

Montana Search and Seizure



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Constitutional Provisions

4th Amendment:

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article II, Section 11:

The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Constitutional Provisions



Article II, Section 10:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Article II, Section 11 and 4th Amendment



- Seizures of Persons

and

- Searches of Persons, Places, Things

Seizures of Persons



What is a seizure?

When--taking into account all of the circumstances surrounding the encounter--the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.

Factors:

1. Threatening presence of several officers
 2. Display of a weapon by an officer
 3. Some physical touching of the person of the citizen
 4. Use of language or tone of voice indicating that compliance with the officer's request might be compelled
- State v. Wilkins, 350 Mont. 56 (2009)

So What?





- **Seizure is the point at which the 4th Amendment or Article II, Section 11 is implicated.**

Two Primary Types of Seizures



1. Terry Stops

2. Arrests

Terry Stops



- Temporary detention to confirm or deny suspicion of wrongdoing

Standard



Particularized Suspicion

1. Objective data from which an experienced officer can make certain inferences
2. a resulting suspicion that the occupant of the vehicle is or has been engaged in wrongdoing or was a witness to criminal activity
 - State v. Gopher, 193 Mont. 189 (1981).

Recent Change



State v. Cybulski, 349 Mont. 429 (2009)



- D drives wrong way on highway for 50 miles, pursued for 6 miles by cops, driver non-responsive to police
- D refused most FSTs and BAC
- D convicted of DUI and criminal endangerment



- **D challenged probable cause for arrest on grounds that officer was inexperienced**



- particularized suspicion requires that the “information available to the investigating officer-whether a rookie or a veteran-be sufficient to allow a hypothetical ‘experienced’ officer to have either particularized suspicion for a stop, or probable cause for an arrest.”



While a peace officer's experience and training may be a factor in determining what sort of reasonable inferences he or she is entitled to make from his or her objective observations, experience and training will not necessarily be the defining element of the test.... The courts will look to the facts and to the totality of the circumstances of each case.

“New” Standard



Particularized Suspicion

1. Objective data and articulable facts from which an officer can make certain reasonable inferences
 2. a resulting suspicion that the occupant of the vehicle is or has been engaged in wrongdoing or was a witness to criminal activity
- Officer's experience a factor
 - Assessed on totality of circumstances

What Constitutes Objective Data?



- Officer's observations
- Police reports
- Patterns of behavior of particular types of law breakers
- Informants

How Assess Sufficiency of Informants?



○ Consider Reliability, Basis of Knowledge, and Corroboration

- ✦ **State v. Pratt Test – DUI type (286 Mont. 156 (1997))**
 - Informant identifies themselves?
 - Information based on personal observation?
 - If yes to both above, police can corroborate innocent details
 - If no to either, police must independently corroborate suspicious activity
- ✦ **State v. Martinez (2003 MT 65, 314 Mont. 434)**
 - Less quantity than needed for PC
 - Same reliability as needed for PC

Arrest



46-6-104: Actual restraint or submission to custody

- 1. Authority to arrest**
- 2. Assertion of authority with intent to affect arrest**
- 3. Restraint of person arrested**
 - a. Physical restraint**
 - b. Verbal: Whether reas. innocent person free to walk away**

Standard: Totality of Circumstances



Probable cause to arrest

1. Reasonable belief that crime committed
2. Reasonable belief that person being arrested committed it

+

Circumstances justifying immediate arrest

1. Safety of offender
2. Safety of public

○ State v. Bauer, 307 Mont. 105, 2001 MT 248

Probable Cause Based on Informants



Totality of the Circumstances

Consider:

1. Reliability

2. Basis of Knowledge

3. Corroboration

○ State v. Barnaby, 2006 MT 203, 333 Mont. 220.

Community Caretaking Doctrine



- **Police interaction with citizens that is not a seizure**
- **If Community Caretaking Doctrine satisfied: no seizure and police do not need particularized suspicion.**
- **If Community Caretaking Doctrine not satisfied: seizure and police need particularized suspicion.**

Community Caretaking Doctrine



1. Officer must have objective, specific, and articulable facts upon which to base a suspicion that a citizen is in need of help or is in peril;
2. If the citizen is in need of aid, the officer may take appropriate action to render assistance or mitigate the peril;
3. When the officer is assured that the citizen is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure.

