



ELEVENTH CIRCUIT UPHOLDS WARRANTLESS SEARCH OF PAROLEE'S RESIDENCE

February 2018

For duplication & redistribution of this article, please contact Law Enforcement Risk Management Group by phone at 317-386-8325.
Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

Article Source: http://llrmi.com/articles/legal_update/2018_us_v_sanders.shtml

©2018 [Brian S. Batterton](#), J.D., Legal & Liability Risk Management Institute

On October 5, 2017, the Eleventh Circuit Court of Appeals decided *the United States v. Sanders*, in which serves as an excellent review regarding the search of parolee's residence as well as the legal requirement for protective sweeps. The relevant facts of *Sanders*, taken directly from the district court's ruling in this case, are as follows:

Defendant was paroled in December 2011 and was subject to "standard conditions" of parole. (Tr. at 6). The Government offered into evidence Defendant's Parole Certificate (Hearing Exhibit 1 ["Ex. 1"]) and the back side of the Parole Certificate titled "STANDARD CONDITIONS UNDER WHICH THIS PAROLE IS GRANTED" (Hearing Exhibit 2 ["Ex. 2"]). (Tr. at 6).

Standard Condition Number 2 provides:

2. **Law/Immediate Notification/Searches**: I will not violate the law of any governmental unit. I will immediately notify my parole officer if I am arrested for any offense, including a traffic offense. My parole officer or any other parole officer may, at any time, conduct a warrantless search of my person, papers, and place of residence, automobile, or any other property under my control. (Tr. at 7; Ex. 2). The case notes and the Parole Certificate reflect that Defendant was provided with the Standard Conditions within 24 hours of his release from prison and that Defendant signed "all corresponding paperwork" relating to his parole conditions and instructions. (Hearing Exhibit 3 ["Ex. 3"]; Tr. at 8-10). The case notes and the Parole Certificate reflect that Defendant informed his parole officer that he would be residing with his mother, Lisa Sanders, at 2099 Martin Luther King, Jr. Drive, Apartment B-1, in Atlanta, Georgia. (Tr. at 9, 10; Exs. 1, 3).

Agent Thompson testified that in April 2013, he was working with the Georgia Board of Pardons and Paroles as a criminal investigator assigned to the counter-gang unit of the United States Marshals Fugitive Task Force. (Tr. at 4). At that time, he was assigned to serve an arrest warrant on Defendant based on a parole violation. (*Id.* at 5). The case was assigned to Agent Thompson because the underlying offence was a violent offense

©2018 Article published in the free LLRMI E-Newsletter

Link to article online: http://www.llrmi.com/articles/legal_update/2018_us_v_sanders.shtml
<http://www.llrmi.com> | <http://www.patctech.com>

(aggravated assault) and because Defendant was a member of the Goodfellas gang. (Id.). Agent Thompson testified that in addition to being subject to arrest based on an alleged parole violation, Defendant was also one of the members of the Goodfellas gang that were wanted for questioning in connection with a homicide investigation. (Id. at 11, 13, 22).

Agent Thompson testified that in conducting his investigation, he went to Defendant's mother's home to serve the warrant, but Defendant was not there. Agent Thompson testified that Defendant's mother, Ms. Sanders, "basically said he wasn't living there," he was staying with his girlfriend, who she identified by the nickname "Shay." (Tr. at 19, 27). Agent Thompson also testified that he had been informed that Defendant had contacted his parole officer using a phone number belonging to Meanda Lewis, who he later determined was "Shay." (Id. at 18, 28). During the course of his work on the case, Agent Thompson developed information that Defendant was not staying at the address he had given to his parole officer, but rather was staying with Ms. Lewis at 3804 Martin Luther King, Jr. Drive, in Building 7, Apartment D-7. (Id. at 10, 18, 19).

On the morning of April 25, 2016, Agent Thompson conducted surveillance at Ms. Lewis's apartment complex and observed Defendant exiting Building 7 and walking to a dumpster. (Tr. at 10, 19). The officers confirmed with the building management that Meanda Lewis lived at Apartment D-7. (Id. at 10). That same day, the officers observed Defendant leave from outside Ms. Lewis's apartment in the back seat of a vehicle registered to Ms. Lewis's father. (Id. at 10, 19, 23).

