SEARCH AND SEIZURE – Is there a search? Search defined: invasion of "reasonable expectation of privacy" and "state action" are both required……...……..….Revised 11/2009

When analyzing the validity of a search, one must first determine if there has been a search at all. "Search" has been defined as any "examination of a person with a view to discovering evidence of guilt to be used in a prosecution of a criminal action." *State v. Superior Court*, 149 Ariz. 269, 274, 718 P.2d 171, 176 (1986). A search has also been defined as "an intrusion into an area in which a person has a reasonable expectation of privacy." *State v. Juarez*, 203 Ariz. 441, 445, ¶ 16, 55 P.3d 784, 788 (App. 2002), *quoting State v. Morrow*, 128 Ariz. 309, 312, 625 P.2d 898, 901 (1981). As the Court of Appeals said in *State v. Guillen*, 222 Ariz. 81, ¶ 8, 213 P.3d 230, 232 (App. 2009):

> To claim protection under the Fourth Amendment, a defendant must have a legitimate expectation of privacy in the invaded place. A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.

[Citations omitted.]

In *State v. Adams*, 197 Ariz. 569, 5 P.3d 903 (App. 2000), the Court of Appeals explained that there are two elements of a legitimate expectation of privacy.

> A court must answer two questions to determine the existence of a legitimate expectation of privacy. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy in the place that was the subject of the search. The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

Id. at 572, 5 P.3d at 906 [citations and internal quotation marks omitted]; *see also State v. Allen*, 216 Ariz. 320, 324, 166 P.3d 111, 115 (App. 2007). Thus, the first question in determining if a search has occurred is whether the person had a subjective expectation

of privacy in the searched area. For example, in *State v. Adams*, 197 Ariz. at 572, ¶ 19, 5 P.3d at 906 (App. 2000), the police had a warrant only to search the premises of a theater. Adams lived in an apartment within the theater, in violation of zoning ordinances. The apartment did not have a separate mailing address, but the police knew, or should have known, that Adams lived there because his driver's license and utility bills used the theater's address. The police obtained a search warrant to search the theater. Although the warrant did not mention the apartment, the police nevertheless entered and searched the apartment and found and seized stolen property. The trial court granted Adams' motion to suppress the property and the Court of Appeals affirmed. The Court found that the defendant had a higher subjective expectation of privacy in his personal apartment than in the theater in general, noting that the apartment had a separate entrance, was separately secured with locks, and was "fully furnished and functional, with bathroom and fully stocked kitchen." *Id*. at 572, ¶ 19, 5 P.3d at 906. Because the apartment was not listed in the warrant, the warrantless search of the apartment was improper. *Id.* 574, ¶ 27, 5 P.3d at 908.

However, a person's *subjective* expectation of privacy alone is not sufficient to constitute a *reasonable* expectation of privacy. "It is well settled that an individual's subjective expectation of privacy alone is not enough to give rise to Fourth Amendment protection." *State v. Duran*, 183 Ariz. 167, 169, 901 P.2d 1197, 1199 (App. 1995). The expectation of privacy must also be one that society accepts as objectively reasonable. *State v. Guillen*, 222 Ariz. 81, ¶ 8, 213 P.3d at 232, *citing United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

In addition, to be a search under the Fourth Amendment and Article 2, § 8 of the Arizona Constitution, the search must be "state action" – that is, it must be a search made by a government agent. In *State v. Weekley*, 200 Ariz. 421, 27 P.3d 325 (App. 2001), the Court of Appeals held that when hotel staff searched a room and later called officers, and the officers' subsequent search did not exceed the scope of the private parties' search, the evidence should not be suppressed.

> The Fourth Amendment prohibits the government, either directly or through its agents, from engaging in unreasonable searches and seizures. The Fourth Amendment's proscription against unreasonable searches and seizures, however, is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official. Clearly, a private search may invade a person's reasonable expectation of privacy. Nevertheless, if that invasion of privacy is purely the result of non-governmental action, once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the information obtained.

Id. at 424, ¶ 16, 27 P.3d at 328 [internal quotation marks and citations omitted]. In *Weekley*, two defendants rented a hotel room. They refused to let maids service the rooms but twice asked the staff to bring them a vacuum cleaner. The hotel staff became concerned and a hotel manager decided to inspect the room for possible damage.

On the last day of the rental term, hotel staff noticed a sign on the doorknob requesting housekeeping services. The manager and another hotel staffer entered the room and saw what they believed to be a drug lab. They called 911 and left the room after re-keying the electronic lock so the defendants could not reenter after the noon checkout time. When officers arrived after noon, the manager took them back to the room, where the officers observed the same items the staffers had already seen. The officers did not move anything or search any areas of the room that the hotel staff had

not already searched. The officers left the room and arrested the defendants, obtaining one defendant's car keys. The officers later returned and seized the drug-related items from the room. In addition, the officers searched the defendant's car in the hotel parking lot and found a rental agreement for a storage unit. The officers never sought or received any warrant to search the room or the car, but they did get a warrant to search the storage unit and found more drugs and chemicals there.

The trial court suppressed all of the evidence, reasoning that there were no "exigent circumstances" justifying a warrantless search and that the unlawful search tainted all of the evidence seized afterwards. The Court of Appeals reversed, reasoning that the Fourth Amendment only protects *reasonable* expectations of privacy. At the very least, when the defendants left "extensive evidence of obvious drug-related activity" in a hotel room and put the "housekeeping" sign on the door, "they could reasonably have foreseen that an employee of the hotel would enter the room, particularly when invited by the sign, and observe the drug-related chemicals and equipment present there." *Weekley*, 200 Ariz. at 425, ¶ 18, 27 P.3d at 329. Moreover, the hotel staffers were not acting as agents of the government – instead, they were motivated by a concern for the hotel's property. *Id*. at ¶ 19. Since the staffers' entries were foreseeable, and since the officers' subsequent entries did not extend beyond what the staffers had already seen, the officers' entries were not "searches" within the meaning of the Fourth Amendment. *Id*. at 426, ¶ 22, 27 P.3d at 330. Furthermore, the hotel had the legal right to terminate the defendants' occupancy as soon as the hotel discovered that the defendants had engaged in illegal or objectionable conduct. *Id*. at

427, ¶ 27, 27 P.3d at 331. Once their occupancy had been terminated, they “no longer had a justifiable privacy interest in the hotel room or its contents.” *Id*. at ¶ 28.