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CRIMINAL LAW: PERSONAL SEARCHES INCIDENT TO TRAFFIC ARRESTS – NO NEXUS NECESSARY?

State v. Gustafson, 258 So. 2d 1 (Fla. 1972)

Appellant-driver was stopped by city police officers, who had observed his vehicle weave across the center line, and was arrested for failure to have a driver's license in his possession. The ensuing search of appellant's person produced from a coat pocket a cigarette package containing marijuana, and appellant was charged with violating state narcotics laws.[1] The trial court imposed probation, withholding adjudication of guilt. On appeal, appellant challenged the constitutionality of the search, and the Fourth District Court of Appeal reversed, holding the search invalid as incident to a traffic arrest.[2] On certiorari,[3] the Supreme Court of Florida reversed and HELD, a search that reasonably ensues after a legal arrest is proper, regardless of whether a nexus exists between the offense and the object sought.[4]

The legal concept of a search incident to a lawful arrest predated the formal search warrant in English common law.[5] Moreover, the United States Supreme Court has long recognized the validity of warrantless searches properly incident to lawful arrests.[6] While the Constitutions of the United States,[7] Florida,[8] and every other state[9] prohibit unreasonable searches and seizures, the Supreme Court has refused to require that all valid searches be effected pursuant to a search warrant.[10] Furthermore, Florida courts have frequently sustained warrantless searches when incident to lawful arrests.[11]

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1. FLA. STAT. ch. 398 (1971).

2. Gustafson v. State, 243 So. 2d 615 (4th D.C.A. Fla. 1971), *rev'd*, 258 So. 2d 1 (Fla. 1972).

3. Conflict was asserted with Farmer v. State, 208 So. 2d 266 (3d D.C.A. Fla. 1968) (upholding search incident to arrest for public drunkenness) and Smith v. State, 155 So. 2d 826 (2d D.C.A. Fla. 1963) (upholding search incident to arrest for traffic violation).

4. The court also held reasonable suspicion of automobile driver intoxication not only justifies stopping an automobile but also justifies a search for intoxicants or drugs. 258 So. 2d at 2. Although this holding should not be minimized, examination will be limited to the nexus ruling.

5. M. HALE, PLEAS OF THE CROWN 639 (1847).

6. "Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England." United States v. Rabinowitz, 339 U.S. 56, 60 (1960).

7. U. S. CONST. amend. IV.

8. FLA. CONST. art. I, §12.

9. *E.g.*, CAL. CONST. art. 1, §19; ILL. CONST. art. I, §6; *see* Harris v. United States, 331 U.S. 145, 160 n.5 (1947).

10. Harris v. United States, 331 U.S. 145, 150 (1947).

11. *See, e.g.*, Self v. State, 98 So. 2d 333 (Fla. 1957); Italiano v. State, 141 Fla. 249, 193 So. 48 (1940); Farmer v. State, 208 So. 2d 266 (3d D.C.A. Fla. 1968); Smith v. State, 155 So. 2d 826 (2d D.C.A. Fla. 1963), *cert. dismissed*, 167 So. 2d 225 (Fla. 1964).

History, however, does not support categorical validation of all searches incident to antecedent lawful arrests.[12] Legal commentators[13] and courts[14] have sharply criticized this approach, agreeing if the arrest is proper the incidental search must still be *reasonable.*[15] Florida courts have consistently so held.[16]

Although the requirement of reasonableness is well recognized, its meaning is unsettled and has generated considerable dispute. Factors determinative of reasonableness of incidental searches have included the practicality of obtaining a warrant,[17] facts known to the officer at the time of the arrest,[18] the necessity for effecting a lawful arrest,[19] the motive of the police officer,[20] the prevention of escape or destruction of evidence,[21] the security of the arresting officer,[22] and *a rational connection between the search and the crime for which the arrest was made.*[23] This rational connection requirement has recently been clarified by the United States Supreme Court. In *Chimel v. California*[24] the Court carefully delineated the permissible scope of incidental searches of the arrestee's premises and determined that reasonable incidental searches must be strictly related to the circumstances of the arrest.[25] However, even this decision has been criticized as a "windfall for criminals" and an undue restriction on effective crime detection and prevention.[26]

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12. Comment, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866, 869 (1969).

