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PRETRIAL CRIMINAL PROCEDURE

P. Raymond Lamonica*

SEARCH AND SEIZURE

Burden of Proof

Almost seventeen years after the United States Supreme Court decided *Mapp v. Ohio*,¹ the Louisiana Supreme Court has for the first time directly addressed the issue of burden of proof at motion to suppress hearings based upon alleged unconstitutional searches or seizures. In *State v. Franklin*,² the court held "that once the defendant makes the initial showing at a motion to suppress hearing that a warrantless search occurred, the burden shifts to the State to affirmatively show that the search is justified under one of the narrow exceptions to the rule requiring a search warrant."³

Some of the prior confusion on the burden of proof issue had resulted from article 703(C) of the Louisiana Code of Criminal Procedure which provides that in a motion to suppress "the burden of proof is on the defendant to prove the grounds of his motion"⁴ This provision must be read in light of the constitutional burden of proof earlier alluded to in *Chimel v. California*.⁵ In *Chimel* the Court stated, "Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it'"⁶

Franklin appears to recognize that the article 703(C) burden is met when the defendant shows that no warrant was

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1. 367 U.S. 643 (1961).

2. 353 So. 2d 1315 (La. 1977).

3. *Id.* at 1318-19. This rationale should also apply to warrantless seizures without searches.

4. See, e.g., *State v. O'Conner*, 320 So. 2d 188, 192 (La. 1975). See also *State v. Amphy*, 259 La. 161, 249 So. 2d 560 (1971), *cert. denied*, 405 U.S. 1074 (1972).

5. 395 U.S. 752 (1969).

6. *Id.* at 762, quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951) (emphasis added).

obtained and that a seizure occurred. At that time the state must "affirmatively show that the search is justified under one of the narrow exceptions to the rule requiring a search warrant."⁷ This holding is of particular importance in light of the often critical impact that factual findings based upon credibility evaluations play in warrant exception analysis.⁸

The court did not specifically hold that the state must meet its burden of proof by "proof beyond a reasonable doubt,"⁹ by "clear and convincing evidence" or by "a preponderance of the evidence." However, the court cited *Lego v. Twomey*,¹⁰ an involuntary confession case in which the United States Supreme Court indicated that the state "must prove at least by a preponderance of the evidence that the confession was voluntary."¹¹ The court may well have applied this test in *Franklin* in stating that "[i]f the evidence is in equipoise, since the burden is on the State, then the motion to suppress should have been granted"¹² However, in prior Louisiana warrant exception cases predicated upon consent, the court has indicated that the state must meet its burden by "clear and convincing evidence."¹³ Since the fundamental issue is the realistic enforcement of constitutional safeguards, whatever the warrant exception at issue, it appears to this writer that the more stringent standard of proof, clear and convincing evidence, is appropriate.¹⁴

Plain View

Several cases this term indicate the continued (but per-

7. 353 So. 2d at 1318-19.

8. See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 590 (1976).

9. In confession cases the burden has been "beyond a reasonable doubt." See LA. CODE CRIM. P. art. 703(C). See also LA. R.S. 15:451 (1950) in which the "affirmatively show" language is similar to that of *Franklin*.

10. 404 U.S. 477 (1972).

11. *Id.* at 489.

12. 353 So. 2d at 1321.

13. *State v. Dupuy*, 319 So. 2d 299 (La. 1975); *State v. Amphy*, 259 La. 161, 249 So. 2d 560 (1971), cert. denied, 405 U.S. 1074 (1972).

14. See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 592 n.85 (1976).

haps lesser) difficulty in dealing with the "plain view" concept. In *State v. Parker*¹⁵ the police, early one morning, observed a lawfully parked van. With a flashlight an officer determined that it was unoccupied and saw a "plastic bag protruding from under the seat, which he thought contained marijuana."¹⁶ One officer opened the unlocked driver's door and removed the package, and the defendant was arrested when he returned to the vehicle.

The case presented two distinct issues regarding plain view notions: first, whether the officers had the right to shine the flashlight in the van to look (search) "to see if there was anyone in it, or any type of letter or anything that might show a name for possible identification,"¹⁷ second, whether the officers had the right to seize the marijuana.

