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Search and Seizure - Warrantless Search- Allowable Extent Incident to Arrest; United States v. Robinson

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• Constitutional Law—Search and Seizure—Warrantless Search—Allowable Extent Incident to Arrest. *United States v. Robinson,* 94 Sup. Ct. 467 (1973).

DISTRICT OF COLUMBIA Metropolitan Policeman Richard Jencks, on April 19, 1968, halted Willie Robinson for a "routine spot check."[1] While examining Robinson's driver's license, motor vehicle registration, and selective service card, Officer Jencks noticed an 11-year discrepancy between the two birthdates listed on his driver's license and his draft card.[2] Upon a later check of police traffic records, Officer Jencks discovered that an operator's permit issued to "Willie Robinson, Jr.," born in 1927, had been revoked and that a temporary license had been issued to a "Willie Robinson," born in 1938. Four days later, the same officer observed Robinson operating the same car and, after stopping the vehicle and receiving the same temporary operator's permit, placed Robinson under arrest for operating a motor vehicle after revocation of his operator's permit and obtaining a permit by misrepresentation.[3] Officer Jencks, with Robinson standing up and facing him, began what is called a "full field search."[4] As he searched, he felt an object in Robinson's left breast pocket. Although, as he later testified in court, he did not think it was a weapon, Officer Jencks removed what turned out to be a crumpled-up cigarette package. Upon opening up the package, he found 14 gelatin capsules of heroin. Robinson was then placed under arrest for possession of narcotics.[5] Based upon that evidence, the defendant was subsequently convicted of illegal possession of narcotics.[6]

Upon appeal of the conviction, a three-judge panel first reversed the conviction as being in violation of the strictures of the fourth amendment.[7]

[1] United States v. Robinson, 94 Sup. Ct. 467, 470 (1973).

[2] The draft card listed a 1927 date while the temporary operator's permit listed Robinson's birthdate as 1938.

[3] Violations respectively of 40 D.C. Code § 302(4) (1967) and Traffic Regulations of District of Columbia § 157(e).

[4] Such a search entails a thorough search of the individual including the contents of all pockets. "The officer is taught 'to examine everything on him [arrestee] at the full field search. Everything that we find in his pockets is examined to find out what it is.'" Police Sergeant describing police academy training, United States v. Robinson, 471 F.2d 1082, 1088 (1972). This search was unusual since Officer Jencks allowed Robinson to remain standing and facing him. This procedure was used because the officer had no fear of any assault from the defendant. *Id.*

[5] A further search produced no other contraband materials. *Id.*, at 1089.

[6] Possession of narcotic drugs, 26 U.S.C. § 4704(a) (1964) and receipt and concealment of narcotic drugs, 21 U.S.C. § 174 (1964).

[7] United States v. Robinson, 447 F.2d 1215 (D.C. Cir. 1971): The court pointed to several factual voids in the record as it then existed. Specifically, the court sought clarification as to (1) whether the search could be justified on an "in plain view" theory; (2) whether there existed any evidentiary basis for the search; (3) whether and to what extent the searching officer continued his search after discovering the narcotics, and (4) whether the search actually conducted was consistent with Metropolitan Police Department practices. United States v. Robinson, 471 F.2d 1082, 1087, fn. 1 (D.C. Cir. 1972).

Upon rehearing en banc, however, the District of Columbia Circuit Court chose to forestall any decision pending a further remand for evidentiary hearings. The issues on appeal were whether Robinson had been denied a the gelatin tablets could be suppressed because: (1) there was a failure speedy trial due to a 16-month delay between arrest and trial; and whether to establish the chain of continuous custody from time of seizure to production in court, and, (2) because the search was violative of the fourth amendment. The court affirmed as to the speedy trial and chain of possession arguments, but, as stated previously, remanded the case for further hearings before making a final decision.[8]

Upon a rehearing en banc after the remand hearings, the Circuit Court reversed[9] Robinson's conviction based upon their holding that the evidence obtained by the officer was gained through an unconstitutional search. The court first outlined what it believed to be the two allowable objectives of an arrest-based search of the person:

