constitute a search because any objects discovered were always clearly visible with the aid of the instruments. The rationale was that since the discoveries precede any intrusion, no constitutional violation of the protected area occurred. The court relied upon four cases. *United States v. Lee*,[21] generally referred to as the first plain view case,[22] involved detection by the coast guard with the aid of a search-light, of cases of contraband whiskey on the deck of defendant's boat. The Court held that the use of a search-light was comparable to the use of a marine glass or a field glass and was not prohibited by the Constitution.[23] *United States v. Hood*[24] held that where an officer shined his flashlight into a car and saw vials of pills in "plain view," the act did not constitute a search because what he saw was encompassed within the plain view doctrine. In *United*

> We can see no difference between an intrusion into the defendant's handbag by means of an electronic device rather than an actual physical intrusion by opening the handbag and conducting a physical search. The very purpose and function of the magnetometer is to search for metal and disclose its presence in areas where there is a normal expectation of privacy.

Accord, People v. Kuhn, 33 N.Y.2d 203, 306 N.E.2d 777, 351 N.Y.S.2d 649 (1973); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972).

18. United States v. Albarado, 495 F.2d 799 (2d Cir. 1974). *See also* United States v. Epperson, 454 F.2d at 770.

19. 521 F.2d at 462, 463.

20. 521 F.2d at 462 n.3 (use of boat searchlight, flashlight, binoculars; generally characterized as "sense-enhancing" instruments).

21. 274 U.S. 559 (1927).

22. Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 Mercer L. Rev. 1047 n.2 (1975).

23. 274 U.S. at 563.

24. 493 F.2d at 677 (9th Cir.), *cert. denied*, 419 U.S. 852 (1974).

States v. Minton,[25] officers aided by binoculars viewed cartons of illicit liquor being unloaded from a truck. The court held the subsequent seizure of the whiskey in the truck was within the plain view doctrine. Finally, *Cobb v. Wyrick*[26] concerned the inadvertent discovery of spent shell casings in defendant's backyard by an officer using a flashlight. The Missouri Supreme Court held that the officer's discovery did not constitute a search. On appeal, the district court approved the application of the plain view doctrine but found that the record did not contain enough facts to determine whether the officer was lawfully upon the premises.

These four cases purport to invoke the plain view doctrine in instances where objects are open to view only with the aid of devices which enhance the sense of sight. The term "plain view" has caused some confusion among the courts in these "open view" situations.[27] The true plain view doctrine was enunciated in *Coolidge v. New Hampshire*.[28]

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.[29]

The doctrine will justify a seizure only when the police have a prior justification for an intrusion,[30] when the incriminating nature of the object seized is immediately apparent,[31] and when its discovery is inadvertent.[32] The doctrine is not applicable to extend a general exploratory search from one object to another until something incriminating at last emerges,[33] nor may it be invoked until after an initial search has occurred.[34]

As the *Coolidge* plain view doctrine is clearly not applicable to Meisha's pre-intrusive and deliberate plain smell discovery, it appears that the court was actually invoking the open view theory. As enunciated in *Lee*,[35] observation from a place which does not violate

25. 488 F.2d (4th Cir. 1973), (per curiam), *cert. denied*, 416 U.S. 936 (1974).
26. 379 F. Supp. 1287 (W.D. Mo. 1974).
27. *See* Comment, 13 SAN DIEGO L. REV. 410, 421-23 (1976).
28. 403 U.S. 443, *rehearing denied*, 404 U.S. 874 (1971).
29. *Id.* at 466.
30. *Id.*
31. *Id.*
32. *Id.* at 469-71.
33. *Id.* at 466.
34. *See* Moylan, *supra* note 22.
35. It appears that the dicta in *Lee* may be interpreted as authority for open view, plain view, and search incident to arrest exceptions to the warrant requirement of the fourth amendment. *See* Hester v. United States, 265 U.S. 57 (1924).

the curtilage of the subject's dwelling is not forbidden by the fourth amendment because there is neither unauthorized physical penetration into the premises nor actual intrusion into a constitutionally protected area. However, this doctrine is largely discredited by modern authority following *Katz*.[36]

