Louisiana Law Review

Volume 26 | Number 3
The Work of the Louisiana Appellate Courts for the 1965-1966 Term: A Faculty Symposium
Symposium: Administration of Criminal Justice
April 1966

Procedure: Evidence

George W. Pugh

EVIDENCE

*George W. Pugh**

EVIDENCE OBTAINED IN VIOLATION OF CONSTITUTIONAL OR STATUTORY RIGHTS

Under the 1961 holding by the United States Supreme Court in *Mapp v. Ohio*,[1] evidence obtained as a result of an unconstitutional search and seizure is inadmissible in state court. When is a search and seizure unconstitutional? Ever since *Mapp v. Ohio*, the Louisiana courts have been struggling with the problem, and will be for some time to come. This past term of court was no exception.

In *State v. Lee*,[2] the state attempted to justify the seizure of certain marijuana cigarettes on the ground that they had been seized pursuant to a search warrant. The difficulty was that the house number of the place to be searched, as designated in the search warrant, had, on telephoned authorization by the issuing judge, been altered by the police officer. This, the Supreme Court found, one judge dissenting, was fatal error. Evidence seized pursuant to the altered search warrant was therefore held inadmissible.

When is there "probable cause" sufficient to justify the issuance of a search warrant?[3] In 1964, in *Aguilar v. Texas*,[4] the United States Supreme Court stated:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U.S. 528, was 'credible' or his information 'reliable.' "[5]

---

*Professor of Law, Louisiana State University.

1. 367 U.S. 643 (1961).
2. 247 La. 553, 172 So. 2d 678 (1965).
3. The matter will be discussed at some length in a Comment in a forthcoming issue of this *Review*.
4. 378 U.S. 108 (1964).
5. *Id.* at 114.

In *State v. Oliver*,[6] a narcotics case, the Louisiana Supreme Court quoted the language set forth above from *Aguilar*, and found that the test was met. In *State v. McIlvaine*,[7] a narcotics case first considered by the Louisiana Supreme Court prior to the *Aguilar* decision, the court had also held that there was sufficient probable cause for the issuance of a search warrant. On certiorari to the United States Supreme Court, however, the judgment was vacated and the case remanded to the Louisiana Supreme Court for reconsideration in light of *Aguilar*.[8]

On the remand of *State v. McIlvaine*,[9] the Louisiana Supreme Court, Justice McCaleb dissenting, held that even if there were not probable cause sufficient to justify the issuance of a search warrant, the seizure of the evidence in question should be upheld as incidental to a lawful arrest. In deciding that the arrest was "reasonable under 'fundamental criteria' laid down by the fourth amendment and in opinions of the United States Supreme Court applying the amendment," the Louisiana Supreme Court stated:

> ". . . [W]e think it is entirely probable that inferences and conclusions from facts may be made in a narcotics case which may conceivably offend standards of reasonableness in another case. The very nature of narcotics transactions, the places where they occur and the parties involved dictate that a different standard should apply if common sense and reason are to play a part in the determination of reasonableness."[10]

What inferences may be properly drawn from facts will, of course, depend upon the context in which the facts occur. But to say this does not seem to be the same as saying that a "different standard" of reasonableness should apply to arrests for narcotics violations, which appears to be what the court is saying. Justice McCaleb in his dissent takes issue with the majority in this regard, stating his position persuasively.

State v. Marchetti[11] was another case decided during the past term concerning the validity of an arrest. Defendant contended

6. 247 La. 729, 174 So. 2d 509 (1965).
7. 245 La. 649, 160 So. 2d 566 (1964), discussed in *The Work of the Louisiana Appellate Courts for the 1963-1964 Term — Criminal Procedure*, 25 LA. L. REV. 455, 456 (1965).
8. 379 U.S. 10 (1964).
9. 247 La. 747, 174 So. 2d 515 (1965).
10. *Id.* at 761, 174 So. 2d at 520.
11. 247 La. 649, 173 So. 2d 531 (1965).

that a statement made by him should be held inadmissible as the product of an illegal arrest.[12] Rejecting this contention, the court found that there had been probable cause,[13] but the reasoning supporting this conclusion seems quite questionable.

