

PROTECTIVE SWEEPS and ARREST SEARCHES The Legacy of Maryland v. Buie¹ PART 2

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As Part 1 of this series of articles demonstrated, *Buie* provides new tools for law enforcement, i.e. protective sweeps and searches incident to arrest. Part 2 reviews cases which did not comply with the *Buie* requirements.

The *Buie* case held that before police officers may conduct a protective sweep, they must have reasonable suspicion that the area to be swept harbors a person presenting a danger to them. Protective sweeps are analogized to the “on the street ‘frisk’ for weapons”² and the “‘frisk’ of an automobile for weapons”³ and as such, the “reasonable suspicion” standard is applicable. If reasonable suspicion is not present, the protective sweep violates the 4th Amendment.

CASE EXAMPLES INVOLVING PROTECTIVE SWEEPS NOT COMPLYING WITH *BUIE*

A warrantless entry into a warehouse could not be justified when there was a lack of specific and articulable facts of the presence of another individual who posed a danger to the officers.

¹ *Maryland v. Buie*, 494 U.S. 325 (1990)

² *Terry v. Ohio*, 391 U.S. 1 (1968)

³ *Michigan v. Long*, 463 U.S. 1032 (1983)

In *U.S. v. Chaves*⁴, agents of the Drug Enforcement Administration (“DEA”) received information from a confidential informant relating to drug trafficking in Miami, Florida. Based on the information provided, the DEA developed a plan to seize approximately 240 kilograms of cocaine using the informant’s van. The informant was to provide the keys to the van to a third person, who would then pick up the drugs and return with the van. DEA agents saw Frank Chaves drive off in the informant’s van. Using both car and helicopter, the DEA surveilled the van. Chaves stopped at a warehouse and departed a short time thereafter. Chaves then drove the van to a restaurant and entered. While Chaves was in the restaurant, a DEA agent approached the van and saw several boxes in an area that was previously empty. DEA agents then proceeded to arrest Chaves and search the van, seizing ten boxes containing 240 kilograms of cocaine, some money, and keys belonging to Chaves.

Shortly after arresting Chaves, DEA agents, who were still surveiling the warehouse, arrested Rafael Garcia and John Torres as they exited the warehouse. Both men were carrying firearms at the time of their arrest. The door of the warehouse was locked and none of the keys taken from Garcia and Torres could open the warehouse. The agents at the warehouse then waited approximately forty-five minutes outside the warehouse with Garcia and Torres in custody. At this time, the agents at the warehouse, who had been joined by those arresting Chaves, conducted a warrantless entry of the warehouse. During the sweep of the warehouse, which lasted approximately five to ten minutes, the agents saw boxes

⁴ *U.S. v. Chaves*, 169 F.3d 687 (11th Cir. 1999)

similar to those found in the van.

At this point, agents drafted a search warrant affidavit, relying on information obtained both before and as a result of the warrantless entry. Late that same evening, agents obtained and executed the search warrant for the warehouse. As a result of the execution of the warrant, DEA agents found approximately 400 kilograms of cocaine, as well as packaging material, boxes, gloves and items belonging to Chaves.

On appeal, both Chaves and Garcia argued that the search of the van and the warrantless entry at the warehouse violated their Fourth Amendment rights and, therefore, their motions to suppress the cocaine seized from the van and at the warehouse should have been granted.

The court sustained the search of the van as to both Chaves and Garcia. Chaves, on the other hand, did have a reasonable expectation of privacy in the warehouse.

The court held that the initial warrantless entry of the warehouse under the auspices of conducting a “protective sweep” violated the Fourth Amendment. *Buie* held that a properly limited protective sweep, conducted incident to an arrest, is permitted under the Fourth Amendment only “when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”⁵ The Court in *Buie* permitted police officers to undertake protective sweeps in these instances because of the compelling “interest of the officers in taking steps to assure themselves that the house in which a

suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.”⁶

Here, the government’s own action undermines any claim that the entry had a protective purpose. It is undisputed that the sweep in this case did not immediately follow the arrest of Garcia and Torres outside the locked warehouse, but occurred a substantial time afterward. During the interim period, approximately forty-five minutes, the officers simply sat in their cars outside the warehouse. The agents, thus, saw no immediate need to enter the warehouse to protect themselves or other persons in the area. *Buie* requires officers to have “a reasonable basis for believing that their search will reduce the danger of harm to themselves or of violent interference with their mission.”

