Search Warrants

The police must obtain a valid search warrant unless the search falls within one of the exceptions to the warrant requirement. A warrant is issued only if probable cause exists to believe that seizable evidence will be found on a person or a premises when the warrant is executed. The police must submit an affidavit to a judge in order to obtain a warrant, and the judge must agree that probable cause exists. The warrant must be precise on its face, describing with reasonable precision the place to be searched and the items to be seized. If it does not, it is unconstitutional. Only police may execute a warrant, and it must be done without unreasonable delay. They must knock, announce their purpose, and wait a reasonable time to be allowed in, unless there is reasonable suspicion that announcing would be dangerous, futile or would inhibit the investigation. (Note that violations of the knock and announce rule will *not* result in the suppression of evidence otherwise properly obtained). Upon entering, police may seize any contraband or "fruits or instrumentalities" of crime they discover, regardless of whether the items are listed in the warrant. They may also detain occupants of the premises during the search, but they may *not* search people found at the premises who were not named in the warrant, unless other grounds justifying a search of those people exists. Warrantless searches are unconstitutional unless they fit within exceptions to the warrant requirement.

Consent

The most common exception to the warrant requirement is consent. A warrantless search is valid if police officers receive voluntary and intelligent consent, regardless of whether the person consenting is aware of the right to withhold consent. The scope of the search may be limited by the scope of the consent, but in general, the area permitted to be searched extends to all areas to which a reasonable person under the circumstances would believe the consent extends. Any person with apparent equal right to use or occupy a premises may consent to a search. The test for the voluntariness of consent to search in Oklahoma is the same as that used in federal courts, with voluntariness to be judged from a totality of the circumstances[10]. A person may only consent to the search of an area where he or she has the apparent right to enter, however. Any evidence discovered after consent is given may be used against all other owners or occupants of the premises. In the case of people sharing a home, a co-occupant may not provide valid consent when the other co-occupant is present and objects to the search.

In Oklahoma, officers acting outside their jurisdiction under color of law cannot legally obtain consent to search[11]. An Oklahoma court has also held that consent by a driver of an automobile which he did not own in the presence of the automobile's owner, who was a passenger and known by the officer to be the owner, was invalid, because the person had no authority to consent[12].

Search Incident to Lawful Arrest

A search made subsequent to arrest must not exceed the area within the arrestee's immediate control, from which he or she might reach a weapon or destructible evidence[13]. For example, In Oklahoma, search of a Defendant's coat pockets after arrest for lewdness was held permissible, incident to lawful arrest[14]. Police may also make a protective sweep of the area being searched if they believe accomplices may be present. The search must be at the same time and place as the arrest, and if the arrest is unlawful, any search incident to arrest is also unlawful. Police may also take inventory of an arrestee's belongings at the police station.

[10] State v. Goins, 84 P.3d 767 (Okl.Cr.App. 2004)
[11] U.S.A. v. Sawyer, 92 P.3d 707 (Okl.Cr. App. 2004)
[12] Johnson v. State, 905 P.2d 818 (Okl.Cr.App. 1995)
[13] Castleberry v. State, 678 P.2d 720, 723 (Okl.Cr. 1984)
[14] Hodge v. State ,761 P.2d 492 (Okl.Cr. 1988)

The Automobile Exception

If police have probable cause to believe a vehicle contains "fruits, instrumentalities, or evidence of a crime," without a warrant, they may search the whole vehicle and any container that might reasonably contain the item for which they had probable cause to search. In Oklahoma, for example, a warrantless search was found lawful where an officer had probable cause to arrest a Defendant for armed robbery, the crime had been committed only a few minutes before, and the police had probable cause to believe that fruits of the crime could be found in the automobile the Defendant was driving when stopped by an officer.[15] When looking for drugs, police have fairly broad authority to search because of their ability to be easily hidden. The search may also extend to a passenger's belongings. One may object to an automobile search, but a Defendant may not challenge the search of an automobile he neither owns nor possesses[16].

"Plain View" Exception

The police may make a warrantless seizure when they are legitimately on a premises, discover evidence, fruits or instrumentalities of crime, or contraband, see the evidence in plain view, and have probable cause to believe the item is evidence, contraband, or a fruit or instrumentality of crime. The "plain view" exception can apply to a home, an automobile or even a person, but in order for the exception to apply, an officer must be *legitimately* present, such as in a public area, or while executing a warrant. If legitimately present, anything an officer sees in "plain view" is admissible. So, if an officer is executing a warrant for weapons, opens a drawer where weapons could be, and finds drugs, the drugs are admissible because they were in "plain view" of an officer who was legitimately on the premises and had the right to look inside the drawer. This exception does not give police authority to *enter* a building because they see something incriminating inside, however[17].