According to the opinion, the officers had been instructed "to be on the lookout for a 1960 Pontiac, bearing an Illinois license, and its owner, Leonard Flanagan, who was being sought in connection with an investigation being conducted through a prior arrest of said Flanagan."[14] During the early hours of the morning, the officers saw a car fitting this description in the 200 block of Bourbon Street in the French Quarter, near the hotel where they had determined Flanagan was living. Shortly after the car was placed under surveillance, the defendant Marchetti approached the car, unlocked the trunk, removed something from within, and put it in his coat pocket. The officers, thinking Marchetti was Flanagan, approached and questioned him. The defendant said he was Marchetti, and denied that he knew Flanagan. Marchetti was asked why he was going into the trunk of the automobile, and the officers did not believe his reply that he had been given $20.00 by someone to remove that person's clothes from a hotel in the 200 block of Bourbon Street and put them and the keys in the automobile. Shortly thereafter, Marchetti was arrested and taken to the police station for questioning. Some forty-five minutes after his arrest, "he was booked under his own name with a violation of LSA-R.S. 14:107,[15] investigation of armed robbery." Subsequently, he made a statement implicating himself with Flanagan in an armed robbery. On the basis of these facts, the Court held that there was probable cause for arrest, stating:

> "Officer Williams testified that at the time Marchetti told the officers that he was to have removed clothes from a hotel room and placed them in Flanagan's car, the story sounded 'phony'; it is to be noted that at the time the story was given, the officers thought that Marchetti was Flanagan, and they had been instructed that Flanagan was wanted. We are constrained to find that any reasonable man would have doubted the story. Flanagan's car was a movable, and Marchetti was

12. See Wong Sun v. United States, 371 U.S. 471 (1963).

13. The matter will be discussed at some length in a Comment in a forthcoming issue of this *Review*.

14. 247 La. 649, 652-53, 173 So. 2d 531, 532 (1965).

15. Vagrancy.

exercising some control over it; it follows that a reasonable man would have thought that Marchetti was Flanagan or that he was a person associated or friendly with Flanagan. Such thinking would lead to the conclusion that the person knew of the whereabouts of the wanted person. Such thinking would be more than suspicion."[16]

The fact that the officers may have reasonably believed Marchetti was Flanagan does not seem sufficient grounds to constitute probable cause for arrest: it does not appear that there was probable cause to arrest Flanagan. Even if the officers might have reasonably concluded that Marchetti was a person associated or friendly with Flanagan, or knew his whereabouts, this would not be sufficient to justify arresting Marchetti. It does not appear that there was probable cause to arrest for "investigation of armed robbery," one of the things for which he was booked; there is nothing in the stated facts to indicate that at the time of arrest there was reasonable cause to believe that defendant was guilty of armed robbery, and, in any event, there seems to be no valid authorization for arrest for "investigation" of armed robbery.[17] The vagrancy statute does provide that "persons found in or near any structure, movable, vessel, or private grounds, without being able to account for their lawful presence therein" shall be guilty of vagrancy,[18] and it is to be remembered that Marchetti was also booked for vagrancy. In this connection, the court's comment that Marchetti's statement sounded "phony" and that "any reasonable man would have doubted the story" takes on added significance. However, the quoted language from the vagrancy statute is very broad indeed, and it is well known that vagrancy statutes are frequently used as a means for picking up suspicious persons for questioning and investigation. It seems questionable to this writer whether such arrests under the vagrancy statute would be upheld by the United States Supreme Court.

Post-Arrest Statements by Accused

Louisiana law provides that when a person has been arrested without a warrant,[19] the peace officer, after causing him to be

16. 247 La. 649, 661, 173 So. 2d 531, 535 (1965).

17. See *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Evidence*, 24 LA. L. REV. 340, 342 (1964).

18. LA. R.S. 14:107(8) (Supp. 1952).

19. LA. R.S. 15:80 (1950). There is a similar provision relative to persons arrested with a warrant, LA. R.S. 15:79 (1950).

booked, shall "without unnecessary delay" take him before either the judge having jurisdiction to sit as committing magistrate in the case[20] or before the judge having trial jurisdiction.[21] Unless an affidavit is then filed setting forth the charge against the prisoner, the law directs[22] that the judge shall discharge the prisoner from custody. These provisions of Louisiana law are very similar to those governing federal proceedings.[23] The well-known *McNabb-Mallory* line of federal cases[24] holds that in a federal proceeding an untimely delay in bringing the prisoner before the committing magistrate will cause statements given during the intervening period to be inadmissible in a federal court. The exclusionary rule of *McNabb-Mallory* was not grounded in constitutional requirements and thus far has not been made applicable as such to the states through the fourteenth amendment.[25]

