

# University of Miami Law Review

---

Volume 19 | Number 3

Article 9

---

5-1-1965

## Search – Incident to Traffic Arrest

Tom Tew

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

Tom Tew, *Search – Incident to Traffic Arrest*, 19 U. Miami L. Rev. 487 (1965)  
Available at: <https://repository.law.miami.edu/umlr/vol19/iss3/9>

This Case Noted is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

sion adopted by the court,<sup>35</sup> other Florida cases not mentioned by the court could support a contrary result.<sup>36</sup>

Lack of clarity in approach to the legal theories presented is also evident. By analogizing the factual pattern presented to selected Florida "dangerous instrumentality" cases,<sup>37</sup> the court interrelated the "inherently dangerous activity" rule and the "dangerous instrumentality doctrine." One wonders whether the court perceived an a fortiori relationship between the two doctrines. Such co-mingling in analysis is certain to result in future confusion in an already confused area of the law. As these areas are in their infancy—separation of thought should be pursued.

BRUCE ALEXANDER

## SEARCH—INCIDENT TO TRAFFIC ARREST

Police officers possessed information that the defendant's driver's license had been revoked. They pursued and stopped him intending merely to write a traffic ticket. Upon learning it was his fourth offense, the officers "frisked" and searched the defendant pursuant to a directive

---

35. For instance, the *Fry* case, *supra* note 35 involved the question of an automobile owner's liability to an employee of a service station negligently injured by a fellow employee with whom the automobile was entrusted. Quoting from that decision, the court adopted the following reasoning as it relates to the particular facts in the instant case:

Indeed, we find nothing in the decisions applying the 'dangerous instrumentality doctrine' to justify a holding that . . . he is liable *solely by reason of ownership* for the negligent operation thereof by one employee resulting in injury to another employee of the service station, both being engaged in performing duties in connection with servicing or repairing the automobile at the time of injury. (Emphasis of the court.)

Florida Power & Light Co. v. Price, 170 So.2d 293, 296 (1964).

36. Inasmuch as Florida courts have suggested that liability predicated upon the dangerous instrumentality doctrine exists irrespective of "the particular legal relationship which exists between the possessor and the owner," authority existed for a contra holding. *Martin v. Lloyd Motor Co.*, 119 So.2d 413, 415 (Fla. 1st Dist. 1960). See also *Frankel v. Fleming*, 69 So.2d 887 (Fla. 1954).

Indeed, the lower appellate court in the instant case stated:

The courts of Florida have made it clear that it is not possible for an owner of a dangerous instrumentality to insulate himself from liability by the device of an independent contractor relationship, since, as a matter of law, such responsibility of control cannot be delegated. . . .

Florida Power & Light Co., 159 So.2d 654, 659 (Fla. 2d Dist. 1963).

37. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920), is the leading Florida case which classified the automobile as a dangerous instrumentality. See the following cases for further applications of the doctrine: *Barth v. City of Miami*, 146 Fla. 542 1 So.2d 574 (1941) (a motor truck); *Shattuck v. Mullen*, 115 So.2d 597 (Fla. 2d Dist. 1959) (an airplane); *Skinner v. Ochiltree*, 148 Fla. 705, 5 So.2d 605 (1942) (firearms).

The ratio decidendi of the cases reveals that the hallmark of any dangerous instrumentality lies in a determination of whether the particular instrumentality is so dangerous in operation as to warrant the imposition of vicarious liability upon the party who entrusts the instrument to another.

It should be noted that the court in the instant decision did not expressly classify electricity as a dangerous instrumentality. However, that finding is implicit in both the appellate court decision and the supreme court opinion.

of the municipal judge that fourth offenders were to be taken to the station and formally charged.<sup>1</sup> The contents of the search resulted in the defendant's conviction for participation in a lottery. The Second District Court of Appeal affirmed the trial judge's order denying a motion to suppress the evidence on the grounds that a reasonable search and seizure may be made incident to a lawful arrest. On certiorari to the Florida Supreme Court, *held*, affirmed; *per curiam*. *Smith v. State*, 167 So.2d 225 (Fla. 1964).

Personal security against search and seizure stands as a principal constitutional guaranty and immunity inherited from the English common law.<sup>2</sup> However, the right of a law enforcement official to search and seize incident to a valid arrest, as well as by search warrant, has an ancient origin.<sup>3</sup> The United States Supreme Court has firmly established the reasonableness of such searches and, thus, federal searches incident to an arrest are not prohibited by the fourth amendment.<sup>4</sup>

1. Florida courts have defined arrest, as distinguished from a detention for investigation, as:

The apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime. . . . When used in this sense, an arrest involves the following elements: (1) A purpose or intention to effect an arrest under a real or pretended authority; (2) An actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested; (3) A communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; and (4) An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him. *Melton v. State*, 75 So.2d 291, 294 (Fla. 1954).

