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The Washington Law of Arrest Without Warrant—Incidental Search

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COMMENT

THE WASHINGTON LAW OF ARREST WITHOUT WARRANT—INCIDENTAL SEARCH

The scope of this comment is limited to considerations of the substantive law of arrest without a warrant and the permissible scope of searches and seizures incidental thereto. The discussion of substantive requirements for arrest without warrant and its incidental search will be confined to present Washington case law as measured against the federal constitutional and common law backgrounds.

Only cursory comments will be made on the substantive requirements regarding warrants; the treatment of warrants will be limited to those situations in which the court has equated the requirements for arrest without warrants with the requirements for the issuance of a warrant. Arrests by private citizens will not be treated since they either rarely occur or are seldom litigated. No attempt will be made to discuss the pros and cons of the "exclusionary rule" as this has been quite ably done elsewhere.[1]

ARREST[2] WITHOUT WARRANT BY PEACE OFFICER[3]

The common law reflected an attempt to balance the conflicting

[1] Pro: See, *e.g.*, Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1885); People v. Cahan, 44 Cal. 2d 454, 282 P.2d 905 (1955). See also GLUECK, CRIME AND JUSTICE 64-75 (1945); Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144 (1948). Con: 8 WIGMORE, EVIDENCE § 2264 (1961). See State v. Rousseau, 40 Wn.2d 92, 97, 241 P.2d 447, 450 (1952) (concurring opinion). See generally, Morris, *The End of an Experiment in Federalism—a Note on Mapp v. Ohio*, p. 407 *supra*.

[2] The RESTATEMENT, TORTS §§ 112-17 (1934) [hereinafter cited RESTATEMENT] will be relied upon for the general definition of terms in the discussion of the law of arrest. Where applicable, the Washington court's definitions will be used.

ARREST. "The taking of another into the custody of the actor for the actual or purported purpose of bringing the other before a court, or otherwise securing the administration of the law." RESTATEMENT § 112. Arrest usually involves restriction of freedom of the arrested person, *i.e.*, an imprisonment. "Thus, while most arrests involve a confinement, some do not, as where the actor takes one into custody by a mere touching while serving a valid warant." 1 HARPER & JAMES, TORTS § 3.18 at 275 (1956) [hereinafter cited HARPER & JAMES]. The Washington court has defined imprisonment as, "any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain or to go where he does not wish to go, is an imprisonment." Harris v. Stanioch, 150 Wash. 380, 384, 273 Pac. 198, 199 (1928), quoting 11 R.C.L. 793 (1916). False imprisonment is then (the unlawful arrest of a person) such an act without a warrant, or by an illegal warrant, or a warrant illegally executed. Pallet v. Thompkins, 10 Wn.2d 697, 118 P.2d 190 (1941). But where one voluntarily accompanies his accusers for the purpose of proving his innocence there is no imprisonment: there must be some restraint to make it false imprisonment. James v. MacDougall & Southwick Co., 134 Wash. 314, 235 Pac. 812 (1925).

[3] "A peace officer is a person designated by public authority, whose duty it is to

interests of the individual in his personal liberty and of society in the apprehension of criminals by limiting the privilege of arrest without warrant. A distinction was made between the privilege of a private person and the privilege of a peace officer to arrest without warrant.[4] A further distinction was made on the basis of whether the arrest was for a felony[5] or for a misdemeanor[6] amounting to a breach of the peace.[7] At the common law, a private individual could arrest without warrant, if (1) the felony for which he arrested had actually been committed; and (2) he reasonably believed the arrested person had committed it; or (3) if the arrested person had attempted to commit a felony in the private citizen's presence and the arrest was made at once or upon fresh pursuit; or (4) if the arrested person was committing a breach of the peace in the private citizen's presence, or having so committed, the citizen reasonably believed the breach would be renewed.[8] A private citizen took the risk of liability for false imprisonment if a felony had not actually been committed.[9]

A peace officer, at common law, was privileged to arrest in all situations in which a private citizen was privileged. The peace officer, unlike the private citizen, was not liable, even if a felony had not actually been committed.[10] He could arrest if he had reasonable grounds to suspect a felony had been committed and that the arrested person had committed it.[11]

In respect to offenses less than felonies, a private citizen's privilege was very nearly the same as a peace officer's.[12] Both could arrest for a misdemeanor amounting to a breach of peace committed in their

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keep the peace and arrest persons guilty or suspected of crime." RESTATEMENT § 114. RCW 9.78.040 provides: "For the purposes of this chapter 'peace officer' means a duly appointed city, county or state law enforcement officer."

[4] 1 HARPER & JAMES § 3.18.

[5] RCW 9.01.020 states: "Every crime which may be punished by death or by imprisonment in the state penitentiary is a felony."

[6] The same statute further states: "Every crime punishable by a fine of not more than two hundred and fifty dollars, or by imprisonment in a county jail for not more than ninety days, is a misdemeanor. Every other crime is a gross misdemeanor." Where an act is prohibited by statute but no penalty is set out, "the committing of such act shall be a misdemeanor." RCW 9.01.090.

[7] "A breach of the peace is a public offense done by violence or one causing or likely to cause an immediate disturbance of public order." RESTATEMENT § 116. The Washington court has said breach of the peace is a "generic term, and includes all violations of the public peace or order calculated to disturb the public tranquility...." Smith v. Drew, 175 Wash. 11, 16, 26 P.2d 1040, 1043 (1933). See also, RESTATEMENT §§ 119-121; 1 HARPER & JAMES § 3.18.

[8] RESTATEMENT §§ 119-21; 1 HARPER & JAMES § 3.18.

[9] 1 HARPER & JAMES § 3.18; RESTATEMENT § 119, comment *i*.

