Fourth Amendment Forum
January/February 2005, Page 52

Giving Thanks

By Milton Hirsch; David Oscar Markus

Giving Thanks

In the ordinary course of things it is the business of this column to discuss opinions in which the Supreme Court resolves Fourth Amendment issues arising in criminal cases. What follows, however, is discussion of an opinion in which a circuit court resolved Fourth and First Amendment issues arising in a civil case. We depart from our accustomed practice because the opinion of our home circuit in Bourgeois v. Peters1 makes a memorable contribution to the rhetoric of political liberty.

"I just thought of what is the matter with policeman's dialogue."

"What?"

"They think every line is a punch line."

Raymond Chandler,

The High Window

At all times material to the following discussion, the police chief of Columbus, Georgia was one W. L. Dozier. However much that name may conjure up the image of Rod Steiger as the paradigmatic small-town Southern police chief in the movie In the Heat of the Night, we are not making it up. W. L. Dozier (no doubt pronounced "Dub-ya Ayl Dozhyuh") was - and for all we know remains - the police chief of Columbus, Georgia. Really.

To be police chief of Columbus, Georgia, is a considerable responsibility, complicated in part by the presence of Ft. Benning. Ft. Benning is the home of The School Formerly Known as the School of the Americas. That may require some explaining.

Once upon a time, the United States government commissioned at Ft. Benning something called the "School of the Americas."2 Ostensibly the purpose of the School of the Americas was to share military training and information with American allies in Latin America. It was widely alleged, and all but conceded, however, that the School of the Americas taught military representatives of dictatorial regimes how to torture and oppress their citizenry. In 2001, Congress renamed the School the Americas, officially terming it the "Western Hemisphere Institute for Security Cooperation;" or, in the relentless acronym-driven argot of the military, WHINSEC.3 Critics of the School Formerly Known as the School of the Americas allege that nothing has changed but the name.

Defenders of the SOA and its successor, however, argue that they do not teach abuse, and that today the curriculum includes human rights as a component of every class. They also argue that no school should be held accountable for the actions of only some of its graduates.4

The most tireless of WHINSEC's critics is an organization called "School of the Americas Watch."5 Every November for about a dozen years now the School of the Americas Watch has organized a rally in a public park across the street from Ft. Benning. The purpose of the rally is to give voice to the organization's opposition to the continued existence of WHINSEC. Approximately 15,000 people attend the rally each year.6 Throughout the history of these rallies no weapons have ever been found at the protest site, and no protester has ever been arrested for an act of violence.7

In November 2002, a week before the annual rally, the City of Columbus instituted a policy requiring everyone wishing to participate in the annual protest to submit to a magnetometer search at a checkpoint some distance from the protest site. The City's decision to impose this search requirement was based on three factors: (1) the Department of Homeland Security threat assessment level was "elevated;" (2) protesters in previous years had "engaged in frenzied dancing" and did not immediately dispense at the end of the scheduled protest;8 and (3) School of the Americas Watch had invited other groups to attend the protest, some of which had allegedly instigated violence at other sites on other occasions. The Eleventh Circuit, pausing to note that magnetometer searches would do nothing, or next to nothing, to deter any of this conduct9 proceeded to consider whether the search in question (i.e. the magnetometer procedure) would violate the First or Fourth Amendments.

I looked at the gun strapped to his hip, the special badge pinned to his shirt. "And they call this a democracy," I said.

Raymond Chandler,

The High Window

The plaintiff group consisted of School of the Americas Watch and various of its members. They alleged that the mass, suspicionless, warrantless magnetometer searches violated their Fourth Amendment rights to be free from unreasonable searches and seizures. The City made several arguments in defense of the searches at issue, all of which the court rejected.

First, the City alleged that after Sept. 11, 2001, the court can and should determine that preventive magnetometer searches at large gatherings are constitutional as a matter of law.10 The court of appeals pointed out, reasonably enough, that the Fourth Amendment contains no exception for large gatherings of people. Nor can it be argued that the Framers failed to foresee the possibility of large protests, particularly in light of the First Amendment protection of the right of the people peaceably to assemble. Of course it may be the case that protesters and passersby would be safer if government were permitted to engage in mass, warrantless, suspicionless searches. But as the court pointed out, in language for which this opinion is truly memorable:

[T]he Fourth Amendment . . . prevents us from trading ever-increasing amounts of freedom and privacy for additional security. . . . We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country. . . . [A] system that gave the federal government the power to determine the range of constitutionally permissible searches simply by raising or lowering the nation's threat advisory system would allow the restrictions of the Fourth Amendment to be circumvented too easily.11

The City of Columbus then fell back on that argument of last resort, the "special needs doctrine." This doctrine first appeared in Justice Blackmun's concurring opinion in New Jersey v. T.L.O.12 There, Justice Blackmun stated that limited exceptions to the probable cause requirement exist, in which reasonableness is established by "a careful balancing of governmental and private interests," but that such a test is applicable only "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."13 Attempts to expand this doctrine - most, but not all, unsuccessful - have been fodder for previous Fourth Amendment Fora. 14

The key to all special needs cases is that the doctrine cannot be used to serve a law enforcement need. In Bourgeois, the City of Columbus claimed that the search in question was not for purposes of criminal investigation, but "to ensure the safety of participants, spectators, and law enforcement."15 But where the government ensures public safety by enforcing criminal laws, public safety is not a governmental interest independent and part from law enforcement.

We submit this article to The Champion at the Thanksgiving holiday. In addition to giving thanks to this important decision demonstrating that the Fourth Amendment is still relevant and important, even after September 11, we give thanks to Blakely v. Washington and Crawford v. Washington. We wish all of you a happy new year and great 2005.

Notes

1.387 F.3d 1303 (11th Cir. 2004).

2.10 U.S.C. 4415, which formerly authorized the School of the Americas, was repealed by §911 of the 2001 National Defense Authorization Act, H.R. 5408.

3.10 U.S.C. 2166. See gen'ly

4<http: //www.ciponline. org/facts/soa.htm>, last visited Nov. 2004.

5. See <http://www.soaw.org.>, last visited Nov. 2004. The website for School of the Americas Watch features a skull wearing a graduation cap, from which a noose dangles. Surrounding this caricature is the organization's motto: SHUT DOWN THE SCHOOL OF THE AMERICAS.

6.Bourgeois, 387 F.3d at 1306.

7.Id.

8.Id. at 1307.

9.Id. at n. 2.

10.Id. at 1309.

11.Id. at 1312. In a separate portion of the opinion, the court considered a related but independent argument, viz. that the search in question, apart from being constitutional as a matter of law, was reasonable as a matter of fact. Id. The court made short shrift of this argument, pointing out that traditional and fundamental Fourth Amendment jurisprudence hold that searches conducted without a priori judicial review (typically by warrant application), and in the absence of probable cause, are presumptively unreasonable, subject to narrow and well-defined exceptions inapplicable here. Id.

12.469 U.S. 325 (1985).

13.Id. at 330.

14.See, e.g., Milton Hirsch & David Oscar Markus, No More Colliding Tubas, The Champion, Sept./Oct. 2002; Milton Hirsch & David Oscar Markus, New Hope, The Champion, July 2001; Milton Hirsch & David Oscar Markus, Stop in the Name of Drugs, The Champion, March 2001.

15.Bourgeois, 383 F.3d at 1314. n