There is no required form of words to announce the purpose to arrest, and when detention by an officer follows immediately on the commission of an overt act of criminality or illegality, the offender must be aware, without formality, of the officer's purpose to arrest. *Giblin v. City of Coral Gables*, 149 So.2d 561 (Fla. 1963).

2. 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. U.S. CONSR. amend. IV.

Construing the fourth amendment in *Harris v. United States*, 331 U.S. 145, 150 (1946), the Supreme Court stated:

This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment . . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen.

3. See the opinion of Cardozo, J. in *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923); *Trial of Henry and John Shears*, 27 How. St. Tr. 255, 321 (1878). It is interesting to note that in the history of the English law the right to search incident to an arrest preceded the formal process of a search warrant. *HALE, PLEAS OF THE CROWN* 639 (1847); *1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND* 193 (1883).

4. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. . . . Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. . . . Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him. *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950).

Prior to the 1961 case of *Mapp v. Ohio*,<sup>4a</sup> protection under the federal constitution for a state search was governed by the flexible constitutional concept of fundamental fairness to rights "basic to a free society embraced in the due process clause of the fourteenth amendment."<sup>5</sup> However, every state constitution, including Florida's,<sup>6</sup> contained a clause essentially analogous to the fourth amendment.<sup>7</sup> In construing the "unreasonable" search and seizure issue presented by the various state constitutions, state courts looked to federal precedent. In *Mapp v. Ohio*,<sup>8</sup> the United States Supreme Court abandoned the constitutional distinction between federal and state searches and held that state searches are governed by the safeguards of the fourth amendment acting through the fourteenth amendment.

The Court in *Mapp* avoided laying down a "fixed formula" for the application of the prohibition against unreasonable search and seizure.<sup>9</sup> The burden of applying the "unreasonable" test was in the first instance for the trial judge to determine,<sup>10</sup> a task he had previously performed in interpreting his own state constitution. Nor were the states

precluded from developing workable rules governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement. . . .<sup>11</sup>

Cases construing searches incident to a traffic arrest have primarily involved the reasonableness of searches of the individual's vehicle, not of his person. While there exists a more liberal standard of reasonableness in searches of vehicles<sup>12</sup> than of homes, case law has not defined a further distinction between personal and vehicle searches. Most often the language of the opinions has encompassed both factual situations, and the constitutional test has been applied to both with equal force. Therefore, this note will necessarily analyze both personal and vehicle searches.

The federal courts have firmly established that the reasonableness of any search and seizure is determined by the facts and circumstances in each case,<sup>13</sup> or by what has been labeled the "total atmosphere of the

4a. 367 U.S. 643 (1961).

5. *Ker v. California*, 374 U.S. 23, 44 (1963).

6. FLA. CONST. DECL. OF RIGHTS § 22.

7. For a listing of the first appearance of such a clause in each state constitution see *Harris v. United States*, 331 U.S. 145, 160 n.5 (1947). See also CORNELIUS, SEARCH AND SEIZURE §§ 9-12 (1926).

8. 367 U.S. 643 (1961). In *Ker v. California*, 374 U.S. 23, 31 (1963) the court reaffirmed its position in *Mapp*. "We specifically held in *Mapp* that this [unreasonable search and seizure] constitutional prohibition is enforceable against the States through the Fourteenth Amendment."

9. *Mapp v. Ohio*, *supra* note 8, at 653.

10. *Ibid.*

11. *Ker v. California*, *supra* note 5, at 34.

12. *Carroll v. United States*, 267 U.S. 132 (1925).

13. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Go-Bart Importing Co. v. United*

case."<sup>14</sup> However, when concerned with an arrest for a traffic violation, the majority of state courts appear to focus on the sole fact of the lawfulness of the arrest. This approach absorbs the question of the reasonableness of the incident search. In short, two separate tests, the validity of the arrest and the reasonableness of the incident search, are merged into one, often accompanied by the court's statement of its desire to establish a uniform standard of search and seizure to aid local law enforcement authorities.<sup>15</sup> Unfortunately, this judicial interest in effective criminal law enforcement appears to preclude juristic consideration of the distinction between the culpability of a defendant in a traffic arrest, and that of a defendant in any other arrest, although the United States Supreme Court has stated that the severity of the offense is an element affecting the reasonableness of a search.<sup>16</sup> The result of such thinking has led to upholding as reasonable personal and vehicle searches incident to arrests for speeding,<sup>17</sup> no driver's license<sup>18</sup> or certificate of title,<sup>19</sup> running a stop light,<sup>20</sup> defective lights,<sup>21</sup> reckless driving,<sup>22</sup> and missing license plates.<sup>23</sup>

A growing minority of state courts—Oklahoma,<sup>24</sup> Illinois,<sup>25</sup> California,<sup>26</sup> Arizona<sup>27</sup>—has recognized that the lawfulness of the arrest

---

States, 282 U.S. 344 (1931); *Drayton v. United States*, 205 F.2d 35 (5th Cir. 1953); *Kelly v. United States*, 197 F.2d 162 (5th Cir. 1952).

14. *United States v. Pampinella*, 131 F. Supp. 595 (N.D. Ill. 1955).

15. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *People v. Lopez*, 207 Cal. App. 2d 860, 24 Cal. 752 (1962); *People v. Watkins*, 19 Ill. 2d 11, 166 N.E.2d 433 (1960).

16. *Brinegar v. United States*, 338 U.S. 160 (1949); *McDonald v. United States*, 335 U.S. 451 (1948).

17. *Haverstick v. State*, 196 Ind. 145, 147 N.E. 625 (1925); *People v. Davis*, 247 Mich. 536, 226 N.W. 337 (1929).

18. *Arthur v. State*, 227 Ind. 493, 86 N.E.2d 698 (1949); *Rucker v. State*, 225 Ind. 636, 77 N.E.2d 355 (1948).

19. *Smith v. State*, 215 Ind. 629, 21 N.E.2d 709 (1939).

20. *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928); *Soileau v. State*, 156 Tex. Crim. 544, 244 S.W.2d 224 (1951).

21. *Johnson v. Commonwealth*, 240 Ky. 123, 41 S.W.2d 913 (1931); *State v. Deitz*, 136 Wash. 228, 239 Pac. 386 (1925).

22. *Commonwealth v. Lewis*, 309 Ky. 276, 217 S.W.2d 625 (1949).

23. *Edmonds v. Commonwealth*, 287 S.W.2d 445 (Ky. 1956).

24. The first clear minority position was taken by the Oklahoma courts in *Brinegar v. State*, 99 Okla. Crim. 299, 262 P.2d 464, 479 (1953). The court announced:

It should be understood by the law enforcement officers that if the record discloses that the search of the person or any portion of his car was unreasonable such search will not be sustained regardless of what such unreasonable search may have turned up.

25. In *People v. Mayo*, 19 Ill. 2d 136, 166 N.E.2d 440 (1960) the defendant was arrested for parking eighteen inches from the curb in violation of a local ordinance. The Illinois supreme court joined the minority by holding that a search of the person and his car incident to an arrest for a traffic violation was unreasonable within the meaning of the constitution.

26. California courts require "reasonable cause" for a search incident to an arrest without a warrant. *People v. Blodgett*, 46 Cal. 2d 144, 293 P.2d 57 (1956); *People v. Brown*, 45 Cal. 2d 640, 290 P.2d 528 (1955); *People v. Molarius*, 146 Cal. App. 2d 129, 303 P.2d 350 (1956). An arrest for an improper "U" turn does not constitute reasonable cause to search the accused. *People v. Molarius*, *supra*.

27. We recognize that a lawful arrest for a minor traffic violation does not in and of

does not alone satisfy the fourth amendment. In addition the search must be reasonable, and a search incident to a minor traffic violation does not meet this test. Justice Frankfurter<sup>28</sup> has viewed this question of reasonableness as one controlled by the necessity of the search.

What is necessity? Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape . . .<sup>29</sup> and, secondly, to avoid destruction of evidence by the arrested person.<sup>30</sup>

Yet the minority concludes that a search for weapons is not always justified when incident to a traffic arrest.<sup>31</sup>

There must be facts and circumstances observed by the officers to cause them in good faith to believe that the motorist is armed, is dangerous, or apparently intends to escape.<sup>32</sup>

Nor, the author submits, is there any "fruit of the crime" for the individual to destroy<sup>33</sup> in the case of a traffic violation. A personal search, for instance, cannot reveal evidence that a stop sign has been run. Nearly all cases upholding a search without a warrant require the searcher to have in mind some reasonably specific thing he is looking for and reasonable grounds to believe it is in the place searched.<sup>34</sup>

itself, automatically render constitutional any contemporaneous search and seizure. . . . [T]he test regarding the legality of a search and seizure is whether it was reasonable under the circumstances. . . . *State v. Tigue*, 95 Ariz. 45, 386 P.2d 402, 405 (1963).

