COURT SUPPRESSES EVIDENCE FOUND DURING CARETAKING SEARCH OF CELL PHONE

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One of the exceptions to the search warrant requirement is commonly called the "community caretaking" search. This search, as the name implies, is not conducted to collect evidence of a crime, but rather to assist members of the community. For example, an officer can search a lost purse to discover the name of the owner so that the purse can be returned. Of course, if evidence of a crime is discovered during a typical "community caretaking" type search, the evidence is normally admissible in court.

On March 28, 2011, the Supreme Court of Colorado decided the *People v. Schutter*[i] which illustrates the first requirement of a "community caretaking" search of a cellular phone, particularly that the cell phone *actually be lost, mislaid or abandoned*. In *Schutter*, the defendant accidentally locked his iPhone in the restroom at a convenience store. Schutter asked the clerk for assistance retrieving his phone, and the clerk told him that he was currently too busy. The clerk told Schutter that he would have to come back later. Schutter then left the convenience store and did not return for over an hour. Meanwhile, the clerk retrieved the cell phone and gave it to a police officer that came into the store. The officer looked at the text messages in order to try and determine the owner. The officer also answered several phone calls made to the phone and also called the dispatch center with the phone in order to obtain the caller ID information on the phone. During this initial "community caretaking" warrantless search of the phone, the officer discovered information that provided probable cause that evidence of illegal drug sales would be contained on the phone. Later that evening, Schutter came to the police station to pick up his phone. The police would not release the phone. Instead, an officer obtained a search warrant for the phone and discovered information that provided probable cause to support a search warrant of Shutter's residence. A search warrant was obtained for Schutter's

residence and during the search, the evidence to charge Schutter with various felony drug offenses was located. Schutter was arrested.

Schutter then filed a motion to suppress and argued that the initial warrantless search of his iPhone was unreasonable under the *Fourth Amendment*. The district court granted the motion to suppress and the government appealed.

The government argued that "an otherwise reasonable expectation of privacy in personal property is diminished when that property is lost or mislaid because it is only reasonable to expect that an officer coming into possession of the property will examine it to learn how it can be returned to its owner."[ii] In support of their argument the government cites numerous cases where these "community caretaking" types of searches have been upheld in other jurisdictions. For example, the court noted

> A handful of courts from other jurisdictions have apparently assumed, for widely-differing purposes and according to widely-differing theories, that officers would be justified in conducting at least some limited inspection of lost property to discover the owner's identity.[iii]

However, the Supreme Court of Colorado stated that they will not be able to decide the parameters of the "community caretaking" search with this case. Instead, they identified the issue as *whether Schutter had in fact "abandoned, lost, or mislaid" his cell phone such that the police would have any valid reason to attempt to ascertain the owner.*

The court noted that the following facts were relevant to the issue above. First, the officer that took the phone knew (1) that Schutter inadvertently left it in the store's locked restroom and knew precisely where it was; (2) that his immediate demand for its return had been refused by the store clerk, who had been too busy to access the restroom; (3) that he left the area only when he was told by the clerk that he would have to come back later to retrieve his phone; and (4) that it was approximately 4:20a.m., and Schutter had only been gone for about an hour. Based on these facts, the court then held

> Under the undisputed facts of this case, the defendant's iPhone was neither abandoned, lost, nor mislaid such that the Aspen police would have had any cause to identify the owner to return it.[iv]

Thus, the Supreme Court of Colorado upheld the motion to suppress.

NOTE: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

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CITATIONS:

[i] Case No. 10SA304, 2011 Colo. LEXIS 246 (2011)
[ii] *Id*. at 6
[iii] *Id*. at 6-7 (see e.g., *Gudema v. Nassau Cnty*., 163 F.3d 717, 722 (2d Cir. 1998) (upholding police department's search of police officer's shield case in 28 U.S.C. § 1983 matter where, among other things, the government acted "in its capacity as employer rather than law enforcement"); *United States v. Sumlin*, 909 F.2d 1218, 1220 (8th Cir. 1990) (finding no violation of expectation of privacy where officers searched purse to determine whether it was the purse defendant reported stolen in robbery); *United States v. Michael*, 66 M.J. 78, 81 (C.A.A.F. 2008) (finding reasonable "in the military context" search to determine ownership of a computer discovered in a military barracks restroom); *People v. Juan*, 221 Cal. Rptr. 338, 341 (Cal. App. 1985) (finding no reasonable expectation of privacy in jacket left at empty table in public restaurant, on theory that owner likely "hopes" some "Good Samaritan" will search for identification to return garment); *State v. Ching*, 678 P.2d 1088, 1093 (Haw. 1984) (upholding suppression of cocaine in closed cylinder found in lost leather pouch as exceeding limits of valid search of lost items for identification); *State v. Hamilton*, 67 P.3d 871, 876 (Mont. 2003) (presuming that finder may examine contents of lost wallet to determine rightful owner in holding under state constitution that expectation of privacy in lost property is diminished only to extent of permitting search by least intrusive means, as specified in written inventory policy); *State v. Pidcock*, 759 P.2d 1092, 1095-96 (Or. 1988) (upholding search of briefcase where officers' motive was to assist private finders of lost property in discharging statutory duty to locate and return property to rightful owner); *State v. Kealey*, 907 P.2d 319, 328 (Wash. App. 1996) (reversing suppression of identification evidence discovered, along with illegal narcotics, in defendant's mislaid purse and used to arrange sting operation for which defendant was subsequently prosecuted); see also 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5:5(d) (4th ed. & Supp. 2010).
[iv] *Id*. at 8