

Search and Seizure Bulletin

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Border Search

Search of defendant's electronic devices was reasonable under totality of circumstances

Citation: *United States v. Williams*, 942 F.3d 1187 (10th Cir. 2019)

The Tenth U.S. Circuit has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

On November 24, 2015, Derrick Williams, an American citizen, boarded an international flight bound for Denver International Airport (DIA). Once on the ground, he proceeded to customs where his passport triggered multiple “lookout” alerts in the U.S. Customs and Border Patrol (CBP) enforcement system. The alerts instructed CBP officers to escort Williams to DIA’s secondary screening area where he was met by Homeland Security Special Agent Kyle Allen.

Agent Allen became aware of Williams in August 2015 when he received a letter stating that Williams had been arrested in Germany for violating weapons laws. According to the letter, someone reported seeing Williams and another man brandishing weapons in a suburban neighborhood. Officers found a crossbow, multiple pistols, and an airsoft gun that resembled an automatic rifle in their possession.

The letter additionally stated that it was unclear how Williams entered Germany as he was banned from the country in 2011 after being discovered living there on an expired visa. The ban extended throughout the Schengen Area for a five-year period. However, Williams admitted to German law enforcement that in 2015 he had already traveled through Belgium, France, Iceland, and the Netherlands—all Schengen member states—and that he would go to Morocco next.

Prompted by this letter, Agent Allen began investigating Williams and discovered that he had domestic felony convictions for trespass, unlawful use of a financial instrument, fraud, and escape. The escape charge arose when Williams fled the United States in 2007 while serving a community corrections sentence. Williams was convicted in 2011 after being deported from Germany to the United States.

On November 13, 2015, terrorist cells operating in France and Belgium launched a large-scale attack in Paris. The terrorists, who claimed allegiance to the Islamic state, were of Moroccan descent. Agent Allen’s supervisors asked that he review his open investigations. Agent Allen then reviewed Williams’ file and, though he did not have specific information linking Williams to terrorist activity, placed a lookout on Williams in the CBP enforcement system.

Less than two weeks after the attacks, Agent Allen learned that Williams had

boarded a flight from Paris to Denver with a stopover in Reykjavik. He met Williams at DIA to interview him. Prior to conducting the interview, however, Agent Allen reviewed Williams' customs declaration form and noticed that he had not listed Germany as one of the countries visited. Only Belgium, France, and Morocco were included.

During the interview, Williams was repeatedly asked if he had traveled to other European countries not listed on his customs declaration form. He was evasive and never affirmatively admitted to having been in Germany. He also gave vague answers regarding his time in Belgium and claimed that he split his time there between a hostel and living with a friend. He could not give specific infor-

mation about the friend other than that his name was Mohammed and they had met near a mosque.

At the close of the interview, Agent Allen explained to Williams that his electronic devices, a laptop and a smartphone, would be searched. He asked for the devices' passwords, which Williams refused to give. As a result, two forensic computer specialists attempted to get around the passwords. When they were unsuccessful, Agent Allen told Williams that his electronics would need to be taken to another site and would be returned to him later. He asked Williams where the devices should be returned, and he gave his address as 3333 Curtis Street. Agent Allen noticed this address did not match the 2952 Downing Street address that Williams listed as his home address on both the customs declaration form and his most recent passport application. Williams was allowed to leave.

The next day, Agent Allen took Williams' electronics to his office. A computer forensics agent used a software program called "EnCase" to bypass the laptop's password and create a copy of the hard drive, which he was then able to search. Within three minutes, the agent found a folder titled "Issue 15 Little Duchess," which contained child pornography. He immediately stopped his search and notified Agent Allen who subsequently obtained a search warrant authorizing a full forensic search. The search ultimately yielded thousands of images and videos of child pornography.

