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Criminal Procedure

BY RUTHEFORD B CAMPBELL, JR.*

INTRODUCTION

In 1974, the Kentucky Court of Appeals decided a number of criminal procedure cases. Although these included cases involving prisoners' rights,¹ probation revocation procedure,² and discovery,³ the more significant decisions were in the area

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¹ In *McGuffin v. Cowan*, 505 S.W.2d 773 (Ky. 1974), the Court held that a prisoner was not entitled to a hearing prior to his "good time" credits being taken from him. This case would seem to be overruled by a subsequent Supreme Court case, *Wolff v. McDonnell*, 94 S.Ct. 2963 (1974). In *Harrison v. Robuck*, 508 S.W.2d 767 (Ky. 1974) the Court held that the Parole Board did not abuse its discretion by excluding counsel at the hearing on Harrison's application for parole. The Court further held that the Board did not abuse its discretion by not supplying Harrison with a statement of the reason for the denial of his parole application.

² In *Reeder v. Commonwealth*, 507 S.W.2d 491 (Ky. 1973) the Court of Appeals, relying on *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), held that Reeder had not been entitled to a lawyer at his probation revocation hearing. In another case relying on *Gagnon*, the Court held that the Johnson Circuit Court had not afforded appellant due process when that court revoked his probation. *Wells v. Webb*, 511 S.W.2d 214 (Ky. 1974). Wells had been arrested on a probation-violation warrant and held in jail 40 days without a hearing of any kind. When Wells instituted a habeas corpus proceeding, the judge denied his habeas corpus relief and then revoked his probation. The Court of Appeals held this procedure did not meet the minimum standards of due process under *Gagnon*. Specifically, defendant had no preliminary hearing and the final hearing (the habeas corpus proceedings) did not meet the *Gagnon* requirements, because appellant was not given notice of the claimed violation, the evidence against him was not disclosed, and "he was not told in advance that the hearing would be on the issue of probation violation, wherefore he was given no opportunity to be prepared or to obtain evidence." *Id.* at 215.

³ In *Roach v. Commonwealth*, 507 S.W.2d 154 (Ky. 1974) a police officer had testified from 35 pages of notes at Roach's trial. Relying on Kentucky Rule of Criminal Procedure 7.26, Roach moved that these papers be turned over to him for examination. The Court of Appeals held that any papers the Commonwealth refused to hand over should have been examined by the trial court to determine whether Roach was entitled to see the papers under Rule 7.26.

The Court of Appeals, in *Byrd v. Commonwealth*, 509 S.W.2d 261 (Ky. 1974), held that the trial court did not abuse its discretion when it overruled defendant's motion for discovery of a ballistics report and a motion to examine some articles of clothing worn by an officer shot by the defendant, because neither the report nor the clothing were introduced in evidence at the trial and because the defendant had an adequate opportunity at the first trial to examine the clothing.

of the right of effective assistance of counsel and the area of search and seizure. It is to these latter two areas that the author will limit his discussion.

I. RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL⁴

A defendant's right to effective assistance of counsel is guaranteed by the United States Constitution.⁵ In 1974 the Kentucky Court of Appeals decided three cases that reflect the Court's attitude to a defendant's claim that he was denied effective assistance of counsel. Most significantly, the Court affirmed that a defendant is denied effective counsel only if the performance of the attorney is so poor as to amount to a farce and a mockery of justice.⁶

In *Lay v. Commonwealth*⁷ appellant claimed that he had been denied the effective assistance of counsel, basing his claim on the ground that he was denied an appeal from his conviction because his retained counsel did not "inform him of his rights regarding indigent appeal."⁸ Although the Court emphasized that there was substantial evidence that appellant had been informed by his lawyer of his right to appeal, the Court apparently determined that the failure to inform a defendant of the right to appeal would not support a claim of ineffective counsel. The Court stated:

In any event, appellant was chargeable with error of judgment on the part of his retained counsel, unless it appears that the efforts of retained counsel were such as to shock the conscience of the Court or to render the proceedings a farce and a mockery of justice. There is no evidence or allegation of such conduct on the part of his counsel.⁹

⁴ For a more extensive discussion of this topic see *Kentucky's Standard for Ineffective Counsel: A Farce and a Mockery?* in the Comments section of this issue.

