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Arrests Without a Warrant in Montana¹

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The Montana Constitution,² like that of the United States³ and those of other states, protects against unreasonable searches and seizures and deprivation of liberty without due process of law. These fundamental guarantees of personal liberty do not prevent arrests without a warrant either according to the common law or pursuant to legislative enlargement of the common

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¹This article will be confined to arrests by peace officers. See R.C.M. 1947, § 94-6004, for arrests by private persons. For convenience the word "arrestee" will be used herein to signify the person arrested. The Montana Supreme Court has used the word in this sense. State ex rel Wong You v. District Court, *infra*, note 32.

²*Mont. Const.*, Art. III, § 7: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation reduced to writing." *Mont. Const.*, Art. III, § 27: "No person shall be deprived of life, liberty, or property without due process of law."

³*U.S. Const.*, Amd. IV: "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 warrant 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." *U.S. Const.*, Amd. V: ". . . nor shall any person . . . be deprived of life, liberty, or property without due process of law." *U.S. Const.*, Amd. XIV: "No state shall . . . deprive any person of life, liberty, or property without due process of law."

These provisions of the Fourth and Fifth Amendments as such apply only to the Federal Government, and there is no federal restriction applicable to the states against unreasonable searches and seizures, except such as may be contained in the Fourteenth Amendment. *Feldman v. United States* (1944) 332 U.S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408, 154 A.L.R. 682. But see *Wolf v. Colorado*, *infra*, p. 15.

law as public security may require.⁴ The statutes of Montana have enlarged the common law at some points, although narrowing it at others, and decisions of the Montana Supreme Court have made further changes which deserve careful examination.

The situations where a peace officer may arrest without a warrant according to the common law⁵ and under the Montana statute⁶ may be surveyed briefly. The first situation is where an offense is committed in the presence of the officer. By "presence" is meant consciousness through the senses, and the courts generally have held that to justify an arrest without a warrant the officer must have information of the commission of the offense from his own senses of sight, hearing or smell.⁷ At common law this right was confined in general to offenses which were felonies or misdemeanors amounting to breaches of the peace.⁸ The Montana statute,⁹ as is true of the statutes

⁴Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 550 (1924).

⁵For a thorough treatment of the law of arrests without a warrant, see Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 673, 798 (1924).

⁶R.C.M. 1947, § 94-6003.

⁷Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at p. 679 ff.; Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 231 ff. (1940); AMERICAN LAW INSTITUTE, CODE OF CRIM. PROC. (with commentaries, 1930), p. 233. An officer could arrest without a warrant for illegally transporting intoxicating liquors where he saw wooden kegs in the back seat, and "detected the odor of moonshine whiskey protruding from," the car driven by arrestee. *State ex rel Hansen v. District Court* (1925) 72 Mont. 245, 233 P. 126. Also, for violation of the prohibition law by a person operating a still, where the officer smelled whiskey in the process of distillation. *State v. Haven* (1926) 77 Mont. 299, 250 P. 615. But the officer must know from his own senses not only that an offense was committed, but who committed it. *People v. Johnson* (1895) 86 Mich. 175, 48 N.W. 870; and see *Johnson v. United States* (1948) 333 U.S. 10, 68 S.Ct. 367, 92 L. Ed. 323.

⁸Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at p. 673 ff.; Perkins, *Law of Arrest*, *supra*, note 7, at p. 229 ff.; AMERICAN LAW INSTITUTE, CODE CRIM. PROC. (with commentaries, 1930), p. 231.

⁹R.C.M. 1947, § 94-6003, sub. 1. The Montana statute also covers offenses "attempted" in the presence of the officer. This is probably a carry-over from the common law, which permitted arrests to prevent the commission of crimes (confined to felonies and misdemeanors amounting to breaches of the peace), when there were circumstances justifying an officer in the belief that their commission was imminent. Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at p. 674 ff. Since in Montana an attempt to commit a crime, even a misdemeanor, is itself a crime (R.C.M. 1947, §§ 94-4710, 94-4711), and since there is authority to arrest for any crime, felony or misdemeanor, committed in the presence of an officer, it seems that the reference to "attempted" offenses is superfluous.

The common law rule is that the arrest, if for a misdemeanor, must be made immediately or on fresh pursuit. Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at pp. 701-2. Such is the provision of the

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in many states,³⁰ enlarges the common law at this point and permits arrest without a warrant for any offense committed³¹ in the presence of the officer, and there would seem to be little doubt of the constitutionality of such statutory enlargement.³²

At common law and under the Montana statute, if the offense is a felony as distinguished from a misdemeanor, there are situations where an officer may arrest without a warrant, although the offense is not committed in his presence. First, at common law, if the arrestee has in fact committed a felony, an officer may arrest therefor if he has reasonable ground to believe that the arrestee has committed it.³³ The Montana statute,³⁴ like statutes in several other states,³⁵ again broadens the common law and permits an arrest without warrant if the arrestee has in fact committed a felony, regardless of the reasonableness of the ground for belief that such is the fact. There has been considerable criticism of the narrowness of the common law rule as applied to guilty felons, and it would seem that the statutory extension of the common law is valid.³⁶ Sec-

AMERICAN LAW INSTITUTE, CODE OF CRIM. PROC. (with commentaries, 1930), § 21(a), and comment p. 234.

³⁰Thirty-eight states have so enlarged the common law. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, p. 19.