State v. Nelson, 319 Mont 250

State v. Nelson, 319 Mont 250



- Officer saw truck on side of road, engine running doctrine, late at night, very cold, Jan 1.
- Officer approached car and found D passed out and unresponsive.
- Officer opened door and smelled alcohol
- **Community caretaking doctrine satisfied**

State v. Reiner, 317 Mont. 304



- Officer receives call of drunk driver in green pickup
- Officer finds green pickup parked off road
- Officer approaches pickup and finds D passed out
- Officer stated that concerned with finding reported DUI driver, not with welfare of D
- D rolls down window and officer smells alcohol
- **Community caretaking doctrine not satisfied**

State v. Seaman, 329 Mont 429



- Officer noticed D sitting in car on very cold day – Jan 6: near zero with subzero wind chill
- Car parked on the shoulder of off-ramp.
- When officer approached, D outside car. D, without acknowledging officer, walked around car, got behind wheel, and put on left turn signal.
- Officer approached to see if D needed aid
- Upon contact, officer noticed her glassy eyes, slurred speech, and odor of alcohol
- Officer started DUI investigation and eventually arrested D for DUI
- **Community caretaking doctrine satisfied**

State v. Litschauer, 330 Mont. 2



- Anonymous 911 call that woman going “ballistic,” banging her head on maroon Chevrolet, and then driving south on Jackrabbit Lane
- Officer driving north on Jackrabbit sees maroon Chevy and stops the car.
- When officer approaches, observes bloodshot eyes, slurred speech, odor
- Officer commences DUI investigation
- D arrested for DUI (3d)
- **Community caretaking doctrine satisfied**

State v. Wheeler, 2006 MT 38



- Officer saw car parked at “odd position” near dangerous intersection
- While driving past, he saw driver making hand or arm gestures, suggesting that she was in an excited, emotional state
- Officer testified thought passenger male, although actually female
- Officer walked up to car to check if everything was ok.
- D said everything ok.
- Officer observed slurred speech, odor ETOH
- D arrested for DUI
- **Community caretaking doctrine satisfied**

State v. Graham, 2007 MT 358



Recap of Seizure of People



State v. Wilkins, 2009 MT 99



- Cop sees car parked in alley
- Car running, lights on
- Cop pulls up behind car but does not activate emergency lights
- Cop gets out and approaches car and observes D smells of alcohol and slurs speech
- D arrested for DUI

State v. Wilkins



- D moves to suppress on grounds officer lacked particularized suspicion
- Should the district court deny the motion?



- **District Court found defendant had been seized and then denied motion on either of two grounds:**
 - 1. The officer had particularized suspicion
 - 2. The community caretaking doctrine

- **Supreme Court affirms for different reason**
 - finds no seizure
 - “our review of the record shows that officer Smith was the sole officer during the initial contact; he did not activate his emergency light, display a weapon or employ threatening tones. He simply approached Wilkins to find out why she was parked on a dark remote street late at night in cold weather.”



- **Arrest ok?**
 - **PC to arrest**
 - ✦ Reasonable belief that crime been committed
 - ✦ Reasonable belief that this person did it
 - **Circumstances justifying immediate arrest**
 - ✦ Inherent in jailable offenses
 - ✦ Safety of offender
 - ✦ Safety of public

Searches of Persons, Places, and Things



What is a Search?





- **An intrusion by a government agent into a constitutionally protected privacy interest.**

How do you determine if there has been a search?



- Katz Test +
 - 1. Did the defendant have an actual subjective expectation of privacy?
 - 2. Is that expectation of privacy one that society is willing to recognize as objectively reasonable?
 - 3. What is the nature of the State's intrusion?

So What?





- **If Search, then that is the point that the 4th Amendment or Article II, Sections 10 and 11 are implicated.**

- **If Search, then government must have legitimate basis for the intrusion:**
 - ✦ **Search Warrant**
 - or**
 - ✦ **Warrant Exception**



**Search Warrants are preferred
by the Montana Supreme Court.**

Warrant Exceptions



SEARCH OF PERSON

1. Terry Protective Pat Down
2. Search Incident to Arrest
2. Consent
3. Inventory

Terry Protective Pat Down



Requirements:

Reasonable belief that suspect is armed and dangerous

Scope:

Exterior of clothes limited to search for weapons

Plus

Plain Feel Extension:

Things that know are contraband

Things thought were weapons

State v. Stubbs, 270 Mont. 364 (1995)

Search Incident to Arrest



Requirements:

1. PC to arrest
2. Lawfully effectuated arrest
3. Custodial arrest

Scope:

Person of arrestee and area of immediate control

Plus

46-5-102

1. Protection of officer
2. Prevent Escape
3. Discover fruits of crime
4. Discover evidence of crime + exigent circumstances

State v. Hardaway, 2001 MT 252, 307 Mont. 139.

Consent



Requirements:

Voluntary consent from owner of property or 3rd party with actual common authority over the property

NO APPARENT AUTHORITY

Scope:

Wherever person consents to be searched.

- State v. McLees, 2000 MT 6, 298 Mont. 15.

Inventory



Requirements:

Routine administrative search pursuant to police policy

- Not for investigation or evidence gathering
- Conducted at station house

Scope:

Person, personal effects

- State v. Pastos, 269 Mont. 43 (1994).

