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The Investigatory Stop of Motor Vehicles in New Mexico

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THE INVESTIGATORY STOP OF MOTOR VEHICLES IN NEW MEXICO

"MISTER, THE SUPREME COURT SAYS IF YOU DRIVE WITH A BURNT-OUT TAIL LIGHT, YOU BELONG TO US."*

Article II, Section 10 of the New Mexico Constitution provides:

The people shall be secure in their persons, papers, homes and

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> effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.[1]

Although this section appears to delineate an absolute requirement for warrants in incidents involving searches and seizures, New Mexico courts as well as courts throughout the nation have recognized that certain situations present "exigent" circumstances which make it impracticable for law enforcement agencies to obtain warrants.[2] With or without warrants police officers must have probable cause to execute searches and seizures.[3]

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1. This section carefully echoes rights guaranteed by the fourth amendment to the United States Constitution: "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 . . . ."

2. State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962); State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App. 1970), *cert. denied,* May 6, 1970. For cases discussing the nature of the exigent search though not finding it in the specific instance, *see* State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975); State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

3. New Mexico courts have carved out four other major exceptions to the warrant requirement with respect to automobiles. These include consent, plain view, search incident to arrest and inventory search.

A voluntary consent can authorize a warrantless search. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), *cert. denied,* 391 U.S. 927 (1968), articulated the standard used to evaluate the voluntariness of consent to an automobile search: "[T]he consent to the search must be freely and intelligently given, must be voluntary and not the product of durress or coercion, actual or implied and must be proved by clear and positive evidence with the burden of proof on the state." *Id.* at 613, 435 P.2d at 443. *See also* State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977); State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975); State v. Herring, 77 N.M. 232, 421 P.2d 767 (1966); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App. 1972).

The doctrine of plain view permits inadvertent seizure of contraband in plain view of an officer from a place where he/she had a right to be. State v. Anaya, 82 N.M. 531, 484 P.2d 373 (Ct. App. 1971); State v. Miller, 80 N.M. 227, 453 P.2d 590 (Ct. App. 1969).

When an arrest takes place, police have a right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. This right to search extends to areas under the accused's immediate control, including those portions of a vehcile from which weapons and other things which might be used to assault an officer or effect an escape, or destroy evidence might be obtained. State v. Reyes, 81 N.M. 404, 467 P.2d 730 (1970); State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969); State v. Perez, 79 N.M. 417, 444 P.2d 602 (Ct. App. 1968); State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968). *See also* State v. Vallejos, 89 N.M. 23, 546 P.2d 871 (Ct. App. 1976); State v. Gurule, 84 N.M. 142, 500 P.2d 427 (Ct. App. 1972); State v. Courtright, 83 N.M. 474, 493 P.2d 959 (Ct. App. 1972); Salazar v. State, 82 N.M. 630, 485 P.2d 741 (Ct. App. 1971).

New Mexico has recognized that a routine inventory of an impounded vehicle in the lawful custody of the police, made without a warrant in the standard course of police procedure and incident to a caretaking function, is not a violation of the fourth amendment. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976); State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974), *cert. denied,* 420 U.S. 955 (1975); State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973), *cert. denied,* 86 N.M. 372, 524 P.2d 988 (1974).

Probable cause to search requires reasonable grounds to believe (1) that the items sought are connected with criminal activity and (2) that the items will be found in the place to be searched.[4] In many cases where a warrantless search has taken place, the search involved a vehicle believed to contain contraband. The theory often used to justify such an intrusion is that the vehicle can be quickly moved out of the jurisdiction and may never be found again if there is a delay in obtaining a warrant.[5] Yet a probable cause determination by an officer in the field is not the sole basis upon which motor vehicles are detained and searched without a warrant. In certain circumstances police officers may investigate possible criminal behavior although there is no probable cause to make an arrest or to search.[6] Investigatory stops of automobiles have been accepted by the United States Supreme Court provided the officer is able to articulate a reasonable suspicion that the law had been or was being violated.[7] Once the driver has been "pulled over," the investigating officer, upon close observation of the vehicle, may gain the probable cause required to conduct a more thorough search, thereby permitting a greater intrusion into the vehicle he/she had stopped for investigatory purposes.

