Buffalo Law Review

Volume 17 | Number 2 Article 11

1-1-1968

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Recommended Citation

Mark A. Hulnick, *Criminal Procedure—The Inapplicability of General Principles of Search and Seizure Incident to a Lawful Arrest to Those Arrested for Traffic Infractions*, 17 Buff. L. Rev. 502 (1968).
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CRIMINAL PROCEDURE—THE INAPPLICABILITY OF GENERAL PRINCIPLES OF SEARCH AND SEIZURE INCIDENT TO A LAWFUL ARREST TO THOSE ARRESTED FOR TRAFFIC INFRACTIONS

Defendant Marsh was arrested at his residence in 1965 pursuant to an arrest warrant issued for a 1963 speeding violation. In the process of effecting the arrest, the officer searched the defendant's person, although no search warrant had been issued. The search revealed a matchbook which contained a slip of paper implicating the defendant in the playing of policy. Subsequent to his arrest for the traffic violation, defendant was charged, tried and convicted for possession of a policy slip.[1] Marsh appealed complaining that his timely motion to suppress the evidence disclosed by the search was improperly denied.[2] The New York Court of Appeals *held*[3] that a police officer is not empowered to conduct a search, as incident to a lawful arrest, when one is taken into custody for a traffic violation pursuant to a valid arrest warrant. *People v. Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 792 (1967).

The fourth amendment to the Constitution of the United States provides that there shall be no searches and seizures without the existence of probable cause, and no warrants shall be issued in the absence of such probable cause.[4] Searches and seizures are permissible without a warrant when incident to a lawful arrest,[5] but this has traditionally been considered a limited privilege.[6] Cases at the turn of the century limited warrantless searches in both character

1. N.Y. Penal Law § 975 which provides:

The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share or interest in numbers, sold, given away, drawn or selected, or to be drawn or selected, or in what is commonly called "policy," or in the nature of a bet, wager or insurance upon the drawing or selection, or the drawn or selected numbers of any public or private lottery, or any paper, print, writing, numbers of device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called "policy" is presumptive evidence of possession thereof knowingly and in violation of the provisions of section nine hundred and seventy-four as amended L. 1926, c. 435, § 3 eff. July 1, 1926.

2. N.Y. C.C.P. § 813c provides:

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to the determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

3. All concur, Breitel J., in result only, except Scileppi J., who dissents in an opinion in which Burke J., concurs.

4. U.S. Const. amend. IV. provides:

The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

5. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950); People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923); Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

6. Trupiano v. United States, 334 U.S. 699 (1948).

and scope. The character of the search was limited to weapons, fruits, or implements used to commit the crime for which the accused was arrested.[7] The scope was limited to the person of the accused and the premises within his immediate physical control.[8] These limitations were subsequently expanded to include unlawfully possessed articles under the accused's immediate physical control,[9] and the premises where the arrest was effected.[10] The right to search absent a search warrant, as incident to a lawful arrest, was further expanded to include articles unrelated to the purpose for which the search was conducted, but which might be deemed instrumentalities and means of any crime committed by the accused.[11] Although the right to search certain parts of the premises where the arrest was effected has been held not violative of the fourth amendment, even if no search warrant has been issued,[12] there is no right to conduct a general search or rummaging of the premises.[13]

The character of the articles which the search seeks to reveal are to be taken into consideration in determining the constitutionally permissable extent of a search.[14] A determination of reasonableness must be made on the basis of the facts and circumstances of each case.[15] Under no circumstances, however, may the power to search either one's person or premises without a warrant exceed the authority of a written warrant.[16] A search without a warrant, in order to be constitutionally permissible, must actually be made as incident to a valid arrest.[17] Stricter requirements of reasonableness may apply where a dwelling is searched,[18] or where the premises were entirely separate from the place where the arrest was made.[19]

Recent developments have focused on probable cause, the absence of which invalidates searches and seizures. The difficulty in applying the probable cause standard is the relative subjectivity of the concept. The Supreme Court first tried to inject some objectivity into the probable cause standard in 1925,

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7. *See* Weeks v. United States, 232 U.S. 383 (1914).
8. *See* Boyd v. United States, 116 U.S. 616 (1886).
9. *See* Carroll v. United States, 267 U.S. 132 (1925).
10. Marron v. United States, 275 U.S. 192 (1927); *accord*, Agnello v. United States, 269 U.S. 20 (1925).
11. Abel v. United States, 362 U.S. 217 (1960).
12. United States v. Rabinowitz, 339 U.S. 56 (1950), which held: where the arrest of a stamp dealer for possession and sale of postage stamps bearing forged overprints was valid, a search without warrant, as incident to the valid arrest, of a desk, safe, and filing cabinets in the small office which constituted accused's place of business and which was open to the public, was a reasonable search and valid.
13. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
14. In Harris v. United States, 331 U.S. 145 (1947), the Court provided that we must look to the particular circumstances of each case. "The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still." *Id.* at 152.
15. *Id.* at 344; Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
16. United States v. Lefkowitz, 285 U.S. 452 (1932).
17. *See, e.g.*, Jones v. United States, 357 U.S. 493 (1958); Lustig v. United States, 338 U.S. 74 (1949); People v. Roach, 44 Misc. 2d 40, 253 N.Y.S.2d 24 (Sup. Ct. 1964).
18. Harris v. United States, 331 U.S. 145 (1947).
19. Agnello v. United States, 269 U.S. 20 (1925).