Williams was indicted and moved to suppress the evidence obtained from his laptop on grounds that it was tainted by the three-minute search conducted prior to the issuance of a search warrant. He argued that the agents needed reasonable suspicion for this kind of search and that, because they did not have it, his Fourth Amendment rights were violated. The government countered that the Fourth Amendment allowed for suspicionless searches at the border and that, even if reasonable suspicion were required, they had ample reason to suspect that Williams was involved in criminal activity. The district court held a hearing on the matter and subsequently denied the motion. The court declined to decide whether reasonable suspicion was necessary to justify the search but found that because the agents had it in this case, Williams could not prevail either way. On appeal, Williams argued that the district court erred in holding that the search was supported by reasonable suspicion and that, without reasonable suspicion, the search of his personal electronic devices at the border violated his Fourth Amendment rights.

DECISION: Affirmed.

Law enforcement officers must have an articulable, individualized, reasonable suspicion that an individual is involved in some criminal activity. In the Fourth Amendment context, the reasonable suspicion analysis requires a careful consideration of the totality of the circumstances. Here, the totality of circumstances surrounding the search of Williams' laptop readily met the reasonable suspicion standard.

First, Williams' criminal history concerned border

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offenses. He fled the United States as a fugitive and was convicted after deportation from Germany. Moreover, German authorities banned Williams from entering any country in the Schengen Area between 2011 and 2016. Agent Allen knew that Williams had blatantly contravened this ban in 2015 by traveling undetected through Iceland, the Netherlands, Belgium, France, and Germany.

Second, Agent Allen knew Williams had been in Germany prior to his return to the United States, yet Williams did not list Germany as one of the countries visited on his customs declaration form despite attesting via signature that his answers on the form were truthful. Additionally, Williams evaded all of Agent Allen's questions regarding his time in Germany and claimed that, because of his advanced age of 39, he was unable to recall details regarding his time abroad.

Third, Williams was returning to the United States on a one-way ticket originating in Paris—the site of devastating terrorist attacks less than two weeks earlier. His travel itinerary included Belgium, France, and Morocco, three countries intimately linked to the attacks. Additionally, Williams had been arrested in Germany for brandishing what appeared to be weapons.

Finally, Williams appeared to distance himself from his electronic devices. On his customs declaration form, Williams gave his home address as 2952 Downing Street and yet, when asked where the devices should be returned, gave his address as 3333 Curtis Street. The totality of the circumstances was sufficient to justify a warrantless search of the laptop and cell phone.

Relatedly, Williams argued that even if the border agents had reasonable suspicion that he was engaged in criminal activity, this suspicion was not particularized enough to justify the search. He suggested that border agents are tasked exclusively with upholding customs laws and rooting out the importation of contraband. He argued that because border agents did not suspect him of either of these types of crimes, they were prevented from searching his laptop and cell phone. The Fourth Amendment does not require law enforcement officers to close their eyes to suspicious circumstances.

See also: *U.S. v. Johnson*, 895 F.2d 693 (10th Cir. 1990).

See also: *U.S. v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977).

Editor's Note:

In *U.S. v. Irving*, 452 F.3d 110 (2d Cir. 2006), the court found a suspicious itinerary relevant under the totality of the circumstances test.

Exigent Circumstances

Officers' entry into other officer's home justified by their knowledge that he had a gun

Citation: *United States v. Rodriguez-Pacheco*, 948 F.3d 1 (1st Cir. 2020)

The First U.S. Circuit has jurisdiction over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

Officer Murillo-Rivera was off-duty when he was approached by his wife's coworker, who complained that Rodriguez-Pacheco, with whom she had once been in a relationship, had been sending her threatening text messages. Officer Murillo-Rivera testified that he saw these complained-of text messages in which Rodriguez-Pacheco was threatening to publish photos and videos of a sexual nature of the victim if she did not agree to rekindle their relationship.

Officer Murillo-Rivera reported the above-described episode to the director of the domestic violence unit; later, he was instructed by the district attorney to locate and arrest Rodriguez-Pacheco pursuant to "established procedure." Officer Murillo-Rivera testified that, in accordance with that procedure and because Rodriguez-Pacheco was a police officer, the proper course of action was to locate and disarm him, explain the complaint to him, and then place him under arrest.

Intending to carry out this procedure, around midnight, Officer Murillo-Rivera headed to Rodriguez-Pacheco's house.