[10] 1 HARPER & JAMES § 3.18.

[11] *Ibid.*

[12] *Ibid.* See Smith v. Drew, 175 Wash. 11, 26 P.2d 1040 (1933).

presence, "if the arrest is made immediately or in prompt and unbroken pursuit, and in no other cases."[13] A peace officer, however, could arrest all those who apparently had participated in a riot or affray in his presence even though some might be innocent.[14] The private citizen was not so privileged. The privilege to arrest in such a situation was extended to a peace officer because the performance of his duty to preserve the peace would be impaired unless he was given wide discretion in performance of his duty and protected from liability should he make an honest and reasonable mistake.[15]

With this brief background of common law standards, attention can now be focused on the Washington law of arrest without warrant by a peace officer.

MISDEMEANOR ARRESTS WITHOUT WARRANT

Probably the most significant change in the common law of arrest made by the Washington court is in the area of arrest for misdemeanors. In *State v. Hughlett*[16] the court said:

> In misdemeanor cases the officer may not arrest without a warrant therefor, except where the *crime* is being committed in his presence, or where he had actual knowledge that the person about to be arrested committed the crime.[17] (Emphasis added.)

The next year the court in *Coles v. McNamara*,[18] a false imprisonment action involving the privilege of an officer to arrest the plaintiff for a misdemeanor, said that it was up to the jury to decide:

> Whether appellent McNamara had *reasonable grounds to believe,* and did believe, that a violation of the law was being committed in his presence for which he had a right to arrest respondent. . . .[19] (Emphasis added.)

Following these decisions came *State v. Deitz*,[20] in which the court held that "even though the misdemeanor committed in the presence of an officer be not a breach of the peace, nevertheless the right to arrest exists."[21] Thus the Washington court abrogated the requirement of "breach of the peace" and provided a defense of "reasonable

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[13] 1 HARPER & JAMES § 3.18, at 281.
[14] *Ibid.* RESTATEMENT § 121, comment *j*.
[15] 1 HARPER & JAMES § 3.18; RESTATEMENT § 121, comments *g* and *j*.
[16] 124 Wash. 366, 214 Pac. 841 (1923).
[17] *Id.* at 368, 214 Pac. at 842.
[18] 131 Wash. 377, 230 Pac. 430 (1924).
[19] *Id.* at 384, 230 Pac. at 432.
[20] 136 Wash. 228, 239 Pac. 386 (1925).
[21] *Id.* at 229, 239 Pac. at 387.

cause" in misdemeanor cases. These changes retreated from the common law, for at common law "both an officer and citizen take the risk that the person arrested is innocent if an arrest is made for an offense less than a felony . . . ."[22] In Washington, therefore, the privilege of arrest exists whenever the peace officer has reasonable grounds to believe that a misdemeanor is being committed in his presence.[23]

Breach of the peace retains significance in the situation where a misdemeanor is not committed in an officer's presence, such as in one's own home. In that situation an officer is privileged to arrest without warrant only "if the person is guilty of disorderly conduct therein such as disturbs the peace and quietude of the general public, or . . . the neighborhood in which he resides . . . ."[24] However, this approach of the Washington court necessarily highlights two key terms: "probable cause" and "presence."

PROBABLE CAUSE. Probable cause to believe that a misdemeanor is being committed in the presence of the officer is essential to a valid arrest.[25] If, however, the officer erroneously, but with probable cause, believed the arrested person had committed a misdemeanor, he ". . . is immune from liability for acting in good faith upon that belief . . . ."[26]

Anonymous information that *X* is committing a misdemeanor does not constitute probable cause; but when coupled with information that officers have obtained to produce an honest and reasonable belief that the law is being violated, the arrest may be made.[27]

On information supplied by anonymous informers the court has said:

> No faithful and vigilant police officer is justified in closing his ears to anonymous information and rejecting it without investigation as being unworthy of his notice. It is the duty of every officer, in enforcing the law, to listen carefully to all such anonymous information; *and, if it is supported by his prior knowledge of the facts or by subsequently learned confirmatory facts* which reasonably may, and which do, produce in his mind an honest belief that the law is being violated, then he has reasonable and probable cause to act, and he should act accordingly, notwith-

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[22] 1 HARPER & JAMES § 3.18 at 283.

[23] For a more recent application of this development see Sennett v. Zimmerman, 50 Wn.2d 649, 314 P.2d 414 (1957). The whole line of cases developing this doctrine is criticized in Note, 33 WASH. L. REV. 203 (1958).

[24] Ulvestad v. Dolphin, 152 Wash. 580, 589, 278 Pac. 681, 684 (1929).

[25] Sennett v. Zimmerman, 50 Wn.2d 649, 314 P.2d 414 (1957).

[26] *Id.* at 651, 314 P.2d at 416.

[27] State v. Zupan, 155 Wash. 80, 283 Pac. 671 (1929); State v. Knudsen, 154 Wash. 87, 280 Pac. 922 (1929).

standing the character of the information which first caused him to investigate.[28] (Emphasis added.)

