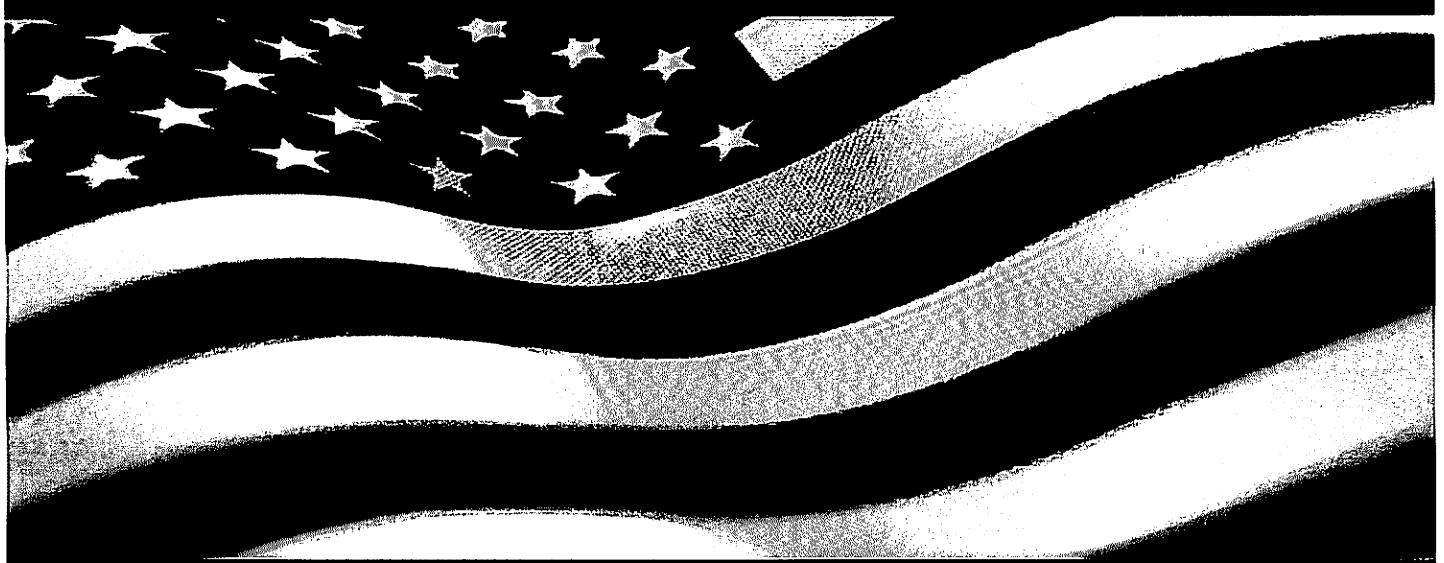
Peter F. Boyce



A Lawyer Dedicated
To Law Enforcement

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Peter F. Boyce is a lawyer in private practice in the Atlanta area. For much of his career, Peter has counseled and defended police officers, their supervisors, their departments, and the governmental entity which employs them when they are threatened with suit or sued for allegations of wrongful conduct.

As an internationally recognized speaker and instructor in many aspects of police civil liability, Mr. Boyce has had the privilege and pleasure of making presentations to local, state, federal and foreign law enforcement officers throughout the world on various civil liability issues associated with drug enforcement work. He also teaches classes on Drug Interdiction, Conspiracy, Risk Avoidance, Search and Seizure, Airport Interdiction, Supervisor Liability, the Use of Force, Profiling, Taser Liability, Highway Interdiction and Ethics, and Asset Forfeiture.

Peter F. Boyce is a graduate of the United States Department of Justice Drug Enforcement Administration Presentations and Skill Course. He is the General Counsel for the National Narcotics Officers Association Coalition (NNOAC) and the National Drug Enforcement Officer's Association, Inc./NDEOA. In addition to his seminar presentations related to undercover police work, he has made key-note addresses to the Arizona Narcotics Association, the Oregon Narcotics Association and the Minnesota Narcotics Association. He has spoken to state Sheriff's Associations and to State Drug Enforcement Associations, as well as presentations to many other groups on police ethics, supervisory liability, street survival and undercover work.