Officer Murillo-Rivera testified that Rodriguez-Pacheco immediately came outside to the front of the house. Officer Murillo-Rivera introduced himself, informed Rodriguez-Pacheco that a woman had filed a domestic violence complaint against him, and asked if he knew the woman. Rodriguez-Pacheco said he knew the woman, and so Officer Murillo-Rivera told Rodriguez-Pacheco that the officers needed to seize his service weapon, and he would have to go to the police station to be questioned.

Officer Murillo-Rivera did not handcuff Rodriguez-Pacheco, despite the point of the visit being to arrest him, and he explained that was because Rodriguez-Pacheco "was very cooperative and his family looked like really decent people."

The officers told Rodriguez-Pacheco that they needed his weapon. Rodriguez-Pacheco said it was inside the house. Once inside the house, Officer Murillo-Rivera retrieved the service weapon and also seized a Go-Pro camera, a white laptop, and a cell phone, all of which he believed could be related to the domestic violence accusation.

Officer Murillo-Rivera got a search warrant for the

seized electronics, and authorities found videos and images of several female minors between the ages of 16 and 17 years old.

Rodriguez-Pacheco was convicted of domestic abuse and other crimes.

Rodriguez-Pacheco appealed, arguing that the officers' warrantless entry into his home was unlawful.

DECISION: Reversed.

The warrantless search was not supported by exigent circumstances.

Generally, a warrantless entry into a person's dwelling could be permitted if there were exigent circumstances. In order to find exigent circumstances, the police had to reasonably believe that there was such a compelling necessity for immediate action as would not allow the delay of obtaining a warrant. The best examples of exigent circumstances included hot pursuit of a felon; imminent destruction or removal of evidence; the threatened escape by a suspect; or imminent threat to the life or safety of the public, police officers, or a person in residence.

Here, Rodriguez-Pacheco had threatened (in a generic sense) his victim, but not with a gun and not face-to-face. Additionally, he was not armed at any point during his encounter with his fellow officers, nor had he given the officers any indication that he would turn violent and become a danger to them. In fact, they never handcuffed him nor did a protective sweep, apparently never in fear for their safety as Rodriguez-Pacheco remained passive, nor did they ever express any concern that some other resident of the house might access the gun to hide or misuse it. Moreover, Rodriguez-Pacheco did not flee when the officers showed up, but instead was, by the officers' own accounts, fully cooperative. Although the officers in Rodriguez-Pacheco's case knew there was a gun nearby, this gun was not alleged to have played a role in the recent commission of a violent crime against a victim who was still on-scene. The fact that the officers knew a gun was in the house, without more, was not sufficient to demonstrate exigent circumstances.

This situation, viewed in its totality, did not reflect one of those crisis situations when there was compelling need for official action and no time to secure a warrant. There was no emergency, no urgency, no actual or threatened violence or gun violence, no armed suspects, no fleeing, no split-second decisions by police in tense moments, and no legal reason not to get a warrant. At bottom, the facts of this case simply did not square with exigent circumstances case law.

See also: *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011).

See also: *U.S. v. Sambo*, 433 F.3d 154 (1st Cir. 2005).

Editor's Note:

A warrantless entry based on exigent circumstances requires an emergency or other urgent need.

Inventory Search

Officers move to arrest suspect, discover gun in her belongings

Citation: *United States v. Seay*, 944 F.3d 220 (4th Cir. 2019), as amended, (Dec. 4, 2019)

The Fourth U.S. Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Police responded to a request from staff at the Spring-Hill Suites in Hampton, Virginia to evict a difficult customer, Bracey. The officers knocked on Bracey's hotel room door and, after a few minutes of delay, she opened it. As Bracey opened the door, Seay exited the bathroom. After the officers informed them that they had been asked to leave, Bracey and Seay packed their belongings and left the room. Seay carried a clear plastic bag as he left. The officers searched the hotel room, found ammunition in the toilet bowl and drug paraphernalia wrapped in women's underwear, and ordered Bracey and Seay back into the room.

