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Casenotes: Constitutional Law — Search and Seizure — 19 U.S.C. § 1581(a) — Random and Suspicionless Boarding of Vessel by Customs Officers Does Not Violate the Fourth Amendment's Prohibition against Unreasonable Search and Seizure. *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983)

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CASENOTES

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — 19 U.S.C. § 1581(a) — RANDOM AND SUSPICIONLESS BOARDING OF VESSEL BY CUSTOMS OFFICERS DOES NOT VIOLATE THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCH AND SEIZURE. *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983).

A customs officer boarded a foreign vessel located in United States territorial waters to check the vessel's documentation. While on board, the officer detected the odor of burning marijuana and his subsequent search resulted in the seizure of approximately 5,800 pounds of marijuana. Defendants were convicted in federal district court of importing and possessing marijuana with the intent to distribute.¹ On appeal, the defendants argued that the district court erred in denying defendants' motion to suppress the marijuana as illegally seized evidence.² The United States Court of Appeals for the Fifth Circuit agreed, found the seizure to be illegal, and held that the random stop of a vessel near the United States border could not be justified as a border search.³ Customs officers therefore must reasonably suspect a violation of law in order to stop and board a vessel.⁴ The Supreme Court granted certiorari⁵ and reversed, holding that the fourth amendment's prohibition against unreasonable search and seizure⁶ is not violated when customs officers, acting without any suspicion of wrongdoing, board a vessel for

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1. *United States v. Villamonte-Marquez*, 652 F.2d 481, 482 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2573 (1983). The United States District Court for the Western District of Louisiana convicted respondents of violating 21 U.S.C. § 952(a) (1982) (importation of marijuana), 21 U.S.C. § 841(a)(1) (1982) (possession of marijuana with intent to distribute), 21 U.S.C. § 846 (1982) (conspiracy to possess marijuana with intent to distribute), and 21 U.S.C. § 963 (1982) (conspiracy to import marijuana).
 2. *United States v. Villamonte-Marquez*, 652 F.2d 481, 484 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2573 (1983). On appeal, the defendants argued three other points of error which are not relevant to this discussion. *See id.* at 484-88.
 3. *Id.* at 486. The court noted that the defendants' vessel was first sighted and boarded 21 miles inside the border. *Id.* The term "border search" refers to searches and seizures at the national border and such border searches do not require reasonable suspicion of illegality. C. WHITEBREAD, *CRIMINAL PROCEDURE* § 12.02 (1980). Therefore, the *Villamonte-Marquez* court considered the case as one involving a stop near the border rather than a "border search."
 4. *United States v. Villamonte-Marquez*, 652 F.2d 481, 486-87 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2573 (1983).
 5. 457 U.S. 1104 (1982).
 6. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

the purpose of inspecting the vessel's registration documents.⁷

Prior to determining whether a search or seizure is reasonable and therefore constitutionally permissible, a fourth amendment interest must be implicated. Case law has established that two elements must exist before the fourth amendment is applicable: (1) the person searched must possess a reasonable expectation of privacy in the item searched or seized and (2) the search or seizure must involve governmental action.⁸

In assessing what constitutes a reasonable expectation of privacy, the Supreme Court has recognized two factors as determinative.⁹ In *Katz v. United States*,¹⁰ the Court addressed the issue of whether police recordings of a suspect's telephone conversation violated the fourth amendment.¹¹ The Court concluded that an individual has a reasonable expectation of privacy while using a telephone booth.¹² Hence, the police violated the suspect's expectation of privacy by recording the conversation, and their conduct therefore constituted an unreasonable search and seizure.¹³ The concurring opinion stated that the reasonableness of an individual's expectation of privacy is determined by evaluating two factors: whether an individual manifests an actual subjective expectation of privacy and whether the expectation is one that society recognizes as reasonable.¹⁴

The fourth amendment affords protection against unreasonable searches and seizures by requiring that search warrants be issued only upon a showing of probable cause.¹⁵ There are, however, six judicially created exceptions to the warrant requirement.¹⁶ There is a two-fold

7. *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2575 (1983). Section 1581(a) of the Tariff Act of 1930 provides:

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 U.S.C. §§ 1701-1711 (1982)], or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. § 1581(a) (1982).

