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Authority of Highway Patrol to Stop and Search Motor Vehicles without Warrant

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While ordinarily the possession of a warrant is needed to make an arrest legal, both the common law and state statutes contain well recognized exceptions to this general requirement. Thus, if a felony, or a breach of the peace, or a misdemeanor involving a breach of the peace, is committed in an officer's presence, he has clear common law authority to arrest.[1] Statutes in most states have liberalized this to allow arrest for any public offense committed in his presence.[2] Also, it is the settled common law rule that even when the offense is not committed in the officer's presence, he may arrest if he has reasonable grounds to believe that a felony has been committed, and that the arrestee committed it.[3] In addition to these familiar exceptions in the general framework of the law of arrest, there are a few further exceptions, entirely statutory, whereby officers are given added authority in specific situations.[4] One of these is the authority conferred on highway patrolmen to halt an automobile and ask the driver to show his operator's license, the statutes commonly not requiring a warrant for such action.[5] In the event the officer's suspicions have been aroused, either before or after stopping a vehicle, as to the possible existence of an irregularity unconnected with the license, it will frequently appear advisable to search the vehicle after inspecting the license. Should he do so, how does the additional element of a search change the legal ground upon which he stands?

The Supreme Court of Tennessee, which has previously dealt with this problem,[6] was recently faced with it again in the case of *Robert-*

1 A.L.I., Code Crim. Proc. (anno., 1930) Commentary to §21, 231.

2 Id., at 231-2; see Perkins, The Law of Arrest (1940) 25 Iowa L. Rev. 201, 229-30.

3 A.L.I., Code Crim. Proc. (anno., 1930) Commentary to §21, 234-6.

4 Commonwealth v. Charles, 114 Pa. Super. 473, 174 Atl. 907 (1934) (Statute permitting arrest on view for traffic offenses less than a misdemeanor held not to contravene constitution.) Such statutory exceptions are often strictly construed. Rodgers v. Schroeder, 220 Mo. App. 575, 287 S.W. 861 (1926); State v. Hunter, 106 N.C. 796, 11 S.E. 366 (1890). The principal case follows this practice of strict construction.

5 Uniform Motor Vehicle Operator's and Chauffeur's License Act, §15 (b); California Vehicle Code (1935) §274 (b); Ill. Rev. Stat. (1941) c. 85, §29f (2). Eighteen states and Hawaii have adopted the Uniform Act at least substantially, all of them incorporating §15 (b) which reads, "The licensee shall have such license in his immediate possession at all times when driving a motor vehicle, and shall display the same upon demand of a (Justice of the Peace, a peace officer or a field deputy or inspector of the (vehicle) Department)." Tennessee's version restricts this requirement to the demand of a state highway patrolman unless the demand follows a traffic or other offense. Tenn. Code Ann. (Williams, 1934) §2715.21.

6 Cox v. State, 181 Tenn. 344, 181 S.W. (2d) 338 (1944).

son v. State.[7] The suspicions of State Highway Patrolmen driving a squad car were aroused by the actions of a passenger in a car ahead who was frequently looking back through the rear window. They halted the car, asked for and inspected the driver's license in reliance on their statutory authority, and then unavoidably noticed a carton in the rear of the front seat labelled "Ben Franklin" whiskey. On trial, where this evidence was held admissible over the objection of defendant's counsel, the arrestees were convicted of the statutory offense of unlawful transportation of alcoholic beverages. On appeal the whiskey was held to be inadmissible as evidence on the ground that the statutory authority involved should be strictly construed, and that where it was not exercised in good faith as a license check, but only as a subterfuge to further the ulterior purpose of a search, the arrest was illegal, as was the ensuing search and seizure.

The question of search and seizure is often a companion to this question of lawful arrest, but must be kept in mind as a separate matter, for the legal consequences flowing from an abuse of authority in that field are different than those in the case of arrest. Should an officer arrest a person without proper authority (no question of search being involved) the legal consequence will be the exposure of the officer to the liability of a civil action for false arrest.[8] No serious impediment to law enforcement is encountered, for the arrestee can be rearrested and brought to justice under a warrant if need be. Even if he is innocent and does press a tort action against the officer, the latter need seldom be seriously worried that a judgment will go against him unless his actions have been flagrant.[9] On the other hand, should a decision to search be made on inadequate grounds, in addition to risking similar civil liability,[10] constitutional objections are encountered, evidence obtained through a wrongful search and seizure may be held inadmissible, depending on the view of the particular jurisdiction, and the value of an otherwise effective piece of law enforcement may be destroyed.

Two problems are presented when this situation of a dubious right to search arises. The first confronts the officer: Is the situation such that a search without a warrant would be lawful? The second confronts the courts: Should evidence be admitted to prove the commission of a crime even though it was obtained by an illegal search? The courts take differing views as to admissibility, but if an officer is in a jurisdiction not allowing the use of illegally seized evidence, it is obviously to his interest to ensure that his actions are such as are authorized by law.

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7 .... Tenn. ...., 198 S.W. (2d) 633 (1947).

