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Recent Developments: Maryland v. Buie: Fourth Amendment Authorizes Warrantless Protective Sweep of Premises When Officer Possesses Reasonable Articulable Suspicion That the Area Poses Danger

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Recent Developments

***Maryland v. Buie*: FOURTH AMENDMENT AUTHORIZES WARRANTLESS PROTECTIVE SWEEP OF PREMISES WHEN OFFICER POSSESSES REASONABLE ARTICULABLE SUSPICION THAT THE AREA POSES DANGER**

In *Maryland v. Buie*, 110 S. Ct. 1093 (1990), the United States Supreme Court held that the fourth amendment permits a warrantless protective sweep in conjunction with an in-home arrest if the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept poses a danger to the officer or others. The Court found probable cause to be an unnecessarily strict standard in justifying protective sweeps.

Two men committed an armed robbery of a restaurant in Prince George's County, Maryland. One of the men was wearing a red running suit. That same day, police obtained arrest warrants for Jerome Edward Buie and his suspected accomplice in the robbery. In executing the arrest warrant for Buie at his home, police fanned out through the first and second floors, while one officer shouted into the basement, ordering anyone there to emerge. Eventually Buie appeared at the bottom of the stairwell and was arrested. Police, thereafter, conducted a protective sweep of the basement and seized a red running suit which was found in plain view.

Buie filed a pre-trial motion to suppress the running suit. Despite finding no probable cause to search the basement, the court denied the motion, and the running suit was allowed into evidence. Buie was convicted of robbery with a deadly weapon and using a handgun in the commission of a felony. The Court of Special Appeals of Maryland affirmed. It determined that once police lawfully enter a home, their conduct should be governed by a standard of reasonableness. "[I]f there is reason to believe that the arrestee had accomplices who are still at large, something less than probable cause–reasonable suspicion– should be sufficient to justify a *limited additional intrusion* to investigate the *possibility* of their presence." *Id.* at 1095 (quoting *Maryland v. Buie*, 72 Md. App. 562, 576, 531 A.2d 1290, 1297 (1988)) (emphasis in original).

In reversing, the Court of Appeals of Maryland recognized that when the intrusion is slight, as in a stop and frisk on a public street, it can be justified by a reasonable articulable suspicion. However, when the sanctity of the home is involved, the government must show that there was probable cause to believe a serious danger existed. The court of appeals held that the State had not satisfied this probable cause standard. *Id.* The Supreme Court then granted certiorari to determine the level of justification required by the fourth amendment before conducting a protective sweep.

In arguing the legality of the protective sweep performed, the State of Maryland set forth two alternative theories: 1) protective sweeps should be permitted in all in-home arrests for violent crimes, under a reasonableness balancing test; or 2) protective sweeps should fall within the standard of *Terry v. Ohio*, 392 U.S. 1 (1968), requiring only a reasonable articulable suspicion that danger exists. *Buie*, 110 S. Ct. at 1096. Conversely, Buie argued that a warrantless protective sweep should never be permitted, except under exigent circumstances. Buie also contended that even if no warrant was required, the probable cause standard should not be relaxed. Furthermore, even if this standard was relaxed, Buie contended that the State had not proven that a reasonable articulable suspicion existed. *Id.*

In an opinion delivered by Justice White, the Supreme Court first acknowledged the general rule that a search is not reasonable absent a warrant issued on probable cause. *Id.* at 1096-97 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)). Exceptions to this rule arise where the public interest involved outweighs the intrusion on the individual's fourth amendment interests. *Id.* The Court found such an exception to exist in *Terry*, where no search warrant or probable cause existed. The *Terry* Court held that an on-the-street frisk for weapons was authorized where the officer possessed a reasonable belief based on specific and articulable facts that the suspect was armed and dangerous. *Id.* In so holding, the Court reasoned that the invasion on the individual's fourth amendment rights was outweighed by the need for police officers to protect themselves and others from danger, even where officers may lack probable cause for an arrest.