Since most of Mr. Boyce's career has been devoted to representing, counseling, and advising police officers, he is able to bring to his presentations a "real life, on-the-street scenario" that street cops immediately understand and appreciate.

Peter F. Boyce regularly works with law enforcement agencies to tailor presentations to meet specific training needs. He is available to provide advice, consultation, or referrals to police officers and their employing agencies when they confront the inevitable legal issues that too often frustrate effective policing.

For the past thirteen years Peter F. Boyce has had the pleasure of speaking to thousands of street level cops as an instructor for the DEA in its Basic and Advanced Narcotic Investigative Schools. He has also been the key-note speaker for HIDTA, the Investigator's Roundtable, the ROCIC, the Mid-West Counterdrug Training Center, multiple state Sheriff Associations, the Georgia, Tennessee, Arizona, Oregon, Minnesota, Missouri and Indiana Narcotics Officers' Association, the Missouri Sheriffs' Association, the National Association of Black Narcotics Agents, the National Narcotics Officers Association Coalition, as well as to police departments and task forces throughout the country. He is a contract instructor for MCTC, MCTFT and FLETC. Mr. Boyce is a member of the American Bar Association and the State Bar of Georgia. He has served as a city attorney for 20 years, a Special Assistant County Attorney for 13 years, and he has represented large metropolitan police departments, as well as small city police departments.

MOST RECENT UPDATES

WARRANTLESS PLACEMENT OF GPS

United States v. Jones, United States Supreme Court (January 2012). After obtaining a warrant to place a GPS tracker on the bad guy's car within 10 days, the cops placed the GPS on the car on the 11th day while parked in a public parking lot. Over the next 28 days, they used the device to track all movements and replaced the battery on the GPS one time. Based in part on the information obtained from monitoring the car's movements, the government obtained a multiple count indictment and conviction of Jones for conspiracy to distribute and possess 5 kilos of coke.

The bad guy filed a motion to suppress and the district court reversed his conviction because the evidence was obtained by a warrantless use of a GPS in violation of the Fourth Amendment.

The US Supreme Court held "we have no doubt that such a physical intrusion (placing the GPS tracker on the car for 28 days) would have been considered a search within the meaning of the Fourth Amendment".

The Supreme Court decision makes it somewhat clear that the bad guy's reasonable expectation of privacy was infringed by the placement of the GPS tracker without a warrant for 28 days.

Concurring opinions by the members of the court indicated the possible far reaching effect of this decision on law enforcement. One concurrence said "when the Government physically invades personal property to gather information , a search occurs and the Government's unrestrained power to assemble data that reveals private aspects of identity is susceptible to abuse".

One concurring opinion suggests the states should enact statutes regulating the use of GPS tracking technology which might allow short term monitoring by GPS.

SEARCH OF EVERYONE IN A GROUP

Williams v. Commonwealth of Kent, (2011). Search of all not generally allowed but due to officer safety concerns where a group is "hanging out" with persons who are openly violating the law, a brief detention and search may be justified.

RIGHT TO RECORD POLICE ACTION

Glik v. Canniffer, (12th Cir., 2011, Mass). The public has a right to record police action in a public place as long as they do not interfere with the ongoing investigation. Question: Does this mean the public can film an officer who is working undercover? Couldn't such filming pose both an officer safety concern as well as interference with an ongoing investigation?

COMPUTER SEARCHES

United States v. Stabile, Fed. 3d (2011), Westlaw 294036 (3d Cir., 2011). Secret service agents looking for evidence of financial crimes searched a computer belonging to the bad guy with permission of his presumed spouse. The search revealed material for making counterfeit checks and a warrant was obtained. In looking for evidence of financial crimes the officer highlighted a file that apparently contained videos of child porn. A second search warrant was obtained to search the files containing child pornography.

