

Thursday, April 24, 2008

Moore no more - Never Moore.

Â Bill of RightsÂ (From public domain.)Â When the U.S. Supreme Court granted cert in VirginiaÂ v. Moore, _ U.S. _ (April 23, 2008), that did not sound good. Yesterday, five years after the Supreme Court unanimously crushed a great Maryland high court probable cause case like a potato chip, Maryland v. Pringle, 540 U.S. 366 (2003), the Supreme Court unanimously reversed Moore. Â A year ago, I described Moore as follows: In Virginia, unlike in some other states, the police are generally prohibited from arresting for any misdemeanor (Va. CodeÂ Â§ 19.2-74), which prevents a search incident to a non-arrestable misdemeanor.Â Moore v. Commonwealth, 272 Va. 717Â (2006). Consequently, a search finding cocaine incident toÂ an arrest forÂ suspended driving was unlawful,Â because suspendedÂ driving is a non-arrestable misdemeanor, unless, as with all misdemeanors, the defendant refuses to give his or her name and address together with a promise to return to court.Â Consequently, it was necessary to suppressÂ theÂ cocaine seized incident to the decision to arrestÂ the defendantÂ for driving with a suspended license. Cross v. Com., _ Va. App. _ (April 3, 2007).Â Â My initial review of the U.S. Supreme Court's MooreÂ decision raises the following thoughts: Â The Supreme Court will not give any protection under the United States Constitution against the search that Moore suffered. The Supreme Court found nothing in Virginia state law to permit a different outcome. If the Virginia courts wish to pronounce that their state laws do allow such extra protections, it is for said courts to decide and for the federal courts not to intervene. I doubt the Virginia courts will do anything to disturb the Supreme Court's Moore decision, and I doubt that Virginia's legislators will do anything, either. Â MooreÂ leaves states free to provide more protections for individual liberties in their statutes and state constitutions than the protection provided in the federal Constitution. For instance, if Moore involved a search on a purely non-jailable matter and if Virginia law did not provide for arresting a person on a non-jailable matter (I think that Virginia law generally does not permit such arrests, except that Virginia cops routinely arrest for charges of public intoxication), I think Moore would have been decided to the opposite of today's result. Â The Virginia Supreme Courtâ€™s Moore opinion was all the more valuable as an offset to the much harsher overall criminal justice system found in Virginia versus in Maryland. Will Virginia change its laws so that the benefits of the Virginia Supreme Courtâ€™s Moore opinion return? Unlikely, but I hope to be proven wrong. Fortunately, offsetting the sad Moore news are the string of Constitution-friendly opinions last week from Virginiaâ€™s Supreme Court.Â Nothing good comes of SCOTUSâ€™s Moore decision, except perhaps for the following oral argument exchange between Justice Scalia and Virginiaâ€™s deputy solicitor general: Â Thanks to Gideon and SCOTUS Blog for giving a rundown on the January 14 oral arguments (see transcript)Â in this Moore case, and to SCOTUS Blog for having provided a running update on the case. Â Thanks to Gideon for drawing attention to this part of the argument: Â JUSTICE SCALIA: So any Federal employee can go crashing around conducting searches and seizures?Â MR. McCULLOUGH [Virginia Dep. Solicitor General]: So long --Â JUSTICE SCALIA: So long as he has probable cause?Â MR. McCULLOUGH: That's correct.Â JUSTICE SCALIA: That's fantastic.Â (Laughter.)Â JUSTICE SCALIA: Do you really think that?Â MR. McCULLOUGH: I think if there is State action, it doesn't matter that you're wearing a badge or that you've gone through the police academy.Â JUSTICE SCALIA: Or that you are an administrative law judge at the, you know, Bureau of Customs? It doesn't matter?Â MR. McCULLOUGH: I think that's right. That if you have -- if the State --Â JUSTICE SCALIA: What about a janitor? You're a janitor, a federally employed janitor.Â MR. McCULLOUGH: Your Honor --Â JUSTICE SCALIA: His neighbor is growingÂ marijuana, and he's just as offended as a Supreme Court Justice would be. Can he conduct a search?Â MR. McCULLOUGH: I think if he's doing it on behalf of the State, the answer is yes.Â JUSTICE SCALIA: Wow. Jon Katz.

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