Volume 73
Issue 3 *Issues 3 & 4*

Article 20

September 1971

Search and Seizure--Was the Right of Privacy Taken To The Cleaners?

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Search And Seizure—Was The Right Of Privacy Taken To The Cleaners?

Police action in a murder investigation presented the Sixth Circuit with a problem concerning the scope of the right of privacy implicit in the fourth amendment of the United States Constitution. During a murder investigation the police learned the murderer had been wearing a dark suit. They also learned from appellant's wife that he had worn a dark suit on Friday, the day of the murder. During interrogation appellant revealed he had taken a dark suit to the cleaners on the following Monday. Based on this information, the police contacted the manager of the cleaners and informed him of their desire to inspect the suit. Willing to assist, the manager sent his service manager to open the shop at approximately 10:00 P.M. With the assistance of the service manager, the police located the suit and removed it from the premises. The suit was not introduced into evidence, but an FBI expert testified that a laboratory investigation had revealed that present on the appellant's suit were fibers of the same type as the victim's clothing. In the first petition for habeas corpus, appellant challenged the legality of the search and seizure because, although a magistrate was available, no warrant was obtained by the police prior to their search and seizure. The circuit court reversed and remanded in part for an evidentiary hearing on the validity of the search and seizure.[1] On remand, relief was denied and appellant appealed.[2] *Held,* affirmed. The warrantless search of the cleaning shop and seizure of the suit was justified; consequently, testimony concerning the results of the laboratory examination was properly admitted. The laboratory examination, itself, was found not to constitute a search; but if it had been, such a search would not have violated appellant's fourth amendment rights. *Clarke v. Neil,* 427 F.2d 1322 (6th Cir. 1970).

"The course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth."[3]

With this statement, Mr. Justice Frankfurter has characterized the complexities and inconsistencies involved in the interpretation of the fourth amendment. A court cannot merely insert the facts of a particular case into well-defined principles of law. Issues

1 Clarke v. Henderson, 403 F.2d 687 (6th Cir. 1968).
2 Clarke v. Neil, 427 F.2d 1322 (6th Cir. 1970).
3 Chapman v. United States, 365 U.S. 610, 618 (1961) (concurring opinion).

are many but standards are few. In other constitutional areas, such as involuntary confessions, rules have been developed to assist courts in evaluating the facts.[4] In contrast, the determinations of what establishes an unreasonable search and seizure are incongruous.[5] Was the search lawful? Was it reasonable? Was there probable cause? What interest does the fourth amendment protect? These are but a few of the questions a court must answer in every search and seizure problem, often without Supreme Court guidelines.

Recent decisions have begun to reduce the perplexity. No longer does the fourth amendment protect a proprietary interest, but rather the individuals right of privacy.[6] The arbitrary line which denied police seizure of "mere evidence" has been erased.[7] The *Olmstead v. United States*[8] "trespass" doctrine, which required physical intrusion for a fourth amendment violation, has been overruled.[9] The fourth amendment "protects people, not places"[10] and hence, the constitutional guarantee is applied regardless of whether there is a trespass.

Although the Supreme Court may continue to formulate a clearer meaning to the fourth amendment, precise standards may never be reached. By judicial interpretation, a dichotomy exists within the fourth amendment.[11] First, an individual is protected from all *unreasonable* searches and seizures.[12] Secondly, no warrants shall be issued without *probable* cause.[13] Though a warrant is not needed for a lawful search, the reasonableness of the search,

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[4] Miranda v. Arizona, 384 U.S. 436 (1966). The Court established guidelines that must be followed when procuring a confession. If a party in custody is not told that he has a right to remain silent, that anything he says may be used against him, and that he is entitled to counsel, retained or appointed; then, any testimony received may not be used in a court of law.

[5] *See* Traynor, *Mapp v. Ohio At Large In The Fifty States,* 1962 DUKE L. J. 319, 326 (1962).

[6] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304 (1967).

