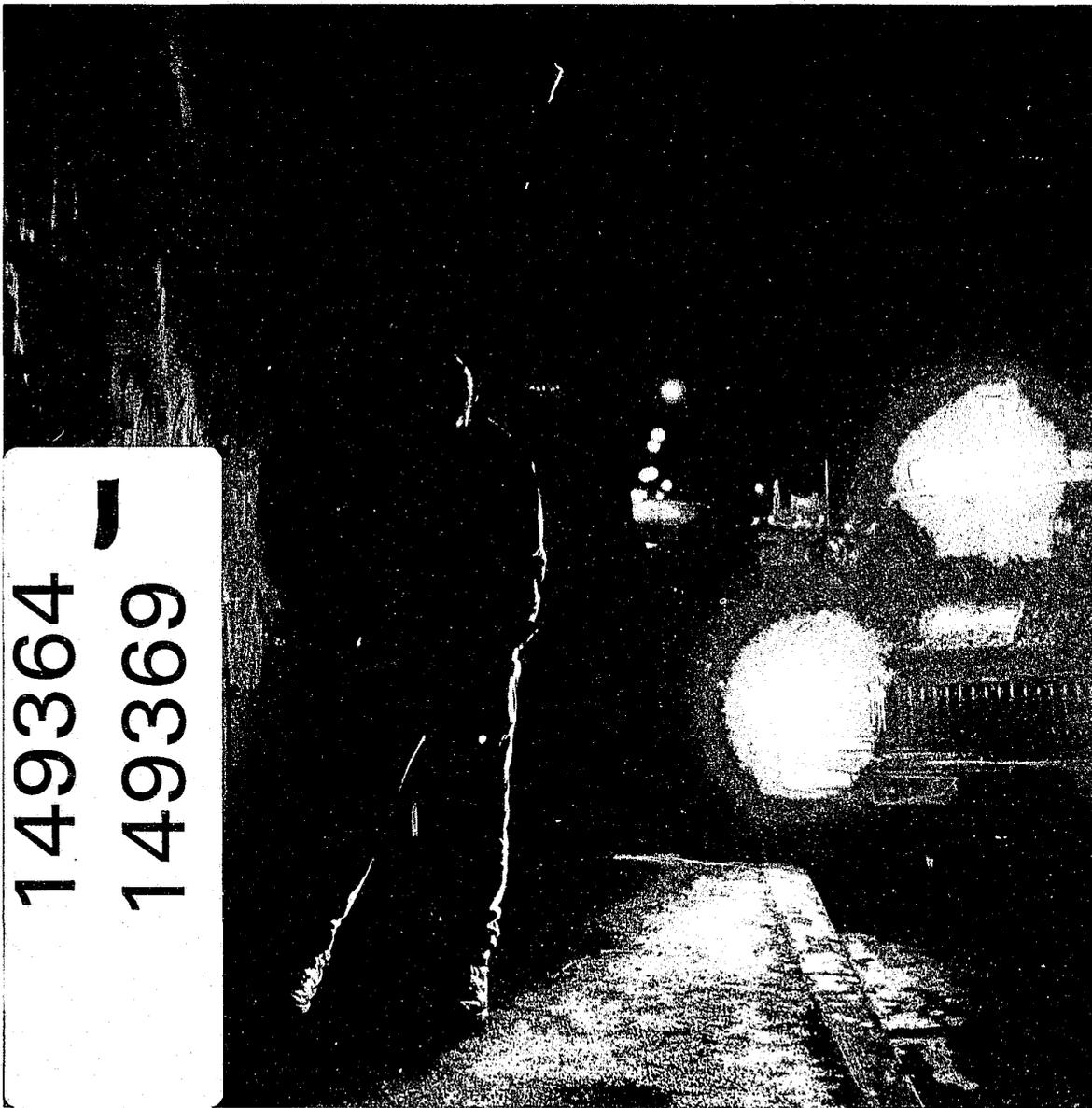




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Director

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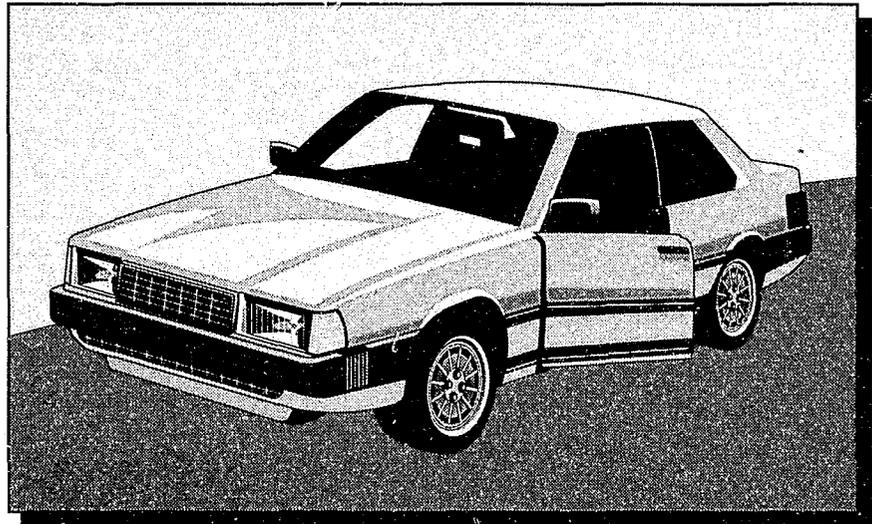
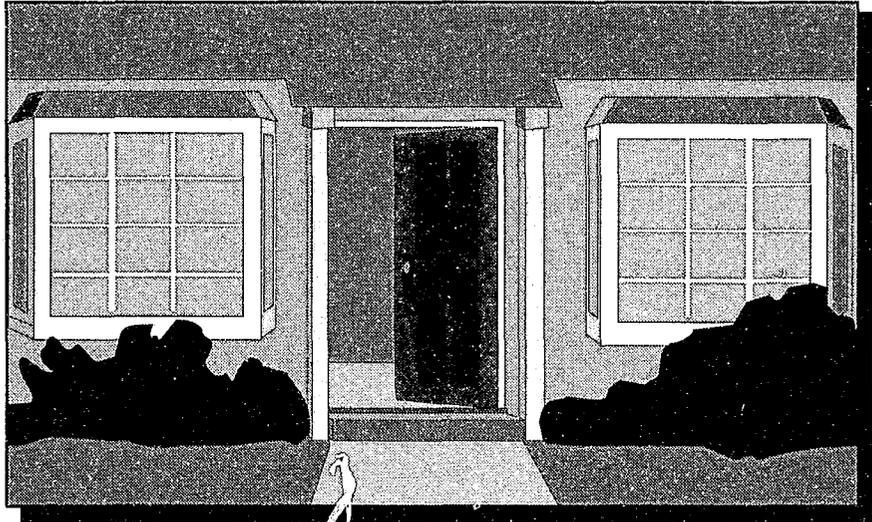
Search of Abandoned Property Fourth Amendment Considerations

By JOHN GALES SAULS

An officer, in trying to locate the pilot of a plane discovered to contain a ton of marijuana, receives information that the man was picked up by a local motel courtesy car. The officer then goes to the motel, where he learns that the man checked in without luggage at 6:25 a.m., paid for the room in advance with cash, and made a long distance call from the room at about 7 a.m., which he also paid for in cash. The officer also discovers that the man told the room clerk that he would be out by check-out time, when he learned it was 12 p.m. The man then ate breakfast and left the motel.

At 11 a.m., a motel housekeeper knocked on the man's room door, and after receiving no answer, opened the door with a pass key. The housekeeper found the room unoccupied, the bed in disarray, the room key on the nightstand, and two keys on a chain, along with another single key in the toilet bowl. Shortly thereafter, the officer enters the room without first obtaining a search warrant and seizes the keys (one of which is later found to fit the airplane's door). The officer also locates a fingerprint (later discovered to match that of the defendant).

At a suppression hearing, the defendant claims the officer violated his constitutional rights by searching the room without a warrant. The prosecution asserts that the defendant abandoned his room, and therefore, the officer's actions were



lawful. This article discusses the facts that law enforcement officers must obtain to demonstrate a person's surrender of fourth amendment privacy in premises, vehicles, and other items of personal property, so that a warrantless search will

be reasonable under the legal theory of abandonment.

