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Search and Seizure - Suppression of Evidence - Judicial Attitude Toward Enforcement

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SEARCH AND SEIZURE—SUPPRESSION OF EVIDENCE—JUDICIAL ATTITUDE TOWARD ENFORCEMENT—The “numbers game” is today the most profitable of the wide-spread gambling rackets. And like all organized gambling it is a focal source and the financial support of far more serious crimes.¹ At the same time it is one of the most difficult forms of crime for the police to control. It needs no costly installations which the police can confiscate or destroy. Unlike “house” gambling it cannot practically be harassed out of business. It can be operated by one man alone, if he survives failure to pay off for lack of capital; or by a syndicate with capital enough to hire runners. All that such operators need is some sort of headquarters to which pick-up men can report and where the bookkeeping can be carried on. This headquarters may be someone’s private house, or merely a rented room. In consequence, the only possibility of holding such gambling in check is through discovery and punishment of its pick-up runners, or fortuitous convictions of the more important operators. And even this latter has been made almost impossible as a practical matter by judge-made limitations on police invasion of a criminal’s privacy.²

This simplicity with which the particular type of racket can be operated and the conditions which naturally make its control peculiarly difficult give striking color and consequence to the judicial attitude toward effective crime prevention revealed in a recent Michigan decision.³

State police had been twice tipped-off that a certain man was picking up gambling bets, a misdemeanor punishable by imprisonment for up to one year.⁴ Acting on the second tip, officers in a cruiser were watching defendant’s car, when it ran the stop sign at

¹ Consider, for example, the discoveries by Senator Kefauver’s wide investigation.

² E.g., *McDonald v. United States*, 335 U.S. 451 (1948); *People v. Cahan*, 44 Cal. (2d) 434, 282 P. (2d) 905 (1955); *McKnight v. United States*, (D.C. Cir. 1950) 183 F. (2d) 977; *Gorman v. State*, 161 Md. 700, 158 A. 903 (1931).

³ *People v. Zeigler*, (Mich. 1960) 100 N.W. (2d) 456.

⁴ Mich. Comp. Laws (1948) §§750.301, 750.304, 750.306.

an intersection. They arrested the driver, Donald Zeigler, for the traffic violation. Asked if he had any contraband, Zeigler said, "No, go ahead and search the car." Search was made and nothing found. Asked if he had any contraband on his person, he reached into an overcoat pocket and pulled out several gambling cards. One officer asked if he might search the defendant and without waiting for permission reached into a coat pocket and took out a memorandum book of bets. The defendant "was reluctant to let it go and made a motion to pull it back." At his trial on a charge of possessing pool books and other wagering memoranda both the gambling cards and memorandum book were offered in evidence. Defendant's motion to suppress was denied. On appeal, the supreme court, Smith, J., vigorously dissenting, reversed conviction and set Zeigler free.

There is ample, though questionable, authority in Michigan for holding that facts learned by what particular judges choose to call unlawful search may be suppressed and concealed from juries sworn to determine the truth.⁵ But before the court in the *Zeigler* case could order the proof of his guilt suppressed it had to decide that the search by which the proof came to light was unlawful. And here the particular judges concerned were free to decide as they chose. "The test of reasonableness cannot be stated in rigid and absolute terms."⁶ "What is a reasonable search is not to be determined by any fixed formula . . . and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."⁷

Just why the court chose to call the search in this case unreasonable is not apparent from the decision. No constitutional provision, no statute, no established rule of law, indeed no sound precedent compelled it. The judges were wholly free to characterize it as lawful and proper if they so chose. That the majority saw fit, instead, to call it unlawful must have been a matter of personal predilection, indicating their attitudes toward effective law enforcement.

The arrest of the defendant was lawful the entire court agreed. The primary issue, therefore, was simply whether or not the search of his person following a valid arrest was itself invalid. On this

⁵ See Waite, "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933).

⁶ *Harris v. United States*, 331 U.S. 145 at 150 (1947).

⁷ *United States v. Rabinowitz*, 339 U.S. 56 at 63 (1950).

point the court might have cited, but did not, Judge Cardozo's opinion in *People v. Chiagales*. There, as in the *Zeigler* case, incriminating material, letters, had been taken from the defendant following his arrest. In holding the search to have been proper that court said: "Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion. . . . The defendant does not attack the legality of the arrest. . . . Conceding the legality of the arrest, he concedes by implication the legality of the search."⁸

Michigan decisions are replete with the general statement that "the police have the power and it is also their duty to search the person of one lawfully arrested . . . for articles that may be used in evidence to prove the charge on which he is arrested."⁹ Whether the limitation of the last six words is intentional or merely casual does not appear, because in each case the search was for only such matters and the right to search for other things was not involved. On the other hand, broader dicta without the limitation are commonplace in other states to the effect that "[t]he guaranty of the constitution is not against all search and seizure . . . and does not extend to immunity from search on arrest."¹⁰ But again these statements are only dicta on the points involved because search for things not connected with the crime for which arrest was made was not involved. Thus again the propriety of the *Zeigler* search is not settled by precedent, is left to judicial preference.

The majority preferred to hold it unlawful, relying upon a dictum in *People v. Gonzales*,¹¹ one of the court's own decisions of a year earlier. In this case the police had stopped a car for having only one headlight burning. In "checking" the interior they found a partially concealed pistol the ownership of which *Gonzales* admitted. When charged with the felony of carrying a concealed weapon he alleged that search of the car was unlawful and evidence of the gun should be suppressed. Suppression was ordered by the trial court and the state appealed. However, the people of Michigan had previously become sufficiently incensed by judicial suppression of evidence and release of law breakers in concealed

⁸ 237 N.Y. 193 at 197, 142 N.E. 583 (1923).

