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Constitutional Law - Search and Seizure - Magnetometer as Search

Constitutional Law—Search and Seizure—MAGNETOMETER AS SEARCH—*Epperson v. United States*, 454 F.2d 769 (4th Cir. 1972).

As a result of the great number of airborne hijackings and in an attempt to prevent them, the United States Government has developed a "system for discouraging and apprehending potential hijackers" [1] that includes the use of a metal detecting device known as a magnetometer. The constitutional validity of the use of this device recently has been questioned in regard to the fourth amendment right against unreasonable searches and seizures in the case of *Epperson v. United States*.[2]

When defendant Epperson was attempting to board an interstate commercial flight, a magnetometer to which all passengers on the flight were exposed indicated that he was carrying a large amount of metal. After removal of several items from his pockets, the device continued to indicate a significant amount of metal on his person. A United States Marshal then searched Epperson's jacket and found a loaded .22 caliber pistol. Epperson was subsequently convicted of violating a federal statute[3] that prohibits the

[1] *See* United States v. Lopez, 328 F. Supp. 1077, 1082-1101 (E.D.N.Y. 1971), for a discussion of the anti-hijacking system. The elements discussed in the opinion are:

(1) *Heavy penalties.* As passed by Congress, the death penalty was provided. This has been superseded, however, by a recent Supreme Court decision that held the death penalty unconstitutional.

(2) *Notice to the public.* Signs are posted at boarding gates, warning of the statutory penalty and asserting that persons and baggage are subject to search.

(3) *Profile.* A set of twenty-five to thirty characteristics based on known hijackers has been compiled to form a method of visual identification of persons who may be contemplating air piracy.

(4) *Magnetometer.* This device measures the distortion of magnetic lines of flux created by passage of a certain quantity of ferrous metal through the measuring area. The model employed in *Lopez* consists of two poles with a series of the measuring devices attached thereto. Passengers walk between the poles; if they carry enough ferrous metal to equal the flux distortion of a predetermined mass (generally equivalent to a .25 caliber pistol), a warning light flashes.

(5) *Interview by airlines personnel.* One who activates the magnetometer is interviewed by airlines employees who make a preliminary determination of whether the person should be detained for questioning by a United States Marshal.

(6) *Interview by Marshal.* The Marshal attempts to determine whether the device has been set off by harmless objects by questioning the detainee, and asking him to display any metal he may be carrying. If the explanation is not satisfactory and the magnetometer remains activated, the detainee then is asked to submit to a search.

(7) *Frisk.* If a pat-down of exterior clothing to locate weapons produces no weapons, the detainee is allowed to board. If the result is otherwise, the person is detained for further investigation and the possible filing of charges.

[2] 454 F.2d 769 (4th Cir. 1972).

[3] Federal Aviation Act of 1958, § 902 (l), 49 U.S.C. § 1472 (l) (1970). The section provides in part:

carrying of concealed dangerous weapons on board an aircraft engaged in interstate commerce. The United States Court of Appeals for the Fourth Circuit affirmed, finding no fourth amendment violation.

Having decided initially that use of the magnetometer was per se a search within the meaning of the fourth amendment, the court determined that this factual situation fell within the warrant exception delineated in *Terry v. Ohio.*[4] The court did acknowledge a difference in the two situations, but noted that *Epperson* hinged on the *Terry* test of "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." [5] The Circuit Court continued, saying "[t]he danger is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances." [6] Citing previous cases that have emphasized the importance of reasonableness in a warrantless search,[7] the court related the extensive tragedy involved in hijackings and

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[W]hoever, while aboard an aircraft being operated by an air carrier in air transportation, has on or about his person a concealed deadly or dangerous weapon, or whoever attempts to board such an aircraft while having on or about his person a concealed deadly or dangerous weapon, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The penalty in this section does not conflict with note 1 *supra,* as acts of aircraft piracy and interference with flight crew members or flight attendants carry much stiffer penalties. *Id.,* (i) (j).

