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UNITED STATES v. MARKHAM:

THE ATTACK ON THE DRUG WAR BECOMES AN ATTACK ON THE FOURTH AMENDMENT

INTRODUCTION

The automobile exception¹ to the fourth amendment² warrant requirement allows police officers to conduct warrantless searches of vehicles under “exigent” circumstances.³ However, over the years, the courts have redefined the automobile exception to allow warrantless searches of vehicles when police could have easily obtained a warrant.⁴ This change has allowed courts to apply the exception to cases other than automobiles stopped in traffic.⁵ One major reason for the change has been an increased effort in fighting the war against drug trafficking.⁶

In *California v. Carney*,⁷ the Supreme Court expanded the exception to include a warrantless search of a stationary motor home parked in a public parking lot.⁸ Because a mobile home can function as both a residence and a vehicle, the Court had to decide whether to apply the stronger protection afforded privacy rights in a home or the lesser protection afforded privacy rights in a motor vehicle.⁹ The application of the automobile exception to a parked motor home was largely an unexplored area at the time *Carney* was decided.¹⁰

In *United States v. Markham*,¹¹ the United States Court of Appeals for the Sixth Circuit expanded the exception even further when it upheld the validity of a warrantless search of a mobile home parked in a private residential driveway.¹² This casenote will review the history behind the fourth amendment’s warrant requirement

¹ This exception to the warrant requirement originated in *Carroll v. United States*, 267 U.S. 132, 162 (1925).

² U.S. CONST. amend. IV: “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.”

³ *Carroll v. United States*, 267 U.S. 132, 151-60 (1925). Exigent circumstances exist when it is not reasonably practicable for police to obtain a search warrant, such as when the search is of a vehicle or vessel that can be quickly taken out of the jurisdiction in which the warrant must be sought. *Id.* at 153.

⁴ Note, *The Need for a Higher Standard of Exigency as a Prerequisite for Warrantless Vehicle Searches*, 71 IOWA L. REV. 1161 (1986).

⁵ *Id.*

⁶ *California v. Carney*, 471 U.S. 386 (1985).

⁷ *Id.* at 386.

⁸ *Id.* See also *Payton v. New York*, 445 U.S. 573, 583-90 (1980).

⁹ See, e.g., *Michigan v. Thomas*, 458 U.S. 259, 261-62 (1982).

¹⁰ Note, *supra* note 4, at 1162.

¹¹ 844 F.2d 366 (6th Cir. 1988).

¹² *Id.* at 369.

and the development of the automobile exception. Next, it will examine the Supreme Court's decision in *Carney* to evaluate the sixth circuit's application of the automobile exception in *Markham*, and the court's ruling that a warrantless search and seizure of a motor home parked in the driveway of a private residence did not violate the constitutional protections guaranteed by the fourth amendment. Finally, the casenote will explore the potential implications for future warrantless searches and seizures of motor homes.

FACTS

On March 17, 1986, an informant tipped the FBI that Markham was expecting a large marijuana delivery.¹³ Allegedly, Markham planned to distribute the drugs.¹⁴ The informant stated that a pick-up truck would deliver the marijuana to Markham's Winnebago, which would be parked at a residence on Fairview Avenue in Barberton, Ohio.¹⁵ The informant also supplied the license number of the motor home which was registered to Markham.¹⁶

At 1:00 a.m. on March 18, the FBI and the Summit County Sheriff parked near the Fairview Avenue residence.¹⁷ They had an unobstructed view of the home.¹⁸ The officials observed a pick-up truck enter the driveway and drive to the parked Winnebago.¹⁹ Another pick-up truck was already parked beside the motor home.²⁰ The Winnebago's internal lights turned on as the truck approached.²¹ The officers noted shadowy figures moving between the vehicles.²²

The pick-up truck left the premises shortly after arriving, carrying large green garbage bags on its bed.²³ The second truck followed.²⁴ There were three persons inside the second truck, and an FBI agent identified one of them as Markham.²⁵

The agents drove down the driveway to the Winnebago.²⁶ They noted that the Winnebago's license number matched the vehicle registered to Markham.²⁷ They also noticed a strong marijuana smell.²⁸ The agents looked through the vehicle's

¹³ *Id.* at 366.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 367.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

windshield and saw many filled green garbage bags.²⁹ The motor home was locked and no one was in or around it.³⁰ One agent crawled in through a window and unlocked the door.³¹ The other agents entered and conducted a warrantless search.³² The agents seized several hundred pounds of marijuana.³³