⁵ *Powell v. Alabama*, 287 U.S. 45, 71 (1932) ("duty [to appoint counsel for a defendant] is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid . . ."); *Reece v. Georgia*, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel is a constitutional requirement of due process which no member of the Union may disregard."); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

⁶ This is consistent with prior Kentucky cases. *Berry v. Commonwealth*, 490 S.W.2d 741 (Ky. 1973); *Caples v. Commonwealth*, 481 S.W.2d 675 (Ky. 1972).

⁷ 506 S.W.2d 507 (Ky. 1974).

⁸ *Id.* at 508.

⁹ *Id.* (citations omitted).

In two other cases, however, appellants claiming ineffective counsel fared better. In *Vaughan v. Commonwealth*¹⁰ the appellant, who had been convicted of a drug violation, claimed he was denied effective counsel, and the Court agreed. In upholding appellant's claim, the Court relied on two factors. One factor was the inadequacy of the attorney's time to prepare the case for trial. Appellant's attorney had conferred with him only 15 minutes before trial.¹¹ The second factor was the possible conflict of interest of appellant's attorney, who was also representing another defendant. Resting its decision "primarily" on these two factors, the Court held that "Vaughan was denied effective assistance of counsel."¹²

The Court in *Vaughan* also discussed the standard of effectiveness for counsel. Although the court endorsed the "farce and mockery" standard, it emphasized that this standard went only to the "trial performance by the attorney and not to the matter of time for preparation for trial."¹³ The latter, therefore, is an independent basis for a finding that counsel was ineffective. As the Court noted: "Our cases do not hold that the failure to allow an attorney adequate time for preparation for trial is a ground for relief only if the attorney's conduct at trial is so hopelessly bad as to make the trial a farce."¹⁴

Finally, the case of *Maynard v. Commonwealth*¹⁵ is consistent with the above two cases. In *Maynard* three defendants, including Maynard, had been convicted of shooting into a dwelling. At the lower court level a single attorney was appointed to represent all three of the defendants, even though

¹⁰ 505 S.W.2d 768 (Ky. 1974).

¹¹ In *Raisor v. Commonwealth*, 278 S.W.2d 635 (Ky. 1955) the Court held that four hours from the time of appointment to the time of trial was insufficient, where defendant was charged with grand larceny.

¹² *Vaughan v. Commonwealth*, 505 S.W.2d at 770. There were at least three other factors that tended to make the effectiveness of counsel questionable. First, there was apparently not an overwhelming amount of evidence against Vaughan. Second, defense counsel did not object to the introduction of evidence obtained by a search of questionable legality. Finally, because of confusion between Vaughan's attorneys, Vaughan's appeal was not perfected.

¹³ *Id.* at 771.

¹⁴ *Id.* It is unclear what standard is applicable to the issue of time for preparation. It would seem that an attorney should be permitted at least a period in which he can reasonably prepare for the particular trial.

¹⁵ 507 S.W.2d 143 (Ky. 1974).

the attorney stated that he would be unable to adequately represent all three because they had antagonistic defenses. The Court of Appeals, relying again on the possible conflict of interest of appellant's attorney to find a denial of the right to effective assistance of counsel, overturned Maynard's conviction with the statement: "The court erred in not appointing separate counsel to represent these co-defendants."¹⁶

As may be expected, commentators have generally been critical of the "farce and mockery" standard. They have pointed out, for example, that the farce and mockery standard "puts an unduly heavy burden on the defendant [and] . . . is unduly vague and is therefore, unpredictable and difficult to apply."¹⁷ Most commentators seem to favor a more demanding standard of effectiveness, one which necessitates at least reasonably competent representation. As one commentator has stated: "It would seem that [the lawyer] must perform at least as well as the lawyer with ordinary training and skill, conscientiously protecting his client's interests."¹⁸ Additionally, and perhaps in response to pressure from commentators, a number of jurisdictions have rejected the "farce and mockery" standard in favor of a reasonableness test.¹⁹

It is hard to defend continued adherence to the "farce and mockery" standard as the appropriate measure of the effectiveness of counsel.²⁰ As stated above, this standard is so vague that

¹⁶ *Id.* at 144. As with the inadequacy of time problem, the fact that an attorney was representing conflicting interests would seem to be an independent basis for holding counsel ineffective. Thus, relief would not be predicated on a finding that the trial was a "farce," because a conflict problem would not go to "trial performance" and accordingly would not be subject to the "farce and mockery" norm. *Vaughan v. Commonwealth*, 505 S.W.2d 768, 770 (Ky. 1974).

