ADDITIONAL THOUGHTS AND RESEARCH FROM THE FESTIVAL LAWYER AND THE #FESTLAW CREW

This area of the law is tricky and murky. I've included two briefs summarizing the relevant case law. Special thanks to the "festlaw crew" (Zachary Plechaty, Donika M. Alexova and Nick Kane) who provided a lot of additional research here.

Feel free to use this research to "check my work" as to what the law is in this area. Also, should you ever have the misfortune of running into legal trouble this legal material is something you can give your attorney to help defend you. I also want to thank the many attorneys who gave me additional "off the record" input. The law of festival entrance searches is a mish mash of Contract law, Property law, Constitutional Law and Criminal Procedure. Hopefully this case law summary can lead everyone to a better understanding of the law in this area.

MUSIC FESTIVAL SEARCHES AND CASE LAW (additional Research By Zachary Plechaty)

> Generally, music concert tickets that say "You consent to a search" intend to make patrons give up rights at the door and/or any time thereafter. For example,
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> "Your use of the ticket is contingent upon your unconditional and voluntary acceptance to be searched…prior to your admission to the venue and/or at any time thereafter." (Electric Zoo)[1]
>
> "You agree that your use of the ticket is contingent upon your knowing, intelligent and voluntary consent to be searched for the presence of illegal or illicit drugs…prior to or during your admission to the venue." (Ultra Music Festival)[2]

Defendants (similarly positioned to Electric Zoo and UMF) have relied upon the consent of the patrons, either expressed or implied, as a justification for their

[1] http://www.madeevent.com/ElectricZoo/wristbandterms.php
[2] http://ultratix.ticketfreak.com/Policy.aspx?type=4

policy. Therefore, the issue is whether patrons consent to a search via the “terms of use” of the ticket.

First, some factors the courts have considered in determining the issue of implied consent include: (1) whether the defendant was aware that his conduct would subject him to a search, (2) whether the search was supported by a “vital interest,” (3) whether the searching officer had apparent authority to search and arrest, (4) whether the defendant was advised of his right to refuse, and (5) whether refusal would result in a deprivation of a benefit or right.

For example, in *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the Supreme Court held that where there is a claim of consent to a warrantless search, the validity of the alleged consent will depend upon the voluntariness with which it is given. The question of voluntariness depends upon the "totality of all [of] the surrounding circumstances." 412 U.S. at 226, 93 S.Ct. [2041] at 2047, 36 L.Ed.2d 854. The courts have identified a number of factors that should be considered in determining whether or not a given search was conducted with the consent of the individual being searched. These include the apparent authority of the searching officer, *Bumper v. North Carolina,* 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); the presence of a substantial number of law enforcement officers, *United States v. Hearn,* 496 F.2d 236 (6th Cir. 1974); the nature of police questions, the subjective state of the individual, and the environment in which the search was conducted, *Schneckloth v. Bustamonte, supra*; whether the subject was advised of the constitutional right to refuse, *Davis v. North Carolina,* 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); and whether refusal would result in deprivation of a right or benefit, *United States v. Albarado,* 495 F.2d 799 (2nd Cir. 1974)

In general, for consent to be valid it must be uncoerced. When it is clear that the search will be conducted regardless of the consent of the party searched, there can be no voluntary waiver of the right to be free from unreasonable searches and seizures. *See State v. Kaluna,* 55 Haw. 361, 373-75, 520 P.2d 51, 60-62 (1974). So that even where he is asked directly whether he objects to the search, there must be at least some intimation that his objection would be meaningful or that the search is subject to his consent. *State v. Price,* 55 Haw. 442, 444, 521 P.2d 376, 377 (1974).

In *Nakamoto*, consent given in the belief that one would forfeit her right to attend the concert, if she refused to be searched, is an inherent product of coercion and will not validate an otherwise improper intrusion. *Gaioni v. Folmar,* 460 F. Supp. 10 (M.D.Ala. 1978); *Wheaton v. Hagan,* 435 F. Supp. 1134 (M.D.N.C. 1977). Accordingly, only where the public interest clearly outweighs the privacy interest of the individual may he be required to surrender his Fourth Amendment protection. *See United States v. Skipwith,* 482 F.2d 1272 (5th Cir.1973) (airport search); *Downing v. Kunzig,* 454 F.2d 1230 (6th Cir.1972) (courthouse search). These two narrowly defined exceptions to the rule are distinguishable from entertainment performances such as music festivals.

First, airport and courtroom searches have received judicial pass essentially because of the magnitude and pervasiveness of the danger to the public safety. The overriding concern in these areas has been the threat of death or serious bodily injury to members of the public posed by the introduction of inherently lethal weapons or bombs. Constitutional provisions, obviously, were never intended to restrict government from adopting reasonable measures to protect its citizenry. But the courts have always been careful to point out that the interference to which an individual's liberty and privacy are exposed must be limited to the very minimum necessary to accomplish the governmental objective.

