

LEGAL MEMORANDUM

TO: EUGENE GETEMOFF, ESQ. OF HURLEY & GETEMOFF

FROM: RAGINA LASHLEY

RE: WARRENTLESS SEARCH AND SEIZURE, SUCCESSFUL MOTION TO SUPPRESS EVIDENCE

DATE: DECEMBER 12, 2018

ISSUE

Under federal and Delaware law, was the search of Mr. Levy's apartment considered an unlawful warrantless search and seizure? Would a motion to suppress evidence found during this search, prove successful?

BRIEF ANSWER

No. If a warrantless search and seizure occurs under exigent and emergency circumstances, it can be deemed lawful. A motion to suppress evidence found during such a search, may be unsuccessful.

SCOPE

This memorandum discusses a person's rights within searches & seizures federal and Delaware law, and if any evidence is procured during a warrantless search, their likelihood of success in a motion to suppress it.

FACTS

During a November morning, while Mr. Levy was at work, a report calls the fire and police department to Levy's apartment building, after observing and smelling smoke on the fifth floor. The police and fire officers gain entry to four, fifth floor apartments, due to the accepted request from a few staff in the leasing office. The search of the fifth floor, includes Levy's apartment. The officers unlock each door, and search for the source of the smoke, and determining it wasn't Levy's apartment. Upon leaving, the police officer stops and notices a small blue plastic bag, filled with a white powdery substance, beside a mirror and rolled up bill on a living room coffee table, near the entrance. Suspecting narcotics, the officer immediately seizes the items while the firemen searches

the rest of rooms, and discovering a still-running fog machine from a Halloween party. The officer had the substance, and material on the bill tested, and Levy is arrested for one count of felony drug possession and one count of paraphernalia possession. The police conduct no further searches on Levy's apartment.

DISCUSSION

Search & Seizure

To be secure in one's property, homes, papers and affects, a United States, and subsequently, Delaware citizens, the Fourth Amendment holds their protection from unreasonable searches and seizures. U.S. Const. amend. IV § 1. This means an issued warrant, supported by probable cause and describing what to search, and what or whom to seize, is necessary, or given consent by the owner or occupant as under Delaware Code. 11 Del. C. § 2301. Both proclamations find support in the Fourteenth Amendment, U.S. Const. amend. XIV § 1, where *"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."* These general rules give the basis where a United States citizen, and Delaware resident, on their civil rights in overall being and standing. Furthermore, it applies to client William Levy, both a United States citizen, and Delaware resident.

Warrantless Search and Seizure

In *Mich. v. Tyler*, 436 U.S. 499, the case deals with an active fire in a leased auction building, and under direct orders, sees a fire chief investigating the cause of the fire, while it was extinguished. Although the smoke and steam thickened, the fire chief located two plastic containers of flammable liquid as reported by a lieutenant. The fire chief called upon the police department, and a responding officer took photos of the containers, surrounding area, and seized the containers for "safekeeping." *Mich. v. Tyler*'s case history shows that neither this seizure, nor the later entries and seizures conducted by the fire chief and other officers, included a warrant or consent of the commercial tenants. Like Levy's case, the police and fire officers were working to deal with the reported emergency, and were taking steps ensuring clarity. However, neither did the business operators of Tyler

approved the second entry of the building. The second entry is after the fire is extinguished, and the officers searched and seized parts of the floor and carpeting, which suggested a fuse trail (possible arson). Regarding the client, Levy did not consent to the entry and search of his apartment building with any of the acting officers, as he was at work.

A similar case, *Horton v. California*, 496 U.S. 128, two officers were investigating an armed robbery, and applied for a warrant to search the suspect's apartment for two of the victim's items and weaponry possibly used. The issuing judge only approved a warrant of the items, two rings. During the officer's search, the rings didn't turn up, but the weapons were in his view and seized. Unlike Mr. Levy's situation, there is an absence of a warrant, however in *Horton*, the Court also states that "An object in plain view does not involve an intrusion on privacy." This argument may be used by the prosecution, as the acting officer was exiting the apartment. The officer in *Horton*, is found justified to seize the found items, due to having no knowledge of their exact location, and probable cause to believe the weapons were used during the crime, along with a warrant for the stolen items.

Emergency & Exigent Circumstances under a Warrantless Search & Seizure

It is natural that a fire department being called to assess or handle a fire, is without need or consent of the property owners, as it is an emergency, and protecting the greater public. The police department, however, were with the fire department and summoned to the apartment building that November morning. Both gained entry to the apartments on the fifth floor by way of each door being unlocked by leasing office staff. In *Hall v. State*, 14 A.3d 512, 2011 Del., officers responded to a 911 call (a hang-up call), and proceeded to wait outside the home before being greeted by the injured co-owner (gash on his face), and another co-owner, then agitated, who allowed the officers entry. The consent for the responding officers to enter the home, sees both federal and state law applied.