The court's response to the search issue was:

[T]here can be no doubt that [the officer] did not intrude upon the defendant's protected area by *standing* in the street along side the van. We *pretermit* deciding and *assume* for the purpose of argument that the evidence was *inadvertently observed*, and that it was clearly *contraband*. For the *purposes of this decision*, we may say that the officers did not conduct an unconstitutional *search*.¹⁸

The court considered whether the warrantless seizure was unjustified, stating "there was no immediate danger that the evidence would be spirited off or destroyed. Leaving the car under surveillance while a warrant could be obtained would have imposed no greater hardship on the officers, nor would it have endangered the evidence."¹⁹

The holding in *Parker* appears to be predicated solely upon the seizure issue, *i.e.*, whether under the particular facts a warrant should have been procured. The majority clearly recognized that probable cause alone, even in automobile cases, is insufficient to authorize a warrantless seizure. The facts indi-

15. 355 So. 2d 900 (La. 1978).

16. *Id.* at 902.

17. *Id.* A license plate check was alleged to be unavailable.

18. *Id.* at 904 (emphasis added).

19. *Id.* at 906.

cating exigency must be considered in each case.

Parker tells us little about what is a "search" within the plain view concept. The nature of stating the *assumption* of non-search, predicated on inadvertence, is perhaps significant.²⁰ This highlights the question of whether an officer can intend to search and still fall within a plain view category.²¹

The search issue was presented two months later in *State v. Schmidt*.²² After a high-speed automobile chase, the defendant, a rear-seat passenger, was required to exit the car. An officer then smelled an odor of marijuana smoke. Before entering the car he shined a flashlight inside, whereupon he saw a "plastic bag, containing what appeared to be marijuana, partially beneath a rear floor mat."²³

Justice Marcus, writing for the majority, acknowledged that the burden of proof was on the state to show that the search and seizure was justified under a warrant exception²⁴ and rejected the contention that the plain view exception applied to the *search*:

Under the facts of the instant case, we do not find that the police officer had a legitimate reason to flash his light into the automobile. The facts indicate that the compact automobile had been stopped for traffic violations. The car was located on the grounds of a state hospital and was surrounded by a number of police officers. The driver and two passengers had been removed from the vehicle. *Clearly, the subsequent flashlight check (intrusion) by Deputy Braden into the vehicle (protected area) was not done to determine if some person who might have harmed him was concealed in the automobile. Rather, we find that the flashlight check was done either as a prelude to or as a part of the inventory search of the car.*²⁵

It appears that the shining of the flashlight was an intru-

20. *Id.* at 904.

21. *See, e.g., State v. Fearn*, 345 So. 2d 468 (La. 1977).

22. 359 So. 2d 133 (La. 1978).

23. *Id.* at 135.

24. *State v. Franklin*, 353 So. 2d 1315 (La. 1978).

25. 359 So. 2d at 135-36 (emphasis added).

sion or search because no factual need for such action was shown. If the automobile had appeared abandoned or had been used in an armed robbery, a reasonable factual need to shine the light or search might well have been found.²⁶ The fundamental question is whether there is an intrusion in an area in which there is a reasonable expectation of privacy. Justice Marcus properly appeared unwilling to conclude that there was always a reasonable expectation that police officers might shine flashlights, and thus intrude, into (or search) stopped automobiles. This privacy intrusion should be examined, as in other cases, by weighing the governmental and personal interests involved in light of the particular facts of the case. Thus, while there might well be no expectation of such an intrusion in a routine driver's license check, there might well be if the stopping is justified on a reasonable belief that dangerous criminal activity is afoot.²⁷

In *State v. Braud*,²⁸ after a lawful traffic stop, an officer, without the use of artificial illumination, observed loose marijuana on the driver's lap. A unanimous court held that such an observation fell within the plain view doctrine. Apparently, the critical difference from *Schmidt* is that in *Braud* there was no significant enhancement of the opportunity for observation of the contraband. Stated differently, the defendant simply had no reasonable expectation that loose marijuana on his lap would not be seen upon a lawful traffic stop. At night, a more difficult constitutional question appears to arise.

In *State v. Byers*,²⁹ the court again had to determine when a search took place in light of plain view considerations. In so doing, the court appears to have clarified the prior term's plurality opinion in *State v. Fearn*.³⁰ In *Byers*, after having been notified by a hunter who had observed "a patch of plants under cultivation, which he suspected was marijuana,"³¹ an officer went onto the property where the plants were located without

26. See, e.g., *State v. Jefferson*, 284 So. 2d 882 (La. 1973).

27. For example, in *State v. Williams*, 349 So. 2d 286 (La. 1977) (armed robbery), if the stop had occurred at night, the use of a flashlight might have been reasonable.

