The Firehouse Lawyer

Volume 13, Number 2

February 2015

Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Joseph F. Quinn is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-858-3226
Cell Phone: 253-576-3232

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

GREAT NEWS!

Soon, the Firehouse Laywer will have a new website (the site address will remain the same: www.firehouselawyer.com)!!!

Inside this Issue

1. Emergency Scenes and Fourth Amendment Protections
2. Case Note

Emergency Scenes and Fourth Amendment Protections

Every so often, the Firehouse Lawyer encounters issues that implicate the Fourth Amendment to the United States Constitution (hereinafter the Constitution). This article summarizes the law of search and seizure, as construed by the United States Supreme Court, other federal courts, and Washington courts, and the legal ramifications it may have to the fire service. This article is partially based on the experiences of our clients at emergency scenes. To begin, a firefighter that is called upon by the police to search or seize a person is an agent of the government. Furthermore, an agent of the government may be sued for violating another's civil rights under color of law. *See* 42 U.S.C. § 1983. And under Washington law, a person may sue the government for common law invasion of privacy, if the government "intentionally intrudes upon his or her solitude, seclusion, or private affairs." *Youker v. Douglas County*, 178 Wn.App. 793, 797 (2014), citing *Reid v. Pierce County*, 136 Wn.2d 195, 206 (1998). This intrusion must be highly offensive or objectionable to a reasonable person. *See Mark v. Seattle Times*, 96 Wn.2d 473, 497 (1981). An employer may be sued for the actions of its employee, as the parties stand in a principal-agent relationship. *See Savage v. State*, 127 Wn.2d 434 (1995). Washington courts have not recognized a constitutional cause of action for invasions of privacy by government agents, such as suits based on violations of the Fourth Amendment. *See Youker* at 797.

Federal Law

The Fourth Amendment, applied to the states via the Fourteenth Amendment, protects "persons, houses, papers and effects" from unreasonable searches and seizures. To raise a challenge under the Constitution, one must have "standing" to do so. *See Katz v. United States*, 389 U.S. 347 (1967). There are essentially two components of standing: state action and the violation of one's privacy. For purposes of this article, we will call the person performing a search or seizure a "state actor."

The Fourth Amendment only protects persons from unreasonable invasions of privacy by "state actors." *Smith v. Maryland*, 442 U.S. 735 (1979). "What is 'private' action and what is 'state' action is not always easy to determine." *Evans v. Newton*, 382 U.S. 296 (1966). State actors are generally the publicly paid police or citizens acting at their direction. *See United States v. Jacobsen*, 466 U.S. 109 (1984). A person does not become a state actor by merely performing a public function; a private actor must undertake functions that are "traditionally exclusively reserved to the State." *See Rockwell* at 258. When a firefighter, or any private person, acts at the behest of law enforcement, that person is a state actor. *See Michigan v. Tyler*, 436 U.S. 499, 506 (1978).[1] A non-example of state action: A FedEx driver opens a package and reseals it, after discovering a pound of marijuana, and calls the police, who open the package later to find the marijuana. The FedEx driver did not act at the direction of the police, and is not a state actor.

Additionally, to have standing, one must have a subjective expectation of privacy in the place being searched (the person searched must consider the place or thing private). *See Katz*. In addition to this subjective expectation, the Constitution only protects those expectations of privacy that society would recognize as reasonable. *See Katz*; *See Also O'Connor v. Ortega*, 480 U.S. 709 (1987). However, "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter, rather than a policeman." *Michigan v. Tyler*, 436 U.S. 499, 506 (1978). Consequently, a person has the same expectations of privacy when firefighters—acting at the direction of the police—intrude upon their person, dwelling or property.[2]

A warrantless search is generally unreasonable—and unconstitutional—unless an exception applies. *See Katz*.[3] Exceptions which are most applicable to the fire service—if acting at the direction of the police—are the "plain view" exception, consent, and "emergency aid" exception. Under federal law, the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable. *See Payton v. New York*, 445 U.S. 573, 587 (1980).

[1] *But See Goldstein v. Chestnut Ridge Volunteer Co.*, 218 F.3d 337 (2000)(finding, in a § 1983 claim, that a volunteer fire department was a state actor, for purposes of a First Amendment violation).

[2] A person has no reasonable expectation of privacy in the "open fields" surrounding his or her dwelling, such as a far-detached barn; but whether property is in the "open fields" depends on the circumstances. *See California v. Greenwood,* 486 U.S. 35 (1988).

[3] It should also be noted that evidence obtained in violation of the Fourth Amendment or its state equivalent is not admissible at trial against the accused, on the state or federal level, under the exclusionary rule. *See Mapp v. Ohio,* 367 U.S. 643 (1961); *State v. Esejose*, 171 Wn.2d 907 (2011).