"Stop and Frisk" Exception

An officer may stop a person without probable cause for arrest if the officer has "an articulable and reasonable suspicion" of criminal activity. Probable cause is not necessary, because a "stop" is not an "arrest." If the officer then reasonably believes the person may be "armed and presently dangerous," the officer may conduct a protective frisk. This frisk may only occur if the officer reasonably thinks the suspect has a weapon, and the scope of the frisk is generally limited to a patdown of the outer clothing, unless the officer has specific information that a weapon is hidden in a particular area of the suspect's clothing. During a patdown, an officer may reach into a suspect's clothing to seize any item reasonably believed, based on its "plain feel," to be a weapon or contraband. These items are admissible as evidence.

Do Not Talk on the Phone!

Often times people accused of crimes are the people that provide the most damning evidence of their own guilt. Many people that are arrested are aware that they should not make incriminating statements to the police. However, after they are arrested and booked into jail they talk about their case over the telephone to their family and friends. Many people who are arrested talk about their case over the phone despite hearing the warning that the calls are being recorded. Sometimes people who are suspected of being involved in large scale drug operations are the subjects of state or federal wiretaps. My advice to anyone who is accused of a crime or who suspects one day they may be accused of a crime is do not talk over the phone! Numerous times I have represented people accused of crimes and been given recordings of either their jail conversations or wiretapped conversations pre-arrest and it is always bad news for my client!

[15] Williams v. State, 561 P.2d 570 (Okl.Crim.App.1977)
[16] Robson v. State, 611 P.2d 1135 (Okl.Cr.App. 1980)
[17] Fite v. State, 873 P.2d 293 (Okl.Cr.App. 1993)

A LEGAL INFORMATION PAMPHLET

FOR INDIVIDUALS ACCUSED OF A DRUG CHARGE IN THE STATE OF OKLAHOMA

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DISCLAIMER

The information provided in this pamphlet is not intended to be legal advice. The information provided is intended to inform you about basic legal information without applying that information to the specific facts of your case. You are strongly encouraged to seek legal advice from a licensed attorney who can apply his or her training and experience to the specific facts of your case.

Kevin Adams is a criminal defense attorney who handles trial and appellate cases in state and federal courts throughout Oklahoma. Mr. Adams is the past president of the Tulsa Criminal Defense Lawyers Association and served on the Board of Directors of the Oklahoma Criminal Defense Lawyers Association. Mr. Adams is a recipient of the Clarence Darrow Award, an award given annually to a lawyer who has exhibited outstanding defense and advocacy for his clients. Mr. Adams has a Martindale-Hubbell rating of BV. This is an excellent rating and is the maximum rating a lawyer who has been practicing less than ten years can receive. In 2007, Mr. Adams was named an Oklahoma Super Lawyer. Super Lawyers is a listing of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. Only the top 5% of attorneys in the state are named Super Lawyers. Mr. Adams is the youngest Super Lawyer in the state of Oklahoma.

When accused of a drug charge, it is important to know how much time you are facing, whether there are alternatives to incarceration available (including probation or drug court), and whether you have a factual or legal defense to the charges.

Offenses and Punishment Ranges

Drug offenses are generally divided into three categories: (1)simple possession, (2)possession with intent to distribute and (3)trafficking/ manufacturing. The statutes governing drug offenses were designed to punish those who possessed drugs less severely than those who possessed drugs with the intent to distribute them, with those who manufactured and trafficked in drugs receiving the harshest treatment. Years of poorly written laws, bad court decisions and politicians vowing to get "tough on crime," however, have led to conflicting outcomes, sometimes frustrating the original purpose of the statutes.

