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Constitutional Law - Admissibility of Evidence - Reasonable Search and Seizure. *Hawley v. Commonwealth*, 206 Va. 479 (1965)

Robert E. Scott

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certain that, without further legislative action, this decision will reverse the trend. In the words of the Court, this decision reduces, the Government's claim for unpaid taxes to the status of an unsecured claim, sharing fourth-class priority with unsecured state and local tax claims....

F. Prince Butler

Constitutional Law—ADMISSIBILITY OF EVIDENCE—REASONABLE SEARCH AND SEIZURE. In November 1963, a dwelling in Chesapeake, Virginia was broken into and coins and whiskey were stolen. The following day, the defendant, John E. Hawley arrived at a motel driving a borrowed automobile. Before checking out on the same day, Hawley received permission from the motel manager to park the automobile in front of the office, stating that he would return to pick up the car in several days. After ten days had passed the manager phoned the police concerning the vehicle. Learning that the car was believed to be involved in the burglary, the police proceeded, without a warrant, to enter through an unlocked door finding under the front seat the coins and whiskey. Five months later Hawley was apprehended and indicted for the burglary.

At the trial the defendant moved that the coins and whiskey be excluded as evidence on the ground that they were procured by an unreasonable search in violation of the Fourth Amendment.¹ The trial court overruled the motion, and following the defendant's conviction for statutory burglary, the cause was brought on error to the Supreme Court of Appeals of Virginia.² The Appellate court held that there was no error in admitting the coins and whiskey in evidence. They found that the search and seizure was reasonable³ on the grounds that the car had been abandoned by Hawley and that its contents were, therefore, *bona vacantia*.⁴

1. U.S. Const. Amend. IV

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

2. Hawley v. Commonwealth, 206 Va. 479, 144 S.E.2d 314 (1965).

3. The court recognized that they were bound to follow the rule established in *Mapp v. Ohio*, 367 U.S. 643 (1961) that evidence obtained by unreasonable search and seizure is constitutionally inadmissible in state criminal prosecutions.

4. From a determination that the owner had permitted Hawley to use the car during

The principle of abandonment as it relates to search and seizure has developed as something of an anomaly. The principle is based on the theory that if an article has been abandoned its contents are converted into *bona vacantia*, and the defendant cannot, therefore, require their return or suppression.⁵ Although the courts have established an elaborate construction defining the limits of reasonable search and seizure,⁶ they have never clearly defined the exact relation of abandoned property to these formulations. The principle of abandonment has, however, been characterized by the development of two distinct types:

- (1) abandonment of property outside the areas encompassed by the protections of the Fourth Amendment.⁷
- (2) abandonment within property falling under the protections of the Constitution to which a possessory interest of another subsequently attaches.⁸

Hawley v. Commonwealth falls within the second category.⁹ In every

the period in question it was found that Hawley had only the right to possession of the vehicle, and that this right was abandoned when he failed to return. The Court inferred from the fact that the defendant evidenced an intention to return in three to four days the collateral presumption that he intended to abandon the car when he subsequently failed to return. Under these circumstances the abandonment was found to have occurred before the search therefore placing the property outside of the protection afforded by the Fourth Amendment.

5. *United States v. Festa*, 192 F.Supp 160 (1960).

6. Exceptions to the well established principle that a search must rest upon a search warrant have been jealously and carefully drawn by the courts. *Jones v. United States*, 357 U.S. 493 (1958). They have been allowed only where incident to a valid arrest or in exceptional circumstances, and even then the burden has been placed upon those seeking the exemption to show the need for it. *Jeffers v. United States*, 342 U.S. 48 (1941). From these formulations the federal courts have established the construction that a search is unreasonable unless it is: (1) Authorized by a valid search warrant; *Marion v. United States*, 275 U.S. 192 (1927); *Woo Lai Chun v. United States*, 274 F.2d 708 (9th Cir. 1960); *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961); or (2) incidental to a valid arrest; *Pampenella v. United States*, 131 F.Supp 959 (N.D.Ill 1955); *Weeks v. United States*, 232 U.S. 383 (1914); *Williams v. United States*, 263 F.2d 487 (D.C. Cir. 1959); or (3) where the defendant has expressly waived constitutional protection and voluntarily consented to the search. *United States v. Minor*, 117 F.Supp. 697 (E.D.Okla. 1959); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (2nd Cir. 1946); *Judd v. United States*, 190 F.2d 649 (App. D.C. 1951).

7. *Hester v. United States*, 265 U.S. 57 (1924) (open fields do not fall within the protection of the Fourth Amendment).

