GOVERNMENT EMPLOYEE SEARCHES AND THE FOURTH AMENDMENT

United States v. Coles, 302 F. Supp. 99 (N.D. Me. 1969)

Defendant Coles was a student at a Maine Job Corps center. Upon returning overdue from a leave, defendant's suitcase was searched by the Administrative Officer of the center. The search, which produced marijuana, was not conducted pursuant to a search warrant, a valid arrest or the defendant's consent.[1] The defendant, charged with possession of narcotics,[2] made a timely motion to suppress the evidence of the search,[3] claiming that the search violated his fourth amendment rights.[4] *Held*: motion to suppress denied. A warrantless search conducted by a government employee who has statutory disciplinary authority is valid even in the absence of probable cause to initiate the search.

The court first pointed out that directors of Job Corps centers are given statutory authority to discipline corpsmen in order to promote proper moral and disciplinary standards at the centers.[5] The court reasoned that the power to discipline encompassed the power to search. And because it was the court, not the statute, which conferred the power to search upon the Administrator, there was obviously no statutory requirement that searches be conducted pursuant to a warrant. Instead of reading in such a requirement to searches by the Administrator, the court held that the Administrator had the authority

1. United States v. Coles, 302 F. Supp. 99 (N.D. Me. 1969). There is nothing in the opinion to indicate that the Administrative Officer of the center had probable cause to make the search.

2. The defendant was charged with possession of narcotics in violation of 18 U.S.C. §§ 7, 13 (1964) and ME. REV. STAT. ANN. tit. 22, § 2362 (1964).

3. The defendant's motion to suppress is sanctioned under FED. R. CRIM. P. 41(e) (1964).

4. U.S. CONST. amend. IV:

> 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.

5. United States v. Coles, 302 F. Supp. 99, 101 (N.D. Me. 1969). 42 U.S.C. § 2720 (1968):

> (a) Within Job Corps centers, standards of conduct and deportment shall be provided and stringently enforced. In the case of violations committed by enrollees, dismissals from the Corps or transfers to other locations shall be made in every instance where it is determined that retention in the Corps, or in the particular Job Corps center, will jeopardize the enforcement of such standards of conduct and deportment or diminish the opportunity of other enrollees.
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> (b) In order to promote the proper moral and disciplinary conditions in the Job Corps, the individual directors of Job Corps centers shall be given full authority to take appropriate disciplinary measures against enrollees including, but not limited to, dismissal from the Job Corps, subject to expeditious appeal procedures to higher authority, as provided under regulations set by the Director.

to conduct warrantless searches. The court then explicitly assumed that the object of the search "was to determine whether contraband was being brought to the Center,"[6] and implicitly assumed that the introduction of marijuana into the center would deteriorate proper moral and disciplinary standards.[7] Thus, the court concluded that the Administrative Officer's search was not only within the scope of his disciplinary power, but actually mandated by his statutory authority to discipline. Secondly, the court cited several cases to support the proposition that a warrantless search conducted by a government employee is not prohibited by the fourth amendment when the government employee is charged with supervisory responsibility to discipline subordinates or is authorized to make warrantless searches by an appropriate regulation.[8]

Searches conducted by law enforcement officers, which are reasonable in scope, are valid under the fourth amendment when conducted pursuant to a warrant issued upon probable cause,[9] as incident to a lawful arrest,[10] with the consent of the defendant,[11] in a "hot pursuit" situation,[12] or in an emergency situation.[13] At the opposite extreme are searches conducted by a private citizen. Courts apply a blanket rule of validity to searches by private citizens when initiated for personal reasons.[14] In between the polar cases of searches

6. United States v. Coles, 302 F. Supp. 99, 103 (N.D. Me. 1969). The court also maintained that ". . . it cannot be seriously maintained that the object of the search was to procure evidence of a crime or in any way to facilitate an anticipated federal prosecution." *Id.* Belief that a search will uncover contraband is quite obviously not the same as probable cause to initiate a search.

7. For discussion of the argument that discipline and order may not be adversely affected by the introduction of marijuana, see 54 LA. L. REV. 618, 621 (1969).

8. United States v. Collins, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960, *rehearing denied*, 384 U.S. 947 (1966); United States v. Grisby, 335 F.2d 652 (4th Cir. 1964); Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968); United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), *aff'd*, 379 F.2d 288 (3d Cir. 1967).

9. Chimel v. California, 395 U.S. 752 (1969).

10. *Id.*

11. Martinez v. United States, 333 F.2d 405 (9th Cir. 1964). Third party consent searches are also valid under the fourth amendment in a limited set of circumstances. *See* Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12.