¹⁷ *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078 (1973).

¹⁸ *Note, Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1435 (1965). For a similar formulation, see *Lumbard, The Adequacy of Lawyers Now in Criminal Practice*, 47 J. AM. JUD. Soc'y 176, 178 (1964) ("the time and attention which would be devoted to the case by the average criminal court lawyer who receives reasonable minimum fee").

¹⁹ *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970); *Scott v. United States*, 427 F.2d 609 (D.C. Cir. 1970); *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960); *In re Saunders*, 472 P.2d 921, 926, 88 Cal. Rptr. 633 (1970); *State v. Merchant*, 271 A.2d 752, 755 (Md. App. 1970); *State v. Thomas*, 203 S.E.2d 445 (W. Va. 1974).

²⁰ For a discussion of the reasons courts are reluctant to find counsel ineffective, see *Bazelon, The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 22-28 (1973).

it gives a court little help in deciding what factors make legal representation ineffective. In a recent Sixth Circuit case, Judge Celebrezze noted this objection to the standard: "The phrase 'farce and mockery' has no obvious intrinsic meaning. What may appear a 'farce' to one court may seem a humdrum proceeding to another."²¹

The more critical problem, however, is the injustice a defendant may suffer under the "farce and mockery" standard. Effective legal representation is essential to a functioning adversary system of justice. To require that representation meet only the "farce and mockery" standard is to relegate the right to counsel to meaningless words. Perhaps Judge Bazelon best stated the problem when he wrote: "The 'mockery' test requires such a minimal level of performance from counsel that it is itself a mockery of the Sixth Amendment."²²

There is yet another very practical reason why the Kentucky Court should reject the "farce and mockery" standard. The Sixth Circuit has recently adopted a reasonableness test as the measure of effective assistance of counsel. This means that, as a practical matter, all defendants in Kentucky state courts are entitled to reasonably effective representation.

In *Beasley v. United States*²³ the petitioner, who had been convicted in federal district court of attempted armed bank robbery, filed a motion to vacate the sentence and judgment, claiming that he had been denied effective assistance of counsel. In sustaining petitioner's motion, the court rejected the "farce and mockery" standard as the appropriate measure of the "effectiveness" of counsel. Rather, the court stated: "We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance Defense counsel must perform at least as well as the lawyer with ordinary training and skill in the criminal law"²⁴

²¹ *Beasley v. United States*, 491 F.2d 687, 692 (6th Cir. 1974).

²² Bazelon, *supra* note 20, at 28.

²³ 491 F.2d 687 (6th Cir. 1974).

²⁴ *Id.* at 696. The court then went on to explicate some specific instances when an attorney's performance would be ineffective under the reasonableness standard: It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. Defense counsel . . . must conscientiously protect his client's interests,

Although it is not entirely clear that state courts are bound to follow precedents of the federal district courts or the federal circuit court of appeals,²⁵ there is a procedure by which a defendant can get the federal standard of "effectiveness" applied to his situation. Under federal law, one convicted in a state court can raise constitutional issues by making an application for a writ of habeas corpus to certain federal courts or judges.²⁶ Thus, a defendant who has been convicted in Kentucky and who has exhausted his remedies with respect to his claim of ineffective counsel can have that issue adjudicated by a federal court, and presumably the Sixth Circuit would apply its own standard of effectiveness. This seems to be the position taken by the Sixth Circuit in *Berry v. Cowan*.²⁷ In that case, Berry, who had been convicted in Kentucky state court of a drug violation, petitioned the Western District of Kentucky for a writ of habeas corpus. Although the Sixth Circuit affirmed the district court's denial of the petition, it recognized that there was a discrepancy between the standard of effectiveness in Kentucky and the standard of effectiveness in the Sixth Circuit. Further, the court indicated that, in determining whether to grant a petition for habeas corpus, the Sixth Circuit would apply the standard of reasonableness explicated in the *Beasley* case. Although the Sixth Circuit found that the Kentucky Court of Appeals had applied "the now abandoned test" of effectiveness, the denial of the petition was affirmed because the conduct of counsel met the more stringent reasonableness standard. The court declared: "Since we conclude that the conduct of counsel met the proper constitutional test, it is immaterial in our judgment

undeflected by conflicting considerations. Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.