³¹The American cases are divided on the question of whether mistake in thinking that conduct is a misdemeanor, when in fact it is not, justifies arrest. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, p. 18. The Montana Supreme Court has held there is no justification in case of such mistake. In *State v. Bradshaw* (1916) 53 Mont. 96, 161 P. 710, it appears that a deputy sheriff, without a warrant, undertook to arrest a person for driving cattle from their accustomed range, which was a misdemeanor. The Court held that, since the arrestee was not in fact committing any crime, he was guilty of no offense in resisting the officer.

³²*Burroughs v. Eastman* (1894) 101 Mich. 419, 45 Am. St. R. 419, 24 L.R.A. 859, 59 N.W. 817.

³³Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448, 453 (1931). Cf. Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at pp. 684, 5.

³⁴R.C.M. 1947, § 94-6003, sub. 2.

³⁵Statutes in nineteen states contain this provision. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, p. 17. Such is the provision of the AMERICAN LAW INSTITUTE, CODE OF CRIM. PROC. § 21(b).

³⁶For a discussion of the constitutional problem see Waite, *Arrest of Felons*, 31 MICH. L. REV. 749 (1933).

" . . . Although most of the statutes have been on the books for many years, there is no holding on their constitutionality. And there seems to be no case in which such a statute has been squarely applied to legalize the arrest and search of a guilty felon so that the evidence upon which he was convicted may be held admissible without the necessity of reviewing the events leading up to the arrest in order to determine whether or not the officer had reasonable grounds . . ." Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 333 (1942).

ond, at common law and under the Montana statute, an officer may arrest without a warrant if a felony has in fact been committed by someone, not necessarily the party arrested, and the officer has reasonable ground to believe that the arrestee has committed it.¹⁷ Third, at common law, under the later and generally accepted view, an officer may arrest without a warrant if there is reasonable ground for him to believe that the arrestee has committed a felony, although in fact no one has committed a felony.¹⁸ The Montana statute narrows the common law at this point,¹⁹ and provides for such arrest only on a charge made²⁰ upon reasonable cause of the commission of a felony by the party arrested, or at night.

In addition to these statutes, in 1937 Montana adopted the Uniform Criminal Extradition Act and the Uniform Act on Close Pursuit. The Extradition Act permits a peace officer to arrest without a warrant upon reasonable information that the accused stands charged in the courts of another state with a felony.²¹ The Close Pursuit Act merely authorizes a peace officer of another state, who enters this state in close pursuit of a person, to arrest him with the same authority as a peace officer of Montana arresting for a crime committed in this state.²² It does not enlarge the situations in which an arrest may be made by an officer.

There is, then, spelled out in the statutes of this state, the limited situations in which a peace officer may arrest without a warrant, and the statutes permitting such arrests in the enumerated situations are believed to be valid, as required by public security, and not violative of any constitutional guarantee of personal liberty. But, more than thirty years ago, Mr. Chief Justice Brantly stated, for the Montana Supreme Court, that the right of an officer

¹⁷Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at p. 685 ff.; R.C.M. 1947, § 94-6003, sub. 3.

¹⁸Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at p. 694; AMERICAN LAW INSTITUTE, CODE OF CRIM. PROC. (with commentaries, 1930), pp. 235, 236.

¹⁹R.C.M. 1947, § 94-6003, subs. 4 and 5.

²⁰"From the earliest times 'credible information from others' has been held sufficient for *reasonable cause to believe*, hence, 'the representation of a credible person, that a felony has been committed' by a particular individual, is sufficient to create reasonable suspicion of guilt. . . ." Perkins, *The Law of Arrest*, *supra*, note 7, at p. 239. But, of course, reasonable cause to believe that a felony has been committed also may be based on facts within the officer's own knowledge. Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at p. 695 ff.

²¹Ch. 190, § 14, LAWS OF MONTANA 1937; R.C.M. 1947, § 94-501-14.

²²Ch. 187, § 1, LAWS OF MONTANA 1937; R.C.M. 1947, § 94-6023.

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“ . . . to arrest without a warrant . . . is vested in him by law, *only under the circumstances defined* in Section 9057²³ and *if the circumstances do not exist*, thus bringing into activity the authority of the law; *he has no power to make the arrest*. His effort to do so is a trespass upon the right of the citizen to the enjoyment of his personal liberty free from aggression by anyone . . . ” (Italics supplied)

Six years later, however, the Montana Supreme Court departed from these established and fundamental doctrines. *State ex rel Neville v. Mullen*²⁴ involved a proceeding under a provision of the Montana Prohibition Enforcement Act, requiring an officer, without warrant, to seize liquor and the container thereof, when the law was being violated in the presence of the officer. The Court said that the right to seize without process was made coextensive with the right to arrest without warrant, and that authority to arrest without warrant was conferred in the same terms as like authority given to any peace officer by what is now Section 94-6003, Revised Codes of Montana, 1947, so that the Court could properly determine the scope of the officer's authority to seize by determining his authority to arrest without a warrant. At the time of the contested seizure, the officer knew that a banquet was being given in a hotel and that some of the persons present showed the effects of having been drinking intoxicating liquors. It was about 9:30 in the evening while the banquet was in progress, and the defendant was in an alley immediately west of the hotel. He was carrying a demijohn encased in a wicker cover and only partially concealed in a handbag. The defendant was employed by one of the persons attending the banquet, and the officer had been informed that he was transporting liquor to his employer. The contention of counsel for the defendant was that from the very nature of the case the officer did not know, and could not know, that the demijohn contained intoxicating liquor at the time of the seizure. But Mr. Justice Holloway, writing the opinion for the majority of the Court, answered:

“ . . . the utmost that can be exacted of the officer who arrests without a warrant is that the circumstances shall be such that upon them alone he would be justified in making a complaint upon which a warrant might issue. In other words, if the circumstances are such that the officer could properly secure a warrant of arrest, he may arrest

²³R.C.M. 1907. R.C.M. 1947, § 94-6003.

