PROTECTIVE SWEEPS and ARREST SEARCHES
The Legacy of Maryland v. Buie
Part 3

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As Part 1 of this series demonstrated, *Maryland v. Buie*[1] provides new tools for law enforcement - protective sweeps and searches incident to arrest. Part 2 reviewed cases that did not comply with the *Buie* protective sweeps requirements. Part 3, the concluding part of this series, reviews the ***search incident to arrest*** aspect of *Buie*.

In dealing with the issue of the scope of protective sweep, the Court in *Buie* stated that:

> ... ***as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.*** Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry*[2] and *Long*[3], and as in those cases, we think this balance is the proper one.

These words give rise to "two prongs" of Buie – search incident to arrest and protective sweeps.

"Search incident to arrest" is predicated solely on the arrest and does not require probable cause or reasonable suspicion. It is the subject of this article.

CASE EXAMPLES OF THE "SEARCH INCIDENT TO ARREST" PRONG OF *BUIE*

A Valid Search Incident to Arrest That Went Too Far

In *United States v. Ford*[4], on the morning of January 10, 1992, six law enforcement officers, including a special agent of the FBI, arrived at the home of Mark Ford's mother with an arrest warrant for Ford. Upon entering the apartment, the FBI agent observed appellant in the apartment hallway and arrested him. The agent then conducted what the Government characterized as a "protective sweep." He walked into the bedroom immediately adjoining the hallway in which appellant was arrested, purportedly to check for individuals who might pose a danger to those on the arrest scene. Once in the bedroom, the agent spotted a loaded gun clip in plain view on the floor. Although he realized that there were no people in the bedroom, the agent nevertheless continued to search. He lifted

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

[2] *Terry v. Ohio*, 392 U.S. 1 (1968)
[3] *Michigan v. Long*, 463 U.S. 1032 (1983)
[4] *United States v. Ford*, 312 U.S. App. D.C. 301; 56 F.3d 265 (D.C. Cir. 1995)

a mattress under which he found live ammunition, money, and crack cocaine, and he lifted the window shades and found a gun on the windowsill.

The protective sweep permitted under *Buie* is limited. In this case, the court held that the agent was justified in looking in the bedroom, which was a space immediately adjoining the place of arrest. And once in the bedroom, the agent could legitimately seize the gun clip that was in plain view. The agent could not, however, lawfully search under the mattress or behind the window shades because these were not spaces from which an attack could be immediately launched. There were no exigent circumstances justifying this further warrantless search. The court held that the items taken from under the mattress and from behind the window shades were seized in violation of the Fourth Amendment and, therefore, inadmissible at trial.

In its decision, the court reasoned that once in the bedroom pursuant to a legitimate protective sweep under *Buie*, and having seen the gun clip in plain view, the law enforcement officers had reasonably available measures to ensure their safety. They could have secured the bedroom and telephoned a magistrate for a search warrant. They could have asked the owner of the apartment, appellant's mother, for consent to a search of the apartment. These reasonable alternatives to a warrantless search would have avoided the infringement of Fourth Amendment rights, without jeopardizing the safety of the officers. Because the officers took no such measures, the search was unreasonable and hence unconstitutional.

(Note: The court commented that the Government chose not to pursue *Buie's* "protective sweep" prong at oral argument. This made sense, the court stated, because record is clear that the Agent possessed no articulable facts which would have led him to believe that the area he searched harbored an individual posing a danger to those on the arrest scene.)

A Search Between the Mattress and Box Springs, Revisited

The case of *U.S. v. Blue*[5] involved the November 22, 1994, search of the interior of a bed in Blue's apartment incident to the arrest of another man, Elton Ogarro. On that date, approximately a dozen agents and officers of the DEA's Task Force went to 64 East 131st Street in Manhattan to execute two arrest warrants and a search warrant for an apartment on the second floor. The arrest warrants were for Brown and Ogarro, who were believed to have been selling crack cocaine.

Shortly after the agents arrived in the vicinity, they arrested Brown outside the building. They waited a few minutes to see if Ogarro would also exit the building. When he did not, the agents entered the building and walked up the stairs. Moments later, the agents saw Ogarro running down the hallway. Agent Fernandez grabbed Ogarro at the top of the stairs and attempted to push him up against the wall. The wall, however, turned out to be the door to Blue's apartment, which flew open, causing Ogarro to fall to the ground inside the apartment.