13. *See* N. SOBEL, CURRENT PROBLEMS IN THE LAW OF SEARCH AND SEIZURE 119, 121 (1964); Simeone, *Searches and Seizures Incidental to Traffic Violations*, 6 ST. LOUIS U.L.J. 506 (1961); Note, *Searches and Seizures – Searches Incident to Traffic Violations*, 1959 WIS. L. REV. 347; Comment, *supra* note 12.

14. *E.g.*, Williams v. United States, 412 F.2d 729, 735-36, (5th Cir. 1969); Amador-Gonzalez v. United States, 391 F.2d 308, 313 (5th Cir. 1968).

15. Trupiano v. United States, 334 U.S. 699, 708 (1948); Amador-Gonzalez v. United States, 391 F.2d 308, 315 (5th Cir. 1968); Jack v. United States, 387 F.2d 471, 472-73 (9th Cir. 1967), *cert. denied*, 392 U.S. 934 (1968); State v. Quintana, 92 Ariz. 267, 268-69, 376 P.2d 130, 131 (1962).

16. Courington v. State, 74 So. 2d 652 (Fla. 1954); State *ex rel.* Stillman v. Merritt, 86 Fla. 164, 99 So. 230 (1923); Haile v. Gardner, 82 Fla. 355, 91 So. 376 (1921); State v. O'Steen, 238 So. 2d 434 (1st D.C.A. Fla. 1970); Range v. State, 156 So. 2d 534 (2d D.C.A. Fla. 1963).

17. Lawson v. State, 484 P.2d 1337, 1341 (Okla. Crim. App. 1971).

18. People v. Character, 32 Mich. App. 40, 42, 188 N.W.2d 12, 14 (1st Cir. Ct. App. 1971).

19. Courington v. State, 74 So. 2d 652, 653 (Fla. 1954).

20. Amador-Gonzalez v. United States, 391 F.2d 308, 315 (5th Cir. 1968).

21. Preston v. United States, 376 U.S. 364, 367 (1964).

22. *Id.*

23. Warden v. Hayden, 387 U.S. 294 (1967); Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433, *cert. denied*, 364 U.S. 833 (1960).

24. 395 U.S. 752 (1969).

25. *Id.* at 762, 766-68. Police conducted a warrantless search of defendant's entire house, incident to his lawful arrest in the house on a burglary charge. The Court held the search unreasonable as it extended beyond the arrestee's person and the area within his immediate control.

26. State v. O'Steen, 238 So. 2d 434, 436, 437 (1st D.C.A. Fla. 1970).

Florida's recently revised incidental search statute[27] appears to mirror *Chimel* and may well reflect a trend. This link between the search and the crime is now regarded by several courts and legal commentators as the test of validity for warrantless incidental searches.[28] The instant decision, however, not only breaks sharply from this trend, but also fails to align with the great weight of established law.[29]

If the reasonableness of an incidental search depends upon the nexus between the object sought and the crime for which the arrest is made, then traffic arrests create peculiar problems. Disregarding the protective search for weapons that may accompany every arrest,[30] the personal search of a traffic violator would produce fruits or instrumentalities of the crime only in unusual circumstances.[31] The only instrumentality of most minor traffic violations would be the vehicle and with the exception of driving while intoxicated, where a search for open liquor bottles is reasonable, there are no fruits of the crimes that comprise most traffic violations. Although personal searches incident to minor traffic offense arrests have frequently been upheld,[32] some courts have been reluctant to justify such searches.[33] It is for traffic arrests that the recognition of a nexus requirement is clearly the better rule; it provides maximum safeguards within fourth amendment

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27. FLA. STAT. §901.21 (1971) provides in part: "(1) When a lawful arrest is effected, a peace officer may search the person arrested and the area within the person's immediate presence for the purpose of: (a) Protecting the officer from attack; (b) Preventing the person from escaping; or (c) Discovering the fruits of a crime . . . ." Note that by striking the word "a" and inserting "the" in (1)(c) above, the legislature could securely fasten the incidental search to evidence of the crime for which the arrest was made—a minute but determinative alteration.