To seize evidence in plain view, the state actor must (1) be legitimately on the premises; (2) discover evidence, fruits or instrumentalities of crime, or contraband; (3) such evidence is in plain view; and (4) the state actor must have probable cause[4]—it must be immediately apparent—that the specific item is evidence, contraband, or has some connection to criminal activity. *See Arizona v. Hicks*, 480 U.S. 321 (1987). This evidence need not have been inadvertently discovered, but the state actor must have some lawful right to access the item. *See Hicks* at 330.

An example of this exception applying: Police officers have a warrant to search a home, and upon search of the home for a particular item, they discover a wholly different item of an incriminating character, such as bags of cocaine atop a coffee table. But each additional intrusion upon a person or her property requires an additional layer of suspicion; such as probable cause or reasonable suspicion. *See Terry v. Ohio*, 392 U.S. 1 (1968). Consequently, if the table in the above example was locked, the police would need a warrant or some exception to the warrant requirement giving them access to the contents of that table, regardless of whether they had a warrant to be in the home. Analogously, if a police officer at a motorcycle accident asked a paramedic to search the glove compartment of the motorcycle for identification, and the paramedic discovered heroin, the additional intrusion—the opening of the glove compartment—would not be covered by the plain view exception (the paramedic had also become a state actor).

[4] "Probable cause" means that the state actor has a reasonable belief, based on reasonably trustworthy information, that some offense has been committed; this is an objective standard. *See State v. Reid*, 98 Wn.App. 152 (1999).

The consent exception may be more complex. Consent searches are permissible warrantless searches, so long as that consent is voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Additionally, a person must have actual or apparent authority to consent—based on the reasonable belief of the state actor. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990). Federal courts will determine whether consent was voluntary based on the totality of the circumstances; the courts use this approach to identify or rule out "police coercion". *See Schneckloth*. The scope of a consent search, i.e. the areas in which a state actor may search, is measured by what a reasonable person would have concluded from obtaining consent from another, as based on the totality of the circumstances. *See Florida v. Jimeno*, 500 U.S. 248 (1991). Therefore, when a search is consented to, the state actor is limited to the scope of the search authorized ("yes, you may search the living room, but please stay out of my bathroom"). *See Walter v. United States*, 447 U.S. 649 (1980). Admittedly, consents are not always as cut-and-dry as the example just stated. But consent may be inferred from actions as well as words, and may be implied as well as express. *See United States v. Hylton*, 349 F.3d 781, 786 (4th Cir. 2003); *See Also United States v. Risner*, 593 F.3d 692, 694 (7th Cir. 2010) (finding implied consent to search a house when a 911 call was made and consenting person told police where a person was hiding in the house).

Based on these authorities, pretend that a paramedic is in the home of an irate 80-year-old woman who has just called 911 complaining of chest pain. Many 911 calls have come from her residence, including complaints of excessive noise and her own drug overdose. While evaluating her, the paramedic asks the woman if he can search her bathroom.[5] She waves her hand

in the air and begrudgingly says "Sure, you medic types really think you can get away with anything!" The paramedic asks her no further questions. He searches her bathroom, and finds various medications and an unregistered sawed-off shotgun on the counter. He subsequently inputs this information into a narrative report and informs the police. The paramedic performed a valid consent search for both the medications and the shotgun, as the woman—based on the totality of the circumstances—voluntarily consented to the paramedic searching the bathroom. Different facts: There are locked drawers in the bathroom. Opening the unlocked drawers, the paramedic finds the shotgun. He had a lawful right of access to those drawers, and it was immediately apparent that the sawed-off shotgun was incriminating; the discovery of the shotgun was made during a valid "plain view" search. Of course, the argument might be made that the paramedic was not a state actor, for purposes of the Fourth Amendment. If the paramedic was a state actor, federal and Washington courts would also look to whether he acted intentionally to violate this woman's civil rights or intrude on her private affairs; and his doing so would have to be highly offensive to a reasonable person.

There is also the "emergency aid", or "community caretaker" exception: Emergencies that threaten health or safety and require immediate action justify warrantless searches. *Brigham City v. Stuart*, 547 U.S. 389 (2006).[6] This is an objective determination—based on the totality of the circumstances, from the state actor's point of view. *Michigan v. Fisher*, 558 U.S. 45 (2010). An example from case law: A man drinks quite heavily, lapses into a barely conscious state and falls on his couch; his wife discovers him this way and calls 911; paramedics respond within minutes. The wife lets them into the house (giving express consent). The paramedics approach the man in order to take his vitals. But he wakes up, waves his arms and asks them to leave. Finding that the man was behaving belligerently, the paramedics called the police, who arrived shortly thereafter. One of the paramedics ("Akers") informed the police that he saw the man hit his wife in the chest (criminal battery). The man began to verbally abuse the police, who informed him that he could either go to jail or the hospital. He was then arrested. The man sued the police officers and Akers under 42 U.S.C. § 1983, for violation of his civil rights under the Fourth and Fourteenth Amendments. He alleged that the police officers unlawfully seized him from his home without a warrant or probable cause, with the assistance of Akers. *See Sheik-Abdi v. McClellan*, 37 F.3d 1240 (7th Cir. 1994).