Moreover, the government has failed to point to any “specific and articulable” facts that would lead a reasonably prudent officer to believe that, at the time of the sweep, a sweep was necessary for protective purposes. Much of the government’s argument as to why a sweep was needed for protective purposes is not based on any specific facts in the government’s possession, but rather is based on the lack of information in the government’s possession. The testimony at the suppression hearing indicated that the officers had no information regarding the inside of the warehouse. Not knowing that there is not another individual who poses a danger to the officers or others cannot justify a protective sweep.

The fact that Garcia and Torres were arrested with weapons in their possession “implies nothing regarding the

⁵*Buie* at 337

⁶*Buie* at 333

possible presence of anyone being in [the warehouse] - the touchstone of the protective sweep analysis.”

Note, however, that the court found the search warrant to be valid, stating that “even discounting that portion of the affidavit describing information uncovered during the unconstitutional warrantless entry, the balance of the affidavit supports a finding of probable cause.”

A protective sweep may last no longer than it takes to complete the arrest and depart the premises. Where there is no arrest, and no facts demonstrate that a reasonably prudent officer would have believed that the apartment harbored another individual posing a danger to those on the scene, there can be no protective sweep under *Buie*.

In *U.S. v. Reid*⁷, while searching for a suspect, U.S. Marshals learned that a man named Mikey, one of the suspect’s close associates, lived in an apartment in San Diego, California. Federal agents went to the apartment to speak with Mikey. The agents did not have a search warrant or an arrest warrant. Deputy Marshal Kitts knocked on the door, which was answered by Junior Grant. Kitts knew that Grant was not Mikey. Kitts asked Grant if he knew who owned the Lexus in the parking space for the apartment. Grant said he did not know. Kitts could smell burning marijuana through the open door. When Kitts identified himself as a federal agent, Grant closed the door and was observed by other agents running from the back door of the apartment.

Two agents detained Grant and frisked him. Kitts handcuffed Grant and told him that he was not under arrest. Kitts did not hear any sounds suggesting that other individuals were in the apartment.

The officers entered the apartment and observed items they believed to be associated with drug trafficking. While a search warrant was being prepared, appellant Wayne Blake attempted to enter the apartment. When questioned, he gave one of the agents his wallet. The agent found a false identification in the wallet and arrested Blake. An hour later, appellant Lawrence Reid entered the apartment and encountered the officers inside. Reid fled and was apprehended. He also presented a false identification and was arrested.

The search warrant was executed a few hours later. Officers found weapons, another false identification with Reid’s picture on it, packing and shipping materials, a scale, marijuana residue and large amounts of cash in the apartment.

Blake and Reid appealed their convictions, arguing that the warrantless search of the apartment violated the Fourth Amendment. The government argued that the search was permissible either as a protective sweep or because of exigent circumstances.

The court held that the warrantless search was neither a protective sweep nor justified by exigent circumstances.

Citing *Buie*, the court noted that “[a] protective sweep may last ‘no longer than it takes to complete the arrest and depart the premises’”. In the present case, Deputy Kitts testified that when the officers detained Grant in the back of the

⁷ *U.S. v. Reid*, 226 F.3d 1020 (9th Cir. 2000)

apartment, Grant was not under arrest. Additionally, the government did not point to any facts that demonstrated that a reasonably prudent officer would have believed that the apartment “harbor[ed] an individual posing a danger to those on the arrest scene.” The officers did not have any information that Grant or anyone possibly inside the apartment was violent. The officers did not see any guns and Grant cooperated with the officers when he was detained outside. Therefore, the officers were not entitled to conduct a protective sweep under *Buie*.

As to exigent circumstances, the smell of burning marijuana cannot satisfy the burden that the government must overcome because one person can smoke marijuana alone. Since that person was detained, there was no risk that he could destroy evidence. Similarly, the fact that the Lexus was parked in the parking space for apartment 101, standing alone, is insufficient to establish exigent circumstances. Other than the two facts offered by the government, there was no evidence that other persons were inside the apartment. Deputy Kitts testified that he did not hear anything that indicated that another person was inside the apartment. And when Grant was detained at the back of the apartment he told the officers that there was no one else inside.

