

# ALBUQUERQUE CRIMINAL LAWYER BLOG

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## **Search & Seizure of Visitors on Property Subject to Warrant**

The New Mexico Court of Appeals addressed 4th Amendment search & seizure issues in the case of *State v. Winton*. The defendant was charged with possession of a controlled substance and drug paraphernalia following a warrantless stop, detention and search of the defendant by police officers.

The police had obtained a search warrant for 1822 Hammett Street. Upon arriving at the scene, the police found the defendant at 1824 Hammett Street as he was entering 1822 Hammett Street. The defendant was ordered to the ground where the officer held him for about 5 minutes with the officer's boot on his neck. The defendant was then held on the ground for another 10 minutes after the officer removed his boot from his neck as the officers searched the premises of 1822 Hammett.

After conducting a search of the residence, Officer Hengst exited the residence to find the defendant lying on the ground. The officer handcuffed the defendant. At that time, he allegedly observed a knife in defendant's pocket. The defendant allegedly told the officer that he had another knife in his possession. Upon searching the defendant, the officer found a pipe with meth residue.

The New Mexico Court of Appeals took note that defendant was not on the property that was the subject of the search warrant, that the defendant was not named in the search warrant, and that the text of the warrant did not provide the officers with the authority to search and seize the defendant. The Court further recognized the longstanding precedent that a warrantless search is presumptively unreasonable under the 4th Amendment placing the burden on the State to prove reasonableness.

The Court stated an exception to the warrant rule allowing officers to detain and search those present on the subject property to prevent flight, preserve evidence, minimize risks to officers, and to facilitate the orderly completion of the search. The Court also recognized that a visitor's mere presence at a home subject to a search warrant is insufficient to justify a search of the visitor. Instead, there must be facts present that would render it reasonable under the circumstances to search the visitor. In short, the officer must have a reasonable belief that the visitor has some connection to the premises or the criminal activity. So far, so good for the Defendant?

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Despite the fact that the defendant was not on the subject premises, and therefore not a visitor at all, and the fact that there appeared to be no suspected connection to the property or the suspected crimes therein, the Court found that the search and seizure of the defendant was lawful. The Court found that the search and seizure was lawful because the police had information that the subject of the warrant, not the defendant, was not afraid to shoot someone. Thus, the search and seizure of defendant was necessary for officer safety despite the lack of connection to the property or the crimes under investigation via the warrant or the threat to officer safety expressed in the warrant.

Thus, visitors cannot be searched and seized simply because of their presence on premises subject to a search warrant. However, a visitor can be detained, held down by a boot on his her neck, and subsequently searched if the police can make any suggestion of officer safety issues. This is apparently the case even where the visitor is not on the property, has no connection to the property or the crime, and was not the individual named in the warrant or the individual feared to pose threats to officer safety.

In short, under *State v. Winton*, a visitor or apparently anyone in close proximity to the premises can be searched and seized without any real justification as long as the officer expresses a fear for officer safety, which should not be hard for the imaginative officer. This ruling makes absolutely no sense in light of the authority recognized by the Court. The ruling effectively negates the protection of visitors against unlawful search and seizure set forth in prior New Mexico cases. Hopefully, the case will move on to the New Mexico Supreme Court where, if the 4th Amendment has any meaning In New Mexico, it should be reversed.

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