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Search and Seizure Incident to Lawful Arrest

A. W. Macy

into the proposed agreement. When Empire sought an injunction, neither the state court nor the United States Supreme Court had any difficulty in disposing of the defendants' contention that their right of free speech would be violated if the picketing were to be enjoined. Said Justice Black for a unanimous court: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."[25]

The decision is an important one, and is undoubtedly correct. Although the *Giboney* case is under the first of the picketing-free speech cases in which the United States Supreme Court has based its decision on the unlawfulness of purpose of the picketing, the state courts have almost without exception upheld injunctions where the picketing sought to induce a violation of a state statute.[26] It is submitted that the decision does not extend the area of permissible state regulation of picketing, but simply reaffirms principles which had already been indicated in earlier decisions. In other words, the decision serves only to define more sharply the extent of the area of permissible state regulation already roughly outlined by the court.

ELLIS C. MAGEE

SEARCH AND SEIZURE INCIDENT TO LAWFUL ARREST—On February 1, 1943, a printer who was in possession of plates for forging overprints on stamps was taken into custody. He disclosed that the defendant was one of the customers to whom he sold and delivered the forged overprints. On February 6, 1943, officers were sent to purchase from the defendant stamps bearing overprints. These stamps were reported to be forgeries on February 9, and on the 16th of the same month officers armed with a warrant for the arrest of the defendant went to the defendant's place of business, arrested him, and over his protest conducted a search of his desk, safe, and file cabinet, the search lasting approximately one and a half hours, during the course of which a large number of stamps upon which overprints had been forged were found. The second count of the indictment charged the defendant with keeping in his possession 573 forged stamps. At the trial the defendant made timely motion for the

25. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 69 S.Ct. 684, 688, 93 L.Ed. 649, 654 (1949).

26. Note (1949) 28 Ore. L. Rev. 391, 393, and the cases there cited.

suppression of the evidence pertaining to the second count, but it was denied. *Held*, that the search and seizure was lawful as an incident of a legal arrest, despite the fact that the arresting officers had sufficient time to obtain a search warrant. The Court also overruled *Trupiano v United States*[1] insofar as it required a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest. *United States v. Rabinowitz*, 70 S. Ct. 430, 49 L. Ed. 407 (1950).

In the principal case the problem of search and seizure without a warrant, incidental to lawful arrest, again confronted the United States Supreme Court; and that Court, consistent in its inconsistent manner of handling this problem, reversed itself within a period of two years. However, it appears that a degree of certainty previously lacking has been brought to this question, though, in the writer's opinion, the price paid for certainty was almost complete removal of the protection of the Fourth Amendment[2] against unlawful searches and seizures as incidents of a lawful arrest.

It has long been recognized by the Supreme Court that within certain limits a right of search and seizure without a warrant but as an incident of a lawful arrest was permissible,[3] but the Court has been hard put to define these limitations and for the past four years has been constantly redefining them much to the confusion[4] of the lower federal courts and the arresting officers. A definable standard as to what is a reasonable and an unreasonable search and seizure is necessary in order to determine whether the evidence seized by the arresting officers is admissible or inadmissible at the trial. The policy of excluding evidence, "The Federal Rule," was founded upon a principle set forth in *Boyd v. United States*,[5] and was first applied in *Weeks*

1. 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948).

2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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."

3. United States v. Rabinowitz, 70 S.Ct. 430, 94 L.Ed. 407 (1950).

4. Justice Black, dissenting in United States v. Rabinowitz, 70 S.Ct. 430, 445, 94 L.Ed. 407, 414 (1950).

5. 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Due to the limited criminal jurisdiction possessed by the federal courts until the end of the nineteenth century (Lasson, The History and Development of the Fourth Amendment to the United States Constitution [1947] 106), and due to the fact that until the last quarter of that century the accused in a federal court was excluded from testifying at all (Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, Selected Essays on Constitutional Law

v. United States.[6] It requires the defendant, if he has knowledge of the seizure, to petition the Court for the return of the evidence before the trial. Failure to do so will estop him from objecting to the unreasonableness of the search when the evidence is introduced. A later extension of the rule permits the defendant who is unaware of the search and seizure to attack collaterally[7] the admissibility of the evidence unreasonably obtained. This procedural device has been most effective in protecting the defendant's substantive rights as guaranteed by the Fourth Amendment.