Similarly, the Court applied these same principles to roadside encounters in *Michigan v. Long*, 463 U.S. 1032 (1983). *Buie*, 110 S. Ct. at 1097. There, the Court upheld the search of the passenger compartment of an automobile where an officer possessed a reasonable articulable suspicion that the suspect was armed and dangerous. *Id.* Moreover, the *Long* Court "expressly rejected the contention that *Terry* restricted preventative searches to the person of a detained suspect." *Id.*

Analogizing the instant case to *Terry* and *Long*, the *Buie* Court compared the risk of danger posed by persons hiding on the premises during an in-home arrest to that posed by a suspect on the street or in a roadside encounter. It found the risk of danger during an in-home arrest as great as, if not greater than, an on-the-street or roadside encounter for two reasons: 1) a protective sweep, unlike a *Terry* or *Long* frisk, has already escalated to the point of arrest; and 2) unlike a street or roadside encounter, an in-home arrest places an officer at a disadvantage because he is on adversarial territory. *Id.* Since the same interests of *Terry* and *Long* existed in the instant case, the Court reasoned that the same standard should apply.

Thus, the Court agreed with the State's argument that a warrant was not required but cautioned that entering a room not

searched prior to the arrest is not a *de minimis* intrusion that may be ignored. *Id.* at 1098. The Court held that incident to the arrest, an officer, without probable cause or reasonable suspicion, could search places immediately adjoining the area of arrest from which an attack could be launched. *Id.* Beyond that, however, "there must be articulable facts which, taken together with the rational inferences from these facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger. . ." *Id.*

In so holding, the Court emphasized the limited scope of a protective sweep; that is, it should be confined to a cursory visual inspection, not a full search, of areas where a person may be found. It may last as long as is necessary to relieve the suspicion of danger but no longer than is necessary for the arrest and departure. *Id.* at 1099.

Moreover, the Court maintained that its holding did not conflict with *Chimel v. California*, 395 U.S. 752 (1969). *Buie*, 110 S. Ct. at 1099. *The Chimel* Court held that a warrantless but justifiable search incident to an in-home arrest was limited to the arrestee's person and the area from which he could obtain a weapon. The Court distinguished *Chimel* in two ways: 1) it was concerned with preventing a full blown search of a house for evidence unrelated to the arrest, unlike the more limited intrusion of a protective sweep; and 2) the justification for the search was the threat posed by the arrestee, not by unseen third parties. *Id.*

Relying on *Terry* and *Long*, the Supreme Court held that warrantless protective sweeps of private dwellings during an arrest are to be measured by a reasonable articulable suspicion standard. By relaxing the general rule requiring probable cause, abuse of police discretion in determining the necessity and scope of a protective sweep may result. However, the Court has yet to recognize the validity of such speculative concerns.

—Tena Touzos

City of Annapolis v. United Food & Commercial Workers, Local 400: **DRUG TESTING OF CITY POLICE AND FIRE FIGHTERS WAS NOT AN UNCONSTITUTIONAL SEARCH AND SEIZURE WHEN CONDUCTED DURING A REGULARLY-SCHEDULED PHYSICAL EXAMINATION**

In *City of Annapolis v. United Food & Commercial Workers, Local 400*, 317 Md. 544, 565 A.2d 672 (1989), the Court of Appeals of Maryland held that the mandatory suspicionless drug testing of police and fire fighters did not violate the fourth amendment. The court of appeals reasoned that the police and fire fighters' privacy interests were outweighed by the City's compelling interest in the safety of personnel, co-workers, and the public. *Id.* at 566, 565 A.2d at 683. Thus, the court of appeals reversed the trial court's ruling.