It is a denial of the right to effective assistance of counsel for an attorney to advise his client erroneously on a clear point of law if this advice leads to the deprivation of his client's right to a fair trial.

Id. (citations omitted).

²⁵ See, e.g., *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970). The court in *Lawrence* cites cases holding that state courts are bound to follow the lower court decisions and cases holding that state courts are not so bound. See also Annot., 147 A.L.R. 857 (1943); Note, *Freeing State Courts to Disregard Lower Federal Court Constitutional Holdings*, 25 Sw. L.J. 478 (1971).

²⁶ 28 U.S.C. §§ 2241-55 (1970).

²⁷ 497 F.2d 1274 (6th Cir. 1974).

that the conduct may also have met the test which is now abandoned.²⁸

In light of the foregoing considerations it seems appropriate for the Kentucky Court of Appeals to adopt the reasonableness standard of *Beasley*. Such a decision would give substance to the constitutional guarantee of effective counsel, as well as prevent needless litigation in the federal courts.²⁹

II. SEARCH AND SEIZURE

A. Search Warrants

In 1974 the Court decided two cases dealing with the legitimacy of search warrants. In *Rooker v. Commonwealth*³⁰ a county judge issued a search warrant based on an affidavit presented to him by a county sheriff. At the hearing on the motion to suppress the evidence obtained under the warrant, the issuing judge admitted that he had not read the affidavit before issuing the warrant. As a result, the Court held that the search was in violation of the State and Federal Constitutions, stating:

Part of the protection of the Fourth Amendment consists of requiring that inferences in determining probable cause be drawn by a neutral and detached issuing authority instead of the police or government agents. Where a judge issues a search warrant based upon an affidavit which he does not read, he makes no determination of probable cause but merely serves as a rubber stamp for the police. Such action is improper even though the affidavit actually shows probable cause³¹

²⁸ *Id.* at 1276.

²⁹ As noted *supra*, the Kentucky Court utilizes the "farce and mockery" standard only as a measure of "trial performance." *Vaughan v. Commonwealth*, 505 S.W.2d 768, 771 (Ky. 1974). Thus where the question of effectiveness involves the lack of time for preparation or a potential conflict, for example, the Court may be, *sub silentio*, applying a reasonableness standard. Under this standard a defendant would be denied effective assistance of counsel if counsel's time for trial preparation was so brief as to prevent a reasonable preparation for the particular case. Further, a defendant would be denied effective assistance of counsel if his attorney, because of a conflict of interest, was unable to provide him with reasonable representation.

³⁰ 508 S.W.2d 570 (Ky. 1974).

³¹ *Id.* at 571. (citations omitted). Not only was the warrant issued in violation of the State and Federal Constitutions, but it also appears to have been in violation of the Kentucky Rule of Criminal Procedure 2.04.

In *Commonwealth v. Eilers*³² the Court was faced with the issue of whether the affidavit in support of a search warrant established probable cause. The affidavit, submitted by Detective Wheat, was based on statements made to Wheat by Jeffries, a Special Assistant United States Attorney. The affidavit stated that Jeffries had informed Wheat that a reliable informant, who had given accurate information a number of times before, had informed him (Jeffries) that Eilers was engaged in illegal gambling activities. The informant had told Jeffries that this conclusion was based on admissions made by Eilers and on the informant's making of bets with Eilers. On the basis of this information, a search warrant was issued. The defendant moved to suppress the evidence obtained under the warrant because the warrant was based on "hearsay on hearsay" and, therefore, did not meet the probable cause requirement. The Court upheld the search, holding that double hearsay would not negate probable cause.

If properly applied, the rule emerging from *Eilers* is sound. It has been previously established by the Supreme Court that the rules of evidence are not applicable to the probable cause determination.³³ Further, hearsay can be considered in the issuance of a warrant.³⁴ Where, however, a warrant is based solely on allegations of an informant, which are related to the court by the affiant, the magistrate must be informed of some underlying circumstances from which the informant concluded that a violation of the law had occurred, and the magistrate must be informed of some of the underlying circumstances from which the officer concluded that the informant was reliable.³⁵ Thus, as the Court noted in *Eilers*, "[i]t is clear that the allegations of the affidavit were sufficient to satisfy the requirements . . . had Jeffries made the affidavit instead of Wheat."³⁶ In *Eilers*, however, there was one additional link between the informant and the court. The additional link was Jeffries. It would seem appropriate, therefore, to require that the reliabil-

³² 503 S.W.2d 724 (Ky. 1973).