Despite *Katz*'s discrediting of the trespass approach to search analysis and hence implicit rejection of the open view doctrine which is based on lack of physical intrusion, the Second Circuit based its decision on a derivative of the open view doctrine; *i.e.*, the plain smell theory. Regardless of *Katz*, it is true that the open view theory has been extended to the use of senses other than sight to establish probable cause for arrest.[37] Yet, no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances, even where the article is contraband.[38] Therefore, in cases following *Lee* it was necessary to find that, for example, where a searchlight fell upon an incriminating object or an object otherwise came into the view of an officer, the discovery was not a "search."[39] The *Bronstein* court's finding that the use of trained dogs to seek out an odoriferous drug did not constitute a search, is understandable in light of the court's reliance on the open view cases, but fails to take into account the effect of *Katz* upon that theory.

In addition to relying upon a discredited doctrine, the Second Circuit failed to support its decision adequately by harmonizing the

36. *See generally* Annot., 48 A.L.R.3d 1178 (1973). *See United States v. Kim*, 415 F. Supp. 1252 (D.C. Hawaii 1976), where the warrantless use of a high power telescope and binoculars to view activities within an apartment from a distant vantage point was held unconstitutional. The court stated, "[a] 'plain' plain view of Kim's apartment was impossible; only an aided view could penetrate. . . . [T]he 'plain' in plain view must be interpreted as permitting only an unaided plain view." *Id.* at 2015.

37. Probable cause for arrest on the basis of odor of narcotics has been found in the following cases: United States v. Martinez Miramontes, 494 F.2d 808 (9th Cir. 1974); United States v. Troise, 483 F.2d 615 (5th Cir. 1973); United States v. Ogden, 485 F.2d 536 (9th Cir. 1973); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); United States v. Fischer, 38 F.2d 830 (M.D. Pa. 1930); United States v. Pagas, 395 F. Supp. 1052 (D.P.R. 1974); Commonwealth v. DeWitt, 226 Pa. Super. 372, 314 A.2d 27 (1973).

Contra, Johnson v. United States, 333 U.S. 10 (1948) (dictum); Taylor v. United States, 286 U.S. 1 (1932); United States v. Mullin, 329 F.2d 295 (4th Cir. 1974); United States v. Lewis, 392 F.2d 377 (2d Cir.), *cert. denied*, 393 U.S. 891, *rehearing denied*, 393 U.S. 956 (1968); United States v. Kaplan, 89 F.2d 869 (2d Cir. 1937) (dictum).

38. State v. Morris, 42 Ohio St. 2d 307, 333, 329 N.E.2d 85, 101 (1975) (dissenting opinion); *accord*, *Coolidge*, 403 U.S. at 468.

39. *See* Harris v. United States, 390 U.S. 234 (1968); Ker v. California, 374 U.S. 23 (1963); United States v. Lee, 274 U.S. 559 (1927). These cases were also relied upon as authority for the plain view doctrine enunciated in *Coolidge*.

facts of the open view cases with the facts in *Bronstein*.[40] Specially-trained dogs with the ability to perceive odors undetectable by humans, cannot realistically be characterized as sense-enhancing instruments in the same category as flashlights or binoculars. The police agents in *Bronstein* did not smell or see any contraband, nor were their own senses enhanced or magnified.[41] Thus, the open view theory, assuming *arguendo* it had been a viable alternative for the court, should not have been applied to these facts.

Invocation of the open view theory leads one to the coordinate holding that a person cannot have a reasonable expectation of privacy toward an object when it is open to view.[42] Accordingly, the court held that Bronstein and his codefendant could not have had a legitimate belief that the suitcase would not be inspected and hence, could not claim constitutional protection.[43] The *Katz* decision holds, however, that the location of an object is not determinative of whether such a belief is justified.[44] Also, the contents of a parcel do not affect the scope of protection.[45] A briefcase has been found to be an article one reasonably seeks to preserve as private, regardless of its location[46] and warrantless searches of baggage have been held invalid in a variety of instances.[47] However, certain lim-

40. United States v. Lee, 274 U.S. 559, 563 (1927) (opinion of Brandeis, J.); United States v. Hood, 493 F.2d 677 (9th Cir. 1974), *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).