The right to search the person of the accused concurrent with a valid arrest and to search and seize the fruits, tools, or evidence of the crime has long been sanctioned.[8] The reason given for this is that it is necessary to protect the arresting officer, to deprive the prisoner of potential means of escape, and to avoid the destruction of the evidence.[9] A search of a ship, an airplane, an automobile or other moving vehicle without a warrant, either incidental to arrest or otherwise, has also been sanctioned by the Court.[10]

Attempts to enlarge the limitations placed on search and seizure incidental to a lawful arrest were, with one exception, rejected by the courts until recently. Thus, in *Weeks v. United States,*[11] search of the defendant's room after he was arrested at his place of employment was held unreasonable in that no search warrant had been obtained. In *Silverthorne Lumber Company v. United States*[12] search of the defendant's office after arrest at home and the seizure, photographing for trial purposes, and replacement of evidence found in the office were held unreasonable as an incident of a lawful arrest. In *Agnello v. United States*[13] the Court held that, though the right to search the person and immediate surroundings of a man upon arrest is unquestionable, it does not follow that his dwelling three blocks away may be searched.

[1938] 1408) the question of unreasonable search and seizure under the Fourth Amendment did not become an issue until the *Boyd* case, which was decided in 1886.

6. 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

7. This has been codified in Fed. Rules Crim. Proc. 41(e) (1946).

8. Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

9. Justice Frankfurter, dissenting in United States v. Rabinowitz, 70 S.Ct. 430, 437, 94 L.Ed. 407, 417 (1950).

10. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Bringer v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1375 (1948).

11. 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

12. 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).

13. 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925).

However, the Court in *Marron v. United States*[14] appeared to have abandoned the above view, and the case seemed to stand for the proposition that a general search for unspecified articles was permissible insofar as it was in connection with a lawful arrest. In that case, the defendant was arrested in the act of selling liquor, and a ledger behind the bar which showed entries of liquor purchases was seized. The rule of the *Marron* case was drastically modified by *Go-Bart Importing Company v. United States*[15] and by *United States v. Lefkowitz*,[16] in which it was emphasized that the articles seized in the *Marron* case were in plain view, thus alleviating the necessity of a general ransacking of the premises;[17] they were instrumentalities used in conducting criminal enterprise; and they were in the immediate control of the defendant, who was apprehended in the commission of the crime in the presence of officers. "Thus explained, *Marron* stands merely for the historically justified right to seize visible instruments of crime at the scene of the arrest."[18] In both the Go-Bart and *Lefkowitz* cases, quite extensive searches of premises incidental to a lawful arrest were held by the Court to be in violation of the Fourth Amendment.

These cases, *Weeks v. United States* through *United States v. Lefkowitz*, limited the arresting officer who was without a search warrant to searching and seizing only those things that were on the physical person of the defendant or under his immediate control in plain view or in a place where they could be seized without a forceful ransacking and rummaging of the place. Recently, however, the Supreme Court has reexamined intensively the whole problem raised by these cases.

The first case to reexamine the question of search and seizure incidental to a lawful arrest was *Davis v. United States*.[19] Federal officers without a search warrant approached the defendant, who was suspected of selling gasoline in violation of the Office of Price Administration rationing requirements (a misdemeanor), and arrested him outside his business premises. After an hour of pressure the defendant acquiesced to the demands of the

14. 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927).
15. 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931).
16. 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932).
17. It does not appear from the facts in the *Marron* case that the ledger was in plain view, nor does the Court there indicate that there was no ransacking of the premises.
18. Justice Frankfurter, dissenting in United States v. Rabinowitz, 70 S.Ct. 430, 441, 94 L.Ed. 407, 420 (1950).
19. 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946).

officers and opened a locked room, producing ration coupons and a book evidencing purchases and sales of gasoline. The Court held that the evidence was admissible on the grounds that the search and seizure was reasonable as an incident of a lawful arrest. Justice Douglas, speaking for the majority, stated that the surrender of the evidence was voluntary and that arresting officers are granted greater latitude in searching for public records than in searching for private papers.[20] This was the first of several one-vote majority cases to arise in connection with this problem; it was a 4-3 decision with Justices Douglas, Reed, Burton, and Black in the majority and Justices Murphy, Rutledge, and Frankfurter in the minority. Chief Justice Vinson had not yet been appointed to the Court, and Justice Jackson was absent.

The movement toward extending the permissible area in which a search and seizure coexistent with a valid arrest would be sanctioned by the Court was given further emphasis in *Harris v. United States*.[21] Officers armed with a valid warrant for the arrest of the defendant accused of passing forged checks in violation of the Mail Fraud Statute and the National Stolen Property Act arrested the defendant and gave his four-room apartment a five-hour search, ostensibly looking for two cancelled forged checks. In the course of the search the officers came across a number of draft notices and registration certificates. As a result of this evidence the defendant was convicted of violating the Selective Training and Service Act. The Court sustained the admission of the evidence, in spite of the lack of a search warrant, as a reasonable search concurrent with a valid arrest. The doctrine of the right to search and seize things in the immediate control of the defendant was extended to include a four-room apartment under the theory that the whole apartment was in the control of the defendant.[22] In sustaining the seizure, the Court stated that the possession of the draft cards by the defendant was a continuing crime against the laws of the United States which was being committed in the presence of the agents

20. Justice Frankfurter pointed out in a strong dissent that surrender of evidence after an hour's persuasion by federal officers could hardly be called voluntary. As the offense was only a misdemeanor a search warrant could not have been obtained and thus more could be accomplished without a search warrant than with one. The distinction between private and public papers is that private papers cannot be seized due to the self-incrimination restriction, while public papers can be seized only upon proper legal sanctions.