Thus, an anonymous "tip" standing alone would not justify arrest, but the "tip" that *X* would be transporting illegal liquor plus knowledge that *X* was a prior liquor law violator, and the over-loaded condition of the truck did add up to probable cause.[29]

Similarly, general information that between the hours of eleven and two an automobile carrying contraband will pass through town is not sufficient to permit officers to stop cars entering the town so that they may conduct an investigation.[30] Mere information is not enough. A fortiori, suspicion is not enough.[31] Therefore, *X's* arrest was unlawful where a sheriff merely suspected, but had no knowledge that *X* had liquor in his possession (a misdemeanor);[32] but suspicion based on observation of a prior offender's activities for two days by officers familiar with the ways of bootleggers was held to be probable cause.[33]

PRESENCE. "In the officer's presence" means within the perception of the officer. It is not enough that a misdemeanor be committed within the proximity of the officer; he must be aware of its commission.[34] If the officer "by the use of any of his senses, perceives that an act is being done, and forthwith investigates and finds that the act constitutes . . ."[35] a misdemeanor (in Washington), he is privileged to arrest. An officer, however, cannot salvage an unlawful arrest for a felony by later discovering that the person wrongfully arrested possessed burglary tools—a misdemeanor. The misdemeanor was not committed in his presence, because he had no knowledge of their existence when he made the arrest.[36]

SHOPLIFTING: A SPECIAL CASE

In 1959 the Washington legislature codified provisions for arrest without warrant in the special instance of the gross misdemeanor of

[28] State v. Bantam, 163 Wash. 598, 601, 1 P.2d 861, 862 (1931).
[29] State v. Knudsen, 154 Wash. 87, 280 Pac. 922 (1929).
[30] Mitchell v. Hughes, 104 Wash. 231, 176 Pac. 26 (1918).
[31] See Giacona v. State, 298 S.W.2d 587, 588-89 (Tex. Crim. App. 1957): "[T]he arrest of a person upon pure supposition or belief is in violation of both state and federal constitutional guarantees of freedom from unreasonable arrest."
[32] State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922).
[33] State v. Dillon, 155 Wash. 486, 284 Pac. 1016 (1930). See also State v. Kittle, 137 Wash. 173, 241 Pac. 962 (1926).
[34] RESTATEMENT § 119, comment *n*.
[35] *Ibid.*
[36] State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948). *But cf.* United States v. Rabinowitz, 339 U.S. 56 (1950).

shoplifting.[37] The legislature provided: "A peace officer may, *upon a charge being made* and without a warrant, arrest any person whom he has *reasonable cause to believe* has committed or attempted to commit the crime of shoplifting."[38] (Emphasis added.) Another provision[39] makes reasonable cause a defense to a "civil or criminal action for false arrest, false imprisonment, or wrongful detention against a peace officer, by a person *suspected* of shoplifting."[40] (Emphasis added.)

Obviously the statute leaves unanswered the very important question—what is reasonable cause? In all probability, however, the court will rely on its previous definitions of reasonable or "probable cause" in its interpretation of this statute—the court seemingly uses the terms interchangeably. Prior to this statute the court held that mere suspicion or bare information by a third party was not probable cause.[41] Yet, the statute can certainly be read as making information alone sufficient grounds for arrest. The provision "upon a charge being made" read with the defense section which uses the word *suspected* could certainly be interpreted as a legislative recognition that the peace officer will normally only have a charge or information of a third party upon which to base his suspicion and this suspicion may be reasonable cause to believe. This construction would further extend the privilege of arrest in the narrow area of shoplifting.

In false imprisonment actions, whether an officer had probable cause to arrest is a jury question.[42] In a shoplifting case, [43] just two years prior to the passage of the statute, a store clerk paid by the store owner, but deputized as a city police officer, by *her own* observations concluded that the plaintiff had shoplifted and arrested him. The deputized detective appealed from an adverse judgment, asserting that the trial court had committed error in instructing the jury that the defendant must prove that the plaintiff *actually committed* the misdemeanor for which he was arrested. The court in holding the instruc-

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[37] RCW 9.78.010-.040. See Morris, *Washington Legislation—Criminal Law*, 34 WASH. L. REV. 308 (1959).

[38] RCW 9.78.020.

[39] RCW 9.78.030.

[40] Notice that an arrest may involve other torts not provided for in this provision, *e.g.*, assault, battery, slander.

[41] State v. Knudsen, 154 Wash. 87, 280 Pac. 922 (1929). See Kalkanes v. Willestoft, 13 Wn.2d 127, 124 P.2d 219 (1942).

[42] Sennett v. Zimmerman, 50 Wn.2d 649, 314 P.2d 414 (1957); Coles v. McNamara, 131 Wash. 377, 230 Pac. 430 (1924). But when legality of an arrest is challenged by a motion to suppress evidence, probable cause is a question of law for the court. State v. Thornton, 137 Wash. 495, 243 Pac. 12 (1926).

[43] Sennett v. Zimmerman, *supra* note 42.

tion to be erroneous held that probable cause to believe that a misdemeanor was committed in the presence of the officer was justification for making an arrest without a warrant. In so holding, the court distinguished three cases[44] on the grounds that the officer in those cases had relied upon information of a third person and not upon his personal observation, and the conduct of the accused did not give rise to a belief that the offense was being committed in the presence of the arresting officer.

It is doubtful whether this distinction will be carried over in the interpretation of the statute, since it makes no mention of "in the presence of the arresting officer," although "presence" was required at common law. Further, the court's statement of policy would seem to indicate that the officer may arrest under the statute on information supplied by a third person if he acts reasonably.

> To require police officers to be insurers of the correctness of their judgment would hamper them in the performance of their duties. Under such circumstances, they would be most reluctant to make any arrests for fear that they would be held liable for having made an honest and reasonable mistake.[45]

Although this was said in connection with what the officer actually observed, that is, in his presence, it would take very little to stretch this policy to cover shoplifting cases, particularly since the statute makes no mention of "in the presence of" and in fact contemplates the officers' acting on information of a third person.[46]

The argument that the statute should be strictly construed since it is penal in nature and in derogation of the common law has had some of its force removed by the *Coles* and *Sennett* line of cases. As will be remembered, a peace officer at common law was privileged to arrest

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[44] City of Tacoma v. Houston, 27 Wn.2d 215, 177 P.2d 886 (1947); State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922); Mitchell v. Hughes, 104 Wash. 231, 176 Pac. 26 (1918).

