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Search and Seizures - Circumstances Justifying Search or Seizure - Warrantless Search and Police Discretion

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RECENT CASES

SEARCHES AND SEIZURES—CIRCUMSTANCES JUSTIFYING SEARCH OR SEIZURE — WARRANTLESS SEARCH AND POLICE DISCRETION — Defendant, an armed robber, entered the premises of a cab company, took $363 and ran. Two cab drivers followed defendant until he entered his home. The cab drivers notified the company dispatcher by radio that the man was a Negro about five-feet, eight inches tall, wearing a light cap and dark jacket and that he had entered a house on Cocoa Lane. The information was relayed to police who converged on the house. Defendant's wife admitted the officers with no objection. One officer found clothing in the washing machine which matched the description before he knew that a weapon, and the defendant, had been discovered in another part of the house. The officers did not have a search warrant. The Supreme Court of the United States, reversing the Court of Appeals for the Fourth Circuit, *held* that even though the clothing was "mere evidence" and had "evidential value only," it was subject to seizure and was admissible in the prosectuion of the defendant. *Warden v. Hayden,* 387 U.S. 294 (1967).

Most significant is the Court's reasoning which justified the officers entering the home without a warrant: "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of other."[1]

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

This part of the Court's decision does not seem to be totally reconcilable with the Fourth Amendment or its precedent interpretation. The justification for allowing the officers to enter without

1. Warden v. Hayden, 387 U.S. 294, 298-9 (1967).
2. U.S. CONST., amend. IV.

a warrant, although reasonable in some circumstances, *may* have the end result of opening the doors of justice wide enough to allow police officers to literally fabricate stories on the pretense of a reasonable belief that their lives or the lives of others are in danger and hence violate the sanctity of a man's home. The Court is fostering, to an important degree, "guilt by suspicion".

The courts of this country have previously championed the protection of the right of privacy with the corresponding sanctity of the home. Searches have been deemed illegal even where such searches were in hot pursuit,[3] where the police officers observed the illegal act,[4] and where the officers had reliable information to act upon.[5] However, in *State v. Hoyt*,[6] an entry without a warrant was justified. There the Supreme Court of Wisconsin said: "Upon observing a body lying on the floor it was [the officers'] duty to enter the home in light of the report that they had previously received."[7] The important factor was the previous report of the shooting together with the observation of the body through a window by the officers. But *Johnson v. United States*[8] held that a search was illegal where officers, detecting the odor of burning opium from a hotel room, entered without a warrant. There the Supreme Court of the United States noted:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[9]

The decision in the instant case seems to eliminate this rule. The right of privacy may now reasonably yield to police officials.

In the history of search and seizure law, the courts have constantly dealt with the issues of reasonableness and with the concept of an emergency. In *McDonald v. United States*,[10] for example, police, suspecting defendant of operating an illegal lottery, kept the defendant under surveillance for two months. Thinking that they detected from the outside the sound of an adding machine and observing defendants operating a lottery through a transom, they forced their way, without a warrant, into the rooming house

3. Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961).
4. Keiningham v. United States, 287 F.2d 126, (D.C. Cir. 1960).
5. Miller v. United States, 357 U.S. 301 (1958).
6. 21 Wis.2d 284, 124 N.W.2d 47 (1963).
7. *Id.* at 64.
8. 333 U.S. 10 (1948).
9. *Id.* at 14.
10. 335 U.S. 451 (1948).

and into the room of defendants. Demanding and obtaining entrance, officers arrested defendants and seized papers and other items. The conviction was reversed. The Court's concept of an emergency is most noteworthy: "This is not a case where officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law."[11] The Court further stated:

> 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. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made the course imperative.[12]

Can we generalize on what are the "exigencies of the situation"? The *McDonald* court gave its impression of an emergency which is rather an extreme example. Quaere, have the courts given us anything more to go on? Most recently, Minnesota[13] and Iowa[14] have concluded that in effect the ultimate test of search and seizure is whether it is reasonable under the facts of each case. The courts have not set out an actual test for determining the justification for a warrantless search. We are left with only the vague concepts of reasonableness and circumstances and exigencies of the situation. We have tests for insanity, we have tests for obscenity, we have the Miranda doctrine which is a test, and we have tests of one sort or another in all areas of the law, but we do not have a test of certainty for the protection of the sanctity of the home. We are only given vague terms for interpretation and decision.

By the use of a hypothetical, we can see where the recent decision might lead us. X is suspected by the police of being involved in some criminal activity. Police enter the home of X for the purpose of a search. X in fact is not home. The police might justify their entry on the grounds that they thought they saw a person in the window with a gun and they "reasonably believed that their lives or the lives of others might be in danger." It makes no difference whether they find anything. The search is still legal and if they do find some evidence which will lead to

11. *Id.* at 454.
12. *Id.* at 455-56.
13. State v. Kotka, 152 N.W.2d 445 (Minn. 1967).
14. State v. Collins, 152 N.W.2d 612 (Iowa 1967).

the arrest of X, the evidence will be admitted. Our homes may now be invaded upon the fabrication or imaginations of law enforcement officers. The Supreme Court did not, or may not, have weighed the values of police expediency versus privacy and sanctity of the home. In some circumstances, obviously, the decision may save lives or property. But in others, it may destroy valuable personal rights. There *must* be a middle ground. "Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."[15]

ALLEN W. BRIGHT

FEDERAL CIVIL PROCEDURE — NEWLY DISCOVERED EVIDENCE — DILIGENCE REQUIRED IN ORDER TO OBTAIN NEW TRIAL—The plaintiff, an employee of the defendant railroad company, and his road crew were to assist another crew rerail a locomotive. The engine was surrounded by snow which had become solidly packed, creating a hazardous condition. In the course of the work, plaintiff slipped and fell, sustaining personal injuries. In an action against the railroad, the trial court entered a verdict for the defendant. Several months after the judgment, on the grounds of newly discovered evidence, plaintiff moved for a new trial under Rule 60 (b) (2) of the Federal Rules of Civil Procedure. The alleged newly discovered evidence was the testimony of a railroad employee stating that his crew was the first to arrive at the derailment. The newly discovered evidence revealed that before the plaintiff arrived blow torches had been used around the derailed engine, causing a considerable amount of the snow to melt. Due to the extremely cold temperature, the melted snow immediately refroze and created the icy surface on which the plaintiff had slipped and sustained his injuries.

The alleged newly discovered evidence was offered after a local railroad employee's bulletin reported that the plaintiff had lost his suit against the railroad. After reading of the result, a railroad employee offered testimony as to his knowledge of the circumstances surrounding plaintiff's injuries. The United States Court of Appeals for the Third Circuit, with one judge dissenting, *held* that the plaintiff knew or should have known that another railroad employee witnessed his fall and that failure to question this witness

15. Henry v. United States, 361 U.S. 98 (1959).