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Criminal Law and Procedure—Arrest For Misdemeanor Not Committed In Presence Of Officer Not Supportable By Evidence Seized Incident Thereto

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The remedy used to effect reinstatement of rights to appeal in the majority of these cases has been a writ of coram nobis and a hearing to determine the validity of the defendant's claim.[26] Once the validity of the claim is established, the right to appeal is simply considered as reinstated,[27] or the court may impose a new sentence *nunc pro tunc* so that the appeal period runs anew.[28] This is an expansion of the use of the writ coram nobis which ordinarily is used to bring to the attention of the trial court matters occuring during the trial, but the Court of Appeals has stated that it would not hesitate to expand the scope of the writ when necessary to afford a deserving defendant a remedy in those cases in which no other avenue of judicial relief appeared available.[29]

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ARREST FOR MISDEMEANOR NOT COMMITTED IN PRESENCE OF OFFICER NOT SUPPORTABLE BY EVIDENCE SEIZED INCIDENT THERETO

In one opinion the Court of Appeals reversed the convictions of six defendants arrested without warrants on charges of book-making.[1] Defendants Caliente and Sessa were arrested after police officers observed them exchanging money and slips of paper with various people. Search incident to the arrest produced betting slips. Two other defendants, Cognetta and Grecco were arrested by police officers who entered a store through a transom after hearing telephone conversations indicating that bets were being received on horseraces and football games. Defendants Perlman and Bernstein were arrested by a police officer who had placed bets by telephone with individuals then unknown to him. After thus registering the bets, the officer proceeded to nearby premises and stationed himself outside of the room in which was located the telephone he had called. Peering through a mail slot the officer saw the defendants recording bets received by

26. See *e.g.*, People v. Stanley, 12 N.Y.2d 250, 189 N.E.2d 478, 238 N.Y.S.2d 935 (1963); People v. Hill, 8 N.Y.2d 935, 168 N.E.2d 841, 204 N.Y.S.2d 172 (1960); People v. Coe, 16 A.D.2d 876, 228 N.Y.S.2d 249 (4th Dep't 1962).

27. People v. Hill, *supra* note 26.

28. People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).

29. *Ibid.*

1. The convictions were under § 986-b of the Penal Law. N.Y. Penal Law § 986 provides: "Any person who engages in . . . book-making with or without writing at any time or place; or any person who keeps or occupies any room . . . upon any public or private grounds within this state . . . for the purpose of recording or registering bets or wagers . . . and any person who records or registers bets or wagers . . . upon the results of any trial or contest of skill, speed, or power of endurance of man or beast . . . or any person who receives, registers or records . . . any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person . . . is guilty of a misdemeanor. . . ." N.Y. Penal Law § 986-b provides: "Any person other than a peace officer in the performance of his duty as such, who knowingly have possession of any writing, paper or document representing or being a record, made by a person engaged in book-making . . . of a bet or wager upon the results of any trials or contests . . . shall be guilty of a misdemeanor. Proof of the possession of any writing . . . of the kind mentioned herein is presumptive evidence of possession thereof knowingly."

telephone calls. He entered the room with a pass key and without a warrant arrested the defendants. Upon appeal the defendants urged that the convictions sustained at trial and affirmed by Appellate Part of the Court of Special Sessions of the City of New York must be reversed as their constitutional rights under the Fourth Amendment had been violated by the arresting officer's alleged illegal search and seizure, and the introduction against them of the evidence so obtained. On appeal, *held*, that the arrests were illegal since no misdemeanor had taken place in the officer's presence, and evidence gained by a search incident to an illegal arrest is inadmissible in the state courts. *People v. Caliente*, 12 N.Y.2d 89, 184 N.E.2d 550, 236 N.Y.S.2d 945 (1962).