[45] Sennett v. Zimmerman, 50 Wn.2d 649, 651, 314 P.2d 414, 416 (1957).

[46] For potential tort liability of an informer see Smith v. Drew, 175 Wash. 11, 26 P.2d 1040 (1933), which held that one who merely provides information to the officers and did not direct or assist in arrest could not be liable for the acts of the officer. For potential liability of private person or corporation for acts of police officer in their employ see Wheatley v. Washington Jockey Club, 39 Wn.2d 163, 234 P.2d 878 (1951), holding that the employer is not liable when a police officer acts in his public capacity but is liable when police officer is acting in the performance of his duties for which he is employed, or his movements are actively directed by the employer. It is a jury question whether the officer was acting in a public or private capacity. Hayes v. Sears Roebuck & Co., 34 Wn.2d 666, 209 P.2d 468 (1949). A deputized employee, in the absence of some express limitation of authority, has the same power of arrest as is conferred upon regular police officers. Sennett v. Zimmerman, 50 Wn.2d 649, 314 P.2d 414 (1957). And, evidently, the same privileges and immunities.

only if, in fact, the misdemeanor actually had been committed.[47] Under the *Coles* and *Sennett* cases the Washington court departed from this common law concept and held that probable cause privileges the arrest. Thus it could be argued that the "common law" in Washington is stated in the *Sennett* case and the statute deviates from that holding only in respect to the requirement of presence.

In any event, one relying upon the statute must take a calculated risk until the court has announced its real import.

FELONY ARRESTS WITHOUT WARRANT

The court in the leading case of *State v. Hughlett*,[48] stated the criteria for the arrest without warrant by an officer in felony cases.

> But in cases amounting to a felony, if the officer believe, and have good reason to believe, that a person has committed, or is about to commit, or is in the act of committing the crime, then he may arrest without a warrant. But the arresting officer must not only have a real belief of the guilt of the person about to be arrested, but such belief must be based upon reasonable grounds. Proper cause for arrest has often been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. An officer may not arrest simply because he has some fleeting idea that one may be about to commit a felony, but he must have reasonable grounds for his belief.[49]

No attempt will be made here to catalog all the cases on probable cause; those that follow are cited as illustrative of the Washington court's attitude on the necessary requirements of probable cause.

The mere assertion by a third person that X is wanted in another county on a felony charge does not constitute probable cause, since there is "no foundation in fact or sufficient circumstances on which to rest a belief that the appellant had committed a felony in King County—or anywhere else."[50] Where, however, the sheriff of one county obtains a warrant for the arrest of X and requests the police in another county to detain him, the police have reasonable cause to believe that a felony has been committed and may arrest, even though the sheriff did not give the police all the information he had.[51] A

[47] 1 HARPER & JAMES § 3.18.
[48] 124 Wash. 366, 214 Pac. 841 (1923).
[49] *Id.* at 368, 214 Pac. at 842-43.
[50] Kalkanes v. Willestoft, 13 Wn.2d 127, 130, 124 P.2d 219, 220 (1942).
[51] State v. Britton, 137 Wash. 360, 242 Pac. 9 (1926). In State v. Symes, 20 Wash. 484, 488, 55 Pac. 626, 628 (1899), the court approved an instruction that a law officer is authorized to arrest "...when he has knowledge that a warrant has been issued upon a charge of felony by proper authority in any county within this state. . . ."

sheriff, acting on a letter from a prosecuting attorney, stating that *X* was guilty of a felony, had probable cause to arrest.[52] Where federal agents and a county sheriff informed city police that *X* would receive illicit liquor from a person arriving on a certain train, the police who observed the accused receive a suitcase had probable cause to believe a felony was in progress.[53]

In *State v. Young*[54] police received a radio call that a robbery had been committed and that a certain type of automobile was used in the escape. The police arrested the driver of an automobile answering the description and found within ten blocks of the scene of the crime and within a few minutes thereafter. The court held these facts established probable cause. However, four years previously in an analogous case, *State v. Miles*,[55] the court held that officers did not have probable cause to arrest defendants on the bare information that two young men had committed a robbery. The officers had received the information by radio call and arrested the defendants, about forty years old, forty-five minutes later. The court said:

> That information would certainly not have been sufficient to justify the issuance of a search warrant, or a warrant of arrest, had the officers applied for one. It stands to reason no wider latitude is allowed in arresting without a warrant, than in securing one.[56]

In the *Young* case the court specifically disclaimed any intent to abandon *Miles*, but said the proximity in time and place and the improbability that at 3:30 a.m. another such automobile would be in the vicinity were the distinguishing factors. If *Miles* stands, the direct implication is that the requirements for arrest without warrant are coextensive with the requirements for issuance of a warrant, that is, circumstances strong enough in themselves to move a dispassionate magistrate to issue a warrant.

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[52] Eberhart v. Murphy, 113 Wash. 449, 194 Pac. 415 (1920).

[53] State v. Thornton, 137 Wash. 495, 243 Pac. 12 (1926). *Accord,* Draper v. United States, 358 U.S. 307 (1959).

[54] 39 Wn.2d 910, 239 P.2d 858 (1952).

[55] State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948). *Compare* State v. Thompson, 158 Wash. Dec. 602, 364 P.2d 527 (1961).