[7] *Id.* at 310. Prior to *Warden,* only contraband, "fruits" of the crime or instrumentalities used in the crime were the proper subjects of an otherwise lawful search. The Court removed the restriction of seizing "mere evidence"—items of evidential value only.

[8] Olmstead v. United States, 277 U.S. 438 (1928).

[9] Katz v. United States, 389 U.S. 347 (1967).

[10] *Id.* at 351.

[11] Note, *Recent Fourth Amendment Developments,* 29 OHIO ST. L. J. 217, 217 (1968).

[12] 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.

[13] *Id.*

in most cases, will depend upon the procurement of a warrant.[14] Therefore, a court's review of a fourth amendment problem necessitates an interpretation of "reasonable", and, in most cases, "probable." But no distinct criteria have been established by the Supreme Court. In *Ker v. California*,[15] the Court said that:

> the reasonableness of a search is . . . [to be determined] by the trial court from the facts and circumstances of the case and in light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinion of this Court applying that Amendment.

As to probable cause, the Court stated:

> Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.[16]

The task in formulating workable standards capable of nationwide application has presented countless problems.[17] Yet without a concrete test, it seems each court will be in the dark, interpreting each case separately on its own particular facts.

Apart from standards, the *Mapp v. Ohio*[18] decision extending the exclusionary rule to state courts enhanced the complexities and inconsistencies. Prior to *Mapp*, approximately half the states had a similar rule, but there was no uniformity of interpretation.[19] The purpose of the exclusionary rule is to compel respect for constitutional guaranteed rights.[20] Deterrence of nefarious law enforcement is the rationale of the exclusionary rule.[21] However, its application only makes sense if in fact it does serve its purpose, namely, the deterrence of unlawful conduct.[22] The premise that the exclusionary rule deters unlawful conduct is largely false.[23] The

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[14] This comment will not attempt to resolve the conflict as to which clause plays the dominant role in determining the validity of the search and seizure. For such a discussion *see* Note, cited in footnote 11, *supra*.

[15] 374 U.S. 23, 33 (1963).

[16] Berger v. New York, 388 U.S. 41, 55 (1967).

[17] Traynor, *supra* note 5 at 328.

[18] 367 U.S. 643 (1961).

[19] Traynor, *supra* note 5 at 323.

[20] Elkins v. United States, 364 U.S. 206, 217 (1960).

[21] Traynor, *supra* note 5 at 334.

[22] McLaughlin, *What has the Supreme Court Taught?* 72 W. VA. L. REV. 1, 389 (1970).

[23] *Id.* at 390.

local police officer is concerned with present conduct, not future litigation. He wants to thwart the immediate unlawful conduct rather than follow the niceties of procedure to insure a conviction. The officer serves his community by removing the source of danger before it results in harm. Though the want of a search warrant may preclude a conviction, he has performed his function. The subsequent loss of a conviction may upset him but probably will not deter him from repeating his conduct.[24] Thus, in evaluating a search and seizure case, the court must balance the purpose of the rule—deterrence—against the often drastic result of freeing unquestionably guilty criminals.[25]

Utilizing indefinite standards and the omnipresent exclusionary rule the Sixth Circuit in *Clark v. Neil*[26] analyzed an unusual fact situation. The admissibility of the evidence derived from the suit depended on the legality of the search and seizure,[27] which in turn depended on whether the police had probable cause to believe that the evidence would aid in a conviction.[28]

To constitute a lawful search, a warrant is normally required.[29] Searches conducted without prior magistrate approval are *per se* unreasonable, subject only to established exceptions.[30] Consent to a warrantless search by a proper party is such an exception.[31] The present search may be viewed as a search of the premises or of the suit itself. If viewed as a search of the cleaning shop, as the majority did, then it was lawful.[32] The rationale of the "consent" exception is that a person can knowingly, and intelligently waive his constitutional protection against a warrantless search.[33] In the present case the manager was aware of the intentions of the

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[24] *Id.*

[25] Kaplan, *Search and Seizure: A No Man's Land in Criminal Law*, 49 CALIF. L. REV. 474, 487 (1961).

[26] 427 F.2d 1322 (6th Cir. 1970).