²⁴*State v. Bradshaw* (1916) 53 Mont. 96, 98, 161 P. 710.

²⁵(1922) 63 Mont. 50, 207 P. 634.

without a warrant if the offense which the circumstances tend to establish was committed in his presence; and it is settled in this jurisdiction that the officer need not have actual, personal knowledge of the facts which constitute the offense in order to be able to make complaint and secure a warrant. The question was settled in *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63, wherein the Court said: "It seems to us that the proper construction of the words "probable cause" as used in the Constitution may be facts embodied in a complaint which charges the offense upon information and belief. . . ."

Thus the Court abandoned the rule that, in order that an offense may be said to be committed in the presence of an officer, he must have personal knowledge through his senses of the commission thereof by the arrestee. Perhaps the same result might have been reached within the confines of an expanded construction being given by some courts to the phrase "within his presence," to include cases where the officer sees part of the offense and is aided as to the rest by what may be considered common knowledge or by information.²⁶ But apparently the Montana Court construed the phrase merely to require that the offense be committed in proximity to the officer, which, of course, is always true where the offense is being committed at the time of the arrest. In such a situation, the opinion sweepingly held that an officer may arrest without a warrant upon such facts as would justify the issuance of a warrant, breaking away completely from the long established law upon which the statutes of this state are founded.²⁷ Very likely this position was the result of a feeling by the Court that the application of the theretofore existing law, to determine when arrests and seizures may be made without a warrant, would

²⁶*State v. Fidelity & Casualty Co. of New York* (1938) 120 W. Va. 593, 199 S.E. 884, 887.

Cf. concurring opinion of Mr. Chief Justice Brantly in the Montana case, in which he said, *inter alia*:

" . . . mere suspicion founded upon hearsay evidence only, however trustworthy in source, without personal observation by the officer of occurrences actually taking place at the time, which, in themselves, indicate that an offense is being committed, does not justify an arrest. . . ."

²⁷Mr. Justice Galen dissented, saying:

" . . . I do not and cannot agree to the . . . holding . . . that a . . . peace officer is authorized upon *suspicion* to arrest a person carrying a grip or satchel and examine the contents thereof without either a warrant of arrest or a search-warrant. . . . It invades the well-recognized principles of a free government and the constitutional guaranties of freedom of the people. . . ."

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make enforcement of the prohibition laws difficult, if not impossible.²⁸

The Court repeated its stand in subsequent prohibition cases. In two of these, the same result might have been reached by applying the orthodox rules as to what constitutes "presence."²⁹ But, in at least one case the result could not have been reached on any theory that the offense was committed in the presence of the officer, importing that the officer knew of his own senses that the arrestee was committing the offense. In *State ex rel Brown v. District Court*,³⁰ it appears that a special officer had informed a sheriff that men in a Dodge car, bearing a certain license number, loaded with intoxicating liquor, had gone through the main street of Hamilton, headed west. The sheriff followed in his car and found the Dodge and three persons in possession of it. No liquor was open to view in the car, but the sheriff searched it, found whiskey in it and charged the persons with illegally transporting intoxicating liquor. In sustaining the search and seizure, the Court said:

"The sheriff . . . had no personal information that the plaintiffs were engaged in this illegal transportation. When, however, an officer of this state is in the possession of such knowledge from the employment of his own senses or from information actually imparted to him by other credible persons as to cause him honestly and in good faith, acting within reasonable discretion, to entertain the belief that provisions [of the law] . . . are being violated in his presence, it is both his right and his duty to seize the liquor together with the instrument of trans-

²⁸Mr. Justice Holloway, in the opinion of the Court, said that the contention for the defendant would render the search and seizure provision of the Prohibition Act a "dead letter," because "under practically any conceivable circumstances it would be impossible for the officer to have such knowledge." Mr. Chief Justice Brantly, in his concurring opinion, said:

". . . the announcement of a rule which would deny the right to make an arrest in all cases except upon personal knowledge of the officer, would render it well nigh impossible to enforce the prohibition, the anti-gambling and other similar laws enacted to suppress crimes which from their nature are generally committed in secret. . . ."

And Mr. Justice Galen, in his dissenting opinion, protested that:

". . . The Constitution applies with equal force to crimes committed against the prohibition laws; its guarantees are equally sacred and inviolate as to all crimes, and no exception or distinction should be made as respects laws for the enforcement of prohibition. . . ."

²⁹*State ex rel Hansen v. District Court, and State v. Haven, supra*, note 7.

³⁰(1925) 72 Mont. 213, 232 P. 201.

portation and arrest the person in possession thereof. . . .'³¹

In *State ex rel Wong You v. District Court*, decided in 1938,³² the same position was taken in a case involving an arrest for violation of the lottery laws, a misdemeanor. A policeman was informed by another officer that a boy was selling lottery tickets, and the boy upon inquiry advised the policeman that he was selling them on behalf of the owner of a lottery in a Chinese laundry. The boy delivered the lottery tickets to the officer and guided him to the laundry and pointed out the proprietor as the man who was running the lottery which was on the premises. In a unanimous opinion, written by Mr. Justice Anderson, the Court held that, while an arrest without a warrant is illegal when made upon mere suspicion and belief unsupported by facts, circumstances or credible information calculated to produce such belief, yet the facts and circumstances in this case were such as to produce in the mind of a prudent and cautious man the belief that a lottery was being conducted on the arrestee's premises and that, therefore, the arrest was legal. The *Mullen* case was again quoted with approval.