21. 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947).

22. The question as to the Court's attitude if the four-room apartment had been a fifty room mansion was not answered in the *Harris* case.

conducting the search, thereby legalizing seizure of articles which would have been improper under a warrant to search for cancelled checks. Justice Murphy in his dissent said, with good reason, that the decision meant that a warrant for arrest authorizes an unlimited search from cellar to attic and that a search warrant is not only unnecessary but a hindrance.[23] This case, like the *Davis* case, was decided by a one-vote majority, this time by a 5-4 vote, Chief Justice Vinson having joined the majority and Justice Jackson the minority.

The problem was next dealt with in *Johnson v. United States*.[24] Officers went to the defendant's hotel on a tip and, attracted by the smell of opium coming from her room, arrested her and searched the room, seizing opium smoking apparatus. The Court seemed to retreat from the position taken in the *Harris* case and held the search and seizure unreasonable because the officers had ample opportunity to obtain a warrant, but it is significant that the arrest was not valid and there was no legal basis to justify the search. For that reason, it cannot be contended that this case modifies either the *Davis* or the *Harris* case. Justice Douglas shifted from the majority to the minority, and the old minority became the new majority—a 5-4 decision.

The principle was further extended by the decision in *Trupiano v. United States*,[25] in which federal agents had information that the defendant was a bootlegger. In February, 1946, one of the agents went to work for the defendant and kept his superiors informed as to the defendant's activities. The defendant's still was raided, and the defendant was legally arrested. Contraband articles in plain view were seized. The Court admitted the arrest was valid, but held the search and seizure illegal because the agents had sufficient time to obtain a search warrant. Thus a test of the practicability of obtaining a search warrant was applied to searches and seizures concurrent with a valid arrest. The Court distinguished *Harris v. United States* on its facts, stating that there the records were public and the evidence seized could not have been known to the arresting officers. But as there was ample time to obtain a warrant in the *Harris* case, it is difficult to conceive that the case was not for all practical

23. See Justice Frankfurter's exhaustive study of the whole problem of search and seizure in his dissent in Harris v. United States, 331 U.S. 145, 155, 67 S.Ct. 1098, 1104, 91 L.Ed. 1399, 1408 (1947).

24. 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

25. 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948).

purposes overruled. The *Trupiano* case was another 5-4 decision, again illustrating the lack of certainty in this field of the law.

The last case, previous to the principal case, involving this situation was *McDonald v. United States*,[26] in which the Court held that a search without a warrant is not justified unless the emergencies of the situation make the securing of a warrant impractical. This is in line with the *Trupiano* case. Although there is doubt concerning the validity of the arrest, Justice Douglas, speaking for the Court, handled it as an unreasonable search and seizure incidental to a valid arrest and held that the seizure was unreasonable because no emergency made it impractical to obtain the warrant. Justice Black concurred in the result, making it a 6-3 decision.[27]

Needless to say, the decisions of the five aforementioned cases confused the lower federal courts and the law enforcement officials. A clear statement of the law as it stood before *United States v. Rabinowitz* is difficult. It appears that the dominant test was the practicability of obtaining a search warrant. If the arresting officers had ample time to obtain a search warrant, then not only was a general searching and ransacking of the premises held unreasonable, but even the seizure of articles in plain view that could be called instrumentalities of the crime was forbidden. However, the situation was not clear. In spite of the attempt to distinguish the *Harris* case in the *Trupiano* case, it was apparent that there was a conflict between the decisions. The big question had not been answered—how much of the rule of the *Davis* and *Harris* cases remained in the law after the *Trupiano* decision?