The government charged Markham with conspiracy to distribute marijuana,³⁴ and distribution of marijuana.³⁵ Prior to trial, Markham filed a motion to suppress the evidence of seized marijuana,³⁶ arguing it was improperly obtained as a result of the warrantless search.³⁷ The District Court of the Northern District of Ohio denied the motion.³⁸ Relying on *Carney*,³⁹ the court held that a warrantless search of a motor home is not a fourth amendment violation if the motor home is being used primarily for transportation purposes and not residential purposes.⁴⁰

The court convicted Markham on both counts.⁴¹ Markham appealed, arguing that the warrantless search violated his fourth amendment privacy rights.⁴² He conceded that under the *Carney* holding his motor home was subject to the automobile exception to the warrant requirement.⁴³ However, he argued that the exception did not apply because there were no exigent circumstances relating to the mobility of the vehicle.⁴⁴ Therefore, the agents had opportunity to obtain a search warrant while the vehicle was unattended and under surveillance, and a warrant should have been required.⁴⁵

Markham admitted that the agents had probable cause to believe contraband was concealed in his motor home.⁴⁶ He also conceded he had no ownership interest

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 367. Pursuant to the provisions of 21 U.S.C. § 841(a)(1) (1983): “Unlawful Acts: Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”

³⁵ *Markham*, 844 F. 2d at 367. Pursuant to the provisions of 21 U.S.C. § 846 (1983): “Attempt and Conspiracy: Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

³⁶ *Id.* FED. R. CRIM. P. 41(e), which provides that a person aggrieved by an unlawful search and seizure may move the district court to suppress the evidence.

³⁷ *Markham*, 844 F. 2d at 367.

³⁸ *Id.*

³⁹ *Carney*, 471 U.S. at 386.

⁴⁰ *Markham*, 844 F.2d at 367.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 368.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 367.

in the Fairview Avenue residence and therefore could not challenge the agents' actions in entering the private driveway.⁴⁷ The sixth circuit only needed to determine whether, given probable cause, a warrantless search of an unattended motor home parked in a private driveway violated the fourth amendment warrant requirement.⁴⁸ The court noted that the motor home was on wheels, bore out of state license plates, and had no utility lines connected to it.⁴⁹ Additionally, although the defendant was a Tennessee resident, the vehicle was parked in a driveway connected to a public street in Barberton, Ohio.⁵⁰ The court concluded that the motor home was so situated that an objective observer would conclude it was being used as a vehicle and not as a residence.⁵¹ In accordance with *Carney*, the motor home fell under the automobile exception to the fourth amendment warrant requirement, and therefore the search was lawful.⁵²

BACKGROUND

The Fourth Amendment

The fourth amendment to the Constitution guarantees each person's right to be free from unreasonable searches and seizures.⁵³ This right is preserved by requiring that police officers conduct searches pursuant to a warrant issued by an independent officer of the court.⁵⁴ The United States Supreme Court has held that the fourth amendment does not denounce all searches and seizures, but only those that are unreasonable, and has established exceptions to the general rule requiring a warrant.⁵⁵

The Automobile Exception

In 1925, the Supreme Court established what is commonly known as the "automobile exception" to the fourth amendment warrant requirement.⁵⁶ In upholding the warrantless search and seizure of an automobile, the Court rested this exception on the long-recognized distinction between vehicles and stationary structures.⁵⁷

⁴⁷ *Id.* The present case differs from *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where the vehicle was parked on the defendant's driveway and the seizure required an entry upon private property.

⁴⁸ *Id.*

⁴⁹ *Id.* at 369.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* United States District Court Judge Higgins for the Middle District of Tennessee, sitting by designation, delivered the opinion of the court, in which Judges Wilford and Guy joined.

⁵³ See *supra* note 2.

⁵⁴ *Carney*, 471 U.S. at 386.

⁵⁵ *Carroll*, 267 U.S. at 147.

⁵⁶ *Id.* at 132.

⁵⁷ *Id.* at 153.

