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# Airport Searches of Suspected Currency Law Violators

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*United States v. Duncan*
693 F.2d 971 (9th Cir. 1982)

In 1980, a United States citizen was convicted in the U.S. District Court for the Central District of California for making a false statement to customs officials regarding the amount of currency he intended to take out of the country.[1] The defendant filed a pretrial suppression motion challenging his arrest on Constitutional grounds. The trial court denied the motion. The defendant appealed, claiming that his conviction under 18 U.S.C. § 1001[2] was improper under the wording of the statute, and alleging that the customs officers' stop and search at the airport violated both his fourth and fifth amendment rights.[3] The United States Court of Appeals for the Ninth Circuit, *held*, affirmed: 1) defendant's false statement in response to the agents' questions was material within the meaning of § 1001; 2) the agents' stop and search at the airport without a warrant was nevertheless valid as a "border search"; and 3) the agents' failure to give the defendant his Miranda warnings before elicting an inculpatory remark was harmless error as there was already sufficient independent evidence of guilt beyond a reasonable doubt. *United States v. Duncan*, 693 F.2d 971 (9th Cir. 1982).

On April 3, 1980, three U.S. Customs Special Agents stopped and questioned defendant, Don Duncan, as he was about to board an international flight from Los Angeles to Bogota, Colombia. The agents were ostensibly assigned to the airport to ensure the passengers' compliance with federal currency regulations.

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1. The district court's opinion is not reported.

2. 18 U.S.C. § 1001 provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. U.S. CONST. amend. IV., V.

Duncan matched a narcotics/currency violation profile used by Customs agents to identify potential violators. Agreeing amongst themselves that Duncan looked suspicious, the agents identified themselves to him, led him away from the other passengers, and asked him whether he had anything to report to Customs. Duncan indicated that he was aware of the five thousand dollar ($5000) limit on unreported currency which may be removed from the country[4] and admitted that he was carrying exactly that amount. After voluntarily producing the five thousand dollars, Duncan consented to a pat-down search which led to the discovery of another five thousand dollars in his back pocket.

When questioned as to why he had not reported the overage to Customs, Duncan replied that he had failed to report the money on his income tax return and feared that Customs would alert the Internal Revenue Service (IRS). When they had completed their search, the agents had recovered over twenty-one thousand dollars from his wallet, money belt, and pockets. The agents seized the money and gave Duncan his Miranda warnings.[5]

The court of appeals first considered whether 18 U.S.C. § 1001 encompassed Duncan's statement to the agents that he was carrying the statutory amount. Concluding that it did, the court decided that the defendant's willfully falsified statement was indeed material.[6]

The Ninth Circuit relied on *U.S. v. Carrier*,[7] which addressed this question in a strikingly similar factual setting. *Carrier* applied a two-part test to determine whether a statement was "material" within the meaning of § 1001. First, the court asked whether the falsification affected the exercise of a governmental function; and second, whether the statement tended to influence an agency deci-

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4. *Duncan* at 974; § 1101(a) provides: Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by any agent or bailee, knowingly-

(1) transports or causes to be transported monetary instruments-

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States-

in an amount exceeding $5000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

5. 693 F.2d at 974.

6. *Id.* at 975.

7. 654 F.2d 559 (9th Cir. 1981).

sion.[8] Since a false "no" would tend to prevent Customs from fulfilling its duties, the court in *Carrier* reasoned that both elements of the test had been met. Thus, the court of appeals concluded that Duncan's statements formed the basis of a § 1001 conviction.[9]

The court next considered whether the agents' questioning infringed Duncan's right against self-incrimination. In the past, it has been held, that where a truthful response will cause one to incriminate oneself, one is permitted to simply state an "exculpatory no," which will not be held against him.[10] In the case at bar, for instance, if Duncan had answered the Customs agent's question truthfully, it would have incriminated him for having violated § 1101.

Again, the court looked to recent case law. In *U.S. v. Moore*,[11] the Ninth Circuit sidestepped application of the "exculpatory no" exception because defendant Moore had not only answered "no" to a government agent's inquiry, but had also made affirmative statements inculpating himself. In the instant case, Duncan likewise answered affirmatively, confirming that he knew of the reporting requirments but was not in violation of them. Therefore, the Duncan court reasoned that the exception did not apply.[12]

Next, the court examined the agents' authority to conduct a warrantless stop and search of Duncan. The court founded its decision on an analysis of two issues: (1) whether or not the search was valid as a border search and, (2) if so, whether the search was reasonable.

Relying on *U.S. v. Stanley*[13] and *California Bankers Assn. v. Schultz*,[14] the Ninth Circuit held that a person leaving the country may be stopped and searched without suspicion or probable cause, "pursuant to border principles."[15] These principles, as articulated in *U.S. v. Ramsey*,[16] explain that the longstanding right of the sovereign to protect itself justifies warrantless border searches. Subsequent cases have held that such border searches are consistent

8. *Id.* at 561-62.