> [T]he legitimate objectives of warrantless searches of the person incident to arrest seem to be (1) seizure of fruits, instrumentalities and other evidence of the crime for which the arrest is made in order to prevent its destruction or concealment; and (2) removal of any weapons that the arrestee might seek to use to resist arrest or effect his escape.[10]

It found that such objectives were broad enough to satisfy the state's interests in invading Robinson's fourth amendment protections. The arresting officer's search for evidence, moreover, is limited to seeking evidence which the officer has reasonable cause to believe will be found on the person of the arrestee.[11] And since Officer Jencks already held the evidence relating to Robinson's criminal violations, that goal could not sustain the search of Robinson's person.

The Circuit Court examined what type of invasion was constitutionally allowable in looking for concealed weapons to protect the officer from assault or to prevent Robinson from escaping. To determine the extent of a search allowed, the majority opinion relied upon the rules of *Terry v. Ohio*[12] and *Sibron v. New York*,[13] since it decided that the present case was clearly constitutionally analogous to the factual situations present in those cases. Judge Wright interpreted *Terry* and *Sibron* to stand for:

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[8] One reason for the lack of testimony was that Appellant's counsel at the trial, who did not represent Robinson on appeal, did not raise the issue that the search exceeded the allowable scope incident to the arrest, United States v. Robinson, 447 F.2d 1215, 1223 (1971).

[9] United States v. Robinson, 471 F.2d 1082 (1972).

[10] *Id.*, at 1093. The Court based this conclusion on Chimel v. California, 395 U.S. 752, 762-763 (1968); and Katz v. United States, 389 U.S. 347, 357 (1967).

[11] *Id.*, at 1094.

[12] 392 U.S. 1 (1968).

[13] 392 U.S. 40 (1968).

> [T]he proposition that in the stop-and-frisk situation where, as in the routine traffic arrest, there can be no evidentiary basis for a search, the *most* intrusive search the Constitution will allow is a limited frisk for weapons, and even then only when the officer reasonably believes himself to be in danger.[14]

Officer Jencks had admitted that he did not fear an assault from the defendant. After a thorough discussion of the factual differences between mere traffic citation stops, full custody arrests, and stop-and-frisk situations, the appellate court held: "Whenever a police officer, acting within the bounds of his authority, makes an in-custody arrest, he may . . . conduct a limited *frisk* of the suspect's outer clothing in order to remove any weapons the suspect may have in his possession."[15] Since the policeman, under these facts and the court's interpretation of the fourth amendment, could only conduct a frisk for weapons, the search was unconstitutional as he had exceeded allowable constitutional conduct. Upon that finding, the conviction gained through improperly seized evidence was reversed under the exclusionary rule.

The Supreme Court reversed the Circuit Court's decision through a complete rejection of its *Terry* approach under these facts, and a declaration that a complete search incident to an arrest was allowed even though the arresting officer had no belief that evidence or weapons were on the arrestee. The Court also held that the authority to search incident to an arrest need not be litigated in each case.[16] The Court first distinguished *Terry* since it consisted of a stop based upon suspicion while Robinson's arrest was based upon probable cause of the violation of two traffic statutes. "*Terry,* therefore, affords no basis to carry over to a probable cause arrest the limitations this Court has placed on a stop-and-frisk search permissible without probable cause."[17] The Court further held that a search incident to an arrest was not limited to situations where the searcher had a belief that evidence or weapons were on the person of the arrestee.[18] Therefore, the lower court's dependence upon *Terry* and *Peters v. New York*[19] to establish such a limited scope upon the search instituted here was unfounded.

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14 United States v. Robinson, 471 F.2d 1082, 1095 (D.C. Cir. 1972) (emphasis in original). For an analysis that supports the Court's appraisal of the limited search allowable under these circumstances, *see,* Note, *Scope Limitations for Searches Incident to Arrest,* 78 YALE L.J. 433 (1969).

15 *Id.,* at 1098. (Footnotes omitted, emphasis in original).

16 United States v. Robinson, 94 Sup. Ct. 467 (1973).

17 *Id.,* at 473.