A number of courts are trying to create limits on the application of the Plain View Doctrine to computer searches. The item may be seized under the Plain View Doctrine if three factors are present: (1) the initial intrusion is lawful; (2) the item seized is in actual plain view; and (3) the incriminating nature of the item is immediately apparent. Some courts have held that a search should be limited by using narrow

search terms. *See* U.S. v. Carey, 172 Fd. 3d 1268 (10th Cir.) States v. Mann, 592 Fed. 3d 779, 7th Cir. (2010). This case reminds officers that when a suspicious file is located that is outside the scope of the initial search warrant it is always better to obtain a second warrant.

SEARCH AND SEIZURE

Kentucky v. King (2011) Westlaw 1832821. Sometimes cop-created exigent circumstances will justify a warrantless entry. The Supreme Court has just ruled that the Exigent Circumstance Doctrine will justify a warrantless entry even when police create the exigency so long as the police do not violate or threaten to violate Fourth Amendment rights. Justice Alito, for the majority, stated "warrantless searches are allowed when circumstances make it reasonable within the meaning of the Fourth Amendment to dispense with a warrant requirement."

In this case, cops saw King, the bad guy, go into an apartment building after buying drugs in an undercover operation. Police went to the apartment door and could smell marijuana. The cops knocked on the door and identified themselves as police officers. They could hear movement in the apartment. No one answered the door. Believing evidence was being destroyed inside the officers kicked in the door and entered. They found one bad guy smoking marijuana and saw coke in plain view. The bad guy was convicted of selling drugs and being a habitual offender. The Kentucky Supreme Court reversed the conviction holding that exigent circumstances do not apply because the police should have known that their own conduct of knocking and announcing would prompt the occupants to destroy evidence. It was the Kentucky Supreme Court's view that police created the exigency. The U.S. Supreme Court saw the case differently.

Remember, the Exigent Circumstance Doctrine allows police to enter a home to prevent imminent destruction of evidence even if they don't have a warrant but they must have probable cause.

Many state courts disapprove of warrantless entries following a police-created exigency. The Supreme Court in the King case held that occupants who choose not to stand on their constitutional rights, but instead elect to attempt to destroy evidence, have only themselves to blame for the warrantless exigent circumstance search that took place.

The officers in this case merely knocked on the door and announced their identity. Those acts did not violate the Fourth Amendment and their conduct was lawful.

Caution: the King decision does not mean that if cops knock on a door of a home, sense movement, and no one answers, that a warrant requirement is excused. The Supreme Court footnote stated very strongly that "in most circumstances the Exigent Circumstance Rule should not apply where the police, without a warrant or other legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted."

CONSENT TO SEARCH

People v. Strimple, WL 130870 (Colorado, 2012). Girlfriend's consent to search valid after boyfriend taken from house. Cops responded to domestic dispute. Boyfriend said no to search but then gave the o.k. Cops found gun during protective sweep and arrested boyfriend. Girlfriend told cops of other guns in home and asked officers to search. They found guns and drugs and boyfriend claims search unconstitutional. The court ruled only "an express refused by a physically present resident could defeat consent by another resident", consent valid.

FRISKING ALL GROUP MEMBERS

Williams V. Commonwealth of Kentucky, WL 5877781 (2011). Frisk of all group members allowable when crime being openly committed. Bad guy was with group of friends, some of whom were

smoking weed. Bad guy was not seen smoking weed. A frisk of guys smoking weed found guns on two members of group. Cops then frisked bad guy and found gun on him (convicted felon). Bad guy argued frisk of him unconstitutional because there was no suspicion particular to him. Kentucky court disagreed. They held police had reasonable suspicion to detain entire group and seeing bulge in bad guy's pants led to valid frisk. Remember frisks of all persons present at crime scene not usually allowed but a detention may be justified where someone is hanging out with others who are openly violating the law.

