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Criminal Law and Procedure—Search And Seizure Authorized As Incident To Lawful Arrest Despite Failure To State Authority And Cause

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consented to the status of managing agent. The statute requires that a certificate designating a managing agent bear the consent of the designee.[19] In deciding that the provision requiring designation of a managing agent applies to the defendant, the court deprives him of his opportunity to decline the responsibility of that position. At the sentencing of the defendant his attorney presented the proposition that defendant had been made the dupe of unscrupulous owners.[20] The present decision might have the effect of fostering this practice. Of course the defendant's status as a person responsible for a multiple dwelling was not disputed and ample evidence of his agency was presented in the trial court, but it is not certain that he would have accepted the position if he had been fully aware of the responsibility involved. By the present decision the agent is deprived of notice of his official responsibility. The Court sought to make a responsible person available to city law enforcement officials. It must be wondered if this purpose has been, or will be accomplished. The true owners remain unscathed while the defendant suffers the penalty of law. It is doubtful that he is capable of remedying the unhealthy conditions, the elimination of which is the ultimate goal of the statute. The true owners are no more constrained to do so than before.

Albert Dolata

SEARCH AND SEIZURE AUTHORIZED AS INCIDENT TO LAWFUL ARREST DESPITE FAILURE TO STATE AUTHORITY AND CAUSE

On June 25, 1960, a jewelry story in New York City was burglarized. Approximately two months later the FBI relayed information to the New York Police indicating that a certain Joseph Coffey was one of the burglars and that he would be attempting to sell some of the plunder on August 30 at a certain street corner in Brooklyn. After being briefed at FBI Headquarters, the two New York detectives accompanied the agents to the designated street corner where they saw Coffey and two other men get into a car. After following this car for a time and seeing one passenger disembark, the FBI agents ordered an arrest. The detectives thereupon approached the car and took Coffey and his passenger into custody. The officers had neither a search nor arrest warrant. A search of Coffey's passenger yielded an envelope containing diamonds. At the trial of Coffey for third degree burglary these diamonds were introduced into evidence despite the defendant's objections. Coffey was convicted of third degree burglary. While this conviction was being appealed to the Court of Appeals of New York, the Supreme Court of the United States rendered its historic *Mapp v. Ohio*[1] decision. Thereafter evidence gathered as a result of an unconstitutional search and seizure was to be excluded in state as well as

19. New York City Administrative Code § D26-3.1 (1955).
20. Record pp. 97-106.

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

federal courts. The Court of Appeals of New York, when first faced with the Coffey Appeal, held that the new *Mapp* rule would apply even though it was promulgated subsequent to Coffey's conviction.[2] The opinion included a statement to the effect that, if this search were incident to a legal arrest, the evidence would be receivable. The court then ordered a hearing to be held in the Court of General Sessions to determine if the motion to suppress should be granted.[3] The hearing revealed that the FBI's information was received from an informer with whom it had dealt in the past. The FBI learned from other officers that Coffey had a criminal record and frequently drove a car answering the description of the getaway car. At the time of Coffey's arrest he was driving this same car. The name of the informer was kept secret during the hearing despite the objection of defense counsel. The hearing also revealed that Coffey was not explicitly informed by the officers of the cause of his arrest. The Court of General Sessions denied the motion to suppress and this decision was affirmed by the Appellate Division. The Court of Appeals in a 6 to 1 decision through Chief Judge Desmond upheld the denial of the motion to suppress and affirmed the conviction. The information received by the officers from both the informer and other sources gave the officers probable cause to arrest the defendant. The search and seizure was therefore valid as incident to a lawful arrest. Refusal to divulge the identity of the informer in a hearing on a motion to suppress is not error unless by making a fair hearing impossible it seriously prejudices the defense. When the unnamed informer is a mere transmitter of information and not a competent witness to the crime itself and there is strong proof of the accuracy of his information, nondisclosure is appropriate. Circumstances, including the fruits of the search, justified the conclusion that the defendant must have known the cause of his arrest. This is sufficient notice to meet the statutory requirement in cases of arrest without warrant. *People v. Coffey*, 12 N.Y.2d 443, 182 N.E.2d 92, 237 N.Y.S.2d 694 (1963).

