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I. INTRODUCTION

The Minnesota Supreme Court recently considered whether searches and seizures by a private security guard invoked Fourth Amendment protection. The supreme court, in State v. Buswell,1 reinstated a trial court's ruling that a security guard's searches failed to constitute government action.2 The supreme court's employment of the private search doctrine, which limits Fourth Amendment protection to government action, barred application of the exclusionary rule.3 Consequently, evidence seized by the guard and later delivered to law enforcement officials secured convictions against the defendants.4

In determining whether government participation transformed the security guard's searches into government action, the supreme court erroneously concluded that the searches occurred without government knowledge or acquiescence and promoted private interests.5 The Buswell decision undermines Fourth Amendment guarantees and further exposes individual security to an increased threat posed by the private security industry.

II. BACKGROUND

A. The Fourth Amendment and the Exclusionary Rule

The Fourth Amendment, as drafted and currently interpreted, prohibits unreasonable searches and seizures.6 The amendment

2. Id. at 620-21.
3. See infra notes 9-12 and accompanying text for a discussion of the application and practical effect of the exclusionary rule.
4. Buswell, 460 N.W.2d at 617.
5. Id. at 620-21.
6. U.S. CONST. amend. IV. The amendment reads as follows: The right of the people to be secure in their persons, houses, papers and effects, against all unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

American colonists drafted the Fourth Amendment in response to their abhor-
guards an individual's security against violations of both person and property. The amendment's terms neither restrict its operation to government intrusions nor require that evidence obtained by a violation be excluded from criminal trials.

To enforce the Fourth Amendment and defend individual security, the United States Supreme Court fashioned the exclusionary rule. The rule demands exclusion of illegally obtained evidence from criminal proceedings in both federal and state courts. Originally, the exclusionary rule served to uphold judicial integrity and constitutional mandates. Recent Supreme Court decisions, however, characterize its function as a deterrent to police misconduct.

Although Supreme Court decisions eventually applied the Fourth
Amendment to the states, most state constitutions already contained similar provisions. These state constitutional prohibitions either adopt the amendment’s terms verbatim or with superficial variations. The Minnesota Constitution, ratified in 1857, provides protection virtually identical to that of the Fourth Amendment.

B. Historical Development of the Private Search Doctrine

Although its terms express no such limitation, the Fourth Amendment protects individuals only from government conduct. The requirement of government action derives solely from judicial interpretation. Unlike the exclusionary rule, the requirement of government action has received limited judicial scrutiny as to its application and purpose.

Commonly referred to as the “private search doctrine,” the requirement of government intrusion eliminates Fourth Amendment analysis as to private conduct. The Fourth Amendment provides...
no protection against unreasonable searches and seizures conducted by private parties.\textsuperscript{22} This exemption of private searches stems from both the amendment's historical development as well as the purpose of the exclusionary rule.\textsuperscript{23} The suppression of evidence discovered by a private party fails to advance the Fourth Amendment's currently recognized purpose: regulation of police activity.\textsuperscript{24}

C. Recent Interpretation of the Private Search Doctrine

Although no constitutional violations result from "private" searches, the mere fact that a search is conducted by a private party does not automatically exempt it from Fourth Amendment scrutiny.\textsuperscript{25} The Fourth Amendment applies only if the private party acted as an instrument or agent of the state.\textsuperscript{26} Whether a private search is transformed into government action is a factual determination which belongs to the trial court.\textsuperscript{27} To make this determination, federal and state courts employ one of two tests: the critical factors test or the government instigation test.\textsuperscript{28}