[4] 392 U.S. 1 (1968). A policeman observed Terry and one other man pacing back and forth along a street, occasionally staring into the window of a particular store. Another man joined the two, and the policeman followed them, suspecting that they were planning a holdup. The officer then approached the trio, frisked Terry, and discovered a pistol, after which a frisk of the original companion produced a revolver. Both were charged with and convicted of carrying concealed weapons. The Supreme Court affirmed the conviction, holding that a warrant was not necessary as a prerequisite to the search.

The *Terry* exception to the warrant requirement states that a reasonably prudent officer, warranted in the belief that his safety or that of others is endangered, may search a suspect for weapons, even though the officer has no search warrant and no probable cause for arrest. *Id.* at 20-27. However, this is not a blanket endorsement for any and all frisks by a policeman. *Terry* noted that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. The Court reinforced this idea, saying "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n. 18.

[5] 392 U.S. 1, at 27.

[6] Epperson v. United States, 454 F.2d 769, 771 (4th Cir. 1972).

[7] *See* Terry v. Ohio, 392 U.S. 1, 20 (1968); Camara v. Municipal Court, 387 U.S. 523, 539 (1967); Elkins v. United States, 364 U.S. 206, 222 (1960).

In *Elkins,* state law enforcement officers obtained a warrant to seize obscene pictures and accompanying sound recordings. The search revealed neither but rather equipment

concluded that the frisk of Epperson following the magnetometer search "was entirely justifiable and reasonable under *Terry*." [8]

In drawing such a close parallel to *Terry*, the court evidently felt that the different circumstances in the instant case did not materially alter the legal consequences that prevailed in the former case. However, the difference *is* substantial. In *Terry*, even though "[t]here was no warrant, no probable cause for arrest, no probable cause for search for evidence of crime" [9] prior to the search, there were suspicious circumstances sufficient to " 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." [10] However, in *Epperson* not only was there a lack of the same three elements noted in *Terry*, but also the United States Marshal had not the least suspicion prior to the electronic search. Thus, without any thought whatsoever that anything might be awry, Epperson was "searched" by the magnetometer as were all other passengers on the flight.

Here the parallel drawn with *Terry* breaks down, for what the court did in effect was to authorize a general body search of all persons boarding commercial flights without requiring the use of a personality profile, informants' tips, or suspicious circumstances. The fear for the safety of the officers or of others existed prior to the search in *Terry*, and after the search in *Epperson*. According to *Terry*, to determine that a search is reasonable, the officer's action must be "justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place." [11]

The court apparently considered these two categories of determination as the standard, but in applying them to the instant situation failed to explain the decision in the practice required in a search and seizure case in which no warrant has been issued. In one sentence, the court disposed of the "justified at its inception" portion of the *Terry* standard,[12] stating that the inconvenience is slight, and the search not for evidence of prior criminal conduct. One questions whether this conclusion satisfies the *Terry* test.

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believed to have been used in wiretapping. The state court allowed the evidence, holding the exclusionary rule not applicable because no federal action was involved. The Supreme Court ruled that the federal standard is applicable to the states.

Camara had refused to allow a warrantless inspection of his apartment by municipal health officers who had reason to believe his use of the premises was violating the city housing code. He sought a writ of prohibition when the city brought criminal charges against him for violating the ordinance. The Supreme Court held that the evidence obtained in the warrantless search was not admissible, and required warrants for such administrative searches.

[8] Epperson v. United States, 454 F.2d 769, 772 (4th Cir. 1972).

[9] *Id.* at 770.

[10] Terry v. Ohio, 392 U.S. 1, 22 (1968).

[11] *Id.* at 20.

[12] Epperson v. United States, 454 F.2d 769, 771 (4th Cir. 1972).

A better basis to obtain the same result would seem to lie along the lines of *Camara v. United States*, which held "that a limited search in certain circumstances can be justified on less than probable cause. . . ." [13] *Terry* exemplifies that case in which a warrantless search is allowed based on less than probable cause, but its application is not broad enough to encompass the instant situation. Likewise, the United States Supreme Court has said that a search warrant cannot be excused "without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." [14] Therefore, under this and other rulings of the Supreme Court, the lower courts must find that a warrantless search falls within one of the recognized exceptions to the warrant requirement,[15] or must create a new exception,[16] or must otherwise find the situation to be reasonable.