The Court has relied upon the *Mullen* case when dealing with arrests for felonies, without clear demarcation between rules applicable when dealing with felons and those applicable when dealing with misdemeanants and apparently disregarding the provisions of the Montana statute that an arrest may be made without a warrant when a felony has in fact been com-

³¹It is interesting to compare *State ex rel Sadler v. District Court* (1924) 70 Mont. 378, 225 P. 1000, in which, although the arrest was made by private persons (investigators employed by a county attorney) and the Court said that their authority was more limited than that of an officer, the Court apparently applied the same rule as it would have applied if it had been dealing with arrest by an officer. (See further *infra*, note 36.) Investigators accompanied the arrestee on a train to Sweet Grass and saw him go into a place on the Canadian line where there was a sign "Taxi Office" over the door. They later saw him talking with a young man who had a car, and saw the young man pick up a grip and carry it to the train, where he set it down and where the arrestee picked it up and, using both hands, threw it on the platform of the pullman and got aboard. The investigators also got aboard and engaged the arrestee in conversation. The arrestee said that he had made several trips to Canada and had secured "good stuff" and that he expected, in the event of the appointment of a friend to the office of Governor General of Liquor at Alberta, to make more money than any other person in Montana. Also, the investigators had talked with some people who were suspicious of the arrestee. The Court found that there was no probable cause, but mere suspicion not justifying arrest without a warrant.

³²106 Mont. 347, 78 P. (2d) 353.

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mitted although not in the presence of the officer. In *State ex rel Kuhr v. District Court*,³³ a postmaster became suspicious of a package and called in a United States customs agent. They opened the package and found that it contained morphine, the knowing possession of which was a felony under state law. The federal officials decided that they had no jurisdiction over the matter, so they told the local sheriff. The sheriff went to the post office where the package was again opened and the sheriff saw the morphine. The arrestee subsequently called for the package, and was arrested without a warrant by the sheriff for unlawful possession, when leaving the post office with the package. The Court held that the arrest was valid, apparently basing its decision on the fact that the sheriff was told by United States officials, who were acting independently of him, that the package contained morphine. The Court quoted the statutory provisions, but said:

“The necessary elements of the grounds on which the officer may act are a belief in the person’s guilt, based either upon facts and circumstances within the officer’s own knowledge, or upon information imparted to him by reliable and credible third persons, provided there are no circumstances known to the officer materially to impeach the information received. . . .”³⁴

³³(1928) 82 Mont. 515, 268 P. 501.

³⁴The *Kuhr* case, as is true of many of the Montana cases, involved a motion to suppress evidence. The Supreme Court of Montana consistently has taken the position that, if the arrest is legal, evidence of the commission of the crime in the possession of the arrestee may be seized as an incident to the arrest.

But a search and seizure unlawful at the time cannot be made lawful by a subsequent arrest. *Johnson v. United States* (1948) 333 U.S. 10, 68 S.Ct. 367, 92 L. Ed. 436; *McDonald v. United States* (1948) 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 144; *Morgan v. State* (1935) 97 Ind. 374, 151 N.E. 98, 100. And to justify a search and seizure as an incident to arrest, the search and seizure should be substantially contemporaneous with or immediately following, not prior to, the arrest. See Annotations, 51 A.L.R. 428; 74 A.L.R. 1391; 82 A.L.R. 784.

Recently the Supreme Court of the United States, in a five to four decision, appears to have found in the Fourth Amendment a material limitation upon these generally accepted propositions, and, in view of *Wolf v. Colorado*, *infra*, p. 15, this limitation seems applicable to the states. In *Trupiano v. United States* (1948) 334 U.S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663, it appears that a federal officer saw an arrestee through an open doorway illegally operating a still (a federal felony). The Court held that the arrest could be made without a warrant for an offense committed in the presence of the officer, although there was ample time to get a warrant, but that the distillery could not be seized without a warrant, since under the Fourth Amendment a warrant must be obtained whenever reasonably practicable. In a dissenting opinion, in which Justices Black, Reed and Burton concurred, Mr. Chief Justice Vinson said the decision of the majority of the Court

*State v. Hum Quock*³⁵ also involved an arrest without a warrant for violation of the state anti-narcotic laws. An investi-

"serves only to open an avenue of escape to those guilty of crime and to menace the effective operation of government," and "is not consistent with judicial authority." Cf. *Brinegar v. United States* (1949) U.S., S. Ct., 93 L. Ed. 1375. Federal officers patrolling a highway leading from known sources of liquor supply to a probable illegal market, observed a car driven by a person whom one of the officers had arrested about five months earlier for illegally transporting liquor, and whom he had seen loading liquor into a car on at least two occasions during the preceding six months, and knew to have the reputation for hauling liquor. The officers pursued the car for about a mile at top speed, and then forced it off the road. The liquor was seized and used as evidence at a trial in which the driver was convicted for violating the Federal Liquor Enforcement Act. In an opinion by Mr. Justice Rutledge, a majority of the Court took the view that the seizure was lawful and that the conviction should be affirmed. Mr. Justice Rutledge stated: "The crucial question is whether there was probable cause for Brinegar's arrest. . . ." But he then proceeded to hold, following *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, that the search and seizure was not unreasonable, because the officers had probable cause to believe that an offense was being committed. The opinion pointed out, however, that no problem of searching a home or other place of privacy was involved. The result was reached without taking into consideration the admission made by the driver of the car immediately before the car was searched, although it is generally recognized that a confession may, if voluntary, indicate that a crime is being committed in the presence. Wilgus, *Arrest Without a Warrant, supra*, note 5, at p. 683; annotation, 44 A.L.R. 132, 135. Mr. Justice Burton concurred on the ground that the interrogation by the officer of the driver of the car was legitimate and that he supplied by his admissions probable cause for the search of his car. Mr. Justice Jackson, with the concurrence of Justices Frankfurter and Murphy, dissented on the ground that the search was illegal from the outset and could not be saved by the driver's subsequent admission that he was transporting liquor, and the fact that the defendant was engaged in liquor running was based on more surmise or hearsay.

