Michigan Law Review

Volume 59 | Issue 2

1960

Constitutional Law- Search and Seizure- Search Incidental to an Administrative Arrest

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—SEARCH INCIDENTAL TO AN ADMINISTRATIVE ARREST—As a preliminary to deportation proceedings, defendant, Rudolf I. Abel, was arrested in his hotel room by Immigration and Naturalization Service agents who acted pursuant to a valid administrative arrest warrant.[1] After the arrest, but without a search warrant, the INS searched Abel's room and seized evidence later used in his trial for espionage. In the district court Abel moved to suppress this evidence on the theory that the search violated the fourth amendment. The district court's denial of the motion[2] was affirmed by the Court of Appeals for the Second Circuit.[3] On certiorari to the United States Supreme Court, *held,* affirmed, four Justices dissenting.[4] Although made without a search warrant, a search incidental to a lawful[5] administrative arrest does not violate the fourth amendment. *Abel v. United States,* 362 U.S. 217 (1960).

The right of an officer without a search warrant[6] to search a lawfully arrested person has long been held to be consistent with fourth amendment limitations, whether the arrest was made with or without an arrest warrant.[7] Although the scope of permissible search has been extended beyond the person to the surrounding area,[8] this right to search without a warrant has been limited, with few exceptions,[9] to criminal arrest cases. Since the deportation proceeding has been classified as civil[10] rather than criminal, the principal case raised the basic question whether the administrative arrest for deportation sufficiently resembled the criminal arrest to justify an incidental search without a warrant. The soundness of the majority's finding that no constitutional distinctions exist can be displayed by

1 Arrest prior to deportation proceedings is authorized by Immigration Act of 1952 § 242, 66 Stat. 208, 8 U.S.C. § 1252(a) (1958); 8 C.F.R. § 242.2(a) (1958).

2 United States v. Abel, 155 F. Supp. 8 (E.D.N.Y. 1957).

3 United States v. Abel, 258 F.2d 485 (2d Cir. 1958).

4 Justice Douglas' dissent, in which Justice Black joined, was based upon the FBI's use of a civil proceeding to accomplish a criminal arrest. The FBI notified the INS of Abel's presence and was present at the arrest. The Court found good faith in the INS actions. The good faith test appears to allow wide latitude to the police in their use of administrative agencies. Justice Brennan, joined by Justices Black, Douglas and the Chief Justice, found no right to search incidental to an administrative arrest.

5 Because of the long acceptance of the administrative arrest and of the defendant's admission of the legality of the arrest below, the Court did not give serious consideration to the petitioner's claim that the arrest itself was invalid.

6 1 BISHOP, CRIMINAL PROCEDURE §§ 210, 211 (2d ed. 1872); Reifsnyder v. Lee, 44 Iowa 101 (1876); see also Weeks v. United States, 232 U.S. 383, 392 (1914).

7 See United States v. Rabinowitz, 339 U.S. 56 (1950); Carroll v. United States, 267 U.S. 132 (1925).

8 Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927).

9 For some examples of the limited right to search without a warrant, see Frank v. Maryland, 359 U.S. 360 (1959) (health inspector); Givner v. State, 210 Md. 484, 124 A.2d 764 (1955) (health inspector); Kelly v. United States, 197 F.2d 162 (5th Cir. 1952) (INS officer at and near border); WIS. STAT. § 29.05(6) (1957) (game warden).

10 Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Zakonaite v. Wolf, 226 U.S. 272 (1912).

a comparison of the purposes and effects of the two proceedings in three areas: (1) the degree of public interest involved in deportation and criminal prosecution; (2) the necessity for the search in implementing this interest; and (3) the quality of protection against unreasonable search which is given to the suspected alien and criminal.

Basically, the concept of permissible search represents a balance between the right of the individual to privacy and the protection of society from undesirable persons and antisocial influences.[11] The public interest in deportation was recognized by Congress in early, and now comprehensive, legislation[12] and is not substantially different from the interest in the prosecution of criminals. Indeed, conviction of certain crimes is a ground for deportation.[13] Moreover, it was long argued that deportation was a criminal proceeding.[14] The search incidental to a criminal arrest serves to protect this public interest by removing from the arrested person[15] weapons or other means of escape and by seizing evidence before its destruction or secretion.[16] The desire to escape and likelihood of destruction of relevant evidence appear equally great in incidents of deportation arrest.

