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United States v. Dzialak: The General Search Warrant— a Void in Judicial Logic

The primary purpose of the Fourth Amendment is to insure the privacy and security of the people and guard against arbitrary invasions by representatives of the government.[1] Extending from this principal is the protection from unreasonable search and seizure. The rigid particularity and specificity required in a warrant to search serves as another protective device. However, recently there has arisen much controversy as to whether this instrument is being interpreted by the courts to benefit the prosecutor more than to protect the people. Apparently, the United States Court of Appeals, Second Circuit, has found it judicially expedient to relax, to some degree, the requirement of extreme specificity in the description of items to be seized in a search warrant.

In *United States v. Dzialak*,[2] the defendant, Dzialak, was convicted in the United States District Court for the Western District of New York on a five count indictment charging possession of chattels and knowing the same to be stolen. [3] Because there existed strong probable cause for the police to believe that Dzialak had possession of stolen chattel, a warrant was issued to search his residence and automobile.[4] The warrant named as specific objects of the search, "27½ dozen pairs of hosiery, one Schwinn boy's bicycle and an accompanying description as well as a description of one carton of binoculars."[5] In executing the warrant to search, the agents found and seized the hosiery and bicycle as described and 3 opera glasses, 2 microscopes and 7 telescopes.[6]

Dzialak appealed to the United States Court of Appeals alleging that the lower court erred in admitting evidence seized in the search of appellants premises by means of an unlawful search and seizure in that all of the items seized were not named in the search warrant.[7] Appellant urged specifically that the opera glasses, microscopes, and telescopes were not contained in the warrant to search with the sufficient specificity. The court refused to uphold this contention in that all of the optical equipment seized may be considered to come under

1. *See* Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York*, 148 N.Y. LAW J. 4 (1962).
2. 441 F.2d 212 (2nd Cir. 1971).
3. *Id.* at 212.
4. *Id.* at 214.
5. *Id.* at 215.
6. *Id.*
7. *Id.* at 214.

the heading of "binoculars" as described in the warrant.[8] No such items were described in the search warrant, although the warrant did authorize a search for a "carton of binocluars."[9] The Supreme Court of the United States denied certiorari.

The law in this area is quite clear. Every search warrant must specifically identify what is to be searched for and seized.[10] Nothing is to be left to the discretion of the officer executing the warrant and that if something is not described in the warrant, it cannot be seized.[11] The search warrant was not known to early common law, but it later crept into the law by imperceptible practice.[12] However, in recognition of its great efficiency, it gradually became engrafted into the law and its legality has long been considered to be established on the grounds of public necessity. The courts and legislative bodies have contented themselves with carefully restricting and controlling the use of the warrant.[13] In order to prevent the practice of overly broad discretion being imposed upon the executing officer, the search warrant has been required to maintain a most particular description of the thing to be seized and failing to do so it is void.[14]

The warrant will be sufficient only if it enables the officer to identify the specific property sought or to locate it with reasonable certainty.[15] Because the Fourth Amendment was intended to prevent general searches seeking to incriminate an accused by using his private papers, the requirement of particularity and specificity serves to limit searches to those items which government representatives have strong probable cause to believe are involved in a crime.[16] The seizure of private papers is subject to rigid controls as they are so testimonial in nature. It is well recognized that it is more important to require a specific description of books, records, and papers, which are usually of value only to the owner and may be irreplaceable, than of tangible property.[17]

In determining the sufficiency of a search warrant to fulfill the requirement of specificity, the test is whether the warrant places a meaningful restriction on the objects to be seized.[18] The purpose of requiring that items to be seized be listed specifically is to insure that said items are not left to the mere discretion of the officer conducting the

8. *Id.* at 217.
9. *Id.* at 215.
10. FED. R. CRIM. P. 41(c).
11. Marron v. United States, 275 U.S. 192, 48 S. Ct. 74 (1927).
12. Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4 (1925).
13. State v. Guthrie, 90 Me. 448, 38 A. 368 (1880).
14. Rice v. United States, 24 F.2d 479 (1st Cir. 1928).
15. Borders v. State, 138 Miss. 788, 104 So. 145 (1925).
16. State v. Doust, 285 Minn. 336, 173 N.W.2d 337 (1969).
17. Lipschutz v. Davis, 288 F. 974 (E.D. Penn. 1922).
18. People v. McEwen, 244 Cal. App. 2d 534, 53 Cal. Rptr. 362 (1966).

