

Recent Case Report

U.S. v. Gandia

(2nd Cir. 2005) 424 F.3d 255

ISSUE

Did officers have grounds to conduct a protective sweep of the defendant's apartment?

FACTS

Three New York City police officers were dispatched to a disturbance involving two men outside an apartment house in the Bronx. The officers were notified that one of the men was armed. When they arrived, they saw two men: one was the building superintendent, Suarez; the other was a tenant, Gandia. Suarez told the officers that Gandia "had displayed a weapon."

The officers detained and pat searched Gandia. He was unarmed. Because Gandia and Suarez were continuing their shouting match, and because it was raining, the officers asked Gandia if they could talk with him inside his apartment. He agreed. One of the officers asked him if there was anyone else in the apartment. He said no.

The door to the apartment opened directly into a small kitchen where Gandia and two of the officers stopped. The third officer, Sgt. Morales, walked over to a doorway that led to the living room and took a position between the two rooms. Sgt. Morales later testified he did this for "safety reasons" because he could see the "whole apartment" from that vantage point and, despite what Gandia had said, he wasn't sure they were alone.

While the other officers were speaking with Gandia, Sgt. Morales was "looking all over the apartment from his position at the doorframe," but he didn't see or hear anything to suggest there might be someone else on the premises. He did, however, see a bullet atop a home entertainment center in the living room. He walked over and picked it up. The officers then asked Gandia for consent to search his apartment (presumably for a gun) but he refused.

By this time, the officers had learned that Gandia was a convicted felon. So, based on the discovery of the bullet and Suarez's statement that Gandia had displayed a weapon, they arrested him for being an ex-con with a gun. They then obtained a warrant to search the apartment and, while executing it, found a gun.

DISCUSSION

Gandia contended the warrant was invalid because it was based largely on the discovery of the bullet which, said Gandia, was unlawful because he had not given the officers consent to enter any room other than the kitchen. The government argued that the sergeant's entry into the living room qualified as a lawful protective sweep. The issue, then, was whether there were grounds for a sweep.

A protective sweep or “walk through” occurs when officers make a quick tour through a home, looking in places where a person might be hiding.¹ Its purpose is to locate people who pose a threat to officers who have entered, usually for the purpose of arresting an occupant.² Accordingly, there are two requirements for conducting protective sweeps:

- (1) **Officers lawfully on premises:** The officers had a legal right to be on the premises.
- (2) **Dangerous person on the premises:** The officers reasonably believed, (a) there was a person inside (other than the arrestee), and (b) that person posed a threat to them.³

As we discuss in the Comment, it was unnecessary for the court to address the first requirement because the second requirement was plainly not met. As the court explained, the sergeant had no reason to believe there was anyone else in the apartment:

The government has pointed to nothing in the record from which a reasonable police officer could have inferred that there was a specific danger of unknown third-parties hiding in Gandia’s apartment. . . . Of course, the police officers were not required to take Gandia at his word when he told them that he lived alone, nor to infer that there was no one else in the apartment when they entered. But they also had no evidence to the contrary that would indicate a third person might be hiding there.

Consequently, the entry into the living room was unlawful, which meant the presence of the bullet could not be considered in determining the existence of probable cause for the warrant. And without the bullet, said the court, there were insufficient grounds for the warrant.

COMMENT

Although the court did not need to decide whether the officers were lawfully on the premises when the sergeant saw the bullet in the living room, it addressed a related issue that could become important. It noted that courts might have trouble upholding a protective sweep whenever the officers’ entry was based on consent. This is because of the possibility that the officers’ real motive in seeking consent was to enter and, once inside, conduct a sweep. As the Fifth Circuit previously observed:

[P]rotective sweeps following a consent entry may in certain circumstances pose Fourth Amendment concerns not present in cases where the initial entry is pursuant to a warrant. For example, concerns might arise respecting a consent to entry requested for a stated common purpose but actually intended not for that purpose but rather for the purpose of gaining access in order to then make a protective sweep of the entire home for unrelated reasons and thus circumvent the warrant requirement.⁴

¹ See *Maryland v. Buie* (1990) 494 U.S. 325, 327.

² See *Maryland v. Buie* (1990) 494 U.S. 325, 333.

³ See *Maryland v. Buie* (1990) 494 U.S. 325, 333; *U.S. v. Jimenez* (1st Cir. 2005) __ F.3d __ [2005 WL 1970292] [“Although *Buie* concerns protective sweeps incident to arrest, this court has extended this doctrine to include protective sweeps in conjunction with the execution of search warrants, and recently to include protective sweeps where the existence of exigent circumstances prompts the entry of police.” Citations omitted.]; *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 769; *Sharrar v. Felsing* (3d Cir. 1997) 128 F.3d 810, 825 [“[T]he possible presence of anyone being [on the premises is] the touchstone of the protective sweep analysis.”].

⁴ *U.S. v. Gould* (5th Cir. en banc, 2004) 364 F.3d 578, 589.

The court indicated that protective sweeps occurring after a consensual entry might also be invalidated if officers had grounds to conduct a sweep when they entered. Under those circumstances, it is possible the officers, by entering despite the danger, deliberately created the exigency upon which they relied for the sweep; i.e., a “do-it-yourself” exigency. As the court in *Gandia* pointed out, “The officers could have avoided the disadvantage of being on [their] adversary’s turf by simply interviewing Gandia elsewhere.” POV