Thus, if the public interest and need are significant, the fourth amendment should prevent a search incidental to administrative arrest only if the protection against unjustified intrusion is materially lower than in the criminal case. In dissent, Mr. Justice Brennan found the absence of judicial intervention in the administrative procedure to be such a deficiency.[17] In criminal procedure, if the federal commissioner[18] finds no "probable cause"[19] for arrest and therefore refuses to issue an arrest warrant, the arrest will probably not be made and a fortiori there will be no incidental search. However, since his investigation is restricted to the question of probable cause for arrest, the commissioner lacks the power to prevent unreasonable

11 Robinson v. Richardson, 79 Mass. (13 Gray) 454, 456 (1859): "Search warrants were never recognized . . . for the maintenance of any mere private right, but [were] . . . confined to cases of public prosecution."

12 1 Stat. 571 (1798); Immigration Act of 1952, 66 Stat. 166, 8 U.S.C. §§ 1101-1503 (1958).

13 66 Stat. 204 (1952), 8 U.S.C. § 1251 (1958).

14 See Bugajewitz v. Adams, 228 U.S. 585 (1913); Zakonaite v. Wolf, *supra* note 10.

15 Even the dissent implicitly recognizes this need to search the person. Principal case at 250-51.

16 Reifsnyder v. Lee, *supra* note 6. For Judge Cardozo's statement of the purposes, see State v. Chaigles, 237 N.Y. 193, 142 N.E. 583 (1923).

17 It may be argued that the magistrate is particularly necessary in this situation to bar collusive action by the FBI and INS. However, the magistrate would have great difficulty in preventing situations such as the present one if the FBI is able to give the INS evidence sufficient to prove a prima facie case of deportability.

18 The United States commissioners are appointed by the district courts, 28 U.S.C. § 631 (1958), and have been termed "justice[s] of the peace of the United States." United States v. Maresca, 266 Fed. 713, 720 (S.D.N.Y. 1920). Under the Federal Rules the proceedings are held before a "commissioner or other officer empowered to commit. . . ." FED. R. CRIM. P. 3.

19 FED. R. CRIM. P. 4 requires "probable cause to believe that an offense has been committed and that the defendant has committed it. . . ."

searches incidental to valid arrests. Moreover, when the arrest is made without a warrant,[20] he has no opportunity to exercise even this limited power before the search. Under the administrative procedure the INS agent, who may not arrest without a warrant, must present a prima facie basis for arrest to his district director in order to obtain a warrant.[21] This procedure appears weaker than the judicial process because the district director would tend to review less objectively the activities of his subordinates. Nevertheless, if the commissioner's investigation before issuing the warrant is as perfunctory and ineffective as the magistrate's hearing at the state level has been shown to be,[22] only limited protection is offered by the proceeding. In the post-arrest preliminary hearing the commissioner makes more extensive review of probable cause for arrest.[23] However, because the search will have been completed and because the power of the federal commissioner to suppress evidence has now been removed,[24] this hearing, which may result in refusal to bind over to the district court, can have only the tangential effect of deterring arrests on insufficient evidence, and this deterrent value of the proceeding will be realized only if commissioners conduct effective investigations. Therefore, in view of the questionable practical value of this judicial intervention and the comparable public interest and necessity for an incidental right to search, it would seem that the Court properly found no constitutional distinction between the criminal arrest and the administrative arrest for deportation.

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[20] For the circumstances under which such arrest is proper, see PERKINS, CRIMINAL LAW 870 (1957). For a study of arrests in which only 3% were found to have been made with a warrant, see Comment, 100 U. PA. L. REV. 1182 (1952).

[21] INS "operating instructions" issued under 8 C.F.R. § 242.2 (1958) so provide. Principal case at 232.

[22] Studies in at least one state show this procedure to provide almost totally ineffective protection. CARRINGER, PROCEDURE BEFORE COMMITTING MAGISTRATES IN PENNSYLVANIA 42 (1947); SADLER, CRIMINAL PROCEDURE IN PENNSYLVANIA § 72 (2d ed. 1937).

[23] FED. R. CRIM. P. 5.

[24] The district courts now have the exclusive right to suppress evidence. FED. R. CRIM. P. 41 (e). This power had also been enjoyed by the commissioners under Act of June 15, 1917, ch. 30, §§ 15-16, 40 Stat. 229 (1917).