Simple Possession of a Controlled Dangerous Substance

Title 63 O.S. §2-402 classifies simple possession of a "controlled dangerous substance" ("CDS") as a misdemeanor or felony, depending upon the Defendant's prior criminal history and the type of CDS. To convict someone of simple possession, the state must prove, beyond a reasonable doubt, the Defendant *knowingly* and *intentionally* possessed a CDS. Possession is defined as "Actual physical custody, or knowledge of the substance's presence, as well as power and intent to control its use or disposition."[1]

Misdemeanor Simple Possession

Individuals who unlawfully possess marijuana, a schedule III substance (i,e., codeine), a schedule IV substance (i.e., Valium, Xanax), or a schedule V substance (mixtures containing limited quantities of illegal drugs) are subject to a misdemeanor for the first offense, with a maximum sentence of 1 year in county jail.

Felony Simple Possession

Second and subsequent felony possessions after a previous conviction for possession of marijuana or a schedule III, IV or V substance are classified as felonies, and carry 2 to 10 years in prison, and one who unlawfully possesses a schedule I or II substance can be charged with a felony, even if it is a first offense. Schedule I and II substances include cocaine, cocaine base (crack), heroine, methamphetamine, morphine and methadone.

A felony possession charge for a first time offender (no prior felony convictions) carries a sentence of 2 to 10 years in prison. A second and subsequent conviction carries a sentence of 4 to 20 years in prison. However, if an individual charged with simple possession has been previously convicted of Title 21 (non-drug offense) felonies, the sentence could be enhanced using the habitual offender statute. (Title 21 O.S. §51.1). This means if an individual is charged with felony simple possession and has one previous Title 21 felony conviction, the sentence could be 4 years to life in prison. If the person has two previous felony convictions, the sentence could be 6 years to life in prison. So, under the habitual offender statute, it is possible to be sentenced to life in prison for simple possession.

Possession with Intent to Distribute

To convict for possession of a CDS with the intent to distribute under Title 63 O.S. §2-401, the state must prove beyond a reasonable doubt the Defendant knowingly and intentionally possessed the CDS with intent to distribute it. "Distribute" means "to deliver other than by administering or dispensing a controlled dangerous substance."[2] One will be convicted of possession with intent to distribute if the state proves intent to deliver the drugs to another person, even if not for profit. So, if a Defendant picks up drugs for a friend, and intends on delivering the drugs to that friend, he or she could be charged with possession with intent to distribute.

[1] Miller v. State, 579 P.2d 200 (Okl.Cr. 1978).
[2] 63 O.S. §2-101(12)

Title 63 O.S. §2-401 governs punishment for possession with intent to distribute a CDS. The punishment ranges vary depending upon the type of substance and whether the person has prior convictions. For first time offenders accused of possessing a Schedule I substance that is a Narcotic or LSD, punishment ranges from 5 years to life in prison. For those accused of possessing a Schedule I or Schedule II substance that is not a Narcotic or LSD, punishment ranges from 2 years to life in prison. For those accused of possessing a Schedule V substance with the intent to distribute, punishment ranges from 0 to 5 years in prison.

Second and subsequent convictions for possession with intent to distribute are also subject to punishment under the habitual offender statute, discussed above. This means, where the accused has one prior felony conviction, the minimum sentence is doubled, and the maximum sentence is life imprisonment. For those with two prior felony convictions, the minimum sentence is tripled, and the maximum sentence is life imprisonment. Second and subsequent convictions under the possession with intent to distribute statute also do not qualify for a suspended or deferred sentence, and are not subject to the 85% rule.

Trafficking in Illegal Drugs

Title 63 O.S. §2-415 governs "trafficking in illegal drugs." The state does not have to prove that a Defendant was selling or even intending to sell drugs in order to obtain a conviction for trafficking. They must only prove the Defendant knowingly possessed a specific amount of a CDS - a trafficking quantity.

Trafficking carries severe punishment. A Defendant who has no prior Title 63 convictions and is convicted of trafficking will be required to serve twice the minimum sentence he or she would be required to serve if convicted of possessing with intent to distribute that drug. If the Defendant has just one prior Title 63 conviction and is convicted of trafficking, the sentence is tripled. If a Defendant has two prior Title 63 convictions and is convicted of trafficking in illegal drugs, he or she receives life without the possibility of parole ("LWOP"). Many faced with an LWOP trafficking charge will be offered a plea deal by the state that does not include an LWOP sentence. Those convicted under the trafficking statute are ineligible for good time credits and suspended or deferred sentences. Trafficking is not subject to the 85% rule. Inmates convicted of trafficking *can* be paroled after serving 1/3 of their time (with the exception of those sentenced to life without the possibility of parole). However, if an individual is convicted of trafficking and is not paroled, he or she will likely serve close to 100% of the sentence because such a sentence carries no eligibility for good time credits.