The existence of probable cause in an emergency or exigent situation is a major exception to the warrant requirement set forth in article II, section 10 of the New Mexico Constitution and the fourth amendment of the United States Constitution. Similarly, the investigatory stop, although technically not used to initiate a search, constitutes a "temporary seizure" of the person and his vehicle and also

4. Carroll v. United States, 267 U.S. 132 (1925). The Court in *Carroll* indicated that a search of a vehicle without a warrant is permissible if the officer undertaking the search has probable cause to believe that the vehicle contains things properly subject to seizure, so-called contraband. Note that a showing of probable cause to search requires a different set of facts and does not necessarily constitute probable cause to arrest which requires an indication that a crime has been or is being committed by the persons to be arrested.

5. The Court in *Carroll* stated:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153.

6. Terry v. Ohio, 392 U.S. 1 (1968); State v. Frazier, 88 N.M. 103, 537 P.2d 711 (Ct. App. 1975); State v. Hilliard, 81 N.M. 407, 467 P.2d 73 (Ct. App. 1970).

7. In United States v. Brigoni-Ponce, 422 U.S. 873 (1975), the Court stated that a vehicle could be stopped to enable law enforcement officials to question the occupants about their citizenship if the officer is aware of specific articulable facts together with rational inferences from those facts, to warrant a reasonable suspicion that the car contains aliens who may be illegally in the country.

is an exception to the warrant requirement in this sense. Law enforcement officers are carefully trained to recognize the characteristics of criminal activity in order to be able to contain it as soon as possible. However, without the imposition of certain safeguards these officers can knowingly or unknowingly violate constitutionally protected rights. For the most part the cases have favored objective tests, or reasonable man tests, to determine whether probable cause to initiate a search or sufficient grounds to investigate a vehicle exists. Over the past sixteen years, beginning in 1962 with *State v. Lucero*,[8] over thirty New Mexico appellate court decisions have been rendered in this area. The majority of these decisions are concerned with either the reasonableness of an investigation or the sufficiency of probable cause to conduct a warrantless search in a so-called exigent or demanding circumstance. This note will discuss the current status in New Mexico of warrantless automobile searches and detentions conducted pursuant to an investigatory stop.

Justification to stop and investigate was a primary issue in the recent case of *State v. Ruud*.[9] There the defendant, Kathleen Ruud, had been detained by Officer Walsmith of the New Mexico State Police after the officer observed a "relatively young female, driving a fairly new pickup with a camper shell and an Iowa license plate."[10] The officer wanted to check her driver's license and registration to see if the vehicle were stolen. The court noted:

> When asked why he thought the vehicle might be stolen Walsmith stated: "... [t]he driver just looked young to me, that's the only thing that I can tell you." He did not think defendant was too young to have a driver's license. The stop was made on a "hunch." Walsmith testified when they go out looking for a "load" (marijuana) they set up a roadblock then use the driver's license and registration to look for everything and that a young driver in a pickup with a camper, with an out-of-state vehicle license plate, would be a good indication that this "might be a good vehicle to search."[11]

The court was not impressed: "The state attempts to justify the stop on the foregoing recited facts. We cannot." Walsmith was relying on a "hunch" or "intuition."[12] Objection to Officer Walsmith's basis for the search was specifically predicated upon the standard set out in *State v. Galvan*,[13] which found similar conduct by police to be improper.

8. 70 N.M. 268, 372 P.2d 837 (1962).
9. 90 N.M. 647, 567 P.2d 496 (Ct. App. 1977), *cert. denied*, Aug. 2, 1977.
10. *Id.* at 648, 567 P.2d at 497.
11. *Id.* at 648-49, 567 P.2d at 497-98.
12. *Id.* at 649, 567 P.2d at 498.
13. 90 N.M. 129, 560 P.2d 550 (Ct. App. 1977).