In September of 1986, the City of Annapolis proposed to the unions a drug testing plan, which required police and fire fighters, as part of their regularly-scheduled periodic physical examinations, to submit urine samples to ascertain the presence of illegal drugs. *Id.* at 546, 565 A.2d at 672-73. One year later, after the parties failed to reach an agreement regarding the details of the program, the City filed a complaint of unfair labor practices with the State Mediation and Conciliation Service. *Id.* The City alleged in its complaint that the unions failed to negotiate in good faith. *Id.* The State Mediation and Conciliation Service found that the drug testing program was not unconstitutional as an unreasonable search and seizure and allowed the City to implement its program. The unions, seeking to prevent implementation of the program, appealed to the Circuit Court for Anne Arundel County. *Id.* at 547-48, 565 A.2d at 673-74. The circuit court found that the plan was unconstitutional under the fourth amendment, because it was not based on individualized suspicion of drug use among the employees. *Id.* at 549, 565 A.2d at 674. The lower court then issued a writ of mandamus enjoining the city from implementing its program. *Id.* at 550, 565 A.2d at 675. The City appealed the circuit court's decision, and the Court of Appeals of Maryland granted certiorari prior to consideration by the court of special appeals. *Id.*

In reaching its decision, the court of appeals relied primarily on two recent Supreme Court cases that were decided after the lower court's ruling. In the first case, *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), the Court upheld mandatory suspicionless drug testing of Customs Service employees involved in drug interdiction or who carried a firearm. *United Food*, 317 Md. at 551, 565 A.2d at 675. In the second case, *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402 (1989), the Court approved Federal Railroad Administration regulations that mandated testing of blood and urine samples for drug use by employees following major train accidents. *United Food*, 317 Md. at 551, 565 A.2d at 675. Both *Skinner* and *Von Raab* held that the collection and testing of urine was a "search" and implicated the proctection of the fourth amendment. *Id.* (citing *Skinner*, 109 S. Ct. at 1413; *Von Raab*, 109 S. Ct. at 1390). However, in *Skinner*, the Supreme Court stated that "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* at 552, 565 A.2d at 676 (quoting *Skinner*, 109 S. Ct. at 1417).

In applying the Supreme Court holdings of *Skinner* and *Von Raab* to *United Food*, the court of appeals focused on the degree of intrusiveness of the "actual" assaying of the urine sample for drug use, instead of the mandatory taking of the sample. *Id.* at 553, 565 A.2d at 676. The court reasoned that the employees had already been providing samples for analysis as part of their regularly-scheduled physical examinations. *Id.* Recognizing that the actual assaying of samples for drug use constituted a search, the court in *United Food* found that the instrusion on employees' reasonable expectation of privacy was not only "minimal" under *Skinner* and *Von Raab*, but negligible for four reasons. *Id.*

First, the employees in *United Food* received three distinct notices of testing: (1) that the physical would be during their "birthday" month; (2) within thirty days, they knew the week of the examination; and (3) within forty-eight hours, they knew the time of the physical. *Id.* at 554, 565 A.2d at 676-77. Second, the disclosure of "private facts," including evidence of physical infirmities or latent diseases, was already part of the regular physical examination. *Id.* at 554-55, 565 A.2d at 677. Therefore, no reasonable expectation of privacy existed with regard to the disclosure of private facts. *Id.* Third, employees were required to complete a medication form to determine whether a positive test could have resulted from an employee's *lawful* use of drugs. *Id.* at 555, 565 A.2d at 677 (emphasis added). Although certain private medical facts might be disclosed on the medication form, the same facts would be the subject of inquiry during a routine physical examination. *Id.* Thus, completion of the medication form was not a significant invasion of privacy. Fourth, regular physical examinations were used to promote physical fitness and treat employees with drug abuse problems. *Id.* at 555-56, 565 A.2d at 677-78.

The court of appeals next considered the governmental interests advanced by the drug tests. In *Von Raab*, the Supreme Court identified two governmental interests of a compelling nature which supported drug tests for certain Customs Service employees as "ensuring that front-line interdiction personnel are