State v. McCall:

The Importance of Individualized Articulation in Litigating Protective Sweeps

BY JESSICA WALSH, ESQ.

PHOTO CREDIT: SHUTTERSTOCK.COM

A fundamental protection afforded by the Fourth Amendment of the U.S. Constitution is the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and that no warrant shall issue for a search or seizure except upon probable cause. There are many exceptions to both the warrant requirement and the standard of probable cause. One such exception is the "protective sweep" doctrine.

In *Maryland v. Buie*, 494 U.S. 325 (1990), the U.S. Supreme Court first recognized that "[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest 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." The court struck a reasonable balance between an individual's rights within their home against the significant government interest in keeping officers safe under potentially dangerous circumstances.

The Nevada Supreme Court recognized this doctrine in the same year in *Hayes v. State*, 106 Nev. 543 (1990), (*overruled on other grounds*). In *Hayes*, the Nevada Supreme Court stated that the sole purpose of a protective sweep "is to protect police officers during the course of an arrest from potentially dangerous persons other than the arrestee who are believed to be on the premises." This opinion went a step further than *Buie,* holding that even if an arrest was effectuated outside the home, officers could enter the home and conduct a protective sweep if it was necessary and the officers had specific and articulable facts "which would warrant a reasonably prudent officer to believe that [the residence] harbored an individual that posed a danger to those on the arrest scene outside." Mere conclusory statements by an officer cannot satisfy these requirements.

This holding, however, came with a strong admonishment. The court was troubled by the indication that a protective sweep was completed as a matter of standard practice. One of the most dangerous phrases in the English language can be "that's the way we've always done it," and often nothing is more dangerous to an officer's justifications for an intrusion on an individual's Fourth Amendment rights than the answer of "I always do that." Nothing is automatic when it comes to an officer's ability to act without a warrant under the Fourth Amendment. The court, therefore, admonished that a standard practice of sweeping a home as a matter of course would be "patently unconstitutional" and would "jeopardize otherwise meritorious convictions."

It was not until late 2022 that the

CONTINUED ON PAGE 20

CONTINUED FROM PAGE 19

State v. McCall:

The Importance of Individualized Articulation in Litigating Protective Sweeps

Nevada Supreme Court would again address the issue of protective sweeps under *Buie* in the case of *State v. McCall*, 517 P.3d 230, 138 Nev. Adv. Op. 64 (2022). Collette Winn lived in Charles McCall's residence. At the time, Winn was on probation. Her probation officer received an anonymous letter with information that Winn was in violation of her probation. The letter "tangentially referred to McCall as a 'convicted felon' but did not otherwise allege that McCall was engaged in any illegal activity or was dangerous." Winn was ultimately arrested by her probation officer at his probation office.

Upon her arrest, Winn was taken back to her residence, along with eight officers, where her search clause was invoked. This "search" was described by the court as a "raid." Four officers in tactical gear entered the residence with guns drawn. McCall came out of his bedroom with his dog. Officers instructed him to put the dog away (in his room). McCall complied and officers followed him into his room to conduct a protective sweep. This ultimately led to officers discovering McCall to be in possession of firearms as an ex-felon.

McCall was subsequently charged with prohibited person in possession of a firearm and moved to suppress the evidence discovered because of the protective sweep. During a suppression hearing, officers testified that it was their intention to conduct a protective sweep of the entire house before even entering the home. The court was extremely troubled by the officers' testimony that "whenever we go into a residence, we clear the residence, we make sure that there are no other people there every time. … We do that every time." And, since the "officers did not have a reasonable belief that the premises harbored a dangerous individual compelling a protective sweep," the district court granted the motion and suppressed the evidence that was the fruit of that search.

In affirming, the Nevada Supreme Court rested their finding on "the officers' troubling admission that they conduct a protective sweep of an entire residence as a matter of course." The court refused to allow the state to "Monday Morning Quarterback" the reasons for the search. The court firmly held that the search was unconstitutional as the officers, in the field, did not *actually* take into consideration any factors that may have allowed them to search. Any attempt by the State to rationalize the reasons available to justify the search appeared as "a post-hoc rationalization that cannot retroactively cure the unconstitutional search." Therefore, in *McCall,* the Nevada Supreme Court doubled down on their admonishment issued in *Hayes* that officers must testify to the *actual* facts and circumstances they took into consideration at the time of the search.

An attorney who finds their way into litigating a motion to suppress arising from a protective sweep would be prudent to keep these admonitions in mind. To allow an officer or prosecutor to later find reasons that it could have been lawful is not the standard for law enforcement under the Fourth Amendment. Thus, it is our duty as attorneys to seek out all factors an officer relied upon in deciding to conduct a protective sweep or any warrantless search or seizure under the Fourth Amendment. This need is especially true because, in the field, officers are subjected to violent and dangerous situations, and they must think quickly and react to avoid a dangerous interaction that could cost them their lives, sometimes so quickly it is without much conscious thought. And while officers generally make the right decision, they often lack the ability to adequately document their articulation in the written report. Indeed, when speaking with an officer about a search, they often can articulate far more factors than they chose to detail in their report. (Although, failing to document factors in their report could bring rise to credibility issues during the suppression hearing.)

As a final note, it is important to distinguish a "protective sweep" from a "premises freeze." A premises freeze allows an officer to "freeze" or "detain" a residence if there is probable cause to obtain a search warrant to search the home, in anticipation of such warrant. *Illinois v. McArthur*, 531 U.S. 326 (2001). Accompanying this freeze is the ability of officers to conduct a limited search of the home to remove occupants before the warrant is obtained, such as when officers are already inside the home when probable cause develops or when officers have probable cause to believe evidence will be destroyed during the time it takes to obtain a warrant.

This limited search accompanying a premises freeze, therefore, does not fall under the protective sweep doctrine. Officers, however, often conflate the two and state that "upon freezing the home, a 'sweep' was conducted." If an officer uses this terminology, they risk a court applying the incorrect standard of "reasonable suspicion of the presence of a dangerous occupant" to a limited search accompanying a premises freeze. Therefore, it is imperative that the attorneys understand what exception to the Fourth Amendment the officers were operating under before proceeding with any hearing.

JESSICA WALSH has more than 17 years of experience prosecuting criminal cases in the Clark County District Attorney's office. She is one of the attorneys who provide advanced legal training and has taught thousands of officers and attorneys on numerous search and seizure topics.