In the *Kuhr* case Mr. Justice Galen dissented, apparently on the ground that the state and federal officers were cooperating in an illegal search in opening the package. Cf. *Lustig v. United States* (1949), U.S., S. Ct., 93 L. Ed. 1369 for the latest pronouncement by the Supreme Court of the United States with respect to participation by federal officers in an illegal search by state officers. A federal officer, charged with enforcement of laws pertaining to counterfeiting, received telephone calls from the local police and the management of a hotel, indicating that violation of these laws was being carried on in a room of the hotel. Local police made a search of the room and, upon finding evidence indicating counterfeiting, sent for the federal officer, who came to the hotel and examined the evidence. When the tenants returned, they were arrested under a warrant which the local police had obtained. Evidence bearing on counterfeiting was turned over to the federal officer, and a prosecution under federal counterfeiting statutes ensued. In an opinion by Mr. Justice Frankfurter, the majority of the Court held that the evidence had been seized in violation of the Fourth Amendment, although the federal officer did not request the search, was not its moving force, and the search was not undertaken to help enforcement of a federal

gator for a County Attorney's office⁸⁶ had been informed by what he deemed a reliable source, a dope fiend, that the arrestee periodically transported narcotics by train, and thereafter by another reliable source, a Chinese business man whose name as a result of a ruling of the trial court was not disclosed, that on a given day the arrestee would take a certain train with a "lot of dope." Pursuant to the latter advice, on the day in question the investigator observed the arrestee on his way to the depot carrying a handbag, and thereupon arrested him and found narcotics under a false bottom of the bag. The Court held that the arrest was legal. Mr. Chief Justice Callaway, in writing the opinion of the Court, referred to the statutes of this state prescribing the situations in which an arrest may be made without a warrant, and to the fact that the arrestee, at the time of his arrest, had committed, and was then engaged in committing, a felony. But the opinion then inquired into the question of whether the investigator had reasonable or probable cause to believe that the arrestee was transporting narcotics, and judgment apparently was based upon an affirmative answer to this question.⁸⁷

Again, in *State v. Neidamier*,⁸⁸ it appears that about midnight a chief of police sent one T with two marked silver dollars to the residence of the arrestee to make a purchase of morphine, T being followed by a police sergeant at a distance of thirty to

law. Said Mr. Justice Frankfurter: ". . . search is a functional, not merely a physical process," and the federal officer's

" . . . selection of evidence deemed important for use in a federal prosecution for counterfeiting, as part of the entire transaction . . . was not severable, and therefore was a part of the search . . . To differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line. . . ."

Mr. Justice Murphy wrote a concurring opinion, in which Justices Douglas and Rutledge joined, to the effect that it was of no consequence whether the illegal search was conducted by state or federal officials; and that also appears to have been the opinion of Mr. Justice Black. Mr. Justice Reed, joined by Justices Jackson and Burton, dissented, on the ground that the federal officer did not participate in the search and seizure.

⁸⁵(1931) 89 Mont. 503, 300 P. 220.

⁸⁶The investigator was a private person and not a peace officer, but the Court took the position that the same rule would be applicable as would be to a peace officer. See also *supra*, note 31.

⁸⁷There has been some confusion as to whether "probable cause" or "reasonable ground" is a question of law for the court or a question of fact for the jury, but it appears to be settled in England that it is a question of law for the court. Wilgus, *Arrest Without a Warrant*, *supra*, note 5, at p. 700. Such is the position of the Montana Supreme Court.

⁸⁸(1934) 98 Mont. 124, 37 P. (2d) 670.

forty feet. T knocked and was admitted, and told the arrestee that a named drug addict was in jail and sick and desired a couple of capsules of morphine. The arrestee invited T in, and went out of doors and returned in a few minutes bringing two capsules or bundles wrapped in tinfoil. He removed the tinfoil, leaving it on a table, and gave the capsules to T in exchange for the two marked silver dollars. T left and returned with the police sergeant to the police station, the sergeant having waited outside. Then the chief of police and the sergeant returned to the arrestee's residence without a warrant and arrested him. In holding that the arrest was legal, the Court relied upon the rule stated in the *Mullen* case that, if the circumstances are such that an officer could properly secure a warrant of arrest, he may arrest without a warrant, and that "probable cause," which will justify the obtaining of a warrant, may be facts embodied in a complaint which charges an offense on information and belief.

A recognition by the Court that an arrest without a warrant may be made if the arrestee has in fact committed the felony for which he is arrested, would have resulted, it is submitted, in a different judgment in *State v. Mullaney*.³⁹ At the time of the arrest, 2:20 A.M., the arrestee had his car parked in the dark about 100 feet from a "club" where, according to the evidence, "dope peddlers and hop fiends, and the riff raff sort of hang around." The arrestee came out of the "club" and looked up and down the street, and evidently didn't see anyone. Then he ran to the car and unlocked the door, at which time he was arrested and narcotics taken from him. It appears that the arrestee had a reputation as a dope peddler, that he associated with known drug addicts and often at night visited places frequented by them; that he would drive around places frequented by dope fiends and honk his horn in a peculiar manner and stop shortly while someone would run out to his car and back again; that his car had been used by his wife and another while in the possession of narcotics; and that one "Blond Babe," about a month before the arrest, informed the officer that she got dope from the arrestee. In these circumstances, the Court held that an arrest without a warrant was illegal. It didn't refer to the provision of the statute permitting the arrest of a person in fact guilty of a felony, but attacked the problem solely from the point of view of whether at the time and place of the arrest there were facts and circum-

³⁹(1932) 92 Mont. 553, 16 P. (2d) 407.

