

Legally Speaking



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It had been a beautiful spring day. Amanda's goal was to enjoy her retirement. She had spent most of her working life in offices. She was now determined to spend as much time outside as she could. Let the dishes sit in the sink. She lived alone. The house work could wait.

Today was a good beginning. She had a marvelous time at the range with four of her favorite guns. To every upside in life, there is a downside. The guns needed to be cleaned. She laid them out on an old plastic table cloth in the kitchen. There was a knock on the door. Amanda had no idea of who it could be. She did not want to let anyone in. Her house was a mess and her guns were on the table. The pounding became more insistent. A voice from the other side of the door was demanding entry. It was the police, they said.

Amanda held the police in high regard. She had never been in trouble with the law. Her license

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to carry a concealed handgun was evidence of that. She went to the door concerned by the hostile tone of voice. Not sure that this profanely rude person on the other side of the door was a police officer, she opened the door only as much as her chain lock would allow.

The angry face on the other side demanded, "Let us in."

"Why?" asked Amanda, frightened by their tone.

"We're the police. Let us in," the man said without answering Amanda's question.

"Is there a problem officer?" questioned Amanda.

"YOU HAVE TO LET US IN," said the officer.

"Do you have a search warrant?" Amanda asked.

Suddenly one of the officers outside the door yelled, "GUN!" The door gave way under the force of the police who wrestled Amanda to the floor and handcuffed her. They immediately searched the house. Seeing the guns on the kitchen table, they arrested Amanda for failing to store guns in a locked container or with a trigger lock.

Some weeks later, she discovered that her landlord had seen her leaving home with her guns. He did not like guns and did not want anyone in his apartments to have guns. Amanda was a tenant at will. A tenant at will is someone who rents an apartment from month to month. Either the tenant or the landlord can end the rental agreement, with or without cause, by simply serving notice

on the other party. Most states require 30 days notice to be given.

Because the landlord knew Amanda had guns, he asked the police to be present when he gave her the notice to quit, to prevent a "breach of the peace" by Amanda. Amanda had no history of violence or criminal behavior but she owned guns. The police had a record that she owned guns. Because she owned guns, they classified her as a "dangerous person."

The newspaper account read, "Cache of weapons, including assault guns, and hundreds of rounds of ammunition and bomb making material [a can of black powder] seized in raid. Police find suicide note titled [Last Will and Testament], book outlining terrorist attacks [*Patriot Games* by Tom Clancy], and survivalist equipment [a tent and camping stove]. Landlord," said the article, "became suspicious when woman suddenly stopped going to work."

Seem far fetched? This is actually a combination of two separate cases in which police forced an entrance to a gunowner's home without a warrant and confiscated their guns. In both cases the gunowner lived alone, held licenses issued by the same department that forced an entry, had valuable property disappear during the police search, and were charged criminally with unlawful storage of guns because the police saw guns that were not locked up when they entered the home.

In both cases, the state law seemed to say that if the licensed

gunowner was home, the guns did not need to be secured. The police took the position that if the gunowner was not carrying the gun on his or her person, it was in storage and needed to be locked. On the other hand, part of the application for the criminal complaint was that the gunowner came to the door wearing a loaded gun, implying the gunowner was dangerous and confrontational.

In both cases lawyers representing the gunowner filed motions to suppress the evidence of the unsecured guns saying there had been an unlawful search and seizure of property. They wanted the court to apply the so called "exclusionary rule."

The exclusionary rule holds that if the police obtain evidence by unlawful means, they cannot use that evidence in a prosecution. What are unlawful means?

The police are supposed to obtain a warrant from a disinterested magistrate before they search any place where you have a reasonable expectation of privacy. There must be probable cause to believe that evidence of a crime can be found in the place to be searched. Probable cause is more than a hunch but less than a certainty. It requires some credible evidence that would lead a reasonable person to believe a crime has, or is about to, take place or that evidence of the same can be found in the area to be searched. The warrant will specify the place to be searched and the items that can be taken. For example, if the warrant says the police can look for a dead body in your house, they do not have the right to search your computer, go into your wallet, read your mail or dig up your backyard. This is part of your constitutional right to be secure from unreasonable searches and seizures and your right not to be forced to testify against yourself under the

Fourth and Fifth Amendments to the federal constitution.

Some searches are deemed reasonable without a warrant. If you grow cannabis in your front yard, the police do not need a warrant to seize the weed. If you invite the police into your home and they see the cocaine set out in neat little packages on your kitchen table, the evidence is in plain view and they can take it. There are also emergency situations that do not require a warrant. The rules that apply to automobiles are laxer than those that apply to your home. The police are allowed to search a car for weapons that might be within the reach of an occupant of the car if the police have reasonable cause to fear injury. To stop someone, an officer needs to have probable cause to believe that person might be involved in criminal activity.