The Court answered the question in the *Rabinowitz* case by overruling the *Trupiano* decision and the practicability test and by substituting a test of reasonableness, to be determined in an "ad hoc" fashion by the district court. The question was apparently settled. *Harris v. United States* was reaffirmed, and in fact, used as authority for the more limited search approved here. In applying the reasonableness test to the case at hand, the Court said that the search and seizure was reasonable be-

26. 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

27. Justice Jackson seems to imply that his test as to what is a reasonable and what is an unreasonable search and seizure springs not from constitutionl beliefs concerning the Fourth Amendment but rather is dependent upon the seriousness of the crime—to Justice Jackson, a serious crime warrants an unreasonable search; a minor crime does not warrant an unreasonable search. See also Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 1314, 93 L.Ed. 1375, 1388 (1948).

cause (1) it was an incident to a lawful arrest, (2) it took place in business premises to which the public was invited, including the officers, (3) the room was small and under the immediate and complete control of the defendant, (4) search did not extend beyond the room used for unlawful purposes, and (5) the possession of forged stamps was a crime just as it is a crime to possess burglar's tools.[28] The *Marron* case was also reaffirmed, and the majority opinion stated that the *Go-Bart* and *Lefkowitz* cases had not drained *Marron v. United States* of its contemporary vitality.[29] In overruling *Trupiano v. United States*, much was made of the hardship that the practicability test imposed on law enforcement officers and the need to grant them discretion in exercising judgment.[30] How much weight the discretion of arresting officers is to have in determining the reasonableness of the search of the Court did not answer.

In spite of the qualifying language which the Court used in sustaining this case, it is the writer's view that by reaffirming the *Harris* and *Marron* cases and using the former as authority for this case, the Court has extended the right to search without a search warrant while making a lawful arrest from a right to seize evidence on the defendant's person and under his immediate control to cover anything in the constructive possession of the defendant in the premises where the arrest is made and has completely eliminated the need to obtain a search warrant, no matter how much advance knowledge the arresting officers may have had. It does not necessarily follow that because the Court in *United States v. Rabinowitz* held that one reason the search was reasonable there was its limitation to one room, that it could not be extended to one room and a hall, or to two rooms. It is difficult, once the idea of seizing only those things in the immediate possession of the defendant is abandoned, to draw a line short of the entire premises.[31] Surely *Harris v. United States*, with its sanction of a search of four rooms, is ample authority for a more extensive search than the one room searched in the principal case. Whether the Court will extend the idea of constructive possession to articles in the possession of the defendant but not on the premises is subject only to conjecture; but it does not appear improbable in light of the extensions already

28. United States v. Rabinowitz, 70 S.Ct. 430, 434, 94 L.Ed. 407, 412 (1950).
29. 70 S.Ct. 430, 433-434, 94 L.Ed. 407, 412.
30. 70 S.Ct. 430, 435, 94 L.Ed. 407, 413.
31. Justice Frankfurter's dissent in United States v. Rabinowitz, 70 S.Ct. 430, 441, 94 L.Ed. 407, 420.

made that this will happen. The physical limitations that the Court will place on premises is also indefinite. It is, however, doubtful that the Court would consider an apartment house or an entire office building as a premise subject to search in connection with a valid arrest. But it appears safe to say that any premise that can be said to be under the immediate control of the defendant is subject to a search and seizure as an incident of a lawful arrest.

The decision in *United States v. Rabinowitz* brings a degree of certainty to this phase of the law that has been lacking since the pre-*Davis* days. This is true in spite of the fact that the *Rabinowitz* case was a 5-3 decision and that Justice Douglas, who in light of his past record would more than likely have voted with the minority, was absent.

During the period that lapsed between the three cases of *Johnson, Trupiano,* and *McDonald* and the case of the *United States v. Rabinowitz,* Justices Murphy and Rutledge, who voted with the majority in those cases, died and were replaced by Justices Clark and Minton,[32] who sided in the *Rabinowitz* case with the minority in the above mentioned cases to form a new majority. In reality, the *Rabinowitz* case can be considered a 6-3 decision when it is realized that Justice Black's dissent in that case was not in protest against the extension of the right to search concurrent with a valid arrest but was motivated by a desire for certainty, which he felt could be obtained by adhering to the *Trupiano* rule long enough to see how it worked.[33] When that is taken in conjunction with his view as expressed by the *Davis* and *Harris* cases, it is not mere conjecture to assume that if the situation is again presented, Justice Black will side with the present majority.

A. W. MACY

TORTS—LIABILITY OF OWNER OF STOLEN AUTOMOBILE—A car owner left his car unattended and unlocked on a public street, with the key in the ignition. The car was stolen, and in the getaway the thief negligently drove into and injured plaintiff, who was exercising reasonable care. Financially responsible car

32. It is interesting to note that both Justice Clark and Justice Minton, who have long been associated with "New Deal" and "Fair Deal" Civil Rights programs in other civil liberties questions, sided with the government and against civil liberties in this case.

33. Justice Black, dissenting in United States v. Rabinowitz, 70 S.Ct. 430, 445, 94 L.Ed. 407, 414.