In *State v. Marchetti*,[26] it was urged that the Louisiana legislature had, by the above-cited statutes, adopted a *McNabb-Mallory* rule of its own. This contention does not seem to have been met head-on by the court. Instead, the court stressed that the record did not indicate that the defendant had requested a preliminary hearing and that the federal courts have not held the *McNabb-Mallory* rule obligatory upon the states under the Constitution. It would appear to the writer that the statutory obligation of the peace officer to take the prisoner after booking "without unnecessary delay" before the committing magistrate or trial judge is unrelated to any assertion by him of such right. Also, it would seem that the fact that the United States Supreme Court has not ruled that the states under the Constitution are required to follow a *McNabb-Mallory* exclusionary rule does not answer defendant's contention that the Louisiana legislature has itself adopted such a rule. Nevertheless, it is clear that the legislature did not expressly adopt an exclusionary rule for violations of the statutory obligation, and it is likewise clear from

20. Where the charge is such that the accused is entitled to a preliminary examination.

21. Where the charge is such that the accused is not entitled to a preliminary examination.

22. LA. R.S. 15:81 (1950).

23. FED. R. CRIM. PROC. rule 5a.

24. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957); and see the discussion in Hogan & Snee, *The McNabb-Mallory Rule; Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958).

25. See Culombe v. Connecticut, 367 U.S. 568 (1961).

26. 247 La. 649, 173 So. 2d 531 (1965).

this case and the *Progue* case[27] that the Louisiana Supreme Court is disinclined to adopt an exclusionary rule similar to that of *McNabb-Mallory*. In any event, an expansion by the federal courts of *Escobedo v. Illinois*[28] may well achieve an impact similar to that which would be accomplished if the *McNabb-Mallory* line were held applicable to the states.

Motion To Suppress

In 1964, in *State v. Rowan*,[29] defendant claimed that the trial judge had committed reversible error in refusing to pass upon his motion to suppress prior to trial. With respect to this contention, the Supreme Court stated:

> "True, in recent years some of the district judges of this state have entertained and ruled on motions of that nature before trial. (We understand that the procedure has been borrowed from that which is practiced in the federal courts, although our statutory law makes no provision for a motion to suppress.) But in each of the cases considered by us in which this has been done it did not appear from the record that the state had objected to the judge's action. Consequently, we have not yet been called upon to determine whether such a motion is cognizable under our procedural laws. In any event no prejudice results when the judge merely defers action on the motion to suppress until the occurrence of the actual trial, at which time he (out of the presence of the jury) hears testimony on the question of the evidence's admissibility — as was done in the instant case."[30]

It seems fair to state that, before the *Rowan* case, it was a matter of doubt as to whether a pre-trial motion to suppress was available in Louisiana, and the *Rowan* case certainly did nothing to alleviate the doubt. The quoted language tended to accentuate it.

In *State v. Davidson*,[31] the Louisiana Supreme Court held not only that a pre-trial motion to suppress evidence obtained in

27. 243 La. 337, 144 So. 2d 352 (1962), discussed in *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Evidence*, 24 LA. L. REV. 340, 342 (1964).

28. 378 U.S. 478 (1964).

29. 246 La. 38, 163 So. 2d 87 (1964).

30. *Id.* at 41-42, 163 So. 2d at 89.

31. 248 La. 161, 177 So. 2d 273 (1965). Although decided subsequent to the period covered by this symposium, this case is included in this discussion because of its great importance and significance to the practitioner.

violation of constitutional rights is available, but also that the failure of defense counsel to utilize it under the circumstances of that case constituted a waiver of his client's rights. The court apparently adopts as Louisiana law the provisions of rule 41(e) of the Federal Rules of Criminal Procedure, not, it appears, because of any attachment for the exclusionary rule of *Mapp v. Ohio*,[32] but because of disaffection for it. In this connection, the court stated:

> "In any event, we believe that, since the exclusionary rule must be applied in all state criminal cases in accordance with the edict in Mapp v. Ohio, the procedural rights of the accused should also conform with the standard provided by the Federal Courts and that he should not be accorded by the trial courts of this State any less onerous procedure than he would have had if he had been tried before a Federal Court. See State v. Rasheed and Thomas, 248 La. —, 178 So. 2d 261, this day handed down. In other words, coexistent with the implementation of the exclusionary rule, it is our policy to adopt and enforce the procedural rule of the court from which the exclusionary rule has emanated."[33]