8. *See Terry v. Ohio*, 392 U.S. 1, 16-18 (1967); *Katz v. United States*, 389 U.S. 347, 361 (1967).

9. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

10. 389 U.S. 347 (1967).

11. *Id.* at 348-50, 352-53.

12. *Id.* at 353.

13. *Id.*

14. *Id.* at 361 (Harlan, J., concurring).

15. *See supra* note 6.

16. The Supreme Court has established six exceptions to the warrant requirement: (1) searches incident to lawful arrest. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969); (2) the automobile exception. *See Carroll v. United States*, 267 U.S. 132,

rationale for permitting exceptions to the warrant requirement. First, in situations where probable cause is present, exigent circumstances often make it impracticable to first obtain a warrant.¹⁷ Second, certain stops¹⁸ and searches impose a minimal degree of personal intrusion, and therefore, police may act with less than probable cause.¹⁹ One type of stop viewed by the courts as involving a lesser degree of intrusion is the investigatory stop.²⁰

The investigatory stop exception²¹ was established by the Supreme Court in *Terry v. Ohio*.²² In *Terry*, a police officer observed the defendant repeatedly peer into a store window.²³ The Court held that the police could stop an individual for brief questioning and a pat-down search for weapons without first obtaining a warrant.²⁴ The Court reasoned that police need only have an articulable suspicion of wrongdoing because investigatory stops involve a minimal degree of intrusion and are necessary to protect the public.²⁵ Probable cause, therefore, was not required for an investigatory stop.²⁶

The *Terry* doctrine has been expanded to permit investigatory

149-50 (1925); (3) hot pursuit and other emergency searches. *See* McDonald v. United States, 335 U.S. 451, 454-56 (1948); (4) consent searches. *See* Davis v. United States, 328 U.S. 582, 593-94 (1946); (5) stop and frisk searches. *See* Terry v. Ohio, 392 U.S. 1, 20-27 (1967); (6) plain view searches. *See* Ker v. California, 374 U.S. 23, 42-43 (1963).

Administrative inspections generally require a warrant but the warrant may be issued upon a showing of less than probable cause. *See* Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967) (housing inspector may search premises only with a search warrant, but warrant may be issued upon less than probable cause). Warrantless administrative searches are justified when there is an urgent governmental interest. *See* United States v. Biswell, 406 U.S. 311, 317 (1972) (no warrant or suspicion of wrongdoing is required to seize unlicensed firearms from a weapons dealer).

17. *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (warrantless search of premises is permitted when evidence is in the process of being destroyed).
18. Any stop, no matter how brief, that restrains an individual's freedom constitutes a seizure within the meaning of the fourth amendment. *Terry v. Ohio*, 392 U.S. 1, 16 (1967).
19. *United States v. Brignoni-Ponce*, 422 U.S. 873, 879-80 (1975) (police only need to have an articulable suspicion that a vehicle contains illegal aliens in order to stop the vehicle and ask a brief question or two concerning the occupants' right to be in the United States).
20. To stop a person engaged in suspicious behavior for brief questioning is a minimal intrusion and therefore no warrant is required. *Terry v. Ohio*, 392 U.S. 1, 20-27 (1967).
21. This exception is traditionally known as the stop and frisk exception; however, the stop and frisk exception has been expanded to permit many types of investigatory stops. *See* C. WHITEBREAD, *supra* note 3, § 9.03; *see also infra* note 27 (stops of automobiles near the border).
22. 392 U.S. 1 (1967).
23. *Id.* at 5-6.
24. *Id.* at 25-27.
25. *Id.* at 20-27.
26. *Id.* at 27.

stops of automobiles near the border.²⁷ In *United States v. Brignoni-Ponce*,²⁸ the Supreme Court determined whether probable cause was necessary before a roving border patrol could stop motorists inside the border while searching for illegal aliens.²⁹ The Court analogized the minimal intrusion involved in these stops to the investigatory stop permitted in *Terry*, and held that an articulable suspicion that a vehicle contained illegal aliens was necessary to justify these brief automobile stops.³⁰