28. *United States v. Rabinowitz*, 339 U.S. 56 (1950).

29. *Preston v. United States*, 376 U.S. 364 (1964); *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Rabinowitz*, *supra* note 28 (Search for weapons to prevent escape of defendant or injury to officer); *Carroll v. United States*, 276 U.S. 132 (1925) (Reasonable belief the defendant was armed); *Agnello v. United States*, 269 U.S. 20 (1925); *Busby v. United States*, 296 F.2d 328 (9th Cir. 1961) (shotgun observed); *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16 (1959) (pistol observed); *State v. Scanlon*, 84 N.J. Super. 427, 202 A.2d 448 (Super. Ct. 1964). However, if the officer knows the defendant and does not consider him dangerous a search will not be upheld. *State v. Kirkman*, 234 N.C. 670, 68 S.E.2d 315 (1951); *Stevens v. State*, 274 P.2d 402 (Okla. 1954); *Duncan v. State*, 191 Tenn. 427, 234 S.W.2d 835 (1950).

30. *United States v. Rabinowitz*, 339 U.S. 56 (1950) (dissenting opinion).

31. *Brinegar v. State*, *supra* note 24.

32. *Id.* at 480-81.

33. *Preston v. United States*, 376 U.S. 364 (1964); *United States v. One 1963 Cadillac Hardtop*, 224 F. Supp. 210 (E.D. Wis. 1963). In many such instances the traffic offense is merely a ruse to justify a search for evidence of some other crime. Such an arrest cannot be used as a pretext to search for evidence unrelated to the crime for which the defendant was arrested. *Jones v. United States*, 357 U.S. 493 (1958); *Harris v. United States*, 331 U.S. 145 (1947); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *Worthington v. United States*, 166 F.2d 557 (6th Cir. 1948); *Henderson v. United States*, 12 F.2d 528 (4th Cir. 1926); *People v. Sapp*, 43 Misc. 2d 81, 249 N.Y.S.2d 1020 (1964). This writer prefers the view that requires the search be made in good faith and limited to seizure of evidence relating to the crime suspected or charged. *People v. Risley*, 213 Cal. App. 2d 219, 28 Cal. 568 (1963).

34. *Abel v. United States*, 363 U.S. 217 (1960); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947); *Carroll v. United States*, 267 U.S. 132 (1925); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961). *Contra*, *Haverstick*

Florida courts have consistently required the search to be reasonable in light of surrounding circumstances and the manner in which the search was made.<sup>35</sup> Under proper conditions a law enforcement officer is authorized to stop a vehicle to check the driver's license,<sup>36</sup> but such practices cannot be a pretext or sham to justify a search.<sup>37</sup> Nor will the courts allow erroneous<sup>38</sup> or unreasonable<sup>39</sup> charges of traffic violations to serve as an excuse to stop and search. If the officer stops the vehicle without a warrant, he must be able "to show that he had 'probable cause' for his acts or 'reasonable belief' of trustworthy information that the car was engaged in the transportation of contraband."<sup>40</sup> However, the driver may consent to a search<sup>41</sup> which would otherwise be unreasonable.<sup>42</sup>

---

v. State, 196 Ind. 145, 147 N.E. 625 (1925); *Tolliver v. State*, 133 Miss. 789, 98 So. 343 (1923).

35. *State v. Simmons*, 85 So.2d 879 (Fla. 1956); *Collins v. State* 65 So.2d 61 (Fla. 1953); *Haile v. Gardner*, 82 Fla. 355, 91 So. 376 (1921); *Range v. State*, 156 So.2d 534 (Fla. 2d Dist. 1963); *Nations v. State*, 145 So.2d 259 (Fla. 2d Dist. 1962).

36. *City of Miami v. Aronovitz*, 114 So.2d 784, 787 (Fla. 1959).

The owner of such a license exercises the privilege granted by it subject to reasonable regulations in the use of the highways common to all citizens. These requirements do not disregard the constitutional guaranties upon which the instant appellee relies [Illegal search and seizure]. We are committed to the view that so long as the regulations themselves are reasonable and are reasonably executed in the public good, the courts should not interfere.

