Florida Law Review

Volume 8 | Issue 3 Article 4

September 1955

Reasonable Search and Seizure–An Expanding Enigma in Florida Prosecutions

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NOTES

REASONABLE SEARCH AND SEIZURE – AN EXPANDING ENIGMA IN FLORIDA PROSECUTIONS

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated . . . ."[1]

Thus the Florida Constitution makes illegal an unreasonable search and seizure by adopting the basic doctrine found in the fourth amendment to the United States Constitution. Nebulous as the concept of reasonableness may be, its guarantee of the privacy of a person's dwelling and belongings against the tyranny of arbitrary law enforcement is one of the cornerstones of the American heritage of individual liberty.

In Florida the legality of search and seizure is tested by timely motion to suppress the evidence;[2] if the search and seizure is unreasonable the evidence seized is inadmissible.[3] This rule, known as the exclusionary rule, rests on the theory that the end cannot justify the means and on the practical consideration that to exclude illegally obtained evidence is the most effective way to discourage such searches. The rule has been criticized as giving the gambler and the bootlegger an easy route to acquittal.[4] In response to this criticism a majority of the states have adopted the admissibility rule, which admits evidence even though the search has not been reasonable.[5]

The Attorney General of Florida has strongly urged that Florida

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[1]FLA. CONST. decl. of rights §22.

[2]Robertson v. State, 94 Fla. 770, 114 So. 534 (1927).

[3]*E.g.*, Melton v. State, 75 So.2d 291 (Fla. 1954); Kraemer v. State, 60 So.2d 615 (Fla. 1952); Dickens v. State, 50 So.2d 775 (Fla. 1952); Dunnavant v. State, 46 So.2d 871 (Fla. 1950); Thurman v. State, 116 Fla. 426, 156 So. 484 (1934); Gildrie v. State, 94 Fla. 134, 113 So. 704 (1927).

[4]See Kraemer v. State, 60 So.2d 615 (Fla. 1952); 8 WIGMORE, EVIDENCE §2183 (3d ed. 1940).

[5]*E.g.*, Argetakis v. State, 24 Ariz. 599, 212 Pac. 372 (1923); State v. Chuchola, 32 Del. 133, 120 Atl. 212 (1922); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936); Commonwealth v. Dabbierio, 290 Pa. 174, 138 Atl. 679 (1927). For a breakdown of the position of all of the states on this point see Wolf v. Colorado, 338 U.S. 25, 33-39 (1949).

adopt the admissibility rule.[6] Under his auspices the following entitled bill was introduced unsuccessfully in each house of the 1955 Legislature:[7]

> "An Act relating to rules of practice in the Courts of Florida; providing that evidence of the violation of all felonies and any misdemeanor relating to lotteries, gambling, bookmaking, concealed weapons, narcotic drugs or habit forming drugs and alcoholic beverages, shall be admissible against any person charged with the commission of any felony or any such misdemeanor without regard to the legality of its obtention; providing for punishment of officer making unreasonable search or seizure."

The bills specifically provide, however, that the act is not to be interpreted as sanctioning unreasonable searches and seizures under the Florida Constitution.

Among the reasons advanced by the Attorney General for the adoption of the admissibility rule are:

(1) The record shows that illegal searches and seizures are no more prevalent in states with such a rule than in states with the exclusionary rule.
(2) The exclusionary rule does not go to the guilt or innocence of the accused.
(3) Illegally obtained evidence is already admissible if obtained by anyone other than a police officer.
(4) The exclusionary rule is a road block to effective law enforcement.

The United States Supreme Court has held that a state legislature may adopt either the exclusionary or the admissibility rule, since they are rules of evidence not going to the essence of the fourth amendment.[8] By analogy, either rule would be permissible in Florida under Section 22 of the declaration of rights. The United States Supreme Court, in holding that evidence illegally obtained is inadmis-

[6]Interview with Richard W. Ervin, Attorney General of Florida, April 1955.
[7]H. 282, S. 186.
[8]Salsburg v. Maryland, 346 U.S. 545 (1954).

sible in federal courts,[9] was the first court to adopt the exclusionary rule.