Arrest outside the residence, sweep inside the residence requires reasonable suspicion.

In *U.S. v. Calhoun*⁸, the court dealt with an arrest outside an apartment with a subsequent protective sweep inside the apartment.

The police intercepted a kilogram of cocaine when a United Parcel Service (“UPS”) employee opened a package addressed to “Sean Johnson.” The police arranged for the controlled delivery of the package to Sean Johnson at the address indicated on the shipping label. When the delivery was made, Kendra Calhoun opened the door, identified herself as Sean Johnson, signed for the package, and took possession of it. She was immediately arrested and placed in handcuffs. By pre-arranged plan, other officers entered the apartment and conducted a “sweep.” They had no prior knowledge anyone was inside. They found two men and an infant. The officers had neither an arrest nor a search warrant.

After having received her *Miranda* rights, Calhoun was given a consent form to sign so the police could search her apartment. She signed it. Asked whether any weapons were in the apartment, Calhoun told the officers a shotgun was under the bed. The officers retrieved the gun. They also seized various documents, including cash receipts for many items of value in the apartment and UPS forms.

Calhoun’s motion to suppress the weapon, the statements she made to police, and various documents found in the apartment was denied. She claims this was error because the pre-arranged sweep was unconstitutional under *Buie*. Although the sweep did not lead to the discovery of any evidence, she contends it was instrumental in causing her to consent to the search and to make the statements she sought to suppress.

The court agreed with Calhoun that the sweep of her apartment was illegal. However, the evidence seized did not turn on the unauthorized sweep. The district

⁸ *U.S. v. Calhoun*, 49 F.3d 231 (6th Cir. 1995)

court's finding that Calhoun's consent was voluntary is not clearly erroneous. Her consent made the subsequent warrantless search of her apartment lawful.

A protective sweep under *Buie* is defined as "a quick and limited search of premises It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." It does not include a search of a box of business records.

The case of *U.S. v. Noushfar*⁹ involves a conspiracy to smuggle valuable Persian rugs into the United States in violation of an Executive Order.

Kamran Shayesteh and his wife Zohreh owned and managed the Galleria deFarsh, a large rug store in Burlingame, California. In 1987, a presidential order imposed an embargo on virtually all Iranian goods. The embargo prevented importation of Iranian products, but did not prevent ownership. The restriction created a sudden increase in demand and in price for the limited supply of Persian (Iranian) rugs already in the United States.

The Shayestehs conspired with others to smuggle Persian rugs from Canada, where they could be legally imported, to California. The conspiracy worked more or less as follows: The Shayestehs, with the assistance of Rabie, imported Iranian rugs from Tehran to Vancouver, often via Singapore, Hong Kong or Malaysia. The rugs were then smuggled into the United States by drivers who failed to declare the rugs or else lied about their origin.

During three smuggling operations, the defendants were assisted by Tim Meyer, an undercover United States Customs agent, whom the Shayestehs hired to drive a truck filled with contraband rugs over the border. When the rugs entered Washington state, customs officials documented them and marked them with an invisible thread. The rugs were delivered to Noushfar in Seattle, and he sent them to the Galleria in California.

The investigation eventually led to the arrest of the Shayestehs by customs agents who then undertook a sweep of their apartment. Agents testified that they arrested the Shayestehs within a minute of entering the apartment. Instead of leaving promptly, they made the Shayestehs sit in their living room while the agents went through the apartment for more than a half-hour. During this period, they spotted a box with business receipts in a closet. Thereafter, other agents returned to the closet to examine the box further. There was no suggestion that the agents feared for their safety. Even if the box had been in "plain view," the further examination exceeded the narrow purpose of a *Buie* sweep.

The court held that the "sweep" by the seven customs agents exceeded the limits of a *Buie* sweep in both time and scope.

Conclusion

As these cases illustrate, a protective sweep of a premises is a search under the 4th Amendment that is analogous to a "Terry frisk" in that it requires reasonable suspicion to believe that the premises harbors a person who is a danger to those on the arrest site. The scope of the protective sweep is limited to a cursory

⁹ *U.S. v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996)

inspection of those places in which a person might be hiding.