The Fourth Amendment to the Federal Constitution has guaranteed that the people are to be secure in their persons and homes from unreasonable searches and seizures.[4] In order to conduct a search, the police, with few exceptions, must possess a search warrant issued by a magistrate on probable cause.[5] The basic element of all definitions of probable cause is a reasonable ground for belief of guilt.[6] The evidence supporting that belief can be less than evidence which would support a conviction.[7] In the course of the search, officers may seize instrumentalities by which a crime is committed, fruits of the crime (*i.e.*, stolen property), weapons by which escape might be effected, or

2. See People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).
3. People v. Coffey, 11 N.Y.2d 142, 182 N.E.2d 92, 227 N.Y.S.2d 412 (1962); See generally 12 Buffalo L. Rev. 113 (1962).
4. U.S. Const. amend. IV.
5. McDonald v. United States, 335 U.S. 451, 455 (1948).
6. Brinegar v. United States, 338 U.S. 160, 175 (1949).
7. *Ibid.*

property, the possession of which is a crime.[8] An automobile is no more vulnerable to illegal searches than is a home.[9] Probable cause must likewise be shown[10] and the affidavits supporting the application must be equally explicit.[11] In no case can the fruits of an illegal search be used to justify the later issue of a warrant.[12] Informer information corroborated by the officers own personal knowledge will generally justify a finding of probable cause.[13] Independent corroboration may not be necessary where the informer has proved reliable in the past.[14] But where information is neither corroborated nor from a reliable source, it is insufficient to establish probable cause for the issuance of a search warrant.[15] The identity of the informer need not be disclosed unless nondisclosure would be fundamentally unfair.[16]

There are two general exceptions to the requirement of a search warrant. A warrantless search may be legal if it is consented to[17] or if it is incident to a lawful arrest.[18] This latter exception is an ever widening exception to the requirement of a judicial warrant.[19] In the case of a warrantless arrest, where no crime has been committed, the police officer must have reasonable cause to believe that the arrestee has committed a felony.[20] Statutes governing such arrests should be strictly construed.[21] The probable cause necessary to obtain a search warrant is indistinguishable from the probable cause which will justify an arrest and search incidental thereto.[22] There is evidence of lack of probable cause if the officer fails to get a search warrant when such acquisition was practicable.[23] The arrest and search are not justified by what they turn up.[24] The search cannot be justified by the arrest, when the arrest in turn must be justified by the fruits of the search.[25] The search must be made after the arrest[26] and only if the arrest is lawful.[27] If the search does not comply with

8. See Harris v. United States, 331 U.S. 145 (1947).
9. See People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960).
10. See United States v. Spears, 287 F.2d 7 (6th Cir. 1961).
11. See United States v. Pearce, 275 F.2d 318 (7th Cir. 1960).
12. See Silverthorns Lumber Co. v. United States, 251 U.S. 385 (1920).
13. See Husty v. United States, 282 U.S. 694 (1931); Hamer v. United States, 259 F.2d 274 (9th Cir. 1958).
14. Draper v. United States, 358 U.S. 307 (1959).
15. See Scher v. United States, 305 U.S. 251 (1938).
16. See Roviaro v. United States, 353 U.S. 53 (1957). Compare King v. United States, 282 F.2d 398 (4th Cir. 1960).
17. See United States v. Sferas, 210 F.2d 69 (7th Cir. 1954), *cert. denied*, 347 U.S. 935 (1954); Abel v. United States, 362 U.S. 217 (1960).
18. United States v. Rabinowitz, 339 U.S. 56 (1950).
19. See Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio*, 13 W. Res. L. Rev. 56 (1961).
20. N.Y. Code Crim. Proc. § 177.
21. Miller v. United States, 357 U.S. 301 (1958).
22. Jones v. United States, 362 U.S. 257 (1960). See generally Brinegar v. United States, 338 U.S. 160 (1949).
23. United States v. One Ford, 265 F.2d 21 (10th Cir. 1959); United States v. Kancso, 252 F.2d 220 (2d Cir. 1958).
24. See United States v. Di Re, 332 U.S. 581 (1948).
25. Johnson v. United States, 333 U.S. 10, 16-17 (1947).
26. See Lee v. United States, 232 F.2d 354 (D.C. Cir. 1956).
27. State v. Brooks, 57 Wash. 2d 422, 357 P.2d 735 (1961).

these standards, the federal exclusionary rule is applicable[28] and a motion to suppress the evidence[29] will be granted.