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stances then existing giving the officer "probable cause" for arrest.⁴⁰

Whether or not the conclusion is justified that there may be no arrest for a felony without a warrant unless there are reasonable grounds to believe that the arrestee is presently committing the offense, it seems clear that the Court at least has required probable cause for belief that the arrestee either is committing or has committed the felony, regardless of the actual guilt of the arrestee. Since the statute is the source of the legal authority of an officer to arrest without a warrant,⁴¹ such a position does not appear to be justified.

Nor does there appear to be any support for the rule of the *Mullen* case when applied to arrests for misdemeanors. Enlargements of the common law are not to be presumed in the absence of statutory authority.⁴² Resort must be had to the common law even in construing a penal statute in a state where there are no common law crimes.⁴³

Furthermore, it is doubtful whether even the legislature could permit arrest for a misdemeanor without a warrant, unless committed in the presence of the officer in the common law sense. There is a line of state cases holding that a statute permitting arrest without a warrant for a misdemeanor, when the officer does not have personal knowledge of the commission of

⁴⁰In holding that there was not probable cause for the arrest, the Court was influenced in part, it seems, by the testimony of the officer that he searched the arrestee at the time of the arrest to find something to hold him on, and, if he had been unsuccessful in the search, he would have let him go. The Court also took the position that neither proof of general reputation nor evidence of past transactions affords a basis for arrest.

⁴¹*State v. Bradshaw* (1916) 53 Mont. 96, 161 P. 710, *supra*, note 11; *State ex rel Olson v. Leindecker* (1904) 91 Minn. 277, 97 N.W. 972; *Shedd v. State* (1948) Miss., 33 So. (2d) 816; *Heath v. Boyd* (1943) 141 Texas 569, 175 S.W. 2d 214.

⁴²Note 41, *supra*; *State v. Lewis* (1893) 50 Ohio St. 179, 33 N.E. 405, 19 L.R.A. 449; *Kominsky v. Durand* (1940) 64 R.I. 387, 12 A. 2d 652; *Allen v. State* (1924) 183 Wis. 323, 197 N.W. 808, 39 A.L.R. 782. It has been said that, as a general rule, statutory extensions of the common law right to arrest without a warrant are strictly construed as being in derogation of the right of the people to personal liberty. 4 AM. JUR., *Arrests*, § 23. In Montana R.C.M. 1947, § 94-101, provides that all of the provisions of the penal code "are to be construed according to the fair import of their terms, with a view to effect its objects and promote justice." But, if it be recognized that the object of the constitutional provisions is to protect the right of the person to his liberty, under a presumption of his innocence of all crime (see *Heath v. Boyd*, *supra*, note 41), it would seem that the doctrine of strict construction of statutory extension may apply in Montana.

⁴³*People v. Sanchez* (1864) 24 Cal. 17; *Mitchell v. State* (1884) 42 Ohio St. 383; *State v. Gaunt* (1885) 13 Ore. 115, 9 P. 55, 58.

the offense, violates constitutional provisions against unreasonable seizures or deprivation of liberty without due process of law.⁴⁴ There are cases to the contrary,⁴⁵ however, and, of course, it is for the court of a state to construe its own constitutional provisions.⁴⁶ But recent decisions of the Supreme Court of the United States raise a question as to whether that Court might hold that to permit arrest without warrant upon such facts as would justify the issuance of a warrant constitutes a deprivation of liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. In *Johnson v. United States*,⁴⁷ in holding a search of living quarters for narcotics by federal officers to be invalid, the Court said:

“The point of the Fourth Amendment, which often is

⁴⁴Ex parte Rhodes (Ala. 1918) 79 So. 462, 1 A.L.R. 568; In re Kellam (1895) 55 Kan. 700, 41 P. 960; Pinkerton v. Verberg (1899) 78 Mich. 573, 18 Am. St. Rep. 473; Orick v. State (1925) 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129; Polk v. State (Miss. 1932) 142 So. 480. See also, People v. Gurn (1930) 341 Ill. 632, 173 N.E. 754.

⁴⁵State v. Hancock (1898) 73 Mo. App. 19; State v. Boyd (1904) 108 Mo. App. 518, 84 S.W. 191; Hanser v. Bieber (1917) 271 Mo. 326, 197 S.W. 68; Salasar v. State (Texas Crim. App. 1927) 1 S.W. 2d 314. See also Main v. McCarty (1854) 15 Ill. 442; Gulf, C.&S.F. Ry. Co. v. Kriegel (Texas Civ. App. 1918) 204 S.W. 1071.

⁴⁶The Montana decisions contain little consideration of the constitutional problems—of the applicability of the unreasonable searches and seizures clause to arrests without warrant, or of factors, such as history and changed conditions requiring departure from historical rules in the interest of public security and effective law enforcement, justifying deprivation of liberty without violation of the due process clause. In the *Mullen* case, Mr. Chief Justice Brantly, in his concurring opinion, said that:

“. . . the provision of the Constitution prohibiting unreasonable searches and seizures (Constitution, sec. 7, Art. III) makes no distinction between persons and property, and the seizure of either without a warrant must be justified by the facts. . . .”

