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Search and Seizure--Probable Cause for Search Warrant

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STUDENT NOTES

SEARCH AND SEIZURE—PROBABLE CAUSE FOR SEARCH WARRANT.—In order to search a house for intoxicating liquor, two affidavits were made before a commissioner. The first stated that, "on or about October 14, 1931, he (affiant) went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises." The second merely asserted a belief that the statements in the first were true. A search warrant was immediately issued and officers searching the premises seized a still and 350 gallons of whiskey, which were offered in evidence against defendant upon his indictment for unlawful manufacture of whiskey and possession of property designed for the unlawful manufacture of intoxicating liquors. Defendant was convicted by the District Court of the United States for the Eastern District of Kentucky and this was affirmed by the United States Circuit Court of Appeals. The decision, however, was reversed by the United States Supreme Court in an opinion handed down November 7, 1932. *Held*, the affidavits were insufficient to furnish probable cause for the issuance of a search warrant under the National Prohibition Act; Mr. Justice Stone and Mr. Justice Cardozo dissenting. *Grau* v. *United States*, 53 S. Ct. 38 (1932).

The above case raises the much discussed problem of what constitutes probable cause sufficient for the issuance of a search warrant. In *Dumbra* v. *United States*, 268 U. S. 435, 441, 45 S. Ct. 546, 69 L. Ed. 1032 (1925), the Supreme Court in defining probable cause said, "if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant." Another definition is given in *Carl* v. *Ayers*, 8 Sickels 14, 17 (53 N. Y. 1873). "Probable cause is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged."

Probable cause is a question much before the federal courts and also the courts of those 19 states which follow the federal rule that evidence obtained by the use of an invalid search warrant cannot be used in evidence to convict a defendant. Cornelius, Search and Seizure (2d Ed.) page 36. In those states adopting a contra view it is naturally of less importance as the defendant is limited to an action against the officer making the search.

To protect the people of this country from unreasonable search and seizure, the 4th Amendment to the Constitution was included in the so called "Bill of Rights." This provided, "No warant shall issue but upon probable cause supported on oath or affirmation and particularly describing the place to be searched and the person or things to be seized." The Supreme Court has decided in *Barron* v. *Baltimore*, 7 Peters 243, 8 L. Ed. 672 (1833), that this is binding only on the federal government. Most states have provided similar protection by constitutional provisions or statutes. Section 10 of the Constitution of Kentucky provides, "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

Disregarding for the moment the Internal Revenue and National Prohibition Statutes, let us examine the affidavits in *Grau* v. *United States, supra*, in the light of these provisions and the previously decided cases.

A search warrant carries with it a presumption that it is preceded by a proper affidavit, placing the burden of proof on the one who desires to show otherwise. When contested, however, it has been frequently held that the warrant is invalid unless the affidavit stated facts sufficient to create in the mind of the issuing officer probable cause to believe there had been a violation of the law. *Abraham* v. *Commonwealth*, 202 Ky. 491, 260 S. W 18 (1924). It is not sufficient that affiant stated he had information and reasonable cause to believe or did believe the facts alleged. *United States* v. *Kelih*, 272 Fed. 484 (1921). The weight of authority is that an affidavit for a search warrant is insufficient if made on information and belief (18 R. C. L. 36), though the opposite conclusion has also been reached. 24 R. C. L. 708. Kentucky generally follows the former rule. It is stated however in *Goode* v. *Commonwealth*, 199 Ky. 755, 252 S. W 105 (1923), that it is not necessary that affiant state facts within his personal knowledge to which he would be permitted to testify at the trial of the person accused, but only facts and circumstances which will enable the officer issuing the warrant to determine whether there is probable cause. The second affidavit, which merely asserted a belief that the statements in the first were true, was clearly insufficient as stated by the court.

The affidavit as well as reciting facts must show a present existing cause for search by showing that conditions are reasonably coexistent with the issuance of the warrant, or at least use the present tense. *Rupinski* v. *United States*, 4 F (2d) 17 (1925), *Bentley, et al.* v. *Commonwealth*, 239 Ky. 122, 38 S. W. (2d) 963 (1931). Here the first affidavit definitely gave the date when the information was obtained and the warrant was issued immediately.