PROTECTIVE SWEEP

State V. Manuel, WL 6372855 (2011). Protective sweep of area adjacent to arrest of bad guy can include lifting the mattress and looking under beds since officers testified they routinely do so to search for anyone who could potentially pose a damage to the officers.

CANINE SNIFF

Jardines V. State, WL 1405080 (Florida, 2011). Dog has positive hit on front door after tip of possible pot growing. Warrant obtained in part based upon sniff. Most courts hold there is no reasonable expectation of privacy at entrance to property that is open to the public, including the front porch. Florida court held sniff at front door was a search requiring probable cause. U.S. Supreme Court has treated dog sniffs as non searches in multifamily residences. Does this mean at a private residence (single family home) you have a higher expectation of privacy? Is this a trend to watch for?

Belloitte v. Edwards, 629 Fed. 3d 415, 4th Cir. (2011). Police suspected a bad guy of being involved in child porn because of photographs he had developed at a Wal Mart. They determined the bad guy and his wife had concealed carry permits and convinced a judge to give them a no-knock warrant to search the house for evidence of child pornography.

The Court ruled there was no exigent circumstances justifying a no-knock entry. They reasoned that a single photograph of alleged child pornography didn't show the bad guy was a danger to police executing the warrant and there was no evidence that the bad guy and his spouse had violent tendencies, and went on to say that the concealed weapon permit should have revealed to the police that the bad guy had passed background checks. While the officers prevailed at the lower Court, the Appellate Court ruled that the civil rights action filed against the officers for excessive force could continue.

The Fourth Amendment allows a no-knock warrant for the following three conditions: (1) protecting the safety of the occupants of the dwelling and police by reducing violence; (2) inhibiting the destruction of property; and (3) protecting the privacy of occupants. It has been repeatedly held that the knock and announce requirement is required unless under particular circumstances it would be dangerous and futile to announce or the announcement would inhibit the effective investigation of the crime by allowing destruction of evidence.

PROFILING

United States v. Ramos, Fed. 3d (2010), 1st Cir. (2010), WL 5129826. The bad guy was parked in a van at the Massachusetts Bay Transit Authority Bus and Train Station. An employee of the Transit Authority noticed the van parked in a peculiar place and noticed that there were several men in the van who appeared to have a Middle Eastern complexion. A few days before bombs had been detonated in a Madrid, Spain train station killing nearly 200 people. The police were called and detained the van driver and its occupants. The van driver was smuggling illegal aliens. The van driver argued that there was no reasonable suspicion for his detention and that it was done solely based upon his skin color.

The Court disagreed. It held that the threat from persons likely to have a particular appearance such as being Middle Eastern was a reasonable factor for officers to consider. The Court noted the officers were following up on a situation on the heels of a major terrorist bombing that happened at a major transit hub. The Court warned that officers should never engage in racial profiling but also should not discount race or ethnicity. The Court ultimately held the officers effectively connected known criminal behavior, present threats and other suspicious factors including the description of the suspect they detained.

Srisavath v. Richardson, 10th Cir. Court of Appeals (2004). Officers did not have sufficient suspicion to stop a car based upon an anonymous phone call that teenagers with baggy pants were looking into windows of cars in a hotel parking lot even if the officer believed the car was being driven by the suspicious teenagers with baggy pants.

SEARCH OF VEHICLES AND CONTAINERS

U.S. v. Mundy, Fed. 3d (3rd Cir., 2010). When impounding a vehicle it is critical that a department have a sufficiently detailed policy governing the inventory process and that the officers performing the inventory be trained in the policy and follow it precisely.