Cf. *State v. Hum Quock*, *supra*, note 35, in which Mr. Chief Justice Callaway, writing the opinion for the majority of the Court, quoted with approval from a Massachusetts case:

“It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of . . . peace officers . . . to arrest without warrant those who have committed felonies.”

In *State ex rel Brown v. District Court*, *supra*, note 30, Mr. Justice Stark, in writing the opinion of the Court, said, without discussion but citing an Ohio case and a Federal case, that no constitutional rights were violated.

⁴⁷(1948) 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367.

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 neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . .⁴⁸

The United States Supreme Court also has said that the due process clause of the Fourteenth Amendment embraces in its generic terms the prohibition against unreasonable searches and seizures as found in the Fourth Amendment. Consequently, the position of the Court in the *Johnson* case may be applied when dealing with state action. In *Wolf v. Colorado*,⁴⁹ the Court held that, in a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained under circumstances which would render it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment. But, the Court distinguished between the basic right to be free from violations of the right of privacy, guaranteed by the Fourth Amendment, and the enforcement of such right by exclusion of relevant evidence. Mr. Justice Frankfurter, delivering the opinion of the Court, said:

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights en-

⁴⁸See also *Trupiano v. United States*, *supra*, note 34. Cf. the dissenting opinion of Mr. Justice Galen in the Mullen case:

" . . . In my opinion, the doctrine laid down in the majority opinion substitutes the judgment of the sheriff or peace officer for that which is expressly lodged in a court or judicial officer under constitutional and statutory provisions. . . ."

⁴⁹(1949) U.S., S. Ct., 93 L. Ed. 1356.

shrined in the history and basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. . . ."

Mr. Justice Black, in a concurring opinion, agreed "with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states," and continued:

"It is not amiss to repeat my belief that the Fourteenth Amendment was intended to make the Fourth Amendment in its entirety applicable to the states. The Fourth Amendment was designed to protect people against unrestrained searches and seizures by sheriffs, policemen and other enforcement officers. Such protection is essential in a free society. . . ."⁵⁰

Justices Murphy, Rutledge and Douglas, in dissenting opinions, also agreed that the Fourteenth Amendment prohibits activities which are proscribed by the Fourth Amendment.⁵¹

Consequently, it appears that the Court was unanimously of the opinion that the protection against unreasonable searches and seizures found in the Fourth Amendment is applicable to activities of state officers. The exact content of the right thus secured, however, is not free from doubt. The Fourth Amendment in express terms applies to "persons" as well as to "houses, papers, and effects." But in view of the history of the Fourth Amendment, as explained in *Boyd v. United States*⁵² and referred to by Mr. Chief Justice Callaway in *State v. Hum Quock*,⁵³ indicating that it was directed against the use of general warrants authorizing searches and seizures, it is possible that the Supreme Court of the United States may take the position that it does not afford protection against arrests without a

⁵⁰Apparently Mr. Justice Black thought it necessary to write a concurring opinion because of his disagreement with a suggestion in the majority opinion that there are reasons for excluding evidence unreasonably obtained by federal police which are less compelling in the case of police under state or local authority.

⁵¹They further took the position that effective enforcement of the rights so guaranteed requires exclusion of evidence obtained by an "unreasonable" search and seizure.

⁵²(1885), 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524.

⁵³*Supra*, note 35.

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warrant. And the Court may not consider the right to protection against such arrests to be of the same fundamental character as the right to protection against searches, at least of homes and other places of privacy, and seizures of property without a warrant. In *Trupiano v. United States*,⁵⁴ the Court sustained the arrest but condemned the contemporaneous seizure of instruments of the crime in the immediate control of the arrestee. But on the other hand, private individuals certainly are protected by the due process clause of the Fourteenth Amendment in their right to personal freedom, and the Supreme Court of the United States may insist upon the distinction, stated in the *Johnson* case, between the functions of a police officer and those of a magistrate, in dealing with arrests by state officers for state misdemeanors. Such a position would seem to require a new approach by the Montana Supreme Court to the subject of arrests without a warrant.

The law on the subject of arrests without warrant has been critically re-examined and restated relatively recently. As a result of a belief by officials of the Interstate Commission on Crime that the law of arrests was antiquated, about ten years ago Professor Sam B. Warner, of Harvard Law School, studied the actual working of the law of arrests in different American cities. He recorded the results of his study and stated his views of the inadequacies in the law on arrests as found in the various states. Automobiles and radios, both public and private, pose new problems; and requiring officers to make decisions on the many technical questions which arise under the common law, is not calculated to result in effective and impartial enforcement of the law. Furthermore, conditions under which persons arrested for crimes are detained are not the same today as they were when the common law rules were being developed in England in the seventeenth and eighteenth centuries. When the rules with respect to the necessity for a warrant were being developed, bail frequently was unattainable, prisons were operated for the profit of the keepers, prisoners frequently were huddled together in dark, filthy rooms, and royal judges might not get around to delivering one from prison for years, during which the prisoner might die of disease. Today there is no such delay by committing magistrates, jails have been improved and bail ordinarily is not very difficult to obtain.⁵⁵

⁵⁴*Supra*, note 34.

⁵⁵Warner, *Investigating the Law of Arrests*, 26 A.B.A.J. 151 (1940).