12. People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

13. McDonald v. United States, 335 U.S. 451 (1948).

14. 19 STAN. L. REV. 608 (1967). *See* Burdeau v. McDowell, 256 U.S. 465 (1921); Watson v. United States, 391 F.2d 927 (5th Cir. 1968), *cert. denied*, 393 U.S. 985 (1969); Gold v. United States, 378 F.2d 588 (9th Cir. 1967); Barnes v. United States, 373 F.2d 517 (5th Cir. 1967). However, searches conducted by a private citizen at the instigation of, or in participation with, a law enforcement officer are not valid as searches by private citizens, but are tested by the standards applicable to searches by law enforcement officers. *Cf.* Lowrey v. United States, 128 F.2d 477 (8th Cir. 1942); Fowler v. United States, 62 F.2d 656 (7th Cir. 1932).

by law enforcement officers and by private citizens are searches by government employees who cannot properly be classified as either law enforcement officers or private citizens.[15]

Decisions concerning government employee searches fall into two groups. One group, upon which *Coles* relied, hold that government employees may legally conduct a warrantless search when specifically authorized by government regulation.[16] The second group justifies warrantless searches as a proper incident to the supervisory responsibility to maintain discipline and security.[17]

The typical regulation authorizing warrantless searches is directed to those government employees with supervisory responsibilities, and is justified as reasonably necessary in order that the supervisor maintain discipline, order or security.[18] It should be noted, however, that *Camara v. Municipal Court*[19] may have impliedly overruled the "regulation" cases. In *Camara,* the Court held that municipal minimum standards housing ordinances could not constitutionally provide for warrantless administrative searches of apartment buildings by government health inspectors.[20] The court noted that "the basic purpose of this amendment, . . . is to safeguard the privacy and security of individuals against arbitrary invasions by *governmental officials.*"[21] Thus, the Court held that administrative searches must be conducted pursuant to a civil warrant, but suggested that a standard of probable cause less rigorous than that required to support a criminal search warrant would justify issuance of a civil search warrant.[22] The *Camara*

15. Oliver v. United States, 239 F.2d 818 (8th Cir. 1957)(a Postmaster); United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), *aff'd,* 379 F.2d 288 (3d Cir. 1967) (a security officer in the United States Mint); Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1926) (a social worker for the Welfare Dept.).

16. *See, e.g.,* United States v. Grisby, 335 F.2d 652 (4th Cir. 1964); Santana v. United States, 329 F.2d 854 (1st Cir. 1964); Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968); United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), *aff'd,* 379 F.2d 288 (3d Cir. 1967).

17. *See* note 36, *infra.*

18. United States v. Donato, 269 F. Supp. 921, 924 (E.D. Pa.), *aff'd,* 379 F.2d 288 (3d Cir. 1967).

19. 387 U.S. 523 (1967).

20. In the companion case to *Camara,* See v. City of Seattle, 387 U.S. 541 (1967), the Court held unconstitutional an ordinance providing for warrantless administrative searches of commercial warehouses.

21. Camara v. Muncipal Court, 387 U.S. 523, 528 (1967).

22. *Id.* at 538-39.

> Where considerations of health and safety are involved, the facts that would justify an inference of "probable cause" to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.

Id. at 538.

decision recognizes that unwarranted intrusions by government officials who cannot be strictly classified as law enforcement officers result in just as much an invasion of the individual's privacy as warrantless intrusions by law enforcement officers in search of criminal evidence and, therefore, searches in both instances should be made pursuant to a warrant.

Moreover, *Camara* noted that there may be constitutional exceptions to the civil warrant requirement in administrative searches, just as there are exceptions to the warrant requirement applicable to police searches.[23] The Court suggested that prompt administrative inspections may be lawfully conducted without a warrant in certain cases, such as in an emergency situation.[24] As a test whether or not a warrant is required, the Court stated that:

> . . . the question is not whether the public interest justifies the type of search in question, but whether . . . the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[25]

Two of the "regulation" cases cited by *Coles* were decided after *Camara*,[26] however, neither of those cases, nor *Coles*, discuss *Camara*. Nevertheless, it would appear that *Camara* is applicable to government employee searches,[27] and in light of *Camara*, *Coles*' unquestioning reliance on the "regulation" cases seems out of order.

Colonnade Catering Corporation v. United States[28] illustrates an

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23. *See* People v. Flynn, noted in People v. Superior Court of the County of Butte, ___ Cal. App. ___, 79 Cal. Rptr. 904 (1969), where the court in invalidating a warrantless search by a postman stated that:

> The thrust of the Fourth Amendment is not aimed solely at the police or law enforcement agencies of the government; it is a guaranty against invasion by *any governmental agency* of the right of privacy guaranteed therein.

Id. at 908 (emphasis added).

24 Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

25. *Id* at 533.

26. Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968); United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), *aff'd*, 379 F.2d 288 (3d Cir. 1967).