For example, in *Downing,* where direct and immediate threat of violence and property destruction was found to justify the government's search policy, it was emphasized that the only interference with access to the courthouse was a brief stop and a cursory examination of packages or briefcases to determine the possible existence of articles having a potential for death or destruction. And in the airport context, the usual method of inspection has been the utilization of magnetometers, a procedure which minimizes citizen inconvenience, resentment, and embarrassment and which appears to have had much success in preventing the passage of prohibited weapons. *United States v. Skipwith, supra,* 482 F.2d at 1275-76. In contrast, by analogy, it cannot be seriously argued that the threat to public safety at entertainment performances such as music festivals is as grave as those that justified suspending the warrant requirement in airport and courthouse searches.

Therefore, in some cases, searches and seizures conducted near the entry gates at music festivals are unlawful. The Fourth Amendment to the United States

Constitution prohibits "unreasonable searches and seizures…" Implicit in that guarantee is the requirement that an agent of the government perform those searches and seizures. The test for determining whether private individuals are agents of the government is whether, in consideration of the circumstances, the individuals acted as instruments of the state. To determine whether a private individual acts as an instrument of the state, courts look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual intended to assist the police or further his own ends. This standard also applies to the actions of off-duty police officers.

For example, In *Iaccarino*, the court held that officers were instruments of the state when they conducted searches in full uniform, including firearms, and several drove police cruisers to the festival. In that case, the facts showed that the promoter hired the officers to conduct the searches as an "extra-duty" assignment, which was coordinated by the sheriff's office and permitted the use of sheriff's office resources. Although the property owner provided the officers with a written job description of their duties, the sheriff's office had discretion as to where to assign officers and also had complete discretion as to how thorough a search to conduct. The sheriff's office had even placed a paddy wagon in front of the patron entrance in contemplation of the impending arrests. Therefore, although the officers were off-duty, they acted as instruments of the state for purposes of Fourth Amendment analysis.

Case Law stating that consent given in the belief that one would forfeit right to attend the concert or festival is therefore invalid.

SUMMARY OF IMPORTANT CASES ON THIS TOPIC (ADDITIONAL RESEARCH BY Donika Alexova)

***Nakamoto v. Fasi*, 635 P.2d 946 (Haw. 1981)**

> Consent given in the belief that one would forfeit her right to attend the concert, if she refused to be searched, is an inherent product of coercion and will not validate an otherwise improper intrusion.

***Gaioni v. Folmar*, 460 F. Supp. 10 (M.D. Ala. 1978**)

Random warrantless searches of persons attending Charlie Daniels' concert in civic center violate Fourth Amendment; airport search analogy defective because searches were merely to find drugs and alcohol which "present no public danger equivalent to those posed by a bomb or gun."

***State v. Iaccarino*, 767 So. 2d 470 (Fla. Dist. Ct. App. 2000)**

Finding no implied consent where the "failure to acquiesce in a search would result in a deprivation of a patron's right to attend the concert, if not their ticket cost as well.

***Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C 1977)**

The policy instituted and enforced by the defendants of conducting random searches for contraband of pocketbooks and other large parcels in the possession of persons entering the Greensboro Coliseum Complex and of conducting random patdowns of persons with bulges in their clothing who are entering the Greensboro Coliseum Complex is in violation of the Fourth Amendment, as applied to the states through the Fourteenth Amendment.

98 Wash.2d 668 (Jacobsen v. City of Seattle 1983) Patrons searched upon entry to a rock concert. Particularly headnote #3: Rock Concerts DO NOT FALL within the Airport/Courthouse search exception

700 N.W.2d. 702 (State of ND v. Selgen 2005) Young man searched upon entry to a hockey game. Search didn't fall within ANY of the exceptions to warrantless search and specifically NO CONSENT can be implied from ubiquitously posted signage indicated submission to search (Headnote #18).

414 F.Supp. 1357 (Collier v. Miller 1976) [See Headnotes 1, 4, and 12] Patrons to a University Stadium sports event were searched for alcohol, Court found these searches unconstitutional for lack of public necessity and the lack of efficacy of the search to avert the alleged danger. BOTH were outweighed by the substantial intrusion of the searches.

460 F.Supp. 10 (Gaioni v. Folmar 1978): [See Headnotes 2 and 7] Concert patrons did NOT voluntarily consent to search just because of ubiquitous signage, also

purpose of search was to seize drugs and alcohol which court stated CANNOT be compared to bombs or guns in their danger to the public; airport exception did NOT apply!!

ADDITIONAL LAW REVIEW ARTICLES

Link to 2006 Valparaiso Law review article

http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1226&context=vulr

FINAL THOUGHTS -WHY DOES THIS MATTER?

In Jacobson v. City of Seattle (1983) 98 Wash.2d 668 the promoters argued that the searches they conducted at rock concerts were minimal and harmless. To prove this they showed the reviewing court a videotape of the pat searches proving that “most of the attendees accepted the pat down without objection and even in good humor”.

The court’s answer is instructive:

While this may persuade defendants no harm was done and there was no "stigma" or "irreparable injury" in a strictly legal sense, the damage to the understanding of constitutional guaranties of freedom from unreasonable searches on the part of these young persons is incalculable