[56] State v. Miles, *supra* note 55, at 930, 190 P.2d at 745. In this connection it is interesting to note that the Washington court, following Grau v. United States, 287 U.S. 124 (1932), has held that probable cause to issue a warrant must be based on evidence competent in a trial before a jury. Pallett v. Thompkins, 10 Wn.2d 697, 118 P.2d 190 (1941); Ladd v. Miles, 171 Wash. 44, 17 P.2d 875 (1932) (hearsay). The *Grau* holding was rejected in Draper v. United States, 358 U.S. 307 (1959). More recently the United States Supreme Court has held a warrant may issue on the basis of hearsay. Jones v. United States, 362 U.S. 257, 271 (1960). The Washington court has not expressly overruled the *Ladd* case but it has been rejected on the authority of Brinegar v. United States, 338 U.S. 160 (1949), in State v. Henker, 50 Wn.2d 809, 314 P.2d 645 (1957).

The officers in *Young*, said the court, had more than a suspicion (suspicion denotes a lack of facts or evidence) but had "reasonable grounds . . . sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty of the reported felony."[57] This, of course, does not state a reason but a conclusion to fit the formula of the *Hughlett* case.

Where police had knowledge that the accused had attempted to "utter and pass spurious paper" and then observed him attempt to negotiate the same, they were held to have probable cause.[58] Likewise, when a complaining witness informed the police that the accused were operating a bunco game and the police arrested upon a pre-arranged signal given by the complaining witness, probable cause existed.[59]

The court has been consistent in stating the test of probable cause as announced in *Hughlett*, but has sometimes been inclined to interpret facts to fit the test.[60]

An officer in making an arrest can only use that degree of force reasonably necessary to effect the arrest. An officer may not act wantonly or oppressively and is not justified in using deadly force if the person sought to be arrested attempts to escape, when the offense is a misdemeanor.[61] On the other hand, every man has the right to avoid illegal arrest by flight and by so doing does not subject himself to arrest as a fugitive.[62] A person may use reasonable force to resist arrest but the force must be proportionate to the injury attempted by the arresting party. If the person resisting illegal arrest uses excessive force he may be arrested for assault.[63]

SEARCH AND SEIZURE

Washington follows what has been denominated as the "federal exclusionary rule."[64] If the arrest is unlawful, any search incidental to the arrest is unlawful. Evidence obtained by unlawful search may be excluded by a timely motion to suppress.[65] This is required by the

[57] State v. Young, 39 Wn.2d 910, 918, 239 P.2d 858, 863 (1952).
[58] State v. Lindsey, 192 Wash. 356, 73 P.2d 738 (1937).
[59] State v. Mason, 41 Wn.2d 746, 252 P.2d 298 (1953).
[60] See, *e.g.*, Plancich v. Williamson, 157 Wash. Dec. 265, 357 P.2d 693 (1960). *But compare Plancich with* Ulvestad v. Dolphin, 152 Wash. 580, 278 Pac. 681 (1929) (drunk in own home).
[61] Coldeen v. Reid, 107 Wash. 508, 182 Pac. 599 (1919).
[62] State v. Rousseau, 40 Wn.2d 92, 241 P.2d 447 (1952).
[63] *Ibid.*
[64] See, *e.g.*, State v. Rousseau, 40 Wn.2d 92, 241 P.2d 447 (1952). See also FED. R. CRIM. P. 41(e).
[65] See, *e.g.*, State v. Gunkel, 188 Wash. 528, 63 P.2d 376 (1936) and cases cited therein.

fourteenth amendment to the United States Constitution as well. "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[66] The right is "implicit in the 'concept of ordered liberty' and as such is enforceable against the states through the due process clause." Due process is denied by a state court's refusal to exclude evidence obtained by state officers in violation of fourth amendment standards.[67] Thus the general rule that a search may be made incidental to a lawful arrest is tempered by this exclusionary rule which precludes the state from profiting from lawless law enforcement.

Illegally obtained evidence may be excluded by court order pursuant to a timely motion to suppress. Generally, a motion to suppress is timely only if made prior to trial[68] because the court is not bound, at the trial, to try collateral issues.[69] However, if it appears on direct or cross examination of the state's witness that articles were obtained unlawfully it is the *duty* of the trial court to exclude upon motion. [70] If the defendant had no opportunity to gain knowledge of the illegality of the arrest and subsequent search, the court should stop the proceedings and determine the collateral issues.[71] In view of these rules and the fact that discovery is now only partially available in criminal proceedings,[72] it would be tactically wise for an attorney, who is called in to defend shortly before trial or at trial, to move for a continuance in order to obtain time to ascertain all the facts surrounding the arrest. If the initial arrest were unlawful—a question of law for the court[73]—the state's case may vanish for lack of competent evidence, and the information may be dismissed. It must be borne in mind that the original

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[66] Mapp v. Ohio, 81 Sup.Ct. 1684, 1691 (1961).

[67] *Ibid.* The rule of Wolf v. Colorado, 338 U.S. 25 (1949) has long been under attack. See dissent in Ohio *ex. rel.* Eaton v. Price, 364 U.S. 263 (1960). It has now been overruled by the *Mapp* case, *supra* note 66.

[68] State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948); State v. Gunkel, 188 Wash. 528, 63 P.2d 376 (1936); State v. Dersiy, 121 Wash. 455, 209 Pac. 837 (1922). But the court need not pass on the motion when made but may postpone action until the trial. The trial court will not be reversed for exercising its discretion to postpone unless a clear abuse of discretion is shown. State v. Green, 43 Wn.2d 102, 260 P.2d 343 (1953).

[69] State v. Dersiy, 121 Wash. 455, 209 Pac. 837 (1922).

[70] *Ibid.*

[71] *Ibid.* State *ex. rel.* Fong v. Superior Court, 29 Wn.2d 601, 188 P.2d 125 (1948) suggests that certiorari is available if the motion to suppress is denied.

[72] See RCW 10.37.030; State v. Thompson, 54 Wn.2d 100, 338 P.2d 319 (1959), noted 35 WASH. L. REV. 168; State v. Olson, 54 Wn.2d 272, 340 P.2d 171 (1959).