Are the facts stated in the affidavit sufficient to create in the mind of the commissioner probable cause for issuing a warrant? The affidavit stated that affiant saw large cans commonly used in handling

whiskey and corn sugar being brought to, and cans heavily loaded carried away from the place. Also that affiant smelled the odor of cooking mash. Facts can only be ascertained through the senses and affiant could only get his knowledge through his sense of sight, hearing, smell, taste or touch. In *United States* v. *Kardos*, 31 F. (2d) 204 (1928), an affidavit was made to obtain a search warrant for a garage, the other conditions being almost identical. The court found the affidavit sufficient as affiant said he was familar with the odor of mash and smelled such an odor coming from the garage. A different view was taken by the court in *United States* v. *A Certain Distillery*, 24 F. (2d) 557 (1928), where it was sought to search a dwelling house. The court thought it was practically impossible to tell by the odor whether the cooking was for food or beverage purposes. Kentucky has upheld the so called "smell warrant" in *Abraham* v. *Commonwealth*, *supra*.

The first affidavit contained the positive statements, "there is a still and whiskey mash on the premises." The courts have usually held that a positive statement without the facts upon which it is based is sufficient to constitute probable cause. *Sutton* v. *United States*, 289 Fed. 488 (1923), *Caudill and McLemore* v. *Commonwealth*, 198 Ky 695, 249 S. W 1005 (1923). By a positive statement affiant assumes responsibility and may be sued thereon, but, if he merely says that he believes, he thereby avoids responsibility. *Neal* v. *Commonwealth*, 203 Ky. 353, 262 S. W 287 (1924).

It is submitted that in Kentucky and all other states having prohibition enforcement legislation, the affidavit would have been sufficient to constitute probable cause for a search warrant.

The basis of the decision in the case discussed is Section 25 of Title 2 of the National Prohibition Act (27 U. S. C. A., sec. 39). "No warrant shall issue to search any private dwelling occupied as such unless it be used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house." *Nobridga* v. *United States*, 22 F (2d) 507 (1927), held that the operation of a still in a house was not a business purpose of which the words in the statute are illustrative. The Supreme Court in reversing followed this decision. The lower court had decided that the affidavit stated facts sufficient to warrant the belief that the dwelling was used as headquarters for the merchandising of intoxicating liquor. The Supreme Court did not think the affidavit furnished probable cause to believe that actual sales were made on the premises and said that the guarantees in the 4th Amendment must be liberally construed to prevent impairment of the protection extended.

In this decision which makes it almost impossible for a federal officer to search a dwelling where he knows intoxicating liquor is being manufactured in large quantities, has not the Supreme Court gone far beyond protecting persons against *unreasonable* search and seizure? In sustaining its position the court cited *Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), and *Gould* v.

United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921). It is interesting to note in reading these cases that after saying the constitutional provision should be liberally construed, the first case drew a distinction between the search of a man's private papers for the purpose of convicting him of a crime and a search for contraband goods "which rightfully belongs to the custody of the law." The second case added that the 4th Amendment permits search and seizure when justified by the interest of the public and when the lawful exercise of police power renders possession of the goods sought unlawful and provides for their seizure.

In defense of the decision, which unquestionably resulted in the defendant escaping the penalty for breaking the law, it might be argued that the responsibility lies with Congress and not with the court. In the section of the National Prohibition Act above quoted, Congress provided that the search of a private dwelling might be made only where it was used for the unlawful *sale* of intoxicating liquor. If they had intended *manufacture* and sale they should have so stated. The Florida Statute which is otherwise similar to the federal act did insert the word *manufacture*. Compiled Laws of Florida 1927, Section 8518. The writer, however, prefers the view taken by the court in *United States* v. *Berger*, 22 F (2d) 867 (1927), that a dwelling that is used for the unlawful manufacture of liquor which is either sold there or is removed from thence for sale, is subject to search. Here the statute was interpreted to give the expression, "for the sale," a meaning equivalent to "in connection with the sale," under authority of Title 2, Section 3 of the National Prohibition Act (27 U. S. C. A., sec. 12), which provides that "all the provisions of this shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

There must necessarily be a lack of uniformity in decisions which must rest on "what a reasonably discrete and prudent man" would think. Many border line cases will depend on the attitude of the judge or judicial officer. Just how much weight will be given to general suspicion, hearsay, reputation of the defendant and judicial notice of the character of the neighborhood where the property to be searched is located, will vary with the judge for "judges are human."

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AGENCY—THE FAMILY PURPOSE DOCTRINE—In the recent case of *Steele* v. *Age's Admr.*, 223 Ky. 714, 26 S. W (2d) 563 (1930), a minor son, driving with his father's consent, had a collision in the family automobile. The boy was driving recklessly at the time, and the machine was precipitated onto the sidewalk, where it struck and killed the plaintiff's intestate. The father, who maintained the automobile for the general use and convenience of the family, was held liable. The court based its decision on the "family purpose doctrine," which has been adopted in Kentucky. *Stowe* v. *Morris*, 147 Ky. 386, 144 S. W 52 (1912); *Miller* v. *Weck*, 186 Ky. 552, 217 S. W 904 (1920),