ABANDONMENT UNDER THE FOURTH AMENDMENT

Fourth amendment law regarding abandonment is simple. When



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“**Officers should be alert to the investigative opportunity presented by abandoned property.**”

”

someone makes evident a surrender of privacy interest in a place or thing, the police may search it without a warrant and with no additional factual justification.¹ In determining whether such a surrender of privacy has taken place, courts use the totality of circumstances test, assessing whether a reasonable person, confronted with the facts known, would conclude that no reasonable expectation of privacy remains.² Interestingly, a court making such a determination is not limited to what the police knew at the time they acted.

A court also may consider facts learned thereafter in determining whether a person surrendered privacy interest.³ More complex is the question of what facts are indicative of such a surrender of privacy interest. The answer to this question varies, depending on the type of property involved.

PREMISES

Premises are abandoned when the occupant no longer has a reasonable expectation that the interior of

the premises will remain undisturbed by others. The lack of an expectation of privacy is frequently shown by facts indicating the occupant departed without apparent intention to return.⁴ This sort of departure is much more easily shown when the person's possession of the property is not based on ownership but on some temporary right to possess, such as a leasehold.⁵ In assessing an abandonment of premises, courts focus on three key factors: 1) Flight by the occupant to avoid apprehension; 2) the nature of the occupant's tenancy; and 3) the condition in which the premises are left upon departure.

Flight

A person's departure from a residence in an apparent effort to avoid apprehension by law enforcement officers is strong evidence of that person's intention to leave the residence and not return. For example, in *United States v. Levasseur*,⁶ two defendants, who rented a house in Ohio, apparently departed the State on November 4, 1984, after learning

by phone that some of their partners in crime were being arrested nearby. Evidence presented at the suppression hearing indicated that the defendants were in Virginia as early as the next day and that they set up a household there within 10 days.

In evaluating the legality of a search of the Ohio house, the court found that the defendants had abandoned it, despite the fact that their rent was paid through the end of November and that they had left and locked their belongings in the Ohio house. The court stated, "Among the facts supporting this conclusion are the [defendants'] history of living underground and fleeing suddenly as the FBI drew near, plus the [defendants'] awareness that the FBI had just surrounded the Cleveland house and arrested their colleagues there."

The court found the defendants' "failure to take their weapons, clothing, and personal belongings with them to Virginia does not necessarily indicate that they had intentions of returning to the [Ohio] house. Instead, coupled with all the other signs of abandonment, it suggests that they learned of the Cleveland arrests while outside their home, and logically decided that it would be too risky to return...just to pack."⁷ Many other courts have given apparent flight to avoid apprehension substantial weight in determining whether premises have been abandoned.⁸

Nature of Tenancy

A second factor indicative of abandonment is the ending of one's contractual right to remain in the premises. In this regard, the shorter the term of the leasehold, the more

easily abandonment is shown. With motel or hotel rooms, the expiration of a person's tenancy alone is sufficient to create an abandonment, because it is unreasonable to expect that the innkeeper will not enter the premises and retake control.

For example, in *United States v. Lee*,⁹ the court determined that the defendant abandoned his motel room based on the fact that the term of occupancy had expired (the defendant's arrest precluded his return to the room). The court recognized that the defendant's absence was not by choice, but noted that it "was the defendant's own conduct that prevented his return to the motel."¹⁰

Some courts have held that the expiration of a motel room's or hotel room's term of tenancy eliminates the guest's reasonable expectation of privacy, even if the guest is still present when the innkeeper seeks to reclaim possession of the room.¹¹ Conversely, where the innkeeper permits the tenancy to continue beyond its expiration (e.g., charging the guest's credit card for an additional day), the extent of the guest's reasonable expectation of privacy may be expanded.¹²

Stronger facts are required when the term of occupancy is longer, as with an apartment or house rental. For example, in *United States v. Sellers*,¹³ the defendant leased a house for a period of months. He left the premises with his rent 5 months in arrears, leaving a note that instructed the landlord that she could have some valuables that he was leaving behind. The court concluded that a finding of abandonment was "clearly justified."¹⁴ However, a tenant, who overstays the term of the lease with

the rent paid up, has clearly not abandoned the premises, even though the tenant is away briefly.¹⁵

Condition of Premises Upon Departure

The third important consideration is the condition in which the premises are left upon departure. Failing to secure premises and removing most items of value are indicative of surrendering control and privacy.

