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Recent Developments: U.S. v. Johns: The Automobile Exception One Step Further

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letions, the statute read: "A court of equity has jurisdiction over the . . . visitation . . . of a child. In exercising its jurisdiction, the court may . . . (4) Determine who shall have visitation rights to a child;" MD. CTS. & JUD. PROC. CODE ANN. § 3-602 (a) (1976). The court stated: "On its face, therefore, section 3-604 (a) (4), prior to the 1981 amendment, constituted the broadest possible grant of authority to courts to determine who shall be awarded visitation rights." *Evans v. Evans*, 302 Md. at 339, 488 A.2d at 159.

The court then addressed the appellee's contention that jurisdiction over visitation must be construed narrowly in view of the 1981 amendment specifically providing for grandparent's visitation rights. The basis for the appellee's argument was that the inclusion of a statutory provision specifically addressed to the visitation rights of grandparents was a legislative recognition of the need to protect these rights. In rejecting their argument, the court of appeals noted a long line of case law previously recognizing the right of grandparents to custody and visitation rights. *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1938).

The thrust of the court's reasoning, however, seems to turn on its examination of the legislative history of the 1981 amendment to Section 3-602 (a) (4). A four year effort had been present in the Maryland Legislature to enact legislation to guarantee visitation rights to grandparents. *Evans*, 302 Md. at 339-43, 408 A.2d at 159-61. However these measures were repeatedly defeated on the grounds that the existing law adequately provided these rights.

The court agreed with the analysis of a 1984 decision by the court of appeals, *Skeens v. Paterno*, 60 Md. App. 48, 480 A.2d 820 (1984), wherein that court stated: "The legislative history contains no indication that the bill was intended as a limitation on grandparental visitation or on anyone else's visitation—in other contexts . . ." *Id* at 60-61, 480 A.2d at 826.

The court's decision in *Evans* reaffirms the longstanding test which has governed Maryland custody and visitation cases, namely, what is in the best interests of the child. *See Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984); *Hild v. Hild*, 221 Md. 349, 157 A.2d 442 (1960); *Carter v. Carter*, 156 Md. 500, 144 A. 490 (1929). *Evans* makes it clear that the Maryland courts have considerable discretion in determining who shall be awarded child visitation rights, and explicitly are not limited to natural or adoptive parents or grandparents.

—M. Tracy Neuhauser

U.S. v. Johns: THE AUTOMOBILE EXCEPTION ONE STEP FURTHER

The Supreme Court through Justice O'Connor in a 7-2 decision extended the rule of law of *United States v. Ross*, 456 U.S. 798 (1982), which stated that once police officers have probable cause to search a lawfully stopped vehicle, they may open and search closed containers found within the vehicle that may conceal the object of their search. In *United States v. Johns*, 105 S.Ct. 881 (1985), the Supreme Court held that a search is not unreasonable, and therefore not violative of the fourth amendment, "merely" because the warrantless search of closed containers takes place several days after the containers are removed from the vehicles.

In the course of an investigation of drug smuggling operations, custom agents by airborne and surface surveillance observed the rendezvous between several pickup trucks and an airplane at a remote airstrip 50 miles from the Mexican border. At trial the surface agents stated that they could not see what transpired, but were told by airborne units that the trucks approached and parked near the small plane. The officers closed in on the trucks, observed an individual covering the containers with a blanket, and smelled the odor of marihuana. In the back of the trucks were containers wrapped in dark green plastic and sealed with tape. The respondents were then arrested. Neither the containers nor the trucks were searched at the scene but instead they were taken to the Drug Enforcement Administration (DEA) headquarters. The containers were unloaded from the trucks and placed in a DEA warehouse; three days later a warrantless search revealed the marihuana. At trial the respondents were successful in suppressing the evidence, and this was affirmed by the court of appeals, *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983).

The Court summarily disposed of the respondents first contention that the officer's probable cause to suspect contraband went to the containers not the vehicles. This distinction is important; if probable cause went to the containers, the rule in *United States v. Chadwick*, 433 U.S. 1 (1977), would invalidate the warrantless search as outside of the automobile exception first set forth in *Carroll v. United States*, 267 U.S. 132 (1925), but if the probable cause went to the vehicle, the only issue is whether the rule in *Ross*, should apply to a three day delay in an otherwise lawful search. The Court did not disturb the findings of fact of the lower court and agreed that the officers had probable cause that not only the packages, but also the vehicle contained the drugs. *See United States v. Johns*, 707 F.2d 1093, 1097 (9th Cir. 1983).

The Court appeared to break the case into two steps. First, that *Ross*, allowed police officers to open and search closed containers found in the execution of a warrantless automobile search. Second, that *Chambers v. Maroney*, 399 U.S. 42 (1970), allowed vehicle searches at the police station that could have taken place at the place of the vehicle stop. Therefore, the Court simply stated, "as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days later . . . was reasonable. . . ." *Johns*, 105 S.Ct. at 887.