Officer DiPentima separated the suspects to interview them. After Bracey's interview, Officer DiPentima and Officer Lucy conferred and determined they had probable cause to arrest Bracey on drug charges. They discussed the possibility of arresting Seay for possession of ammunition as a felon and decided they should interview him. Officer Lucy also wanted to "determine what property was whose" and to "search [Bracey's] property prior to taking her to lockup."

While Seay was being interviewed, Officer Lucy searched Bracey's belongings. As footage from the officers' body cameras showed, Officer Lucy first searched a handbag, which Bracey admitted was hers. After searching the handbag, Officer Lucy gestured to the clear plastic bag and asked, "whose stuff is this right here?" As Bracey picked up the plastic bag, she responded, "this stuff is our stuff." Officer Lucy again asked who the plastic bag belonged to, and Bracey again responded that it was "our stuff." Officer Lucy then searched the plastic bag and discovered a silver handgun wrapped in a red jacket.

Ultimately, Seay pled conditionally guilty to being a felon in possession of a firearm.

Seay appealed, arguing that the discovery of the gun was the product of an unlawful search.

DECISION: Affirmed.

The seizure of the gun was lawful.

Generally, the government was prohibited from using evidence discovered in an unlawful search against the individual whose constitutional right was violated. However, this rule was subject to certain exceptions. One such exception was the inevitable discovery doctrine, which allowed the government to use evidence gathered in an otherwise unreasonable search if it could prove that law

enforcement would have ultimately or inevitably discovered the evidence by lawful means. “Lawful means” include searches that fell into an exception to the warrant requirement, such as an inventory search that would have inevitably uncovered the evidence in question.

For the inventory search exception to apply, the search had to be conducted according to standardized criteria, such as a uniform police department policy, and performed in good faith.

Here, Officers Lucy and DiPentima testified that it was standard procedure to inventory an arrestee’s belongings before taking him or her to jail. The officers had probable cause to arrest Bracey and were preparing to arrest her. Officer Lucy testified that Bracey had identified the plastic bag as “our stuff” and that the officers would have inventoried Bracey’s belongings, including the contents of the plastic bag, pursuant to the standard procedure. The officers’ testimony explaining the inventory procedure was sufficient.

Seay argued that, because Officer Lucy testified that part of the inventory procedure was discretionary, the government could not demonstrate that an inventory would have been conducted according to standardized criteria or that such a search was inevitable. Seay was correct that an inventory search policy had to restrict discretion in order to tether inventory searches to their permissible purposes and prevent them from becoming a ruse for general rummaging in order to discover incriminating evidence. However, police discretion was not entirely forbidden; for example, an inventory search policy could leave the inspecting officer sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself.

Officer Lucy testified that, if an arrestee requested to send property with a companion rather than take it to jail, officers would document each item being released. As he explained, this practice was intended to prevent allegations that officers stole seized property and to prevent contraband from going to jail. Officer Lucy testified that it was “up to officer discretion” whether to verbally identify each item in a container on camera and confirm with the arrestee that each item would be sent with his or her companion. This limited discretion based on concerns related to the purposes of an inventory search did not violate the Fourth Amendment.

Whether or not the officers would have conducted the inventory by identifying each item on camera did not change the analysis. Bracey could not leave the plastic bag behind because she had been evicted from the hotel. If she had asked to send the bag with Seay instead of bringing it to lockup, Officer Lucy testified that the contents would have been documented before being released. Based on the evidence, the plastic bag would have been inventoried either when Bracey was taken to lockup or before being released to Seay.

See also: *Utah v. Strieff*, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016).

See also: *U.S. v. Doyle*, 650 F.3d 460 (4th Cir. 2011).

Editor’s Note:

Inventory procedures serve to protect an owner’s property while the property is in police possession.

Search Warrant

Officers get search warrants for drugs, find gun

Citation: *United States v. Lawton*, 2019 WL 6403965 (S.D. Ga. 2019), report and recommendation adopted, 2020 WL 833804 (S.D. Ga. 2020)

Police received a complaint about suspicious activity at a residence in Savannah, Georgia. In response, officers began to surveil the property. Agent Baker personally conducted the surveillance and, although he did not observe criminal conduct, he did observe suspicious activity. As the investigation progressed, a confidential informant (“CI”) informed agents that narcotics were available at the residence.

