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Can the Police "Impound" a Home While They Seek a Search Warrant?

by Ralph C. Anzivino

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Issue

Can the police "impound" a home that they have probable cause to believe contains contraband while they secure a search warrant?

Facts

On the afternoon of April 2, 1997, two officers of the Sullivan, Ill., police department went to the home of respondent Charles McArthur and his wife, Tera McArthur. The home was a trailer located in a trailer park. Tera had asked them to accompany her to the trailer to "keep the peace" while she moved her belongings out. After Tera removed her possessions from the trailer, she told the officers that her husband (respondent) had "dope" in the trailer. Assistant Police Chief John Love asked Tera to describe what she had seen. Tera said she had seen the respondent hide "pot" under the couch in the trailer.

Officer Love knocked on the door of the trailer, and McArthur answered. Officer Love told McArthur that his wife had informed the officers that he had marijuana in the trailer. Respondent denied the accusation. Officer Love asked the respondent if he could enter the trailer and search it, but the respondent declined to permit the officer to search without a search warrant. When this conversation concluded, McArthur was outside the trailer. Respondent did not testify that he was asked or otherwise compelled to step out of the trailer. Officer Love testified that he did not recall whether he asked the respondent to come outside or whether the respondent did so on his own.

Officer Love asked Tera whether she would be willing to tell a judge what she had seen, and she agreed to do so. Officer Love's partner then left with Tera to go to the local prosecutor's office for the purpose of seeking a search warrant for the trailer. Officer Love remained behind with McArthur. He did not arrest McArthur or tell him that he was

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Illinois v. McArthur
Docket No. 99-1132

Argument Date:
November 1, 2000
From: The Illinois Appellate Court

Case at a Glance

A drug suspect is likely to destroy any evidence of drugs in his home if he knows the police are planning to search it. This case presents the question of whether the Constitution permits a police officer to "impound" a drug suspect's home while his fellow officer leaves the scene to seek a search warrant.

not free to leave. When McArthur asked Officer Love if he could go back inside the trailer to wait for the warrant, Officer Love told him that, until the warrant was or was not obtained, he would not be allowed to reenter the trailer unless accompanied by the officer.

Respondent and Officer Love waited outside the trailer for about two hours before other officers returned with a search warrant for the trailer. At least twice McArthur entered the trailer to get cigarettes and call family members. Each time, Officer Love stood in the doorway of the trailer and observed him. Officer Love made no further entry into or search of the trailer. At the suppression hearing, the respondent admitted that his purpose in asking to go back into the trailer was to destroy the evidence concealed there, and that he would have done so had he been permitted to enter alone. He did not, however, announce that purpose to Officer Love. At some point during the two hours, the respondent's mother came to the trailer. She was also told by Officer Love that she could not enter unaccompanied. When other officers returned with the warrant, McArthur showed the officers where a small quantity of marijuana and paraphernalia were hidden. He was then arrested.

Respondent was charged with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of less than 2.5 grams of marijuana, all misdemeanor violations. He filed a motion to suppress the items found at his residence. He argued that barring him from entering the trailer while the search warrant was sought had amounted to an illegal arrest, and that the marijuana and paraphernalia recovered when the warrant was executed were the products of that illegal arrest.

After an evidentiary hearing at which the respondent and Officer Love testified, the trial court granted the respondent's motion to suppress. The State appealed, and the Appellate Court of Illinois, Fourth District, affirmed. *People v. McArthur,* 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999). The appellate court did find that the police officers had "probable cause to secure the residence." Nevertheless the court held that barring McArthur from reentering his home without police accompaniment amounted to a "constructive eviction." The court distinguished this case, wherein the respondent was on the premises at the time the home was seized, from one in which the police secure premises and bar entry by anyone thereafter arriving. Similarly, the court distinguished that portion of the opinion in *Segura v. United States,* 468 U.S. 796, 813 (1984) (opinion of Burger, C.J., joined by O'Connor, J.), that declared that the seizure of a residence presents a lesser interference with the occupant's possessory interest if the occupant is then in custody. The court noted that in this case, the respondent was present but not arrested at the time he was barred from entering his trailer. Finally, the court concluded that Officer Love conducted both a search and a seizure when he stood in the doorway of the trailer to observe the respondent as he made phone calls and retrieved his cigarettes.