³³ *Draper v. United States*, 358 U.S. 307 (1959); *Brinegar v. United States*, 338 U.S. 160, 172-73 (1949).

³⁴ *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *Draper v. United States*, 358 U.S. 307 (1959).

³⁵ *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

³⁶ *Commonwealth v. Eilers*, 503 S.W.2d 724, 726 (1973).

ity of the additional link (Jeffries) be established by demanding that the magistrate be presented with facts and circumstances proving the credibility of Jeffries. This would seem consistent with prior cases, which have demanded that sources utilized by an affiant as a basis for a search warrant be demonstrably credible. Absent unusual circumstances, a presumption that a Special United States Attorney is reliable would appear to be justified. In such a case, *Eilers* is sound, especially in light of the fact that the Supreme Court has said that the probable cause determination is a common sense, non-technical determination.³⁷

B. *Automobile Searches*

In *Scillion v. Commonwealth*,³⁸ the Kentucky Court upheld a warrantless search of an automobile and in so doing utilized a confused analysis that is not uncommon in similar Kentucky cases.³⁹ In *Scillion* a police officer stopped an automobile driven by Cornwell. The officer arrested Cornwell for having no driver's license, and he arrested Scillion for permitting an unlicensed driver to operate Scillion's car.⁴⁰ After both men had been removed from the car and searched by the officer, the officer noticed a leather glove protruding from under the seat of the car. He then conducted a warrantless search of the automobile, which revealed incriminating evidence. Although the Court of Appeals upheld the search as reasonable, the justification for the warrantless search was less than clear. At one point the Court quoted from a prior Kentucky case, which stated that if an officer has probable cause to arrest the occupants of an automobile, "he may place him or them under arrest and may forthwith proceed to search the automobile incident to the arrest."⁴¹ The Court was somewhat uncertain, however, whether that rule would apply in *Scillion*, apparently

³⁷ *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

³⁸ 508 S.W.2d 307 (Ky. 1974).

³⁹ See note 47 *infra*.

⁴⁰ The automobile was registered in the name of Scillion's wife.

⁴¹ 508 S.W.2d at 308, quoting from *Commonwealth v. Hagan*, 464 S.W.2d 261, 264 (Ky. 1971).

because the offense involved was not serious.⁴² Nevertheless, the Court was able to find an alternative basis for the warrantless search.⁴³

In order for a warrantless search to be "reasonable," within the meaning of the fourth amendment, it must fit within one of the exceptions to the search warrant requirement.⁴⁴ One such exception is a search incident to a lawful arrest. The leading case on this exception is *Chimel v. California*,⁴⁵ in which the Supreme Court explained the rationale for warrantless searches incident to a lawful arrest in terms of protection of the officer and prevention of the destruction of evidence by the person arrested. Accordingly, the Court limited the scope of the search incident to a lawful arrest to "the area 'within [the arrested person's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destroy evidence."⁴⁶ As the Supreme Court held in a subsequent case, a search incident to a lawful arrest "must . . . be confined to the area within the arrestee's reach at the time of the arrest."⁴⁷ The problem in *Scillion* was that the scope of the search was not limited to the area described in *Chimel*. In *Scillion*, the two men had "exited their vehicle" at the time of the search of the car. Thus, it is difficult to justify the search of the car by the need to protect the officer or to prevent the destruction of evidence by the defendant. To the extent that *Scillion* is based on the right of an officer to search incident to a lawful arrest, it is unsound.⁴⁸

The Court in *Scillion*, however, seemed to find an additional basis for sustaining the search. That justification was

⁴² While the Court refused to characterize the offense as a "minor traffic violation," it stated that perhaps an arrest for the violations involved "alone would not authorize a search of the automobile." 508 S.W.2d at 308.

⁴³ The alternative basis for the search was the "emergency" doctrine. See text accompanying and sources cited in notes 48-56 *infra*.

⁴⁴ *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *Katz v. United States*, 389 U.S. 347 (1967).