[73] State v. Thornton, 137 Wash. 495, 243 Pac. 12 (1926).

arrest is the crux of the matter; if illegal, the evidence will be excluded. Generally, arrest and search are not made legal by virtue of what the search subsequently reveals; "in law it is good or bad when it starts and does not change character from its success."[74] Not only is physical evidence excluded if the arrest was illegal, but the arresting officers will not be permitted to testify as to what they heard or observed.[75]

A key question often is: How broad a search does the word "incidental" legally authorize? In the Washington context, "incidental" does not carry with it the usual denotation of "dependent on, or appertaining to, another thing (the principal); directly and immediately pertaining to, or involved in something else, though not an essential part of it."[76] In a recent case, *State v. Brooks*,[77] the Washington court held that a search *prior* to arrest *may* be considered "incidental thereto" where sufficient grounds for lawful arrest did exist before the search and seizure was made. In that case officers saw an illegally parked car and while questioning its occupants the officers noticed some uncuffed pants in bags in plain view.[78] The clothing was pulled from the bags which contained four men's suits with the price tags still attached. When questioned, the defendant denied knowledge or ownership of the car and clothing;[79] the officers placed him under arrest and booked him on suspicion of burglary and larceny.

The court held that the officer had "sufficient cause to believe a felony had been or was being committed by the appellant."[80] This illustrates the liberality with which the court views "probable cause." It is difficult to imagine how one can reach the conclusion that a felony

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[74] State v. Miles, 29 Wn.2d 921, 931, 190 P.2d 740, 745 (1948), quoting United States v. Di Re, 332 U.S. 581 (1948). *But cf.* State v. Britton, 137 Wash. 360, 365, 242 Pac. 377 (1926) where officers had knowledge of a burglary and were requested to detain and search *X:* "any irregularity in the manner of his arrest and detention was cured when evidence of his connection with the crime was discovered in his effects and his arrest became legal." The quoted material appears to be unnecessary since the sheriff of *L* county had requested that *X* be arrested for a burglary committed in *L* county, which was, as the court held, probable cause. See also State v. Much, 156 Wash. 403, 287 Pac. 57 (1930); State v. Symes, 20 Wash. 484, 55 Pac. 626 (1899).

[75] State v. Miles, note 74 *supra;* City of Tacoma v. Houston, 27 Wn.2d 215, 177 P.2d 886 (1947).

[76] WEBSTER, NEW COLLEGIATE DICTIONARY 421 (1957). "*[I]ncident to* does not mean: 'Coincidentally with, or aiding the course of, an arrest'." State v. McCollum, 17 Wn.2d 85, 90, 136 P.2d 165, 167 (1943).

[77] 157 Wash. Dec. 320, 357 P.2d 735 (1960). See also State v. Krantz, 24 Wn.2d 350, 164 P.2d 453 (1945).

[78] *Compare* Henry v. United States, 361 U.S. 98 (1959).

[79] Some Washington cases support the proposition that by denying ownership of the car or the goods the defendant cannot contend his constitutional rights have been violated by search of the car or the introduction of evidence found therein. State v. Vennir, 159 Wash. 58, 291 Pac. 1098 (1930). This is of doubtful validity in light of Jones v. United States, 362 U.S. 257 (1960) discussed *infra* at note 115.

[80] State v. Brooks, 157 Wash. Dec. 320, 322, 357 P.2d 735, 736 (1960).

is being committed from the singular fact of seeing a bag of clothes with uncuffed pants exposed. This perhaps may be viewed as judicial recognition of clairvoyant powers possessed only by policemen and judges.

The case could possibly have been resolved on the rationale of the *Deitz*[81] case, which allows an officer to arrest for a misdemeanor not amounting to a breach of the peace. The officers could have arrested for the misdemeanor (illegal parking) and then searched. This approach however would raise the question of the proper area of search. Yet, it is not beyond the realm of possibility and illustrates the import of the Washington deviation from the common law standards regarding the law of arrest. That is, if the arrest for the misdemeanor was valid, so would be the search; the "property seized either under a valid search warrant or as incident to lawful arrest may be used in the prosecution of a suspected person for a crime other than the one for which he was arrested, or for which a search warrant was issued."[82]

Some Washington cases have provided police officers with tools which allow searches of individuals suspected of crime although the police seemingly do not have the requisite probable cause to obtain a search warrant or warrant of arrest.[83] To circumvent fourth amendment standards,[84] under these cases the police need only keep the suspect under surveillance until he commits a misdemeanor; arrest him for that violation, and then search him in hopes of obtaining sufficient evidence upon which to base a conviction for the "real" crime. This technique is particularly effective where the crime is one of illegal possession, such as in narcotics cases.[85] It is very difficult to establish probable cause to believe that one is in possession of illicit goods, such as narcotics, because their compact nature permits concealment on the person so as to not arouse suspicion. The present case law plus statutes such as the vagrancy law[86] give the police a powerful and potentially dangerous search weapon, limited only by their imagination, good sense and judicial conscience.

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[81] State v. Deitz, 136 Wash. 228, 239 Pac. 386 (1925).

[82] State *ex rel.* Fong v. Superior Court, 29 Wn.2d 601, 609, 188 P.2d 125, 129 (1948).

[83] See, *e.g.*, State v. Brooks, 157 Wash. Dec. 320, 357 P.2d 735 (1960).

[84] The Washington court has equated article I, section 7 of the Washington Constitution with the fourth amendment of the United States Constitution. State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922). The court, however, has expressed reluctance to go as far as the federal courts in suppressing evidence. State v. Vennir, 159 Wash. 58, 291 Pac. 1098 (1930).

[85] See RCW 69.32.080; 69.33.430 (Search and seizure—warrant return).