The articulable suspicion standard, however, is not required when motorists are stopped at fixed checkpoints for purposes of determining their residence status.³¹ A checkpoint stop of this type, which does not involve a search, results in a slight intrusion upon the motorist's fourth amendment interests.³² Although the fourth amendment is implicated, the government has satisfied the fourth amendment's requirement of reasonableness because every motorist is stopped and not taken by surprise.³³

*United States v. Villamonte-Marquez*³⁴ was the first case in which the Supreme Court addressed the issue of whether customs officers, acting without any suspicion of wrongdoing, could randomly stop and board a vessel to inspect the vessel's documents.³⁵ The Court reasoned that fixed checkpoints were not a viable alternative to random vessel stops because, unlike automobiles, vessels do not travel according to a circumscribed path.³⁶ The Court further noted that, as opposed to automobile license plates, observance of a vessel's outward markings by customs officers would not reveal whether a vessel was in compliance with documentation laws.³⁷ The *Villamonte-Marquez* Court concluded that boarding a vessel, therefore, was necessary to effectively administer the documentation laws.³⁸ As a result, the *Villamonte-Marquez*

27. See *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

28. 422 U.S. 873 (1975).

29. *Id.* at 876.

30. *Id.* at 880-82.

31. *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-58 (1976).

32. *Id.* at 557-58.

33. *Id.* at 558-59. The *Martinez-Fuerte* Court noted that the motorist is not surprised by a fixed checkpoint because he knows, or may obtain knowledge of, the location of the checkpoints. *Id.* at 559; cf. *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984) (fixed sobriety checkpoints held constitutional under federal and state law).

34. 103 S. Ct. 2573 (1983).

35. *Id.* at 2575. For a discussion of how the various circuits have ruled on this issue, see Comment, *The Fourth Amendment: Rusting on the High Seas*, 34 MERCER L. REV. 1537, 1539-60 (1983) (written prior to the *Villamonte-Marquez* holding and noting that *Villamonte-Marquez* will provide the Supreme Court with a chance to address this issue for the first time. *Id.* at 1563 n.193); Comment, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 93-99 (1977).

36. 103 S. Ct. at 2580.

37. *Id.*

38. *Id.* at 2582.

Court held that the fourth amendment's protection against unreasonable search and seizure was not violated when customs officers, lacking articulable suspicion of a violation of law, boarded a vessel to inspect the vessel's registration documents.³⁹

The Court's holding in *Villamonte-Marquez* failed to consider the individual's expectation of privacy while on board his vessel. The Court contrasted the boarding of a vessel with the stopping of an automobile,⁴⁰ but neglected to compare the boarding of a private vessel with the entrance into a private residence.⁴¹ Since a boat often serves as a dwelling or temporary residence, an individual's expectation of privacy while on board his vessel could reasonably equal a homeowner's expectation of privacy while in his home. The *Villamonte-Marquez* Court, however, discounted the reasonableness of this expectation by concluding that the government's need to enforce vessel documentation laws outweighed any fourth amendment interest that individuals have on board a vessel.⁴² Owners of private vessels, however, have a significant expectation of privacy while on board their vessels because such vessels often serve as a temporary residence.

The majority's rejection of the use of fixed checkpoints in waterways as impractical was criticized by the dissent in *Villamonte-Marquez*. As noted by the dissent, a fixed checkpoint was feasible because the boarding occurred in a separate channel through which all vessels moving to and from the open sea must traverse.⁴³ The Supreme Court has often required that law enforcement officers use the least intrusive means of accomplishing law objectives.⁴⁴ This policy would favor the use of fixed checkpoints, in that they have been recognized to be less intrusive than random stops.⁴⁵

Furthermore, the boarding of the respondents' vessel cannot be justified as an investigatory stop to conduct a document inspection pursuant to section 1581(a). Section 1581(a) provides that "[a]ny officer of the customs may . . . go on board of any vessel" to conduct a document inspection.⁴⁶ In *Villamonte-Marquez*, however, a customs officer

39. *Id.*

40. *See supra* notes 36-38 and accompanying text.