In *Galvan* two officers, while patrolling a country road at 2:00 a.m., observed a vehicle approximately two miles away turn off the county road onto an unmarked dead-end road. One of the officers upon cross examination revealed that the "turn-off" caused him "to turn on my lights and go down after him."[14] He stated that he had been suspicious prior to that activity due to "[t]he lateness of the hour, the fact that I have been a policeman for eight years–just intuition."[15] In analyzing the basis for this investigatory stop, the *Galvan* court found that though the existence of probable cause to arrest is not a necessary prerequisite to justify investigation, investigation can take place only when there exists a reasonable suspicion that the law has been or is being violated.[16] But what is a reasonable suspicion? The *Galvan* court defined it as an awareness by the officer "of specific articulable facts, together with rational inferences from those facts" which would "warrant the officer, as a person of reasonable caution to believe the action taken was appropriate."[17] In *Ruud* the officer admitted that he was proceeding on a mere hunch, a conspicuously inadequate assertion of suspicion as pointed out by the court: "In *Galvan* we held that the officer must have articulable facts available, when viewed by an objective standard, to warrant a person of reasonable caution to believe the action taken is appropriate. Here there was no articulable reason to stop defendant for the purpose of investigating possible criminal behavior. Walsmith was relying on 'hunch' or 'intuition.' "[18]

Prior to *Ruud* and *Galvan* the supreme court undertook examination of the investigatory stop practice in *State v. Bidegain.*[19] That case involved facts similar to those in *Ruud,* with the notable exception that the defendants were stopped at a State Police roadblock and not arbitrarily pulled off from the highway. In reversing the court of appeals[20] the New Mexico Supreme Court in *Bidegain* found the stop to be permissible as "a routine check of driver's licenses and vehicle registrations."[21] This was based on the fact that the police were conducting roadblock detentions of all vehicular traffic to check driver's licenses and vehicle registrations. New Mexico police officers are empowered by statute to conduct such

14. *Id.* at 132, 560 P.2d at 553.
15. *Id.*
16. *Id.* at 131, 560 P.2d at 552.
17. *Id.*
18. 90 N.M. at 649, 567 P.2d at 498.
19. 88 N.M. 466, 541 P.2d 971 (1975).
20. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App. 1975), *rev'd,* 88 N.M. 466, 541 P.2d 971 (1975).
21. 88 N.M. at 469, 541 P.2d at 974.

checks.[22] In *Ruud* the state had argued that Officer Walsmith was within the scope of this authority when he stopped Ms. Ruud.[23] The *Ruud* court, however, held that "[w]hen the detention becomes an excuse for some other purpose which would not be lawful, the actions taken become unreasonable and fail to meet the constitutional requirement"[24] of reasonableness. In so holding the court of appeals expressly invalidated all random and unsupportable stops for registration and driver's license checks.[25] The court did qualify its action by excluding from its effect "those routine roadblocks set up in good faith to check registration certificates and driver's licenses" where all travelers are checked.[26] The court cited *State v. Bidegain* as an example.

In *State v. Bloom*[27] the supreme court reinforced its decision in *Bidegain* by once again reversing the court of appeals.[28] The Justices in *Bloom,* however, premised their decision not on the propriety of police action but rather upon the power of an appellate court to review trial court findings.[29] The supreme court in *Bloom* was not convinced, as was the appellate court in the more recent decision of *State v. Ruud,* that the circumstances of the investigatory stop were conclusive in finding that the stop of the vehicle in question was a mere subterfuge for carrying out an otherwise unreasonable search. The court of appeals in *Bloom* had arrived at this conclusion by reviewing the direct examination of New Mexico State Police Officer Williams who was conducting the roadblock:

22. N.M. Stat. Ann. § 64-3-11 (Repl. 1972) provides: "[E]very such registration evidence or duplicates thereof certified by the division shall be exhibited upon demand of any police officer." N.M. Stat. Ann. § 64-13-49 (Repl. 1972) provides:

> Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of a justice of the peace, a peace officer, or a field deputy or inspector of the division. However, no person charged with violating this section shall be convicted if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

23. 90 N.M. at 649, 567 P.2d at 498.

