Search and Seizure In Environmental Cases: Tips and Traps

Environmental Crimes Section
Environment and Natural Resources Division, U.S. Department of Justice

Bad Things That Can Result From A "Bad" Search…

- Evidence can be suppressed
- A guilty person might go free
- In U.S. at least, the investigating agency/agent might be sued

Right To Personal Privacy

- Established for all persons in Section 14 of the Constitution, including right not to be subject to searches of person, home or property, seizure of private possessions or violation of private communications;
- BUT, section 36(1) says Constitutional rights may be limited by law of general application, provided such limitation is reasonable, justifiable and does not negate essential content of basic right to privacy

Criminal Procedure Act (Part 2) Regulates Search and Seizure

- Standard is "reasonable belief" that a particular article located on certain premises is connected with the commission of an offence;
- Objective test
  - Information justifying suspicion should be placed before Justice of the Peace justifying him/her to issue a search warrant authorizing s/szr operations
- Exigent warrantless searches also authorized in narrow circumstances

Similar in US, where a "Search" is….

- The invasion of an individual's reasonable expectation of privacy as the result of state action.
- "Reasonable expectation of Privacy ("REP")
- "State action"

Overall:

- In our practice, the prosecutor is as involved as the agent in the preparation, execution and return of the search warrant, and analysis of evidence seized therefrom;
- To accomplish this, we insist on:
  - Reviewing and approving affidavit and attachments
  - Briefing and helping organize the raid team
  - Being available by phone during execution to answer questions from agents, attorneys or media and, if necessary, helping obtain additional warrants;
  - Reviewing seized evidence asap after seizure

In U.S., Search Warrants Have Four Parts:

The warrant itself

-usually a form, looks like a cover sheet

The affidavit

-outlines the p.c.; written by an agent

Attachment A (description of the place to be searched)

Attachment B (description of the things to be seized)

The affiant must ensure that each part is correct down to the smallest detail

Affidavit Must Contain:

- Experience and knowledge of the affiant;
- Explanation of relevant laws and regs;
- Precise description of place(s) to be searched and things to be seized; and
- Narrative of facts (not conclusions) establishing probable cause.
- Try to draft a document which any agent could read and have no doubt about where to search and what to seize

What We Tell Affiants:

- DON'T hide anything relevant: be absolutely candid;
- DON'T try to write persuasively or add editorial comments about what you think - just state facts;
- DO describe the sources of all factual information (who saw it, who said it, who told them about it); and
- DO describe your CI and his/her situation completely.

Where A CI Was Used, Include:

- When s/he started working for gov't and why
- The CI's criminal history, if any
- The CI's motivation for cooperation
  - Monies paid
  - Promises of immunity or non-cooperation
  - Anything else
- Corroboration of information provided by the CI
  - Excerpts of transcripts from tapes made by the CI, etc.
  - Any and all other corroboration
- Why agent believes the CI is reliable and credible

SW Affidavit Must Be

- CLEAR
- CANDID
- CONCISE
- COMPLETE

More Affidavit Drafting Tips

- Aim to be clear, concise and logical; use simple, short sentences whenever possible;
- Pretend you are explaining the case to a 12-year old; assume no prior knowledge by the reader;
- Make sure every single sentence is absolutely true and accurate; and
- Always get a prosecutor to review and approve it prior to presenting to the magistrate.

Describing The Premises

- The more detail the better: goal is to write a description that any agent could use to find the correct premises; include everything you can about the address and physical description of the premises;
- If a rural property, include driving directions from nearest city or town; and
- Use "premises", not "house," and include "appurtenances and outbuildings" whenever possible. Double-check everything!

Describing The Items To Be Seized

- Objective: write this so that nothing is left to the discretion of the searching officer.
- Describe as precisely as possible the actual items you hope to find; and
- Add the phrase "together with fruits and instrumentalities of the crime and all other property constituting evidence of the crime of _____."
- Size matters; remember plain view

Our Role In Warrant Preparation

- Review affidavit drafts carefully – ensure tips suggested earlier are followed;
- Ask all necessary questions to satisfy self that the affidavit is as perfect and well-justified as it can be
- Don't be rushed into approving an affidavit that isn't ready
- Ensure descriptions of premises and property are complete and bulletproof
- Ensure agency is prepared to handle live or dangerous evidence items

In U.S., The "Good Faith" Exception Does Not Apply:

- If the warrant was obtained using a deliberately or recklessly false affidavit;
- If the magistrate was not neutral or objective in approving the warrant; and/or
- If the warrant was "so lacking in indicia of p.c. as to render official belief in its existence entirely unreasonable.