41. *See* note 9 *supra*; *accord*, State v. Elkins, 47 Ohio App. 2d 307, 311, 1 Ohio Op. 3d 380, 382, 354 N.E.2d 716 (1976).

42. *Accord*, United States v. Johnston, 497 F.2d 397 (9th Cir. 1974) where defendant who boarded train with suitcases containing marijuana did not have a reasonable expectation of privacy from drug agents with an inquisitive sense of smell.

43. United States v. Missler, 414 F.2d 1293 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970). The protection under the fourth amendment extends only to those situations in which the complainant had a reasonable and legitimate expectation of privacy.

> Generally, it has been held that the capacity to claim the protection of the fourth amendment against unreasonable searches and seizures depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from Governmental intrusion . . . .

Mancusi v. DeForte, 392 U.S. 364, 368 (1968).

44. What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Katz v. United States, 389 U.S. 347 (1967). The *Bronstein* defendants attempted to disguise the odor of marijuana with moth balls packed within the suitcase.

45. United States v. Peisner, 311 F.2d 94 (4th Cir. 1962). The fourth amendment provision precluding unreasonable searches and seizures of persons, their houses, papers and effects is sufficiently broad to afford protection against unreasonable searches and seizures to all types of property even though contraband of any type or obscene in nature.

46. United States v. Michelli, 487 F.2d 429 (1st Cir. 1973).

47. United States v. Jellsett, 448 F.2d 1278 (9th Cir. 1971) (per curiam). Search of defendant's suitcase was held invalid where the search was not incident to arrest, the suitcase

ited searches have been upheld when necessary to further the public policy of preventing hijacking.[48] It is significant that such policy considerations were not raised in *Bronstein*.[49]

IV. Conclusion

As the open view theory is not appropriate in cases where human senses are not enhanced, and since one may have a reasonable expectation of privacy regarding baggage consigned to a carrier, especially after arrival, the *Bronstein* decision can best be explained by the recent national effort to curb the traffic in drugs,[50] including marijuana as well as more dangerous narcotics. In light of this fact, the search of baggage without a warrant upon a tip from an informant may be considered a necessary step in furthering the national interest. Such public policy is not, however, expressed in the opinion. But, although it is impossible to actually determine the motivation of courts to permit inspections of personal items without constitutional protection, it seems reasonable to expect that as public opinion becomes more tolerant toward use of marijuana, courts may find inspections such as that involved in *Bronstein* to be searches requiring satisfaction of fourth amendment requirements.

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was not at the time of search within area of defendant's immediate control, and there was no probable cause to believe that it contained contraband. United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974), *rehearing denied*, 504 F.2d 760 (1974). Warrantless search of baggage which defendants claimed and which they had checked at airport held unconstitutional.

United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973). Warrantless search of defendant's luggage which had been checked with airline could not be justified as an administrative search pursuant to regulations where it was unrelated to airport screening program which was designed to catch potential hijackers by searching carry-on luggage. United States v. Miner, 484 F.2d 1075 (9th Cir. 1973). When defendant no longer wished to board plane, search of his baggage without his consent was unreasonable.

48. An individual's expectation of privacy in an airline terminal is not the same as that in a street or park when considered in light of the increase in aircraft piracy, the dangers presented to innocent bystanders and the inherent difficulty in preventing hijackings. People v. Lee, 108 Cal. Rptr. 555 (Ct. App. 1973).

49. *Bronstein* also did not address the presence of exigent circumstances which might validate an unwarranted search upon probable cause. Such a discussion is therefore beyond the scope of this casenote. However, two cases may deserve attention: State v. Matthews, 216 N.W.2d 90 (N.D. 1974) (4-3 decision), considered facts very similar to *Bronstein*, but at a bus depot, and held that the "automobile exception" as an exigent circumstance does not apply to a package in the custody of a common carrier. In United States v. Lonabaugh, 494 F.2d 1257 (5th Cir. 1973), where officers had control over baggage about to be loaded on a plane, an unwarranted search and seizure is unconstitutional. No exigent circumstances were present which excused the failure to obtain a warrant where officers stated they had good relations with airline personnel and where nothing would have prevented them from detaining the suitcases while a warrant was being obtained. *Cf.* United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973).

50. *See* note 1 *supra*.