The State filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois. The Illinois Supreme Court denied the petition. *People v. McArthur,* 185 Ill. 2d 651, 720 N.E.2d 1101 (1999). The State's Petition for a Writ of Certiorari to the Supreme Court of the United States was filed on Jan. 4, 2000, and granted on May 1, 2000. *People v. McArthur,* 120 S.Ct. 1830 (2000).

Case Analysis

The Fourth Amendment to the United States Constitution restricts only searches or seizures that are unreasonable. This key principle requires the balancing of competing interests. In each instance, the reviewing court must balance the intrusion on an individual's personal Fourth Amendment rights against the public interest underlying the state's execution of a particular procedure. *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *see also United States v. Place,* 462 U.S. 696 (1983).

In this case, the State argues that its interest in securing evidence before its destruction outweighs the lesser Fourth Amendment interests implicated by the temporary seizure of the respondent's residence. First, the State notes that by barring McArthur from entering his home while a fellow officer sought a search warrant, Officer Love selected a course of action deliberately designated to mitigate the nature and extent of the intrusion on the Fourth Amendment rights of the respondent. The procedure effected a seizure and thus implicated interests that figure differently in Fourth Amendment analysis than those implicated by a search. A seizure affects a person's possessory interest in the property seized, while a search affects the maintenance of personal privacy. Although both interests are protected by the Fourth Amendment, the physical entry to an individual's home (the search) is considered the chief evil against which the wording of the Fourth Amendment is directed. The State asserts that only a seizure occurred here, not a search.

Next, the State argues that the infringement upon the respondent's possessory interests imposed by the seizure of his home was mitigated in significant ways. First, the seizure

was provisional. It was undertaken only to allow officers to obtain a search warrant and was in effect only as long as it took to obtain one. Second, the approximate two-hour period was reasonable. The record supports no suggestion that the time period was excessive or that the officers were not diligent in seeking the warrant or returning to conduct the search. During those two hours, Officer Love's partner was able to return to the local police station with the respondent's wife, prepare a warrant, a complaint, and two affidavits; locate a judge; submit them for his review; obtain his approval; and return to the respondent's home. Two hours is an eminently reasonable time within which to accomplish those tasks.

In addition, Officer Love effectively tempered the effects of the seizure by permitting McArthur to enter the trailer, albeit only under his observation. These instances did not compromise the respondent's privacy rights. They did permit him to exercise some possessory interest in his home by using the telephone and obtaining cigarettes. Therefore, even the interference with his possessory interest in the home was mitigated to some extent.

Finally, McArthur was not personally seized when he was barred from reentering his trailer. He was not told he was under arrest, was not physically restrained, and was free to go anywhere in the world except back into the trailer by himself. He was not seized at all. Therefore, the impoundment procedure resulted in an infringement of the respondent's Fourth Amendment rights that was substantially mitigated and considerably less extensive than would have been occasioned by a search.

On the other hand, the State's interest in this case was considerable. The Supreme Court has accorded substantial weight to the need of investigating authorities to prevent the destruction, alteration, or concealment of evidence of crimes. Officer Love's decision to secure the premises was based on his desire to prevent anyone from disturbing evidence, and specifically his concern that the respondent could dispose of or destroy evidence. The presence of the respondent at the scene unrestricted by arrest made that concern acute. Respondent's own intentions elevated that concern beyond the level of speculation. Had Officer Love not prevented him from doing so, the respondent would, by his own admission, have destroyed the evidence hidden in the trailer. In this case, the officer was correct to be concerned about the potential destruction of evidence.

The State believes the balance of competing interest tilts in favor of approving the impoundment procedure. The State's interest in preserving the marijuana and paraphernalia hidden in the respondent's home is meaningful. The presence of the respondent, the person with the strongest motive to destroy the items, made such destruction a strong possibility. Respondent's admitted intentions made it a certainty. On the other side, while McArthur did suffer some loss of the use of his home, this deprivation was confined to a reasonable period directly related to the securing of a warrant. More critically, the impoundment procedure provided a means to avoid the more grave intrusion of entry to preserve evidence. Impoundment, therefore, satisfies the Fourth Amendment by providing a model of restrained police conduct and by eliminating the need for a greater intrusion. Impoundment provides a middle ground that accommodates a police officer's investigative interest at a lesser cost to the rights of the individual.