The first test, formulated in \textit{United States v. Walther},\textsuperscript{29} stresses two

\begin{itemize}
  \item \textsuperscript{22} See \textit{Burdeau}, 256 U.S. at 475. Civil and criminal actions are available to subjects of illegal searches and seizures conducted by private citizens. See 1 LAFAVE, \textit{supra} note 6, § 1.8(a), at 176.
  \item \textsuperscript{23} See \textit{supra} notes 11-12 and accompanying text for a discussion of the exclusionary rule's purpose.
  \item \textsuperscript{24} Lambert, \textit{supra} note 8, at 369. \textit{See, e.g.}, Michael Wukmer, Comment, \textit{The Fourth Amendment Following Private Searches: Is There a Privacy Interest to Protect?}, 52 U. CIN. L. REV. 172, 176 n.30 (1983) (citing 1 LAFAVE, \textit{supra} note 6, § 1.6 (1978) (stating that deterrence of neither private parties nor government officials results from the exclusion of evidence where search motive relates to other than criminal convictions)).
  \item \textsuperscript{25} \textit{See, e.g.}, United States v. Jacobsen, 466 U.S. 109, 113 (1984) (holding no Fourth Amendment violation resulted from invasion of defendant's package by private carrier's agents solely because of their private character).
  \item \textsuperscript{26} \textit{See} Skinner v. Railway Execs Ass'n, 489 U.S. 602, 615-16 (1989) (reasoning that because government removed legal barriers to employee drug testing and encouraged and participated in testing, Fourth Amendment is implicated); \textit{cf.} Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (reasoning that because murder suspect's wife did not act as instrument or agent of government when she voluntarily provided police officers with incriminating evidence, Fourth Amendment is not implicated).
  \item \textsuperscript{27} State v. Buswell, 460 N.W.2d 614, 618 (Minn. 1990), \textit{reh'g} denied, (Minn. Oct. 8, 1990), \textit{cert. denied}, 111 S. Ct. 1107 (1991). This determination remains subject to a clearly erroneous standard of review. \textit{Id.} at 618-19; \textit{see also} United States v. Koenig, 856 F.2d 843, 849 (7th Cir. 1988) (holding that trial court's finding that private mail carrier examined packages for its own reasons was not clearly erroneous).
  \item \textsuperscript{28} \textit{See infra} notes 32-33 and accompanying text (discussing the adoption of the private search doctrine by individual states).
  \item \textsuperscript{29} 652 F.2d 788 (9th Cir. 1981). Other federal circuit courts also apply this test.
\end{itemize}
critical factors: government knowledge and acquiescence and the intent of the party performing the search. The second test examines the degree of government instigation. These tests, while limited in precedential value, help trial courts focus on the significance of the government’s share of the intrusion.

III. THE BUSWELL DECISION

A. The Facts

In 1988, Brainerd International Raceway (BIR) contracted with North Country Security for private security services on race weekends. North Country’s responsibilities included ensuring that only ticket holders entered the raceway grounds. It discharged this duty

See, e.g., United States v. Pierce, 893 F.2d 669, 673 (holding that airline employees failed to demonstrate intent to assist law enforcement efforts when they opened “suspicious” package which contained drugs), reh’g denied. 897 F.2d 528 (5th Cir. 1990); Pleasant v. Lovell, 876 F.2d 787, 798 (10th Cir. 1989) (holding that IRS special agents knew of and acquiesced in the conduct of private actor who provided them documents for investigative purposes); United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987) (actor’s seizure of company documents for IRS agents failed to demonstrate intent to assist law enforcement officials).

30. Walther, 652 F.2d at 792.

31. See United States v. Luciow, 518 F.2d 298, 300 (8th Cir. 1975) (holding that some degree of government instigation is required to transform a private individual’s search into governmental action). See also United States v. Coleman, 628 F.2d 961, 965 (6th Cir. 1980) (holding that police did not instigate, encourage or participate in search of truck containing marijuana).

32. The Minnesota Supreme Court acknowledged that “[t]he diversity in factual settings involving private searches mandates an individual, case-by-case analysis in which precedent plays but a small part.” Buswell, 460 N.W.2d at 618.