For example, in *United States v. Akin*,¹⁶ the defendant left his motel room with the door wide open, and neither luggage nor clothes were left in the room. Although his term of tenancy had not ended, the court

“ Failing to secure premises and removing most items of value are indicative of surrendering control and privacy. ”

found that the condition of the room, coupled with the fact that the defendant never returned to it, was sufficient to establish an abandonment.

Similarly, in *United States v. Hunter*,¹⁷ the defendant departed his motel room, leaving the room key on the nightstand and apparently taking all personal items except for three keys left in the toilet bowl. These facts were held to establish an abandonment.

An abandonment of an apartment or house can also be established by the condition of the premises at departure. For example, in *United States v. Sledge*,¹⁸ the defendants' landlord went to their apartment 2 days prior to the end of their lease. He found the front door open, and the entrance hall light on. The living room and kitchen had been cleared of furniture, decorative items, and appliances, and no one was present in the apartment. There was also no food in the apartment, and trash and a few items of clothing were strewn around the rooms. Based on these facts, the court concluded that the defendants had abandoned the premises.¹⁹

VEHICLES

Because of the mobility of vehicles and the diminished expectation of privacy associated with them, the factors that courts consider in determining whether a vehicle has apparently been abandoned are somewhat different. The focus of the inquiry is whether a person no longer reasonably expects that the vehicle and its contents will remain undisturbed by others. Key factors in making this determination include: 1) Flight from the vehicle by the person in an apparent effort to avoid apprehension by law enforcement; 2) where, and for how long, a vehicle is left unattended; 3) the condition in which the vehicle is left unattended; and 4) denial, by a person who is present, of possession or ownership of the vehicle.

Flight

As noted in the discussion of abandonment of premises, apparent flight to avoid apprehension by law

enforcement officers is a strong factor in determining that property has been abandoned. In *United States v. Tate*,²⁰ two Missouri State Highway Patrol troopers conducting a license check determined that a motorist's license was issued in an alias for a fugitive from the State of Washington. As they approached the motorist's van to confront him, he opened fire on the officers with an automatic weapon, killing one and severely wounding the other. The motorist then fled the scene on foot. In evaluating the legality of a later search of the van, the court noted, "When Tate fled the scene of the murder, leaving the van unoccupied and unlocked, he abandoned his expectation of privacy in the van and its contents."²¹

Where, and For How Long, Vehicle Left Unattended

The reasonableness of a person's expectation of whether a vehicle and its contents will remain undisturbed by others is clearly affected by where the person leaves the vehicle unattended and for what period of time. For example, a person who leaves a car in the traveled lane of a busy highway should expect the police to remove the car with some promptness.

As the U.S. Supreme Court has noted, "The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge."²² Although most cases considering subsequent searches in such circumstances employ the "inventory" exception to the warrant requirement, abandonment is sometimes an alternative lawful justification.²³

A more difficult abandonment question is presented when a person parks a vehicle lawfully. Unless other factors are present, such as flight, abandonment is only found in such cases where the vehicle is parked on someone else's property either without authorization or for a period of time that exceeds the permission granted.²⁴

“
**The reasonableness
of a person's
expectation...is clearly
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vehicle unattended
and for what period
of time.**
”

For example, in *United States v. Gullede*,²⁵ two men gained permission to park a U-Haul trailer at a service station, saying that their car was overheating and that they would return in 2 or 3 days. Ten days later, the service station attendant called police, who searched the trailer. The court summarily concluded that the trailer had been abandoned.²⁶

Condition of Unattended Vehicle

The manner in which a person apparently treats the vehicle is another factor that courts consider in evaluating whether the person's expectation of privacy has been surrendered. In *United States v. Oswald*,²⁷ an officer encountered a

Pontiac Firebird, engulfed in flames, in the median of Interstate 75 in rural Tennessee. The officer learned from bystanders that the driver left the scene.