Pre-Raid Planning

- Ensure the search team includes:
  - Case agent
  - Enough agents for searching and security
  - Computer search/mirroring person(s)
  - Hazmat personnel (if necessary)
  - Wildlife handlers (if necessary)
  - Not you (stay at the command post, office or somewhere available by telephone)
- Ensure all lab protocols for sample collection are understood

- At pre-raid meeting, discuss
  - Raid team organization (divide security, search, seizure, interview and logging tasks up among team members)
  - Entry procedures and conduct of team
  - All members must read sw affidavit and attachments
  - Limits on scope and area of search
  - Plain view seizure/additional warrant issues
  - Must interview targets/subjects, if possible
  - Handling of persons present
  - Handling of wildlife or hazmat
  - Media/defense lawyer inquiry protocols
  - Sealed warrant issues, if necessary

Executing the Search Warrant

- Be aware of time, and time of day, limits
- Knock and announce, unless you have received a "no-knock" warrant (rare in wildlife cases)
- If no one answers, you may break in
- Give or leave a copy of the warrant face sheet and a receipt for all property taken;
- Officer who applied for warrant must make an inventory of seized items and "return" it to the magistrate

Search and Detentions Of Persons Present During Execution

- All persons present when you enter may be required to assemble for purposes of officer safety and to prevent destruction of evidence;
- Residents may be detained for the duration of the search;
- You may pat down any person you reasonably believes poses a threat;
- Can't search people unless warrant specifies or you arrest them
- Can't search containers in possession of visitors unless consent or other warrant exception exists

Warrant Execution Tips

- Assemble everyone present in one place; determine who leaves, who stays and who needs a pat-down;
- Ask resident to collect all cash and jewelry and put on kitchen table;
- At end of search, ask person to confirm before two officers that none of these has been removed;
- Locate all weapons, ensure safe, store in plain view;
- Give copy of warrant to resident;
- Photograph/videotape the search, if possible.

Warrant Execution Tips, cont'd

- Put one person in charge of collecting and logging in evidence found by other searchers;
- Assume everything you say during search will be recorded and played back in court
- Refer any lawyers to the prosecutor
- At end of search give inventory to resident (or leave on premises)
- Don't delay in making the return to the judge
- Keep chains of custody short and strong
- No press releases or media comments - period.

Our Role During SW Execution

- Only rookies go to the search site – don't:
  - you are not a law enforcement agent,
  - you don't want to become a witness, and
  - you're probably not covered by insurance or immunity on site;
- Remain at your office or the agency's command center;
  - answer telephone questions from searching agents about what they should do or seize;
  - handle press calls (don't comment) and defense lawyer calls (same)

When Advising Agents How Much Evidence To Seizre, My Personal Mantra Is:

"If you kill it, you must eat it."

- In other words, if you decide to haul it off, be prepared to either return it or log it, stamp it, understand it, preserve it and justify its seizure.

Seizing Live Wildlife

- Agents should try for abandonment, to reduce liability for death, costs of care and delay in disposition;
- Seizure "in situ" is sometimes possible
- Understand that smuggled wildlife will likely not be repatriated, due to pathogen exposure; understand disposition and care options/cost and who will bear these before approving seizure.
  - Is there a South African analog to the Lacey Act Reward Accoun?

Clark R. Bavin Wildlife Forensics Laboratory

USFWS – Ashland, Oregon, USA

- Performs forensic exam of all types of evidence in wildlife cases;
- Provides analysis and testimony for foreign cases;
- Fully-staffed Morphology, Serology, Criminalistics and Technical Support sections

As Soon As Possible After Execution:

- Agent should return to the target all items not actually needed, with a receipt;
- Agent should return copies of important documents to target (e.g. docs needed for tax preparation);
- Agent should prepare and present to prosecutor a complete log of items seized and, if possible a list of "hot docs."

Prosecutor's Role After SW Execution

- After agents organize and catalogue seized items, review them in presence of agents asap;
  - Never take possession of evidence yourself
- Decide what items should be returned to target and ask agents to do so asap;
- Ensure warrant is returned promptly and all procedures are followed;
- Encourage swift completion of agent reports about the search ("if you kill it, you must eat it")

Final Thoughts:

- A well-drafted and executed search warrant can forestall a suppression hearing and persuade the defense attorney that the rest of your case is equally strong, thus encouraging a plea; the reverse is equally true;
- A search warrant is like an airplane that you will eventually have to pilot (in court); best to pre-flight it as thoroughly as possible before you have to take off in order to avoid a crash
- The more you work with agents during the sw preparation phase, the better agents they will become

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