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Right of Federal Officers to Search and Seize Without Warrant Confined to Instances of "Inherent Necessity"

In the closing weeks of the last term, the United States Supreme Court handed down an opinion which fares well to become one of the central landmarks in that labyrinth of law known as searches and seizures. The majority opinion in *Trupiano v. United States*¹ marks a new phase of the battle over the interpretation of the Fourth Amendment² which has raged within the Court since the lines were drawn in the *Davis* and *Zap* cases³ in 1945, and plainly constitutes a victory for that faction of the Court which reads the requirements of the Amendment most liberally in favor of the individual. Without an express overruling of any precedents, it announces a principle so broad that considerable doubt is cast upon the present validity of pre-existing Supreme Court doctrine,⁴ and many lower federal court decisions⁵ are now clearly discredited. In the *Trupiano* case a radically different judicial technique was employed for testing the legality of searches and seizures without warrant incident to a valid arrest. Instead of looking to the breadth or intensity of the search, or the nature of the objects seized following arrest, the Court majority, by scrutinizing the conduct of the law enforcement officers prior to the search, sought to determine whether or not there was "some other factor in the situation—besides the arrest—that would make it unreasonable or impracticable to require the arresting officers to equip themselves with a search warrant."⁶ If there was no such factor demanding summary action, the Court holding is that the mere presence of the arrestee in convenient proximity to the contraband property will not justify its seizure. Thus if the officers had reason to believe that criminal instrumentalities or contraband would be found upon the premises and ample time was available to present their evidence to a magistrate, it was their duty to do so, disregard of which would result in judicial condemnation of the seizures made at the site

¹ *Trupiano v. United States*, —U.S.—, 68 S. Ct. 1229 (1948).

² 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."

³ In *Davis v. United States*, 328 U.S. 582 (1946), by a vote of four to three, it was held that constitutional protection did not extend to the seizure of ration coupons at a gas station during business hours; in *Zap v. United States*, 328 U.S. 624 (1946), by the same vote, it was held that a government contractor who had consented to periodic audits of his books could not object to the seizure of a check evidencing fraud during one of the government audits. Note (1947) 37 J. Cr. L. & Criminology 413.

⁴ The broad dicta in the following cases conferring an almost absolute right on officers to search and seize without warrant following an arrest of persons committing crime have been substantially sapped of their former force: *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Carroll v. United States*, 267 U.S. 132, 158 (1925); *United States v. Lee*, 274 U.S. 559, 563 (1927); *Marron v. United States*, 275 U.S. 192, 198 (1927); *Harris v. United States*, 331 U.S. 145, 150 (1947).

⁵ *Mabie v. United States*, 60 F. (2d) 209 (C.C.A. 3d, 1932); *Rocchia v. United States*, 73 F. (2d) 966 (C.C.A. 9th, 1935); *United States v. Feldman*, 104 F. (2d) 255, (C.C.A. 3d, 1939); *United States v. Esposito*, 45 F. Supp. 39 (E.D. Pa. 1942).

⁶ 68 S. Ct. 1229, 1234.

of the arrest.⁷ Save for certain exceptional cases, the requirement of a search warrant is, therefore, made an absolute imperative.

In the *Trupiano* case the Internal Revenue officers laid in wait for their prey for nearly three months, all the while gathering evidence and keeping in close contact with an agent who was working side by side with defendants in their illicit distillery. Secret radio communication was set up between the farm on which the still was operated and the headquarters of the officers. Truckloads of alcohol were seized leaving the farm prior to the raid. The landowner who had leased the property on which the still was erected was in constant touch with the government agents and was ready at all times to supply accurate testimony for purposes of securing a warrant. Yet with all this evidence at hand, the federal agents commenced the foray armed with neither arrest nor search warrants. Mere inconvenience, it appears, discouraged them from obtaining any. Their entry on to the farm was lawful as they came at the behest of the owner himself. One of the agents, through an opening in the barn, saw the defendant actually at work at the distillery equipment. The arrest was then made and the apparatus seized along with several hundred cans of alcohol. With this imposing array of contraband and evidentiary matter the case was brought to trial, where the defendants moved to suppress all the evidence seized during the course of the raid. The district judge denied the motion, expressly commending the agents for "good policing and efficient crime detection."⁸ The Circuit Court of Appeals affirmed in a per curiam statement.⁹ The Supreme Court, Mr. Justice Murphy writing for the five-man majority, reversed, holding the arrest at the still as lawful but the incidental seizure of the contraband property not legalized by the concededly valid arrest.¹⁰

Obviously the point at which the judicial eye is cast has been shifted from the time and place of search to the antecedent circumstances. Most of the previous decisions involving the validity of a search and seizure incident to an arrest have discussed elaborately and with extreme refinements the permissive scope of the search when made, without a retrospective investigation of what the officers at the outset had reason to expect they might find at the site. The unsatisfactory character of the former approach is illustrated by the widely-discussed *Harris* case.¹¹ There illegally possessed draft-cards were seized after a meticulous hunt for stolen checks in the defendant's apartment incident to a valid arrest therein for forgery. The old charge was dropped, and *Harris* was tried and convicted of the newly discovered crime. In all of the four exhaustive opinions written in that case no workable formula was evoked for determining just what objects were within the "permissible scope" of a search not limited to specific objects or places by a previously-acquired

⁷ That this limitation has not been asserted by the Court previously is apparent from an examination of the facts in *Agnello v. United States*, 269 U.S. 20 (1925), dicta from which have been cited extensively on this point, where the narcotic officers had ample time and evidence to secure a warrant but got by successfully without it as long as they stayed inside the house where the arrest took place.