The Fourth Amendment to the Constitution of the United States prohibits "unreasonable searches" of person and property. However, the Constitution does not specifically say anything about the exclusion or admission of evidence which is obtained by means of unreasonable search or arrest. In 1884 the United States Supreme Court decided the case of *Boyd v. United States*[2] and although not concerned with the problem of search and seizure, the first awareness of the evidentiary rules implicit in the Fourth and Fifth Amendments came to light. Thirty years later this Court directly met the same issue of the propriety of the use of unconstitutionally seized evidence in Federal prosecution and held in *Weeks v. United States*[3] that the exclusion of illegally obtained evidence in Federal Courts was inherent in the Fourth and Fifth Amendments to the United States Constitution. The Court later indicated that the exclusionary rule of the *Weeks* case could be forced upon the state courts by means of the Due Process clause of the Fourteenth Amendment to the Constitution.[4] However, the majority reasoned that it was more expedient to let the states decide for themselves, and, as long as steps were taken to uphold the Fourth Amendment, no federal interference by way of the exclusionary rule should issue from them. At this time thirty states rejected the doctrine on various grounds. In 1955, in an opinion by Justice Traynor[5] the State of California accepted on its own volition the doctrine of the *Weeks* case and reasoned with considerable foresight what the Supreme Court of the U.S. was to say in 1961 when deciding *Mapp v. Ohio*.[6] The California court considered that the only practical way to give substance to the Fourth Amendment was by applying the exclusionary rule to the state courts. At this time New York State still refused to accept the exclusionary doctrine. In *People v. Defore*,[7] decided in 1926, Judge Cardozo argued that with authority divided on the issue the courts should not change their approach until the legislature acted. That decision was based upon the Supreme Court's upholding of *People v. Adams*[8] in 1916 and saying that such a decision struck the balance

2. 116 U.S. 616 (1885).
3. 232 U.S. 383 (1914).
4. Wolf v. Colorado, 338 U.S. 25 (1949).
5. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
6. 367 U.S. 643 (1961).
7. 242 N.Y. 13, 150 N.E. 585 (1926).
8. 176 N.Y. 351, 68 N.E. 636 (1903).

between protecting society from crime and safeguarding individual liberties. At the time of the decision in *Defore* the Supreme Court had changed its views as to the admissibility of illegally seized evidence,[9] but New York nevertheless, permitted introduction of such evidence. The search in the *Defore* case was a violation of the guarantee against unreasonable search and seizure incorporated in the New York Constitution.[10] In 1943, in *People v. Richter's Jewelers Inc.*[11] the Court of Appeals allowed the use of unconstitutionally seized evidence, verifying the New York court's opinion on this matter. The fluctuations between the state courts in this regard came to an end in 1961 when the Supreme Court applied the exclusionary rule of the *Weeks* case to the state courts in the celebrated case of *Mapp v. Ohio*. The Court said that the Fourteenth Amendment to the United States Constitution through its Due Process clause against the states, binds the courts of the states to exclude all unconstitutional evidence obtained as a result of an "unreasonable" search in violation of the Fourth Amendment.

The Fourth Amendment to the Constitution contains the very important term "probable cause." This term is decisive in any felony arrest made without a warrant and is a deciding factor as to whether or not a warrant will issue by a magistrate or judge. The terms probable cause, reasonable grounds, or reasonable cause all mean essentially the same thing.[12] The prohibition in the New York and United States Constitutions is against an "unreasonable search"; a search which has no probable cause is unreasonable and cannot become legal by what is uncovered in the search.[13] The United States Constitution dictates that all searches made without warrant are unreasonable. The exceptions to this rule are the necessary ones of a search by consent[14] or as incidental to a lawful arrest.[15] A search incidental to a lawful arrest will be reasonable or unreasonable depending upon whether there was probable cause. At common law a police officer had the authority to arrest without a warrant for a misdemeanor if it involved a breach of the peace and was committed in his presence.[16] These powers were broadened by the adoption of the Code of Criminal Procedure in 1881 by giving a police officer the authority to make an arrest without a warrant for any crime committed in his presence.[17] However, the distinction between "committed in officer's

9. Angenello v. United States, 269 U.S. 20 (1925).
10. N.Y. Const. art. I, § 12.
11. 291 N.Y. 161, 51 N.E.2d 690 (1943).
12. Burt v. Smith, 181 N.Y. 1, 73 N.E. 495 (1905); Peers v. New York, 6 Misc. 2d 779, 165 N.Y.S.2d 171 (Ct. Cl. 1957).
13. Henry v. United States, 361 U.S. 98 (1959); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Lee v. United States, 232 F.2d 354 (D.C. Cir. 1956); Walker v. United States, 125 F.2d 395 (5th Cir. 1942); Bell v. United States, 9 F.2d 395 (9th Cir. 1925).
14. Amos v. United States, 255 U.S. 313 (1921).
15. People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).
16. See Hall, *Legal & Social Aspects of Arrest Without Warrant*, 49 Harv. L. Rev. 566 (1936).
17. N.Y. Code Crim. Proc. § 177; People v. Moore, 11 N.Y.2d 271, 183 N.E.2d 225, 228 N.Y.S.2d 822 (1962); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

presence" for making an arrest for a misdemeanor must be contrasted with the "reasonable cause" limitation placed upon arrest for a felony.[18] Many states allow an officer to make an arrest without a warrant if he had reasonable grounds for believing that a misdemeanor is being committed in his presence.[19]