33. Id. at 617-18. The Minnesota Supreme Court employed the private search doctrine on at least two prior occasions. See State v. Kumpula, 355 N.W.2d 697, 701 (Minn. 1984) (holding that police officer’s entry into defendant’s apartment accompanied by caretaker was reasonable, but search of personal papers was not); State v. Hodges, 287 N.W.2d 413, 416 (Minn. 1979) (holding Fourth Amendment protection did not extend to warrantless entry into defendant’s warehouse, although landlord consented).

34. Brainerd International Raceway operates a racetrack on private property in Crow Wing County, approximately six miles outside the city of Brainerd, Minnesota. The raceway lies outside the city’s jurisdiction with respect to police protection. Buswell, 460 N.W.2d at 615.

35. Id. Keith Emerson, a member of the Brainerd police force, owned and operated North Country Security. All Brainerd police officers, Emerson included, held appointments as special deputies for Crow Wing County. However, no Brainerd police officer carried an independent power of arrest outside the city limits. Id.

36. Id. In return for payment of a set amount, North Country hired guards and managed all security arrangements at the track. Id. at 616.

37. Id. BIR also requested that North Country prevent illegal drugs and other contraband from entering the premises. Id. The Minnesota Supreme Court supported BIR’s efforts stating:

Crowd and patron conduct is difficult to control during a race of this magni-
by randomly stopping and searching vehicles which sought entry.\textsuperscript{38} On August 18, 1988, North Country\textsuperscript{39} searched vehicles occupied by Jeffrey Buswell, Gary Schwartzman, and Dale Schmidt.\textsuperscript{40}

After entrance gates were opened, a North Country security guard\textsuperscript{41} stopped and searched the defendants' vehicles.\textsuperscript{42} Contrary to company policy,\textsuperscript{43} the guard neglected to obtain the defendants' consent or inform them of the option to refuse and exit the premises.\textsuperscript{44} The guard searched extensively\textsuperscript{45} and uncovered drugs and drug paraphernalia.\textsuperscript{46} Upon discovery of the contraband, the armed security guard\textsuperscript{47} handcuffed the defendants to a nearby fence and notified his supervisor.\textsuperscript{48} North Country, pursuant to previously established protocol,\textsuperscript{49} summoned local law enforcement officials who
arrested the defendants after further investigation.\textsuperscript{50}

The trial court denied the defendants' motion to suppress the evidence seized by the security guard and found them guilty of possession of controlled substances.\textsuperscript{51} The court held that the security guard's searches failed to constitute government action so as to trigger the Fourth Amendment's exclusionary rule.\textsuperscript{52} The court of appeals reversed and remanded.\textsuperscript{53} The Minnesota Supreme Court reversed the court of appeals and reinstated the trial court's judgment.\textsuperscript{54}

\textbf{B. The Court's Analysis}

The court in \textit{Buswell} based its decision on the established principle that the Fourth Amendment proscribes only government action.\textsuperscript{55} The court stated that, if the searches had been conducted by government officials, they would have been unconstitutional.\textsuperscript{56} However, the court held that the private security guard's searches failed to constitute government action.\textsuperscript{57} Consequently, drugs seized by the guard and later delivered to law enforcement officials secured convictions against the defendants.\textsuperscript{58} In determining whether government participation recast the private security guard as an agent of the state, the court applied the critical factors test employed in \textit{United States v. Place}.\textsuperscript{59}

They also agreed that a sheriff's deputy would remain "on call" to accommodate any requests for assistance. \textit{Id.}\textsuperscript{60} A subsequent custodial search of defendants Buswell and Schwartzman revealed more cocaine on their persons. State v. Buswell, 449 N.W.2d 471, 472 (Minn. Ct. App. 1989), rev'd, 460 N.W.2d 614 (Minn. 1990), \textit{reh'g denied}, (Minn. Oct. 8, 1990), \textit{cert. denied}, 111 S. Ct. 1107 (1991).

