2-1-1974

Aviation

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AIRPORT SEARCHES

Four important cases have recently been decided in the United States in the area of airport searches.

1. *United States v. Ruiz-Estrella,* 481 F.2d 723 (2CCA, 1973). In this case the defendant was charged with attempting to board an airliner while in possession of a dangerous weapon. The facts were that the defendant, as he checked in for a Miami flight, was identified by the ticket agent as an FAA hijacking "Profile Selectee." The ticket agent accordingly turned the defendant's ticket over to a uniformed federal sky marshal who took the defendant into a stairwell at the end of the boarding ramp, and after closing the door behind them, asked for identification. Upon showing a bankbook, a Social Security card, and a union card, the defendant was informed that he would have to go through a baggage search. He handed over a shopping bag which appeared upon first glance to be filled with toys. The sky marshal searched through this shopping bag and found in one of the boxes purportedly containing a toy truck, a sawed-off shot gun containing several shells.

During the motion to suppress, the trial court granted the government's motion to exclude the defendant, his attorney, and the public from the courtroom during the testimony of the sky marshal on the subject of the secret profile. This and the fact that the motion to suppress was denied were assigned as errors on appeal.

The Second Circuit Court of Appeals stated that the exclusion of the defendant and the public from that portion of a suppression hearing

dealing with the necessarily confidential hijacking profile abridged neither the right to confrontation nor that to a public trial. The court based the statement on the strong public policy behind confidentiality in airline cases, noting that though the rights of an accused are surely important, they are not absolute. After reviewing the record, however, the court determined that there was a confrontation right violation requiring reversal since the sky marshal's testimony in camera went beyond the subject of profile to the merits of the case.

The Court next addressed itself to the lawfulness of the search and seizure. It made three specific findings:

a. That though the defendant in fact handed over the bag to the sky marshal, there was no consent to the search. The Court pointed out that the prosecution had the burden of proving a freely and voluntarily given consent from the totality of all the surrounding circumstances. Since the defendant was taken away from the public area into the stairwell with the door closed behind him, and since there the defendant was alone with a uniformed federal sky marshal, it was the opinion of the Court that the handing over of the bag to the sky marshal was but an acquiescence to apparent lawful authority rather than an act of voluntary consent to search.

b. That this limited airport search would have been justified by the danger of hijacking alone, were it shown that the passenger had been given advanced notice of his liability to such a search so that he could avoid the search by choosing not to travel by air. It was the opinion of the Court, however, that no such advanced notice could be shown by record. Neither a poster, nor the ticket agent, nor the sky marshal made the defendant aware that he had the right to refuse to be searched if he should choose not to board the aircraft.

c. That the seizure in the case at bar could not be justified on the less than probable cause standard of *Terry v. Ohio*, 88 S.Ct. 1868. Reasonable suspicion to justify a pat-down search must be predicated upon "specific and articulable facts." It was the opinion of the court that this standard as laid out by the *Terry* case is not satisfied where a person meets the hijacking profile and produces marginally confusing identification.

2. *United States v. Legato*, 480 F.2d 408 (5CCA, 1973). This case involved the following facts. The FBI in Miami, Florida, received an anonymous tip over the telephone that someone carrying a

bomb in an orange shopping bag would attempt to board an airplane leaving for Chicago that same day from either the Miami or Ft. Lauderdale airport. The authorities focused their attention upon a 4:10 p.m. Delta flight from Ft. Lauderdale to Chicago. As the Delta flight was scheduled to depart, the ticket agent noticed that walking by the counter toward the gate to the plane were two men one of whom was carrying a bright orange shopping bag in which a gift wrapped package was visible. Delta then announced over the public address system that a bomb threat had been received, and that all passengers were to return to the ticket area to reclaim their baggage and submit to a security search. Instead of stopping at the ticket counter, the man carrying the orange shopping bag continued out of the door of the terminal and across the street into the parking lot. It was here that a security agent stopped him, the defendant in this case, and took possession of the shopping bag. The defendant was then taken back to the terminal where he refused to open the gift-wrapped package which was in the shopping bag; however, he agreed to allow an FBI agent to do so. Heroin was found in the package.