As long as the exclusionary rule remains in force in Florida it will be necessary to define the phrase *reasonable search and seizure* in order to obtain a criminal conviction. The basic prerequisite is a search warrant supported by an affidavit setting forth sufficient facts to show that the officer had reasonable grounds for believing that the premises were being used for the illegal purpose alleged. These reasonable grounds are the "probable cause" required for a search warrant affidavit;[10] they should not be confused with the probable cause needed to arrest without an arrest warrant or to search a vehicle without a search warrant. Admittedly the distinctions required in each case are hazy and for the most part undefined, but not to make them is to invite confusion.

The rule that requires a warrant to be issued before a search may be made is not without exceptions. These exceptions arise in searches (1) incident to lawful arrest, (2) of vehicles when there is probable cause, and (3) of certain establishments regulated by state agencies. Voluntary consent to the search waives the requirement of a search warrant,[11] so it cannot properly be considered an exception.

A search warrant can be invalid because of lack of a statement of probable cause in the affidavit,[12] or because of lack of specification of the place to be searched[13] or the articles to be seized.[14] It is not within the scope of this note to examine the factors that determine whether a search warrant is valid. It will be limited to a discussion of the Florida Supreme Court's determination of the reasonableness of search and seizure in those cases in which the search was predicated on an invalid search warrant or on none at all.

Searches Incident to Lawful Arrest

The first exception – that search and seizure incident to lawful arrest is reasonable – has been supported by a number of Florida

[9]Weeks v. United States, 232 U.S. 383 (1914).

[10]See Fla. Stat. §933.04 (1953).

[11]*E.g.*, James v. State, 80 So.2d 699 (Fla. 1955). Escobio v. State, 64 So.2d 766 (Fla. 1953).

[12]Dunnavant v. State, 46 So.2d 871 (Fla. 1950); see Owen, *A Brief on Searches and Seizures, Probable Cause, Arrest,* Office, Att'y Gen'l of Fla. (1954).

[13]Dunnavant v. State, 46 So.2d 871 (Fla. 1950).

[14]Gildrie v. State, 94 Fla. 134, 113 So. 704 (1927).

decisions.[15] This exception applies not only to arrests made under a warrant but also to arrests of persons committing a crime in the arresting officer's presence[16] or of persons the officer has reason to believe are committing or have committed a felony.[17]

There are certain limitations to this exception. One is that the arrest must be made before the search. The recent case of *Melton v. State*[18] is an extreme example of the application of this rule. An officer entered a private home under the apparent authority of a search warrant that later proved to be invalid. In the defendant's presence he lifted a floor board in the kitchen and discovered moonshine whisky, upon which he immediately arrested the defendant. The Court noted that even without discovery of the whisky there had been sufficient probable cause for arrest for the sale of untaxed liquor but held that, since the search and seizure was made before the arrest, it was not incident to a legal arrest and was therefore unreasonable. The United States Supreme Court has held, however, that when a valid arrest warrant has been issued and there is no search warrant a search can be made as an incident to lawful arrest, even prior to the time the actual arrest is made, and that the evidence so seized is admissible.[19]

Even when the arrest precedes the search, evidence obtained by the search may not be used to validate the arrest.[20] If the arrest is illegal the search is illegal, with the result that the officer is little more than a trespasser.[21] Another limitation prohibits an exploratory search even after a lawful arrest.[22]

In the area of traffic offenses, driving to the left of the center line[23] or passing on a curve that is not in a "no-passing" zone[24] are not infractions of the law and thus cannot form the basis for arrest incident to which search and seizure may be made. No case holding that

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[15]Mixon v. State, 54 So.2d 190 (Fla. 1951); Brown v. State, 46 So.2d 479 (Fla. 1950); Victor v. State, 141 Fla. 508, 193 So. 762 (1940); Italiano v. State, 141 Fla. 249, 193 So. 48 (1940).

[16]FLA. STAT. §901.15 (1) (1953).

[17]FLA. STAT. §901.15 (3) (1953).

[18]75 So.2d 291 (Fla. 1954).

[19]United States v. Rabinowitz, 339 U.S. 56 (1950).

[20]Dickens v. State, 59 So.2d 775 (Fla. 1952).

[21]Dickens v. State, 59 So.2d 775 (Fla. 1952) (dictum).