Agents Fernandez, Koval and Jenkins entered Blue's apartment. Jenkins

[5] *U.S. v. Blue*, 78 F.3d 56 (2nd Cir. 1995)

identified Ogarro as the man for whom they had a warrant, handcuffed him behind his back, and placed him on the floor face down. Jenkins then approached Blue, who had been sitting on the bed during the incident. Jenkins identified himself as a police officer, but received no response from Blue, who appeared lethargic, as though under the influence of a narcotic. Jenkins handcuffed Blue behind his back and placed him in a prone position on the floor.

After Ogarro and Blue were handcuffed, Agents Jenkins and Koval performed a "security sweep" of the apartment. The apartment consisted of a single room, approximately 12 feet by 8 feet, all of which was visible at a glance. Agent Koval lifted Blue's mattress off its box spring. In the middle of the box spring, Koval discovered a package wrapped in brown paper, a machine gun, and an ammunition clip.

Blue was arrested and charged with unlawful possession of a firearm.

In his appeal, Blue does not contest that the officers (1) had the requisite articulable facts that he posed a danger and (2) properly detained him. He does, however, claim that the search between his mattress and box spring during his detention exceeded the permissible scope of a protective sweep. In its opinion, the court considered separately the issues of whether the search was legally justified because (1) the bed was within the immediate reach of Ogarro, and (2) the space between the mattress and box spring may have concealed a person.

The court held that the search of the area in the middle of the box spring was beyond the reach of Ogarro and thus was overbroad. Ogarro and Blue were prone on the floor, two feet from the bed, their hands cuffed behind their backs, and guarded by Agent Fernandez who stood over them. Ogarro's and Blue's manacled hands were clearly visible to Agent Fernandez at all times. Given the small size of the one-room apartment and the fact that Ogarro and Blue were secured during the entire time, there was no possibility that either one of them could reach deep into the interior of the bed without being stopped by Agent Fernandez or one of the other agents.

As to the contention that the search of the interior of the bed was justified as a protective sweep for a possible third person, the court held that the officers lacked articulable facts to support an inference that a person could have been hiding in a cavity in the box spring. There was no indication in the record of any movement by Blue or any other unidentified individuals when the agents entered the room. Moreover, there was no indication that the officer's search was the result of a rise or bulge in the mattress. Nor did the officers suggest anything unusual about the bed. Furthermore, prior to their unanticipated entry, the arresting officers had no information concerning Blue or his apartment which would indicate that their safety was threatened by a hidden confederate, let alone one within the confines of the mattress and box spring.

Search of Two Adjoining Rooms Incident to Arrest

In the case of *In Re: Sealed Case*[6], the court held the warrantless entry into a

[6] *In Re: Sealed Case*, 332 U.S. App. D.C. 84; 153 F.3d 759 (D.C. Cir. 1998)

residence and the warrantless arrest of the defendant were lawful. The court concluded that Metropolitan Police Department officers Riddle and Wilber had probable cause to believe the defendant was committing a burglary. They observed someone appear to break open the door to an unlit house and enter it without turning on the lights. When they approached the door to investigate, they discovered that the lock was indeed broken. When Riddle identified himself as a police officer, the person who had entered the house did not respond in any way. When Riddle again identified himself as a police officer and tested the door, the person inside pushed back for several seconds. Riddle then heard steps going away from the door. The totality of these circumstances gave Riddle probable cause to believe a burglary was in progress.

Riddle entered the house and chased the defendant up the stairs and into a large, darkened bedroom. He seized the defendant, led him into the hallway, patted him down for weapons, took him downstairs to the first floor, and handed him off to other officers. Riddle immediately returned upstairs to the large bedroom. In the darkened corner where the defendant had been standing, Riddle discovered a bag of crack cocaine and a semiautomatic handgun. Riddle entered the small bedroom, which was only a few feet from the large bedroom, a few feet from the top of the stairs, and adjacent to the room in which the defendant had been apprehended. He saw and seized a clear plastic bag containing white rocks and a triple-beam scale. The defendant moved to suppress these items.

The court upheld the search of the large bedroom as a search incident to arrest. The guns and drugs Officer Riddle found in the large bedroom were located in an area under the defendant's "immediate control." The defendant was arrested while standing next to a chair in the bedroom. The drugs were found on that chair, and the gun was found beside it.

In upholding the search of the small bedroom, the court relied on *Buie*. The court held that the small bedroom was an area immediately adjoining the place of arrest from which an attack could have been immediately launched. Officer Riddle discovered the drugs and the triple-beam scale "in plain view" during a "cursory visual inspection" of the small bedroom. The court held that the search of the small bedroom was lawful under the "search incident to arrest" prong of *Buie.*

Search of Attic Space Above Place of Arrest

In *Ortiz-Sandoval v. Gomez*[7], police had probable cause to arrest the defendant for a homicide. The police went to the house where the defendant was living and learned that he was living in an attached garage that had been converted to an apartment. The police entered the apartment and found Ortiz-Sandoval and his brother asleep. They arrested Ortiz-Sandoval. Officer McLaren testified that after Ortiz-Sandoval and his brother were secured he immediately looked around the garage apartment. A ceiling opening large enough for the officer to fit his upper torso inside was "just above" where Ortiz-Sandoval slept. The opening adjoined the area of the arrest and was an area from which an attack could be immediately launched.