Mundy was stopped for a traffic violation and the officers realized the VIN & plate showed the car was not registered. They impounded the vehicle. The written inventory policy required that the officers conduct a vehicle inventory describing any damage to any equipment, personal property of value left in the vehicle, including the trunk area if accessible. The written policy stated no locked areas including the trunk should be forced open while conducting the inventory. The Philadelphia police officer followed the written policy, opened the trunk with a key, and found a plastic bag. Inside the bag was a shoebox containing two bags of coke. A subsequent search warrant based upon the coke found during the inventory led to the discovery of more coke. The bad guy challenged based upon the Fourth Amendment setting forth the argument that the Philadelphia Police Department Police Department policy, while allowing inventories of impounded cars, did not guide officers on how to deal with closed containers.

In South Dakota v. Opperman, 428 U.S. 364 (1976) and Colorado v. Bertine, 479 U.S. 367 (1987), both addressed the issue of when police may inventory the contents of closed containers found in vehicles lawfully taken into custody. In those cases the Courts held that inventory fulfills three government interests: (1) it protects the owner's property while it is in the custody of the police; (2) it insulates the police from claims of lost, stolen or vandalized property and (3) it guards the police from danger.

In this case the Court of Appeals held that inventory was guided by sufficiently detailed policy. The written policy giving the officers the right to search all accessible areas of the vehicle, including the trunk, provided that they could do so as long as they did not force open either the trunk or locked container. The cocaine was found in a plastic bag in the trunk, the warrant was obtained and the search was thereafter admissible.

All police agencies should ensure that their policies are tailored to both Federal and State Court decisions pertaining to inventory searches.

CASUAL ENCOUNTER/RUNNER

United States v. Perdoma, U.S. App. LEXIS 19066 (8th Cir., 2010). Perdoma, the bad guy, was observed by a drug task force officer entering a bus station with only a small bag as luggage. The task force officer followed him, watched him produce his wallet and buy a ticket, and then approached the bad guy and asked to speak with him. The officer asked to see the bad guy's wallet and identification. (Note: many

states would not allow a stop and id procedure) The bad guy smelled of marijuana. The task force officer noted that the bad guy was clearly nervous and sweating. The bad guy took off running and was chased down by the task force officer. He had a small amount of marijuana in his pocket. He was placed under arrest. The bag he was carrying was searched and revealed a pound of meth. The bad guy argued the search of the bag incident to his arrest was barred by Arizona v. Gant, 129 Sup. Ct. 1710 (2009). In Arizona v. Gant the Supreme Court held that police may search a vehicle incident to arrest of an occupant only in two circumstances: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and (2) when it is reasonably believed that relevant evidence to the crime might be found in the vehicle. In Gant, the driver had been handcuffed and secured in a police car and the search incident to the arrest was not justified by safety rationale.

A large number of State Courts have emphasized the unique limiting factors in Gant. In this case, a search incident to the arrest happened near where Perdoma was apprehended and he had already run once. The officers didn't know how strong the bad guy was or whether he could fight them and gain access to a weapon that might be hidden in the bag. The Court in Perdoma stated that whether an officer has exclusive control of a seized item does not determine whether the item remains in the area for which the arrestee might gain possession of the weapon. The Court rejected the notion that an officer's exclusive control of an item necessarily removes the item from the arrestee's area of immediate control. Perdoma's argument that the search of the bag incident to the arrest is barred by Arizona v. Gant was rejected by the 8th Cir.

TASERS/USE OF FORCE

Cavanaugh v. Woods Cross City, 2010 U.S. App. Lexis 2290, 10th Cir. Mrs. Cavanaugh's husband reported a domestic disturbance with his wife and indicated to the police when they came to his house that she had been drinking and taking pills and had left the house with a kitchen knife. The officer began looking for Mrs. Cavanaugh and soon thereafter she walked up the front steps. She did not appear to be carrying a knife. She veered away from the officers and walked towards the house. An officer discharged his taser in Mrs. Cavanaugh's back without warning when her feet were on the front steps of the home. She hit her head on the concrete steps, suffering a traumatic brain injury.