\textit{Buswell}, 449 N.W.2d at 471-72. Defendants violated \textit{Minn. Stat.} \textsection 152.09, subd. 1 (2) (1989) (repealed August 1, 1989) and \textit{Minn. Stat.} \textsection 152.15, subd. 2 (2) (1988) (repealed August 1, 1989). For current Minnesota statutory law as to the possession of controlled substances, see \textit{Minn. Stat.}, ch. 152 (Supp. 1991).


\textit{Buswell}, 460 N.W.2d at 620-21.

55. \textit{Id.} at 617. Directly citing \textit{Burdeau v. McDowell}, 256 U.S. 465 (1921), the court stated the Fourth Amendment was not intended to limit private conduct. \textit{Id. See supra} note 15.

56. \textit{Buswell}, 460 N.W.2d at 617. The court stated, "[w]e have not the slightest doubt that these searches, which can charitably be characterized as being 'outrageous,' would violate the Fourth Amendment and result in suppression had they been made by one exercising governmental action." \textit{Id.}

57. \textit{Id.} at 620.

58. \textit{Id.} at 617. \textit{See supra} notes 9-10 and accompanying text for a discussion of the application and practical effect of the exclusionary rule.
States v. Walther. 59

In discussing the first factor, the supreme court rejected the defendants’ contentions that the searches involved government knowledge and acquiescence. 60 Although it acknowledged that law enforcement officials knew of North Country's plans to conduct searches, the court found nothing indicating these officials knew of or acquiesced in the specific searches performed by the security guard. 61 The court ruled that the security guard conducted the searches without government objectives in mind. 62

Analyzing the second factor, the underlying purpose of the searches, the court again rejected the defendants' claims of government entanglement. 63 The court stated BIR's interest in excluding stowaways and contraband from the raceway grounds qualified as a legitimate private purpose. 64 Accordingly, the Minnesota Supreme Court reinstated the trial court's finding that the security guard's searches constituted private action outside Fourth Amendment constraints. 65

IV. ANALYSIS OF THE BUSWELL DECISION

The Minnesota Supreme Court followed a line of precedent holding that the Fourth Amendment applies only to government conduct. 66 The supreme court held that the security guard's searches

59. Buswell, 460 N.W.2d at 618-20. See text accompanying notes 26-33 for a discussion of the test developed in United States v. Walther, 652 F.2d 788 (9th Cir. 1981). The Buswell court also examined the degree of government instigation in the search and concluded "that it was the race track management who requested vehicle searches for nonpaying attenders, and for other items that might be used to disrupt the raceway weekend program." Buswell, 460 N.W.2d at 620.
60. Id. at 619 (citing United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981)).
61. Buswell, 460 N.W.2d at 619. The court stated, "nothing in the record indicates that law enforcement officials knew the searches would violate BIR policy and be conducted without first obtaining the consent of the vehicle occupants." Id.
62. Id. The court noted that no government official persuaded North Country personnel to conduct searches in any particular manner or for specific items. Id.
63. Id. at 620-21.
64. Id. at 620. The court stated:

The BIR primarily sought to prevent people from entering the raceway without first paying admission. Additionally, the BIR had legitimate private reasons to prevent illegal drugs, mopeds, and fireworks from entering the raceway in order to minimize disruptive behavior of patrons, to prevent injury to or discomfort of other patrons, and to reduce the possibility of destruction to property.

Id.
65. Id. at 620-21.
66. See generally Buswell, 460 N.W.2d 614. Citing the primary United States Supreme Court cases which developed this legal principle, the court states, "we cannot ignore the clear line of precedents starting with Burdeau v. McDowell which hold
failed to constitute government action subject to Fourth Amendment constraints. In accordance with the critical factors test, the court correctly examined the searches as to their degree of government involvement and underlying purpose.