The following day, Agent Thompson and seven or eight other task force members went to Ms. Lewis's apartment to serve the arrest warrant. (Id. at 10-12, 19, 32). When they arrived, the officers knocked and announced their presence as police officers but got no response. (Id. at 11). They continued to knock and announce. (Id.). The officers heard dogs barking, and one of the task force officers could see the dogs through the back-sliding glass doors. (Id. at 19-20). That officer did not report seeing any persons inside the apartment. (Id. at 11, 20). Agent Thompson showed Defendant's picture to a neighbor, who confirmed that Defendant was inside. (Id. at 11, 20-21). The officers then went back and continued to knock and called out Ms. Lewis and Defendant by name. (Id.). Thereafter, the dogs stopped barking and the officer in the back of the apartment reported that he saw the dogs run up the stairs. (Id.).

At that point, Ms. Lewis came to the window and said she was coming down. (Tr. at 11, 21). She then opened the door. Agent Thompson asked if Defendant was inside and told her he had a warrant for his arrest. (Id.). In response, Ms. Lewis stated that she did not want to go to jail. (Id. at 12). Defendant then came down the stairs, and Agent Thompson arrested him without incident. (Id. at 12, 21-22). The dogs did not come downstairs, and the officers learned that the dogs had been put into a room. (Id. at 21).

After arresting Defendant, Agent Thompson asked Ms. Lewis if anyone else was in the apartment, and she said no. (Tr. at 13, 22). Nevertheless, the officers conducted a "protective sweep" of the apartment. Agent Thompson testified that the officers conducted

the protective sweep because he was concerned that other people might be in the apartment. (Id. at 13). He testified that he conducted the protective sweep in part because Defendant was "constantly" in contact with certain other gang members who were suspects in the same homicide about which Defendant was wanted for questioning:

My ten years' experience in doing fugitive and gangs in addition to intelligence we had from social media sites and crime stopper tips that Mr. Sanders was constantly in contact and associating with several of these - several other of these wanted gang members, so we asked Ms. Lewis if there was anybody else inside the residence. She stated no. However, I was not convinced of her answer given my ten plus years of experience that many times people are afraid to tell the truth that there's somebody else in there even though we had arrested Mr. Sanders who was our initial arrestee. So for our safety because the window upstairs where Ms. Lewis came from looked down to where the other officers were and knowing that Mr. Sanders was constantly in contact with these other gang members, we continued to conduct a protective sweep of the downstairs. . . .

[My purpose in going to Ms. Lewis's home that day] was to arrest Mr. Sanders. In my experience of ten years doing fugitives and specifically gang members, usually where we arrest one gang member we will find others, or we find other people hiding because the police are there, and they're usually not even wanted sometimes. So in that we knew Mr. Sanders was very close with these individuals and that we know that they had been spending time, you know, late evenings, early mornings together, basically 24-hours a day that we were told he was with them. When he was not with other gang members, he was with these specific people. One of them, one of them specifically I'm trying to recall his name because he had a nickname, but when we were there and arrested him, hearing movement upstairs probably was the dogs, but at the time we could not confirm that. (Tr. at 13, 23).

Agent Thompson then asked Ms. Lewis to go upstairs with him to secure the dogs, which she did. (Tr. at 13).. Upstairs, there were two bedrooms. One was empty, and the other room contained a large "bed of bedding" which Agent Thompson described as approximately five or six comforters positioned directly on the floor (not on a bed frame or platform) with another five or six comforters or sheets in a ball. (Id. at 14, 24, 25). That room looked "lived in" with male and female clothing items. (Id. at 14) Agent Thompson testified that someone could hide in the "bed of bedding." (Id. at 14, 25). Task force agent Monet then used his foot to move the bedding "to ensure that there was no one under there" and discovered a firearm. (Id. at 14, 25). Agent Thompson asked Ms. Lewis if the gun was hers, and she said no. (Id. at 14). Among the items found in the room was a "Viking Life" sweatshirt, which is a music entertainment group associated with the Goodfellas gang, and Defendant's cell phone. (Id. at 14-15, 25-26).