The CI’s information led officers to conduct several “controlled buys” of narcotics using bills whose serial numbers were prerecorded. In total, Agent Baker and the CI conducted four controlled buys, all video and audio recorded. Agent Baker was able to positively identify Lawton as the vendor in those recordings. Agent Baker discovered Lawton’s name and his criminal history by searching property and vehicle records and law enforcement databases. Based on the evidence gathered from the controlled buys, Agent Baker applied for and received a state search warrant for the residence.

Officers prepared to execute the warrant. Their preparation involved a briefing, at which Agent Baker provided all involved officers with the results of the investigation concerning Lawton and the other known residents at the house. Before the warrant was executed, and before law enforcement had revealed its presence, Lawton was observed leaving the residence. Officers followed him to a nearby gas station, where he was detained. They then transported him back to the residence where other officers were in the process of executing the warrant.

Once the officers entered the residence, they cleared it of its occupants and proceeded to search for the contraband specified in the warrant. In a back bedroom of the house, officers discovered, among other evidence, 12.5 ounces of cocaine, a firearm, over \$19,000 in cash, and other paraphernalia that were commonly associated with preparing crack cocaine. Agents also discovered a birth certificate for “Okemi Lawton.” After discovering the firearm, but before they removed it from the house, officers checked its serial number and determined that it had been reported stolen. After discovering the evidence, Agent Baker transported Lawton to a police station,

where he was placed under arrest. At trial, Lawton challenged the recovery of the firearm, claiming that it had not been listed in the search warrant.

SEARCH: Lawful.

The seizure of the gun was lawful.

The affidavit supporting the warrant application clearly indicated officers' awareness, prior to the gun's discovery, that Lawton was a convicted felon. The incriminating character of a firearm in his possession was, therefore, immediately apparent. A firearm that reasonably appeared to be in the possession of a convicted felon qualified as contraband—and was therefore subject to seizure under the plain view doctrine.

Moreover, before officers seized the gun, Agent Baker testified that they checked its serial number and determined it was reported stolen. Since the gun was found in plain view during the course of a lawful search, the additional investigatory step of recording and querying its serial numbers did not constitute a further search. In similar circumstances courts have recognized that such inquiries are justified extensions of the plain-view doctrine. Even if the gun's discovery only raised the reasonable suspicion that it was related to the drug evidence expressly covered by the warrant, the officers' search of the serial number was a perfectly reasonable step to confirm or refute those suspicions.

Lawton did not dispute that officers were authorized by the warrant to search the residence for drugs. While conducting that authorized search, they discovered a gun in close proximity to evidence of drug trafficking. Based on that proximity and their knowledge that Lawton was a convicted felon, they had, at least, reasonable suspicion that the firearm was contraband. Even assuming that the circumstances of their initial discovery alone did not justify the gun's seizure, they certainly warranted the further investigative step of checking its serial number. Once the serial number confirmed that the gun was stolen, its contraband character was confirmed.

See also: *U.S. v. Folk*, 754 F.3d 905 (11th Cir. 2014).

See also: *U.S. v. Prather*, 279 Fed. Appx. 761 (11th Cir. 2008).

Editor's Note:

When law enforcement officers stumble across guns during a lawful search for drugs, they are allowed to draw the reasonable inference that the guns may be related to drug trafficking.

Pat-down

Officer searches man on bus after searching his bag

Citation: *United States v. Muse*, 2019 WL 7037667 (D.N.M. 2019)

Darius Muse was indicted on charges of transporting narcotics. In the early morning of July 1, 2017, Special Agent (SA) Perry was patrolling the Greyhound bus station in Albuquerque, New Mexico. Sometime after 3:00 a.m., Perry boarded an eastbound bus and began to speak to passengers when they re-boarded. He was in plain-clothes with his firearm concealed. SA Perry spoke with approximately five other passengers before getting to Muse. He introduced himself as a "police officer" there to "check the bus . . . for security." He then asked the passengers where they were traveling to. Responses varied from Fairbault, Minnesota, to Chicago, Illinois, to Austin, Texas.