The Supreme Court ruled that:

[T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The fourth amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.⁵⁸

The Court recognized that an individual's privacy interests in both a residence and an automobile were constitutionally protected, however, the ready mobility of an automobile justified a lesser degree of protection of those interests.⁵⁹

The guaranty of freedom from unreasonable searches and seizures by the fourth amendment has been construed, practically since the beginning of Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.⁶⁰

However, the Court stressed that "in cases where the securing of a warrant is reasonably practicable, it must be used."⁶¹

Even in cases where an automobile was not immediately mobile, the Court relied on the lesser expectation of privacy consideration to justify application of the automobile exception.⁶² The Court has ruled that these reduced expectations of privacy are justified for two reasons.⁶³ First, a car has little capacity for escaping public scrutiny because it travels on public streets where the car's occupants and

⁵⁸ *Id.* at 149.

⁵⁹ *Id.* at 146.

⁶⁰ *Id.* at 153.

⁶¹ *Id.* at 156. See also 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 509, 511 (1978). Professor LaFave believes that the *Carroll* Court would have invalidated the search if the police had had a reasonable chance to obtain a warrant.

⁶² *South Dakota v. Opperman*, 428 U.S. 364 (1976). The defendant's automobile was impounded for multiple parking violations and police inventoried the car, pursuant to standard procedure. They discovered marijuana in the glove compartment and subsequently arrested the defendant for possession. The court ruled that even though the automobile was not readily mobile, the search was valid because the glove compartment of a standard automobile was relatively open to plain view and therefore had limited privacy.

⁶³ *Id.* at 367.

contents are in plain view.⁶⁴ Second, the public is fully aware that it is accorded less privacy in its automobiles because of the compelling government interest in vehicle regulation.⁶⁵ The Court's refusal to require a warrant when a car is not readily mobile has severely emasculated the exigent circumstances requirement seemingly intrinsic to the *Carroll* decision.⁶⁶

The Carney Rule

In 1985, the Supreme Court⁶⁷ upheld the validity of a warrantless search of a stationary motor home which was capable of immediate mobility and located in a public place.⁶⁸ The Court held that the automobile exception is based on two primary considerations: (1) the ready mobility of motor vehicles, and (2) the reduced expectations of privacy in motor vehicles.⁶⁹ The problem that the Court faced was that *Carney's* motor home displayed characteristics of both a home and an automobile.⁷⁰ Therefore, the Court was forced to choose between protecting a person's interest in keeping his home private (which generally forbids warrantless searches),⁷¹ and the government's interest in enforcing the law (which supports warrantless searches under the automobile exception).⁷²

By definition, a motor home meets the mobility criteria necessary for it to fall under the automobile exception. A motor home is a vehicle subject to the extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.⁷³ To distinguish between a motor home and an automobile for purposes of the automobile exception, a court must apply the exception based on the size of the vehicle and its particular characteristics.⁷⁴ Failure to apply the exception to vehicles such as motor homes contravenes public policy because it ignores the fact that a motor home can easily be used to transport illegal drugs.⁷⁵

⁶⁴ *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

⁶⁵ *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

⁶⁶ See generally Gardner, *Searchs and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-Ross World*, 62 NEB. L. REV. 1, 9 (1983) (urgent circumstances allowing warrantless searches cease once the vehicle is stopped); see also, Note, *The Automobile Exception: A Contradiction in Fourth Amendment Principles*, 17 SAN DIEGO L. REV. 933, 940 (1980).

⁶⁷ *Carney*, 471 U.S. at 395. Chief Justice Burger delivered the opinion for the majority in which Justices White, Blackmun, Powell, Rehnquist and O'Connor joined. Justice Stevens filed a dissenting opinion in which Justices Brennan and Marshall joined.

⁶⁸ *Id.* The motor home was parked in a public parking lot in downtown San Diego.

⁶⁹ *Id.* at 393.

⁷⁰ *Id.*

⁷¹ See generally *Payton v. New York*, 445 U.S. 573 (1980).

⁷² See generally *United States v. Ross*, 456 U.S. 798 (1982).

⁷³ *Cady*, 413 U.S. at 441.

⁷⁴ *Carney*, 471 U.S. at 393.

⁷⁵ *Id.* at 393-94.