The State also contends that the Fourth Amendment does not require that the police obtain a seizure warrant before temporarily seizing a residence while awaiting a search warrant. The officer's decision to secure the premises in this case accords with the Supreme Court's prescription for preserving the status quo, pending the issuance of a search warrant. The Supreme Court has stated that police may seize property that they have probable cause to believe contains contraband for the limited period required to obtain a warrant. In *Arkansas v. Sanders,* 442 U.S. 753 (1979), the Court condemned the warrantless search of a suitcase found in a car but observed that the police had acted "commendably" in seizing the suitcase. The proper course of action, in the Court's view, would have been to hold the suitcase, unopened, until a warrant could be obtained. These principles should apply with equal force to a residence, so long as privacy interests are not compromised.

The State admits that in securing McArthur's residence and barring his entry, Officer Love acted without a warrant. Indeed, the very purpose of his actions were to freeze the circumstances in place while a search warrant was sought. It is not disputed that Officer Love had probable cause to believe that marijuana was secreted within McArthur's trailer. Respondent's wife had told him it was there. She had seen it herself. When Officer Love asked her specifically where it was, she told him where it was hidden. Because he had probable cause and because the seizure of the respondent's home did not involve entry and lasted only long enough to allow officers to obtain a judicial search warrant, the seizure of McArthur's trailer required no warrant or showing of particularized exigent circumstances.

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The State argues that because Officer Love was entitled to bar the respondent from entering his trailer unless escorted, the officer's observations of McArthur inside the trailer was a consensual acceptance of that condition. On at least two occasions while they waited for the warrant, Officer Love permitted McArthur to enter the trailer while under his observation. Each time Officer Love stood in the doorway of the trailer and watched McArthur but made no further entry or search. The Illinois Appellate Court determined that, by these entries, Officer Love had also "secured the dwelling from the inside" and concluded therefrom that the officer had executed a warrantless, illegal search of the trailer.

The State argues that the real consequence of these brief and cabined entries was to lessen the intrusion upon respondent's Fourth Amendment interests by actually permitting him to continue to exercise some possessory rights in his residence. Because Officer Love was entitled to secure the residence as he did in order to prevent the destruction of evidence, he was entitled to bar McArthur's entry. Respondent's decision to accept Officer Love's conditions was therefore voluntary on his part, and the officer's presence in the doorway was consensual. In fact, Officer Love's terms essentially empowered both the officer and the respondent. Officer Love was entitled to keep the respondent out of the trailer entirely. Similarly, had the respondent desired to prevent Officer Love from entering, he could have done so by simply staying outside himself.

Respondent, on the other hand, believes that the State's interest in preserving the evidence of his misdemeanor offenses does not outweigh his possessory and privacy rights in his home. The State asserts that the infringement on McArthur's possessory interests was mitigated by the fact that he could reenter his home under police observation. Furthermore, the State claims that the two-hour dispossession of McArthur's home was an eminently reasonable time in which to obtain a search warrant. Respondent urges the Court to reject these arguments. The police conduct cannot be judged in the context of a simple external seizure of McArthur's home. Rather, one must consider the totality of the impoundment process, including the warrantless entries into the respondent's premises and the restraining of his person from going into his own home.

A seizure of personal property reasonable at its beginning may become unreasonable due to its duration if its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment. A 90-minute detention of luggage has been held unreasonable. *U.S. v. Place,* 462 U.S. 696 (1983). Here, the seizure of McArthur's home lasted nearly two hours. Thus, the respondent contends, the seizure resulted in a significant deprivation of his possessory interest in his home, and the State's attempt to balance its interest in prosecuting him for two misdemeanor offenses solely against a two-hour external seizure of his home is not correct. Rather, one should balance the State's interests against the unreasonable seizure of his home and the warrantless entries. Respondent says that, viewed in this context, the balance clearly weighs in favor of protecting his possessory and privacy interests in his home.

Respondent contends that the police conducted a warrantless search of his home that was unreasonable under the Fourth Amendment. It is axiomatic that the physical entry of the home is the chief evil against which the Fourth Amendment is directed. The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. The burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut.

Although the possible destruction of evidence is a commonly claimed exigency, the circumstances under which officers may make warrantless entries into homes to prevent the loss of evidence has not been defined. The circuit courts of appeal have consistently held that warrantless entries into private residences are not permissible on the grounds of fear that evidence was likely to be lost. Rather, a showing that destruction of evidence was imminent was required. Several state courts have also agreed that "exigent circumstances" requires more than a mere apprehension that evidence will be destroyed.