18 *Id.,* at 474.

19 392 U.S. 40 (1968). Although language in *Peters* indicated that the search was limited as the lower court had found, the Court said it did not believe that the court intended to impose such a "novel and far reaching limitation" upon the right to search although the language had been approved in Chimel v. California, 395 U.S. at 794. The Court failed to cite any cases which found such a limitation as "novel" in fourth amendment interpretation. United States v. Robinson, 94 Sup. Ct. 467 (1973).

After the Court concluded that previous cases and the history of the fourth amendment did not support the lower court's limitations, the majority[20] stated that their fundamental disagreement with the Circuit Court arose "from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the search of a person incident to a lawful arrest."[21] Proceeding from that fundamental disagreement and further concluding that its decision was fortified by *Weeks*,[22] history[23] and practice in England and the United States and that its holding was not precluded by stare decisis, the Court concluded that:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc judgment* which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. . . . A custodial arrest of a suspect based on probable cause is reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.[24]

The validity of this decision *can be questioned* since it allows a form over substance fact determination in its rejection of the lower court's reliance on *Terry*, even though the interests to be balanced and factual situations are, in reality, parallel. Further, based upon recent decisions which held that the allowable scope of a warrantless search is limited to a search for weapons or evidence, the search was invalid since the arresting officer admittedly sought no further evidence or weapons. But most importantly, the decision must be doubted since the Court has, in effect, written a general search warrant that allows a full search of the person by any police officer who can effectuate a full custody arrest even if it is for a traffic or status violation. The search will never have to withstand judicial scrutiny since the lawful arrest validates the search. Such a holding does basic violence to the purpose of the fourth amendment, *i.e.*, to place a neutral and detached magistrate between governmental intrusions and the privacy of a citizen.

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[20] Mr. Justice Rehnquist wrote the majority opinion. Justice Powell concurred while Mr. Justice Marshall dissented, joined by Justices Douglas and Brennan.

[21] United States v. Robinson, 94 Sup. Ct. 467, 477 (1973).

[22] Weeks v. United States, 232 U.S. 383 (1914).

[23] For descriptions of the history of the fourth amendment, *see*, N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937), and Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part One*, 3 RICH. L. REV. 278 (1969), *Part Two*, 4 RICH. L. REV. 60 (1969).

[24] United States v. Robinson, 94 Sup. Ct. 467, 473 (1973).

The Court concluded, in part, that *Terry* did not apply because its frisk was based upon reasonable suspicion while the present case was based upon probable cause. Such an interpretation, however, fails to fathom the real parallel that exists between these cases which is that both searches had to be limited since they were not based upon the officer's probable cause of the existence of weapons or evidence on the person being searched but upon something less, and anything less than probable cause will not support a search whether it is instituted with or without a warrant. Officer Jencks testified that: "I just searched him [Robinson]. I didn't think about what I was looking for. I just searched him."[25] He did not fear the man he had arrested nor did he believe that he would find either evidence or weapons during his rummaging through Robinson's clothes. The problem is that the Court failed to recognize that while Jencks had probable cause to arrest for two traffic violations, he did not have any suspicion that a warrantless search was necessary. Imagine a police officer attempting to obtain a search warrant for the search of a person by stating that he did not know what he was looking for, but that he just would like to search the person. That was what was allowed here but *without* a warrant. The officer was just looking for something, anything, and happened to find heroin. The point to be emphasized is that "the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation possible."[26] Those circumstances must be determined by balancing the need to search against the invasion which the search entails.[27]

The circumstances and interests present in *Robinson* and *Terry* are similar. The police officer must be limited to a search which accomplishes the governmental goal which is the protection of the officer from assault with a concealed weapon.[28] There was simply no other need to instigate a search, and, therefore, *Terry* should have been used since it supplies a ready analogy to both fulfill the government's needs and to limit the intrusion that satisfies the protections of the individual. The Court's rejection of the Circuit Court's decision to so analyze *Terry* has eliminated an important right based solely on the initial contact between Robinson and Jencks. This has been done even though case law that could have been used for deep, valid analysis of the interests involved was present but ignored. Thus, a shallow form over substance determination has extinguished Robinson's fourth amendment rights.