An officer who stops you on the street may ask for identification. If the officer feels threatened for his safety, he may pat you down for weapons. Generally any time an officer stops you, and you reasonably feel that you are not free to walk away from him, there has been a seizure of the person and certain constitutional rights start to apply. It always pays to be polite to police officers. If they have a legitimate need to know, you should always cooperate so long as you are not the focus of their investigation. If you are the focus of their investigation, you want to consult with your attorney before you do anything. If, however, the police are on a "fishing" expedition and ask to search your home or car for no particular reason, you have the right to say "no" and it can not be held against you. I would not consent to such a search because it encourages a circumvention of the constitution.

As far back as 1886, in the case of the *Boyd v. the United States*, 116 U.S. 616, the United States Supreme Court developed the

rationale to exclude evidence from being used in the federal courts if the evidence was obtained in violation of a citizen's rights.

"It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. Breaking into a house an opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation [of the Fourth and Fifth Amendments to the Constitution]"

By 1914, the rule was firmly established. In 1961 it was held to be a fundamental right applicable against the states.

From time to time people have suggested that the police be allowed to use evidence gathered illegally and that the remedy of those whose rights have been violated is to sue the police. Often lawsuits against the police are not practical.

In the first case that made up the opening example, the police revoked the gunowner's handgun license after he/she reported, as required by law, a break in and theft of two handguns. The police showed up at the gunowner's door with the notice of revocation. Although the police had no warrant, they demanded immediate entry to confiscate the individual's remaining rifles and shotguns. Local law required a license to have a gun in your home. Even though the gunowner was, at the time of the entry, entitled

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to obtain a rifle permit, he/she did not have one the moment the police delivered the notice of revocation of the handgun license. Felony charges were filed against the gunowner for improper storage of guns based upon the police finding a 90-year-old rifle in the home that was not secured.

The gunowner had more than ten court appearances over a two year period on the criminal charge because the police kept continuing the matter. Sometimes people who have jobs are badgered into pleading guilty in exchange for a sentence of probation because they just cannot keep taking time off from work.

Eventually the court held that there was no emergency situation. Because the police should have obtained a search warrant, the search was declared unlawful and the evidence found by the search was "excluded," from being used as evidence. The criminal case was dismissed.

There are a number of problems with the gunowner suing the police. First, because of the length of time it took for the criminal case to be dismissed, the time in which the gunowner had to file a civil case had almost expired. Second, although the case against the gunowner was dismissed, it was dismissed for lack of evidence. If the gunowner were to testify against the police in a civil matter, the police might be able to use that testimony to bring new criminal charges against the gunowner. Even if these problems were resolved, the question becomes, what were the gunowner's damages? There might be a couple of thousand dollars of property damage, but the cost of bring the case to

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trial exceeds that. Courts do not compensate for hurt feelings. Given the length of a civil action, given the amount of time the injured party would have to spend preparing for court, a civil suit is not practical unless the citizen was seriously, physically injured by the police. For many people, the fear of police retaliation, especially in smaller communities, is very real. The other frustrating thing about suing the police is there is no detriment to the officer who violated someone's civil rights. Each time he goes to court, he gets paid by the town. Normally it will not come out of the police department budget. Without the exclusionary rule there is no downside to a police officer violating a citizen's rights.

In the second case, the landlord was trying to evict the gunowner. The police were present to prevent a breach of the peace when the landlord served a court notice. The individual was arrested at the door before the notice was served under circumstances similar to those in the opening example. The individual's home was turned inside out by the police looking for evidence of some crime. The officers saw the gunowner's safe was open and a number of guns were outside of it so they charged him/her with unlawful storage. The gunowner's motion to exclude evidence was not allowed.

The gunowner was found guilty of failing to keep stored guns in a locked container because the guns found by the police were not within the immediate reach of the gunowner when the police forced an entry. The Court said some police actions require no constitutional justification, such as when the police are making a "well-being" check. The police were at the gunowner's apartment as a "community care-taking

function" not investigating a crime. Even though that function would not justify an entry into the gunowner's home, the "inherent dangerousness" of owning guns was such that the officers had the right to restrain the gunowner and search his home for their own safety when they appeared at his door. Thus anything they saw within the house was in plain view and could be used as evidence against the gunowner. The gunowner is now incarcerated. His/her case is on appeal.

The so-called safe storage acts were supposed to protect small children from accidentally getting hold of a gun. They have often not been used for that purpose. Rather, in some areas, they have been used as an excuse to strip citizens of their right to own a gun without any rational relationship to child safety.

Although the Supreme Court has held the right of the people to own guns is protected by the constitution, that does not change the huge prejudice against gun ownership among certain segments of our population. This article changed some of the facts, and did not disclose others, in the two cases discussed to protect the privacy of the persons involved. The essence of what happened to each has, in a simplified form, been accurately recounted. Most honest people cannot envision the police acting against them. They see no point in allowing criminals to go free on constitutional technicalities. All of the Constitution, however, is important to our concept of liberty. We must oppose any attempt to circumvent its protections no matter how well-meaning the excuse sounds to justify the invasion of rights.