27. The ordinance in *Camara* provided for criminal penalties, and it might be suggested that this distinguishes *Camara* from the "regulation" cases which do not set forth criminal penalties. However, the *Camara* Court explicitly stated that:

> We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

28. 410 F.2d 197 (2d Cir. 1969).

application of *Camara* which, by analogy, might justify the result reached by *Coles*. In *Colonnade,* inspectors of the Alcohol and Tobacco Division of the Internal Revenue Service conducted a warrantless search of defendant's premises and seized some unsealed liquor and funnels which were allegedly being used to refill bottles in violation of federal tax law. A federal regulation authorized the warrantless inspection of certain documents required to be kept by retail liquor dealers and any distilled spirits stored on the premises of the dealer.[29] The defendant moved to suppress the evidence of the search alleging that the regulation was unconstitutional under *Camara*. The court found that the proper test of the validity of warrantless searches under *Camara* was whether the objectives sought to be achieved by a warrantless search would be frustrated if the inspectors were required to obtain a warrant.[30] The court took notice that taxes on distilled spirits are an essential part of the national revenue, and that a common method of evading such taxes is refilling the liquor bottles.[31] Thus the court concluded that there is a substantial public interest compelling periodic inspection of the premises of liquor dealers. The court also took notice that efforts in the 1920's to enforce the eighteenth amendment were frequently ineffectual because the liquor dealer could quickly dispose of illegally bottled liquor during the time the inspector delayed in acquiring and presenting a warrant.[32] Thus the court found that surprise was an important element in liquor violations inspections. The court pointed out that the regulation authorizing warrantless inspections limited such inspections to normal business hours, and authorized inspection only of certain business records required to be kept and any distilled spirits stored on the premises.[33] Unlike the broad statutory authorization in *Camara*, the *Colonnade* regulation, the court concluded, was limited in scope so as to provide protection against excessive intrusion upon the individual's privacy.[34] In the balance, the court found that the governmental purpose in collecting excise taxes on distilled spirits would be frustrated if liquor inspectors were required to obtain warrants, and therefore upheld the regulation as constitutional under *Camara*.[35] In that it recognizes the various interests

29. 26 U.S.C. § 5146(b) (1964).
30. Colonnade Catering Corp. v. United States, 410 F.2d 197, 200 (2d Cir. 1969).
31. *Id.* at 202-03.
32. *Id.* at 203.
33. *Id.* at 201.
34. *Id.* at 201-02.
35. *Id.* at 200.

to be weighed in regulation justified searches, *Colonnade* represents an improvement over the rubber stamp reasoning of *Coles*.

The second group of cases in the government employee search areas hold that government employees charged with supervisory duties may validly conduct a warrantless search of subordinates as incident to the supervisory responsibility to maintain discipline and order.[36] These decisions, as the "regulation" cases, fail to consider the impact of the governmental intrusion into the individual's right of privacy. While it may be true in certain instances that a government employee-supervisor needs to make an immediate and warrantless search in order to maintain proper standards of discipline and order, the supervisor status is not worthy of being elevated to a constitutional standard for all cases. The fact that a government employee is also the supervisor of an individual searched does not ameliorate the governmental invasion of privacy, nor does it demand that a search to be conducted immediately and without a warrant in all circumstances. Therefore, it is suggested that *Camara* applies to searches by government employees who are charged with supervisory duties. This means that searches by government employee-supervisors must be conducted pursuant to search warrants unless the nature of the situation is such that the burden of obtaining a warrant would be likely to frustrate the governmental purpose for initiating the search.[37] In addition, as *Camara* suggested that a warrant to make an administrative search may be issued on less than probable cause to issue a criminal search warrant, it may be appropriate in the government employee-supervisor situation to issue a search warrant on less than criminal probable cause. At the very least, it should be recognized that, if the fourth amendment is to protect the individual against unreasonable governmental invasion of privacy, supervisory authority alone is not enough to sanction all warrantless searches.

The *Coles* court reasoned that because the Administrative Officer of the center had statutory authority to discipline corpsmen, he had the authority to conduct warrantless searches.[38] It is questionable whether disciplinary authority includes authority to conduct warrantless

36. *See, e.g.*, United States v. Collins, 349 F.2d 863, *cert. denied*, 383 U.S. 960 (1965), *rehearing denied*, 384 U.S. 947 (1966), United States v. Miller, 261 F. Supp. 442 (D. Del. 1966); People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967).

37 See note 25, *supra*, and accompanying text.

38. United States v. Coles, 302 F. Supp. 99, 102 (N.D. Me. 1969).

searches. A common definition of "discipline" is: ". . . retribution for an offense, especially in a subordinate."[39] The search which *Coles* classified as an appropriate disciplinary measure was conducted before any disciplinary infraction was discovered. Thus it could be argued that the search of the defendant's suitcase was beyond the Administrator's statutory disciplinary authority.

Moreover, in each of the cases which *Coles* cited as authority for the proposition that a government employee with supervisory responsibility may legally conduct a warrantless search of subordinates in order to maintain discipline and order, there was at least probable cause for initiating the search.[40] There is not the slightest indication in *Coles* that there was probable cause to search defendant's suitcase. By disregarding this fact, *Coles* virtually destroys any protection the individual may have had against warrantless searches by government employees.

39. Local 23393, AFL v. American Can Co., 28 N.J. Super. 306, 199 A.2d 693 (1953).
40. See note 8, *supra*.