9. 693 F.2d at 976.

10. *Id.; see* U.S. v. Bush, 503 F.2d 813, 819 (5th Cir. 1974), which reversed a case for the defendant based on this exception.

11. 638 F.2d 1171 (9th Cir. 1980).

12. 693 F.2d at 976.

13. 545 F.2d 661, 661-67 (9th Cir. 1976), *cert. denied* 436 U.S. 917 (1978).

14. 416 U.S. 21, 63 (1974).

15. 693 F.2d at 977.

16. 431 U.S. 606, 616 (1977).

with the fourth amendment.[17]

The court acknowledged that the Customs agents had performed a border search because an international airport is the functional equivalent of a border.[18] It is enough, the court reasoned, that the passenger intend to leave the country and that the search occur in reasonable proximity to the departure.[19]

The court then turned to the reasonableness of the search, noting that the agents initially asked only for Duncan's consent to a pat-down. He was not asked to remove his sweater or money belt until more than five thousand dollars was discovered. Not only was the manner of the search not unusual, but it was out of the public view, and therefore, neither humiliating nor embarrasing to Duncan. Further, Duncan had constructive notice that he might be searched; it was not necessary that he be warned explicitly since an airport search might reasonably be anticipated.[20] Finding no impropriety, the court concluded that the agents' conduct comported with the border search exception to the warrant requirement.

Finally, the court of appeals addressed the agents' failure to give Duncan Miranda warnings, holding that, in the Ninth Circuit, Miranda warnings need not be given in border searches until the agents have probable cause to believe that the person questioned has committed an offense.[21]

The court reasoned that no Miranda warnings were needed when Duncan made his initial statement since the agents had probable cause to believe that he committed an offense. However, after the agents discovered the second five thousand dollars, they had probable cause to believe that Duncan violated either 31 U.S.C. § 1058[22] or 18 U.S.C. § 1001.

Although Miranda warnings should have been given at that point, the court ruled that the ommission was harmless beyond a reasonable doubt. Duncan's second statement, referring to the IRS, was not necessary to convict him since his first statement, coupled

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17. *See also* U.S. v. Martinez-Fuerte, 428 U.S. 543, 549 (1976).

18. 693 F.2d at 977.

19. *Id.*

20. *Id.* at 978.

21. *Id.* at 979; *see also* U.S. v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980); U.S. v. Espericueta-Reyes, 631 F.2d 616, 621-22 (9th Cir. 1980).

22. 31 U.S. § 1058 provides: Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1000, or imprisoned not more than one year, or both. *Compare* note 2, *supra.*

with the cash found on him, was sufficient independent evidence of guilt.[23]

Circuit Judge Fletcher's dissent took exception to the majority's finding that Duncan's stop and search was legal. The dissenting judge denied that there was any authority, statutory or otherwise, for the "border search exception." The majority's reliance on *Ramsey* was misplaced, he argued, since that case addressed border searches of persons entering, rather than leaving, the country.[24] The judge supported his position by citing 31 U.S.C. § 1105(a),[25] which provides that a court must issue a warrant to search someone suspected of violating § 1101.

The dissent also called the court's attention to *U.S. v. Bedore*,[26] which held that 18 U.S.C. § 1001 was not intended to embrace oral, unsworn statements unless such statements would substantially impair the basic functions entrusted by law to the particular agency.[27] The Supreme Court, in *U.S. v. Gilliland*,[28] claimed that § 1001, as envisioned by the Secretary of the Interior, had been designed to apply only to false and fraudulent papers rather than oral statements.

Even if Duncan did not come within the purview of § 1001 sanctions, the dissent concedes that prosecution under 31 U.S.C. § 1058 would be appropriate.[29] The only difference between the two sections is the penalty prescribed for violating the reporting statute.

*Duncan* is significant because it affirms the government's authority to search anyone about to leave the country on less than probable cause and without first giving Miranda warnings. In this respect, the case extends the "protection principle" of *Ramsey* to border searches of passengers leaving, as well as entering, the

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23. 693 F.2d at 979.

24. *Id.* at 981 n. 2.

25. Section 1105(a) provides that: If the Secretary [of the Treasury] has reason to believe that monetary instruments are in the process of transportation and with respect to which a report filed under section 1101 of this title [requiring disclosure of currency in excess of $5000] has not been filed or contains material omissions or misstatements, he may apply to any court of competant jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of . . . (1) One or more designated persons.

26. 455 F.2d 1109 (9th Cir. 1972).

27. 693 F.2d at 985.

28. 312 U.S. 86, 93-94 (1941).

29. 693 F.2d at 985; *see* note 21, *supra*.

country. The Ninth Circuit refused to rule on whether Duncan could have taken advantage of the "exculpatory no" exception had his first statement been a simple "no." This open issue, and the objections raised by the dissent, are certain to recur in future cases.

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