After his arrest, Defendant was taken outside the apartment. (Tr. at 22, 26). At some point Defendant was placed in an Atlanta Police car. (Id. at 26). After Defendant learned that the officers had found a gun, Defendant began yelling obscenities and "making statements that he was going to get his girl to take the gun." (Id.).

The Government also called Special Agent Craig Fries, an ATF agent who, at the relevant time, was working as a detective with the Atlanta Police Department and served on the U.S. Marshals Fugitive Task Force. (Tr. at 29-30). Agent Fries was present at Ms. Lewis's apartment during the arrest. Agent Fries testified that Ms. Lewis consented to the search after Defendant was arrested, telling him to "go ahead" in response to his request to check for any additional persons. (Id. at 33). Agent Fries also testified that while Defendant was outside of Ms. Lewis's apartment, Defendant allegedly "made a statement to us saying he claimed possession of the firearm. He said it did not belong to his girlfriend, Ms. Lewis, and he claimed possession of it." (Id. at 35). Defendant also allegedly stated "my fingerprints are on it." (Id. at 36). Agent Fries went on to testify that when Defendant was getting into the transport vehicle, Defendant then stated that the gun belonged to his girlfriend. (Id.). Agent Fries testified that he had not asked Defendant any questions; his job was not to question Defendant, but rather to transport him to the homicide department. (Id. at 36-37).ⁱⁱ

Sanders filed a motion to suppress the gun and alleged (1) that the search of the residence violated the Fourth Amendment and (2) that his statements were involuntary. The district court denied the motion and held that there were three reasons to support the warrantless search: (1) the fact that he was a parolee, (2) the protective sweep doctrine, and (3) consent from Ms. Lewis. He was subsequently indicted under federal law for being a convicted felon in possession of a firearm. Sanders appealed the denial of his motion to suppress to the Eleventh Circuit Court of Appeals. [Note: This article will not discuss the double jeopardy challenge that was also denied.]

On appeal, Sanders argued that the parole search exception to the warrant requirement did not apply, the protective sweep was not valid, and the consent was not valid consent. He also argued that the statements should be suppressed as fruit of the poisonous tree because of the firearm discovered in violation of his rights under the Fourth Amendment.

The first issue before the court was whether the warrantless search of Sander's residence violated the Fourth Amendment. The court of appeals set out to examine the three reasons that the district court used to uphold the warrantless search, particularly, (1) Sander's status as a parolee, (2) the protective sweep doctrine, and (3) consent from Ms. Lewis.

First, regarding Sanders' status as a parolee, the court of appeals stated

In Samson, the Supreme Court held that the suspicionless search of a California parolee did not violate the Fourth Amendment. Samson, 547 U.S. at 857. The Court noted that parolees are generally subject to significant parole conditions, and the reach of these conditions demonstrates that parolees "have severely diminished expectations of privacy by virtue of their status alone." Id. at 852. **The Court further noted that California law required parolees to consent to suspicionless searches, and this search condition was "clearly expressed" to the defendant. Id. Thus, the Court determined that the defendant did not have a legitimate expectation of privacy. Id. In contrast, the Court reasoned that the state had substantial interests warranting the privacy intrusion, including combating recidivism and promoting reintegration into society. Id. at 853.ⁱⁱⁱ [emphasis added]**

Thus, the court noted that, based on precedent from the Supreme Court, parolees have a “severely diminished expectation of privacy”, and the government has a “substantial interest” in monitoring parolees to prevent recidivism. Importantly, the decision of the Supreme Court, in *Samson*, was based on the fact that California had a statute that required parolees to consent to suspicionless searches. However, in *Sanders*, the defendant had a similar search condition of which he was aware in the terms and conditions of his parole. As such, the court of appeals agreed with the district court that this was sufficient to justify the warrantless search of the residence in which Sanders was apparently residing, based upon his clothing and belongings at the residence.

