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Constitutional Law: Delayed Search of Accused's Vehicle without Warrant Reasonable under Fourth Amendment

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Case Comments

Constitutional Law: Delayed Search of Accused's Vehicle Without Warrant Reasonable Under Fourth Amendment

Defendant was convicted in a California state court for selling heroin. Evidence was introduced at trial which had been seized from defendant's automobile while it was in police custody. Petitioner appealed, claiming that the evidence should have been excluded since it was seized by police without a warrant, violating the fourth amendment's protection from unreasonable search and seizure. The California District Court of Appeal agreed with petitioner but held that admission of the evidence was harmless error as it did not result in a miscarriage of justice.[1] The California Supreme Court declined to hear the case.[2] The United States Supreme Court sustained the validity of the search, *holding* that a search of an automobile is reasonable within the meaning of the fourth amendment if it is closely related to the reason the accused is arrested and the reason the car is impounded and is being retained. *Cooper v. California*, 386 U.S. 58 (1967).

The fourth amendment provides that the security against unreasonable search and seizure applies to persons, houses, papers, and effects.[3] This protection has been extended by interpreta-

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1. The Supreme Court did not address itself to this issue because they decided that no error existed. However, the applicability of the California harmless-error constitutional provision to alleged federal constitutional error was decided on the same day in the companion case of Chapman v. California, 386 U.S. 18 (1967). The Court, citing the standard established in Fahy v. Connecticut, 375 U.S. 85 (1963), held that the federal standards of harmless error must be used in determining whether a violation of a federal constitutional right has contributed to a conviction in a state court.

2. This fact had no bearing on the United States Supreme Court's authority to review the case. The Supreme Court has stated that:

> Whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach.

Williams v. Bruffy, 102 U.S. 248, 255 (1880). *See* Minneapolis, St. P & S. Ste. M. Ry. v. Rock, 279 U.S. 410 (1929) (right of Court to hear case when state supreme court denied review); Gregory v. McVeigh, 90 U.S. (23 Wall.) 294, 306.

3. U.S. CONST. amend. IV specifically provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particu-

tion to include a business office,[4] a store,[5] a hotel room,[6] an apartment,[7] and an automobile.[8] Although initially the right to have illegally seized evidence excluded from trial was applicable only to the federal courts,[9] this right was later made applicable to state courts under the due process clause of the fourteenth amendment.[10] The fourth amendment implicitly provides that a search pursuant to a warrant issued upon probable cause is

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larly describing the place to be searched, and the persons or things to be seized.

In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court held that in a federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure.

4. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), where the Court stated: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *See also* Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Comment, 33 HARV. L. REV. 869 (1920).

5. Amos v. United States, 255 U.S. 313 (1921). *But see* Davis v. United States, 328 U.S. 582, 592-93 (1946) (distinguishing *Amos*).

6. Lustig v. United States, 338 U.S. 74 (1949); *see* Feldman v. United States, 322 U.S. 487, 494 (1944) (Black, J., dissenting); Note, *Federal Courts' Control of Illegal Conduct of State Officers*, 42 MINN. L. REV. 121 (1957).

7. Jones v. United States, 362 U.S. 257 (1960). The Court, speaking through Mr. Justice Frankfurter stated:

> In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.

Id. at 270-71.

8. Rios v. United States, 364 U.S. 253 (1960); Gambino v. United States, 275 U.S. 310 (1927); Note, *Search and Seizure of an Automobile Incident to an Arrest for an Offense Other Than a Traffic Violation*, 31 Mo. L. REV. 436 (1966).

9. Elkins v. United States, 364 U.S. 206 (1960); Schwartz v. Texas, 344 U.S. 199 (1952); Wolf v. Colorado, 338 U.S. 25 (1949). *But see* Rochin v. California, 342 U.S. 165 (1952). *See also* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUPREME COURT REV. 1; Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties*, 45 U. ILL. L.F. 1 (1950); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959).