28. 357 So. 2d 545 (La. 1978).

29. 359 So. 2d 84 (La. 1978).

30. 345 So. 2d 468 (La. 1977).

31. 359 So. 2d at 85.

a warrant or consent. Several months later the officer returned with another officer, found the defendants at the cultivated area and arrested them. The alleged marijuana patch was located within a clearly posted 640-acre tract.³²

Justice Sanders, who dissented in *State v. Fearn*, wrote for the unanimous court. The court held that defendants had a reasonable expectation of privacy because the property was posted and a chain barred public access. *Byers* appears to be predicated directly upon a conclusion that the marijuana patch was not in "plain view" because the officers were not in a place they had a right to be. The court stated:

[Plain view] does not apply if the view is from a place that the officers have no right to be. In the present case, the officers observed the marijuana from a position on the property. The point of observation was a place that the officers had no right to be without a search warrant.³³

The well-written opinion avoids confusion which often arises in "plain view" cases. It is clearly predicated upon the fact that as the officers were not in a place they had a right to be, they were violating the constitutional privacy expectations of defendants. The observation (search), therefore, could not be in "plain view."³⁴

The writer believes "plain view" cases can be better structured and more simply considered if the distinction between the search and the seizure is kept clearly in mind. If an officer observes something from a place where he has a right to be, either because he has a warrant or because he is not invading another's privacy interest, that which he observes is in "plain view"; no illegal search or intrusion upon a reasonable expectation of privacy has occurred. The "inadvertence" consideration should arise only when an officer comes across evidence when he is lawfully looking either because he has a warrant or be-

32. "PRIVATE ROAD; DO NOT ENTER; POSTED NO HUNTING, FISHING, TRESPASSING; POSTED NO HUNTING." *Id.*

33. *Id.* at 87.

34. Therefore the court did not discuss the need for a warrant to *seize* (in addition to search) or the element of inadvertence. See, e.g., *State v. Dunbar*, 356 So. 2d 956 (La. 1978).

cause the person lacks a reasonable expectation of privacy, *i. e.*, reasonably expects that someone will not be looking. Upon making any approved observation a seizure is not automatic, the normal warrant exceptions to seizures must be considered and applied.

Search Warrants—Inaccurate Affidavits

In light of the decision by a closely divided court on the right to challenge search warrant affiant veracity,³⁵ it is surprising that there was a unanimous decision by the court on the *res nova* issue of how to treat misstatements in warrant affidavits. In *State v. Rey*,³⁶ the court, speaking through Justice Dixon, adopted the stringent test established by the United States Court of Appeals for the Fifth Circuit in *United States v. Thomas*.³⁷ Under that test evidence must be suppressed if the warrant was issued on the basis of an affidavit containing a misstatement that was made with intent to deceive the magistrate, whether or not the error was material to the showing of probable cause, or was made unintentionally, but was material to the establishment of probable cause.³⁸ In adopting this test the supreme court rejected less stringent tests which would hold a warrant valid if the affidavit contained a negligent, unintentional misrepresentation that was material to probable cause.³⁹

To implement the *Rey-Thomas* test the court must first determine if there was intentional⁴⁰ misrepresentation. If there was, no matter what the probable cause significance, the war-

35. *State v. Melson*, 284 So. 2d 873 (La. 1973). *Melson* held that a defendant had a right to traverse an affiant's allegations in an application for a warrant which were alleged with particularity to be false. See *The Work of the Louisiana Appellate Court for the 1974-1975 Term—Pre-trial Criminal Procedure*, 37 LA. L. REV. 535, 539 (1977).

36. 351 So. 2d 489 (La. 1977).

37. 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975). "We are in agreement with the approach described by the Fifth Circuit and adopt it as our own." 351 So. 2d at 492.

38. See *United States v. Thomas*, 489 F.2d at 669.

39. *United States v. Belculfine*, 508 F.2d 58 (1st Cir. 1974); See *United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973).

40. "[I]ntentionally' must be used here to mean [a] deliberate act made for the purpose of deceiving the magistrate." *State v. Rey*, 351 So. 2d at 492 n.1.

rant must be stricken. If there was only a negligent misrepresentation, the information negligently given must be excised and the court must determine whether there existed probable cause absent the excised information. *Rey* thus embraces an exclusionary policy which abhors both negligent material misconduct and intentional misconduct whether it was material or not.

