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Use of an Arrest as A Pretext for A Search Without A Warrant

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lower federal court decisions upholding the "silver platter" doctrine. E.g., *United States v. Moses,* 234 F.2d 124 (7th Cir. 1956); *United States v. White,* 228 F.2d 832 (7th Cir. 1956); *Jones v. United States,* 217 F.2d 381 (8th Cir. 1954); *Fredericks v. United States,* 208 F.2d 712 (5th Cir. 1953), *cert. denied* 347 U.S. 1019 (1954).

Perhaps the leading case advocating the "silver platter" doctrine is *Burdeau v. McDowell, supra.* In that case a private individual committed the illegal search and seizure. The Court held the evidence admissible, regarding the Fourth Amendment and the prophylactic rule of evidence set forth in *Weeks v. United States,* 232 U.S. 383 (1914) as applicable only where there is federal participation in the illegal acquisition of such evidence. Thereafter, federal courts found little reason to differentiate between "state officers" and "private individuals" concerning illegally obtained evidence.

Nevertheless, it should be noted that while Mr. Justice Frankfurter coined the phrase "silver platter" in *Lustig v. United States, supra,* he reserved comment on its validity. However, Mr. Justice Murphy, joined by Justices Douglas and Rutledge, wrote a brief concurring majority opinion stating: "In my opinion the important consideration is the illegal search. Whether state or federal officials did the searching is of no consequence to the defendant and it should make no difference to us." 338 U.S. 74, 80. This expression of views by three Supreme Court Justices seemed to somewhat tarnish the "silver platter," but its lustre was again brightened in *Irvine v. California, supra,* when Mr. Justice Jackson, speaking for the majority said, "Even this court has not seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpetrated the wrong." 347 U.S. 128, 136. In the light of these contrary viewpoints, the extemporary comment in the instant case must be regarded as casting no small doubt on the doctrine's heretofore generally assumed authenticity.

While popular opinion may question the wisdom of excluding relevant wiretap evidence, such criticism should be directed to Congress, for a plain reading of section 605 fully vindicates the Supreme Court's decision.

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Narcotic officers, acting solely on the basis of information obtained from a paid informant, arrested defendant without a warrant of arrest and seized several ounces of heroin from his person. Upon consideration of a motion to suppress the evidence on the ground that it was illegally obtained, *held* (2-1): that the narcotic officers in relying on an informant's tip had reasonable grounds to believe

defendant was committing a violation of the Federal Narcotics Act so as to effect a lawful arrest, and heroin disclosed by a search incident to such arrest was admissible in evidence against the defendant. *Draper v. United States,* 248 F.2d 295 (10th Cir. 1957).

The Fourth Amendment of the United States Constitution which prohibits unreasonable searches and seizures does not denounce all searches and seizures without a warrant but only those which are unreasonable. While this constitutional protection does not undertake to define what is unreasonable, it is well settled that where a person is legally arrested for an offense, whatever is upon his person or in his control which may be used to prove the offense may be seized and held as evidence. *Carroll v. United States,* 267 U.S. 132 (1955). Thus, lawful arrest becomes an indispensible condition precedent to a closely allied search and seizure without a warrant. *Agnello v. United States,* 269 U.S. 20 (1925).

The validity of an arrest depends upon the existence of reasonable grounds or probable cause to believe that a crime has been or is being committed. *McDonald v. United States,* 335 U.S. 451 (1948); U.S. CONST. amend. IV. To insure this constitutional insulation for the protection of basic rights, normal procedure is that the law enforcement agencies apply for a warrant before an arrest, thereby giving the judiciary a chance to determine whether there is proper cause for the arrest. Only under extraordinary circumstances are law enforcement agencies excused from the requirement of first having the judiciary determine the question of whether there is probable cause to believe that a crime has been or is being committed. *United States v. Walker,* 246 F.2d 519 (7th Cir. 1957). However, even where the presence of extraordinary circumstances justifies an arrest without a warrant the basic requirement of probable cause to believe that a crime has or is being committed remains, and upon this fact the legality of the arrest will depend. *United States v. Lefkowitz,* 285 U.S. 452 (1932). Congress, in enacting the Narcotic Control Act, adopted these same principles when they provided: ". . . an agent of the Bureau of Narcotics may make an arrest without warrant for violations of narcotic laws where such arrested has or is committing such violation." Narcotic Control Act, 70 STAT. 570 (1956), 26 U.S.C. §7607(2) (Supp. 1957).

Probable cause has been defined as where the facts and circumstances together with the reasonable inferences to be drawn from them, are such as would lead a reasonably prudent person to conclude that the law has been violated. *Bruner v. United States,* 150 F.2d 865 (10th Cir. 1945). In substance, probable cause means that there are reasonable grounds to form a belief of guilt which are more than mere suspicion but less than that which would justify a conviction. *Brinegar v. United States,* 338 U.S. 160 (1949).

Since the hearsay exclusion rule is applicable only at the trial, *United States v. Costello,* 350 U.S. 359 (1956), the difficulty that arises in the instant case is whether information obtained from an informer is sufficient to constitute probable cause as grounds for a warrant or an arrest without a warrant. There are varying decisions holding that hearsay evidence in the form of an informer's tip may or may not be sufficient to constitute probable cause. In *Worthington v. United States,* 166 F.2d 557 (6th Cir. 1948), it was held that a federal agent acting on information obtained from a man who refused to identify himself, did not have sufficient probable cause to justify an arrest. While in *United States v. Bianco,* 189 F.2d 716 (3d Cir. 1951), information obtained from a known informant believed to be reliable from past experience was sufficient to create probable cause regardless of its hearsay character. The crux of these decisions centers around the reliability of the information so obtained, and information coming from an anonymous, undisclosed or unverified source is not sufficient. *United States v. LiFat Tong,* 152 F.2d 650 (2 Cir 1945). Thus, there is no reason to suppose that hearsay evidence derived from an informant, like any other evidence, is not competent evidence on which to show probable cause for an arrest, while the weight to be given its reliability is a matter for the sound discretion of the court in considering a motion to suppress.

The court in the instant case, aligning itself with the prevailing view, apparently seemed satisfied that an informer's tip, found to be realiable from past experience, in and of itself was sufficient to constitute probable cause. In view of the fact that the arrest was made solely on the basis of a tip entirely uncorroborated, except by past experience of the informant, this decision seems quite questionable . It is apparent that the court, influenced by the evidence of guilt so obtained from the arrest, was in search of a means for circumventing the constitutional protection against unreasonable searches and seizures. In the opinion of the writer, it is impossible to justify such a decision on the ground that evidence of the crime was found after the arrest or that such action is necessary to enable a better system of law enforcement. To allow such a gradual whittling away of our constitutional guaranties would open the door for law enforcement agencies to use arrests as a pretext to search for evidence of crime and in time would reduce to a mockery our concept of individual freedom. Therefore, it is imperative that the judiciary, in determining the validity of an arrest, restrict themselves to the actual grounds for the arrest without resorting to its fruits in the guise of expediency and necessity to justify their decision.

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