In *Hall*, the case also applies what's known as the *Guererri* test, further established in *Guererri v. Delaware*, 922 A.2d 403 (Del. March 29, 2007), where police respond to reports of gunshots in the area. They forcefully enter a home, based on what they believe was an emergency, after seeing a car with bullet holes. The

officers spoke with the owners, and assessed neither injured or needed medical help. Both Guererri and his housemate stated no others were in the home or needed help. Still keeping this statement in mind, the officers still searched the basement and came upon suspected “marijuana plants in plain view.” *Id.* At 405. The three-part Guererri test is applied, and provides the prosecution’s possible argument:

“(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.” Id. at 406.

Concerning reasonable grounds, the prosecution sees their police entry of Levy’s apartment as such, in which the emergency (possible fire), as reason for accessing and protecting the tenants and leasing property. That their search was merely for the source of the fire, and because both acting officers smelled smoke, they assert probable cause to search the fifth floor as reported. After determining an emergency, the second and third parts of this test, as outlined by the Supreme Court of Delaware in *Guererri*, citing *Cady v. Dombroski*, 413 U.S. 433, agrees that the officers must “...conduct the search primarily to achieve a community caretaking function, rather than to pursue a law enforcement objective.” *Id.* at 406.

Holding to the community caretaking function, the Delaware Supreme Court states it must be throughout their time on the premises under warrantless entries, as in *Williams v. State*, 962 A.2d 210 (Del. December 2, 2008). It states a trained officer remains objective, to suspect someone may be in danger, and are lawfully due to investigate under the purposes of helping them. Once determining that person is in danger, the officer can take proper steps to “mitigate the peril,” and if nonexistent or ceased, the function is over. Any sort of unreasonable seizure is lawful due to a warrant, or an exception to the warrant such as a reasonable, articulable suspicion of criminal activity.” *Id.* at 222. Their apartment search, the prosecution may argue under this function, perhaps citing that the officer wasn’t motivated by a possible seizure of contraband, and the later arrest of Levy. It also serves as a possible prosecution argument of what’s known as a “protective sweep,” an act explained by the officers in *Hall*, assuring no one is left in dangerous circumstances.

In Levy's situation, the acting officers were observing each apartment for the source of the fire for further containment. In *Hall*, the Supreme Court of Delaware supported the officers' explanations, and Superior Court's reasoning in applying the Guerri test for warrantless searches and seizures. Furthermore, the Court established that this test, or *Emergency Exception Doctrine*, is lawful in certain situations when applied to circumstances.

Drugs & Drug Paraphernalia

Regarding Levy's situation and his arrest, the Delaware Code, 11 Del. C. § 1904, states that an officer may arrest a person without a warrant when:

“(1) The officer has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.”

The prosecution may argue that the officer who seized the drugs in Levy's apartment, has reasonable grounds to believe they are the possessor. *Blake v. State*, 65 A.3d 557 (Del. April 29, 2013), sees the Supreme Court of Delaware refer to Title 16 of the Delaware Code, and states that the duties of proof required by the State and citizens accused of drug possession, must go beyond reasonable doubt. The drug paraphernalia found by the officer in Levy's apartment, was the rolled-up dollar bill, near the flat-top mirror on the coffee table, and the small blue bag to contain the substance.

Under Delaware law, Title 16 continues that drug paraphernalia includes anything used for storing or containing substances into the body. Narcotics, the white substance the officer suspected, and was found to be in the small blue bag in Levy's apartment, are substances that are indirectly or directly extracted from natural origins. Possessing narcotics, or any drugs & related paraphernalia, “includes location in or about the defendant's person, premises, belongings, vehicle or otherwise within the defendant's reasonable control.” 16 Del. C. § 4701. The prosecution may argue that although Mr. Levy was away, the positive results of the substance, and it being found in his apartment, was in his immediate control and premises.

Motion to Suppress the Evidence

Regarding Mr. Levy's likelihood of success on a motion to suppress the evidence in his home, lies on the arguments of both the prosecution and the defense team. The prosecution, following *Lopez v. State*, 861 A.2d 1245, would have to prove Levy was the immediate possessor of the drugs and paraphernalia, and the evidence is enough, beyond a reasonable doubt under Delaware law. The matter of drugs and paraphernalia lies within the positive drug testing of cocaine found in the bag and on the rolled-up bill.

In *Lopez-Vazquez v. State*, 956 A.2d 1280, petitioner Lopez-Vazquez is determined by the courts, to not have been part of the initial investigation of drug trafficking. Any evidence found after the investigative stop, was ruled inadmissible ("fruit of the poisonous tree") and the decision remanded. In Levy's case, a potential argument could be that Levy was not the initial source, direct or indirect, of the smoke in the apartment buildings. However, an alternative, could lie with the prosecution in that the evidence found on the coffee table in Levy's apartment nonetheless satisfied the issue of "reasonable and articulable suspicion," of the substance to be drugs and paraphernalia and Levy the possessor. Both petitioners in *Hall* and *Guererri* respectively, sought to suppress the evidence, however both cases saw the Delaware Supreme Court affirmed the denial each petitioner's motion to suppress, due to the exceptions granted under the emergency/exigent doctrine and contraband seen in plain sight.

CONCLUSION

Because of earlier rulings, and previous examinations in federal and state law, the smoke and responding officers to Mr. Levy's apartment building, may be considered lawful entry. A motion to suppress the evidence seized under this circumstantial warrantless search and seizure, may likely be unsuccessful.