In light of the doubt that previously existed with respect to the availability of the pre-trial motion to suppress in Louisiana, and the federal courts' reluctance to permit a waiver of constitutional rights,[34] it seems questionable whether the *Davidson* case itself would be upheld by the United States Supreme Court. In any event, the Louisiana court's adoption of rule 41(e) of the Federal Rules of Criminal Procedure would seem to be controlling for future cases and is of utmost importance to the practitioner. Under rule 41(e), a motion to suppress *shall* be made before trial unless opportunity to make it did not exist or the defendant was not aware of the grounds for the motion. It is clear from the rule that otherwise the right to object might be lost. Fortunately, the rule does stipulate that "the court in its discretion may entertain the motion at the trial or hearing," but the prudent attorney, to protect his client's rights, should take care to assert them timely.

---

32. 367 U.S. 643 (1961).

33. 248 La. 161, 177 So. 2d 273, 275 (1965).

34. See Henry v. Mississippi, 381 U.S. 908 (1965); Fay v. Noia, 372 U.S. 391 (1963); and a discussion of these and the *Davidson* case in a comment in this *Review*, Comment, *Post Conviction Remedies*, 26 LA. L. REV. 705 (1966).

DISCOVERY — CRIMINAL CASES

In 1945, the Louisiana Supreme Court, in the landmark decision of *State v. Dorsey*,[35] held that Dorsey's defense counsel had the right to a pre-trial inspection of his client's alleged written confession, which the district attorney had in his possession and planned to use at the trial, but refused to disclose. In a unanimous opinion authored by Justice Hawthorne, the Supreme Court rejected the argument that the confession was "a public document" within the meaning of the Public Records Act,[36] and held that it was not privileged from disclosure to defense counsel. The court based its decision on the proposition that under the State and Federal Constitutions every accused is guaranteed a fair trial, and that to deny defense counsel a pre-trial inspection of defendant's written confession would be tantamount to denying accused a fair trial and would be a violation of constitutional rights. The court recognized that under the traditional common law view no such right of inspection existed, but found that fairness required it.

To permit defense counsel a pre-trial inspection of his client's alleged written confession seems quite reasonable, but as late as 1953 the New Jersey Supreme Court stated "Louisiana is the only state in the Union where it is claimed that there exists a right to an inspection of a confession."[37] In recent years, great strides have been made in other jurisdictions towards granting defendants pre-trial discovery rights,[38] a development following the earlier broadening of discovery in civil cases.

Defense counsel in Louisiana have repeatedly attempted to secure an expansion of the rule of *State v. Dorsey*, but to no avail. Louisiana, the trail-blazing jurisdiction in this area, stopped where it started, and *State v. Pailet*[39] reflects another unsuccessful effort. Defense counsel moved to suppress all evidence obtained through wiretapping and prayed for oyer of wiretap recordings in order that he could use them as a means of ascertaining whether the officers appearing as witnesses for the state were testifying truthfully when they stated that the evidence they secured against the defendant came from sources

35. 207 La. 928, 22 So. 2d 273 (1945).
36. La. Acts 1940, No. 195, § 3, now LA. R.S. 44:3 (1950).
37. State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).
38. See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964), and authorities collected therein.
39. 246 La. 483, 165 So. 2d 294 (1964).

independent of the wiretapping.[40] In affirming the trial court's refusal to force pre-trial inspection of the wiretap recordings, the Supreme Court, citing instances, stated that on numerous occasions defense counsel had unsuccessfully urged the court to broaden the scope of *State v. Dorsey*, that it is "the well-established rule that all evidence relating to a pending criminal case which is in possession of the State is privileged and not subject to inspection by the accused unless and until it is offered in evidence at the trial,"[41] and that the single exception to this rule is when the state has a written confession of the accused in its possession. Apparently, the statement that such evidence is privileged is based upon the Public Records Act, but it is significant that in *State v. Dorsey* the act was held not to bar the disclosure of defendant's written confession in the hands of the state. Good discovery devices have helped to reduce the "game" element of the civil trial; it is perhaps of even greater importance to reduce the "game" element of our criminal trials.