SA Perry also asked three of the passengers about their luggage but did not ask to search it. One of them nevertheless offered to let Perry look at her backpack, but he declined to do so. When asked about his interaction with this passenger at the evidentiary hearing, SA Perry responded that he did not remember her specifically and could not recall the circumstances around her because the interaction occurred approximately two and a half years ago.

SA Perry then moved on to Muse, who was sitting in a window seat towards the rear of the bus. As with the other passengers, Perry introduced himself as a "police officer" there to check the bus "for security." Muse explained that he was headed to Akron, Ohio and was coming from California. SA Perry asked if Muse was coming back on the bus, to which he replied that he was not sure. Perry then requested consent to search Muse's bag for contraband, which he gave by saying "yeah," offering to open the bag, and then telling Perry to "go ahead." The search revealed nothing of interest. When asked during the hearing why he requested to search Muse's bag but not the other passengers', SA Perry responded that he had made numerous seizures from passengers traveling to Akron. He later testified that prior to hearing about Akron, there was nothing at all that made him suspicious of Muse.

After finding nothing in the bag, SA Perry thanked Muse and wished him a good trip. Instead of moving on to another passenger, however, he then re-initiated the encounter by asking, "Sir, would you give me permission just to pat you down for contraband?" Perry testified that in response to his request, Muse said "yeah." However, in the audio recording of this event, any response by Muse was inaudible. Following the pat-down request, Muse stood up from his seat and raised his hands above his head while facing the front of the bus. He was sitting alone but there were other passengers in the vicinity. Perry then began his search. Using his palms and fingers, Perry patted down Muse's waist up to his torso, up to his chest, around his back and up his back, and then down around his ankles on each leg, and then to his groin area. Upon searching Muse's crotch, SA Perry felt a round, hard bundle between his legs which he believed to be drugs. Muse did not object to the search while it was occurring.

Following the pat-down, SA Perry asked Muse for

identification and then placed him under arrest. Muse was holding a phone, which SA Perry told him to put down before handcuffing him. SA Perry then led Muse off the bus and transported him to the DEA's Albuquerque district office. The arrest occurred at approximately 4:00 a.m., and the two arrived at the DEA office around 30 minutes later. Sometime thereafter, SA Perry strip-searched Muse and discovered that he was in fact carrying a softball-shaped bundle in a pair of underwear he was wearing. The bundle weighed 850 grams and field-tested positive for the presence of methamphetamine, a result later confirmed by laboratory testing.

Around three hours later, at 7:19 a.m., SA Perry conducted a post-arrest interview of Muse. SA Perry began by reading Muse his *Miranda* rights, which he waived. Muse then admitted that he was approached by an individual in California who asked him to transport drugs to Amarillo, Texas for \$1,000. He agreed and was instructed to wear a pair of underwear with a large ball of drugs taped to the crotch area. Upon arrival in Texas, Muse was going to transfer the drugs to an awaiting individual in exchange for the \$1,000. Muse was subsequently charged with possession of methamphetamine with intent to distribute. He then filed a motion to suppress both the evidence recovered from his person and the statements he made to SA Perry.

DECISION: Motion granted.

Muse argued that he did not consent to the pat down search, and that the physical evidence must therefore be dismissed. He further argued that his statements were made as a result of an illegal search, and should also be suppressed. The government argued that Muse consented to the search, and that his actions confirmed that consent.

The court agreed with Muse, and found that the pat-down search was improper. They first pointed out that SA Perry had already searched Muse's bag, and admitted that he had no reasonable suspicion of criminal activity, but for Muse's stated destination. They therefore found that the legality of the search turned on Muse's consent. Because there was no clear evidence of such consent presented, the court examined Muse's behavior and action leading up to the pat-down search.

