Michigan Law Review

Volume 49 | Issue 1

1950

CONSTITUTIONAL LAW-FOURTH AMENDMENT-SEARCH WITHOUT A WARRANT INCIDENT TO ARREST

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—SEARCH WITHOUT A WARRANT INCIDENT TO ARREST—Respondent was convicted of selling and of possessing and concealing forged and altered stamps of the United States with intent to defraud.[1] The primary evidence of "possessing and concealing" consisted of numerous forged and altered stamps taken from respondent's one room office by Federal officers immediately after his arrest. The stamps were the product of a one and one-half hour search of the desk, safe and file cabinets in the office. The officers, though without a search warrant for the premises, made the arrest pursuant to a valid warrant.[2] Respondent protested the search, and this protest was renewed by motions to suppress and to strike the evidence pertaining to the stamps. All of the motions were denied. The court of appeals reversed on the ground that since the officers had had time in which to procure a warrant and had failed to do so, the search was in violation of the Fourth Amendment[3] and the evidence inadmissible.[4] On certiorari to the United States Supreme Court, *held,* reversed. The search was reasonable, and therefore not prohibited by the Fourth Amendment, in view of the fact that it was incident to a valid arrest, was confined to a small, public area under the immediate control of respondent, and was a search for the subject matter of the crime for which the arrest was made. Justices Frankfurter, Jackson and Black dissented. *United States v. Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430 (1950).

[1] 35 Stat. L. 1116 (1909); 18 U.S.C. (1946) §§268 and 265.

[2] Principal case at 58. The Court, at 60-62, adds that the arrest would have been valid without a warrant inasmuch as the officers had probable cause to believe that a felony was being committed in their presence.

[3] U.S. CONST., Amend. IV: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[4] United States v. Rabinowitz, (2d Cir. 1949) 176 F. (2d) 732. The Court rested its decision squarely upon the rule of Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229 (1947): "If it were not for the decision of the Supreme Court in Trupiano v. United States and if Harris v. United States were its last utterance, we would have unhesitatingly held the seizure valid." Hand, J., at p. 734.

In this area of constitutional law where confusion has been compounded,[5] this much is clear: there are certain searches, described as reasonable, which are exceptions to the Fourth Amendment's requirement of a warrant.[6] It is also clear that the Supreme Court has, since the *Weeks* case, thought one of these exceptions to be the right to search some area around and about a person legally arrested when that search is incident to the arrest.[7] The Court in the principal case gives a certain and narrow definition to that exception. Though the principle of the case may be extended, the decision limits the intensity of the search by defining the permissible area of search as the immediate, public area under the control of the person arrested.[8] The permissible objects of search are also limited—to things which are the subject matter of the crime, or the instruments thereof.[9] Thus the decision comes within the traditional approach of previous cases, and in so doing tends toward a desirable consistency in the Court's view,[10] though of necessity overruling, for this type of case, the anomalous rule of *Trupiano v. United States*.[11] The chief arguments of the dissent, while ignoring the safe-

[5] WIGMORE, EVIDENCE, 3d ed., §2184a (1940); Ramsey, "Acquisition of Evidence by Search And Seizure," 47 MICH. L. REV. 1137 (1947).

[6] (1) Searches of open spaces in some instances: Hester v. United States, 265 U.S. 57, 44 S.Ct. 445 (1924). (2) Searches of moving vehicles on probable cause: Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925). (3) Searches of persons arrested: Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886). See WIGMORE, EVIDENCE, 3d ed., §2184a (1940). See also Judge Cardozo's opinion in People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923).

[7] Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914); Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927); Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098 (1947), rehearing denied, 331 U.S. 867, 67 S.Ct. 1527 (1947). See generally annotations in 74 A.L.R. 1388 (1931); 82 A.L.R. 775 (1933); 169 A.L.R. 1420 (1947). See also Dillon v. O'Brien and Davis, 16 Cox C.C. 245, L.R. 20 Ir. 300 (1887).

[8] The language used by Chief Justice Vinson in Harris v. United States, supra note 7, at 151 and 152 indicates that he would extend this exception far beyond the principal case by eliminating the requirement that the area searched be public and by allowing search of the entire premises.

[9] In the Harris case, cited supra note 7, the search was for forged checks, the subject matter of the crime for which arrest was made, but the objects seized (altered draft cards), and for possession of which Harris was convicted, were unrelated to the arrest. See comment on this case in 38 J. CRIM. L. 244 (1947).

[10] Marron v. United States, supra note 7; Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153 (1931); Harris v. United States, supra note 7. See also Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946), rehearing denied, 329 U.S. 824, 67 S.Ct. 107 (1946) in which Justice Douglas justified the search partly on the ground that the objects (gasoline ration stamps) were particularly subject to seizure inasmuch as the government required that they be kept available. It is interesting to note that Justice Douglas changed the Davis minority into a majority by voting against the validity of the search in Trupiano v. United States, supra note 4, in which the object of the search was illegal whiskey. Justice Douglas did not take part in the decision of the principal case. But see limiting dicta in United States v. Lefkowitz, 285 U.S. 452 at 462, 52 S.Ct. 420 (1931).

[11] Supra note 4; noted in 48 COL. L. REV. 1257 (1948) and 61 HARV. L. REV. 1452 (1948). The test requiring an inherent necessity for search without a warrant which was adopted in the Trupiano case was almost wholly novel. Some supporting language can be found in Taylor v. United States, 286 U.S. 1, 52 S.Ct. 466 (1932), but the essential element of a valid arrest was missing in that case.

guards established by the majority, consist of a condemnation of the general exploratory search without a warrant and of an appeal, unique on the part of Justice Frankfurter, to the doctrine of stare decisis in the form of the *Trupiano* decision.[12] This view of the case would permit search only of the person arrested, with an accompanying right to seize those things open to the view of the officers.[13] The majority, on the other hand, in delegating some discretionary power to the officers,[14] seems to give emphasis to the idea that the privacy protected by the Fourth Amendment[15] no longer exists when the circumstances required as conditions precedent to the search do exist.[16] With the reason for protection gone, the practical arguments in favor of permitting the search acquire greater weight, and should, it is submitted, prevail against the "open view" alternative suggested by Justice Frankfurter.[17]

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[12] Principal case at 80-86.

[13] Id. at 75.

[14] This delegation is vigorously criticized by Justice Jackson in his dissent to Harris v. United States, supra note 7, at 197.

[15] See Justice Brandeis dissenting in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928). See also Wolf v. Colorado, 338 U.S. 25 at 27, 69 S.Ct. 1359 (1949).

[16] This thought was implicit in the decision of Davis v. United States, supra note 10 at 592. See also 38 J. CRIM. L. 244 at 248 (1947).

[17] The "open view" alternative has been criticized by Justice Jackson in this language: "It would seem a little capricious to say that a gun on top of a newspaper could be taken but a newspaper on top of a gun insulated it from seizure. If it were wrong to open a sealed envelope in this case, would it have been right if the mucilage failed to stick?" Harris v. United States, supra note 7, at 197. The practical arguments against discharge of a proven offender should be especially considered in a "close" case in view of the widespread dissent among the states from the Federal exclusionary rule under the Fourth Amendment. See Appendices to Wolf v. Colorado, supra note 15, at 33.