8. *Abel v. United States*, 362 U.S. 217 (1961).

9. *Weller v. Russell*, 321 F.2d 848 (3rd Cir. 1963) (automobiles are protected from unreasonable search).

previous case of this latter type, where the defendant has abandoned the seized evidence within a property in which he has only a possessory interest, consent to the search has been secured from the owner or lawful possessor of that property.¹⁰ The effect of this requirement has been to place this type of abandoned property within the context of reasonable search and seizure by finding it an application of the principle that a person in lawful possession of the article seized, or the premises in which they may be found, may under proper circumstances consent to the search.¹¹

Here, however, the Virginia Supreme Court of Appeals found as reasonable a search of abandoned property of this latter type which had been conducted without the consent of the lawful possessor.¹² The court based its decision solely on the "settled" rule "that the right afforded to persons by the Fourth Amendment . . . does not extend to abandoned premises or property."¹³ The two cases cited by the court, *Abel v. United States*¹⁴ and *Fegeur v. United States*,¹⁵ in support of its view that the car was abandoned and the subsequent search reasonable can be sharply distinguished on this very issue of consent. The explanation for this conflict lies primarily in the fact that the Virginia court does not make the same distinction between the two types of abandoned property that has been drawn by other courts in the past. Rather it held that abandoned property lies outside the established restrictions on unreasonable search and seizure whether or not the property is abandoned within areas protected by the Fourth Amendment. This result was obtained because the Virginia court has taken the

10. *Supra*, note 8 (consent of hotel management obtained to search abandoned room); *Fegeur v. United States*, 302 F.2d 214 (8th Cir. 1962) (consent of landlord to search room abandoned by tenant); *United States v. Calise*, 217 F.Supp 705 (S.D.N.Y. 1962) (consent of owner of building to search trash abandoned for collection by lessee after expiration of the lease); *Newingham v. United States* 4 F.2d 490 (3rd Cir. 1925) (search of abandoned desk and files, sold under landlord's warrant with consent of the purchaser); *Frank v. United States*, 347 F.2d 697 (8th Cir. 1965) (Postal inspectors after first obtaining consent from the lessor, entered and seized the abandoned property).

11. *Fredrickson v. United States*, 266 F.2d 463 (1959).

12. From the facts it can be established that neither the owner nor the manager gave consent to the search. The owner did not even know that the police had taken possession of the car. While the manager, though informing the police that the car appeared to be abandoned, gave no express consent to any search of the vehicle.

13. *Supra*, note 2.

14. *Supra*, note 8.

15. *Supra*, note 10.

rule peculiar to the first category of abandoned property,¹⁶ and employed it without distinction to a case which properly falls within the second.¹⁷

However, by upholding the admissibility of the evidence on the sole ground that the car was abandoned by Hawley, without a finding that consent had been secured from the subsequent lawful possessor; the Virginia court has found as reasonable a search without a warrant that does not lie within the construction which the courts have established defining the limits to which a search and seizure should be permitted.¹⁸ Consequently, abandoned property in Virginia on the basis of this decision is no longer, under any circumstances, related to reasonable search and seizure, but lies rather within that area to which the Fourth Amendment has no application.

Robert E. Scott

Criminal Law—CHRONIC ALCOHOLICS CAN NOT BE CONVICTED FOR PUBLIC DRUNKENNESS. In the case of *Driver v. Hinant*,¹ the United States Court of Appeals for the Fourth Circuit overruled earlier holdings of the North Carolina State Supreme Court² and a United States

16. *Supra*, note 7. In this case where property had been abandoned by the owners in open fields (to which the fourth Amendment guarantees do not extend), the court held that, "there is no seizure in the sense of law" where the officers examined the contents of the property after it had been abandoned.

17. For a discussion of the rule that automobiles are protected from unreasonable search under the Fourth Amendment see *Weller v. Russell*, *supra*, note 9.

18. From this finding follows the presumption that the search cannot be justified as being reasonable on the basis of any previous federal precedents. If consent is not required by the Virginia courts in order to make the search reasonable, on what basis can it be held to be such. Abandonment as a general abstract does not justify a search. For after property has been abandoned either: (1) it is found in some area outside the protection of the Fourth Amendment, or (2) it is found in an area secured from unreasonable search by constitutional guarantees. Therefore, some other factors must be present. Logically, if a right to possession is abandoned some others' rights must accede. Under the second possibility above these new possessory rights would be protected from unreasonable search. If so, how can a search be reasonable which is conducted, in the absence of probable cause, without the consent of the acceding possessor?

1. ———F.2d———(1966).

2. *State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964).