The first successful application of the *Rey* test was in *State v. Martiniere*.⁴¹ In that case the court found a deliberate misrepresentation because the affiant "appeared" to have failed to state affirmatively facts which reflected illegal searching activity and because the affidavit was "written in a manner which intimates that all of the facts which it reveals were within the firsthand knowledge of the affiant."⁴² It thus appears that the court is willing to take a stringent attitude in examining affidavits which include misrepresentations and that the concept of intentional misrepresentation will not be narrowly circumscribed.⁴³

Private Party Searches

In *State v. Yates*⁴⁴ the defendant was removed by a department store security guard to a security office where, without having been given *Miranda* warnings, he made an incriminating statement. The trial court refused to suppress the statement on the basis that shoplifting detentions pursuant to article 215 of the Code of Criminal Procedure did not require the

41. 362 So. 2d 526 (La. 1978).

42. *Id.* at 529 (emphasis added).

43. The *Rey-Thomas* test may go beyond that required by the United States Constitution. In *Franks v. Delaware*, 98 S. Ct. 2674 (1978), decided subsequent to *Rey*, the United States Supreme Court stated: "There must be allegations of deliberate falsehood or of reckless disregard for the truth . . ." 98 S. Ct. at 2685 (emphasis added). The decision does not, however, hold that material negligent (simple negligence) misrepresentation is acceptable as a basis for establishing probable cause. Additionally, the court in *Franks* appeared unwilling to find an absence of probable cause even when intentional misrepresentations were made if they were not material: "[I]f these requirements [specificity of allegations] are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." 98 S. Ct. at 2685 (emphasis added).

44. 357 So. 2d 541 (La. 1978).

warnings. The supreme court rejected this conclusion but found that *Miranda* warnings were not required because the defendant was not subject to a coercive environment and thus was not "in custody," a requisite to trigger *Miranda*.⁴⁵

Two significant issues were not addressed by the court; first, whether a "detention" as given in article 1, section 13, of the Louisiana Constitution⁴⁶ means the same as *Miranda*'s "in custody," and second, whether action by a private party is covered by the *Miranda* decision or the provisions of article 1, section 13, under all circumstances, or whether it is brought within this coverage because of the statutory authorization given to stop suspected offenders under article 215.⁴⁷ While it appears that *Miranda* does not apply to private party searches because of the fourteenth amendment limitation,⁴⁸ it does not necessarily follow that the analogous protections of article 1, section 13, are inapplicable to private action, although the history of the provision indicates no such intent.⁴⁹

The fact that the court did not address the private party issue is particularly interesting because earlier in the term the court did address the issue, in a limited manner, in connection with article 1, section 5, of the Louisiana Constitution.⁵⁰ In *State v. Nelson*⁵¹ the defendant allegedly was given two diamond rings by a clerk but failed to return one. Two store guards took the defendant to a room, handcuffed and unclothed him,

45. The uncontradicted testimony was that the defendant was free to depart. 357 So. 2d at 543.

46. Article 1, section 13, of the 1974 Louisiana Constitution provides that whenever "any person has been arrested or detained in connection with the investigation or commission of any offense," he shall be advised of several listed rights.

47. LA. CODE CRIM. P. art. 215 does not expressly authorize a search.

48. See *Burdeau v. McDowell*, 256 U.S. 465 (1921).

49. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 40 n.207 (1974). See *State v. Hutchinson*, 349 So. 2d 1252 (La. 1978), for implicit application of article 1, section 5, to private action. See Hargrave, *supra*, at 21.

50. Article 1, section 5, of the Louisiana Constitution provides in part:

Every person shall be secure in his person, property, communications, houses, papers and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the person or things to be seized, and the lawful purpose or reason for the search.

51. 354 So. 2d 540 (La. 1978).

and then checked his clothing and person. After the defendant had put his trousers back on, one guard thought he saw a gold object "in the right rear of the gums."⁵² When the defendant refused to spit out the object, one guard grabbed his throat to prevent swallowing. During the struggle an incriminating statement was made. The ring was never recovered despite X-rays and examinations of bowel movements.

