

February 17, 2011

Attention Mall Shoppers! The 4th Amendment Does Not Apply Here

The Fourth Amendment to the U.S. Constitution provides limits to law enforcement search and seizure procedures in order to protect individuals' privacy. Under the 4th Amendment, unreasonable searches and seizures carried out by law enforcement officials are forbidden. Perhaps most importantly, any evidence gathered in violation of the 4th Amendment is inadmissible in Court.

The 4th Amendment prohibits police officers from entering your house or your workplace, searching your backpacks, purses, or any other private personal item, among other private matters, in the absence of either probable cause or consent to the search.

Unfortunately, the protections of the 4th Amendment do not extend to illegal searches and seizures by non-governmental agents. Essentially, individuals may be subject to unreasonable and otherwise illegal search and seizure at the hands of a host of private actors such as landlords, employers, store employees, private security guards and the like. The New Mexico Supreme Court held as much in *State v. Luis Santiago*.

The lack of protection means that should a later court action be commenced, whether civil or criminal, 4th Amendment rights and remedies do not generally apply. As such, illegal search and seizure may as a basis for excluding the evidence

A not too uncommon example will illustrate the point. Mall security guards can be quite aggressive. On occasion, based upon pure hunch (to be generous), they may choose to search a teenager's backpack. In so doing, contraband such as marijuana or other drugs may be discovered. Mall security may then hold the teenager until police arrive, who coincidentally are often conveniently located nearby.

Even if the security guard lacked probable cause to search the teenager's backpack, the search would not be considered illegal. Moreover, the drugs would be admissible so long as it is not found that the mall security was acting as an arm or under the direction of law enforcement.

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Determining whether or not the mall security was acting under the direction of law enforcement can be challenging at best. Perhaps more problematic are situations where mall security engage in profiling or other constitutionally suspect behavior that gives rise to the search to begin with. Unfortunately, this may be far more common than we would like to believe. This type of conduct gives rise to a whole new set of issues beyond the 4th Amendment.

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