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Illinois Appellate Court moves in 'limited lockstep' in criminal case

That's against the law!" "What they did was unconstitutional!" "I'm sure that's illegal!" "That clearly violates the Constitution!"

People without legal training often use these expressions interchangeably and, thus, incorrectly. That is to be expected. What is depressing is when appellate justices do not understand the difference.

A case in point is a recent decision of the 1st District Appellate Court, *People v. Lomax*. 975 N.E.2d 115 (2012).

Lomax concerned a case for when the need for "emergency aid" would excuse the Fourth Amendment's usual requirement that police must obtain a warrant to enter a dwelling. The court noted that the traditional test in Illinois was set out in *People v. Griffin*. 158 Ill.App.3d 46 (1987). The test consisted of three prongs: the police 1) must have reasonable grounds to believe there is an emergency; 2) must have a reasonable basis for associating the emergency with the location to be entered; and 3) must not be primarily motivated by an intent to engage in a search for criminal evidence. The court noted, however, that *Griffin*'s third prong — dealing with the subjective motives of the police — was no longer operative. This is because, the court said, that prong "was found unconstitutional by the U.S. Supreme Court in *Brigham City v. Stuart*. 547 U.S. 398 (2006)." At 122, n.2.

This is wrong. To understand why, we need to review a few basic legal concepts.

Let's say a state provides that anyone who commits the offense of driving without a license can only be given a ticket. Nonetheless, a police officer arrests a driver named "Moore" for this offense. The search incident which led to the arrest uncovered contraband drugs on Moore's person. He is charged with possession of drugs. Moore then files a motion to suppress, claiming that the arrest

and search violated the Fourth Amendment.

Was the arrest illegal? You bet. State law clearly forbade the police from arresting a person for driving without a license. It was "against the law," so it was obviously "illegal."

But it was not "unconstitutional." This is because the U.S. Supreme Court has held that, no matter how minor the offense, an arrest is always reasonable under the Fourth Amendment. *Atwater v. City of Lago Vista*. 532 U.S. 318 (2001).

So Moore contends that the Fourth Amendment exclusionary rule excludes evidence seized pursuant to an illegal, but not unconstitutional, arrest. The U.S. Supreme Court unanimously rejected this position in *Virginia v. Moore*. 553 U.S. 164 (2008). It held that the mere fact that the arrest is illegal is insufficient. The exclusionary rule only operates when police action is unconstitutional. The only way the evidence could be suppressed is if Virginia law provides suppression as a remedy for evidence seized pursuant to illegal arrests in Virginia.

So an arrest could be "illegal," but nonetheless "constitutional." And this brings us to *Lomax*'s problem with its use of the term "unconstitutional."

The U.S. Supreme Court in *Brigham City* examined what was required for the police to use the "emergency aid" exception to the warrant clause. The court concluded that the subjective motivations of the police were irrelevant under the Fourth Amendment. This is because an action is reasonable under the Fourth Amendment "[A]s long as the circumstances, viewed objectively, justify the action ... It therefore does not matter here whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured."

So after *Brigham* the third prong in *Griffin* that examined the subjective motivations of the police officers was not necessary un-

CRIMINAL PROCEDURE

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der a Fourth Amendment analysis. But let's be precise. The U.S. Supreme Court did not say that utilizing a subjective analysis was "unconstitutional." What it said was that it was "not required" by the Fourth Amendment.

Why is this such a crucial distinction? Because holding that something is "unconstitutional" commonly means that it is forbidden by the Constitution. If you tell me that the city of Chicago has prevented the Socialist Party from having a meeting because it disagrees with that group's political views, I can conclude that the city's actions are "unconstitutional" — that is, Chicago is absolutely forbidden to do this under the First Amendment.

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But the U.S. Supreme Court's decision in *Brigham* did not mean that Illinois was forbidden to use the third prong of *Griffin*. It merely meant that the prong was not required under the Constitution.

And this is a huge distinction. If Illinois decided that the Illinois Constitution required *Griffin*'s third prong, it could obviously do so. Our federal system allows a state to use "independent and adequate state grounds" to go beyond the basic governmental restrictions it must accept under the U.S. Constitution. Since the third prong is a further restriction on state power, beyond those restrictions mandated by the Fourth Amendment, the U.S. Supreme Court has no power to disturb such a decision. See *Michigan v. Long*. 463 U.S. 1032 (1983).

So how could the Illinois Appellate Court make a mistake that you would not expect from a first-year law student? I blame "limited lockstep." As you know, by using this doctrine Illinois holds that in the vast majority of situations it will simply accept the U.S. Supreme Court's views on search and seizure law with no independent analysis. See *People v. Caballes*, 851 N.E.2d 26 (2006).

"Limited lockstep" makes Illinois courts intellectually lazy. The U.S. Supreme Court in *Brigham* found that Illinois' *Griffin* test restricted police more than the Fourth Amendment mandated. If this situation occurred in most other states, the state court would say, "Well, we now know the Fourth Amendment does not force us to use the third prong. So should we retain it independently under state law because it is a good rule?"

In Illinois, however, courts are programmed to slavishly follow the U.S. Supreme Court with no judicial analysis. So the *Lomax* court cannot even distinguish things "forbidden" under the Fourth Amendment from things "not required" by it. *Lomax* shows how Illinois courts are literally forgetting how to operate in a federal system.