10. Mapp v. Ohio, 367 U.S. 643 (1961). The Court specifically rejected the *Wolf* rule on the rationale that time and practical application had rendered the *Wolf* decision unworkable in the face of the overriding concerns of justice espoused by the fourth and fourteenth amendments. *See* Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-examination in the Wake of Mapp v. Ohio*, 13 W. RES. L. REV. 56 (1961); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319; Comment, 42 B.U.L. REV. 119 (1962); Comment, 30 FORDHAM L. REV. 173 (1961).

constitutionally permissible and until 1950,[11] it was generally assumed that *only* searches conducted with a valid warrant were reasonable.[12]

The Supreme Court has, however, recognized exceptions to the general rule in cases involving movable vehicles and searches incident to a lawful arrest. These departures have been justified on the common-law grounds of a necessary and implied exception to the amendment.[13] Recognizing that a vehicle can be quickly removed from the locality or jurisdiction in which a warrant must be sought, the Court has held that where an arresting officer has probable cause to believe that a vehicle is carrying contraband or illegal merchandise, he need not obtain a warrant to search.[14] Similarly, warrantless searches incident to arrest have been justified to afford the police a method of self-protection, to prevent the escape of the suspect, and to mitigate against the possible destruction of the evidence.[15] It has been held,

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11. *See* Rabinowitz v. United States, 339 U.S. 56 (1950). Mr. Justice Minton, speaking for the Court stated:

> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. . . . The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.
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> It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches.

Id. at 65.

12. *See id.* at 70 (Frankfurter, J., dissenting); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 109 (1966); *cf.* Trupiano v. United States, 334 U.S. 699 (1948); Agnello v. United States, 269 U.S. 20, 32 (1925).

13. *See* J. LANDYNSKI, *supra* note 12; Carroll v. United States, 267 U.S. 132, 154 (1925); *cf.* Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967).

In the recent case of Warden v. Hayden, 387 U.S. 294 (1967), the Court permitted a warrantless search prior to an arrest where police officers pursued a suspected armed felon into a house. Reasoning that the situation necessitated the search, the Court stated "the exigencies of the situation made that course imperative . . . ." *Id.* at 298.

14. Carroll v. United States, 267 U.S. 132 (1925). *See also* Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931).

15. Preston v. United States, 376 U.S. 364 (1964); United States v.

however, that the scope of these permissible searches may encompass only the person of the accused and the area within his immediate control,[16] which includes in some instances the place where the arrest was made.[17] These limitations or qualifications of the exceptions to the general rule were intended to prohibit the authorities from using the exceptions as a license to permit a general exploratory search of the person or premises of the accused.[18]

Extending the concept of permissible searches even further, the Supreme Court in *Rabinowitz v. United States*[19] upheld the validity of a search incident to a lawful arrest even though there was time to secure a search warrant. The Court did not, however, base its decision on the necessities which were thought to justify searches incident to arrest, but rather on the ground that the fourth amendment prohibits only unreasonable searches. Rejecting the assumption that all searches conducted without a proper warrant and not falling within the common law exceptions are unreasonable and therefore prohibited by the amendment, the Court stated that:

> The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.[20]

Although *Rabinowitz* dealt with a search incident to arrest, the above quoted language arguably implies that warrantless searches which are not within the common-law exceptions might be valid if "reasonable" under the particular circumstances. Subsequent cases, however, did not immediately expand the areas of warrantless searches beyond the common-law exceptions.[21]

Illustrative of the Court's reluctance to extend the implications of *Rabinowitz* was the case of *Preston v. United States*.[22]

Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting); State v. Chinn, 231 Ore. 259, 373 P.2d 392 (1962).

16. Weeks v. United States, 232 U.S. 383 (1914).

17. United States v. Rabinowitz, 339 U.S. 56 (1950); Marron v. United States, 275 U.S. 192 (1927); Agnello v. United States, 269 U.S. 20 (1925).

18. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

19. 339 U.S. 56 (1950).

20. *Id.* at 63.

21. *See, e.g.*, Preston v. United States, 376 U.S. 364 (1964); Ker v. California, 374 U.S. 23 (1963); Chapman v. United States, 365 U.S. 610 (1961).

22. 376 U.S. 364 (1964).

In *Preston*, defendant was arrested on a charge of vagrancy while seated in his automobile. The vehicle was subsequently taken into police custody to remove it from the street and was searched shortly thereafter. Based partially upon the evidence obtained through this post-arrest search, defendant was convicted of conspiring to rob a federally insured bank. In reversing the conviction, the Supreme Court held that when the search of an automobile without a warrant was too remote in time or place to have been made incident to the arrest it failed to meet the test of reasonableness under the fourth amendment.[23] The Court reasoned that the normal justifications for allowing contemporaneous searches[24] are absent once the accused has been placed under arrest and the automobile is in police custody. Because the search was without a warrant and neither of the exceptions to warrantless searches applied, the search was deemed unreasonable and therefore illegal under the fourth amendment. *Preston* represents, therefore, an apparent retreat from the implications of the test of general reasonableness discussed in *Rabinowitz.*