24. *Id.*

25. *Id.* at 650, 567 P.2d at 499.

26. *Id.* Such routine roadblocks have also been upheld by the United States Supreme Court. In United States v. Brigoni-Ponce, 422 U.S. 873, 883, n. 8 (1975), the Court recognized that: "[O]ur decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registrations, truck weights and similar matters."

27. 90 N.M. 192, 561 P.2d 465 (1977).

28. State v. Bloom, 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976), *rev'd* 90 N.M. 192, 561 P.2d 465 (1977).

29. The supreme court stated: "Conflicts in evidence are to be resolved by the finder of the facts. . . . The realities of the factual situation were for the trial court to determine and not for the Court of Appeals." 90 N.M. at 194, 561 P.2d at 467.

Q. Then why did you stop it (the car) . . .?
A. Because I figured he was hauling marijuana.
Q. This is before you, before you even approached the car?
A. Yeah, . . . [After explaining that the officers were also looking for stolen cars, the questioning continued].
Q. Okay what led you to believe that they might have been stolen?
A. By the way the people act, by the car they are driving. You take a 'skroag' driving a Lincoln Continental, a ten thousand dollar car and he don't even have shoes to put on, something wrong.
Q. A what? What did you call—
A. Hippie, skroag, whatever. . . .
Q. So then the reason that you signaled to Mr. Mikorey [the co-defendant] to stop at the roadblock is because you suspected he was hauling dope?
A. Uh huh. . . .
Q. What was it about the two people in the car?
A. They just looked like dope haulers.
Q. Okay what do dope haulers look like?
A. Just like that. . . .

THE COURT: How would I know what to look for if I were looking for a dope hauler, Mr. Williams?

THE WITNESS: Well, Your Honor, you would have to go through the State Police School and be out on the highway and know, you can tell these people. I mean you have to do it with experience, you just, you couldn't just jump out there and say that guy I think is hauling dope. . . .

Q. Was it the clothes they were wearing, [their age, their length of hair]?
A. No. It was by the way they acted. Like I said I got my own way of telling which you wouldn't have.
Q. Okay.
A. You know, *I can't explain it to you.* (Emphasis added.)[30]

The officer's own admission that he was unable to articulate a reason for the stop is perhaps the clearest violation of the current reasonable suspicion test set out by *State v. Galvan.*[31] Clearly a decision that the evidence as a matter of law did not support the trial court finding that the officer acted reasonably was appropriate. Yet the supreme court reversed the court of appeals for so holding.[32]

Despite the strong position taken by the court of appeals in *Ruud* and *Galvan* towards increasing scrutiny over police conduct in investigatory stops of automobiles, the *Bloom* and *Bidegain* cases may

30. 90 N.M. at 230-31, 561 P.2d at 929-30.
31. 90 N.M. 129, 560 P.2d 550 (Ct. App. 1977). *See* text accompanying note 17, *supra.*
32. 90 N.M. at 195, 561 P.2d at 468.

indicate that the New Mexico Supreme Court is becoming reticent to curtail such police practices. As a result, the present status of the investigatory stop remains unsettled.

CONCLUSION

Although the immediate future of investigatory stops seems linked to the *Galvan* test, the courts may eventually begin to rely to a greater extent than at present on the "field intuition" of the police officer in detaining and searching citizens. This poses a challenge to the protection of constitutional rights because two conflicting concerns are at stake. On the one hand, it has been argued that police are indeed successful in identifying possible criminal activity in the "streets" long before it becomes apparent to the average citizen. Such reasoning asks whether the temporary imposition placed upon a handful of innocent persons is not perhaps outweighed by the interest in apprehending those trafficking in illegal drugs. On the other hand, such police activity is objected to on the ground that an intrusion merely based upon the whimsy of a state trooper is necessarily violative of the United States Constitution, and if such offensive conduct is permitted to flourish it inevitably erodes not only fourth amendment rights but all others as well. One legal scholar posed the challenge thus:

> If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.[33]

Could we possibly ask any less of our courts?

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33. Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).