[86] RCW 9.87. See particularly 9.87.010(8), (12)-(14). See State v. Dillon, 155 Wash. 486, 284 Pac. 1016 (1930).

Area of Search. A search incidental to a lawful arrest may be made of the person of the accused.[87] Items of personal effects obtained by the search which bear on the crime for which he was arrested or on any other crime may be introduced into evidence against him.[88] The court has reasoned that if an accused's person may be searched, so may the bags he is carrying and also the automobile of which he had control and possession at the time of his arrest.[89] The right to search a suspect's automobile was extended in *State v. Cyr*[90] to automobiles within a reasonably close proximity to the arrested person at the time of arrest. If the accused is arrested in his home, it too may be searched.[91]

Some very broad dicta in *State v. Evans*[92] forewarned of extreme possibilities if the court should apply *Cyr* type reasoning when an accused is arrested away from his home. In the *Evans* case officers lawfully arrested the defendant while he was on his way back to his hotel room. The officers searched his room and found some incriminating evidence. The court affirmed the trial court's denial of the motion to suppress the evidence on the theory that the defendant had consented to the search. In dicta, however, the court said that even in absence of the consent the search would have been lawful. The court reasoned that the room could have been searched had the defendant been arrested there and "the fact that he was caught before he reached the place ought not to require the application of a different rule."[93] The extreme possibility became a reality in *State v. McCollum*[94] where the defendant was arrested while in a hospital and officers without a search warrant searched his house for evidence. The court approved this conduct by relying on *Evans* for construing "incident to arrest" as not requiring that the arrest and search be "coincidental." This decision, if followed to its conclusion would dispense with search warrants after an accused has been arrested. The exception to requiring a search warrant will have swallowed the rule.

Further problems arise with respect to *illegal search prior to arrest.*[95]

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[87] See, *e.g.*, State v. Deitz, 136 Wash. 228, 239 Pac. 386 (1925).
[88] State *ex rel.* Fong v. Superior Court, 29 Wn.2d 601, 188 P.2d 125 (1948).
[89] State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923).
[90] 40 Wn.2d 840, 246 P.2d 480 (1952).
[91] State v. Evans, 145 Wash. 4, 258 Pac. 845 (1927).
[92] *Ibid.*
[93] *Id.* at 13, 258 Pac. at 849.
[94] 17 Wn.2d 85, 136 P.2d 165 (1943). See also State v. Green, 43 Wn.2d 102, 260 P.2d 343 (1953); State v. Beaupre, 149 Wash. 675, 271 Pac. 26 (1928).
[95] This situation should be distinguished from that of *State v. Brooks* in which the search was held valid where officers had grounds for the arrest prior to the search but did not arrest until after the search. In the situation now under discussion the search was conducted either in the absence of the suspect or prior to the time when

State v. Buckley[96] and *State v. Thomas*[97] involve similar fact patterns but reach contrary results. In *Buckley* officers investigating a complaint that a burglary had been committed in an apartment house went to the room of another tenant, entered without invitation and searched the room in the presence of the tenant. The search produced items which fitted the description of stolen articles; arrest followed. Upon the conviction of the defendant, the trial court realized it had erred in denying defendant's motion to suppress and granted a new trial; the supreme court affirmed. In *Thomas* police officers followed the trail of unartful felons to the room which they had rented. The officers looked over the transom and seeing the room unoccupied, entered and found a revolver and some clothing. They left the room intact and waited for the return of the occupants. Upon their return the officers arrested them and "found" incriminating evidence at the time of the arrest. The court disregarded the search prior to arrest and looked only to conduct subsequent to the arrest which they found lawful. This was done on the authority of *State v. Evans*.

In *Buckley* the court cited *Silverthorne Lumber Co. v. United States*[98] which seemingly would set the standard for jurisdictions following the exclusionary rule.

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, *but that it shall not be used at all.* Of course this does not mean that the facts thus obtained become sacred or inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot use it in the way proposed.[99] (Emphasis added.)

It would thus appear that *Thomas* is clearly wrong, both on the basis of precedent of the earlier *Buckley* case and on the philosophy of the exclusionary rule, that is, the state should not benefit from its own wrong.

Scope of Search. A consideration of overriding importance, after granting that search may be made incidental to a lawful arrest, is the allowable extent and scope of the search made. Should the fact of lawful arrest privilege officers to make a broad search beyond that

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the officers had reasonable cause to believe an accused was in any way involved with the crime.

[96] 145 Wash. 87, 258 Pac. 1930 (1927).
[97] 183 Wash. 643, 49 P.2d 28 (1935).
[98] 251 U.S. 385 (1920).
[99] *Id.* at 392.

which would be allowed under a search warrant issued by a magistrate?

If one were to look to the philosophy underlying search incident to arrest, the answer perhaps would be an easy one. It has been argued that search incident to arrest is authorized (1) to protect the arresting officer and to deprive the prisoner of potential means of escape; and (2) to avoid destruction of evidence.[100] From this it is asserted that the officer may seize anything within the prisoner's control: "What a farce it makes of the whole Fourth Amendment to say that because for many legal purposes everything in a man's house is under his control therefore his house—his rooms—may be searched."[101] This argument did not convince the Court and the result has been to create two lines of cases on the scope of search on the federal level.

One line is represented by *Abel v. United States*,[102] *Harris v. United States*,[103] and *United States v. Rabinowitz*.[104] They allow a broad and painstaking search of the entire premises occupied by the suspect at the time of his arrest. Under *Abel*, the arrest upon which the search is predicated need not be for violation of a criminal law or on facts indicating probable cause but may be an administrative arrest.[105] Any evidence turned up will be usable against the arrested person whether it bears upon the violation for which he was arrested or not.[106]

Prior to these cases, *United States v. Lefkowitz*[107] and *Go-Bart Importing Co. v. United States*[108] held that the fourth amendment would only permit a search—incidental to a lawful arrest—of the person and articles usable, accessible and in his personal custody.