28. *See, e.g.*, Williams v. United States, 412 F.2d 729, 736 (5th Cir. 1969); Amador-Gonzalez v. United States, 391 F.2d 308, 315 (5th Cir. 1968); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433, *cert. denied*, 364 U.S. 833 (1960); Lawson v. State, 484 P.2d 1337, 1341 (Okla. Crim. App. 1971); Elliott v. State, 116 S.W.2d 1009, 1012 (Tenn. 1938); Comment, *supra* note 12, at 868.

29. 258 So. 2d at 4.

30. Most courts concur with the Supreme Court of Wisconsin: "[T]he protection of the lives of our law enforcement officers outweighs the slight affront to the personal dignity of the arrested person who undergoes a search for weapons . . . ." Barnes v. State, 25 Wis. 2d 116, 125, 130 N.W.2d 264, 269 (1964). Such a "pat down" search is not unreasonable even without probable cause to believe the arrestee is armed, but should not extend beyond the need for the officer's security. *See* People v. Rodriguez, 262 N.Y.S.2d 859 (Nassau County Ct. 1965). However, all searches incident to arrest should not be justified on the grounds that the officer is looking for weapons. *See,* Comment, *supra* note 12, at 874.

31. Lawson v. State, 484 P.2d 1337, 1341 (Okla. Crim. App. 1971).

32. *E.g.*, Self v. State, 98 So. 2d 333 (Fla. 1957) (defective taillight); Arthur v. State, 227 Ind. 493, 86 N.E.2d 698 (1949) (no driver's license); Edmonds v. Commonwealth, 287 S.W.2d 445 (Ky. 1956) (missing license plates); People v. Davis, 247 Mich. 536, 226 N.W. 337 (1929) (speeding); Soileau v. State, 156 Tex. Crim. 544, 244 S.W.2d 224 (1951) (running a stop light).

33. *E.g.*, People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433, *cert. denied*, 364 U.S. 833

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standards of reasonableness and protects the unwary motorists from possible abuse by overzealous police officers.[34]

Because appellant in the instant case was validly arrested for the commission of a misdemeanor in the presence of a police officer,[35] certain similar cases may be factually distinguished. Since appellant's cigarette package was located inside his coat pocket, the plain sight exceptions to warrantless incidental searches are inapplicable.[36] Also distinguishable are searches of the vehicle[37] or the passengers,[38] as well as searches not actually contemporaneous with the arrest.[39] Similarly excluded are traffic violations for which citations were issued but no arrest resulted, and those traffic arrests made as a pretext to search for evidence of other crimes.[40] Thus, the narrower issue becomes: When a valid arrest is made for a traffic violation that constitutes a crime, is a contemporaneous personal search of the violator lawful, and to what extent is such a search reasonable?[41]

Judicial authority on point is scarce and courts have frequently emphasized other issues.[42] However, in *Amador-Gonzalez v. United States*,[43] Judge Wisdom from the Fifth Circuit pleaded:[44]

> We will have fewer unconstitutional searches, if the emphasis is on the objective relationship between the nature of the offense and the nature (circumstances) of the search, rather than on the motivative cause of the arrest.

In *Williams v. United States*,[45] the same court was adamant in excluding evidence from a search that lacked the required nexus:[46]

(1960); People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783 (1967).

34. When such searches produce evidence for prosecution on more serious charges, questions of the admissibility of that evidence arise. Gustafson v. State, 243 So. 2d 615 (4th D.C.A. Fla. 1971), *rev'd*, 258 So. 2d 1 (Fla. 1972). As yet, the United States Supreme Court has not explicitly decided this issue. "In Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), the Court found the search too removed in time to be considered incidental to arrest for a minor traffic violation." Comment, *supra*, note 12, at 872 n.5.