ANALYSIS

Although a motor home is subject to the same vehicle regulations as an automobile, it does not necessarily follow that the pervasive schemes of regulation lead to reduced expectations of privacy in motor homes.⁷⁶ Common usage and construction of motor homes provide owners a more substantial and legitimate expectation of privacy⁷⁷ than do automobiles. When a motor home is stationary in a location removed from the highway, the expectations of privacy within it are not unlike the expectations one has in a residence.⁷⁸ Indeed, a motor home definitely does not meet the Court's criteria set forth in *Cardwell v. Lewis*, where the expectation of privacy was reduced because the passengers and contents were plainly visible to the public.⁷⁹ A motor home is functionally equivalent to a cabin, hotel room, or vacation home.⁸⁰ Therefore, it should be accorded the same privacy expectations associated with these types of temporary residences.⁸¹ The general rule that "searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances,"⁸² should apply to motor homes.

California v. Carney

In *Carney*, the Supreme Court addressed the question of whether a motor home was a residence or vehicle for purposes of the fourth amendment warrant requirement.⁸³ In *Markham* the sixth circuit relied extensively on the *Carney* decision.⁸⁴

Carney's motor home was parked in a lot in downtown San Diego.⁸⁵ Drug Enforcement Administration agents, who had information that the defendant's motor home was being used to exchange marijuana for sex, kept the vehicle under surveillance.⁸⁶ The agents watched a youth enter the motor home and leave shortly thereafter.⁸⁷ The agents stopped the youth, who confirmed that the information was

⁷⁶ See *Carney*, 471 U.S. at 405 (Stevens, J., dissenting).

⁷⁷ *Id.* at 402 (Stevens, J., dissenting).

⁷⁸ *Id.*

⁷⁹ 417 U.S. at 590. The defendant in *Cardwell* was charged with using his automobile to commit murder. After his arrest, the police towed the automobile to a police impoundment lot, and conducted a warrantless examination of its exterior for evidence of tire and paint marks matching those at the scene of the crime. Because the case was factually different from prior search cases involving automobile interiors, the Court's ruling examined the controlling factors that extended the fourth amendment protection to motor vehicles, concluding that the right to privacy was the touchstone of the inquiry in all automobile search cases.

⁸⁰ *Carney*, 471 U.S. at 407 (Stevens, J., dissenting).

⁸¹ *Id.* at 408 (Stevens, J., dissenting).

⁸² *United States v. Karo*, 468 U.S. 705, 714-715 (1984).

⁸³ *Carney*, 471 U.S. at 386.

⁸⁴ *Markham*, 844 F.2d at 367-69.

⁸⁵ *Carney*, 471 U.S. at 388.

⁸⁶ *Id.*

⁸⁷ *Id.*

accurate.⁸⁸ The agents and the youth returned to the motor home and the youth knocked on the door.⁸⁹ Without a warrant or consent, one agent entered the motor home and observed marijuana.⁹⁰ A subsequent warrantless search revealed more of the drug, and the defendant was charged with possession of marijuana for sale.⁹¹

The defendant moved to suppress the evidence because it was obtained in violation of his fourth amendment constitutional rights.⁹² The California Superior Court denied his motion, and convicted him on a plea of *nolo contendere*.⁹³ The California Court of Appeals affirmed.⁹⁴ However, the California Supreme Court reversed the decision,⁹⁵ holding that the search of a motor home was unreasonable. The court reasoned that the automobile exception did not apply because the expectations of privacy in a motor home were more like those in a dwelling than in an automobile.⁹⁶ Although other exigencies might arise to permit warrantless searches, those associated with the automobile exception were inapposite in cases involving motor homes.⁹⁷

The United States Supreme Court reversed the California Supreme Court, holding that the warrantless search of the defendant's motor home did not violate the fourth amendment.⁹⁸ It reasoned that when a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes, the vehicle exception applies.⁹⁹ The Court stated that the exception had historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicated it was being used for transportation.¹⁰⁰ The Court concluded that applying the vehicle exception in these circumstances served two important purposes.¹⁰¹ First, police officers were not hampered in their efforts to locate and prosecute illicit drug traffickers.¹⁰² Second, the public's legitimate privacy interests remained protected.¹⁰³

In ruling that the motor home fell under the automobile exception, the majority reasoned that an observer could objectively conclude that the vehicle was being used

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 389.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See generally Comment, *California v. Carney: Fashioning a "Motor Home Exception" to the Warrant Rule*, 60 NOTRE DAME L. REV. 216 (1984).

⁹⁸ *Carney*, 471 U.S. at 395.

⁹⁹ *Id.* at 392.