A more recent case, *United States v. Schafer*,[17] has achieved the same

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[13] This does not mean, however, that a warrant is not necessary. "In fact, the Court has insisted that while a limited search may be justified on less than probable cause, this less-demanding standard must still be implemented by a neutral magistrate, unless one of the well-established exceptions apply. . . ." United States v. Brewer, 343 F. Supp. 468, 475 (D. Hawaii 1972).

[14] McDonald v. United States, 335 U.S. 451, 456 (1948). Without a search warrant police officers gained access through the window of defendant's landlady's apartment, and from there observed illegal lottery operations. The officers then seized the number slips and other evidence. The Supreme Court reversed a conviction, holding the evidence was obtained by illegal search and seizure.

[15] *See* Chimel v. California, 395 U.S. 752 (1969) (search incident to and contemporaneous with a lawful arrest); Chambers v. Maroney, 399 U.S. 42 (1970) (search of a vehicle based on probable cause); Terry v. Ohio, 392 U.S. 1 (1968) (search for weapons when a reasonably prudent officer is warranted in believing that his safety or that of others is endangered); Harris v. United States, 390 U.S. 234 (1968) (search where article is left in plain view); Warden v. Hayden, 387 U.S. 294 (1967) (search in hot pursuit of a fleeing felony suspect); Cooper v. California, 386 U.S. 58 (1967) (search incident to custodial prerogative); Abel v. United States, 362 U.S. 217 (1960) (search of abandoned property); Zap v. United States, 328 U.S. 624 (1946) (searches knowingly and voluntarily consented to); United States v. Barone, 330 F.2d 543 (2d Cir. 1964), *cert. denied*, 377 U.S. 1004 (1964) (search under urgent necessity, such as loud screams from inside a building, or to prevent destruction of the thing to be seized); Annot., 6 A.L.R. FED. 317, at § 3 (1971). For a further discussion of these exceptions see Wheeler v. Goodman, 330 F. Supp. 1356, 1361-62 (W.D.N.C. 1971); Annot., 5 AM. JUR. TRIALS 331, §§ 5, et seq. (1966).

See additional discussion of *Terry* exception at note 4 *supra*.

[16] "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." Camara v. Municipal Court, 387 U.S. 523, 533 (1966).

[17] 461 F.2d 856 (9th Cir. 1972). A routine search was made of Schafer's baggage (*all*

result as *Epperson* by following the Supreme Court guidelines,[18] and apparently that same reasoning could have been employed in *Epperson.* The necessary time delay in obtaining warrants for magnetometer searches of all passengers would frustrate the reason for these inspections, allowing potential hijackers the opportunity to take over an aircraft before warrants could issue.

The Fourth Circuit passed over the solution to the problem of search without requiring even mere suspicion, much less probable cause. The *Schafer* case tackled the issue by offering a credible solution in terms of established fourth amendment precedent. Although *Schafer* involved baggage, and *Epperson* concerned only the person of the defendant, there appears to be no reason why the same argument would not be equally valid for *Epperson.* In conclusion, although the *Epperson* court has reached an obviously necessary result, it appears that there is existing established fourth amendment law under which the problem of warrantless search could have been solved.

S. H. M.

luggage was searched indiscriminately) to determine if it contained any article or plant pests prohibited by an agricultural quarantine. The inspecting officer discovered marijuana in defendant's bag, and upon a closer investigation found LSD tablets. The court held the substances admissible in a criminal prosecution.

[18] The Ninth Circuit noted that "a search warrant requirement would 'frustrate' the purpose of these inspections, because of the time delays inherent in the search warrant mechanism. Unless all departing passengers could be detained while warrants . . . could issue. . . ." *Id.* at 858. This follows *Camara,* note 15 *supra.* The *Schafer* Court also discussed the issue of probable cause, finding that no means other than a full search of all baggage "would achieve acceptable results." Because the search was not arbitrary or selective, and since the main purpose was not to "[e]ffect a further deprivation of life, liberty or property . . . the necessity for these baggage searches at the Honolulu airport satisfies the 'probable cause' requirements of *Camara.*" *Id.* at 859.