The court found that it was unreasonable for SA Perry to assume that Muse had clearly heard and understood his request for consent, a conclusion supported by Muse's later statement that he in fact had not. The court also found that because it was unreasonable for SA Perry to assume that Muse had clearly heard and understood his request, it was also unreasonable for him to assume that Muse's subsequent act of standing up and raising his arms above his head was meant to express unequivocal and specific consent in response. The court therefore found that the both the physical evidence and statements should be suppressed as the fruit of an illegal search.

See also: *United States v. Freeman*, 2002 WL 35650115 (D.N.M. 2002).

See also: *U.S. v. Elliott*, 107 F.3d 810 (10th Cir. 1997).

Editor's Note:

In U.S. v. Blake, 888 F.2d 795 (11th Cir. 1989), the defendants were walking in the Fort Lauderdale International Airport when they were approached by two sheriff's deputies. After inspecting the defendants' tickets and identification, one of the deputies requested permission to search their luggage and "persons" for drugs. One of the defendants consented, and within seconds the deputy "reached into [his] groin region where he did a frontal touching of the outside of [the defendant's] trousers in the area between the legs." Upon reaching into the defendant's crotch, the deputy felt a hard object and heard a crinkling sound. The deputy then repeated this procedure after receiving the other defendant's consent and again "felt a foreign object in [his] crotch." Referring to the deputy's searches as "outrageous and unreasonable," the district court held that they exceeded the scope of consent and accordingly must be suppressed. The Eleventh Circuit affirmed. It noted that the deputy's request to search the defendants' "persons," without more explanation, "need not have been reasonably construed as a request for permission to touch [their] genitals." The Eleventh Circuit further stressed that the search "took place in a public airport terminal" and that "[g]iven this public location, it cannot be said that a reasonable individual would understand that a search of one's person would entail an officer touching his or her genitals."

In Brief

North Carolina

Blood draw

At around 6:00 a.m., Officer Richard of the Shelby Police Department was dispatched in response to a call reporting a stationary car in the middle of Earl Street. Upon his arrival, Officer Richard observed a beige Toyota Prius in the "dead middle of the roadway" with its headlights turned on and the engine running. Officer Richard approached the car and observed a male, later identified as Hoque, "slumped over appearing to be asleep in the driver's seat." Officer Richard did not see any other passengers in the car. When Officer Richard knocked on the driver's side window, Hoque would not speak to him. Officer Richard asked Hoque to roll down his window, but Hoque refused. Officer Richard opened the door, asked Hoque his name, and engaged Hoque in conversation. Officer Richard observed that Hoque was "groggy" and his breath smelled of alcohol. While waiting for other officers to arrive, Officer Richard tried to determine Hoque's name. Hoque produced a bank card as his only form of identification. Officer Richard saw an open New Amsterdam vodka bottle in between Hoque's legs. Hoque then "revved his engine very high" and "pressed the gas." After Officer Richard turned the engine off by depressing the keyless push-button, Hoque tried to restart the car several times. Officer Richard realized he

