Warrantless Search Problems and Answers

Jeff Welty

UNC SCHOOL OF GOVERNMENT

1. Two homicide detectives employed by the police department of a town built around a mountain lake want to conduct a "knock and talk" at a murder suspect's home. There is a gravel road to the home, but it is faster for the officers to go by boat, so they do. They dock their boat at the suspect's dock, and walk up the dock to a path that leads to the suspect's house. As they go around a bend in the path and approach the back door of the house, they see what looks like a trash pile in the suspect's back yard. Atop the pile is a shirt with rust-colored stains on it. The officers seize the shirt, which turns out to be stained with the victim's blood. The shirt is critical evidence at the trial, and the defendant moves to suppress it.

    a. What is the state's best argument for the validity of the seizure?

    The state can argue that in this community, boat travel is sufficiently common that the deck and path are a "common entranceway," like a sidewalk to a front door in a typical neighborhood. Thus, the shirt was in plain view. Justifying the seizure of the shirt, however, requires more; the mere fact that the officers can see evidence from a common entranceway does not justify an intrusion into the curtilage to seize it, and the garbage has not been dragged to the curb for collection. Perhaps the state could argue that exigent circumstances exist, because the suspect will likely remove the shirt as a result of the officers' visit, but this is somewhat speculative. And it is also possible that a court would find such an exigency to have been created by the police themselves, in deciding to proceed with a knock-and-talk rather than withdrawing to obtain a warrant.

2. A wildlife officer is in a boat, patrolling Jordan Lake in Durham County. He notices several people fishing from a remote beach. He sees one of the people place an object under a rock about 75 feet from the rest of the group. The officer stops to check whether the people have fishing licenses, and finds that they do. He then proceeds to the rock, finds a margarine tub underneath it, and opens the tub, finding drugs.

    a. Did the officer's decision to open the tub violate the Fourth Amendment?

    Arguably. This scenario is based on Anderson v. State, 209 S.E.2d 665 (Ga. Ct. App. 1974). In that case, a majority of the court held that the margarine tub was abandoned, and indeed, that the defendant "sought to place the [drugs] out of his possession" as the police approached. By contrast, the dissenters reviewed in the container as hidden, not abandoned, and argued that "under these circumstances [the officer] had no more right to open [the container] than he would have had to open the defendant's wallet if the defendant had left it under the rock while he went for a swim."

3. An officer suspects that Frank is growing marijuana. Frank lives in a semi-rural area, on a five acre lot. The officer parks down the street from Frank's house, and approaches it on foot. The entire lot is surrounded by a barbed wire fence. "No trespassing" signs are attached to the fence every 50 feet. Nonetheless, the officer climbs through the fence and approaches Frank's house.

The area is heavily wooded, and the officer cannot see anything until he is within 100 feet of the house, at which point the trees stop and a clearing begins. Hiding behind the last tree, the officer can see a garden plot about 10 feet from the back door to the house. There are tall spiky plants growing in the garden; the officer recognizes the plants as marijuana.

a. At this point, has the officer violated the Fourth Amendment?

No. The woods surrounding Frank's house are open fields. Although they are fenced and posted with "no trespassing" signs, they are simply too far from the house to be part of the curtilage. Because the officer has remained behind the last tree, he has not entered the clearing, which is the outermost possible boundary of the curtilage on these facts. The marijuana plants are in plain view.

b. Can the officer legally approach the house and seize the plants?

No. The garden is clearly within the curtilage of the house. A warrant is presumptively required to enter the curtilage. The officer does not have a warrant, and no exception to the warrant requirement applies.

4. Two officers are patrolling a high-crime area when they stop a Ford Mustang for going 42 m.p.h. in a 35 m.p.h. zone. As the Mustang pulls to the curb, the passenger door opens and a young man jumps out. He takes a step away from the car, pitches a small object back into the car, and takes off running. One officer chases him, but can't catch him. The other officer searches the car, over the driver's objection, and finds a small bag of cocaine between the driver's seat and the console. The driver is charged with possession of cocaine, and he moves to suppress.

a. Is this search valid? If so, on what theory? If not, why not?

It is probably valid under the vehicle exception to the warrant requirement. The area, the flight of the passenger, and the pitching of the object likely provide probable cause to search the vehicle. Note that the search cannot be justified on the basis that the passenger abandoned the object – even assuming arguendo that the object was abandoned, the search was of the car, which was not abandoned, not of the object.

b. Now assume that the person who ran from the vehicle was caught two blocks away and arrested based on an outstanding warrant. Would a vehicle search be justified as a search incident to arrest?