8 Odinetz v. Budds, 315 Mich. 512, 24 N.W. (2d) 193 (1946); Pine v. Okzewski, 112 N.J. Law 429, 170 Atl. 825 (1934). The view has been taken that such a temporary halting as that required to check a license would not constitute an arrest. People v. Henneman, 367 Ill. 151, 10 N.E. (2d) 649 (1937); Restatement, Torts, §112, 127; Perkins, The Law of Arrest (1940) 25 Iowa L. Rev. 201, 206-7; Proposed Arrest Act, Draft of Interstate Commission on Crime (1941) §2, III (not an arrest unless detention is for more than two hours). The more general view, and that of the principal case, however, is that such a stoppage and interrogation is an arrest.

9 Muska v. Apel, 203 Wis. 389, 232 N.W. 593 (1930); Smith v. Drew, 175 Wash. 11, 26 P. (2d) 1040 (1933).

10 U. S. Fidelity & Guarantee Co. v. State, 121 Miss. 369, 83 So. 610, (1920); Krehbiel v. Henkle, 152 Iowa 604, 129 N.W. 945 (1911).

The general rule as to search and seizure without a warrant is familiar—once given a precedent lawful arrest, a search may be made of both person and property as an incident to the arrest.[11] Tennessee limits this to include only such articles as might be used to (a) effect an escape, or (b) which tend to evidence guilt of the offense for which the arrest was made.[12] The federal rule is no longer so restricted, and if contraband is found, the possession of which constitutes a crime other than the one for which the arrest was made, the seizure of it is nonetheless not unreasonable and therefore lawful.[13] Even in Tennessee, however, some further leeway is given, in that an officer may search if he has "probable" or "reasonable cause" to believe that the law has been violated,[14] and this rule is in general use.[15] What constitutes probable cause has been held to be such facts as would lead a reasonably prudent and intelligent person to conclude that there was good ground to believe that the law had been violated.[16] This, in those states where it is an issue as to admissibility, will be decided by the trial judge should the defendant's counsel move to suppress the evidence, and it is usually said that it must be determined by him in each case in view of all the facts and circumstances under which the particular search and seizure was made.[17]

Since every situation walks on its own legs, it is difficult to say in advance of a court decision just what may or may not constitute probable cause in a given border-line case. However, some examples may indicate the viewpoint of the courts. In one Tennessee case,[18] an arrest and search was held to be justified when officers observed a man carrying a nail keg, from a place where nails were unlikely to be obtained, to his car and begin to drive away. They had had information that the man was engaged in the unlawful transportation of liquor (by statute a breach of the peace in Tennessee), and a search of the keg after stopping the car revealed that such was the case. While the court regarded the "tip-off" alone as insufficient, yet that plus the actions of the man gave grounds for a reasonable belief that a breach of the peace was being threatened. Another case from the same state sustained a search as reasonable where an officer found an automobile parked in a dark alley about 9:00 P. M. His flashlight revealed a disordered interior cluttered with one gallon cans, and the appearance that something was hidden under the rear seat, a search of which revealed a quantity of corn whiskey. Throwing the light on the car was regarded not as a search but as an inspection, which the circumstance of the car being hidden in the darkness of the alley made it his duty to make. The next step in the reasoning was that the visible

11 Marron v. United States, 275 U.S. 192 (1927). This is limited to a contemporaneous search.

12 Elliott *et ux.* v. State, 173 Tenn. 203, 116 S.W. (2d) 1009 (1938). Such restrictions are commonly used, and are not confined only to Tennessee. United States v. Lagow, 66 F. Supp. 738 (S.D.N.Y. 1946).

13 Harris v. United States, ... U. S. ...., 67 S. Ct. 1098 (1947).

14 Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922); Smith v. State, 155 Tenn. 40, 290 S.W. 4 (1926).

15 Pearson v. United States, 150 F. (2d) 219 (C.C.A. 10th, 1945); Jones v. State, ... Okla. ...., 166 P. (2d) 443 (1946); Carroll v. United States, 267 U.S. 132 (1924).

16 *Ibid.*

17 People v. Exum, 382 Ill. 204, 47 N.E. (2d) 56 (1943); Hoppes v. State, 70 Okla. Crim. 179, 105 P. (2d) 433 (1940).

18 Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922), cited *supra* note 14.

disorder supplied grounds for a reasonable belief that the law was being violated. Since the belief arose and then the search followed, it was held not an unlawful search.[19]

Running through these cases, including the principal case, there appear to be two requirements for probable cause. First, some facts must exist or events happen to which the officer can point as being those upon which he based his belief that an irregularity was taking place. While they need not be clear and positive proof, their existence is nonetheless essential, and if all the officer can say is that his "suspicions were aroused," or that the defendant's conduct was "suspicious," any search prompted by such vague feelings will almost certainly be held illegal.[20] Second, whatever facts or inferences from facts are eventually relied on to support the officer's belief or conviction that the law has been, or is about to be violated, they must be known prior to the arrest and not learned of later, or as a result of the arrest.[21] Both of these requirements are in use not only in Tennessee but also generally.