⁸ 70 F. Supp. 764, 765 (D.C. N.J. 1947).

⁹ 163 F. (2d) 828 (C.C.A. 3d, 1947).

¹⁰ —U.S.—, 68 S. Ct. 1229 (1948). Chief Justice Vinson dissented in an opinion in which Justices Black, Reed and Burton joined. *Id.* at 1235.

¹¹ *Harris v. United States*, 331 U.S. 145 (1947). Note (1947) 38 J. Cr. L. & Criminology 244; Note (1947) 96 U. Pa. L. Rev. 128; Note (1947) N.C. L. Rev. 53; Note (1948) B.U.L. Rev. 485; Comment (1947) 1 Van. L. Rev. 60; Kizer, *The Fourth Amendment and the Harris Case* (1947) 7 Lyr. G. Rev. 122.

warrant. For the mine run of cases, the *Trupiano* rule dispenses with this futile disputation concerning the availability to searchers of "public documents,"¹² contraband in plain sight,¹³ articles in the "immediate possession,"¹⁴ purely evidentiary papers if a felony was stopped in operation,¹⁵ and so forth. Only if the searching officers can demonstrate, in Mr. Justice Murphy's phrase, the "inherent necessity" of the incidental search, e.g. as where great speed was required because of the imminency of removal of the subject-matter from the jurisdiction,¹⁶ or where the search was solely for the protection of the officers to uncover weapons concealed in the room,¹⁷ will the question of *extent* of permissible search and seizure arise. Presumably if the defendant can show that the officers *could have* obtained a warrant describing the objects seized and failed to do so, that is the end of it. Of course, it is clear that if there was insufficient evidence to constitute probable cause for the initial arrest, nothing subsequently uncovered by the unauthorized search could validate either the search or the arrest.¹⁸ Thus federal officers who fail to obtain a search warrant, even though they are successful in lawfully arresting their man on the premises which they desire to search, are caught in a logical dilemma. If they profess to be seeking particular articles suspected beforehand to be present in the room they will run afoul of the *Trupiano* rule; if they admit to rummaging for nothing *in particular* their search will be condemned as "exploratory."¹⁹

As in every case where the obviously guilty are turned free, one must ask what value the case has as precedent for the innocent, for that can be its only justification. On its facts the *Trupiano* case is certainly shocking, yet this very quality may in its impact on law enforcement officials help to dispel some of the indifference that is too frequently shown to the warrant requirement.²⁰ The decision may also raise anew

¹² *Davis v. United States*, 328 U.S. 582 (1946); *Harris v. United States*, 331 U.S. 145; *cf. United States v. Shapiro*, —U.S.—, 68 S. Ct. 1375, 1393 (1948) (Frankfurter, J., dissenting).

¹³ *Go-Bart Importing Co v. United States*, 282 U.S. 344 (1931).

¹⁴ *United States v. Lefkowitz*, 285 U.S. 452 (1932).

¹⁵ *Marron v. United States*, 275 U.S. 192 (1927).

¹⁶ *Husty v. United States*, 282 U.S. 694 (1931). *But cf. United States v. Di Re*, 332 U.S. 581 (1948); *Hart v. United States*, 162 F. (2d) 74 (C.C.A. 10th, 1947).

¹⁷ This is the historical reason for the practice; see opinion of Cardozo, J., in *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923).

¹⁸ Usually in such cases the "arrest" is merely a pretext for the search for evidence. This may not be done, *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Henderson v. United States*, 12 F. (2d) 528 (C.C.A. 4th, 1926); *United States v. Kaplin*, 89 F. (2d) 869 (C.C.A. 2d, 1937); *Worthington v. United States*, 166 F. (2d) 557 (C.C.A. 6th, 1948); "The Government may not justify the arrest by the search and at the same time justify the search by the arrest," Jackson, J., in *Johnson v. United States*, 333 U.S. 11 (1948). Even if probable cause exists it will not, without more, justify the invasion of a private storage place or outbuilding, *Taylor v. United States*, 286 U.S. 1 (1932); *United States v. Edelson*, 83 F. (2d) 404 (C.C.A. 2d, 1936); *Roberson v. United States*, 165 F. (2d) 752 (C.C.A. 6th, 1948).

¹⁹ *Go-Bart v. United States*, 282 U.S. 344 (1931); *United States v. Kirschenblatt*, 16 F. (2d) 202 (C.C.A. 2d, 1926). The general warrant which conferred upon the police in colonial times the power of exploratory search without specification was the evil at which the Fourth Amendment was aimed. See *Paxton's Case*, Quincy 471, *et seq.* (Mass. 1761); *Cooley*, Const. Lim. (3d. Ed.) §470.

²⁰ Testimony of United States Marshal in *United States v. Mello*, 66 F. (2d) 135 (C.C.A. 3d, 1933): Q. "Why didn't you go get a search warrant if you knew so surely?"

A. "I didn't figure I needed a search warrant. If I had the evidence to get a search warrant, I had the evidence to seize it without." *Id.* at 137.

Held: Search and seizure approved.

the pertinent query as to whether suppression of evidence is really the most effective way to reduce the number of lawless police raids. Aside from the questionable deterrent effect these judicial fulminations may have on the police, the remedy of exclusion of evidence is available inevitably to the guilty alone while the innocent victim of a raid for all practical purposes still goes without redress. As Chief Justice Vinson remarked in his dissent in the principal case, the insistence in all situations on the use of a search warrant with its consequent proscription of competent evidence "only serves to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties."

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