The Buswell court erroneously concluded, however, that the searches occurred without government knowledge or acquiescence and promoted private interests. As evidenced by their conference with North Country, local law enforcement officials undoubtedly knew of and acquiesced in the company’s plans to conduct searches and detain individuals. At that conference, the parties established a procedure for contacting law enforcement officers upon the discovery of contraband, and designated an officer to remain “on call” to assist with potential arrests. Despite these uncontested facts, the court found no government involvement in the security guard’s searches.

Similarly, the court incorrectly ruled that the searches were motivated by private interests. The security guard’s searches were specifically designed to assist law enforcement officials secure criminal convictions. BIR’s interests demanded only that the defendants be excluded from the raceway grounds. The private security guard assumed the public function of law enforcement by directing the

that the fourth amendment only gives protection against unlawful government actions.” Id. at 620, 621 n.6.

67. Id. at 620-21.
68. See supra notes 25-26 and accompanying text.
69. Private interests were promoted by preventing unpaid admissions, preventing illegal drugs, and minimizing disruptive behavior. Buswell, 460 N.W.2d at 620.
70. See supra note 49. See also Buswell, 460 N.W.2d at 621 (Yetka, J., dissenting) (arguing that contact between North Country and local law enforcement clearly indicates acquiescence to the searches); 1 LAFAVE, supra note 6, § 1.8(e) n.151; see also El Fundi v. Deroche, 625 F.2d 195, 196 (8th Cir. 1980) (state action exists when private security guards and police officers act in concert to deprive a plaintiff of civil rights).
71. Buswell, 460 N.W.2d at 621.
73. The Buswell court improperly required a showing that local law enforcement officials encouraged a particular manner or type of search. See also Buswell, 460 N.W.2d at 621 (Yetka, J., dissenting). The dissent discusses Skinner v. Railway Execs Ass’n, 489 U.S. 602 (1989), and states, “[t]he Court did not require the defendants to establish, as the majority suggests the defendants should here, that the government encouraged a particular manner of or objectives for searching people . . . .” Buswell, 460 N.W.2d at 621.
74. Id. Although the dissent commends private citizens who assist law enforcement personnel, it warns that their efforts must avoid violation of the Constitution. Id. at 622 (Yetka, J., dissenting).
75. Buswell, 460 N.W.2d at 617. See supra note 37 and accompanying text for a discussion of BIR’s security interests.
76. See Buswell, 460 N.W.2d at 622 (Yetka, J., dissenting). The public function
searches toward the discovery of contraband and subsequent public prosecution.77 Nevertheless, the court failed to conclude that the guard’s searches constituted government action.78

The court’s shortsighted decision creates three undesirable consequences. First, the ruling fosters the idea that private security guards possess broader authority to conduct searches than government officials.79 The supreme court’s willingness to advance this position defies common sense. Ill-trained in the subtleties of search and seizure law, security guards pose a much greater threat to individual security.80

Second, the decision encourages reliance on private security personnel. If permitted to ignore Fourth Amendment proscriptions, security guards become an attractive alternative to public law enforcement. Nothing prevents government officials from prosecuting individuals with evidence obtained by private security guards. This fact, coupled with the expanding use of security guards, creates the untenable result of a corresponding rise in unreasonable searches.81

Third, the court’s decision diminishes Fourth Amendment protection. Although the Fourth Amendment provides no protection

strand of state action theory asserts that a private citizen becomes a government actor when that person “performs tasks and exercises powers that are traditionally governmental in nature.” Steven Euller, Private Security and the Exclusionary Rule, 15 HARV. C.R.-C.L. L. REV. 649, 657 (1980). The doctrine continues to gain acceptance in private security cases. Id. n.33. See generally DeNinno, supra note 21 (examining recent private search cases in light of the Fourth Amendment).


77. Id. at 616. Where such search motivations exist, a suppression of the evidence discovered provides an effective deterrent to future misconduct. See supra notes 11-12 and accompanying text for a discussion of the rationale behind limiting application of the exclusionary rule to government searches and seizures. The force of this rationale breaks down, however, in connection with cases involving searches by private security officers who act for the very purpose of obtaining evidence of crime. Annotation, supra note 19, at 558.

