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Fourth Amendment Does Not Prevent Police Officers from Donducting Inventory Search of Closed Containers, Pursuant to Standard Police Procedures, Regardless of Whether Less Intrusive Means Exist to Achieve Inventory's Purpose.

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RECENT DEVELOPMENTS

CRIMINAL PROCEDURE—INVENTORY SEARCHES—FOURTH AMENDMENT DOES NOT PREVENT POLICE OFFICERS FROM CONDUCTING INVENTORY SEARCH OF CLOSED CONTAINERS, PURSUANT TO STANDARD POLICE PROCEDURES, REGARDLESS OF WHETHER LESS INTRUSIVE MEANS EXIST TO ACHIEVE INVENTORY'S PURPOSE. *Colorado v. Bertine*, __ U.S. __, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

Steven Lee Bertine was arrested for driving while intoxicated and taken into police custody by a Boulder, Colorado, police officer. In accordance with Boulder police procedures, a backup officer proceeded to inventory the contents of Bertine's van prior to having the vehicle removed to an impoundment facility. Behind the front seat, the officer found a backpack in which he found several metal canisters. When opened by the officer, the metal canisters were found to contain cocaine, cocaine paraphernalia, methaqualone tablets, and $700 in cash. Additionally, a sealed envelope containing $210 was found in a zippered pouch on the backpack. Upon completion of the inventory search, the van was towed to an impoundment lot, and the officer returned to the police station with the backpack and its contents.

Bertine was subsequently charged with driving while under the influence of alcohol, unlawful possession of cocaine with intent to dispense, sell, and distribute, and unlawful possession of methaqualone. Prior to trial, Bertine moved to suppress the evidence found in the closed backpack and containers, alleging that the search of these articles exceeded the permissible scope of an inventory search under the fourth amendment to the United States Constitution. While noting that the inventory search was conducted in a "somewhat slipshod manner," the district court found that the search was conducted pursuant to standard procedures and that the decision to impound and inventory the vehicle was made in good faith. The court, however, granted the motion to suppress, on the ground that the inventory search violated the Colorado Constitution. On appeal, the Colorado Supreme Court affirmed the result reached by the district court. The court, however, ruled that the inventory search violated the fourth amendment to

the United States Constitution, relying on *Arkansas v. Sanders*, 442 U.S. 753, 753-66 (1979) (warrantless search of luggage unreasonable under automobile exception) and *United States v. Chadwick*, 433 U.S. 1, 1-16 (1977) (warrantless search of footlocker unreasonable under automobile exception). On writ of certiorari, the United States Supreme Court reversed the Colorado Supreme Court, holding that the inventory search was both reasonable under the fourth amendment and controlled by prior holdings in *Illinois v. Lafayette*, 462 U.S. 640, 640-48 (1983) (warrantless inventory search of shoulder bag held reasonable) and *South Dakota v. Opperman*, 428 U.S. 364, 364-76 (1976) (warrantless inventory search of glove compartment deemed reasonable).

Although disagreement exists regarding the existence and precise number of exceptions to the fourth amendment's warrant requirement, several general exceptions have emerged: (1) inventory searches; (2) the plain view doctrine; (3) search incident to arrest; (4) consent; (5) *Terry* stops; (6) hot pursuit; (7) emergency situations; and (8) the automobile exception. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (inventory searches conducted pursuant to standard procedures held reasonable); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (allowing seizure of evidence discovered in plain view); *Chimel v. California*, 395 U.S. 752, 766-68 (1969) (incident to arrest, search of person and immediate area is reasonable); *Bumper v. North Carolina*, 391 U.S. 543, 547-50 (1968) (holding search conducted with suspect's consent reasonable); *Terry v. Ohio*, 389 U.S. 1, 30 (1967) (frisk of outer clothing to discover dangerous weapons held reasonable); *Warden v. Hayden*, 387 U.S. 297, 298 (1967) (exigent nature of hot pursuit justifies warrantless search); *Schmerber v. California*, 384 U.S. 757, 770 (1966) (possibility of evidence being destroyed justifies warrantless search); *Carroll v. United States*, 267 U.S. 132, 159-62 (1925) (allowing warrantless search of automobiles).