The Fifth Circuit Court of Appeals upheld this airport search on the authority of *United States v. Moreno*, 475 F.2d 44 (5CCA, 1973). The Court recognized that the public danger posed by aircraft piracy has transformed the airport into a critical zone where special Fourth Amendment considerations apply. It then went on to say that the Fourth Amendment intrusion incident to an airport search is not unconstitutional if it is based upon a particularized set of facts which reasonably substantiates the investigating officer's belief that the individual was armed in some fashion, and hence a threat to air security. In the Court's opinion, the facts of the case at bar were sufficient to justify such an intrusion.

The search in this particular case was also upheld on the theory of consent. The Court pointed to the fact that the defendant was adequately warned of his Miranda rights before the shopping bag was in fact searched. It then held that the rule in the Fifth Circuit was that, absent proof of actual coercion or intimidation, a consent constitutes a valid waiver of Fourth Amendment rights if prior to the search Miranda warnings are given. And, the validity of this waiver is not affected by a failure to include in the Miranda warning a specific reference to the Fourth Amendment.

3. *United States v. Davis*, 482 F.2d 893 (9CCA, 1973). Defendant in this case was accused of attempting to board an aircraft while

carrying a concealed weapon in his brief case. The fact pattern on which the charge is based is simple. As defendant approached the loading gate, a T.W.A. employee told him that a routine security check was necessary, reached for his brief case, opened it, and found the gun in question. The gun was seized and the defendant was taken into custody.

In reversing the case the Ninth Circuit Court of Appeals made the following observations:

a. That although the search was conducted by an air carrier employee, the Fourth Amendment nonetheless applied. The Court viewed the search of defendant's brief case as not an isolated event but as part of a nation-wide anti-hijacking program conceived, directed and implemented by federal officials in cooperation with air carriers.

b. That the stop and frisk rationale of *Terry v. Ohio* was inapplicable to the case at bar. The Court emphasized that the justification for a *Terry* frisk is primarily the officer's self-protection; and its predicate is "specific and articulable" facts that would justify a reasonable prudent man in believing a person was about to commit a crime or that he was carrying a weapon.

c. That the search could not be legitimized as a lawful administrative search. The Court recognized the principle that a search conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched. Its constitutionality or lawfulness depends upon its reasonableness which itself is determined by reference to the immediate need for the search. From this the Court concluded that airport screening searches of the persons and immediate possessions of potential passengers for weapons and explosives are reasonable under the Fourth Amendment, provided each respective boarder retains the right to leave rather than submit to the search. In the case at bar, the T.W.A. employee never afforded the defendant the opportunity of opting not to board the aircraft in lieu of search.

4. *State v. Sigerson,* 282 So.2d 649 (Fla. 2d Dist. 1973). In this case the defendant was to board an aircraft at Tampa International Airport when, while checking into the airport, he apparently fell within the criteria of a "sky-jacker profile" as developed by the Federal Aviation Administration. He and his carry-on baggage were sent through

a magnetometer. This device however was not activated. Nonetheless his person was searched, and he was found to be in control of more than five grams of marijuana.

The appellate court found the search to be legally infirm. The defendant was never advised that he had the right of refusing to be searched provided he did not board the aircraft; there was not one shred of evidence in the record to establish probable cause for the search and seizure.

AIRPORT DEVELOPMENT

The Ninety-Third Congress amended the Airport and Airway Development Act of 1970 by passing the Airport Development Acceleration Act in 1973, Pub. L. 93-44, 87 Stat. 89. This new legislation expands the definition of "airport development" under the Airport and Airway Development Act of 1970 to include any work relating to public airports, airport passenger terminal buildings, airport hazards, navigational aids, safety equipment, and any acquisition of land or navigation easement necessary to accomplish the aforementioned work. The statute also authorizes the Secretary of Transportation to make grants for airport development totaling $375 million for the fiscal years 1974 and 1975. Proscribed by the new law is state taxation on any person traveling in air transportation, on the carriage of said persons, and on the gross receipts derived therefrom.

PENDING LEGISLATION

Presently before the United States Congress are two bills, S. 39 and H.R. 8277, both of which are entitled Anti-Hijacking Act, and both of which are substantially the same in content. If either bill is enacted into law, an aircraft pirate would be deemed a universal criminal for purposes of prosecution in the United States, as is presently a high-seas pirate. The proposed legislation provides that whoever, while aboard an aircraft in flight outside the special aircraft jurisdiction of the United States, commits a crime and is afterward found in the United States shall be punished either by death or by imprisonment for not less than twenty years.