[27] *Id.* at 1323.

[28] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307 (1967). Although the Supreme Court announced in *Hayden* a test to determine whether the seizure of "mere evidence" was justified, they spoke in terms of indefinites.

[29] Katz v. United States, 389 U.S. 347 (1967).

[30] *Id.* at 357. These exceptions include: search incident to a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); "stop and frisk", Terry v. Ohio, 392 U.S. 1 (1968) (officer may detain and "frisk", provided he has reasonable grounds to believe that the individual is armed and dangerous); "hot pursuit", Warden, Md. Pentitentiary v. Hayden, 387 U.S. 294 (1967) (police may enter premises without a warrant when in "hot pursuit" of a suspect); emergency to prevent a loss of evidence, Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of a vehicle).

[31] Frazier v. Cupp, 394 U.S. 731, 740 (1969).

[32] Clarke v. Neil, 427 F.2d 1322, 1324 (6th Cir. 1970).

[33] Amos v. United States, 255 U.S. 313, 317 (1921).

police and willingly cooperated.[34] However, the majority also stated that if the search were viewed as a search of the suit, it would still not violate fourth amendment rights.[35] The dissenting opinion felt the issue was not the validity of the manager's power to consent, but rather the propriety of his authority to turn the suit over to the police.[36] While the justices differed on the scope of the search involved, both opinions recognized the right of privacy as the controlling issue. The majority considered whether the police action invaded appellant's right of privacy,[37] while the dissenting opinion considered whether the appellant had voluntarily abandoned his right of privacy by placing his suit in the cleaners.[38]

Prior to *Jones v. United States*,[39] some decisions seemed to intimate that the fourth amendment found its roots in property law.[40] Yet, as early as 1886 the Supreme Court recognized the fourth amendment as essentially protecting a personal right to privacy.[41] The Court in *Jones* reaffirmed the privacy interest and refused to allow the constitutional guarantee to be dependent upon the subtle distinctions of property laws.[42] Similarly, the fourth amendment rights are not to be eroded by the law of agency.[43] The function of the fourth amendment is to protect personal privacy against an unwarranted invasion by the state.[44]

Since the suit was voluntarily delivered to the cleaners, the inadmissibility of this evidence is conditioned on the retention of his privacy interest in the matter present on the suit.[45] "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[46] The majority felt the appellant's failure

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[34] Clarke v. Neil, 427 F.2d 1322, 1323 (6th Cir. 1970).

[35] *Id.* at 1325.

[36] *Id.* at 1326 (dissenting opinion). The dissenting justice relied heavily on the contrary wording of the district and circuit opinions. The circuit court stated: "[w]ith the service manager's assistance the police located appellant's suit and took it, . . ." However, the district judge said: "[t]he suit was located and freely surrended by the manager of the laundry."

[37] *Id.* at 1325.

[38] *Id.* at 1326-27 (dissenting opinion).

[39] 362 U.S. 257 (1960). The Court acknowledged that to establish "standing" courts generally required the party to own or possess the siezed property. The Court, however, overruled both standards.

[40] *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928).

[41] Boyd v. United States, 116 U.S. 616, 630 (1886). The Supreme Court held the essence of a fourth amendment violation was not breaking down a person's doors but the invasion of personal security, personal liberty, and private property.

[42] Jones v. United States, 362 U.S. 257, 266 (1960).

[43] Stoner v. California, 376 U.S. 483, 488 (1964).

[44] Schmerber v. California, 384 U.S. 757, 767 (1966).

[45] Clarke v. Neil, 427 F.2d 1322, 1325 (6th Cir. 1970).

[46] Katz v. United States, 389 U.S. 347, 351 (1967).

to conceal the suit or anything contained thereon showed a lack of intent to "preserve as private" the suit or the matter contained thereon.[47] However, the dissent insisted that appellant could relinquish a quantum of privacy without relinquishing all of it.[48] The Ninth Circuit has held that a person did not surrender his right to privacy merely by placing sealed packages in the hands of a bailee.[49] Similarly, a hotel guest retained his privacy interest against unwarranted searches by police officers notwithstanding the hotel manager's consent to the search.[50] However, in a recent decision the Supreme Court held that evidence obtained in a warrantless search of a duffel bag authorized by one joint user of the bag could be used against the non-consenting user.[51] This seems to indicate that the latter had relinquished his right to privacy by allowing another free access to the bag.

