

## “THE FEDERAL CORNER”

### A Non-Routine Border Search Issue

#### Buck Files

Sometimes words don't mean what they should. Consider, for example, the words “border search.” Where would a border search be conducted? At the border. Wrong. If you go to WestLaw's ALLFEDS database and type in the query “international airport” & “border search,” you will see that there have been 337 cases that arose out of border searches conducted at international airports.

Judges of the United States Court of Appeals for the Fifth Circuit have written opinions in 78 of these cases which were concerned with such offenses as those involving child pornography (*United States v. Pickett*, 638 F.2d 765 (5<sup>th</sup> Cir. 2010)); drugs (*United States v. Mejia*, 720 F.2d 1378 (5<sup>th</sup> Cir. 1983)); and, currency violations (*United States v. Berisha*, 925 F.2d 791 (5<sup>th</sup> Cir. 1991)).

On September 29, 2015, United States Court of Appeals for the Second Circuit held that the search and copying of a defendant's notebook by a customs officer at an international airport was justified by reasonable suspicion. *United States v. Levy*, \_\_F.3d\_\_, 2015 WL 5692332 (2d Cir. 2015) [Panel: Circuit Judges Hall, Lohier and Meyer (Opinion by Lohier)].

#### A Brief Synopsis of the Facts

David Levy was a target of a federal investigation into a series of stock manipulation schemes. A year earlier, Levy's wife had been indicted for her participation in these same schemes.

Levy had returned to the Miami International Airport following a business trip to Panama. Levy himself expected to face criminal charges. At the Miami airport, United States Customs and Border Protection (CBP) Officers detained Levy after receiving information about the investigation of Levy from a Drug Enforcement Administration (DEA) task force. They detained Levy and escorted him to a holding area. Without Levy being present, the officers inspected his luggage and found a notebook that contained 18 pages of Levy's handwritten notes. One of the officers examined and photocopied the notebook and then returned all of Levy's items to him. Levy was permitted to leave the airport.

Within 72 hours, Levy was indicted on various fraud counts. Later, Levy was charged in a superseding indictment was returned that charged him with money laundering and other crimes in which the Government claimed Levy was engaged at the time that his notebook was examined and photocopied. All the charges arose from Levy's participation in the stock manipulation schemes.

The following are excerpts from Judge Lohier's opinion:

[An Overview of the Opinion]

*The principal question presented is whether United States Customs officers at an international airport may lawfully and without a warrant examine and photocopy a document that belongs to a traveler entering the United States if the officers have reasonable suspicion on the basis of information supplied from another federal agency that the traveler is engaged in criminal activity unrelated to contraband, customs duties, immigration, or terrorism. We hold that such a search is lawful under the border search doctrine and that the District Court properly denied the defendant's motion to suppress. We therefore affirm. [Emphasis added]*

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[The Pretrial in the District Court]

Before trial, Levy moved to suppress the photocopy of the notebook that the CBP officer had inspected. The District Court denied the motion under the border search doctrine. *As relevant here, the District Court agreed with Levy that the search of the notebook was a “non-routine” border search because “[t]he close reading and photocopying of an entrant's documents goes beyond the general searching one expects at a point of entry” and may “intrude greatly on a person's privacy.”* United States v. Levy, No. 11–cr–62–PAC, 2013 WL 664712, at \*6, \*12 (S.D.N.Y. Feb. 25, 2013). But it held that the search was still justified under the Fourth Amendment because the CBP officers reasonably suspected that Levy was “engaged in a stock fraud conspiracy.” [Emphasis added]

In denying the motion, the District Court also rejected Levy's argument that CBP officers could not search material unless it related to a crime that CBP is authorized by regulation to investigate—that is, a crime relating to contraband or dutiable merchandise. To the contrary, the District Court determined, none of the cases upon which Levy relied in advancing this argument “limit[ed] the crimes for which customs agents may conduct non-routine searches if they have a reasonable suspicion.”