The court disagreed. The court cited the general rule that state actors, in this case the police, and perhaps Akers, generally must have a warrant to enter a home; and further found that entry into a dwelling to aid in an emergency cannot become a "general voyage of discovery unrelated to the purpose of the entry." *Sheikh-Abdi*, quoting *United States v. Brand*, 556 F.2d 1312 (5th Cir.) (in which the original entry was for a suspected drug overdose). Turning to Akers, the court underlined that § 1983 claims are based on personal fault: Although Akers notified the police of his concerns, this did not amount to an intentional violation of the man's constitutional rights. *See Sheikh-Abdi* at 1248. Akers and his partner entered the home with the wife's consent. After doing so, their approach, in calling the police, was reasonable. *See Id.*

---

[5] Admittedly, the woman has a subjective expectation of privacy in her bathroom that society would recognize as reasonable, and is therefore protected by the Fourth Amendment.

[6] Note also that a warrantless search is justified to discover the source of a fire *while it is burning*, not after it is extinguished. *See Michigan v. Tyler*, 436 U.S. 499 (1978).

Let us consider a hypothetical: A medic unit is dispatched to a domestic disturbance at a private residence. A 27-year-old man answers the door. His nose is bleeding heavily; he has bruises around his neck, is crying, and is missing teeth; he claims to be the owner of the home. A paramedic asks if she can enter the home to evaluate him. He says yes. The man's girlfriend appears moments later; she has blood on her hands. She claims the man was "beating on her" so she retaliated; but she has no signs of injury. The police arrive shortly after the medic unit and enter the home. After taking vitals from the man, and discovering high blood pressure, the paramedic administers morphine, inserts an IV line, and passes off the man to an EMT and another paramedic for transfer to the hospital. After the paramedic passes the man off for transport, a police officer informs her that the girlfriend matches the description of a person who recently robbed a convenience store at gunpoint, and asks her to search the bedrooms and the garage for weapons. The paramedic complies. She has become a state actor. She finds the gun in a closed bedroom closet, and takes it back to the police officer.

The emergency aid exception most likely does not apply because the emergency no longer exists in the home: The patient was transported. Additionally, the search for the gun went beyond the reason for entering the home: rendering emergency aid. The paramedic was more likely engaged in a "general voyage" to discover evidence. The plain view exception does not apply for two reasons: (1) An argument may be made that the paramedic had no lawful right to access the rest of the home because the emergency was over, despite getting consent to enter the home; and (2) the gun was not in plain view, but located in a closed closet. Incidentally, the paramedic most likely exceeded the scope of the consent given—entry into the home. Let us look further.

Washington Law

Unlike the Fourth Amendment, the word "unreasonable" does not appear in the Washington Constitution, Article I § 7, which mandates that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I § 7 is more protective than the Fourth Amendment. *See State v. Snapp*, 174 Wn.2d 177 (2012). Under Washington law, a private person becomes a state actor when he or she "acts as an agent or instrumentality of the state." *State v. Walter*, 66 Wn.App. 862 (1992) (stating further that "[O]ur state constitution ordinarily governs only the conduct of the state's own agents or those acting under color of state law."). Firefighters and paramedics are subject to a complex regulatory scheme for certification and compliance with the law. *See* RCW 18.120.010; WAC 296-305-01003; RCW 49.17.010. But to say that because firefighters and paramedics are subject to such regulation that they act under color of state law ignores circumstances unique to the search-and-seizure context. For example, any person may enter a dwelling, at their own peril, to extinguish a fire. And that person may discover evidence of arson and inform the police. Any person may render emergency aid, at risk of being deemed negligent, or accused of committing an intentional tort, such as battery. And that person might discover evidence of bodily injury, suggesting murder. But such persons are not law enforcement, and do not act as agents of the government. Fire departments operate at taxpayer expense. They are not law enforcement in the context of search and seizure, but perhaps in the context of code enforcement (such as measuring compliance with the International Fire Code), some search issues arise.