The court stated the issue as "whether the statement was the direct product either of an unlawful search or of the use of unreasonable force."⁵³ Traditionally, involuntary statements no matter by whom obtained are inadmissible because of the high degree of unreliability.⁵⁴ The court however preferred to "rest [its] ruling . . . on the unreasonableness of the illegal search by *private persons*, in the course of which the statement was improperly obtained as a direct consequence of unreasonable force exercised under the circumstances."⁵⁵ The court then concluded, "[T]he accused was subjected to [1] an unreasonable search [2] *under the color of authority* claimed by virtue of a *statute* [article 215 of the Code of Criminal Procedure] that permitted private persons to use [3] *reasonable force* to detain him."⁵⁶

The court in *Nelson* did not hold that in all circumstances private party searches are encompassed within the protections against searches and seizures. The holding is limited because of the statutory authorization and, perhaps most importantly, the use of unreasonable force. Significantly, it is also limited to seizures of inculpatory statements. It may be that the court did not want to expand notions of voluntariness since there was no clear intent to interrogate but rather simply to produce the ring. A holding that the statement was involuntary would have required the difficult determination of whether an interrogation can be unintentional.

The holding appears to have extended protection against

52. *Id.* at 541.

53. *Id.*

54. See *State v. Glover*, 343 So. 2d 118 (La. 1977); *State v. George*, 15 La. Ann. 145 (1860).

55. 354 So. 2d at 542 (emphasis added).

56. *Id.* (emphasis added).

a private party search and seizure through use of unreasonable force resulting in an inculpatory statement. Whether statutory authorization is of controlling significance is uncertain.⁵⁷ Whether the same private party coverage would be applicable if real evidence (such as the ring rather than the statement) was produced is also uncertain in light of the traditionally more stringent supervision of statements because of their inherently lesser reliability when compared to real evidence.⁵⁸

Inventory Searches of Vehicles

The Supreme Courts of the United States and Louisiana⁵⁹ have held that "true inventory searches" of motor vehicles are reasonable and thus not in violation of the fourth amendment of the United States Constitution or article 1, section 5, of the Louisiana Constitution respectively. Several cases this term help in determining what is a "true inventory search" and thus a "reasonable" search pursuant to article 1, section 5, of the Louisiana Constitution.

The cases appear to require as a necessary first element that the vehicles be "lawfully and actually impounded."⁶⁰ The court has not yet found it necessary to articulate those circumstances in which a vehicle might be "lawfully impounded," because it has indicated that the mere lawful authority to impound is insufficient to justify an inventory search; a vehicle must be "necessarily" as well as "lawfully" impounded and the search must be "necessary."⁶¹ While the language of the decisions is devoted primarily to questions of good faith and subter-

57. See the discussion of *State v. Yates*, 357 So. 2d 541 (La. 1978), in the text at note 44, *supra*.

58. See *State v. Glover*, 343 So. 2d 118 (La. 1977), and authorities cited therein.

59. *South Dakota v. Opperman*, 428 U.S. 364 (1976); *State v. Jewell*, 338 So. 2d 633 (La. 1976).

60. *State v. Jewell*, 338 So. 2d 633, 638 (La. 1976).

61. [I]n the crowded and mobile society of today, the practical exigencies of law enforcement have sometimes been held to justify limited invasions of privacy, restricted to their limited purpose, even though based on something less than probable cause The so-called "inventory" search of motor vehicles necessarily and lawfully impounded by the police, when the inventory is necessary under the exigencies of the situation, is an instance.

State v. Gaut, 357 So. 2d 513, 516 (La. 1978) (emphasis by the court). See also *State v. Jewell*, 338 So. 2d at 638.

fuge, functionally the facts may be *objectively* analyzed in terms of the *necessity to impound* and the *necessity to search*.

In *State v. Rome*⁶² the court examined the necessity of the impoundment when the officer, following an arrest for drunken driving, did not *ask* the defendant "*whether he could make other arrangements for his vehicle* (such as [leaving it] with service station personnel or by calling a member of his family)." ⁶³ In *State v. Gaut*⁶⁴ that issue was examined when the defendant, also arrested for driving while intoxicated, *requested* that a passenger be allowed to take possession of the vehicle. In both cases the court appears to have found no necessity to impound.⁶⁵

In *Gaut* Justice Tate indicated that, in some instances, there may not be a necessity to impound a vehicle unless the driver is given the additional option of consenting to the vehicle being "left unsearched and parked."⁶⁶ That there is a standard police practice alleged to require the impoundment does not appear to change the necessity to impound analysis.⁶⁷

The factors relating to necessity to search have received the most attention by the courts. Because no case is predicated wholly upon the necessity of impoundment, it cannot be said that absent necessity to impound, the court has *held* the search unconstitutional. The language and rationale of the cases, however, seem to provide that if there is no objective necessity to impound, no inventory search should follow under any circumstances. If, however, there exists a necessity to impound (or that fact is not controlling), facts relating to the necessity to search should be examined.