search.[19] However, it is well settled that the fact that the executing officer must exercise his judgment as to what item or items are to be seized under the warrant does not necessarily indicate that the warrant should lack the required particularity, so long as the determination which the officer is required to make is a factual determination, not one of opinion.[20] The description of property to be seized is required to be specific only so far as the circumstances of each case will ordinarily allow.[21] In most cases only items described in a search warrant may be seized.[22] However, items which can be considered a means or instrumentality of a crime, or contraband in plain view may be seized, even though such items are not described in the warrant under which the search is being conducted.[23]

The line of cases which adhere to the "plain view" doctrine have common factual perameters.[24] In each, the police officers had a prior justification for an intrusion in the course of which he came *inadvertently* across a piece of evidence tending to incriminate the accused. Of course, the extension of the original justification is legitimate only where it is apparent to the officer that they have evidence before them; thus the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.[25]

The United States Supreme Court currently enforces an exclusionary rule in state and federal crimimal proceedings and applies such a rule to those searches and seizures in violation of the Fourth Amendment.[26] Futhermore, the Court has on several occasions reiterated the strong stance taken against general searches.[27] The Fourth Amendment requirement that a warrant particularly describe the things to be seized is precise and clear.

> It reflects the determination of those who wrote the Bill of Rights that the people of this new nation should forever be secure in their persons, house, papers, and effects from the unbridled authority of a general warrant.[28]

The significance of the *Dzialak* case is found in the analysis utilized

19. Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506 (1965).
20. Strauss v. Stynchombe, 224 Ga. 859, 165 S.E.2d 302 (1968).
21. State v. Nelson, 84 S.D. 218, 169 N.W.2d 533 (1969).
22. United States v. Alloway, 397 F.2d 105 (6th Cir. 1968).
23. FED. R. CRIM. P. 41(c).
24. *See*, McDonald v. United States, 335 U.S. 451 (1948); Warden v. Hayden, 387 U.S. 294 (1967); Katz v. United States, 389 U.S. 347 (1967).
25. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
26. Comment, *The Exclusionary Rule in Context*, 50 N.C.L. REV. 1049 (1972).
27. *See*, Berger v. United States, 388 U.S. 41, 87 S. Ct. 1873 (1967); *accord*, Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506 (1965).
28. Stanford v. Texas, 379 U.S. 476, 85 S. Ct. at 509 (1965).

by the court to justify the legality of the seizure. There exists no question but that the hosiery and bicycle were specifically described in the warrant and seized in accordance with the particular description. However, the three opera glasses, telescopes, and microscopes were not described with such specificity. The court, in sanctioning the seizure, made clear its opinion that these items would fall under the category of "optical equipment" and that binoculars are categorized as such and were sufficiently described in the warrant. Optical equipment seems to be the common denominator that was used to categorize the seized items with the binoculars. It appears that the court arrived at its decision syllogistically; in that the warrant specified binoculars; binoculars are optical equipment; and telescopes and microscopes are considered optical equipment.[29] Therefore, the logically invalid syllogism that follows is that binoculars are microscopes, telescopes, and opera glasses.

The court refused to lend discussion to the "plain view" doctrine as a possible justification for the seizure. Rather, it chose unsuccessfully to attempt relating the items specifically described in the warrant to those generally seized. One must suggest that the facts of the case demand that this court not only address the issue of "plain view", but attempt to justify the seizure within that doctrine. Without such justification its opinion fills the all too familiar void of judicial utterances.

An example of the applicability of the "plain view" doctrine, as held in *United States v. Lefkowitz*, is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.[30] Such is clearly the situation in *Dzialak*.

The basic analysis is that material which bears a reasonable relationship to the purpose of a search under a lawful warrant may be seized.[31] The seizure of evidence not described in a search warrant can be upheld. But, essential to the validity of such a seizure is that the search which leads to the discovery of the unlisted material be conducted in good faith.[32] It is well settled that a search pursuant to a warrant does not entitle executing officers to engage in a general search under the guise of a search warrant.[33] The state cannot benefit from an illegal search by producing illegal evidence gained as a result of such a search.[34] Other courts have been stricter in similar situations concerning items seized that were not described in the search warrant, and have held that