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ute would provide a remedy to Adler since he made the report to the employer. Adoption of a statute similar to those in Michigan and Connecticut would not provide a remedy, since he did not report his suspicions to a public body; however, the statute could represent the clear mandate of public policy that is required by *Adler*. Further, the Michigan statute does not require that the employee actually report the alleged violation to a public body, but only that his discharge occurred and he "was about to report" the suspected violation.[19] The employee does not bear the burden of pleading the actual violation of law.

Arguments against enactment of a Whistleblowers' statute include the basic business management position that a business cannot properly or profitably operate if every employee has the right to second guess the legality and/or morality of all management decisions. Simply stated, an employee who thinks that his employer is acting illegally should be so dissatisfied that he should terminate his employment unilaterally. Ideally, if an employee suspects that the business is not operating legally, he should not want to be employed by that business. Realistically, financial considerations of an individual employee may not allow him the luxury of such idealism. At the same time, an employee who has reported to supervisors that he believes that illegal activities are taking place must realize the risk that he is taking and expect that supervisors may question his loyalty to the employer.

The employee, however, deserves the protection of a Whistleblowers' statute because job security is valuable, particularly when unemployment is high. Termination may leave the employee with depressed job prospects when his only failing was the refusal to ignore what reasonably appeared to him to be illegal practices of his employer. With the demand for less government, the question arises of whether wrongful discharge or a Whistleblowers' statute infuse unnecessary governmental interference with private industry. According to *Adler*, that question is answered by the balancing of the three interests: individual, business and society. The interest of society in enforcement of its criminal laws may tip the scale in favor of the enactment of a Maryland Whistleblowers' statute.

Notes

[1]Wrongful discharge has been called interchangeably wrongful, abusive or retaliatory discharge. *Adler v. American Standard Corp.*, 291 Md. 31, 36, 432 A.2d 464 n. 2 (1981).

[2]*The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 BUS. LAW. 1 (1984).

[3]*Recognition of a Cause of Action for Abusive Discharge in Maryland*, 10 U. BALT. L. REV. 257 (1981).

[4]291 Md. 31, 432 A.2d 464 (1981).

[5]291 Md. at 47, 432 A.2d at 473.

[6]291 Md. 31, 432 A.2d 464 (1981).

[7]MD. ANN. CODE art. 101, § 39(a) (1979); MD. ANN. CODE art. 89, § 43 (1979); MD. CTS. & JUD. PROC. CODE ANN. §§ 8-105, 8-401 (1984); MD. COM. LAW CODE ANN. § 15-605 (1983).

[8]*Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981).

[9]MD. ANN. CODE art. 100, § 95 (1979).

[10]291 Md. at 42, 432 A.2d at 470.

[11]291 Md. 31, 432 A.2d 464 (1981).

[12]111 Ill. App. 3d 502, 444 N.E.2d 588 (1982).

[13]111 Ill. App. 3d at 508, 444 N.E.2d at 592 (quoting *Palmateer v. International Harvester*, 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981)).

[14]291 Md. at 45, 432 A.2d at 472.

[15]575 F. Supp. 715 (D. Md. 1983).

[16]575 F. Supp. at 717.

[17]CONN. GEN. STAT. ANN. §§ 31-51M (West Supp. 1985); MICH. COMP. LAWS ANN. §§ 15.361-369 (West Supp. 1985); ME. REV. STAT. ANN. tit. 26 §§ 831-840 (Supp. 1984).

[18]MICH. COMP. LAWS ANN. § 15.363 (West Supp. 1985).

[19]MICH. COMP. LAWS ANN. § 15.363 (West Supp. 1985).

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The dissent of Justice Brennan, with whom Justice Marshall joined, stressed that the delay in the search removes any exigency that may impair reasonable efforts to obtain a warrant. Accordingly, the dissent insisted that there lacked any of the justifications for not adhering to the fourteenth amendment's warrant requirement.

The Court's decision is dangerous because it shows a total disregard for that tenuous connection between rules and their justifications. The automobile exception was based on narrow justifications; the impracticality of obtaining a warrant on something as mobile as a vehicle, the diminished expectation of privacy, and the safety of law enforcement officers. But once a closed container is taken from the automobile and placed in a warehouse, those justifications have evaporated. Departing from the established justifications makes it easier for future courts to make further unsupported extensions, which jeopardize the fourteenth and fourth amendments' protection against unreasonable searches and seizures.

In addition, by not narrowly applying the warrant requirement, the Court runs the risk that otherwise diligent police officers will momentarily become unobservant so that the stated focus of the search will be the vehicle, and not the package contained within the vehicle. This momentary lapse removes the search from *United States v. Chadwick*, 433 U.S. 1 (1977) which states that if the suspicion is focused on the closed container, a warrant is required, and puts it within *United States v. Ross*, 456 U.S. 798 (1982). This becomes an unwise rule when it rewards otherwise trivial differences in police surveillance by dispensing with the warrant requirement. A better position would be to resist the temptation to extend the automobile exception, and limit the exceptions to the warrant requirement to those within the ambit of the original justifications.

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