The instant case is similar to *Preston* in that the automobile was searched some time subsequent to the arrest.[25] However, the Court undertook to distinguish *Preston* on factual grounds. In *Preston* the reason the car was being held bore no relationship to the search, and the search was unrelated to the arrest for vagrancy. In *Cooper* the automobile was impounded and held pursuant to a state statute which provided that a vehicle involved in the illegal handling of narcotics was to be held as evidence until a forfeiture had been declared or a release ordered.[26] In addition, the object of the search in *Cooper* was related to the accused's arrest on a charge of a narcotics violation. Consequently, the Court in *Cooper* held that the close relationship of the search to the nature of the arrest as well as to the reason the vehicle was in custody validated the search as reasonable within the spirit and meaning of the fourth amendment.

However, it is arguable that standing alone these distinctions are transparent and unconvincing. It is at once apparent that the statute under which the vehicle was impounded does

23. *Id.* at 368.
24. See note 15 *supra* and accompanying text.
25. In *Preston*, the car was searched "soon after the men had been booked at the station." 376 U.S. at 365. In *Cooper*, "the search occurred a week after the arrest of petitioner." 386 U.S. at 58.
26. CAL. HEALTH & SAFETY CODE § 11611.

not specifically authorize its search.[27] Rather, the language of the statute seems to import that such vehicles may be held as evidence only when such evidence *has* been found, but in *Cooper* the vehicle was first held and then the evidence found. Indeed, if custody of the car has any relevance, it arguably militates against the reasonableness of the search for with the man and the car in police custody, there was no danger that the car would be removed from the jurisdiction, or that the evidence would be destroyed. Further, the distinction based on the relationship between the search and the arrest is unconvincing for in *Preston* the Court indicated that even if evidence of the crime of vagrancy were involved—assuming that there is such a thing—the search would have been unreasonable.[28] Moreover, the reasoning of the *Preston* decision would seem to apply to the *Cooper* facts whether the purpose of the search had a relationship to the arrest or not for even if the search were related to the arrest, there was no possibility that the evidence would be destroyed once the defendant was arrested and the car taken into custody.

The Court in *Cooper*, however, was not addressing itself to precisely the same issue as it was in *Preston*. In the latter case the Court was deciding whether or not the search was reasonably incident to an arrest, while in the former the Court was dealing with the question of whether the search was reasonable under the fourth amendment even though it was not incident to an arrest.[29] Therefore, it is arguable that the Court in *Cooper* was attempting to establish that a warrantless search may be reasonable within the meaning of the fourth amendment even though it does not fall within the traditional exceptions of searches incident to a lawful arrest or searches of movable vehicles. Unlike *Preston*, which relied solely on necessity for justification to permit warrantless searches, the Court in *Cooper* adopted the test of general reasonableness established in *Rabinowitz* and extended the scope of permissible warrantless searches beyond the common law exceptions based on necessity.

Although *Cooper* is the first case to explicitly make this departure, searches under somewhat similar factual situations have been upheld in the past. Although most prior Supreme Court decisions speak in terms of searches incident to arrest, the traditional justification for permitting such searches, as set out in

27. This interpretation of the statute was rendered by the state court. People v. Cooper, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483 (1965).
28. Preston v. United States, 376 U.S. 364, 368 (1964).
29. Cooper v. California, 386 U.S. 58, 61 (1967).

the *Preston* decision, is frequently lacking.[30] In addition, several lower courts have reached similar conclusions, distinguishing the *Preston* decision on factual grounds.[31]

The fact that the sweeping holding of *Preston* was not entirely consistent with the decisions in prior cases, and the reluctance of lower courts to strictly apply the reasoning of *Preston* may have had a significant bearing on the *Cooper* decision. However, the decision may represent no more than a statement of reality for, although the Court in *Preston* defended the contemporaneous search doctrine on the grounds of necessity, subsequent cases indicate that the real justification is the convenience and expediency of allowing a reasonable search following an arrest.[32]

The difficulty with the doctrine announced in *Cooper* lies in the fact that there are no standards based on established reasoning which can be used to determine the legitimacy of a particular search. Without guidelines, law enforcement officers have no method other than intuition by which to determine whether or not a search and seizure is legal. Based on *Cooper*, it appears that a car may be searched if it is being held as evidence of the crime and/or is subject to forfeiture for the crime,[33] but such a conclusion should be tempered in light of the fact that in *Cooper* there was a statute which specifically authorized the authorities to impound the vehicle. Further, the *Cooper* decision places great weight upon the close relationship between the nature of the arrest and the objectives of the search. Such