The most recent exception to the warrant requirement, the inventory search, was first recognized by the Supreme Court as reasonable under the fourth amendment in the case of *South Dakota v. Opperman*. *See South Dakota v. Opperman*, 428 U.S. 364, 376 (1976); *see also Illinois v. Lafayette*, 462 U.S. 640, 640-48 (1983) (reaffirming validity of inventory searches); *United States v. Brown*, 787 F.2d 929, 931 (4th Cir.) (recognizing inventory search as exception to warrant requirement), *cert. denied*, ___ U.S. ___, 107 S. Ct. 137, 93 L. Ed. 2d 80 (1986). Inventory searches are different from other warrant requirement exceptions because a finding of probable cause is immaterial in determining the reasonableness of the search under the fourth amendment. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 643 (1983) (probable cause immaterial in determining reasonableness of inventory search); *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976) (probable cause analysis regarding reasonableness of routine inventory search unnecessary

without allegation that search conducted as subterfuge for criminal investigation); *United States v. Duncan*, 763 F.2d 220, 223 (6th Cir. 1985) (absent probable cause, warrantless search must fall under inventory exception). *See generally* Reamey, *Revaluating the Vehicle Inventory*, 19 CRIM. L. BULL. 325 (1983). Probable cause is dispensed with on the theory that an inventory search represents a standard community caretaking procedure rather than a criminal investigation. *See Illinois v. Lafayette*, 462 U.S. 640, 644 (1983) (inventory search defined as "an incidental administrative step following arrest"); *South Dakota v. Opperman*, 428 U.S. 364, 383 (1976) (Powell, J., concurring) (inventory searches not conducted to discover criminal evidence); *United States v. Feldman*, 788 F.2d 544, 553 (9th Cir. 1986) (inventory search unreasonable when conducted as means of seeking incriminating evidence), *cert. denied*, __ U.S. __, 107 S. Ct. 955, __ L. Ed. 2d __ (1987). Furthermore, when inventory searches are conducted according to standardized procedures which restrain the scope and the discretion of the police officer administering the search, the searches are considered reasonable under the fourth amendment. *See South Dakota v. Opperman*, 428 U.S. 364, 383-84 (1976) (Powell, J., concurring) (inventory search reasonable when officer has no discretion involving conditions which exist surrounding search); *United States v. Brown*, 787 F.2d 929, 932 (4th Cir.) (inventory search reasonable if conducted pursuant to standard procedures and not used to gather incriminating evidence), *cert. denied*, __ U.S. __, 107 S. Ct. 137, 93 L. Ed. 2d 80 (1986); *United States v. Abbott*, 584 F. Supp. 442, 449 (W.D. Pa.) (standardized procedure insures limited scope of search), *aff'd*, 749 F.2d 28 (3d Cir. 1984).

Inventory searches of either impounded vehicles or an individual's personal effects prior to incarceration are deemed necessary to protect three government interests: (1) protection of the owner's property; (2) protection of police against false claims of lost property; and (3) protection against potential danger to the police and others. *See Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). The reasonableness of the search depends upon the government's interests outweighing both the intrusiveness of an inventory search and the individual's expectation of privacy in the contents of his vehicle. *See Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *South Dakota v. Opperman*, 428 U.S. 364, 377-79 (1976) (Powell, J., concurring). It is of no consequence, however, to the reasonableness of the search that a "less intrusive" means might have been used to effectuate the inventory search in furtherance of the government interests involved. *See Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983); *United States v. Brown*, 787 F.2d 929, 932 (4th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 137, 93 L. Ed. 2d 80 (1986); *United States v. Griffin*, 729 F.2d 475, 487 (7th Cir.), *cert. denied*, 469 U.S. 830 (1984).