when it held in *Carroll v. United States*[20] that probable cause exists where the facts and circumstances within the arresting officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. A New York case, *People v. Valentine*,[21] substituted a reasonably cautious police officer for the reasonably cautious man standard. This obviously relaxed the restraints upon law enforcement officials due to the fact that police are inherently more suspicious than the common citizen, and therefore are more cautious. The *Valentine* rule proved to be of relatively short duration when viewed in the context of the recently, and as of yet not fully interpreted case of *People v. Berger*.[22] The Supreme Court, in overruling the New York Court of Appeals, reestablished the "reasonable man" standard of *Carroll*. These general principles have not been directly applied, however, where the arrest is for violation of a traffic ordinance.

There are no established uniform rules governing all searches and seizures. Courts examine the surrounding circumstances of an arrest, the nature of the offense charged, and other peculiarities of the case,[23] all of which determine whether the search was reasonable. In New York State, this test applies to vehicles as well as people.[24] The difficulty with applying the same vague standards of reasonableness for searching violators of traffic ordinances is the fact that traffic violators are not treated as criminals under the law of New York.[25]

Section 155 of the New York Vehicle and Traffic Law expressly provides that:

> A traffic infraction is not a crime and the punishment therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof.

Even prior to the enactment of this section, New York courts have held that traffic infractions were not crimes.[26] Moreover, a traffic ticket is not proof that

20. 267 U.S. 132 (1925); *see also* Beck v. Ohio, 379 U.S. 89 (1964); Draper v. United States, 358 U.S. 307 (1959).
21. 17 N.Y.2d 128, 216 N.E.2d 321, 269 N.Y.S.2d 111 (1966). *See also* Jackson v. United States, 302 F.2d 194 (D.C. Cir. 1962).
22. Berger v. New York, 388 U.S. 41, 54-56, (1967).
23. People v. Watkins, 19 Ill. 2d 12, 166 N.E.2d 433 (1960).
24. *See* People v. Beaman, 44 Misc. 2d 336, 253 N.Y.S.2d 674 (Sup. Ct. 1964), which held that a search of a defendant's car after he had been taken to a precinct house and subjected to a sobriety test, was not incidental to the primary purpose of the arrest and was therefore illegal. *See also* People v. Adorno, 37 Misc. 2d 36, 234 N.Y.S.2d 674 (Sup. Ct. 1962), which held that a taxicab during the period of hire is no more vulnerable to incidental search than the hirer's residence.
25. N.Y. Veh. & Traf. Law § 155. *See also* N.Y. Rev. Pen. Law § 55.10(4) providing: "Notwithstanding any other provision of this section, an offense which is defined as a traffic infraction shall not be deemed a violation or a misdemeanor by the virtue of the sentence perscribed therefore."
26. *See, e.g.*, Squadrito v. Griebsch, 1 N.Y.2d 471, 136 N.E.2d 504, 154 N.Y.S.2d 37 (1956) ("The legislature's purpose in denominating a traffic law violation an infraction was solely to prevent the offender being adjudicated and treated as a criminal." *Id.* at 478.). People v. Malmud, 4 A.D.2d 86, 90, 164 N.Y.S.2d 204 (2d Dep't 1957) (A traffic violation

a person has been guilty of some designated violation, for it is merely notice to appear and be charged with a specific violation.[27] These cases cast doubts upon any theory that such an offense is sufficient to sustain a search without a warrant. For example, some states hold that a search incident to an arrest for a traffic violation is invalid if not for the tools and implements of the offense.[28] Thus a search would be permissible if the arresting officer was trying to locate a bottle of liquor for one arrested for drunken driving, but a search for a violation such as speeding, or making an illegal turn would not be permissible since not for tools or implements of the offense. A Kentucky case[29] went so far as to say that an arrest for a traffic violation does not give the arresting officer authority to search a vehicle without a search warrant.[30] Furthermore, a search is not valid if it is made through the subterfuge of a pretended arrest for a traffic violation,[31] thereby affirming the conclusion of the federal courts that not every search following a lawful arrest is valid.[32]