The other problem presented by the situation of a dubious right to search is whether, even though the search be unlawful, the evidence so seized should nevertheless be admitted on trial to prove the commission of a crime. The issue here centers around the application of the Fourth Amendment to the Federal Constitution,[22] or similar provisions in state constitutions. The United States Supreme Court has taken the view that in order to protect citizens against unreasonable searches by federal officers, convictions based on the use of illegally seized evidence must be reversed, and that such evidence is not properly admissible.[23] However, the Fourth Amendment has been held not to apply to the actions of state officials.[24] While the Fourteenth Amendment does pertain to the states, only those principles of justice in the first eight amendments which are to be deemed "fundamental" are to be applied to states through the Fourteenth's due process clause.[25] This position of selective application of the Bill of Rights to the states has been recently restated and approved,[26] and the Fourth Amendment is not

19 Smith v. State, 155 Tenn. 40, 290 S.W. 4 (1926), cited *supra* note 14.

20 McKee v. State, 59 Okla. Crim. 353, 60 P. (2d) 216 (1936); see Comment (1937) 22 Iowa L. Rev. 580; Cox v. State, 181 Tenn. 344, 181 S.W. (2d) 338 (1944), cited *supra* note 6. The principal case also takes this view. An interesting articulation of one court's viewpoint appears in Arnold v. State, 8 N.Y.S. (2d) 28 (1938) where it was said, "When a state trooper stops a person or a car on a public highway, he should be prepared to assign a legal reason for doing so. He may not do so with the sole objective of 'questioning' people. There should be an underlying reason and cause to justify his act. And this is so despite such duty as a driver may have to stop for apparent cause, or to furnish information."

21 United States v. Duane, 66 F. Supp. 459 (D.C. Neb., 1946); Poldo v. United States, 55 F. (2d) 866 (C.C.A. 9th, 1932); State v. McBride, 327 Mo. 184, 37 S.W. (2d) 423 (1931).

22 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 on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

23 Weeks v. United States, 232 U.S. 383 (1914); Agnello v. United States, 269 U.S. 20 (1925).

24 Weeks v. United States, 232 U.S. 383 (1914).

25 Palko v. Connecticut, 302 U.S. 319 (1937).

26 Adamson v. California, ... U. S. ...., 67 S. Ct. 1672 (1947).

one of those principles which must of necessity be observed by the states as an essential to justice and a fair trial.[27]

Thus, the states are free to make their own rule. Almost all, however, incorporate a provision similar to the Fourth Amendment in their constitutions,[28] and the interpretation and application of such provisions governs. In spite of the general existence of such clauses, many states admit evidence even though it be illegally seized.[29] Tennessee is an example of those which do not, and its courts will stop in the midst of a trial to determine the question of the reasonableness of a search.[30]

The wisdom of uncompromisingly holding seized evidence to be inadmissible is, at least in the situations involving automobiles, open to challenge. Courts have held that vehicles come under constitutional provisions as to the right of the people to be secure in their homes against unreasonable searches and seizures.[31] But one federal court has stated that the probable cause necessary to justify a search of a car might be far less than that required for the search of a dwelling.[32] And the Supreme Court in the *Carroll* case held that supplemental legislation under the National Prohibition Act showed an intent of Congress to allow a more liberal rule for the search of an automobile than for a home, and that such a distinction was consistent with the Fourth Amendment.[33] These latter viewpoints seem preferable, for the original fear of abuse centered around what should happen to a man's "home and castle,"[34] and the automobile has clearly contributed something to the activities of organized crime which on occasion requires immediate action. A house remains stationary, and a warrant can issue in due course; a vehicle in motion is not so obliging. Furthermore, once a car is stopped, it seems only common sense to allow a patrolman to use his eyes should the evidence of an infraction be

27 See the reference to Weeks v. United States, cited *supra* note 23, in Palko v. Connecticut, cited *supra* note 24, at 324.

28 Article I. §7 of the Constitution of the state of Tennessee is an example: "That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted."

29 The leading case representing this view is People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926).

30 State v. Bass, 153 Tenn. 162, 281 S.W. 936 (1926).

31 Robinson v. State, 187 Ind. 144, 149 N.E. 891 (1925); People v. Montgares, 336 Ill. 458, 168 N.E. 304 (1930). Sometimes such holding is based on the appearance of the word "possessions" in the state constitution, as in the Tennessee constitution, cited *supra* note 28, and which it is to be noted is not used in the Fourth Amendment, cited *supra* note 22. In one state, the constitution of which uses the term "possessions", an automobile was held to be fully as sacred as a home. Millette v. State, 167 Miss. 172, 148 So. 288 (1933).

32 Pearson v. United States, cited *supra* note 15.

33 Carroll v. United States, cited *supra* note 15. One federal court has interpreted this as meaning that a warrant is rarely, if ever, necessary for the search of an automobile. Cannon v. United States, 158 F. (2d) 952 (C.C.A. 5th, 1946). This appears to be stretching the significance of that case, however, and the actual holding of the *Cannon* case rests on the rule of probable cause.

34 See the exhaustive historical treatment in Boyd v. United States, 116 U.S. 616 (1886), indicating that trespass on land or dwelling, and prying into private papers were the two items of greatest concern.