⁴⁵ 395 U.S. 752 (1969).

⁴⁶ *Id.* at 763.

⁴⁷ *Vale v. Louisiana*, 399 U.S. 30, 33 (1970).

⁴⁸ In both *Ashcraft v. Commonwealth*, 487 S.W.2d 892 (Ky. 1972) and *Commonwealth v. Hagan*, 464 S.W.2d 261 (Ky. 1971), the Court used language that seems to support the search of an entire automobile incident to a lawful arrest. It should be pointed out, however, that it is not clear that *Scillion* is based on the search incident to a lawful arrest exception.

what has been referred to as the "emergency" or "exigent circumstances" doctrine. Under this rubric the Supreme Court has developed an exception to the search warrant requirement where there is probable cause to search and the delay involved in obtaining a warrant threatens the loss of evidence.⁴⁹ Since the mobility of an automobile generally creates such exigent circumstances,⁵⁰ the Supreme Court has permitted warrantless searches of automobiles in order to prevent the loss of evidence, if there is probable cause to search.⁵¹ Thus in *Chambers v. Maroney*,⁵² a case in which all four occupants of an automobile were arrested on suspicion of robbery, the Supreme Court upheld a warrantless search of an automobile because there was probable cause to search and because the automobile "was a fleeting target for a search."⁵³

Since the automobile in *Scillion* would also be a fleeting target, the search would have been reasonable, *if* there had been probable cause to search. The problem in *Scillion*, however, was the absence of facts sufficient to establish probable cause. Probable cause to search requires facts that would lead a man of reasonable caution to believe that seizable items will be found in the place to be searched.⁵⁴ At the time of the search the officer had seen "a leather glove protruding from under the seat of the automobile; he knew that Scillion had dangerous propensities; and he knew that on a previous occasion Scillion had carried a weapon in his car."⁵⁵ Based only on the above information, it is unlikely that a man of reasonable caution would believe that the automobile contained weapons. The glove would seem to be no evidence of the presence of weapons. Thus, the only evidence of weapons was the reputation of the defendant.⁵⁶ That should not have been enough, standing

⁴⁹ *E.g.*, *Schmerber v. California*, 384 U.S. 757 (1966).

⁵⁰ *But see Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

⁵¹ *Cardwell v. Lewis*, 94 S.Ct. 2464 (1974); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

⁵² 399 U.S. 42 (1970).

⁵³ *Id.* at 52.

⁵⁴ *Carroll v. United States*, 267 U.S. 132, 162 (1924). *See also* Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

⁵⁵ *Scillion v. Commonwealth*, 508 S.W.2d 307, 308 (Ky. 1974).

⁵⁶ For a discussion of whether the reputation of a defendant can be considered in determining whether there is probable cause, *see Spinelli v. United States*, 393 U.S.

alone, to establish probable cause.⁵⁷

Although the Court was wrong to permit the search in *Scillion*, an equally disturbing aspect of the case was the lack of precision in the analysis. Although the Court seemed to indicate that a policeman can search an automobile anytime he arrests the driver, the Court did not clarify its position on that issue. Further, the Court's analysis of probable cause was at best cavalier. There were virtually no facts supporting probable cause. More fundamentally, the Court failed to make explicit what the officer had probable cause to search for, although it apparently was weapons. Such laxity in analysis is unbecoming a Court which otherwise had a good year in the area of criminal procedure.

410 (1969) ("assertion [that defendant was a known bookmaker] may [not] be used to give additional weight to allegations that would otherwise be insufficient." *Id.* at 418-19); *United States v. Harris*, 403 U.S. 573 (1971) (plurality opinion) (a magistrate or officer "may properly rely" on a "policeman's knowledge of a suspect's reputation . . . in assessing the reliability of an informant's tip." *Id.* at 583).

⁵⁷ The lack of probable cause becomes even more apparent when one compares *Scillion* to *Spinelli v. United States*, 393 U.S. 410 (1969). In the latter case the Supreme Court found no probable cause for a search warrant where the affidavit in support of the warrant stated: (1) that the affiant "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdon 4-0029 and WYdon 4-0136"; (2) that Spinelli was a known bookmaker and gambler; (3) that Spinelli had been seen going toward and entering the apartment to be searched; and (4) that the apartment had phones corresponding to the numbers given by the informant.