PRIVILEGE — PHYSICIAN-PATIENT

It is clear that there is a physician-patient privilege in Louisiana criminal cases,[42] but is there one in civil cases? In the opinion of the writer, the Supreme Court had not clearly ruled on the question prior to 1965.[43] In *Moosa v. Abdalla*,[44] a custody case, the matter was again[45] squarely presented to a court of appeal. The parties had been judicially separated, and on their stipulation the lower court had previously awarded custody of the children to the mother, subject, *inter alia*, to the father's right to keep the children during the summer months. Thereafter, the mother brought proceedings to modify the custody decree, contending that the children were being injuriously affected by long visitation rights. To the attempt by the wife to secure the testimony of a neuro-psychiatrist who had been treating the father, the father asserted an alleged physician-patient privilege. The trial court denied the privilege, and the Third Circuit Court of Appeal granted certiorari. In a scholarly per

40. The court in footnote discussed the authorities relative to the admissibility of wiretap evidence, but found it unnecessary to rule on the question.

41. 246 La. 483, 497, 165 So. 2d 294, 299 (1964).

42. LA. CODE OF CRIM. PROC. art. 476 (1928), LA. R.S. 15:476 (1950).

43. See the discussion and the authorities collected in *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Evidence*, 24 LA. L. REV. 340, 344 (1964).

44. 173 So. 2d 53 (La. App. 3d Cir. 1965).

45. In Boulware v. Boulware, 153 So. 2d 182 (La. App. 2d Cir. 1963), the Second Circuit, in another custody case, denied the existence of the privilege.

curiam, one judge dissenting, the court of appeal certified the question to the Supreme Court. The Supreme Court elected to handle the case as though it had been brought there on direct appeal. A unanimous court held, in a well-reasoned decision, that there is no physician-patient privilege in Louisiana civil cases.[46]

In the opinion of this writer, a strong argument can be made for a limited physician-patient privilege,[47] and Louisiana's present position with respect to it seems rather anomalous. The Constitution of 1921[48] stipulates that the "Legislature shall provide . . . for protecting confidential communications made to practitioners of medicine and dentistry and druggists by their patients and clients while under professional treatment and for the purpose of such treatment." In 1927, the Supreme Court in *State v. Genna*[49] held that this provision is not self-operative, and the following year, when the Code of Criminal Procedure was adopted, the legislature made express provision in it for a physician-patient privilege.[50] *Moosa v. Abdalla* holds that there is no physician-patient privilege in Louisiana civil cases, but it is interesting to note that in 1964, in an act providing for the licensing and regulation of *psychologists*,[51] the legislature established a psychologist-client privilege,[52] presumably for both criminal and civil cases. Neither the court of appeal nor the Supreme Court decision mentions the 1964 legislation or any bearing it might have upon the problem. A person who is having mental difficulties and senses himself in need of professional help, but fears that what he might reveal would be damaging to him if subsequently disclosed in a judicial proceeding, is in an interesting situation. If cognizant of the law, he might well feel it necessary to forego the benefits of psychiatric treatment, but could safely consult a psychologist. It seems that the legis-

46. 248 La. 344, 178 So. 2d 273 (1965). Although decided subsequent to the period covered by this symposium, this case is included in this discussion because of its relationship to the court of appeal decision.

47. For an outline of some of the problems, see *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Evidence*, 24 LA. L. REV. 340, 344 (1964).

48. LA. CONST. art, VI, § 12.

49. 163 La. 701, 112 So. 655 (1927).

50. LA. CODE OF CRIM. PROC. art. 476 (1928), LA. R.S. 15:476 (1950).

51. La. Acts 1964, No. 347, LA. R.S. 37:2351-2368 (Supp. 1964).

52. La. Acts 1964, No. 347, § 16, now LA. R.S. 37:2366 (Supp. 1964), provides: "A certified psychologist shall not be examined without the consent of his client, as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall a certified psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity."

lature either should establish some form of physician-patient privilege — at least for psychiatrists — or should abolish the psychologist-client privilege. The existing state of the law seems hard to justify.