¹⁰⁰ *Id.* at 394.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

as a mode of transportation, rather than as a residence.¹⁰⁴ The Court set forth various factors that could be relevant in making this determination.¹⁰⁵ These factors included the vehicle's location, whether it was readily mobile, licensed, connected to utilities, or had convenient access to a public street.¹⁰⁶ The Court also noted that it was attempting to assist police officers in their efforts to deter illegal activities by not burdening them with the impossible task of determining whether other vehicles contained mobile living quarters,¹⁰⁷ thereby necessitating a warrant.

However, it was not necessary for the Court to resolve every unanswered question regarding when vehicles come under the exception in order to decide *Carney*.¹⁰⁸ Rather, both definition and common usage of the English language suggest that society already distinguishes between "motor homes," "campers," and "automobiles."¹⁰⁹ The external characteristics of these various vehicles should provide trained officers with enough clues to make distinctions between the vehicles' functions, and determine whether a warrant is necessary.¹¹⁰

The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement.¹¹¹

By holding that a stationary motor home falls under the automobile exception, the Supreme Court has accorded priority to the exception, rather than the general rule of the fourth amendment warrant requirement. The Court has effectively erased any privacy interest an individual may have in the motor home unless such vehicle is parked on the vehicle owner's property.¹¹² It has overlooked the very reason underlying the majority of mobile home purchases -- to be able to travel without leaving the comfort and privacy of an individual's own home.

Although the two justifications for the vehicle exception (ready mobility and a diminished expectation of privacy) were intended to be weighed equally, the Court has given more weight to the diminished privacy aspect. This appears to contradict the original intent of the fourth amendment, which is to protect the privacy of citizens from unreasonable searches and seizures.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 394 n.3.

¹⁰⁶ *Id.* Although the factors appear to provide adequate guidance, factual distinctions cannot be drawn between a vehicle that is situated as a residence and one that is not. Any attempt to draw such distinction are likely to result in further confusion. See Note, *supra* note 4, at 1178 n. 171.

¹⁰⁷ See *Carney*, 471 U.S. at 406-07.

¹⁰⁸ *Id.* at 406 (Stevens, J., dissenting).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Coolidge*, 403 U.S. at 481 (1971).

¹¹² See *id.* at 481.

United States v. Markham

Although closely paralleling the Supreme Court's reasoning in *Carney*, the sixth circuit has expanded the automobile exception even further by upholding the search of an unattended motor home in a private driveway.¹¹³ Such expansion allows police officers great latitude in implementing the fourth amendment warrant requirement. The exception effectively abrogates any privacy rights at campgrounds, whether for one night or one season, because the tourist has no real ownership interest in the campsite.¹¹⁴ Again, it contravenes the fourth amendment guarantee of protection against overzealous police officers.

CONCLUSION

A motor home is now deemed to fall under the automobile exception to the fourth amendment warrant requirement. This rule, laid down by the Supreme Court and now expanded by the sixth circuit, has several implications. It diminishes the constitutional protection guaranteed by the fourth amendment; it provides the government with greater latitude in conducting warrantless searches and seizures; and it places every individual's privacy in danger of unreasonable intrusion, in order to increase law enforcement efficiency.

Although it is sometimes necessary to conduct a warrantless search of a motor home suspected of transporting drugs, that necessity is substantially reduced when the vehicle is parked in a place used for residential purposes, such as a private driveway or campground. The right to privacy should be elevated above social policy permitting a warrantless search in cases such as *Markham*. Common use of the English language suggests that society already distinguishes between a "motor home" which is "equipped as a self-contained traveling home," a "camper" which is only equipped for "casual travel and camping," and an "automobile" which is "designed for passenger transportation."¹¹⁵ This indicates that society recognizes that the expectations of privacy within a motor home are not unlike the expectations one has in a fixed dwelling.¹¹⁶ "If the motor home was parked in the exact middle of the intersection, between the general rule and the exception for automobiles, priority should be given to the rule rather than the exception."¹¹⁷

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¹¹³ *Markham*, 844 F.2d at 369.

¹¹⁴ It could be argued that by renting or leasing a site, the tourist has a temporary ownership interest; however, given the Court's propensity to make the automobile exception the norm, it is doubtful whether that argument would be successful.

¹¹⁵ *Carney*, 471 U.S. at 406; see also WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 118, 199, 775 (1983).

¹¹⁶ *Carney*, 471 U.S. at 402.

¹¹⁷ *Id.*