⁹ *People v. Harris*, 300 Mich. 463, 2 N.W. (2d) 464 (1942), quoting *People v. Cona*, 180 Mich. 641 at 652 (1914), quoting *Smith v. Jerome*, 47 Misc. 22 at 24, 93 N.Y.S. 202 (1905).

¹⁰ E.g., *People v. Hord*, 329 Ill. 117 at 119, 160 N.E. 135 (1928).

¹¹ 356 Mich. 247, 97 N.W. (2d) 16 (1959).

weapons cases—and again later in narcotic peddling cases—to put into the state constitution a specific provision that pistols and other weapons seized by the police outside the curtilage should not be excluded from evidence.¹² The trial court's suppression of the evidence was reversed on this ground. Properly speaking, there was no issue of lawfulness of search before the court and no finding concerning it was relevant.

In his opinion, however, Justice Edwards did enter upon a discussion of what would constitute a lawful search. Without broad examination of the question generally, he bluntly repudiated, on the ground that its cited authorities did not sustain it, the holding in a still earlier case that: "The arrest here was lawful, and that it therefore was proper for the officers to search the person of the defendant and the vehicle in which he was then riding is settled by the following authorities, from which we need not quote."¹³ Justice Edwards' dictum then set up the proposition that even after lawful arrest search must be limited to looking for fruits of the crime, or the means by which it was committed, or instruments calculated to effect escape from custody. He was not voicing a decision relevant to the case itself; conceivably he was deliberately setting up a bit of judicial legislation for guidance of the court in the future.

At any rate, the search in the *Zeigler* case had no purpose connected with the offense of running the stop sign, and the majority, relying only on the tenuous authority of that earlier dictum, held it "unreasonable" and the evidence obtained unusable.

The dissenting opinion contends that the search was lawful, as well as for other reasons because "based on probable cause to believe that a crime has been or is being committed and that evidence thereof is to be found." The majority met this only with a flat statement that "anonymous information does not meet the test."¹⁴ Justice Smith's vigorous reply was: "Rarely has the betrayal of justice by the easy seduction of words been more apparent than in this case. Here the word that solves everything for our majority is the word 'anonymous.' . . . If the information reaching the officer of the commission of a crime is definite, certain, and apparently trustworthy, the officer acts upon probable cause even though the

¹² MICH. CONST., Art. II, §10, as amended in 1936 and 1952.

¹³ *People v. Davis*, 247 Mich. 536, 226 N.W. 337 (1929).

¹⁴ Relying on *People v. Miller*, 245 Mich. 115, 222 N.W. 151 (1928) and *People v. Guertins*, 224 Mich. 8, 194 N.W. 561 (1923).

informant refuses to state his name, is silenced before his name is disclosed, recites a fictitious name, or, indeed, gives his name as Smith or Jones. . . . Here the information was apparently authentic, reliable, and precise. . . . It cannot be the law that officers, given certain facts apparently reliable and trustworthy, may remain quiescent in the station house if their informant refuses to disclose his name, but must be galvanized into immediate action if the informant adds that his name is John Doe."¹⁵

The merits of these various points of view as to the legality of the search, or, indeed, their judicial wisdom cannot be settled on a basis of strict law, nor even of obligatory precedent. "The constitutional expression 'unreasonable searches' is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic, and legal conditions."¹⁶ In the principal case the majority obviously labored to produce the result which they wished, apparently indifferent to its social consequences. The dissent was forthright and credibly accurate, "If a police officer cannot arrest and search [under such conditions] then we indeed make this State a happy hunting ground for those evilly disposed."¹⁷ The effects of the decision developed almost immediately. Within less than three weeks police officers stopped a car for a traffic violation. In the car they found \$2,700 in cash, 150 cartons of cigarettes and 300,000 trading stamps recently stolen from a local market. At the preliminary hearing the magistrate "felt compelled" by the *Zeigler* decision to reject the evidence.¹⁸ At a rehearing he bound defendants over for trial on the strength of other evidence. In further proceedings, however, the circuit court held the evidence admissible, on the ground that the circumstances surrounding the incident indicated the vehicle was not stopped solely for a traffic violation but because the automobile "gave grounds for suspicion." The court also stated that "there was no search of the automobile other than observation," and that prior decisions did not bar the evidence so obtained.¹⁹

Though effective control of numbers gambling, and indeed of all crime, is "stuck" with the *Zeigler* decision, there is, happily, no sound reason why later judges or even these same judges need to

¹⁵ 100 N.W. (2d) 456 at 464-465 (1960).

¹⁶ *Milam v. United States*, (4th Cir. 1924) 296 F. 629. See also comment, 42 MICH. L. REV. 147 (1943).

¹⁷ 100 N.W. (2d) 456 at 463-464 (1960).

¹⁸ ANN ARBOR NEWS, Jan. 19, 1960.

¹⁹ ANN ARBOR NEWS, June 18, 1960.

stick by it. "I see no reason," said the Supreme Court's Justice Jackson, "why I should be consciously wrong today because I was unconsciously wrong yesterday."²⁰

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²⁰ *Massachusetts v. United States*, 333 U.S. 611 at 640 (1948). See also *Special Equipment Co. v. Coe*, 324 U.S. 370 at 383-384 (1945): "This Court was responsible for their creation. This Court should take the responsibility for their removal." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *United States v. Darby*, 312 U.S. 100 (1941); *Helvering v. Griffiths*, 318 U.S. 371 (1943).