IMPEACHMENT — PRIOR INCONSISTENT STATEMENTS

In *Guerra v. Young Constr. Co.*,[53] a personal injury case, defendant complained of the trial court's refusal to permit him to bring out, apparently by cross-examination of the plaintiff, that during the five years preceding the injury complained of, plaintiff had not filed an income tax return. Defendant apparently urged that the evidence was relevant and admissible for impeachment purposes, as a prior contradictory statement tending to show that defendant had earned less than he claimed. Upholding the ruling of the trial court, the Court of Appeal (Fourth Circuit) stated:

> "Defendants argued, from the practice of contradicting testimony of a plaintiff's earnings by showing lesser amounts from his income tax returns, that the fact no returns have been filed should be admitted in evidence to the jury. However, while income tax returns, showing smaller income than that testified to, are admissible as prior inconsistent statements, the absence of a return does not constitute a prior inconsistent statement, and is therefore not admissible on that ground."[54]

Although not technically a "statement," it would seem that the non-filing should have been admissible as prior conduct seemingly inconsistent with the plaintiff's testimony.[55] If his failure to file a tax return were due to factors other than earnings of less than the statutory minimum, then plaintiff should have to come forward and explain the circumstances or suffer the consequences.

Aside from use as impeachment testimony, it would appear that the non-filing of income tax returns should have been admissible as an admission.[56]

---

53. 165 So. 2d 882 (La. App. 4th Cir. 1964).
54. *Id.* at 887.
55. See MCCORMICK, EVIDENCE § 34, n.3 (1954).
56 See *id.*, §§ 246-250 (1954).

HEARSAY

In *State v. Oliver*,[57] a narcotics case, the trial court, over a hearsay objection, permitted arresting officers to testify to detailed descriptions supplied by an informer. The descriptions, it appears, fitted the defendants. Upholding the ruling of the trial court, the Supreme Court (on appeal of one of the defendants) expressed doubt that the testimony was hearsay, stating that it was offered not to establish the truth of the descriptions, but only to show that the officers had been given such descriptions.[58]

It seems to this writer that the trial court should have sustained the hearsay objection. In determining whether proffered evidence is or is not hearsay, one naturally considers both relevancy and materiality, for testimony which is hearsay in one context may not be in another.[59] In the instant situation, it appears that the questioned testimony was permitted to go to the jury to be used by them in their deliberations on guilt or innocence. In such deliberations by the jury, the reasonableness of the officers' actions in making the arrest seems quite immaterial. The importance of the description furnished by the informer hence appears in this context not to be the *fact* that such detailed descriptions had been furnished to the officers but rather the verity or truthfulness of the out-of-court statement of description, as well as trustworthiness of the implied out-of-court assertion by the informer that persons fitting said description were guilty of *some* crime (presumably that for which they were being tried). It seems that in this context the hearsay objection should have been sustained.

The foregoing analysis assumes that the instant testimony was permitted to go to the jury on the question of guilt or innocence. Of course, in a different context the same evidence might properly be admissible; for example, on the hearing before the judge of a motion to suppress evidence obtained as the result of an allegedly illegal arrest. In such a hearing, it is material whether the arresting officer acted reasonably in making the arrest. The fact that he had been furnished such and such description would be very relevant in determining

57. 247 La. 729, 174 So. 2d 509 (1965).

58. The Court went on to hold that even if the testimony in question were hearsay, its admission was not prejudicial to the substantial rights of the defendant.

59. See Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954).

whether he acted reasonably. In the context apparently presented by the instant problem, however, it seems that utterance of fact rather than the fact of the utterance is of prime importance.

Statements Made in the Presence of Defendant

In *State v. Watson*,[60] the Supreme Court again implied that statements made in the presence of the defendant, at least those made in his presence other than when he is in legal custody, are admissible in evidence despite hearsay objection. In the opinion of this writer, for reasons stated previously in this *Review*,[61] the circumstances that a statement was made in the presence of the defendant should not necessarily overcome a hearsay objection, even where the defendant was not in legal custody at the time the out-of-court statement was made.

PHOTOGRAPHS — FOUNDATION FOR ADMISSIBILITY

In *Launey v. Traders & Gen. Ins. Co.*,[62] Judge Tate, Presiding Judge of the Third Circuit, took pains to outline the law relative to the foundation required for the admissibility of photographs, providing a very helpful summary of the governing principles. The *Launey* case was an action for personal injuries, and to show the scarred condition of the injured party's face shortly after the accident, five photographs were admitted over objection. Three of these were identified by the victim as being pictures of himself accurately depicting his condition at the time, and two were similarily identified by the attending physician. This, the court of appeal held, was sufficient foundation for the introduction of the photographs. It was not a prerequisite for admissibility that the photographer take the stand and negative possibilities of retouching or distortion.