[7] *Ortiz-Sandoval v. Gomez*, 1996 U.S. App. Lexis 7999 (9th Cir. 1996)

In his appeal, the defendant argued that the protective sweep was not reasonable under *Buie* because the police lacked reasonable suspicion to believe other persons were present. This court stated that that information was not necessary "because the officers were entitled, even without reasonable suspicion, to search areas adjoining the place of arrest" from which an attack could be immediately launched.

ARREST OUTSIDE PREMISES, PROTECTIVE SWEEP INSIDE PREMISES REQUIRES REASONABLE SUSPICION OF DANGER

Cases permitting entry into a premise following an arrest outside have all involved the "protective sweep" prong of *Buie*, requiring reasonable suspicion of danger. No courts have allowed a *Buie* "search incident to arrest" inside the premises following an arrest outside the premises.

The case of *Sharrar v. Felsing*[8] involved suit under 42 U.S.C. §1983 for arrests without probable cause, unreasonable search and seizure, and use of excessive force.

This case began with Patricia Gannon's 911 call alleging that her estranged husband, David Brigden, and three other unidentified people had come into her apartment and had beaten her up. Officer Felsing was dispatched to Brigden's apartment. The situation quickly escalated to the point where additional officers (including some from adjoining communities), the SWAT team (dressed in black fatigue uniforms and armed with shotguns, rifles and submachine guns), officers with drug/explosive sniffing dogs, the town Mayor, the Police Commissioner, and an FBI trained hostage negotiator became involved.

The police created an inner and outer perimeter around Brigden's residence. All residents in the inner perimeter were evacuated. Someone was dispatched to contact the schools in the area to divert their normal bus routes and to keep all children who lived in the immediate vicinity of Brigden's residence at school. The fire station was ordered to accept evacuees; fire trucks and ambulances were told to come to the scene without lights and sirens; the City marina was closed so that no boats could leave the harbor; and the bridge which provided the sole vehicular access to the City was blocked. Once the inner perimeter was cleared, an officer, who was "the department sniper," and another officer were stationed at a nearby building. At least four officers were assigned to the rear of the residence.

Brigden and the other men in the residence complied with orders to come out of the apartment at which time they were taken into custody. The "tactical unit immediately entered the building and cleared it to make sure there were no other suspects still hiding inside." Brigden's residence consisted of a three story, single-family house that had been converted into four separate locked and numbered apartment units. The first floor contained two apartments, one of which was occupied by Brigden. There were separate apartments on the second and third floors. The officers admitted that they knew that the other units were rented to other people. The SWAT team cleared the building by entering each room in the entire building to make sure there were no

[8] *Sharrar v. Felsing*, 128 F.3d 810 (3rd Cir. 1997)

other suspects. Police then secured the residence so that no one would enter the premises again until a search warrant was procured. This "sweep" took somewhere between five and twenty minutes.

There were a number of issues in the case including the lawfulness of the arrests, the use of force, qualified immunity, and "protective sweep."

The officers sought to justify their warrantless entry into Brigden's unit immediately following the arrest on the ground that it was a quick protective sweep incident to the arrest and needed to protect the safety of the officers involved. The officers contended they entered the residence seeking to determine that there were no other accomplices hiding in the building with access to the gun that remained unaccounted for.

This court held that a sweep incident to an arrest occurring just outside the home must be analyzed under the "protective sweep" prong, not the "search incident to arrest" prong, of *Buie*. This analysis requires "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The court cited cases from the 6th , D.C., 11th, 2nd and 10th Circuits in support of this position.

The court found no articulable basis for the sweep and concluded that the *Buie* standard was not met. However, this court also held that because the law as to protective sweeps inside the home incident to arrests made outside the home was not clearly established, defendants were protected by qualified immunity.

Conclusion

The Supreme Court has approved protective sweeps of closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that there must be articulable facts which would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest site. The initial sweep should last no longer than necessary for the officers to arrest the subject and leave the premises. Any person found during the sweep may be frisked under the familiar *Terry* reasonable suspicion test. Any evidence or contraband found during the sweep may be seized under the plain view doctrine.