To accommodate the law on the subject of arrests without warrant to modern conditions, a Uniform Arrest Act was prepared by the Interstate Commission on Crime.⁵⁶ This Act restates the common law in allowing a peace officer to arrest without warrant any person whom he reasonably believes to have committed a felony. It also permits arrest without warrant for a felony, whenever a felony has been committed by the arrestee, although the officer has no reasonable ground to believe that the arrestee committed it. It permits arrest by a peace officer without warrant for a misdemeanor when the officer has reasonable ground to believe that the arrestee has committed a misdemeanor in his presence; and also when the officer has reasonable ground to believe that the person to be arrested has committed a misdemeanor out of the officer's presence, *and will not be apprehended unless immediately arrested.*⁵⁷

The enlargement of the common law to permit arrest of a guilty felon, without regard to reasons which led the officer to make the arrest, is not novel or different in substance from the provision of the Montana statute,⁵⁸ but the exceedingly plain wording of the Uniform Arrest Act should prevent its suffering judicial oversight.⁵⁹ Adoption of the provision of this Act for arrest for a misdemeanor committed in the presence of the officer would require a reversal of the holding of the Montana Supreme Court in *State v. Bradshaw*, that mistake by an officer in thinking that conduct is a misdemeanor, when in fact it is not, does not justify an arrest.⁶⁰ And the provision for arrest for a misdemeanor not committed in the presence of the officer, would avoid much of the doubt of the constitutionality of the position of the Montana Supreme Court, since it requires not only that the officer have reasonable ground to believe that the arrestee has committed the misdemeanor but also reasonable

⁵⁶For a full discussion of this Act, see Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

⁵⁷UNIFORM ARREST ACT, § 6.

⁵⁸*Supra*, notes 14, 15.

⁵⁹Professor Warner has pointed out that very few decisions have applied the provision as found in state codes. He says:

" . . . In contrast with this judicial utilization of the provision are a number of cases in which the provision is simply ignored—frequently its application would either have spared the court the necessity of deciding that the officer might reasonably believe the defendant guilty of a felony, or would have avoided the release of an undoubtedly guilty felon . . ." Warner, *The Uniform Arrest Act*, *supra*, note 56, at p. 333, footnote 29.

Cf. *State v. Hum Quock*, *supra*, note 35, *State v. Neidamier*, *supra*, note 38; *State v. Mullaney*, *supra*, note 39.

⁶⁰See *supra*, note 11.

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ground to believe that the offender will not be apprehended unless immediately arrested. Surely, unless there is reason to suppose that the offender will escape if not immediately arrested, the delay incident to obtaining a warrant will not injure the interests of the state.^a

The way is thus pointed to a complete restatement of the law on arrests without warrant. Certainly the common law is inadequate for effective policing under modern conditions. The Montana statutes remove some, but not all, of these inadequacies. The decisions of the Montana Supreme Court, perhaps in an effort to cope with modern conditions, appear to have departed from the statutes and to have laid down a rule which, as applied to arrests for misdemeanors, is of doubtful constitutionality. A thorough-going restatement of the law, therefore, seems to be in order.

^aThere is considerable disagreement as to whether officers should be permitted to arrest without warrant for misdemeanors not committed in their presence.

“. . . The argument in favor of permitting such arrest is that they could always do so as to felonies . . . and that the distinctions between felony and misdemeanor were arbitrary and purely historical. On the other hand it is contended that the lesser disgrace of arrest for misdemeanor would lead to arrests without careful checking of the charge of crime. While these opposing arguments are rather closely balanced, it would seem that it should be possible to arrest petty thieves and other misdemeanants who will otherwise escape. . . .” ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, p. 22.

On the continent of Europe, a distinction has long been taken between arrest and detention, there being no need of a reasonable ground of suspicion for the latter. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, p. 24. The Uniform Arrest Act incorporates this distinction and provides that a peace officer may stop any person abroad when he has reasonable ground to suspect that the person is committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going. It provides that any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated. But the total period of detention must not exceed two hours, and the detention is not recorded as an arrest in any official record. At the end of the detention the person must be released, or arrested and charged with a crime. The Act does not authorize questioning of persons in their homes; and the suspect cannot be compelled to answer questions without giving him immunity from prosecution, for to do so would violate constitutional safeguards against self-crimination. It is contended that these provisions for questioning without immediate arrest harmonize the law and practice, are essential to proper policing, protect officers against suits for false arrest, protect the public from the humiliation of arrests, and are, therefore, reasonable and not in violation of any constitutional safeguard of personal liberty. Warner, *The Uniform Arrest Act, supra*, note 56, at pp. 317-324. However, arguably, such detention conflicts with the traditional political ideals, whereby it is insisted that individuals who have committed no wrong shall be absolutely unmolested. See Hall,

Law of Arrest in Relation to Social Problems, 3 U. CHI. L. REV. 345, 371.

ADDENDUM

As this goes to the printer, the Supreme Court of the United States has overruled *Trupiano v. United States* (*Supra*, note 34 and page 17), to the extent that it "requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after lawful arrest." In a five to three decision the Court said that "no one questions the right, without a search warrant, to search the person after a valid arrest," and sustained as reasonable search, as an incident to a lawful arrest, of the arrestee's "desk, safe and file cabinets, all within plain sight of the parties, and all located under respondents' immediate control in his one-room office open to the public." The extent of the permissible area of search beyond the person proper remains to be decided under the facts and circumstances of each case, but the majority opinion noted, apparently with approval on this point, state cases, including *State ex rel Wong You v. District Court*, *Supra*, page 8, construing state safeguards similar to the Fourth Amendment. *United States v. Rabinowitz*, decided Feb. 20, 1950.