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25 United States v. Robinson, 471 F.2d 1082, 1089 (1972).

26 Terry v. Ohio, 392 U.S. 1, 1969, *citing* Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

27 Camara v. Municipal Court, 387 U.S. 523 (1967). For an extensive examination of the balancing of interests, *see*, Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and Lee*, 61 CAL. L. REV. 1011 (1973).

28 The Circuit Court extensively examined the usefulness of a frisk in finding concealed weapons. United States v. Robinson, 471 F.2d 1082, 1099 *et seq.* (1972).

The Court also based its decision upon the long line of cases that had its beginning with *Weeks* which have held that there is a right to search incident to arrest. Since the search is an allowable exception, it is reasonable under the fourth amendment. That conclusion, however, only states a general rule without qualification. The problem is that while such searches are considered to be valid, their allowable scope is the issue that has plagued the courts. That scope has been limited by allowing officers to only seek either weapons or evidence. In *Chimel v. California,*[29] where the court declared invalid the search of an arrestee's entire house incident to an arrest, the allowable scope was found by looking at the reasonableness of the actions of the officer:

> [I]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.[30]

Furthermore, in a recent case also cited by the majority to validate the general rule allowing a search incident to an arrest,[31] *Cupp v. Murphy,*[32] the court stated:

> We believe this search was constitutionally permissible under the principles of *Chimel v. California. . . . Chimel* stands in a long line of cases recognizing an exception to the warrant requirement when a search is incident to a valid arrest. . . . *The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession. . . . The Court recognized in Chimel that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement.*[33]

Based upon that reasoning, the court held that the use of physical evidence gained by scraping Murphy's fingernails at a station house detention was permissible since probable cause existed as to Murphy's implication in the murder and the ready destructibility of the evidence involved. In other words, the police could scrape Murphy's fingernails for physical evidence of the murder *under these special circumstances* but they could not examine his wallet in the hope of finding incriminating evidence. An examination of these two recent cases belies the court's dependence upon the general allowance of a search incident to an arrest since that allowance must be tied to that exception's rationale; the search for weapons or evidence that the officer reasonably believes to be in the arrestee's

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29 395 U.S. 752 (1961).

30 *Id.,* at 763. *See,* Player, *Warrantless Searches and Seizures,* 5 GEO. L. REV. 269, 270 (1971).

31 United States v. Robinson, 94 Sup. Ct. 467, 472 (1973).

32 412 U.S. 291 (1973).

33 *Id.,* at 295 (emphasis added).

possession. The reason why such searches are limited is that a warrantless search of any type is regarded as suspect and, unless allowed by exigent circumstances, illegal per se.[34]

The problem with the present holding is that it does not examine the reasons underlying the general rule and such loose reasoning permits the exception to eventually overtake the rule. "[T]o assume that this exception of a search incidental to arrest permits a free handed search without warrant is to subvert the purpose of the Fourth Amendment by making the exception displace the principle."[35] This case seems to open a wide new exception that was not understood to be present before. Past cases, notwithstanding the view of the majority, have always determined the validity of a search incident to an arrest by whether it was reasonable conduct based on a desire to find either evidence or weapons. The lack of either purpose in this case and the allowance of Officer Jencks' "fishing expedition" seems to fly directly in the face of traditional fourth amendment values.

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crimes and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.[36]

While the scope of an allowable search has been limited since *Agnello v. United States,* the reasons that allow such a search have not, until *Robinson,* been doubted.

The most surprising and dangerous finding by the court was its decision to base the search on the validity of the arrest without making any further determination of the search itself. This decision, in effect, writes a search warrant for any police officer who can effectuate a full custody arrest. Pure status arrests, *i.e.,* public intoxication, seem to be included. Such rationale allows bootstrap reasoning to validate the search—"The arrest is valid, therefore the search is valid." Under this ruling, an intoxicated arrestee could be strip-searched with no judicial examination of that search. Such a holding does damage to the basic goal of the fourth amendment.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a

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[34] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[35] United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting).