[22]See Irvin v. State, 66 So.2d 288 (Fla. 1953).

[23]Collins v. State, 65 So.2d 61 (Fla. 1953); Brown v. State, 62 So.2d 348 (Fla. 1952).

[24]Burley v. State, 59 So.2d 744 (Fla. 1952).

reasonable search and seizure can be made incident to a legal traffic arrest has been found, although dicta support this proposition.[25] A recent decision[26] seems to require that a search following a lawful arrest be made for the purpose of bolstering the charge for which the arrest was made in order for the search to be "appropriately incident" to the arrest. The conclusion may be drawn that no search can be made incident to a legal traffic arrest, since nothing that could be found would bolster a traffic charge. On the other hand, "appropriately incident" may mean only that no exploratory search should be made. If the first interpretation is correct – and it is the more obvious one – this case seriously restricts the concept of searches incident to lawful arrest. The case seems out of line, at least by analogy, with an earlier decision[27] holding that when a legal search is being made for moonshine whisky and lottery paraphernalia are found they may be seized. Admittedly, in the latter case the search was lawful, but the cases are parallel in that in neither were the seizures themselves appropriately incident to the original purpose of the arrest.

An expansion rather than a limitation of the rule is found in *Italiano v. State*,[28] in which the Court held lawful a search and seizure incident to an arrest in which the arresting officer had one of his cohorts set the scene for the making of an illegal bet.

Vehicular Searches Upon "Probable Cause"

The second exception, search of vehicles upon "probable cause" alone, arises from section 933.19 of Florida Statutes 1953, which adopts the provisions of the opinion in *Carroll v. United States*.[29] The defendants in this case were convicted of transporting whisky in violation of the National Prohibition Act. The search and seizure was upheld as reasonable, even though it was made without a search warrant and was not incident to a lawful arrest, because the arresting agents had probable cause to believe that the defendants were transporting whisky and if they had waited to procure a search warrant the defendants would have been many miles away.

The application by the Florida Court of section 933.19 in con-

[25] *E.g.*, Ippolito v. State, 80 So.2d 332, 334 (Fla. 1955) (dictum); Collins v. State, 65 So.2d 61, 63 (Fla. 1953) (dictum).

[26] Courginton v. State, 74 So.2d 652 (Fla. 1954).

[27] Lopez v. State, 66 So.2d 807 (Fla. 1953).

[28] 141 Fla. 249, 193 So. 48 (1940).

[29] 267 U.S. 132 (1925).

nection with vehicular searches and seizures is best understood by studying the factual situations in those cases in which it has been the deciding factor. In *Ellis v. State*,[30] decided prior to the enactment of section 933.19, the *Carroll* case was cited with approval, and the Court held that probable cause could arise from a tip that a certain automobile was carrying bootleg liquor. It is to be noted that in this case the occupants had left their automobile.

In 1946 the Court held that search of a car was not unreasonable after the officer unintentionally illuminated the back seat of the car with the spotlight of his police cruiser, revealing a large quantity of loose coins and causing two of the car's occupants to flee.[31] Four years later the Court stated in *Brown v. State*[32] that "trustworthy information" constituted probable cause sufficient to authorize search of an automobile. The arresting officer had an invalid search warrant, which would have been valid if its supporting affidavit had set out the "trustworthy information" in the correct form. This case did not distinguish between arrest without an arrest warrant and search without a search warrant but asserted that reasonable grounds were present for both.

In recent years the Supreme Court of Florida has become more strict in automobile search cases. In 1952 the Court held in *Kersey v. State*[33] that a tip to the Beverage Department plus a criminal record of the owner of the car was not sufficient to constitute probable cause to authorize the stopping and searching of an automobile. Later in the same year the Court held the evidence of probable cause insufficient for search when an officer received from an anonymous phone caller information that two unidentified cars had been meeting frequently under suspicious circumstances near the caller's residence.[34] The Court stated that suspicions could not be substituted for known facts and that officers should be able to distinguish between the two. In 1953 it was decided that information supplied by an anonymous informer did not create the "probable cause," "reasonable belief," or "trustworthy information" required to make the search one that would not contravene the declaration of rights.[35]

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[30]92 Fla. 275, 109 So. 622 (1926).
[31]Joyner v. State, 157 Fla. 874, 27 So.2d 349 (1946).
[32]46 So.2d 479 (Fla. 1950).
[33]58 So.2d 155 (Fla. 1952).
[34]Kraemer v. State, 60 So.2d 615 (Fla. 1952).
[35]Collins v. State, 65 So.2d 61 (Fla. 1953).