In the instant case the Court reasoned that a police officer is not entitled to search a motorist for an ordinary traffic violation, and the fact that the arrest was made subsequent to the actual occurrence of the violation in no way altered the nature or consequences of the original violation.[33] The Court recognized that searches may be made incident to a lawful arrest, and also that the arrest of the defendant was valid. The Court refused, however, to halt its inquiry at that point, which would have affirmed the conviction, and focused its attention upon the legislative intent and the spirit of the law. Chief Judge Fuld claimed that, for the purposes of search and seizure, the legislature never intended to include traffic violators in the same category as those arrested for more serious crimes.[34] The Court concluded that, with respect to the traffic violator, "the statutory scheme does not contemplate treating him as a common criminal to be booked, photographed, fingerprinted and jailed."[35] The Court then reasoned that the search in the instant case was unreasonable, and evidence obtained as a result of such an illegal search should be suppressed.[36]

It is submitted that the Court avoided the most obvious, and perhaps the most persuasive argument for reversal. The Court simply could have declared the search to be unreasonable. A search of the defendant two years subsequent

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is not a crime.); Lea v. MacDuff, 205 Misc. 24, 126 N.Y.S.2d 646 (Sup. Ct. 1953) (Speeding is a traffic violation and not a crime.). *See also* (1953) Op. Att'y Gen. 103.

27. In People v. Scott, 3 N.Y.2d 148, 143 N.E.2d 901, 164 N.Y.S.2d 901 (1957), the Court stated that the uniform traffic ticket is merely a notice to appear in a given court on a given day to be charged with a specific crime, and is not sufficient information to be used as a pleading in prosecution for operating a motor vehicle while intoxicated.

28. Courington v. State, 74 So. 2d 652 (Fla., 1954).

29. Lane v. Commonwealth, 386 S.W.2d 743 (Ky. 1965).

30. *Id.* at 743.

31. *See, e.g.*, People v. Molarius, 146 Cal. App. 2d 129, 303 P.2d 350 (1956); Collins v. State, 65 So. 2d 61 (Fla. 1953); People v. Lee, 371 Mich. 563, 124 N.W.2d 736 (1963).

32. Preston v. United States, 376 U.S. 364 (1964).

33. People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 792 (1967).

34. *Id.* at 102, 228 N.E.2d at 786, 281 N.Y.S.2d at 793.

35. *Id.*, 228 N.E.2d at 786, 281 N.Y.S.2d at 793.

36. *Id.*, 228 N.E.2d at 786, 281 N.Y.S.2d at 793.

to the date of the arrest could not possibly have produced any evidence of the traffic violation which the defendant was accused of committing. Therefore, the search must be characterized as merely exploratory, and as a result, evidence obtained therefrom must be suppressed.[37] The contention that the officer was searching for a weapon may be quickly refuted in view of the nature of the evidence confiscated. One could hardly expect a weapon to be hidden on the inside of a matchbook cover. The impact of the decision weighs heavily in the area of search and seizure, however, because the Court chose to confront the issues directly, taking into account not only judicial precedents, but also legislative intent. Through this rationale, the Court narrowed the issue specifically to traffic violations. Had the Court upheld the search, the decision could have been construed as a license to search whenever a traffic ordinance has been violated. The legislature has acknowledged that the overwhelming number of traffic violators are not criminals.[38] Therefore, traffic violators should not be subjected to degrading and unreasonable searches in violation of their constitutional guarantees.[39]

The strange procedure followed by the police in the instant case, coupled with the fact that the arresting officer actually conducted a search, suggests that the case may be more complicated than the decision would lead one to believe. It is possible that the police were looking for some excuse to search the defendant's person or premises, and that the traffic citation presented the opportunity they were seeking. If this element were actually present in the case, it may have had an important bearing on the courts requiring more stringent limitations on the police power of search and seizure.

MARK A. HULNICK

37. McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950): Officers, without a warrant or enough evidence to obtain one, broke into a house in order to seize evidence they hoped to find. They found it, but the search was held to be in violation of the fourth amendment to the United States Constitution.

United States v. Hirsch, 57 F.2d 555 (W.D.N.Y. 1932): A forced entry into a suspicious looking building which was later discovered to have housed a still, was declared an exploratory search and therefore unconstitutional.

People v. Molaris, 146 Cal. App. 2d 129, 303 P.2d 350 (1956): A search of defendant's car for no apparent reason, disclosed narcotics. The court held the search exploratory and therefore unconstitutional.

Collins v. State, 65 So. 2d 61 (Fla. 1953): An officer searched a car. The court held the officer making the search must be prepared to show the court that information he possessed purportedly giving rise to his reasonable belief that the automobile was carrying contraband was sufficient basis for the issuance of a warrant if he had obtained one.

People v. DeLuca, 343 Ill. 269, 175 N.E. 370 (1931): Search of defendant's person while on board a train by officers hoping to find evidence of a violation of the gaming laws was held unconstitutional.

People v. Lee, 371 Mich. 563, 124 N.W.2d 736 (1963): An officer stopped an automobile because of the poor condition of the license plate. The officer then proceeded to search the vehicle, and found narcotics hidden under the cushion. The court held it was illegally seized and therefore not admissible into evidence.

38. N.Y. Veh. & Traf. Law § 155.

39. *See* Henry v. United States, 361 U.S. 98 (1959); Carroll v. United States, 267 U.S. 132 (1925).