JUDICIAL NOTICE — PERSONAL KNOWLEDGE

In a civil case tried to a judge alone, may the judge take into consideration, in appraising the credibility of the witnesses, his personal knowledge of the witness and his reputation for truth

60. 247 La. 102, 170 So. 2d 107 (1964).

61. See the discussion in *The Work of the Louisiana Appellate Courts for the 1961-1962 Term*, 23 LA. L. REV. 406, 412-13 (1963); and *The Work of the Louisiana Appellate Courts for the 1962-1963 Term*, 24 LA. L. REV. 340, 348 (1964).

62. 169 So. 2d 757 (La. App. 3d Cir. 1964).

and veracity? In *Hudson v. Arceneaux*,[63] the question was squarely presented. In his reasons for judgment, in discussing why he accepted one version of controverted facts rather than another, the trial judge forthrightly but bluntly stated, *inter alia*: "The court knows [a named witness], personally and by reputation, and does not have great regard for his veracity."[64]

The Court of Appeal for the Third Circuit, citing the *Miranne*[65] case, recognized the rule that a judge may not properly "make his individual knowledge of a fact, not generally known, the basis of his decision in a case pending before him."[66] The court held, however, that "in determining the credibility of a witness and in deciding what weight should be attached to his testimony the trial judge may properly take into consideration his own personal knowledge of the witness and of his reputation."[67] In so holding, the court apparently draws a distinction between using personal knowledge of a fact as the basis for decision and using personal knowledge of a witness and his reputation in determining credibility of a witness and deciding what weight to be accorded his testimony. The distinction seems hard to justify. Of course, as the appellate court points out, it would be very difficult indeed (the court says "impossible") for a trial judge who knows the witness and his reputation completely to disregard or ignore it. The court says "it would be highly impractical and untenable for us to hold that a trial judge, in observing the demeanor of a witness while testifying, in evaluating his testimony or in determining the credibility of the witness, must ignore or disregard his own personal knowledge of the witness or his reputation."[68] But, of course, a problem arises for the litigant, unaware of the trial judge's personal appraisal of the witness and his reputation. The Court of Appeal states that:

> "The trial judge is under no duty to inform the parties, either prior to or during the trial, of the fact that he is acquainted with the witness or that he has some knowledge of the background or personality of the witness or of his standing or reputation in the community. It also is not neces-

63. 169 So. 2d 731 (La. App. 3d Cir. 1965).
64. *Id.* at 734.
65. Miranne v. State Farm Mut. Auto. Ins. Co., 54 So. 2d 538 (La. App. Orl. Cir. 1951).
66. 169 So. 2d 731, 735 (La. App. 3d Cir. 1965).
67. *Ibid.*
68. *Ibid.*

> sary for the trial judge to testify to, or to place in the record, any facts of which he may have personal knowledge relating to the reputation of the witness or which may have some bearing on the conclusions reached by the judge as to the credibility of that witness."[69]

In reviewing the factual determination by the trial court, the court of appeal explicitly stated that it attached "added weight" to the conclusions of the trial judge with respect to the credibility of the witness because of the judge's personal acquaintance with the witness and his reputation.

Although the writer fully recognizes that there are difficulties inherent in a rule precluding a trial judge from drawing upon personal knowledge of a witness and his reputation in appraising his testimony, it seems that there are also genuine practical difficulties and dangers in adopting a contrary rule. How can a party protect himself if, by chance, the judge is in error with respect to his personal knowledge? Generally, a party may not introduce evidence to establish the credibility of his witness until the credibility of the witness has been attacked,[70] and this would appear to be true even if he suspects that the trial judge may have some reason to doubt the witness' veracity. The instant case indicates that the appellate court may properly give "added weight" to the trial judge's conclusions because of his personal knowledge. But the trial judge may not have testified (and hence not been subject to cross-examination), and the credibility of the witness, as here, may never have been formally attacked. It would seem that a rule contrary to that taken by the court of appeal would be in greater accord with evidentiary authorities.[71]

69. *Ibid.*

70. See LA. R.S. 15:484 (1950), and MCCORMICK, EVIDENCE § 49 (1954).

71. See 9 WIGMORE, EVIDENCE §§ 2569-2570 (1940), and MCCORMICK, EVIDENCE § 324 (1954).