Sentences vary depending upon the type of CDS. For example, in Oklahoma, an individual must possess 28 grams of powder cocaine in order to be considered "trafficking in cocaine," but only 5 grams of cocaine base (otherwise known as "crack") in order to be considered "trafficking in crack cocaine." This difference is known as the "crack disparity." Recently, the United States Sentencing Commission eliminated the powder cocaine/cocaine base disparity, however these sentencing changes have not yet been implemented in Oklahoma.

Factual Defenses

When facing a drug charge, it is important to examine any factual defenses that may be available. These defenses depend upon the type of charge a Defendant is faces.

Proximity vs. Possession Defense

On a charge of possession, certain factual defenses may be available which are unavailable for harsher charges. An example is the proximity defense. It is not sufficient for the state to prove mere proximity of a substance to the Defendant - they must prove that the Defendant had knowledge and control of the drugs before possession can be established.

Constructive possession may be established by "ownership, dominion and control over the contraband."[3] Possession may also be inferred, "…when the contraband is found in a place which is exclusively accessible or used by the accused and subject to his dominion and control."[4] But the "mere proximity to the contraband" or "mere association with a person who has actual or constructive possession of the contraband, is insufficient to support a conviction."[5] There must be, "…additional evidence establishing the accused's knowledge and control."[6] So, a possible defense to possession is the Defendant's lack of knowledge or control over the substance, or that the substance was not found in a place exclusively accessible to the Defendant.

Personal Use Defense

When an individual is charged with possession with the intent to distribute, a defense could be that the person possessed the drugs only for personal use. Factual issues such as the presence or absence of scales, baggies, drug notations and unexplained wealth become significant with this defense.

Generally, unlawful possession of contraband with an intent to distribute may be actual or constructive.[7] While an individual may face a possession charge, it may be possible to avoid the possession with intent to distribute charge, and therefore the harsher penalty, by proving that the drugs were meant for personal use (i.e., simple possession) rather than for distribution.

Evidence of Trafficking

Because trafficking charges are based upon the quantity of drug possessed, a Defendant must possess a "trafficking quantity" in order to be convicted. The specific quantities are found in Title 63 O.S. § 2-415. The term "trafficking" does not create the presumption a Defendant sold or even intended to sell drugs - it merely sets forth guidelines for punishment, and represents a determination by the Legislature that "those who possess [a drug in excess of a specified amount] deserve a stiff punishment."[8] Any factual defense against trafficking must therefore consist of a determination that the amount of controlled substance discovered did not amount to a "trafficking quantity."

Legal Defenses - the Fourth Amendment

Most legal defenses arise when a person's Fourth Amendment Rights to be free from unreasonable searches and seizures are violated. They are dealt with by filing a motion to suppress to exclude any illegally seized evidence. A Defendant's Fourth Amendment Rights can be the most powerful tool a lawyer has in fighting drug charges. In a dissenting opinion, Supreme Court Justice Brennan discussed Fourth Amendment Rights as follows:

> "Fourth Amendment rights ... are not mere second- class rights but belong in the catalog of indispensable freedoms. …. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government....But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside the court." [9]

To conduct a search, the police are required to obtain a warrant. There are some exceptions to the warrant requirement. They include consent, search during a lawful arrest, probable cause that an automobile contains evidence of a crime, evidence in "plain view," and search during a "stop and frisk."

[3] Rudd v. State, 649 P.2d 791 (Okl.Cr. 1982),794 (citing Miller v. State, 579 P.2d 200, 202 (Okl.Cr.App. 1978))
[4] Id
[5] Staples v. State, 528 P.2d 1131 (Okl.Cr.App.1974)
[6] Clarkson v. State, 529 P.2d 542 (Okl.Cr.App.1974)
[7] Miller v. State, *supra.*
[8] Anderson v. State, 905 P.2d 231, 233 (Okl.Cr. 1995) (citing United States v. Maske, 840 F.Supp. 151, 158 (D.D.C.1993))
[9] Illinois v. Gates, 462 U.S. 213, 274-75, 103 S.Ct. 2317, 76 L.Ed.2d 527, 572 (1983) [Brennan, J., dissenting, citing Brinegar v. United States, 338 U.S. 160, 180-181, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)(Jackson, J., dissenting)]