[36] Agnello v. United States, 269 U.S. 4, 5 (1925), *citing* Carroll v. United States, 267 U.S. 132 (1925), and *Weeks* as support for this statement.

> neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[37]

This decision removes the neutral and detached magistrate and admittedly allows the policeman's ad hoc judgment to stand as long as the arrest is valid. The court gives police the ability to use traffic offenses as a basis to validate searches where they seek not the traffic offender but the ability to search the individual. Thus a person driving a car with a tail light burned out could be stopped and arrested so that a search to find incriminating evidence could be instituted.[38]

Such a decision is too loose with its allowances of police discretion in an area that is "pre-eminently the sort of question which can only be decided in the concrete factual circumstance of the individual case."[39] That such a factual case-by-case approach has been the rule is supported by cases too numerous to mention.[40] *Robinson*, however, ends this judicial examination and places between the individual and a police officer the "quick *ad hoc* judgment"[41] of the police officer. And that judgment will no longer be broken down into the arrest and the search.

From the beginning the purpose of the fourth amendment has been to place a calm and neutral person between the citizen and the government. That such a desire to retain a neutral person still exists is apparent from the numerous cases cited by the Appellate Court that have held a search of the person incident to an arrest for a traffic violation invalid under the fourth amendment.[42] This decision removes that neutral person so earnestly sought and retained for the past 200 years.[43]

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[37] Johnson v. United States, 333 U.S. 10, 13-14 (1948). The Amendment, of course, applies with equal validity to persons. Katz v. United States, 389 U.S. 347 (1968).

[38] *See*, Marshall, J., dissenting, 94 Sup. Ct. 467 at 482. While Officer Jencks did not have absolute discretion in making an arrest subsequent to a traffic violation since that discretion is limited by D.C. Police General Orders, *See*, Metropolitan Police Department General Order, No. 3, Series 1959 (April 24, 1959). Many police officers do have such discretion. *See*, Leftkowitz v. United States, 285 U.S. 452, 467 (1932). For an examination of the problems faced when there is a search incident to a traffic violation, *see*, Note, *Search Incident to Arrest for Traffic Violation*, 1959 WISC. L. REV. 347 (1959).

[39] Sibron v. New York, 392 U.S. 40, 59 (1968).

[40] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971):

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."

[41] United States v. Robinson, 94 Sup. Ct. 467, 477 (1973).

[42] United States v. Robinson, 471 F.2d 1082, 1103 (D.C. Cir. 1973). *See*, Note, *supra*, note 38.

[43] For the surprising passion aroused by the fear that the fourth amendment would not be included in the Bill of Rights *see* Patrick Henry's speech as quoted in LASSON, *supra* note 23 at 92.

CONCLUSION

The fourth amendment is intended to eliminate all unreasonable intrusions by the government into a citizen's privacy. The determination of the reasonableness of the intrusion is to be accomplished by a judicial officer, *not* a police officer. As one Justice explained the need for the search warrant:

> [T]he presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[44]

And where a police officer has acted without prior judicial approval, his actions, whether based on an arrest or not, should be examined by a judicial officer to prevent the slow erosion of these rights.

The court should have, first, opened the search to its review. Upon that decision, the search would be invalid either because it exceeded the limits placed on a search incident to a valid arrest as allowed in *Chimel* or since the situation is analogous to *Terry,* the search went beyond the scope needed to protect the government's interest in allowing any search.

The court's refusal to do so allowed what was a flexible exception to become an inflexible rule[45] which has encroached upon a constitutionally protected area. It is a classic example of a well-defined exception slowly becoming a rule through shallow interpretation. Justice Frankfurter's fear, expressed in Rabinowitz, dissenting, has become a reality.[46]

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44 MacDonald v. United States, 335 U.S. 451, 455-456 (1949).

45 "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and any stealthy encroachments thereon." Boyd v. United States, 116 U.S. 616, 635 (1886).

46 United States v. Rabinowitz, 339 U.S. 56, 80 (1959) (Frankfurter, J., dissenting). "The exceptions cannot be enthroned into the rule."