During the next 90 minutes, the driver did not return nor was the fire reported to the authorities. After the fire was extinguished, the officer removed items from the car, including a locked, metal briefcase. When he opened the briefcase, the officer discovered it contained two kilograms of cocaine. In holding the car and contents had been abandoned, the court noted: "One who chooses to leave luggage in an unlocked burned-out automobile at the side of a highway in the country can fairly be thought to have a much lower expectation of privacy.... Flaming cars do tend to attract a certain amount of attention. The flames may keep people at a respectful distance for a time, but fires eventually die out; and a fire-ravaged automobile, left unprotected in the open countryside, invites just the kind of examination Oswald feared his would receive."²⁸

Denial of Possession or Ownership

A final important factor in weighing whether a vehicle has been abandoned is whether a person denies possession or ownership. For example, in *United States v. Hastamorir*,²⁹ Customs agents approached three men whom they had just observed loading the contents of two boxes into the rear of a Chevrolet station wagon. When confronted, all three denied any knowledge of the station wagon or its cargo. The agents discovered 30 kilograms of cocaine in the car. In

assessing these facts, the court concluded, "We hold that [defendant] did not express a subjective expectation of privacy in the Celebrity station wagon nor its contents, and effectively abandoned any fourth amendment rights he possessed in the station wagon and its contents."³⁰

OTHER ITEMS OF PERSONAL PROPERTY

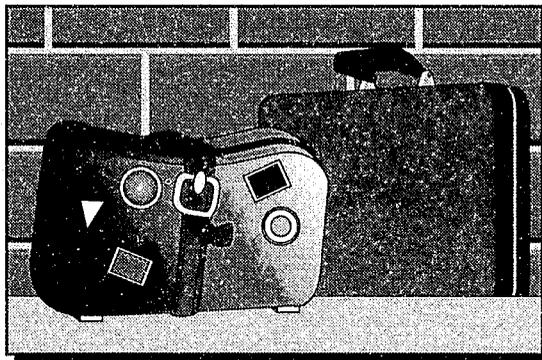
Because of the portability of most personal items and the manner in which they are often discarded, the factors that courts consider in determining whether items of personal property have apparently been abandoned are: 1) Flight from where the item is left by the person in an apparent effort to avoid apprehension by law enforcement; 2) where, and for how long, the item is left unattended; 3) the condition in which the item is left unattended; and 4) denial, by a person who is present, of possession or ownership of the item. As with a vehicle, the focus of the inquiry is whether a person no longer reasonably expects that the item and its contents will remain undisturbed by others.

Flight

As with premises and vehicles, apparent flight to avoid apprehension by law enforcement officers is a strong factor in determining that property has been abandoned. When a person being pursued by the police throws or drops personal property along the way, in places where it will be accessible to the public, it is unreasonable for the person to expect that the items will remain undisturbed or unexamined.³¹

Where, and For How Long, Item Left Unattended

The reasonableness of a person's expectation of whether a item of personal property and its contents will remain undisturbed by others is clearly affected by where the person



leaves the item unattended and for what period of time. One's reasonable expectations regarding the privacy of a valuable placed in a safe deposit box are quite different than those for the same item placed in a sidewalk trash can.

For example, a person who drops papers on a public street and walks away relinquishes any reasonable expectation of privacy in them.³² Similarly, a person who places items into a trash can on a public sidewalk has surrendered privacy interest in the items.³³ Also, a person who puts a bag on the front steps of an apartment house or in the public hallway of an apartment house and walks away surrenders privacy interest in the bag and contents.³⁴

Conversely, a person who checks a parcel with a store clerk while shopping has not surrendered privacy interest in the item.³⁵ Similarly, a person who throws a bag

onto the hood of his car and tries to prevent a police officer from looking into it has not abandoned the item.³⁶ Abandonment does not occur when a person demonstrates a continuing interest in the privacy of an item, either by placing it in another's care or by remaining close to the item and affirmatively seeking to protect it from others.³⁷

Denial of Possession or Ownership

A final important factor in weighing whether an item has been abandoned is whether a person denies possession or ownership. For example, in *United States v. Springer*,³⁸ a bus passenger, after being asked by police officers, denied ownership or possession of a suitcase. The U.S. Court of Appeals for the Second Circuit concluded the passenger had abandoned the suitcase.³⁹

CONCLUSION

Officers should be alert to the investigative opportunity presented by abandoned property. When officers elect to proceed based on an abandonment justification, they should preserve the facts upon which they concluded that the person previously in possession had surrendered privacy interest in the place, vehicle, or item searched. ♦

Endnotes

¹ *California v. Greenwood*, 108 S.Ct. 1625 (1988); *Abel v. United States*, 362 U.S. 217 (1960); *Hester v. United States*, 265 U.S. 57 (1924).