The lower Court ruled the officer was not entitled to qualified immunity because Mrs. Cavanaugh did not pose an immediate threat to the officer or anyone else, she was not fleeing but quickly walking to her own home. The officer claimed that while he did not see a knife, he was fearful that Mrs. Cavanaugh was armed and would go into the house once again to assault her husband. The officer said he commanded her to stop and when she did not do so he deployed his taser. Mrs. Cavanaugh pled guilty to intoxication and assault. Ultimately, the officer was granted qualified immunity by the Appeals Court because the law was not clearly established at the time in the 10 Circuit. In the 10th Circuit it is now clear that a taser should not be used on a non-violent misdemeanant who does not pose an imminent threat and was not evading or resisting arrest without first giving a warning. The 10th Circuit has said that officers should give a loud warning when feasible and consider other means to effectuate an arrest without the use of a taser.

In Graham v . Connor, (2009) 490 U.S. 396, the Court has held that the government's interest in the use of force must be examined by looking at three core factors: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting or attempting to evade arrest by flight.

In the Bryan case the court ruled that Bryan did not pose an immediate threat to the officer. The evidence showed that Bryan was standing unarmed at a distance of 15 or 25 feet away from the officer at the time he was tasered. The court also ruled that even if Bryan failed to comply with an officer's command to remain

in the vehicle, such non-compliance does not constitute "an act of resistance" supporting a substantial use of force.

The court ruled that passive resistance does not justify the use of intermediate force and even though Bryan displayed bizarre behavior that bizarre behavior did not justify such force. Bryant did not struggle with the officer and the officer was not attempting to restrain or arrest Bryant before he used the taser. Police officers are required to consider whether other tactics, if any, are available to affect an arrest.

This case probably would have been different if Bryan had made a move towards the officer, had not fallen on his face and broken four teeth, or otherwise attempted to evade or elude the officer.

SEARCHING CELLULAR TELEPHONES

People v. Weaver, 909 N.E. 2d 1195 (N.Y. 2009). Two drug dealers met and one killed the other over a 1/4 kilo of cocaine. The cell phone of the dead drug dealer was found and searched. It revealed a call from the murdering drug dealer. The cell phone company was asked to ping the murdering drug dealer's phone to reveal his location. He was found and arrested. He argued that the ping of his cell phone violated the Fourth Amendment.

The Court noted while some states have statutes restricting warrantless use of GPS trackers, most state's Supreme Courts have interpreted their constitution to follow the reasoning of the U.S. Supreme Court decision in United States v. Knotts, 460 U.S. 276 (1983) which held that a warrantless monitoring of signals from a beeper inside of an automobile traveling on a public road did not violate the Fourth Amendment.

United States v. Park 2007 WL 1521573 (N.D. Cal.) Cops observed Park entering and leaving a building that was under surveillance for a marijuana grow operation. Upon obtaining a warrant they searched the building, arrested Park, and took him to booking where they searched his cell phone.

The Judge suppressed the phone numbers and names in Park's phone reasoning the phone was more like a mini personal computer. There was no officer safety or evidence preservation issue to allow the search to go forward.

In another case, Northern overdosed on crack cocaine and when questioned by police identified Smith as their dealer. The police arranged for Northern to buy more cocaine from Smith and when he showed up he was arrested. Incident to his arrest and without a warrant the police searched the call log and confirmed the transaction between Smith and Northern. The Court tossed the search saying it could not be part of a valid search incident to the arrest under those circumstances. While some courts consider cell phones to be a closed container similar to a computer, other courts believe that the cell phone memory is short lived as new calls are received the memory from the older calls is automatically eliminated. Other courts such as in State v. Smith, - - - N.E. 2d. - - -, 2009 WL 4826991 (Ohio 2009) have found that while phones can't be equated to laptop computers, once the cops seized the phone the State's interest in preserving the evidence is satisfied and a warrant is required to examine the data.