35. FLA. STAT. §§322.15, .39 (1971); *see* note 4 *supra*.

36. *E.g.*, Marron v. United States, 275 U.S. 192 (1927); State v. Ashby, 245 So. 2d 225 (Fla. 1971).

37. *E.g.*, Carroll v. United States, 267 U.S. 132 (1925); People v. Gonzalez, 356 Mich. 247, 97 N.W.2d 16 (1959).

38. *E.g.*, United States v. Di Re, 332 U.S. 581 (1948).

39. *E.g.*, Preston v. United States, 376 U.S. 364 (1964).

40. *E.g.*, Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

41. *See*, People v. Rodriguez, 262 N.Y.S.2d 859, 861 (Nassau County Ct. 1965).

42. *See generally* Note, *Search and Seizure Incident to Traffic Violations*, 4 WILLAMETTE L.J. 247 (1966) (various courts have focused on the type of traffic arrest, the unintentional nature of the violation, or the issuance of a summons only versus a full summary arrest).

43. 391 F.2d 308 (5th Cir. 1968).

44. *Id.* at 315.

45. 412 F.2d 729 (5th Cir. 1969).

46. *Id.* at 736.

> [T]he present state of the law is that the test [of reasonableness for warrantless searches] can be satisfied only where the search . . . [is] closely related to the reason the defendant was arrested . . . . [thus providing] the essential nexus between arrest . . . and search . . . .

By refusing to recognize the vitality of the nexus test, the court in the instant case appeared to reject the position taken by the Fifth Circuit and shared by other federal courts.[47] In addition, several state courts have expressly refused to repudiate the nexus requirement for searches incident to traffic arrests.[48] One writer even suggests a movement away from any application of the incidental search doctrine to traffic arrests.[49] However, Florida cases[50] reveal that the principal opinion's reversal of the Fourth District Court of Appeal[51] was not a singular instance of conflict within the state.

The warrantless search incident to a traffic arrest should be the most narrow exception to the warrant requirement of the fourth amendment. The policy that a full search without warrant will be supported by any lawful arrest gives dangerously broad discretion to the police officers who must apply it. While states are not precluded from developing workable rules governing arrest, search, and seizure in order to meet the practical demands of effective criminal investigation and law enforcement,[52] neither should they indiscriminately apply to this area a legal concept developed to meet a different problem.[53] The exemption from fourth amendment warrant requirements should only lie in exceptional circumstances, and the burden to show need should be on those seeking the exemption.[54] Although the sweeping overbreadth of the principal case may only represent a public policy statement,[55] the practical effect of a rule permitting *full* warrantless searches incident to most traffic arrests is fearsome to imagine. The court does not reject the requirement that incidental searches be reasonable, but expressly refuses to acknowledge the saliency of the nexus element. The danger is

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47. *See* Jack v. United States, 387 F.2d 471 (9th Cir. 1967), *cert. denied*, 392 U.S. 934 (1968).

48. *See generally* note 28 *supra*.

49. *See* Note, *supra* note 42.

50. State v. O'Steen, 238 So. 2d 434 (1st D.C.A. Fla. 1970); Loften v. State, 173 So. 2d 157 (3d D.C.A. Fla.), *cert. denied*, 180 So. 2d 658 (1965); Chapman v. State, 158 So. 2d 578 (3d D.C.A. Fla. 1963).

51. 258 So. 2d 1.

52. Ker v. California, 374 U.S. 23, 34 (1963).

53. People v. Watkins, 19 Ill. 2d 11, 18, 166 N.E.2d 433, 436-37, *cert. denied*, 364 U.S. 833 (1960).

54. United States v. Jeffers, 342 U.S. 48, 51 (1951).

55. "In today's proliferation of illegal drug use . . . . and devastating use of various drugs in myriad forms . . . .

. . . .

This is no time for a retreat in the law when modern methods are demanded by accelerating criminal activity." 258 So. 2d at 2, 4.