In applying this balancing test, it is generally contended that although an individual has a diminished expectation of privacy in his vehicle, that expectation does not extend to personal effects carried in an automobile. *See Arkansas v. Sanders*, 442 U.S. 753, 764 (1979) (suitcase has same level of privacy whether taken from automobile or elsewhere); *United States v. Chadwick*, 433 U.S. 1, 9-10 (1977) (fourth amendment protection extends beyond the home); *United States v. Lochan*, 674 F.2d 960, 965 (1st Cir. 1982) (listing factors necessary to determine privacy expectation in automobiles); *see also Rakas v. Illinois*, 439 U.S. 128, 155 (1978) (Powell, J., concurring) (automobiles do not receive identical fourth amendment protection as do homes); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (function of automobile is for transportation rather than location of residence; therefore, diminished expectation of privacy in automobile). Generally, courts have recognized that items used as a depository of personal effects are afforded greater fourth amendment protection. *See Arkansas v. Sanders*, 442 U.S. 753, 762 n.9 (1979) (neither size nor failure to lock container alters "its fundamental character as a depository for personal, private effects"); *United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983) (briefcase afforded greater expectation of privacy), *cert. denied*, 465 U.S. 1023 (1984). *See generally* Comment, *Toward a Functional Fourth Amendment Approach to Automobile Search and Seizure Cases,* 43 OHIO ST. L.J. 861 (1982). In the aftermath of *Chadwick* and *Sanders*, however, much confusion has resulted from courts' attempts to distinguish the levels of privacy to be afforded various containers. *See Arkansas v. Sanders*, 442 U.S. 753, 768-71 (1979) (Blackmun, J., dissenting) (discussing confusion regarding which containers can be searched after Court's holding in *Chadwick*). *Compare United States v. Finnegan*, 568 F.2d 637, 640-41 (9th Cir. 1977) (automobile exception justifies warrantless search of suitcase) (overruled by *United States v. Ross*, 454 U.S. 891 (1981)) *with United States v. Stevie*, 582 F.2d 1175, 1178-79 (8th Cir. 1978) (en banc) (automobile exception does not permit warrantless search of suitcase), *cert. denied*, 433 U.S. 911 (1979). One of the reasons for the confusion stems from the various exceptions to the warrant requirement which have been raised regarding the search of such containers. *See Illinois v. Lafayette*, 462 U.S. 640, 649 (1983) (warrantless search of purse-type shoulder bag permissible under inventory exception, but not as search incident to arrest); *New York v. Belton*, 453 U.S. 454, 462 (1981) (applying principles of search incident to arrest to search of jacket pocket located in automobile passenger compartment); *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979) (policies behind automobile exception do not apply to warrantless searches of personal luggage); *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (once luggage seized, policies justifying search incident to arrest no longer applicable); *United States v. Ramsey*, 431 U.S. 606, 611-27 (1977) (opening of letters in course of border search permissible); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (pursuant to custodial arrest, search of

cigarette package reasonable); *United States v. Oswald*, 783 F.2d 663, 667-69 (6th Cir. 1986) (warrantless search of metal briefcase permissible where owner abandoned car on roadside); *United States v. Mazzone*, 782 F.2d 757, 760-62 (7th Cir.) (probable cause focus on automobile as carrier of contraband permits searching of closed containers; however, where probable cause is focused on container rather than automobile, warrant is required), *cert. denied*, ___ U.S. ___, 107 S. Ct. 141, 93 L. Ed. 2d 84 (1986); *United States v. Freire*, 710 F.2d 1515, 1521-23 (11th Cir. 1983) (search of briefcase permissible under automobile exception but not under search incident to arrest because briefcase found in trunk, not passenger compartment), *cert. denied*, 465 U.S. 1023 (1984). *But see Arkansas v. Sanders*, 442 U.S. 753, 766 (1979) (Burger, C.J., concurring) (automobile exception theory irrelevant in deciding reasonableness of warrantless luggage search because luggage itself has legitimate expectation of privacy). This judicial confusion has resulted in the rendition of conflicting lower court interpretations of the privacy interests afforded particular containers. *Compare United States v. Rivera*, 654 F.2d 1048, 1056 (5th Cir. 1981) (warrantless search of garbage bag unconstitutional), *vacated on rehearing*, 684 F.2d 308 (5th Cir. 1982) *with Evans v. State*, 368 So. 2d 58, 59 (Fla. Dist. Ct. App. 1979) (warrantless search of garbage bag constitutional). *See generally* Note, *Warrantless Container Searches Under the Automobile and Search Incident Exception*, 9 FORDHAM URB. L.J. 185 (1980) (discussing different treatment afforded various containers).