had not turned on his chest-mounted body camera, so he activated it at that time. Hoque asked if he could pull the car forward and attempted to start the car “a couple more times,” despite Officer Richard telling him to stop. Hoque also stated that he was at home; Officer Richard explained to Hoque that he was actually in the middle of the road. Officer Richard observed that Hoque appeared “disheveled” and that his “eyes were very glossy and bloodshot-appearing.” Officers Smith, Kallay, Torres, and Hill arrived on the scene and activated their body cameras. Officer Smith observed Hoque sitting in the driver’s seat of the car and engaged Hoque in conversation. Hoque told Officer Smith that “he had just a few sips [of alcohol] just a couple hours ago.” Officer Smith smelled a “very strong odor of alcohol” on Hoque’s breath and noticed that Hoque’s eyes were red and glassy, and that his movements were slow and labored. Officer Smith thought Hoque’s movements were labored due to alcohol consumption. Upon Officer Smith’s request, Hoque got out of the car for field sobriety testing. Officer Smith performed a horizontal gaze test; Hoque failed, showing all six signs of impairment. Hoque also failed a vertical gaze test, which led Officer Smith to believe that Hoque was “significantly high.” While Officer Smith was performing the field sobriety tests, Officer Torres observed that Hoque was “very slow to react” and had “red, glassy eyes” and “slurred speech.” Hoque did not understand where he was or what time it was, and he had a hard time answering questions. Officer Torres saw the open alcohol bottle between Hoque’s legs. Officer Smith asked Hoque to provide a breath sample on the portable alcosensor. Although Hoque initially agreed, he refused 10 to 12 times when asked to give a sample. Hoque repeatedly placed his hands in his pockets, which Officer Smith told him not to do. Because Hoque was making Officer Smith feel concerned for his own safety, Officer Smith grabbed Hoque’s right wrist to pull it out of Hoque’s pocket and said, “The games are over. We’re not going to put our hands back in our pockets anymore.” After Hoque refused one last opportunity to provide a breath sample, Officer Smith began to arrest him. Because Hoque “tensed up” and “pulled his arms back,” Officers Richard and Torres assisted Officer Smith in placing Hoque under arrest. Hoque continued to struggle with the officers, fell down to his knees, and began shouting and crying. Officers Smith and Torres adjusted Hoque’s handcuffs, and Hoque stopped shouting and crying. When Officers Smith and Torres tried to place Hoque into the patrol car, Hoque was uncooperative and would not put his legs in the car. Officer Torres grabbed Hoque’s legs, placed them inside the car, and shut the door. Officer Torres smelled alcohol on Hoque’s breath. Officer Kallay retrieved the vodka bottle and gave it to Officer Smith. Officer Smith poured the liquid out of the bottle in accordance with the police department’s common practice and placed the bottle in

the patrol car. After Hoque was in the back of the patrol car, Officer Smith turned off his body camera. Officer Smith transported Hoque to the Law Enforcement Center annex for a chemical analysis of his breath and explained Hoque’s implied consent rights to him. Officer Smith did not have his body camera turned on while at the Law Enforcement Center annex, in violation of his department’s policy. Hoque refused to sign the implied rights form and did not request an attorney. Officer Smith gave Hoque one more opportunity to submit a breath sample. Hoque did not put his mouth on the intoxilyzer machine or attempt to blow. After Officer Smith marked Hoque as refusing to provide a breath sample, Officer Smith obtained a search warrant for Hoque’s blood from the magistrate. Officer Smith transported Hoque to the hospital to have a blood sample taken. At the hospital, Hoque told the nurse that she did not have his permission to take his blood. Hospital staff told Officer Smith that Hoque would need to be held down for the blood draw, because he was refusing to cooperate, despite the search warrant. Officers Smith and Kallay placed Hoque in handcuffs and placed him on his stomach. Because Hoque was “somewhat combative and did not want his blood drawn,” two nurses assisted the officers in holding Hoque down, and a nurse was able to draw Hoque’s blood. At his trial for driving while under the influence, Hoque argued that the forced blood draw was unlawful.

BLOOD DRAW: Lawful.

In this case, the officers were authorized to require Hoque to provide a blood sample, because they possessed a valid search warrant. Hoque’s blood was drawn by medical personnel, in a hospital, which the U.S. Supreme Court has identified as a reasonable manner in which to draw blood. Finally, the use of force in taking the blood sample in this case was caused by Hoque’s refusal to comply with a lawful warrant and was reasonable. Hoque admitted that he was initially asked to lie down so that his blood could be drawn. When Hoque refused and resisted the blood draw, the officers used the force necessary to restrain him while the sample was taken. Hoque had no right to resist execution of a search warrant and, in fact, his actions rose to the level of criminal conduct under state law for resisting a public officer. Hoque was given multiple opportunities to comply with the warrant, and it was his refusal to comply with a lawful warrant that forced the situation. Hoque could not resist a lawful warrant and be rewarded with the exclusion of evidence. In summary, the officers’ use of force was objectively reasonable in light of the facts and circumstances confronting the officers at the time they executed the search warrant.

Citation: *State v. Hoque*, 837 S.E.2d 464 (N.C. Ct. App. 2020)