It is interesting to note that the *Abel* line of cases would permit a search broader than that allowed under a search warrant. With a search warrant, an officer may seize only what the search warrant describes.[109] Under *Abel*, however, an officer may seize, without prior judicial approval all evidence of commission of any crime.

The Washington cases, although prior in time, would seem to "follow" the broad search approach[110] and are in accord with the rule that any evidence bearing on any crime discovered during the search will

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[100] United States v. Rabinowitz, 339 U.S. 56 (1950) (dissenting opinion).
[101] *Id.* at 72.
[102] 362 U.S. 217 (1960).
[103] 331 U.S. 145 (1947).
[104] 339 U.S. 56 (1950).
[105] Abel v. United States, 362 U.S. 217 (1960).
[106] *Ibid.*
[107] 285 U.S. 452 (1932).
[108] 282 U.S. 344 (1931).
[109] Marron v. United States, 275 U.S. 192 (1927).
[110] State v. Much, 156 Wash. 403, 287 Pac. 57 (1930).

be admissible against the arrested person.[111] As was indicated above[112] dicta in one case indicated search would be permitted of the accused's apartment if he were returning to it. This is far beyond even the broadest Supreme Court decision and seems patently wrong and violative of the spirit if not the letter of the constitutional prohibitions of unreasonable search.

Standing to Raise the Issue. The Washington court has attached an extreme significance to ownership of the article seized beyond that warranted by law or reason. In one case[113] officers searched for a murder weapon in the garden outside appellant's home prior to his arrest. The appellant's motion to suppress was denied, and the supreme court affirmed on three grounds, all of which seem doubtful in principle.

> In the first place, appellant in his affidavits did not aver, had, and could show, *no ownership with possessive rights* to any of these articles... without which he could assert no constitutional right thereto.[114] (Emphasis added.)

On this reasoning the police could search any house or person with impunity if the article seized was not owned with possessive right by the person searched.[115] That this is contrary to the mandate "no person shall be disturbed in his private affairs, or his home invaded, without authority of law"[116] seems clear beyond argument. The proper rule is stated by *Jones v. United States:*[117] "Anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress...."[118]

The other alternative grounds for denying the motion to suppress were that (1) there was no statute "conferring jurisdiction on any magistrate to issue search warrants, the subject-matter of which is the evidence or instrument of murder";[119] and that (2) only unreasonable searches without probable cause are forbidden. Under (1) above, the court, by implication, would have us believe that officers are authorized to search whenever there is no statute under which they could obtain a warrant—a totally novel and frightening thesis. Under (2), to state

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[111] State *ex rel.* Fong v. Superior Court, 29 Wn.2d 601, 188 P.2d 125 (1948).
[112] See discussion accompanying note 88 *supra.*
[113] State v. Much, 156 Wash. 403, 287 Pac. 57 (1930).
[114] *Id.* at 411, 287 Pac. at 60.
[115] To the same effect see State v. Vennir, 159 Wash. 58, 291 Pac. 1098 (1930) holding that the defendant could not assert abridgement of his constitutional rights if he denied ownership or knowledge of car or liquor found therein.
[116] WASH. CONST. art. 1, § 7.
[117] 362 U.S. 257 (1960). *Cf.* FED. R. CRIM. P. 41(e).
[118] *Id.* at 267.
[119] State v. Much, 156 Wash. 403, 411, 287 Pac. 57, 60 (1930).

that only unreasonable searches are forbidden is to assume the conclusion that the search was reasonable. The philosophy behind the federal and state constitutional right to privacy safeguards is that *all* searches, whether without warrant or not incidental to lawful arrest, are unreasonable, notwithstanding the presence or absence of a statute detailing how warrants are to be issued in specific cases. The state constitutional provision quoted above—"without authority of law" contemplates the issuance of a warrant by a disinterested magistrate upon a showing of probable cause or, at the very least, a search incidental to lawful arrest. Anything else would be unreasonable and therefore contrary to the Washington Constitution. The privilege of officers to arrest upon probable cause for misdemeanors not amounting to breach of the peace is an effective tool to ferret out suspected felons when arresting for misdemeanors, but the price for this police efficiency is paid from the ever-diminishing treasury of individual liberty.

If the Washington court follows the *Abel* case and holds that any arrest—even an administrative arrest—when validly made would justify a broad search, the requirement of search warrants will become extinct. For if the police, with their modern surveillance techniques are unable to catch their suspect in a misdemeanor, they need only solicit the cooperation of an administrative agency—as was done in the *Abel* case—and obtain the evidence they need. Through cooperation with the health or building inspector, the police have an effective weapon with which to gain enough evidence to make an arrest.[120] In any event, if the arrest could not be effected when the administrative agent inspected the house or business of the suspect, sufficient information could be gained to obtain a search warrant, which would probably be the last resort when so many easier paths are now open.

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[120] The *Abel* case and Frank v. Maryland, 359 U.S. 360 (1959) combined, seem to provide a search and arrest weapon which is unhampered by the fourth amendment. In *Frank*, the court upheld a Baltimore ordinance which permitted the commissioner of health, whenever he *suspected* that a nuisance existed in any house, to demand entry therein in the daytime. If the owner or occupier refused, he forfeited twenty dollars. With this new found power one can expect a close alliance between the police and administrative officials. The police can use the administrative officer as a "spy" to get enough information so that a warrant may issue or merely accompany the official, as in the *Abel* case, gain admittance on their "credentials" and do the searching and arresting themselves.