In the instant case the court concluded that, since the crimes were misdemeanors which the officers did not know had taken place in their presence, the arrests were illegal, and, consequently, the evidence was obtained by means of an unconstitutional search, and must be suppressed in accordance with the decision in *Mapp v. Ohio*. In the *Caliente* and *Sessa* cases the court reasoned that there is no crime inherent in exchanging slips of paper and money. The only proof of a crime was the slips illegally seized after the arrest. Thus the court found that the officers arrested on probable cause that a misdemeanor was being committed and such an arrest is prohibited by section 177 of the Code of Criminal Procedure.[20] In the *Perlman* and *Cognetto* cases the officers had respectively placed bets over the telephone and heard bets being made by phone. The dissent[21] reasoned such circumstances show that a misdemeanor was taking place and since the officers were a party to the crime (in the *Perlman* case) and heard the completion of the crime (in the *Cognetto* case) the misdemeanor had taken place in the officers' presence. However, this position is untenable as the officers did not know who committed the crime until they entered the premises —and an entry under such circumstances is a tresspass rendering the ensuing arrests unlawful. The officers could not enter the premises without a valid reason.[22] The mere hearing of a conversation from beyond closed doors indicating that a misdemeanor was being committed was not the commission of such in the officers' presence. Consequently it appears that the officers entered only upon probable cause that a misdemeanor was being committed and this basis fails to meet the statutory test for a lawful arrest for misdemeanor without a warrant. The majority's decision indicates that the statutory requirement of "in the officer's presence" means more than mere physical proximity. As pointed out in

18. N.Y. Code Crim. Proc. § 177(4),(5); People v. Massey, 6 N.Y.2d 893, 160 N.E.2d 922, 190 N.Y.S.2d 703 (1959).

19. Hill v. Day, 168 Kan. 604, 215 P.2d 219 (1950); Ryan v. Conover, 59 Ohio App. 361, 18 N.E.2d 277 (Ct. App. Hamilton County 1938); Cave v. Cooley, 48 N.M. 478, 152 P.2d 886 (1944); State *ex rel.* Verdis v. Fidelity & Cas. Co., 120 W. Va. 593, 199 S.E. 884 (1938).

20. N.Y. Code Crim. Proc. § 177 provided at that time:

> A peace officer may, without a warrant, arrest a person, (1) For a crime, committed or attempted in his presence; (2) When the person arrested has committed a felony, although not in his presence; (3) When a felony has in fact been committed and he has reasonable grounds for believing the person to be arrested has committed it. . . .

The "presence" limitation in a misdemeanor is to be contrasted with the "reasonable ground" factor in a felony arrest.

21. Instant case at 96, 184 N.E.2d at 553, 236 N.Y.S.2d at 949, also raised the question of whether defendants Perlman and Bernstein had standing to entitle them to Constitutional protection since the title to the premises was in someone else's name. For an extensive treatment of this issue, see Brief for Appellant pp. 16-22.

22. *Accord*, Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10 (1948).

Caliente and *Sessa* the officer must know that the acts which he is observing are criminal in themselves. A further requirement is that the officer must know at least the physical identity of the individual who is committing the misdemeanor. Thus it appears that in order for an arrest without a warrant for a misdemeanor to be lawful the officer must have enough evidence to convict a given individual at the time of the arrest.

This decision is indicative of the responsibility which the courts of the United States have assumed in order to safeguard the Constitutional rights of the individual. The officers arrested merely on probable cause that a misdemeanor was being committed in the *Caliente* and *Sessa* cases and on probable cause that the individuals whom they arrested in the *Perlman* and *Cognetto* cases were those who had committed the misdemeanors. Therefore the Court's position is altogether justified in light of the statutory provision in force at the time of deciding the present case and the *Mapp* decision. Three weeks after this case the Court of Appeals decided *People v. De Leo*.[23] An officer observed a man entering a vacant building. The officer then climbed to the roof; from here he saw and heard the defendants engaging in book-making activities. The officer entered and arrested the defendants. In an ensuing search betting slips were found. The Court upheld the convictions without an opinion. This case appears to be in harmony with the instant case since the officer had positive identification of the individuals who had committed a misdemeanor in his presence. The problem of sustaining convictions in this area does not stem so much from the *Mapp* decision as it does from the Code of Criminal Procedure. However, prior to *Mapp* the Code was not as restrictive since evidence obtained illegally was admissible in the state courts. Recognizing the difficulties which the law enforcement agencies have had in this area and appreciating the social necessity of rendering the law enforceable, the New York State Legslature has passed two bills, effective July 1, 1963 which should ease the police officer's dilemma while maintaining Constitutional rights. The Wallach bill[24] amends subdivision 1 of section 177 of the Code of Criminal Procedure so that a police officer, "as enumerated in section one hundred fifty-four (a) of the Code of Criminal Procedure," will be permitted to make a misdemeanor arrest without a warrant when he has "reasonable grounds for believing" that a crime is being committed in his presence. Before the amendment a peace officer could make such an arrest without a warrant only when the crime was committed or attempted in his presence.[25] The Rules Committee Bill[26] amends the Code of Criminal Procedure by adding a new section, 154-a, which gives a broader definition to the term police officer in relation to peace officers. With the above changes in effect, the law enforcement agencies will be better equipped to enforce the statutes prohibiting betting and