This uncertainty is manifested in the context of inventory searches as well. *See United States v. O'Bryant*, 775 F.2d 1528, 1534 (11th Cir. 1985) (upholding inventory search of briefcase to determine ownership); *United States v. Griffin*, 729 F.2d 475, 484 (7th Cir.) (inventory search of recessed storage compartment and unsecured paper bag deemed reasonable), *cert. denied*, 469 U.S. 830 (1984); *United States v. Laing*, 708 F.2d 1568, 1571 (11th Cir.) (per curiam) (inventory search of unsecured Yahtzee box held reasonable), *cert. denied*, 464 U.S. 896 (1983); *United States v. Bloomfield*, 594 F.2d 1200, 1203 (8th Cir. 1979) (inventory search of zippered knapsack held unreasonable). It is generally recognized, however, that it is permissible to inventory the trunk of a car. *See United States v. Duncan*, 763 F.2d 220, 221-23 (6th Cir. 1985); *United States v. Long*, 705 F.2d 1259, 1261-62, (10th Cir. 1983); *United States v. Bosby*, 675 F.2d 1174, 1179 (11th Cir. 1982); *United States v. Edwards*, 577 F.2d 883, 893 (5th Cir.), *cert. denied*, 439 U.S. 968 (1978); *United States v. Martin*, 566 F.2d 1143, 1145 (10th Cir. 1977).

Although the Court in *Bertine* did not settle the issue concerning the privacy expectations which reasonably attach to particular containers in all contexts, the majority did develop a bright-line rule regarding inventory searches. *See Colorado v. Bertine*, ___ U.S. ___, ___, 107 S. Ct. 738, 743, 93 L. Ed. 2d 739, 748 (1987). The Court stated that inventory searches conducted

pursuant to standard procedures, in furtherance of government interests, are reasonable and outweigh any intrusion of an individual's expectations of privacy in, seemingly, any container. *See id.*; *accord Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (any container may be searched in an inventory situation). Imperative to this holding is that the inventory search be conducted pursuant to standardized procedures. *See Colorado v. Bertine*, __ U.S. __, __, 107 S. Ct. 738, 744, 93 L. Ed. 2d 739, 748-49 (1987) (Blackmun, J., concurring) (underscoring fact that inventory search must be part of standard procedure).

In *Bertine*, the Supreme Court approved a Boulder, Colorado, Police Department procedure which authorized the opening of closed containers during inventory searches. *See id.* at __, 107 S. Ct. at 740, 93 L. Ed. 2d at 744; *see also United States v. Feldman*, 788 F.2d 544, 551-53 (9th Cir. 1986) (unwritten standard procedure to inventory all stolen vehicles found reasonable), *cert. denied*, __ U.S. __, 107 S. Ct. 955, __ L. Ed. 2d __ (1987); *United States v. Wilson*, 758 F.2d 304, 306 (8th Cir. 1985) (per curiam) (standard procedure which directed search of car's exterior, trunk, and passenger compartment found reasonable). Furthermore, the Court in *Bertine* held that a standard procedure need not be free of police discretion in its execution as long as the search is valid and not used for the sole purpose of discovering incriminating evidence. *See Colorado v. Bertine*, __ U.S. __, __, 107 S. Ct. 738, 743, 93 L. Ed. 2d 739, 748 (1987) (upholding as reasonable Boulder police procedure which allows officer's discretion on whether to park and lock vehicle, or impound); *United States v. Feldman*, 788 F.2d 544, 551-53 (9th Cir. 1986) (officer's discretion in deciding place and timing of inventory search found reasonable), *cert. denied*, __ U.S. __, 107 S. Ct. 955, __ L. Ed. 2d __ (1987). *But see United States v. Abbott*, 584 F. Supp. 442, 448 (W.D. Pa.) (absence of affirmative requirement to impound vehicle raises inference that impoundment is pretexted on criminal investigation), *aff'd.*, 749 F.2d 28 (3d Cir. 1984).

The Court further resolved an earlier pre-*Bertine* conflict regarding whether an attempt must be made to consult the vehicle's owner prior to impoundment. *See United States v. Brown*, 787 F.2d 929, 932 (4th Cir.) (where all occupants of vehicle intoxicated, officer's decision to impound is reasonable), *cert. denied*, __ U.S. __, 107 S. Ct. 137, 93 L. Ed. 2d 80 (1986); *United States v. Duncan*, 763 F.2d 220, 224 (6th Cir. 1985) (factor in determining reasonableness of inventory search is availability of owner to arrange for other safeguards rather than impoundment); *United States v. Abbott*, 584 F. Supp. 442, 448 (W.D. Pa.) (when owner available, opportunity should be given to secure property), *aff'd.*, 479 F.2d 28 (3d Cir. 1984); *United States v. Lawson*, 487 F.2d 468, 477 (8th Cir. 1973) (owner should be given choice of whether to impound vehicle). The Court in *Bertine* clearly stated that the consent of the vehicle's owner is not necessary prior to impoundment. *See*