Since the primary purpose of the search is to protect against loss of valuables,⁶⁸ it is necessary to search only when

62. 354 So. 2d 504 (La. 1978).

63. *Id.* at 505-06 (emphasis by the court).

64. 357 So. 2d 513 (La. 1978).

65. Because other facts relating to necessity to search were also present, it cannot be said that either *Rome* or *Gaut* hold that absent a necessity to impound, a search would be unconstitutional.

66. 357 So. 2d at 516 n.1.

67. See *State v. Gaut*, 357 So. 2d at 515; *State v. Rome*, 354 So. 2d at 506; *State v. Jewell*, 338 So. 2d at 640.

68. *State v. Jewell*, 338 So. 2d 639 (La. 1976).

there is a reasonable belief that valuables are present. If the driver "disclaims that any valuables are involved and is willing to consent to the agency's failure to afford him such protection by an inventory search,"⁶⁹ the claim that an inventory search is necessary is "hollow . . . indeed."⁷⁰

The belief that valuables are present also relates to the scope of the search. If the search extends beyond areas where valuables can reasonably be expected to be, there appears to be no necessity for an extended search.⁷¹ It may be that an officer is obligated to ask whether there are valuables present and then, if he obtains a negative answer, not to search for them.⁷²

While many difficult questions are not finally resolved—such as whether the officer must ask whether any one else could take possession of the vehicle, whether the driver must request such action, whether the officer must ask whether any valuables are present, and the extent to which an officer can rely upon verbal statements that no valuables are present—it does appear that the court's primary considerations are the objective facts relating to the necessity to impound or search.

Interestingly, however, most of the court's discussion in the cases is devoted to the much more difficult factor of subjective good faith. It seems to this writer that a careful delineation of the objective factors relating to the necessity to impound and the necessity to search could alleviate much uncertainty by eliminating in many cases the need to consider good faith at all. If there is no objective necessity to impound or to search, the inquiry should end. Superimposed on these objective factors should be the facts material to subjective good faith, which should be considered only when an objective necessity to impound and to search has been found.⁷³

69. *State v. Gaut*, 357 So. 2d at 516.

70. *Id.*

71. *See, e.g., State v. Jewell*, 338 So. 2d at 639, where the court stated that an ashtray was an "unlikely place for anything of value which an owner could complain was lost or stolen." *See also State v. Rome*, 354 So. 2d at 506.

72. *See State v. Schmidt*, 359 So. 2d 133, 136 (La. 1978).

73. Lack of good faith with respect to the need to search and the need to impound has been found by the court to be reflected by (1) a search at the site rather than at

In this quickly developing area of the law, it is commendable that the court is willing to look at all factors in individual cases to determine whether the search was reasonable. The writer believes it would be helpful if courts would delineate when impoundment is objectively necessary and when a search is objectively necessary; this would avoid in many circumstances the need to examine the more subjective good faith element.

CONFESSIONS—JUVENILES

The difficult and sometimes ignored⁷⁴ issue of whether the waiver of *Miranda* rights in juvenile cases should be dealt with differently than with adults was addressed in *In re Dino*.⁷⁵ The juvenile *Miranda*-waiver aspect of the *Dino* case, like *Miranda* itself, does not appear to be as important for its holding, in light of the specific facts, as it is for the regulatory and prophylactic rules which it enunciates.

The court, speaking through Justice Dennis, rejected the "morass of speculation"⁷⁶ of the "totality of circumstances"⁷⁷ test for constitutional waiver in juvenile cases and concluded:

[T]he rights which a juvenile may waive before interrogation are so fundamental to our system of constitutional rule and the expedient of requiring the advice of a parent, counsel or adviser so relatively simple and well established as a safeguard against a juvenile's improvident judicial acts that we should not pause to inquire in individual cases whether the juvenile could, on his own, understand and effectively exercise his rights.⁷⁸

The court thus has adopted the protective rule that to establish waiver the state must "affirmatively show that the

the place of storage, (2) failure to call a towtruck prior to beginning the search and (3) failure to ask consent for the search. See *State v. Gaut*, 357 So. 2d at 516.