No. Until recently, the answer to this question was yes: the passenger compartment of a vehicle could be searched incident to the arrest of any recent occupant, and given that the passenger was arrested only two blocks from the vehicle and presumably just a minute or two after exiting it, he likely would have qualified as a recent occupant. After Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710 (2009), however, a search would be improper: the arrestee has no access to the vehicle, since he is two blocks away, and since he was arrested on a warrant for an earlier offense, it's unlikely that there will be evidence of the offense of arrest in the car.

5. An officer suspects that Dave is selling pirated DVD movies. He walks up a sidewalk to Dave's front door, knocks, and when Dave's wife answers, the officer explains his suspicions and asks to search the house. When she says that she's not sure she should let him, he responds, "well, I can always apply for a search warrant," although he's unsure whether he has probable cause to support a warrant. Dave's wife says that he can go ahead and search the house. He searches the interior of the house and then the back deck, finding nothing. From the deck, he sees a dog kennel 40 feet from the house. He searches that, too, and finds 100 copies of *Big Momma's House* that are obviously pirated. Dave is eventually charged, and moves to suppress the DVDs.

    a. Is Dave's wife's consent sufficient to support the search?

    There are two issues here. First, is Dave's wife's consent voluntary in light of the officer's comment about the warrant? Although there is authority suggesting that "[b]aseless threats to obtain a search warrant may render consent involuntary," United States v. White, 979 F.2d 539 (7th Cir. 1992), the officer's threat here is not completely without foundation, and he only said he could "apply for" a warrant, not that he would get a warrant. Given the lack of any other coercive circumstances, the consent is likely voluntary. Cf. State . Kuegel, 195 N.C. App. 310 (2009) (consent to search was given voluntarily and though officer said that if consent was denied he "would leave two detectives at the residence and apply for a search warrant"); State v. Fincher, 309 N.C. 1 (1983) (the defendant consented voluntarily where he "was told that although he did not have to give permission to search, if he refused the officers would obtain a search warrant and conduct a search").

    Second, does her consent to "search the house" include consent to search the kennel? Although there is a split of authority about this issue nationally, in North Carolina the answer is yes. State v. Hagin, __ N.C. App. __, 691 S.E.2d 429 (2010) (holding that consent to search a dwelling normally includes consent to search any outbuildings within the curtilage).

    b. Is there any theory other than consent on which the search of the kennel may be valid?

    The state might argue that the kennel is far enough from the house that it is in an "open field" rather than within the curtilage. This is doubtful given the short distance, though distance is not the only factor. Furthermore, even if the kennel were in an open field, actually entering the kennel might be a "search," depending on the construction of the kennel and whether it was locked.

6. Two officers are trying to serve an arrest warrant on a suspect. The warrant charges him with PWISD cocaine. The officers go to the suspect's home, but rather than approaching the home immediately, they decide to conduct surveillance. A minute or two later, a car arrives at the residence, the driver honks the horn, and the suspect comes out of the house for a brief conversation with the driver, after which the driver departs. The same thing happens three other times in the next thirty minutes. The officers then decide to serve the warrant. They knock and announce, receive no answer, and break down the front door. They smell marijuana immediately, and arrest the suspect in the living room. They proceed to search the house, finding no one else

present, but locating a stash of marijuana in a dresser drawer in a back bedroom, which the suspect (now defendant) eventually moves to suppress.

a. Is this search valid? If so, on what theory? If not, why not?

The search is not valid. It is not valid as a search incident to arrest, as the back bedroom is not within the arrestee's "grab space." Nor is it valid as a protective sweep, because an assailant could not hide in a dresser drawer. Finally, there are no exigent circumstances because no one else is present to attempt to destroy evidence.

7. An officer stops a vehicle for unsafe movement based on failure to use a turn signal. The officer orders both the driver and the passenger out of the vehicle, and both comply. The passenger says, unprompted, "man, I'm on probation, I'm not doing anything, and I don't need to be in any trouble." The passenger also seems nervous to the officer. Because it is late at night and the officer is alone, he is concerned for his safety. He frisks both the driver and the passenger. While frisking the passenger's jacket pocket, the officer feels a small hard object that is too small to be a weapon but that the officer thinks could be a crack pipe. He pulls it out of the passenger's pocket, and it is, in fact, a pipe, complete with what appears to be drug residue on it. The passenger is charged with possession of drug paraphernalia, and he moves to suppress.

a. Was the officer justified in deciding to frisk either or both occupants? Why or why not?

Under Arizona v. Johnson, 555 U.S. __ (2009), the officer was entitled to frisk anyone he had reason to suspect might be armed and dangerous. He had no reason to suspect the driver, so that frisk was improper. The frisk of the passenger likely was proper given the late hour, the fact that the passenger was on probation, and the passenger's apparent nervousness and unprompted exclamation.

b. Assuming that the frisk of the passenger was justified, was the officer justified in seizing the pipe? Why or why not?