[The Trial in the District Court]

*At trial, the parties stipulated that a photocopy of the notebook could be introduced as evidence. The Government relied on the evidence with some effect. Among other things, it used the names listed in the notebook to tie Levy both to various illegal trades and to certain unindicted co-conspirators who participated in the securities fraud schemes. The Government also referred to the notebook in closing argument, pointing out that Levy's forgery of certain relevant documents could be proven by the handwriting in the notebook. Levy was convicted of all the counts against him and sentenced principally to a term of 108 months' imprisonment. This appeal followed. [Emphasis added]*

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[Routine Searches at the Border]

*When the evidence at issue derives from a border search, we recognize the Federal Government's broad plenary powers to conduct so-called "routine" searches at the border even without "reasonable suspicion that the prospective entrant has committed a crime." Tabbaa v. Chertoff, 509 F.3d 89, 97–98 (2d Cir.2007); see United States v. Montoya de Hernandez, 473 U.S. 531, 538, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant..."). It is well established that the Customs area of an international airport is the functional equivalent of a border for purposes of the border search doctrine. See, e.g., United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006). [Emphasis added]*

[Not Having to Answer the "Routine" Search Issue]

*Had the CBP officer merely skimmed the notebook and returned it to Levy without copying it, we have no doubt that the inspection would have been routine. Cf. United States v. Arnold, 533 F.3d 1003, 1009 (9th Cir.2008) (holding border search of an electronic device permissible even without reasonable suspicion where "CBP officers simply had [the traveler] boot [the laptop] up, and looked at what [he] had inside"). Whether searching and copying the notebook here constitutes a "routine" border search that could be conducted without reasonable suspicion is somewhat more debatable. But for now we avoid resolving that question because the record of the Government's criminal investigation of Levy prior to the inspection of his notebook supports the District Court's ruling that the inspection was justified by reasonable suspicion. [Emphasis added]*

[What is the Level of Suspicion Required?]

The Supreme Court has instructed that "the level of suspicion the [reasonable suspicion] standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." *Navarett v. California*, — U.S. —, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014) (quotation marks omitted). *Reasonable suspicion requires only "a particularized and objective basis for suspecting the particular person stopped of criminal activity."* *Id.* (quotation marks omitted). [Emphasis added]

[The CBP's Officer's Level of Suspicion]

The CBP officer had such a basis in this case. Although Levy disputes this conclusion, a review of the allegations in the initial underlying indictment against Levy (filed within days of the search) and the allegations in the subsequent, superseding indictment confirm that the search was justified by the CBP officer's reasonable suspicion of Levy's ongoing criminal participation in securities fraud schemes. In fact, the level of suspicion was so high that Levy himself was aware of his status as a target of an ongoing federal investigation even prior to arriving at the airport, and his lawyer previously had contacted federal prosecutors about the investigation.

[The CBP Officer Could Rely on Information Provided by the DEA]

We also conclude that the CBP officer was entitled to rely on information provided by the DEA task force to justify the border search in this case. Official interagency collaboration, even (and perhaps especially) at the border, is to be commended, not condemned. Whether a Customs official's reasonable suspicion arises entirely from her own investigation or is prompted by another federal agency is irrelevant to the validity of a border search, which we have held "does not depend on whether it is prompted by a criminal investigative motive." *United States v. Irving*, 452 F.3d 110, 123 (2d Cir.2006)

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[CBP Officers are Permitted to Search and Review Documents & Items]

Levy argues that border searches conducted by the CBP, even at the prompting of another federal agency, should at least be confined to crimes that a statute or regulation specifically authorizes CBP to investigate. We recognize that CBP officers focus primarily on contraband, dutiable merchandise, immigration fraud, and terrorism. See *United States v. Flores-Montano*, 541 U.S. 149, 153, 124 S.Ct. 1582, 158 L.Ed.2d 311 (2004); *Tabbaa*, 509 F.3d at 93. But (like other federal law enforcement officers) CBP officers are neither expected nor required to ignore tangible or documentary evidence of a federal crime. They have the authority to search and review a traveler's documents and other items at the border when they reasonably suspect that the traveler is engaged in criminal activity, even if the crime falls outside the primary scope of their official duties.

My Thoughts

- The next time that we have a border-search-at-an-international-airport case, it appears that we should begin our analysis of the search issue by first determining whether the search is a routine or non-routine search. If it is a non-routine search then we turn to an analysis of what the officers' level of suspicion was.
- If we have a *Levy*-type client, then the odds are stacked against him because of the officer's knowledge of his alleged criminal conduct. If, however, our client is a *Waldo Snerd*-type -- whom the officers have never heard of -- then there is a possibility that we might prevail on a non-routine search argument.