Second, the court of appeals examined the protective sweep doctrine as a reason for the warrantless search. The court stated

[O]fficers may conduct a warrantless "protective sweep" of a house while arresting a suspect inside. *Maryland v. Buie*, 494 U.S. 325, 331-35, 110 S. Ct. 1093 (1990). A "protective sweep" is defined as "a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others." *Id.* at 327. These sweeps are confined to a "cursory visual inspection" of places in which a person might be hiding. *Id.* Officers may search closets and spaces immediately adjoining the place of arrest without probable cause or reasonable suspicion. *Id.* at 334. However, to search areas beyond the immediate vicinity of the place of arrest, officers must have articulable facts that, taken together, would warrant a reasonably prudent officer's belief that the area to be swept harbors a person posing a threat. *Id.* In the course of a lawful protective sweep, officers are "free to seize any evidence they discovered in plain view within the proper scope of the protective sweep." *United States v. Tobin*, 923 F.2d 1506, 1513 (11th Cir. 1991) (en banc).^{iv} [emphasis added]

Thus, in summary, when officers arrest a person in a residence, the officers, as a matter of routine, may conduct a “cursory visual inspection of places in which a person may be hiding”; *however, during this limited search, officers can only look in immediately adjoining spaces to the place of arrest. Officers may expand that search to the entire residence only when they have “articulable facts” that, in the totality of the circumstances, would lead a reasonable officer to believe that the remainder of the residence “harbors a person posing a threat.”* While conducting a lawful protective sweep (based on the conditions stated), officers may seize any evidence they discover in plain view within the lawful scope of the protective sweep. Importantly, since the purpose of a protective sweep is to discover people that pose a threat, officers must limit the places they search to places that could conceal a person (no jewelry boxes, pill bottles, book bags, etc...).

The court of appeals noted that the district court held, based on facts and testimony from the arresting agent, that based on his 10 years of training and experience, gang members stay in close proximity to one another. Further, the agent testified that they had received information that Sanders was basically with other gang members 24 hours a day. Additionally, the agent testified that they heard movement upstairs, and while it could have been the dogs that they saw, they could not confirm that without the protective sweep. Therefore, the court of appeals held that the district court’s ruling was supported by evidence, and the protective sweep was justified under the Fourth Amendment.

Sanders also argued that the agents exceeded the permissible scope of the protective sweep when they looked under the pile of bedding. The agents described the pile of bedding as large enough to conceal a person, which is why they moved it. The district court credited their testimony. Thus, that is a sufficient reason to move the bedding, as during a protective sweep the scope is limited to places that could conceal a person. Therefore, the court of appeals held that this did not violate the Fourth Amendment.

Third, the court considered the consent obtained from Ms. Lewis, the person to whom the apartment was leased. The court stated

[L]aw enforcement officers may nonetheless search a person's property without a warrant so long as they first obtain the voluntary consent of the person in question. United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989). When conducting a search pursuant to validly given consent, **the scope of the search is limited to the terms of its authorization.** United States v. Rackley, 742 F.2d 1266, 1270-71 (11th Cir. 1984).^v

The court, based on testimony of the parties, made a factual determination that Ms. Lewis had, in fact, given the agents voluntary consent to search the apartment. Since there was evidence to support the district court's finding of fact, the court of appeals cannot overturn that decision. Therefore, they affirmed this as a valid reason to uphold the search under the Fourth Amendment.

Lastly, since the court of appeals held that there was no Fourth Amendment violation regarding the search of the residence, "fruit of the poisonous tree" argument regarding his statements that stemmed from the alleged illegal search also must fail, therefore, the district court was correct in admitting the statements.

Therefore, the court of appeals affirmed the decision of the district court.

ⁱ No. 17-10596 (11th Cir. Decided October 5, 2017 Unpublished)

ⁱⁱ United States v. Sanders, 1:15-CR-250-LLM-CMS (N.D. Ga. 2016)

ⁱⁱⁱ Sanders, No. 17010596 at 4-5

^{iv} Id. at 5-6

^v Id. at 6