37. *Byrd v. State*, 80 So.2d 694 (Fla. 1955). The sheriff received information that the defendant's truck was loaded with moonshine and stopped the truck for no other reason. While examining the defendant's driver's license, the sheriff detected the "shine" dripping from the vehicle. The Supreme Court reversed a conviction and held at 696: "[A] minor traffic violation can not be used as a pretext to stop a vehicle and search it for evidence of violation of other laws." *Accord*, *People v. Roache*, 237 Mich. 215, 211 N.W. 742 (1927); *Robertson v. State*, 184 Tenn. 277, 198 S.W.2d 633 (1947); *Cox v. State*, 181 Tenn. 344, 181 S.W.2d 338 (1944).

38. *Burley v. State*, 59 So.2d 744 (1952). The deputy who made the arrest for the traffic violation assumed that passing on any part of a curve was illegal when, in fact, the defendant's car was not within a no-passing-zone. In reversing the conviction, the court stated at 745:

The trial judge appears to have taken the position that so long as Burley was under arrest for traffic violation, a search was in order regardless of the legality of the arrest. To so hold would nullify the constitutional inhibition against unreasonable search and seizure.

39. *Collins v. State*, 65 So.2d 61 (1953) (The most serious misconduct that could be charged to the defendant was that on three occasions in the course of a mile or so he drove one foot over the center line of the highway.); *Graham v. State*, 60 So.2d 186 (Fla. 1952) (An arrest for reckless driving that consisted of driving across the center line two or three times was declared sham.).

40. *Collins v. State*, *supra* note 39, at 65.

41. *Slater v. State*, 90 So.2d 453 (Fla. 1956) (The defendant voluntarily opened the trunk in which damaging evidence was found.). See *United States ex rel. Holloway v. Reincke*, 229 F. Supp. 132 (D. Conn. 1964) for a distinction between submission and active cooperation. The court found the defendant's consent was merely acquiescence to the inevitable. See also *Application of Tomich*, 221 F. Supp. 500, 502 (D. Mont. 1963):

While a search and seizure otherwise unreasonable and illegal may be consented to, such consent is not to be lightly inferred, but must be proven by clear and positive testimony, and there must be no duress, actual or implied, and the consent must be unequivocal and specific and freely and intelligently given.

42. *Longo v. State*, 157 Fla. 668, 26 So.2d 818 (1946). Officers asked defendant, who

In the instant case, the district court found that "the officers . . . did not illegally arrest the defendant and the search incident thereto was proper."<sup>43</sup> The court's primary concern was in negating any inference that the arrest was a pretext for the search,<sup>44</sup> not in establishing the reasonableness of the search under the circumstances.

It must be concluded that both appellate courts considered the search of the defendant's pockets reasonable. But it is difficult to establish any necessity for this search. Nothing in the record warrants a finding that the motorist was armed, dangerous, or intended to escape, thus necessitating a search for weapons.<sup>45</sup> Nor could the search reveal any "fruit of the crime."<sup>46</sup> The defendant's only crime was not having a driver's license which he admitted. Finally, the defendant's rights against unreasonable search and seizure were not waived by his consent<sup>47</sup> to be searched, for the facts clearly state the defendant protested against the search.

It is hoped that the sole dissent of Justice Thomas will reflect Florida's future position:

My analysis of the cases cited and of this one impels me to conclude that although an officer may stop a motorist and examine his license in the protection of the public against unauthorized operations he may not, if the driver is found to possess no license, search his person on the theory that the car is consequently being operated in the officer's presence in violation of law, gather evidence of a totally unrelated offense not known, or suspected at the time of the halting and sustain the action under the general rule that a search is valid if made as an incident to a lawful arrest. There are at times two things wrong with such procedure. It ignores the guaranties of the Constitutions and it countenances the idea so often rejected by the courts, i.e., that the end justifies the means.<sup>48</sup>

TOM TEW

---

was stopped for speeding, if they could search his car. He consented and turned over the keys for that purpose.

43. *Smith v. State*, 155 So.2d 826, 828 (Fla. 2d Dist. 1963).

44. *Id.* at 827-28. The court found the defendant was searched only when the officers learned this was his fourth offense. A directive of the municipal judge required all fourth offenders to be taken to the police station to be formally charged.

45. See text accompanying note 32 *supra*.

46. See note 33 *supra*.

47. See notes 41-42 *supra*.

48. *Smith v. State*, 167 So.2d 225, 228 (Fla. 1964).