No. The officer knew that the object in the passenger's pocket was not a weapon, so he could have seized it only if he immediately developed probable cause to believe that it was evidence of a crime; in such a case, the seizure would be justified under the "plain feel" doctrine. State v. Williams, 195 N.C. App. 554 (2009). Here, however, the officer only thought that the object "could be" a pipe, which is insufficient.

8. An officer suspects a 17-year-old of selling marijuana. The officer goes to the 17-year-old's home at 4:00 p.m., and the teenager is there alone, although the officer knows that the teenager's parents live there too. The officer asks if he can search the house for marijuana, and the 17-year-old says yes. The officer searches the teenager's room and finds nothing, but arrests him in the room anyway based on reports the officer received from the teenager's drug customers. The 17-year-old's parents come home as the officer is completing the arrest; they ask what the officer is doing and he says that he is arresting their son for selling drugs. They sit down in shock. After the arrest, the officer continues the search, finding marijuana in a vase in the family room. The teenager is charged with PWISD marijuana, and he moves to suppress the drugs.

a. What is the defendant's best argument that the 17-year-old's consent does not validate the search?

The defense should argue that the 17-year-old is not in possession of the house and so cannot consent to a search.

b. Is there any set of facts under which the state could argue that the 17-year-old's consent was valid?

Perhaps, if the 17-year-old had substantial authority over the home (e.g., he was often allowed to stay there alone, he had his own key, etc.). Given that he is almost of age, a court might treat him as an adult for purposes of consent if the facts showed that he was treated as an adult within his family.

c. Other than consent, are there other bases on which the state might argue for the validity of this search?

It might argue that the search was valid as a search incident to arrest, but since the arrest did not take place in the family room, the vase was not in the suspect's "grab space." It would be better off arguing that exigent circumstances support the search, in that the parents might destroy any evidence left in the home. This argument is likely to succeed if there is evidence that the parents are involved in, or support, their son's drug activities; absent such evidence, some courts will infer a risk of destruction of evidence from the family relationship alone, while others will not.

9. Several officers are having lunch together at a sandwich shop. A man walks in, and one of the officers recognizes him as the subject of an outstanding arrest warrant for statutory rape. The man is wearing a backpack. The officer instructs the man to put down the backpack and to put his hands in the air. The man complies. The officer tells the man that he is under arrest and that he should come to the officers' table. Again, the man complies. The officer handcuffs the man. Another officer retrieves the backpack and opens it. He finds evidence of identity theft.

a. Was the search of the backpack justified?

Probably not. The issue is whether the search was proper incident to the man's arrest. If Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710 (2009), applies to personal property, the search would be justified only if (1) the arrestee were unsecured and able to reach the backpack, or (2) there were reason to believe that evidence of the crime of arrest would be found within the backpack. The first condition is not met because the man was away from the backpack, in handcuffs, and in the presence of several officers at the time of the search. The second condition is not met because there is nothing to suggest that evidence of the rape will be inside the backpack. Even if Gant does not apply to personal property, the search may be improper because at the time of the search, the backpack was not within the man's "grab space." The court of appeals has been skeptical about whether officers may search an arrestee's luggage incident to arrest. State v. Thomas, 81 N.C. App. 200 (1986).

10. An officer is conducting a traffic stop. He asks the driver to step out of his vehicle, and the driver does so. The officer asks the driver whether he would mind if the officer frisked him for the officer's safety. The driver says that he wouldn't mind. The officer pats him down and feels what the officer recognizes as a marijuana pipe in his pocket. The officer removes the pipe, and a small bag of marijuana comes with it. The officer arrests the driver, handcuffs him, and puts him in the officer's car. The officer then searches the driver's vehicle.

    a. Did the officer do anything wrong prior to searching the car?

    No. The frisk was consensual, and the removal of the pipe was justified under the plain feel doctrine.

    b. Was the search of the car proper?

    Yes. There are two possible bases for the search. First, under the search incident to arrest doctrine, the search was proper if there was reason to believe that the car contained evidence of the crime of arrest. Second, under the vehicle exception to the warrant requirement, the search was proper if there was probable cause to believe that evidence of a crime would be found in the car. Just as the odor of marijuana emanating from a vehicle provides probable cause to search the car, see, e.g., State v. Schiffer, 132 N.C. App. 22 (1999), the fact that the driver was in possession of drugs likely provides probable cause to search the vehicle. See State v. Kizer, 2010 WL 916343 (N.C. Ct. App. Mar. 16, 2010) (unpublished) ("The cocaine found in defendant's pocket provided the officers with probable cause to search the defendant's vehicle."); United States v. Johnson, 383 F.3d 538 (7th Cir. 2004) (holding that an officer's "discovery of [drugs] on [the defendant's] person clearly provided him with probable cause to search the trunk of the vehicle, including any containers"). The lower standard that applies to searches incident to arrest was therefore also met.