41. 103 S. Ct. at 2575-82. The defendants were on board a private vessel — a sailboat — and not a commercial vessel.

42. *Id.* at 2581. The Court stated that the government's necessity in conducting random and suspicionless vessel stops is to promote safe waterways and to deter smugglers. *Id.*

43. *Id.* at 2589 (Brennan, J., dissenting).

44. *See, e.g.,* *Delaware v. Prouse*, 440 U.S. 648, 650 (1979) (holding that police may not randomly stop vehicles to check their registration, but a checkpoint scheme would be constitutional due to the limited nature of the intrusion); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-60 (1976) (permitting fixed checkpoints near the border as a less intrusive alternative than roving patrols).

45. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

46. *See supra* note 7 for the statutory provision.

and a police narcotics investigator boarded the respondents' vessel.⁴⁷ First, the statute contains no provisions authorizing *police* officers to board a vessel either to conduct a document inspection or for any other reason.⁴⁸ Second, the two officers were not in fact conducting a document inspection, but were working together as part of a patrol that had been formed in response to a tip that there was drug smuggling activity in the area.⁴⁹ Thus, these two officers improperly relied upon section 1581(a) as a means to further their ongoing criminal investigation, rather than to conduct a document inspection.

The majority failed to give adequate consideration to alternatives to random vessel boardings. The Court reasoned that it was necessary to board vessels because their exterior markings do not provide sufficient evidence of compliance with registration laws.⁵⁰ An improved system of exterior markings, as suggested by the dissent, would obviate the need to board vessels and would thus require no personal intrusion.⁵¹ Other alternatives to random vessel boardings include periodic mandatory dockside inspections and inspections conducted at sea, based on a neutral selection process.⁵²

The distinctions between vessels and automobiles do not justify a rule that permits random vessel stops for document inspection to be conducted without any suspicion of wrongdoing. The holding in *Villamonte-Marquez* allows vessel boardings for document inspection to serve as a pretext for contraband searches. To prevent this effect⁵³ and to protect the individual's reasonable expectation of privacy while on

47. Brief for Respondent at 10, *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983). Reference is made to the brief as the Court's opinion failed to state that the police officer, who boarded the vessel, was a narcotics investigator.

48. *See supra* note 7 for the text of § 1581(a).

49. *See* Brief for Respondent at 9, *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983); *United States v. Villamonte-Marquez*, 652 F.2d 478, 487 (1981), *rev'd*, 103 S. Ct. 2573 (1983).

50. *Villamonte-Marquez*, 103 S. Ct. at 2580 (1983).

51. *Id.* at 2590 (Brennan, J., dissenting). The dissent argues that improved exterior markings and the use of ship-to-shore radios would be less intrusive alternatives to vessel boardings.

52. For a complete discussion of alternatives to random vessel boardings, see Comment, *Fourth Amendment: Rusting on the High Seas*, 34 *MERCER L. REV.* 1537, 1561-63 (1983); Comment, *High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea*, 93 *HARV. L. REV.* 725, 740-50 (1980).

53. The scope of the Maryland marine police officers' statutory authority (State Boat Act, MD. NAT. RES. CODE ANN. §§ 8-701 to -739 (1983 & Supp. 1984)) is similar to that granted customs officers under section 1581(a). The relevant language of the State [Maryland] Boat Act is essentially identical to section 1581(a). *See id.* at § 8-727. Nevertheless, the state statute has been construed to mean that Maryland marine police officers may not stop and board a vessel without at least a reasonable suspicion of illegal activity. *See Blair v. United States*, 665 F.2d 500 (4th Cir. 1981). Since *Villamonte-Marquez* did not require customs officers to have a reasonable suspicion of illegal activity while acting pursuant to section 1581(a), the probable effect in Maryland is that state marine police officers may no longer be required to have a reasonable suspicion of illegal activity when acting pursuant to section 8-727 of the Maryland boat act. Maryland, however, is free to afford an

board his vessel, random vessel stops should not be permitted in the absence of an articulable suspicion of wrongdoing.

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