23. 12 N.Y.2d 913, 188 N.E.2d 402, 238 N.Y.S.2d 97 (1963).
24. N.Y. Sess. Laws 1963, ch. 580, § 1(1).
25. See Dumbra v. United States, 268 U.S. 435 (1925); Steele v. United States, 267 U.S. 498 (1925); Carroll v. United States, 267 U.S. 132 (1925).
26. N.Y. Sess. Laws 1963, ch. 581, § 154(a).

also the use of narcotics.[27] The decision in the present case would no doubt be reversed if arising under the present statute and once again the proper balance between the Constitutional rights of the individual and the protection of society against such crimes should be realized.

Douglas P. Grawunder

CONVICTION OF AGENT OF OWNER FOR VIOLATION OF ADMINISTRATIVE CODE WHICH REFERRED TO OWNERS UPHELD

Defendant, as agent in charge of a multiple dwelling in Manhattan, was convicted of violating a provision of the Administrative Code of the City of New York requiring that every owner of a multiple dwelling file a statement of registration and occupancy. That conviction before the Magistrates Court of the City of New York was reversed and the complaint dismissed by order of the Appellate Part of the Court of Special Sessions of the City of New York, on the ground that the registration requirement imposed by the Administrative Code pertains to true owners only, and therefore did not cover defendant. On appeal by permission, *held*, reversed, three judges dissenting. The Administrative Code provision requiring that owners of multiple dwellings file a statement of registration and occupancy, does not apply to true owners only, but also applies to agents and any responsible person in charge of the premises. *People v. Chodorov*, 12 N.Y.2d 176, 188 N.E.2d 124, 237 N.Y.S.2d 689 (1962).

The Council of the City of New York enacted Title D of the Multiple Dwelling Code[1] in 1955 as an integrated plan for coping with conditions of "overcrowding, excessive occupancy, insufficient sanitation" and other health hazards plaguing the tenement housing of the city.[2] The Council found that the enforcement of multiple dwelling regulations in the past had been severely handicapped by difficulty in identifying, and the unavailability of the persons responsible for the proper maintenance of the buildings within the city.[3] In order to cure this problem section D26-3.1 was passed. The Council sought, by requiring the registration of multiple dwellings and the designation of a person responsible therefor, to eliminate the obstructions of unavailability and lack of identification. Such a law is entirely within the legislative power of the Council[4] as set forth in the Constitution,[5] the New York City Charter,[6] and those provisions of the Multiple Dwelling Law which permit cities to promulgate more

27. See Rochin v. California, 342 U.S. 165 (1952); Blackford v. United States, 247 F.2d 745 (9th Cir. 1957); People v. Sullivan, 18 A.D.2d 1066, 239 N.Y.S.2d 517 (1st Dep't 1963) (*per curiam*); People v. Diaz, 36 Misc. 2d 195, 232 N.Y.S.2d 208 (N.Y.C. Ct. of Spec. Sess. 1962); People v. Ibarra, 30 Cal. Rptr. 223 (2d Dist. Ct. App. 1963).

1. New York City Administrative Code §§ D26-1.0 to -8.0 (1955).
2. New York City Administrative Code § D26-1.0 (1955).
3. *Ibid.*
4. People v. Schildhaus, 17 Misc. 2d 825, 186 N.Y.S.2d 68 (Ct. Spec. Sess. 1959), *accord*, People v. Lewis, 295 N.Y. 42, 64 N.E.2d 702 (1945).
5. N.Y. Const. art. IX, § 12.
6. New York City Charter § 27.