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Constitutional Law: Florida Tightens Requirements for Vehicular Searches

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a character and in a condition to be used as contemplated by the contract, and that the bailor is liable for damages occasioned by faults or defects in the article. Although the authority is old and related to contract rather than to tort law, the principle involved applies equally well to the instant case. The *Phillipoff* case was available to the Fourth District Court of Appeal as authority for holding the gas company liable under the doctrine of implied warranty.

Justification exists for extending the coverage of implied warranty to certain bailment situations as in the instant case where the object bailed was potentially dangerous and the bailor exercised almost full control over the bailed article. Although the plaintiffs may recover upon retrial on the issue of negligence, the importance of this decision is that the court apparently declined to extend implied warranty protection to any bailee. Thus, the court may have created a large exception to Florida's expanding coverage of implied warranty.

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CONSTITUTIONAL LAW: FLORIDA TIGHTENS REQUIREMENTS FOR VEHICULAR SEARCHES

Carter v. State, 199 So. 2d 324 (2d D.C.A. Fla. 1967)

Defendant was arrested by city police officers acting on the belief that he was transporting lottery equipment in his truck. A search of the truck revealed incriminating lottery tickets and other gambling paraphernalia. The police did not have a warrant for the arrest or search, although for two weeks prior to his arrest they had observed defendant making trips between his home and a gasoline station suspected of supplying gambling equipment.

At his trial for violation of Florida's gambling laws,[1] defendant objected to the admission of lottery equipment seized from his truck on the ground that it was obtained as the result of an unreasonable search in violation of the fourth amendment and section 22 of the Florida Declaration of Rights.[2] On appeal from the Pinellas County Circuit Court, the Second District Court of Appeal HELD, the evidence was inadmissible because the officers did not have probable cause for defendant's arrest and, having had reasonable opportunity, should have procured a search warrant.

1. FLA. STAT. §849.09 (1965).
2. FLA. CONST. Decl. of Rights §22.

From the fourth amendment's prohibition against unreasonable searches has evolved the general rule that no searches of dwellings may be conducted except under authority of a warrant issued upon a showing of probable cause before a judge or magistrate.[3] Reflecting this rule, the Florida statutes provide elaborate mechanics for procuring search warrants.[4]

However, exceptions to the general rule have been recognized by Florida courts where it is reasonable to conduct a search without a warrant.[5] Two exceptions here applicable include a search made incident to an arrest on probable cause and a search made of a moving vehicle on probable cause.

The United States Supreme Court recognized in *Carroll v. United States*[6] that there are reasonable searches for which no warrant is required, one such search being that of a moving vehicle. In *Carroll*, the Court upheld the stopping and searching of an automobile without warrant where the arresting officers had probable cause to believe the automobile was carrying contraband. The rationale behind the Court's decision was based on necessity — the inherent mobility of automobiles makes it difficult to obtain a warrant prior to a search.

Carroll is the leading case on vehicular searches and has been cited repeatedly by both federal[7] and Florida[8] courts for the proposition that an automobile search may be made without a warrant if based on probable cause. It is important to note, however, that the *Carroll* decision substantially qualifies this broad proposition. In delineating the circumstances under which a search without a warrant may be made, the Court said "where the securing of a warrant is reasonably practicable it *must* be used."[9]

In the area of dwelling searches, federal[10] and Florida[11] cases have held that the fact officers have had sufficient opportunity to procure a warrant does not necessarily render invalid a search without a warrant. The Florida

3. *See, e.g.*, United States v. Young, 322 F.2d 443 (4th Cir. 1963), *cert. denied*, 375 U.S. 952 (1963); FLA. STAT. §933.18 (1965).

4. FLA. STAT. §933.01 (1965) states that "any judge" can issue a warrant; §933.02 provides the grounds upon which such search warrants may be obtained and requires that these grounds be supported by affidavits; §933.05 prohibits issuance of a search warrant "except upon probable cause supported by affidavit . . . naming or describing the person, place or thing to be searched and particularly describing the property or thing to be seized . . . ." Section 933.07 fixes a judicial duty upon a judge or magistrate to examine the proofs submitted and to be satisfied that "probable cause exists for the issuing of the search warrant" before it is issued.

5. Four exceptions are generally recognized: (1) where voluntary consent to the search is given, *see* Jackson v. State, 132 So. 2d 596 (Fla. 1961); (2) where the search is of certain establishments regulated by state agencies, *see* Boynton v. State, 64 So. 2d 536 (Fla. 1953); (3) where the search is incident to a lawful arrest, *see* Bryant v. State, 155 So. 2d 396 (2d D.C.A. Fla. 1963); (4) where the search of a vehicle is based on probable cause, *see* Range v. State, 156 So. 2d 534 (2d D.C.A. Fla. 1963).

6. 267 U.S. 132 (1925).

7. *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949); United States v. Roberts, 90 F. Supp. 718 (E.D. Tenn. 1950).

8. Kersey v. State, 58 So. 2d 155 (Fla. 1952).

9. 267 U.S. at 156 (emphasis added).

10. United States v. Rabinowitz, 339 U.S. 56 (1950).

11. Casso v. State, 182 So. 2d 252 (2d D.C.A. Fla. 1966).

court grafted this exception to automobile searches in *Brown v. State*, citing the *Carroll* decision as authority, and holding that a vehicular search does not require a warrant even where it would have been reasonably practicable to procure one.[12] This case is directly contra to the warning contained in the *Carroll* opinion, which has been adopted by Florida as the statutory law governing searches of automobiles.[13] *Carter* revitalizes the statutory standards seemingly overlooked in *Brown* and other Florida cases.