The proposed legislation further provides that whenever the President of the United States determines that a foreign nation is acting in a manner inconsistent with the Convention for the Suppression of Un-

lawful Seizure of Aircraft, or is used as a base of operations for terrorist groups, he may, without notice and for as long as he deems necessary, suspend the right of air transportation to and from that foreign nation. He may also suspend the right of any foreign air carrier to engage in foreign air transportation between the United States and any foreign state maintaining air service between this country and the foreign nation in question.

EXTRADITION

The United States has recently entered into two extradition treaties, one with Paraguay, the other with Uruguay. In each treaty aircraft piracy is an extraditable offense.

FUEL SHORTAGE IMPACT

In October, 1973, the major oil companies in the United States apprised the air transportation industry that a 15% cut-back in the delivery of jet fuel to the industry would take effect immediately. To meet this crisis, a mandatory fuel allocation program was instituted by the Civil Aeronautics Board on November 1, 1973. As of that date, the airlines were limited to a level of jet fuel consumption equal to the purchases of the previous year. In addition, American, United, and Trans World airlines were permitted by the Board to reduce their competitive flights on a pro-rated basis on 15 routes and substitute small planes for their jumbo jets on five other routes.

On November 5, 1973, the President announced that United States airlines would have to cut flights by 10% in order to meet the present fuel crisis. Two days later Pan American World Airways filed a petition with the Civil Aeronautics Board calling for emergency action to deal with the fuel shortages. Specifically, that airline requested that the C.A.B. approve talks by Pan American and all other United States and foreign airlines so that there could be negotiated among them schedule adjustments, capacity limitations, and other cooperative arrangements in international routes. The most controversial feature of Pan American's proposal was its request for federal sanctioning of "pooling" arrangements, i.e., agreements wherein rival airlines flying the same route coordinate flight frequencies and share profits. Such "pooling" arrangements are presently used widely by foreign airlines.

On November 10, the C.A.B., in response to Pan American's petition, granted the airline industry — both foreign and domestic — permission to negotiate agreements to meet the problems posed by the energy crisis. It rejected, however, the suggestion by Pan American for permission of the airline industry to negotiate "pooling" agreements. The anti-competitive nature of such arrangements was the basis for the rejection.

Approximately a month later, on December 5, the Chairman of the C.A.B. referred to the airlines' fuel saving agreements at a speech delivered in Dallas, Texas. Specifically, he stated that he "had put a priority on the development of a system for controlling cutbacks which is clearly and demonstrably a fair one." Obviously alluding to the willingness of the Board to control scheduling, the Chairman stated that "the Board considers such authority essential if it is fairly and rationally to meet the extraordinary challenge posed by the need to amputate one fourth of the body of American air service in less than ninety days."

In expressing the above views, the Chairman was speaking in support of legislation now before the Congress which would give the C.A.B. new authority to dictate scheduling changes mandated by fuel shortages. This particular provision is part of emergency energy legislation passed by the Senate and pending in the House.

The airline industry opposes the projected move on the grounds that it would remove from management a basic prerogative — to determine the frequency of schedules on assigned routes.

SAFETY

On November 29, 1973, the National Transportation Safety Board called on the Federal Aviation Administration to alert all airlines to "unsafe conditions," including possible improper loading of dangerous chemicals which might have led to the crash of a cargo jet at Boston early in November.

The aircraft in question was about 100 miles northeast of Montreal on a flight from New York to Scotland when smoke penetrating the cockpit forced the crew to turn back. While making an apparent normal approach to Logan Airport the aircraft behaved erratically approximately twelve miles out and crashed at the runway threshold. The three-man crew perished in the crash.

The Safety Board's message to the FAA Administrator said:

"In our continuing investigation we have identified unsafe conditions that should be brought to the immediate attention of all air carriers involved in the transportation of hazardous materials.

A portion of the cargo was chemicals classified as dangerous articles under the regulations. Included was nitric acid in five one-pint plastic-capped glass bottles packaged inside wooden boxes cushioned with combustible material similar to sawdust.

The outer package, the Board continued, did not carry the specification marking "this side up" or "this end up" although two arrows were stencilled on all four sides suggesting how the package was to have been oriented.

An extremely hazardous condition could be caused accidentally by a bottle cap that was insecure and an outer package that was not properly oriented because of inadequate markings and warnings, or because of improper handling or storage. If a fire were to break out, the chemical reaction would be extremely difficult to control particularly in flight.

Preliminary indications, the Board added, are that on the accident aircraft, some of the packages containing hazardous materials may have been placed on their sides."