30. *See, e.g.*, Harris v. United States, 331 U.S. 145 (1947), where all four rooms of an apartment were thoroughly searched for five hours while the suspect was handcuffed. It is difficult to see where such a search was necessary for the protection of evidence or police, or to prevent escape, any more so than in *Preston*. *See also* Ker v. California, 374 U.S. 23 (1963); Abel v. United States, 362 U.S. 217 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950); Marron v. United States, 275 U.S. 192 (1927).

31. For a collection and discussion of cases distinguishing *Preston*, see People v. Webb, 56 Cal. Rptr. 902, 424 P.2d 342 (Sup. Ct. 1967).

32. Except for Frankfurter's dissent in United States v. Rabinowitz, 339 U.S. 56, 68 (1950), and the *Preston* case, the cases generally state that the officers have a right to search without a warrant, to seize things connected with the crimes, not because it is necessary, but because it is reasonable. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950); Marron v. United States, 275 U.S. 192 (1927); Agnello v. United States, 269 U.S. 20 (1925).

33. A number of cases have distinguished *Preston*, when the car in question was itself evidence of a crime rather than a container of incriminating articles. *See* Trotter v. Stephens, 241 F. Supp. 33 (E.D. Ark. 1965); People v. Talbot, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966); Johnson v. State, 238 Md. 528, 209 A.2d 765 (1965).

a relationship should, therefore, be a determining agent. Lastly, factors relied upon by lower courts which distinguished *Preston* prior to the *Cooper* decision may also be relevant in implementing the *Cooper* doctrine. Such factors have included the proximity of time and place to the arrest,[34] the fact that a subsequent search was part of a continuing series of events between the arrest and search,[35] the difficulty or inadvisability of conducting a search at the time and place of arrest,[36] and the amount of protection needed to ensure against any third party's tampering with the evidence.[37] Although the decisions refer to the fact that such searches are reasonably incident to arrest, and therefore reasonable, it appears that under *Cooper* they may be valid if reasonable, even though not incident to arrest.

The *Cooper* decision does not necessarily alter the decisions presently rendered by lower courts, but it definitely establishes that a search need not be consistent with the former justifications for searches incident to an arrest to be reasonable under the fourth amendment. At this time, however, it is at best conjecture to predict what will ultimately be the correct interpretation and the proper scope of the *Cooper* decision, as its ambiguity and its departure from the reasoning of *Preston* will doubtless result in a variety of interpretations by the lower courts.[38] Should chaos result it can only be hoped that the Supreme Court will undertake to clarify the problem which it has created.

34. *Cooper* indicates that the lack of proximity of time and place to the arrest is not necessarily fatal to the validity of the search. This factor may nevertheless be significant in determining whether the search is incident to an arrest and if not, whether it is reasonable even though not incident to an arrest. *See* Crawford v. Bannan, 336 F.2d 505 (6th Cir. 1964); People v. Robinson, 62 Cal. 2d 889, 402 P.2d 834, 44 Cal. Rptr. 762 (1965).

35. *See* Price v. United States, 348 F.2d 68, 70 (D.C. Cir. 1965); Arwine v. Bannan, 346 F.2d 458 (6th Cir. 1965); Trotter v. Stephens, 241 F. Supp. 33 (E.D. Ark. 1965).

36. *See e.g.*, Arwine v. Bannan, 346 F.2d 458 (6th Cir. 1965); People v. Montgomery, 21 App. Div. 2d 904, 252 N.Y.S.2d 194, 195 (1964); State v. McCreary, 142 N.W.2d 240 (S.D. 1966).

37. *See, e.g.*, Arwine v. Bannan, 346 F.2d 458 (6th Cir. 1965); State v. McCreary, 142 N.W.2d 240 (S.D. 1966); People v. Talbot, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966).

38. In People v. Webb, 424 P.2d 342, 56 Cal. Rptr. 902 (Sup. Ct. 1967), the majority felt that the controlling consideration in *Cooper* is that the statute *required* the vehicle to be seized and held as evidence. Four dissenting justices in *Cooper* and one concurring justice in *Webb* interpreted *Cooper* as overruling *Preston*.