² *United States v. Levasseur*, 816 F.2d 37 (2d Cir. 1987); *United States v. Sledge*, 650 F.2d 1075 (9th Cir. 1981). Consider also,

Illinois v. Rodriguez, 110 S.Ct. 2793 (1990) (objective standard used to measure "apparent" authority to consent to a search).

³ *United States v. Levasseur*, 816 F.2d 37 (2d Cir. 1987).

⁴ *United States v. Wilson*, 472 F.2d 901 (9th Cir.), *cert. denied*, 414 U.S. 868 (1973).

⁵ See *Wilson v. Health & Hospital Corporation of Marion County*, 620 F.2d 1201 (7th Cir. 1980).

⁶ 816 F.2d 37 (2d Cir. 1987).

⁷ *Id.* at 44.

⁸ See, e.g., *United States v. De Parias*, 805 F.2d 1447 (11th Cir. 1986); *United States v. Winchester*, 916 F.2d 601 (11th Cir. 1990).

⁹ 700 F.2d 424 (10th Cir.), *cert. denied*, 103 S.Ct. 3094 (1983).

¹⁰ *Id.* at 425. See also, *United States v. Rahme*, 813 F.2d 31 (2d Cir. 1987); *United States v. Ramirez*, 810 F.2d 1338 (5th Cir. 1987); *United States v. Hunter*, 647 F.2d 566 (5th Cir. 1981).

¹¹ See, e.g., *United States v. Rambo*, 789 F.2d 1289 (8th Cir. 1986); *United States v. Larson*, 760 F.2d 852 (8th Cir. 1985). See also, *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) (defendant had no reasonable expectation of privacy in cave where he was residing as a trespasser); *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) (squatters on government land had no reasonable expectation of privacy in houses they had illegally constructed there).

¹² See *United States v. Mulder*, 808 F.2d 1346 (9th Cir. 1987).

¹³ 667 F.2d 1123 (4th Cir. 1981).

¹⁴ *Id.* at 1125. See also, *United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

¹⁵ Cf. *United States v. Wyler*, 502 F.Supp. 959 (S.D.N.Y. 1980).

¹⁶ 562 F.2d 459 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978).

¹⁷ 647 F.2d 566 (5th Cir. 1981).

¹⁸ 650 F.2d 1075 (9th Cir. 1981).

¹⁹ See also, *United States v. Wilson*, 472 F.2d 901 (9th Cir.), *cert. denied*, 414 U.S. 868 (1973) (defendant was a weekly tenant in apartment; landlord found door open and apartment in disarray, and neighbors said defendant had moved out). For an example of facts sufficient to demonstrate abandonment of business premises, see *United States v. Binder*, 794 F.2d 1195 (7th Cir. 1986).

²⁰ 821 F.2d 1328 (8th Cir. 1987).

²¹ *Id.* at 1330. See also, *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971) (defendant fled car, which came to rest partially

on the pavement, on foot after wrecking it during a high-speed chase); *United States v. Williams*, 569 F.2d 823 (5th Cir. 1978) (defendant unhitched semi-trailer loaded with marijuana, leaving it parked at rest station, after apparently becoming aware of police surveillance).

²² *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976).

²³ See *United States v. Hunter*, 647 F.2d 566 (5th Cir. 1981) (airplane left unattended in grassy area about 20 feet off airport runway in rainy, foggy weather, therefore presenting a hazard to other traffic).

²⁴ See *United States v. Scrivner*, 680 F.2d 1099 (5th Cir. 1982) (defendant left two trucks unattended at night with the ignition keys inside, one parked outside a warehouse he leased, the other parked in the warehouse. The court held that although imprudent, the defendant's actions did not constitute an abandonment).

²⁵ 469 F.2d 713 (5th Cir. 1972).