The Safety Board scheduled a public hearing for late January, 1974. Investigators were reported not only tracing the origin of the apparent fire but also considering whether turbulence from a jumbo jet that had landed shortly before might have contributed to the accident.

LATIN AMERICAN AIR CARGO CORPORATION

At a meeting in Rio de Janeiro, the heads of five independent air cargo companies in Brazil, Mexico, Venezuela, Peru and Argentina, confirmed the formation of the Latin-American Air Cargo Corporation — LACCO. The function of this new corporation is to increase air cargo traffic between Western Hemisphere countries through an integrated system to receive and forward consolidated cargo.

CANADIAN AIRPORT TAX

On January 1, 1974, or when administrative details are completed thereafter, a tax on passengers boarding aircraft in Canada will become

effective. In announcing the tax, the Transport Minister stated that the tax is applicable each time a passenger embarks on a plane, even on a stopover. The tax amounting to $2.80 is not applicable to transit passengers who remain in the aircraft during a stopover.

ICAO

Two concurrent ICAO meetings were held in Rome from August 28 to September 21, 1973 (5 *Law. Am.* 653, 1973). Measures considered were the amendment of the Chicago Convention (1944), and new conventions and protocols supplementing the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970) and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971). Regretfully, neither meeting was able to reach agreement on any of the substantive proposals presented. At its final meeting, the Assembly adopted the following resolution:

> THE ASSEMBLY,
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> MINDFUL that the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security;
>
> CONSCIOUS of the mandate bestowed on the International Civil Aviation Organization to ensure the sale and orderly development of international civil aviation;
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> MINDFUL of the Resolution A17-1 adopted at its 17th Session (Extraordinary) condemning acts of violence directed against international civil air transport;
>
> CONDEMNS all acts of unlawful interference with civil aviation and any failure by a contracting State to fulfill its obligations to return an aircraft which is being illegally detained or to extradite or submit to prosecuting authorities the case of any person accused of an act of unlawful interference with civil aviation;
>
> APPEALS to all States which have not already become parties to the Tokyo, Hague and Montreal Conventions to give urgent consideration to the possibility of so doing;
>
> REAFFIRMS the important role of the International Civil Aviation Organization to facilitate the resolution of questions which may arise

between contracting States in relation to matters affecting the safe and orderly operation of civil aviation throughout the world.

On 30 August, the Assembly adopted the following Resolution which condemned Israel for its recent violation of Lebanon's sovereignty, for its forcible diversion and seizure of a Lebanese civil aircraft and for its violation of the Chicago Convention:

THE ASSEMBLY,

HAVING CONSIDERED the item concerning the forcible diversion and seizure by Israeli military aircraft on 10 August 1973 of a Lebanese civil aircraft chartered by Iraqi Airways;

CONSIDERING that Israel, by this action, violated Lebanese airspace, jeopardized air traffic at Beirut civil airport and committed a serious act of unlawful interference with international civil aviation;

NOTING that the United Nations Security Council, by its Resolution 337 (1973) adopted on 15 August 1973, has condemned Israel for violating Lebanon's sovereignty and for the forcible diversion and seizure of a Lebanese civil aircraft and has called on ICAO to take due account of the above-mentioned Resolution when considering adequate measures to safeguard international civil aviation;

NOTING that the ICAO Council, on 20 August 1973, condemned Israel for its action;

RECALLING that the United Nations Security Council in its Resolution 262 in 1968 condemned Israel for its premeditated action against Beirut Civil Airport which resulted in the destruction of 13 commercial and civil aircraft, and recalling that the Assembly of ICAO in its Resolution A19-1 condemned the Israeli action which resulted in the loss of 108 innocent lives and that the Council, by its Resolution of 4 June 1973, strongly condemned the Israeli action and urged Israel to comply with the aims and objectives of the Chicago Convention;

1) STRONGLY CONDEMNS Israel for violating Lebanon's sovereignty and for the forcible diversion and seizure of a Lebanese civil aircraft and for violating the Chicago Convention;

2) URGENTLY CALLS upon Israel to desist from committing acts of unlawful interference with international civil air

transport and airports and other facilities serving such transport;

3) SOLEMNLY WARNS Israel that if it continues committing such acts the Assembly will take further measures against Israel to protect international civil aviation.

The Assembly was attended by delegates from 101 Member States and by observers from eight international organizations, including the United Nations.