In this case, Officer Love admitted that he entered into McArthur's home despite being denied permission to search. Therefore, the burden is on the State to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attached to Officer Love's entries. The State argues that the exigency of imminent destruction of evidence was present. However, there were no exigent circumstances justifying the warrantless entries into the respondent's home that were not created by the

police officers themselves. Although McArthur was clearly aware of the police presence outside his home while his wife moved her things out, the 2.3 grams of marijuana, one-hitter, and pipe were not in "imminent" danger of destruction. Respondent did not make any attempt to destroy the 2.3 grams of marijuana or the drug paraphernalia until the police knocked on his door, told him that his wife had reported drugs inside, and asked if they could search. Thus, the police had no specific evidence of imminent destruction sufficient to satisfy the exception to the warrant requirement for Officer Love's entries into the respondent's home.

Moreover, assuming that the evidence of the respondent's misdemeanor offenses was in imminent danger of destruction, preserving the 2.3 grams of marijuana, one-hitter, and pipe did not justify the warrantless entries into his home in order to secure them. The State's interest in prosecuting the respondent for two misdemeanors did not qualify as exigent circumstances justifying Officer Love's warrantless entries into his home. Once Tera McArthur told the police about the marijuana and paraphernalia inside the trailer, the officer could have easily left with her (without telling the respondent about the incriminating information), obtained a search warrant, and returned to retrieve the evidence and arrest the respondent. Thus, the evidence likely would have remained intact if the officers had left with Tera McArthur and complied with the warrant requirement. The officers created the exigency concerning the destruction of evidence when they informed the respondent that they believed he had marijuana inside. A ruling that this type of conduct contributes to the creation of the exigency of destruction of evidence will result in officers' being able to create such exigencies at will and bypass the warrant requirement.

The State made a number of arguments to justify the police entry into McArthur's home. First, the State argued that because Officer Love was entitled to prevent the respondent from entering his home without a police escort, the respondent consented to Officer Love's entries each time the respondent wanted to go inside his home. Second, the State argued that the real consequence of Officer Love's brief entries was to lessen the intrusion upon the respondent's possessory interests by permitting him to exercise some control over his home. And finally, the State observed that Officer Love saw nothing of consequence as a result of his looks inside the respondent's trailer, and, therefore, his entries could not have contributed in any way to the discovery of the contraband.

Respondent believes each of the State's arguments should be rejected. The State's first argument relies on a belief that Officer Love did not violate McArthur's Fourth Amendment rights by impounding his home. In other words, the State is proposing a rule that provides that if the State does not illegally seize a home or its owner when it prevents him from entering, then he automatically consents to the police entry into his home when the owner subsequently desires to enter for any reason. This argument ignores the true meaning of "consent" to search. Here, the respondent expressly told Officer Love that he could not go inside his home without a warrant. Thus, he did not voluntarily consent to Officer Love's entries. Likewise, he did not give his implied consent by entering into his own home to make phone calls to his mother and sister and to get cigarettes. Respondent was told that he could not go inside his home alone so that he could destroy evidence. Officer Love refused McArthur's requests to go inside alone. Clearly, Officer Love entered the respondent's home under color of office. Respondent's entries into his home accompanied by Officer Love were a submission to authority, not a voluntary consent.

Likewise, the respondent rejects the state's argument that Officer Love's entries lessened the intrusion upon his possessory rights. Officer Love's entries constituted an even greater intrusion upon the respondent's Fourth Amendment rights. Although McArthur was concealing evidence of two misdemeanor crimes, his expectation of privacy in his home was not diminished. He was entitled to keep Officer Love outside his home until the police had a warrant. Under the State's argument, his possessory rights could not be enjoyed without giving up his right to privacy in his own home. Given that invasion of the home by the government is the chief evil at which the Fourth Amendment is directed, it is hard to imagine how the intrusion upon the respondent's rights was lessened by Officer Love's warrantless entries.

Respondent rejects the State's assertion that since Officer Love did not see anything incriminating during his entries, they should not be considered illegal. The State is essentially arguing "no harm, no foul." That is not the standard for determining whether an impermissible warrantless entry occurred. Officer Love's warrantless entries prevented the respondent from destroying his 2.3 grams of marijuana, one-hitter, and pipe. Thus, Officer Love's warrantless entries significantly contributed to the discovery of the evidence against the respondent. Accordingly, the State has not met

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its burden with respect to justifying Officer Love's warrantless entries into McArthur's home.