In cases in which one has allowed another access to his "effects," it seems there must have been some act other than observation by the police officers before a fourth amendment violation could occur. This in turn would seem to necessitate some overt act by the complaining party so that he could retain his privacy interest in the searched property. Appellant performed no such act, as in the *Corngold*[52] case—sealing the packages. Yet, can it be said that a laboratory examination is synonomous with observation? The Fourth Circuit held that a bailee's consent made a search of an automobile reasonable, but indicated the case may have been different had the police done more than search beyond what was visible.[53] This difference does not seem to merit a judicial distinction in the present case in light of the purpose of the fourth amendment and the facts involved. If an individual's right to privacy is not invaded by looking at what is visibly present on lawfully seized property, it does not seem to be any more invaded by putting that same property under a microscope.

The legality of the seizure of appellant's suit was further predicated on probable cause criteria. Seizure of "mere evidence" is permissible if the police have probable cause to believe the evidence sought would aid in a conviction.[54] Probable cause is not based on

[47] Clarke v. Neil, 427 F.2d 1322, 1325 (6th Cir. 1970).
[48] *Id.* at 1326 (dissenting opinion).
[49] Corngold v. United States, 367 F.2d 1 (9th Cir. 1966).
[50] Stoner v. California, 376 U.S. 483 (1964).
[51] Frazier v. Cupp, 394 U.S. 731 (1969).
[52] Corngold v. United States, 367 F.2d 1 (9th Cir. 1966).
[53] United States v. Eldridge, 302 F.2d 463, 466 (4th Cir. 1962).
[54] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307 (1967).

technical considerations, but on the practical considerations of everyday life.[55] The facts and circumstances of the case determine if a reasonable man would have acted similarly. This same court had previously remanded to the district court for an evidentiary hearing on probable cause.[56] The circuit court felt the district court's affirmative answer was supported by the facts.[57]

It has been asserted that "there is no war between the constitution and common sense."[58] Yet, an emphasis on the application of common sense—not permitting persons to escape punishment through application of the exclusionary rule[59]—will lead to a dilution of fourth amendment freedoms. The decision in the present case illustrates that fact. The court has reacted to the harshness of the result of finding a fourth amendment violation by contracting the scope of privacy. An analogous situation developed in England when numerous crimes were punishable by death.[60] Faced with imposing a severe penalty for the commission of what would today be considered a misdemeanor, the courts and juries were likely either to acquit the offender or find him guilty of a lesser offense.[61] As a result, the public interest in punishing and detering crime was thwarted. The same is true of the court's decision in the present case. Rather than allow a person who is "obviously guilty" to go free by virtue of the exclusionary rule, the court has elected to narrow the scope of privacy. Consequently, the penological interest of the public has been furthered at the expense of the protection afforded by the fourth amendment. "Common sense" would indicate that one who leaves his clothes at the cleaners does not thereby relinquish his interest in privacy. The court should have recognized that the search and seizure violated the fourth amendment and should have sought a solution which was more pragmatic and less injurious to the public's interest in privacy.

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[55] Brinegar v. United States, 338 U.S. 160, 175 (1949).
[56] Clarke v. Neil, 427 F.2d 1322, 1323 (6th Cir. 1970).
[57] *Id.* at 1324.
[58] Mapp v. Ohio, 367 U.S. 643, 657 (1961).
[59] Schaefer *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956). Justice Schaefer recognized the public's appreciation of the rules of procedure was limited to an attitude of contempt, viewing these rules as loopholes through which the criminal escapes. The concern with guilt or innocense seems to outweigh the ideal of fair procedure.
[60] BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW 754 (1941).
[61] *Id.*