Though the rule in *Carroll* and its concomitant admonition have been explicitly followed in at least one instance where a federal court was applying Florida law,[14] the Florida courts have diluted the rule. Adopting a half-way stand between *Carroll* and *Brown*, the Florida Supreme Court has held that it would be "safer procedure" to procure a warrant prior to searching a vehicle.[15]

The distinction between recommending and requiring a warrant to search a vehicle where there is sufficient time and opportunity to go before a magistrate may seem insignificant; however, failure to make the distinction encourages searches without warrants. The thrust of the fourth amendment is to encourage the use of warrants wherever practicable to insure that searches will be reasonable.[16] It is much more desirable, time and circumstances permitting, to have independent judicial determination of the existence of probable cause than to leave such an inexact criterion to the discretion of arresting officers. Such loose interpretation of the *Carroll* decision has not gone without dissent and critical comment,[17] yet until *Carter v. State* Florida courts paid little heed to such criticism.

Another trend indicated by Florida decisions is that the requirements for probable cause, where automobile searches are involved, have been lowered. *Cameron v. State*,[18] reviewing prior decisions, indicated that minimal evidence is being held sufficient to constitute probable cause for the search of a vehicle without a warrant. In a subsequent case the court concluded, again upon reviewing prior decisions, that "[t]he aftermath of the *Carroll* case in Florida has been . . . a trend to narrow the concept of immunity against searches and seizures involving automobiles."[19]

12. 46 So. 2d 479, 481 (Fla. 1950).

13. FLA. STAT. §933.19 (1965).

14. Walker v. United States, 125 F.2d 395 (5th Cir. 1942).

15. Collins v. State, 65 So. 2d 61, 65 (Fla. 1953).

16. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950) (dissenting opinion); Brinegar v. United States, 338 U.S. 160 (1949) (dissenting opinion).

17. Mr. Justice Jackson, dissenting in *Brinegar* stated: "the extent of any privilege of search and seizure without [a] warrant which we sustain . . . officers interpret and apply themselves and will push to the limit." Brinegar v. United States, 338 U.S. 160, 182 (1949). Dissenters in a recent Supreme Court case, McCray v. State, 87 S. Ct. 1056, 1065 (1967) stated that "[u]nder the present decision we leave the Fourth Amendment exclusively in the custody of the police. . . . What we do today is to encourage arrests and searches without warrants." Also, a commentor criticized the logic behind Florida law on automobile searches since the law does not require a warrant to search a vehicle if based on probable cause even if there were sufficient time and opportunity to procure one. Comment, *Search and Seizure — the Florida Automobile Cases*, 10 MIAMI L.Q. 54, 65 (1955).

18. 112 So. 2d 864 (1st D.C.A. Fla. 1959).

19. Miller v. State, 137 So. 2d 21, 23 (2d D.C.A. Fla. 1962).

Carter v. State tightens the requirements long ago enunciated in the *Carroll* opinion, but largely ignored by subsequent Florida decisions. By requiring not only a showing of probable cause but also a showing that there was not sufficient opportunity to procure a warrant, the *Carter* decision infuses new vitality and substance into existing law. While not eliminating liberal police discretion regarding the existence of probable cause, the *Carter* case restricts it within more reasonable bounds. After all, if police officers do in fact have probable cause for stopping and searching a vehicle and sufficient opportunity to procure a warrant, they should not be hesitant to obtain judicial confirmation.

The decision in *Carter* does not define "reasonable opportunity" to procure a warrant by reference to point in time alone. Only where both time and circumstances reasonably permit the procuring of a warrant will the fruits of a search without a warrant based on probable cause be rendered inadmissible as evidence.[20] Surely this is not a prohibitive requirement for law enforcement officers. This decision will curb potential abuses of police power by requiring officers to "think twice" as to the existence of probable cause and the opportunity to procure a warrant. At the same time such procedure will retain adequate leeway, when necessity requires, for officers to conduct vehicular searches without a warrant.

Neither the fourth amendment nor section 22 of the Florida Declaration of Rights states that a search cannot be made without a warrant if it is reasonably practicable to procure one. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[21] Yet the reasonableness of the vehicular search cannot depend on the finding of probable cause subsequent to the search. In all likelihood, many searches of vehicles on alleged probable cause have revealed nothing, and some motorists have been delayed and harassed unduly. Requiring a warrant where reasonably practicable would curb these unnecessary searches and encourage independent judicial determinations as to the existence of probable cause.

But the *Carter* decision, while it tightens the requirements for vehicular searches, lays down no readily ascertainable standards as to what constitutes "reasonable opportunity, both in point of time and circumstances" to procure a warrant. Subsequent cases will have to supply the necessary guidelines.

Thus, uncertainty exists for police officers not only whether probable cause exists but also whether reasonable opportunity exists for procuring a search warrant. However, the fact that the *Carter* opinion encourages resort to the courts to resolve the uncertainty in both respects is more in line with the mandate of the fourth amendment and retains as paramount the public interest in protection from unreasonable searches.

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20. 199 So. 2d 324, 334 (2d D.C.A. Fla. 1967).
21. United States v. Rabinowitz, 339 U.S. 59, 66 (1950).