29. 441 F.2d 212.
30. 285 U.S. 452, at 465.
31. People v. Sohmers, 55 Misc. 2d 925, 286 N.Y.S.2d 714 (1968).
32. Davis v. State, 499 P.2d 1025 (Alas. 1972).
33. Marron v. United States, 275 U.S. 192, 48 S. Ct. 74 (1927).
34. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963).

the seizure must be invalidated unless it falls under plain view exceptions. If not, the seizure of such items exceeds the scope of the search warrant and its fruits must be suppressed.[35]

Other recent cases on this particular aspect of search warrants have shed some light on the *Dzialak* decision. In *State v. Michaelson*,[36] the defendant was convicted of concealing stolen property. Probable cause was sufficient to believe that the defendant had possession of a stolen automobile. The warrant named as objects of the search, registration papers for the automobile and other relevant correspondence of the stolen vechicle.[37] In executing the warrant to search defendant's residence, the police seized a number of papers relating to the automobile which were not specifically described in the warrant, such as a receipt for an engine. The defendant appealed to the Minnesota Supreme Court contending that its refusal to suppress evidence which the police seized in a search of his home constituted reversible error by the trial court because these items were not named in the warrant.[38]

The Minnesota court held the seizure proper in that the seized items clearly and definitely related to the items described in the warrant.[39] It is worthy to note that the item seized, "an engine slip", falls under the heading of the item described, "relevant correspondence of the stolen vehicle." Phrased differently, the category or common denominator of seizable items was described in the warrant, while in the *Dzialak* case the court had to reach beyond the described items in the warrant to grasp a common category that would make for a reasonable relationship between the items described and the items seized.

A recent North Carolina case bears eloquent testimony to this same judicial logic. In *State v. Shirly*,[40] the defendant was convicted for unlawful possession of LSD and marihuana. The defendant appealed contending that the search warrant was insifficient to justify the seizure of LSD, since the affidavit upon which it was based referred to marihuana.[41] The warrant, however, expressly authorized the officers to search the described premises and seize "all illegally held narcotic drugs [sic] thereon."[42]

The court found that the words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the

35. State v. Neal, 279 So. 2d 172 (La. 1973); *contra*, State v. Pietraszewski, 285 Minn. 212, 172 N.W.2d 758 (1969).
36. — Minn. —, 214 N.W.2d 356 (1973).
37. *Id.* at —, 214 N.W.2d at 358.
38. *Id.* at —, 214 N.W.2d at 359.
39. *Id.*
40. 12 N.C. App. 440, 183 S.E.2d 880 (1971).
41. *Id.* at 443, 183 S.E.2d at 883.
42. *Id.* at 441, 183 S.E.2d at 881.

warrant from authorizing a general search, clearly prohibited by the Fourth Amendment.[43] The significance of the *Shirly* case is that the items seized were part and parcel of the items described, and no common denominator had to be sought in order to relate the seized and described items. Thus the court correctly held the seizure a proper execution of the warrant.

While it is sometimes permissable to seize items other than those described in the search warrant, the state must demonstrate a reasonable relationship between the search authorized and the seizure of items not described.[44] In *Dzialak*, the court did not recognize the state's failure to demonstrate such a relationship. The search warrant particulary described one carton of binoculars. The agents seized telescopes, opera glasses, and microscopes. These items are simply not binoculars as described in the warrant. It is not disputed that these objects do entertain a common relationship as being optical equipment. However, this relationship is tenuous as evidenced by the broad heading that had to be employed to draw a relationship between the two items. Optical equipment can no doubt encompass anything from contact lens to massive solar telescopes. Surely the court in *Dzialak* would not have held that seizure of a common magnifying glass proper simply because it comes under the heading of optical equipment.

One must suggest that the warrant itself should have contained the authorization to seize "optical equipment." A warrant describing "binoculars" should be valid only when "binoculars" are seized.

CONCLUSION

The *raison d'etre* of the search warrant has been to narrowly define those instances where law enforcement officers may make unwanted intrusions into the lives of our nations citizenry. Unfortunately, *Dzialak* reflects a concensus of federal courts wishing to eliminate the Fourth Amendment protections against searches and seizures heretofore restricted to special circumstances, by juxtaposing the question of reasonableness upon the plain view doctrine, where the latter should have stood alone. Such an obfuscation can only hope to render extinct all of the rights guaranteed by the Fourth Amendment.

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43. *Id.* at 443, 183 S.E.2d at 883.
44. United States v. Joseph, 278 F.2d 504 (3rd Cir. 1960).

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