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Criminal Procedure--Search Prior to Arrest

Joe Harrison
University of Kentucky

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of risk theory. Therefore, the plaintiff would not be barred unless his injury was a possible result within the risk to which the plaintiff had subjected himself. This is a more exact method of determining the plaintiff's negligence, and would give the trial judge and jury more precise standards by allowing them to weigh the plaintiff's act in relation to the risk created.

William G. Kohlhepp

CRIMINAL PROCEDURE—SEARCH PRIOR TO ARREST.—The defendant was walking down a deserted street in the heart of New York City at 3:15 a.m., carrying a shotgun. When questioned about the gun by two police officers, he replied that he was going hunting. The officers, after discovering that the gun was loaded, ordered the defendant to accompany them to the police station for further questioning. While putting the defendant into the patrol car, one of the officers touched the defendant's clothing, and felt an object about the size of a pistol. A formal search revealed that the defendant had in his possession a pistol, a tear gas gun, and two knives. He was then arrested and two charges were filed against him, one relating to the shotgun, the other to his possession of concealed weapons. The charge relating to the shotgun was dismissed. The defendant moved to suppress the evidence that was taken from him on the ground that it was obtained by an illegal search before the arrest. *Held*: Motion denied. Since the officers had probable cause to believe that a criminal act was being committed in their presence, they were "authorized to arrest the defendant or to search his person incidental to such an arrest." *People v. Salerno*, 235 N.Y.S.2d 879 (1962).

The United States Constitution¹ and all state constitutions² have provisions which afford protection against unreasonable searches and seizures. To give effect to this protection, the Supreme Court has ruled that all federal³ and state⁴ courts must exclude evidence obtained by such unreasonable searches. Thus, the issue in the principal case was whether a search made by officers prior to an arrest, upon probable cause that a crime was being committed in their presence, was unreasonable.

¹ U.S. Const. amend. IV.

² *E.g.*, Ala. Const. art. I, § 5; Alaska Const. art. I, § 14.

³ *Weeks v. United States*, 232 U.S. 383 (1914).

⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

Some courts adopt the view that such a search is unreasonable.⁵ As stated in *United States v. Royster*:

The law of search is governed by the Fourth Amendment as construed by the Supreme Court of the United States. As thus construed, the Fourth Amendment outlaws all searches made without a warrant excepting those incident to a lawful arrest. . . . [T]he right to search without a warrant as an incident to a lawful arrest is a narrow exception to the prohibition of the Fourth Amendment and has its roots in necessity. The necessity in such cases arises from the need to protect the arresting officer, to deprive the prisoner of potential means of escape and to prevent the destruction of evidence by the person arrested. . . . The necessity which justifies a search incident to an arrest does not and can not arise until an actual arrest is made. It is apparent, therefore, that a lawful arrest is an indispensable prerequisite to a valid search incident thereto.⁶

It seems that the Kentucky Court of Appeals accepted this view in *Hall v. Commonwealth*:

Section 10 of our Constitution guarantees that our citizens will be secure in their persons, houses, papers, and possessions from unreasonable search and seizure. Under this section *no citizen's house, person or possessions may be searched before his arrest without a warrant issued for such search.* . . . (Emphasis added.)⁷

The reasons for this rule are well stated in another Kentucky case:

To sanction such [a search before a legal arrest] would be too dangerous to the hard earned liberties of a free people. It is a better that a man. . . . who certainly deserved to suffer the penalty provided by law for carrying a concealed weapon, entirely go free on such a charge rather than to sanction his present conviction by an illegal invasion of that liberty guaranteed to him and his forefathers. . . .⁸

Other courts take the view adopted in the principal case that a search made prior to an arrest is reasonable if the officers have probable cause to believe that a criminal act is being committed in their presence.⁹ Many of these courts, however, require that the search and the arrest be so near in time as to be practically simultaneous.¹⁰

⁵ 47 Am. Jur. *Searches and Seizures* § 53 (1943); 79 C.J.S. *Searches and Seizures* § 66 (1952); Cogan, *The Law of Search and Seizure* 28 (1952). "There can never be any occasion where a person may be successfully and legally searched unless it is an incident to a lawful arrest."

⁶ 204 F. Supp. 760, 762-63 (N.D. Ohio 1961).

⁷ 261 S.W.2d 677, 678 (Ky. 1953); *accord*, *Commonwealth v. Vaughn*, 296 S.W.2d 220 (Ky. 1956); *Gholson v. Commonwealth*, 308 Ky. 81, 212 S.W.2d 537 (1948); *Banks v. Commonwealth*, 202 Ky. 762, 261 S.W. 262 (1924); *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 360 (1920).

⁸ *Powell v. Commonwealth*, 307 Ky. 545, 548, 211 S.W.2d 850, 851 (1948).

⁹ *People v. Rodriguez*, 22 Cal. Rep. 324 (1962); *People v. Clifton*, 169 Cal. App. 617, 337 P.2d 871 (1959); *Jones v. State*, 264 S.W.2d 722 (Tex. 1954).

¹⁰ *State v. Reynolds*, 101 Conn. 224, 125 Atl. 636 (1924); *State v. Hoover*, 219 Ore. 288, 347 P.2d 69 (1959).

While it is accepted by both views that a search made incidental to a lawful arrest is reasonable, the difference between the two turns upon the meaning which has been given by each to the word "incidental." Under the first view if the search is made prior to the arrest, the search is not "incidental," as this view requires the search to follow the arrest. The second view, as adopted in the principal case is that even if the search precedes the arrest, it may be incidental.

The decision of the principal case is not justified. The facts and circumstances which prompted the search clearly indicated that the defendant had present intention to commit a criminal act. Thus, the officers had sufficient reason to effect an arrest of the defendant prior to the search. While it might be advantageous to permit a search prior to an arrest to avoid unnecessary arrests, this advantage is greatly outweighed by the restriction that such a rule places on the citizen's rights of security and privacy. An analysis of the decisions rendered since adoption of the constitutional guarantees against unreasonable searches and seizures reveals an ever increasing area of "reasonable" searches accompanied by increasing restrictions on the rights of security and privacy. The ultimate test for the necessity of the rule in the principal case is a test of public utility. Therefore, since the view requiring the arrest to precede the search meets present law enforcement needs, there are no social or economic values which warrant courts adopting the broader rule.

Joe Harrison

BANKRUPTCY—STATUTORY BAR TO HABITUAL DISCHARGE NOT APPLICABLE TO CHAPTER XIII WAGE EARNER PLAN.—Debtor filed a wage earner plan under chapter XIII of the Bankruptcy Act¹ seeking an extension of time to pay his debts in full. The proceeding was dismissed by the referee in bankruptcy because the debtor had received confirmation of an extension within six years preceding the filing of his present plan. The referee held that chapter III, section 14, (c) (5)² barred a subsequent confirmation within a six year period. The United States District Court for the District of Kansas affirmed. Debtor appealed to the court of appeals for the tenth circuit. *Held:*

¹ 52 Stat. 930 (1938), 11 U.S.C. §§ 1001-1086 (1958).

² 30 Stat. 550 (1898), as amended, 11 U.S.C. § 32 (c) (1952) provides:

"The court shall grant a discharge unless satisfied that the bankrupt . . . in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title. . . ."