78. Buswell, 460 N.W.2d at 620-21.

79. Id. at 622 (Yetka, J., dissenting).


81. United States v. Dansberry, 500 F. Supp. 140, 145 (N.D. Ill. 1980). The court stated, “[i]f private security guards are permitted to ignore fourth amendment proscriptions, reliance on private security personnel rather than law enforcement officers will be encouraged and unconstitutional searches will increase. Such a result is untenable.” Id.
against unreasonable searches and seizures by private parties, private security guards operate in a "gray area" which sits astride the public-private distinction. The Buswell court erred on the side of a restrictive interpretation of the Fourth Amendment, thus sanctioning the opportunity for widespread abuse by private security personnel. The court's decision to classify the security guard's searches as private action further relaxes constitutional strictures through judicial interpretation and supports an expanding government right to violate individual security.

V. Conclusion

The private security sector employs more people and expands at a faster rate than public law enforcement. This growth represents an increasing threat to individual security. Used as supplements to police protection, private security personnel perform functions similar to licensed police officers. Though cognizant of the threat posed by private security guards, the Buswell court nonetheless re-

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82. The judicial exemption of private searches from Fourth Amendment scrutiny applies in even the most egregious of circumstances. See, e.g., Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (holding Fourth Amendment protection against unreasonable search and seizure does not apply when private detective illegally blew open safe to obtain evidence); United States v. McGuire, 381 F.2d 306 (2d Cir. 1967) (holding recordings initially obtained through theft by a private citizen and later voluntarily given to government were admissible), cert. denied, 389 U.S. 1053 (1968); Geniviva v. Bingler, 206 F. Supp. 81 (W.D. Pa. 1961) (holding evidence obtained from a burglary was not excluded by the Fourth Amendment). See also supra note 19 and accompanying text.


84. Id.

85. State v. Buswell, 460 N.W.2d 615, 622 (Minn. 1990), reh'g denied, (Minn. Oct. 8, 1990), cert denied, 111 S. Ct. 1107 (1991) (Yetka, J., dissenting). The dissent advanced a "strict constructionist" approach in analyzing the protection afforded by the Fourth Amendment. Justice Yetka stated, "I am concerned that the majority opinion, in effect, waters down the Bill of Rights. The Bill of Rights should be changed by amending the Constitution itself, not by judicial interpretation." Id.

86. People v. Zelinski, 594 P.2d 1000, 1005 (Cal. 1979) (quoting PRIVATE SECURITY ADV. COUN. TO U.S. DEPT. OF JUSTICE, REPORT ON THE REGULATION OF PRIVATE SECURITY SERVICES 1 (1976)).

87. Zelinski, 594 P.2d at 1005. The California Supreme Court stated, "[w]e are mindful, however, of the increasing reliance placed upon private security personnel by local law enforcement authorities for the prevention of crime and enforcement of the criminal law and the increasing threat to privacy rights posed thereby." Id.


89. The court stated:

[W]e express our concern that egregious searches by private security guards escape the penalty of suppression, whereas similar conduct by licensed law enforcement officers would not. We take notice that private security guards
instated the trial court’s finding that the security guard’s searches failed to constitute government action subject to Fourth Amendment constraints.90

The Minnesota Supreme Court correctly employed the critical factors test to determine whether government participation transformed the security guard’s searches into government action.91 However, the court erroneously held that the searches occurred without government knowledge or acquiescence and promoted private interests. Law enforcement officials knew of and acquiesced in North Country’s plans to conduct vehicle searches and detain people.92 BIR’s security interests required only the exclusion of stowaways and contraband from the raceway grounds.93 Its interests were not furthered by the confiscation of contraband and subsequent prosecution of its patrons. In holding that the security guard’s searches failed to constitute government action, the court has undermined the purpose of the Fourth Amendment and opened the door to unbridled searches by private security personnel.94

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