In a recent case[36] police officers in an unofficial car ordered defendants to stop because of an alleged traffic violation. The Court held that the defendants could have misunderstood the command or feared foul play and that their failure to stop and the subsequent chase did not give rise to sufficient probable cause to search their automobile without a warrant.

Another recent case held that a police officer could not search a truck because he recognized the smell of moonshine whisky, the Court deeming it impossible to differentiate between legal and illegal whisky through the olfactory sense.[37]

Searches of Establishments Regulated by the State

Another exception to the rule requiring that a warrant be issued before search can be made exists in connection with certain types of businesses. The state demands, as a prerequisite to licensing these businesses, that the owner consent to search without warrant by state officers especially appointed for the purpose of inspection.[38] The Court has held that a hotel inspector, in compliance with chapter 511, Florida Statutes 1953, needs no warrant to inspect a hotel, even though his sole purpose is to look for gambling violations and not violations of the hotel statutes.[39] A dictum in *Boynton v. State*[40] indicates that beverage officials inspecting a bar and restaurant can reasonably search for and seize lottery paraphernalia and can arrest for gambling violations committed in their presence. The Court said, however, that search of a business establishment may not extend to any of the premises not a part of the "place of business" and held the search unreasonable because the gambling and lottery paraphernalia were in a separate part of the building from where the liquor was sold.

Conclusion

If Florida ever adopts the admissibility rule this discussion will be applicable only to those situations in which the liability of the searching and seizing officer is under question, since the effect of the

[36]Ippolito v. State, 80 So.2d 332 (Fla. 1955).
[37]Byrd v. State, 80 So.2d 694 (Fla. 1955).
[38]*In re* Smith, 74 So.2d 353 (Fla. 1954).
[39]64 So.2d 536, 549 (Fla. 1953) (dictum).
[40]Salsburg v. Maryland, 346 U.S. 545 (1954).

admissibility rule is to divorce the criminal action from the legality of the search and seizure. If an individual is to be kept secure in his person, home, papers, and effects, there must be an effective deterrent against unreasonable searches and seizures. Whether criminal or civil action against the police officer can ever be an effective sanction is open to question, but the exclusionary rule has in some cases blocked the progress of bona fide criminal prosecutions. In some instances the Florida Supreme Court has been too strict in interpreting the phrase *reasonable search and seizure.* If the search is really unreasonable the evidence should be suppressed, but the Court should not carry the doctrine to the extreme. A more liberal interpretation of *reasonable* would have alleviated much of the present criticism of the exclusionary rule voiced by law enforcement officers.

Even if the Legislature does adopt the admissibility rule, there is the chance that the Florida Supreme Court will not accept the analogy between the bill of rights, under which such a rule is valid, and the declaration of rights, but will declare the rule unconstitutional by stating that the exclusionary rule is an essential element of section 22.

Since the admissibility rule was not passed, the interpretation of the phrase *reasonable search and seizure* remains all important. The Court has stated that a reasonable law authorizing search must correspond to the nature of the evil to be corrected; it is a matter for judicial determination.[41] At least one law of this nature has been held unconstitutional.[42] The definition of the phrase must be decided by the Court from the circumstances of the individual case before it if the phrase is to retain the flexibility necessary to insure justice under all circumstances. Realizing that any rules of construction must be cast in such a manner that they will retain this flexibility, a few suggestions are here set forth that may temper criticism leveled at the present law and reduce the number of acquittals of conspicuously guilty defendants because of the mistakes of overzealous officers.

(1) In search incident to arrest cases, a search should be considered reasonable, even though technically made prior to the arrest, if a legal arrest could have been made before the search.
(2) In vehicular search cases, search of the entire automobile

[41]Haile v. Gardner, 82 Fla. 355, 359, 91 So. 376, 377 (1921) (dictum).
[42]Thurman v. State, 116 Fla. 426, 156 So. 484 (1934).