Respondent posits that the impoundment of homes to preserve evidence should not be permitted where only misdemeanor offenses are involved. Under the Fourth Amendment, the Supreme Court attempts to balance the government's interest in enforcing laws against the individual's privacy interest. When applied to impoundment cases, the balancing should reflect an effort to look to the scope of the particular intrusion, in light of all the exigencies of the case, including the seriousness of the offense. The seriousness of the offense is relevant in determining whether the police violated the Fourth Amendment with respect to a warrantless entry into a home. Thus, it is logical to look at the nature of the underlying charge in determining whether a warrantless seizure and impoundment of a home violates the Fourth Amendment.

Respondent also asserts that the trend of recent decisions is to uphold warrantless entries into private residences to prevent the destruction of evidence only when relatively serious offenses are involved. The Supreme Court uses the distinction between serious and petty offenses in determining whether the constitutional guarantees of trial by jury and legal counsel are available. Thus, the question becomes how to articulate a standard with respect to the seriousness of an offense for courts and police officers to readily apply in determining whether the seizure and warrantless entry into a home is constitutionally permissible. The courts have recognized the need for easy-to-apply and familiar standards to guide police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

Respondent contends that the line with respect to impoundment and warrantless entries should coincide with the line most jurisdictions use to distinguish misdemeanors and felonies. The felony/misdemeanor line has clear boundaries that are easily discerned and applied by officers and courts. Application of this distinction would achieve the same results within a state and similar results from state to state. Finally, the rule could not be easily manipulated or abused in cases such as the respondent's, in which the police could have questioned Tera McArthur concerning the amount of marijuana she saw in her husband's home. Thus, the police should be able to readily ascertain at the scene whether they are dealing with a felony or misdemeanor offense.

Finally, the respondent postulates that society will not suffer serious consequences if the impoundment of homes, including warrantless entries to preserve evidence, is disallowed in misdemeanor cases. An analysis of the costs and benefits of a rule prohibiting seizures of the home in order to preserve evidence in misdemeanor cases comports with the Fourth Amendment's reasonableness requirement. Accordingly, McArthur urges the Supreme Court to draw the line between constitutionally permissible and impermissible impoundment of homes based on the seriousness of the offense. Respondent believes such a balancing test reveals that the impoundment of his home and the warrantless entries by Officer Love violated the Fourth Amendment. As reflected by the nominal sentences for both misdemeanors for which the respondent was charged, the State of Illinois did not have a great interest in protecting society at large from his activities within his own home. Moreover, the public's interest in prosecuting him is outweighed by the advantage of requiring the police to obtain a warrant before impounding the home of a person suspected of committing a misdemeanor.

SIGNIFICANCE

New ground will be plowed in this case under the Fourth Amendment. Warrantless entries into one's home by the police are not permitted under the Fourth Amendment, absent exigent circumstances. In the absence of exigent circumstances, however, where the police have probable cause to believe a home contains contraband, will the police be able to "impound" the home for a reasonable time to secure the issuance of a search warrant?

Searches and seizures under Fourth Amendment jurisprudence are governed by the standard of reasonableness. Reasonableness is generally determined by balancing the intrusion on a citizen's rights against society's interest in enforcing the law. Impounding a home is less than a full intrusion into one's home. On the other hand, the impoundment in this case was for the arrest of a misdemeanant, not a felon. How will the Supreme Court balance these competing interests? Will they approve a new "impoundment" process as a law enforcement tool? If so, will the Supreme Court limit home "impoundment" to felony cases only? The answer will be forthcoming shortly.

ATTORNEYS FOR THE PARTIES

For the State of Illinois (Joel D. Bertocchi (312) 814-3698)

For Charles McArthur (Jeff Justice (217) 422-9800)

AMICUS BRIEFS (AS OF OCT. 6)

In Support of the State of Illinois

The States of Ohio, Alaska, Arizona, Delaware, Idaho, Iowa, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, South Carolina, South Dakota, Utah, Vermont, and Washington, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia (Robert C. Maier (614) 466-8980)

The United States (Seth P. Waxman, Solicitor General, U.S. Department of Justice (202) 514-2217)