Warrant Exceptions



SEARCH OF AUTOMOBILES

- 1. TERRY PROTECTIVE PAT
DOWN OF CAR**
- 2. SEARCH INCIDENT TO
ARREST OF CAR**
- 3. “AUTOMOBILE EXCEPTION”**
- 4. INVENTORY**
- 5. CONSENT**

Terry Protective Pat Down of Car



Requirements:

- Reasonable belief that suspect is armed and dangerous and that reason suspect is armed and dangerous is connected to car

Scope:

- Passenger compartment limited to places that weapons could be hidden

Search Incident to Arrest



New York v. Belton, 453 U.S. 454 (1981)



- Supreme Court held that when an officer lawfully arrests the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of the car and any containers therein.
- Purpose of SIA is
 1. Safety of officer
 2. Prevent destruction of evidence



- **Bright-line rule:**

- **No consideration either:**

1. **Officer's subjective believe that D has a weapon or that there is potential evidence to be destroyed**

Or

2. **Defendant's actual ability to obtain a weapon or destroy evidence**



Arizona v. Gant,
556 U.S. ----, 129 S.Ct. 1710, 173 L.Ed.2d
485 (2009)

- **New rule for Search Incident to Arrest**

Arizona v. Gant



- Search incident to arrest warrant exception only applies when either
- (1) the arrestee is unsecured and within reaching distance of the passenger compartment, or
- (2) the officers reasonably believe that evidence **relevant to the crime of arrest** might be found in the car.

Search Incident to Arrest of Car



Requirements:

- Lawful custodial arrest of recent occupant of car

Scope:

- Area of immediate control=passenger compartment including containers

Plus

- 46-5-102
 1. Protection of officer
 2. Prevent Escape
 3. Discover fruits of crime
 4. Discover evidence of crime + exigent circumstances

- State v. Elison, 2000 MT 288, 302 Mont. 228.

“Automobile Exception”



Requirements:

- PC to search
- Exigent Circumstances
 - Prevent harm to cop/others
 - Prevent destruction of evidence
 - Prevent escape
 - Prevent improper frustration of legitimate law enforcement
 - ✦ Not mobility of car
 - ✦ Not difficulty in obtaining warrant

Scope:

- Wherever PC to search
 - State v. Elison, 2000 MT 288, 302 Mont. 228.

Inventory



- **No Inventory of Cars in Montana.**

Consent



Requirements:

Voluntary consent from owner of property or 3rd party with actual common authority over the property

NO APPARENT AUTHORITY

Scope:

Wherever person consents to be searched

State v. Schwarz, 2006 MT 120



- Officers attempting to arrest Lowe go to D's house where Lowe had been staying.
- D's 13 year old daughter gives officers consent to search house for Lowe.
- During search, officers discover drugs.
- D arrived and admitted drugs hers.
- D moved to suppress for illegal search



- Court creates a per se rule that youth under 16 cannot have actual authority to consent to search of parent's home.

State v. Ellis, 351 Mont. 95 (2009)



- Police respond to residence after 911 call of sexual assault
- V, 13 years old, tells officer that her dad drugged her and sexually assaulted her the night before
- V takes cop into bedroom where sheets, pajamas and underwear are recovered.
- D's semen is present on the sheets



- **D moves to suppress evidence based on V's inability to consent to search of D's house**
- **Following State v. Schwarz, District Court granted motion to suppress**

State v. Ellis



- State argued that Schwarz should not apply when juvenile is also a victim of an offense
- And
- If Schwarz applied, discovery of the evidence was still admissible under inevitable discovery

- **Court rejected both arguments:**



1. **No child victim exception**

1. **Not child's right to waive**
2. **Cops can still get warrants**

2. **Not inevitable discovery**

- ✦ to “excuse the failure to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement.”

Justice Leaphart dissents (Morris joins)



- Drafter of State v. Schwarz
- V had expectation of privacy in her underwear, pajamas and sheets; D did not
- No search occurred, as V gave the items to the cops
- “I would endorse a victim's exception to the per se rule that a minor cannot consent to the search of her parents' home. The exception would be limited to crimes against the person, Title 45, chapter 5, MCA, that were alleged to have been committed against the minor which occurred in the home in question.”

Judge Simonton (sitting in for Rice) dissents



- **Would overturn Schwarz.**

Exigent Circumstances



- Probable Cause + Exigent Circumstances

Exigent circumstances



- Things that would cause a reasonable person to believe that entry (or other prompt action) was necessary to prevent:
 1. physical harm to the officers or other persons,
 2. destruction of relevant evidence,
 3. escape of the suspect, or
 4. some other consequence improperly frustrating legitimate law enforcement efforts.

Exclusionary Rule



Rule



- Evidence Obtained by exploiting constitutional violation is suppressable.
 - Direct Evidence
 - Fruit of the Poisonous Tree Doctrine

Exceptions



1. Attenuation of the Taint: Is there a point at which the primary taint has been purged, often due to some voluntary action on the part of the defendant?

2. Independent Source: Would the police have discovered the evidence from a source independent of the constitutional violation?

3. Inevitable Discovery: Would the evidence have been discovered by lawful means?

- State v. Therriault, 2000 MT 286, 302 Mont. 189.

Exceptions



Court has yet to adopt the good faith reliance on a warrant later held to be invalid.