74. See, e.g., *State v. Hills*, 354 So. 2d 186 (La. 1978); *State v. Hall*, 350 So. 2d 141 (La. 1977).

75. 359 So. 2d 586 (La. 1978).

76. *Id.* at 591.

77. See, e.g., *State v. Melanson*, 259 So. 2d 609 (La. App. 4th Cir. 1972).

78. 359 So. 2d at 592.

juvenile engaged in a meaningful consultation with an attorney or an informed parent, guardian, or other adult interested in his welfare before he waived his right to counsel and privilege against self-incrimination.”⁷⁹

Several potential issues were not expressly considered. The court did not discuss whether the concerned adult or attorney must concur in the waiver, nor did it indicate whether “meaningful consultation” requires concurrence. If the civil incapacity analysis employed by the court is extended further, it may be that concurrence is required since in the civil area the adult must concur or be substituted for the minor in creating a judicially enforceable juridical act.⁸⁰ However, it may be that since significantly different societal values are involved, the court will determine that concurrence, or its absence, is only another circumstance in the new test for waiver. This test may avoid some of the “morass of speculation” because the presence of a concerned person will serve to facilitate a more realistic and satisfactory determination of the juvenile’s understanding and the voluntariness of his consent.

Also, the court did not discuss whether the protective rule applies to a juvenile who is being prosecuted as an adult.⁸¹ In light of the policy considerations carefully articulated in *Dino*, it appears that the rule would apply regardless of how the state characterizes the charge. It is difficult to see how a sixteen-year-old charged with murder as an adult can be presumed to have a better understanding of his rights than one charged as a juvenile with attempted murder. In *State ex rel Coco*,⁸² the court concluded that a juvenile is subject to juvenile jurisdiction even if taken into custody for an offense for which he can be prosecuted as an adult until formal charges have been brought by indictment or information. While jurisdictional concerns should not control considerations of constitutional

79. *Id.* at 594.

80. *See, e.g.*, LA. CIV. CODE art. 1785; LA. CODE CIV. P. art. 4501. *See also* LA. CIV. CODE art. 2318. Even in a judicially supervised proceeding, if an incompetent is not represented as required by law, the judgment is an absolute nullity. LA. CODE CIV. P. art. 2002. Application of the civil incapacity analogy should require further study in light of the different personal and governmental interests.

81. *See* LA. CONST. art. V, § 19.

82. 363 So. 2d 207 (La. 1978).

waiver, the fact that the child is subject to juvenile jurisdiction at the time most statements are obtained may fortify the position that the protective rule given in *Dino* should apply here also.

No doubt the drawing of the line at the age of seventeen may create difficult cases for the court. For example, suppose a "street-wise" sixteen-year-old and a more naive seventeen-year-old are joint participants in criminal activity. If both confess and the sixteen-year-old is not afforded the additional *Dino* protections, his statement must be excluded; the seventeen-year-old's statement is not. While initially this might appear to be an untoward result, it should be remembered that we are forced to draw lines in many areas of the law that may cause similar results.⁸³ The nature of juvenile and adult jurisdiction itself can create anomalous situations based upon a few days difference in birth. The laudatory purpose of *Dino* should not be quickly rejected because the prophylactic rule may result in exclusion in cases that are similar but for the age demarcation.

Finally, *Dino* raises the question of whether fourth amendment waiver standards for juveniles are affected. Can, for example, a fifteen-year-old consent to a search of his person or property without consultation with an attorney or concerned adult. Since informed consent of the *Miranda* variety itself has never been required for fourth amendment waiver,⁸⁴ it may be that *Dino*-type safeguards are not required. The court should, however, consider the nature of fourth amendment waiver in juvenile cases in light of the policies articulated in *Dino*. One significant difference between fourth and fifth amendment considerations which might justify different treatment is the difference in the reliability of the evidence produced.⁸⁵

83. See, e.g., LA. CONST. art. V, § 19; LA. R.S. 14:80 (Supp. 1971), 14:81 (Supp. 1977), 14:92 (Supp. 1976); LA. CIV. CODE arts. 3528-55.

84. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); see, e.g., *State v. Rogers*, 324 So. 2d 403 (La. 1975).

85. See *State v. Glover*, 343 So. 2d 118 (La. 1977).