The Court in the instant case has accepted as amply justified the lower court's determination that the officers had probable cause for arrest. In so doing they emphasize that the informer was not the sole source of information. The agents had checked on the history and the record of the accused and his associates. In so doing they learned that defendant was known to drive a car answering the description of the getaway car. This knowledge was reaffirmed when the defendant appeared on the night of his arrest driving that same car. The Court, however, had yet to justify the fact that the prosecution was permitted to keep secret the name of the informer. In disposing of the defendant's claim that there might not even be an informer, the Court holds that the testimony of the FBI agent as well as that of the prosecuting attorney is adequate proof that an informer did exist.[30] They go on to point out that the principal elements of the informer's story were checked out and found plausible and that this eliminated any danger which could result should an informer merely attempt to sell tavern rumor. Relying on the conclusion that the informer was a mere transmitter of information and not in any sense a competent witness to the crime, the Court held that nondisclosure of his identity was appropriate in order to protect the flow of information to the police authorities. The final point considered was the statutory requirement that an officer, in making an arrest, give notice both of his authority and the cause for arrest, except where the party is at the time committing a felony or is under hot pursuit.[31] The Court held that, even though the requirement was not explicitly met, the surrounding circumstances, including the possession of the jewels, indicated that defendant must have been aware of the reason for his arrest, and in this way was under sufficient notice.

The Court in the instant case notes parenthetically that probably the principal question on this appeal involves the withholding of the informer's identity. Judge Fuld, in dissent, likewise centers on that aspect of the case in urging reversal of the conviction. The majority, however, has simplified this issue by sustaining the trial judge's contention that sufficient information existed exclusive of the informer to establish probable cause for arrest. Assuming this to be true, the majority is in accord with federal authorities when it allows the prosecution the privilege of withholding the informer's identity.[32] Having found adequate probable cause for arrest, the Court still had to justify the method of arrest. The officers had failed to give Coffey notice of their authority and cause of arrest as required by statute. If this rendered the arrest illegal,

28. See People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).
29. See N.Y. Code Crim. Proc. § 813(e).
30. Compare King v. United States, 282 F.2d 398 (4th Cir. 1960).
31. N.Y. Code Crim. Proc. § 180.
32. See, *e.g.*, Roviaro v. United States, 353 U.S. 53 (1957); Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947).

then the resulting search was likewise illegal. To avoid this conclusion the Court relies at least partially on the fact that the search uncovered the jewels. The validity of this reasoning is highly doubtful. Failure to comply with statutory requirements for arrest has rendered arrests illegal and unlawful.[33] The two requirements then for a legal arrest in this case were probable cause and compliance with the statutory provision of notice of authority and cause. All authorities agree that the fruits of the search could not be used to supply probable cause for the underlying arrest.[34] If the fruits cannot be used to fulfill one predicate of a legal arrest, *i.e.*, probable cause, they should not be used to justify the presumption that the defendant knew his cause of arrest. A search and arrest should not be permitted to pull themselves up by their own bootstraps in any manner.[35]

George P. Doyle

WAIVER OF TRIAL BY JURY IN CRIMINAL CASES

Defendant was indicted for rape in the first degree, assault in the second degree, carnal abuse of a child, and endangering the life, health and morals of a child. The case had given rise to some emotional newspaper commentary in which the defendant was described as a "sex monster," and a "molester of dozens of children." The defendant believed that because of this notoriety he could not obtain a fair jury trial,[1] and thus he moved, on the authority of a 1938 amendment to Article I, section 2 of the New York Constitution, to waive trial by jury.[2] The motion was denied, and the defendant subsequently was convicted on all counts. He appealed, assigning as error the denial of this motion. The Appellate Division reversed and ordered a new trial, granting the People permission to appeal. *Held,* in a four-three decision, that where a waiver of trial by jury is requested in good faith, the court, if confident that the defendant fully understands the consequences of his act, must then grant the waiver as a matter of right. *People v. Duchin,* 12 N.Y.2d 351, 190 N.E.2d 17, 239 N.Y.S.2d 670 (1963).

At common law, those accused of a felony could not waive the right to trial by jury.[3] While neither the courts nor the legislatures have generally distin-

33. People v. Gallo, 206 Misc. 935, 135 N.Y.S.2d 845 (N.Y. City Magis. Ct. 1954). See also Egan v. State, 255 App. Div. 825, 7 N.Y.S.2d 64 (4th Dep't 1938); People v. Dontz, 282 App. Div. 993, 125 N.Y.S.2d 526 (3d Dep't 1953).

34. *E.g.*, Johnson v. United States, 333 U.S. 10 (1947); United States v. Di Re, 332 U.S. 581 (1948).

35. McDonald v. United States, 335 U.S. 451 (1948). Compare Johnson v. United States, 333 U.S. 10 (1947).

1. People v. Duchin, 16 A.D.2d 483, 229 N.Y.S.2d 46 (2d Dep't 1962).

2. The relevant language of Article I, section 2, reads as follows: "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense."

3. Lord Dacres Case, Kelyng's R. 59, Crown Cases 89 (reign of Henry VIII, jury