As stated above, however, persons enjoy the same constitutional[7] protections that they would when a police officer invades their privacy, when the person acting upon them acts as an agent of the government, i.e. is a state actor. Searching an individual generally requires a warrant. *See State v. Martines*, No. 69663-7-I (Wash.2014). Under Washington law, there are many "jealously and carefully guarded" exceptions to the warrant requirement. *State v. Snapp*, 174 Wn.2d 177 (2012). Washington courts recognize all of those exceptions already enumerated above, although applying somewhat different standards to each. Under Washington law, a "plain view seizure" is valid if the state actor (1) has a justification (probable cause) for the initial intrusion, such as a warrant or a 911 call; (2) inadvertently (not intentionally) discovers contraband; and (3) has immediate knowledge that he has incriminating evidence before him. *See State v. Bell*, 108 Wn.2d 193, 196 (1987). Washington courts attached the "inadvertence" requirement to this exception; therefore, the state actor could have *no idea* that she might discover incriminating evidence in a particular place she has a lawful right to be (such as an emergency scene).

As to the consent exception, Washington courts parrot federal law: (1) the consent must be voluntary, (2) the person giving consent must have had authority to give consent, and (3) the subsequent search may not exceed the scope of the consent. *State v. Nedergard*, 51 Wn.App. 304, 308 (1988).

Furthermore, the Washington courts have ruled that "law enforcement may make a warrantless search of a residence if (1) it has a reasonable belief that assistance is immediately required to protect life or property, (2) the search is not primarily motivated by an intent to arrest and seize evidence, and (3) there is probable cause to associate the emergency with the place to be searched." *State v. Smith*, 177 Wn.2d 533 (2013). Consequently, and similar to federal law, state actors may not go on a "general voyage" to discover evidence after entering a dwelling to quell an emergency; state actors may only search those areas that are relevant to the emergency, and only if that search is contemporaneous with the emergency.

One Final Hypothetical

What if a firefighter acts at the behest of his employer, not the police? Pretend that a Washington fire department has a policy of searching for the identification of an individual at an accident scene, for purposes of charging fees for accident cleanup, e.g., of spilled fluids. A public medic unit of this fire department is called to an accident on Interstate Five. The driver is extricated from his Corvette[8], but it is determined that he is more than likely intoxicated, as he reeks of liquor. They discover no ID on the driver. Without direction from the police, and pursuant to department policy, on-scene paramedics and EMTs, in addition to searching for alcoholic beverages in the passenger compartment, open the middle console to search for ID. They find a pound of cocaine, and report this to the police.

From a Fourth-Amendment standpoint, it may be argued that those in the medic unit are not state actors, as they are not acting at the behest of law enforcement. Those in the medic unit are acting in their official capacity, but they are searching for ID for purposes of levying their own fees and

[7] To reiterate, we discuss constitutional protections in this article, not those protections afforded at common law, such as the right to sue for invasions of privacy.

[8] There is also an "automobile exception" to the warrant requirement under federal law, but we will not address that here.

charges, not fines to be imposed by the state. Of course, government employees that are not law enforcement should not be granted unfettered discretion to rove through the belongings of others. Of course, common sense tells us that firefighters and publicly employed paramedics act at the behest of government. This may be true because they are generally charged with protecting the public health and safety. But it also may be true that although these employees act at the behest of the government, they do not automatically act at the behest of law enforcement, which seems to be required for a finding of state action under the Fourth Amendment. Pretending the above employees are state actors, one might argue that if an emergency did exist, these employees were not in search of evidence to quell the emergency; the driver did not give consent to search the console; and the pound of heroin was not in plain view.

Assuming that a firefighter or paramedic becomes a state actor for purposes of the Fourth Amendment and Article I § 7, the above exceptions may be invoked to preclude the employer from being found liable under § 1983, or the exclusion of evidence obtained by the employee. But each time one is accused of violating another's constitutional rights, an objective determination of the facts is warranted, and every case is different. And of course, a disgruntled citizen might sue for common law invasion of privacy under Washington law.

Case Note

Recently, the Supreme Court of Washington decided *Worthington v. WestNET* No. 90037-0 (2015). This case involved the applicability of the Public Records Act, RCW 42.56, to entities formed under the Interlocal Cooperation Act, RCW 39.34 (ICA). The *WestNET* court found that interlocal agencies, in this case a multi-jurisdictional drug task force, cannot evade the PRA. WestNET argued that it was not a separate legal entity that could be sued, and was therefore not subject to the PRA. The court disagreed. As it has many times, the court stressed that the PRA is to be construed liberally. The court stated that it cannot rely on the self-designation of an entity formed under the ICA to discern whether the entity is somehow exempt from the PRA; the inquiry is whether and to what extent the entity conducts government business. Interestingly, all the justices agreed on one point: although not a legal entity, an agency formed pursuant to an ILA can make itself unamenable to lawsuits under RCW 39.34.030 (4). (In this instance, of course, the municipal corporations that agreed to the ILA remain liable to suit instead.)

But the court cited RCW 42.56.030, which states that when the provisions of some other statute conflict with the PRA, that the PRA controls. In doing so, the court found a conflict between the statutes, and resolved the conflict in favor of disclosure.

DISCLAIMER