²⁶ See also, *United States v. Gibson*, 421 F.2d 662 (5th Cir.), *cert. denied*, 400 U.S. 837 (1970).

²⁷ 783 F.2d 663 (6th Cir. 1986).

²⁸ *Id.* at 667. See also, *United States v. Taylor*, 683 F.2d 8 (1st Cir.), *cert. denied*, 459 U.S. 945 (1982) (sailing vessel deserted on the rocks on the Maine coast); *United States v. Ramapuram*, 632 F.2d 1149 (4th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) ("junkie" car, unlocked and with the trunk lock removed, bearing expired license plates, parked in farm field about 150 feet from public road); *United States v. Calhoun*, 510 F.2d 861 (7th Cir.), *cert. denied*, 421 U.S. 950 (1975) (garbage truck, with one expired license plate rather than the two required, doors open and unlocked, one tire flat, and snow piled around it indicating that it had not been moved in some time, parked in city beside liquor store).

²⁹ 881 F.2d 1551 (11th Cir. 1989).

³⁰ *Id.* at 1560.

³¹ See *California v. Hodari D.*, 111 S.Ct. 1547 (1991) (youth, pursued by police, threw down rock of cocaine on public sidewalk); *Michigan v. Chesternut*, 486 U.S. 567 (1988) (defendant, who was being trailed by a marked police car, threw a paper bag on sidewalk); *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991) (defendant, being chased by police officers, threw a canvas bag into a friend's backyard); *United States v. Collis*, 766 F.2d 219 (6th Cir.), *cert. denied*, 106 S.Ct. 150 (1986) (defendant, being chased by police officers, threw shoulder bag over cyclone fence in airport parking lot).

³² *United States v. Eubanks*, 876 F.2d 1514 (11th Cir. 1989).

³³ *United States v. Caputo*, 808 F.2d 963 (2d Cir. 1987); *United States v. Dunkel*, 900 F.2d 105 (7th Cir. 1990) (defendant placed business documents into dumpster outside dental office and adjacent to parking lot); *United States v. Jabara*, 618 F.2d 1319 (9th Cir.), *cert. denied*, 446 U.S. 987 (1980) (defendant threw shopping bag out window of apartment onto driveway).

³⁴ *United States v. Wider*, 951 F.2d 1283 (D.C.Cir. 1991); *United States v. Thomas*, 864 F.2d 843 (D.C.Cir. 1989); *United States v. Torres*, 740 F.2d 122 (2d Cir. 1984), *cert. denied*, 471 U.S. 1055 (1985). See also, *United States v. Ramos*, 960 F.2d 1065 (D.C.Cir. 1992) (defendant stuffed plastic bag between seat cushions of inter-city bus and then sat a few seats away); *United States v. Mehra*, 824 F.2d 297 (4th Cir. 1987) (defendant concealed hashish in a roll of fabric that was imported into the United States; hashish was discovered as the fabric was processed and was turned over to law enforcement); *United States v. Brown*, 473 F.2d 952 (5th Cir. 1973) (defendant buried suitcase containing stolen money in open field beneath chicken coop near abandoned farmhouse).

³⁵ *United States v. Most*, 876 F.2d 191 (D.C.Cir. 1989).

³⁶ See *Smith v. Ohio*, 494 U.S. 541 (1990); *United States v. Sylvester*, 848 F.2d 520 (5th Cir. 1988) (defendant set down hunting box in field and walked some distance away to hunt; held not to have abandoned box and contents).

³⁷ See *Rios v. United States*, 364 U.S. 253 (1960) (passenger in taxi dropped package to floorboard while riding, and did not thereby abandon it); *United States v. Boswell*, 347 A.2d 270 (D.C.App. 1975) (defendant set down object covered with blanket in hallway and walked 20 or 30 feet to telephone; did not abandon item); *United States v. Jackson*, 544 F.2d 407 (9th Cir. 1976) (defendant put down suitcase and walked a few steps away).

³⁸ 946 F.2d 1012 (2d Cir. 1991).

³⁹ See also, *United States v. Lewis*, 921 F.2d 1294 (D.C.Cir. 1990); *United States v. Nordling*, 804 F.2d 1466 (9th Cir. 1986) (airline passenger left carry-on bag under plane seat, denied having any carry-on luggage); *United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.