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SEARCH AND SEIZURE INCIDENTAL TO A LAWFUL ARREST

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The fourth amendment to the constitution of the United States:

> 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 Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

By its terms, premises protected by the fourth amendment may only be subject to search upon issuance of a proper warrant. To this general rule, a notable exception has been carved: a search of premises incidental to a lawful arrest thereon is allowed without a warrant. This exception is not a new concept, it was founded in the old common law traditions. As Judge Cardozo once said: "Immunity from unreasonable searches and seizures is not from all searches and seizures, but from searches and seizures unreasonable in light of common-law traditions."[1] *Harris* v. *United States* represents probably the most famous case upholding a search of premises incidental to a lawful arrest without a search warrant. Here officers armed only with an arrest warrant, arrested the defendant, Harris, in the living room of his four room dwelling, and proceeded to search the entire dwelling for evidence of his crime. In upholding the search and admitting the evidence seized, the court stated that searches and seizures incidental to lawful arrest was a practice of ancient origin. They also said that the practice had become an integral part of the law enforcement procedure of both the United States and of the individual states.[2] Since the recent *Mapp*[3] case excluded evidence obtained in an illegal search and seizure in all courts, state and federal, this exception to the general prohibition of

[1] People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923).

[2] Harris v. United States, 331 U.S. 145 (1947).

[3] Mapp v. Ohio, 367 U.S. 643 (1961).

the Constitution has begun to play an increasing role in the work of those involved in the field of criminal law.

To begin the examination of the search of premises incidental to lawful arrest, we will review prerequisites the law requires for such a search. The search must of course be *lawful.*[4] For it is the arrest which gives rise to the right of search, therefore, if the arrest is unlawful the search cannot be upheld. Secondly the arrest must be *bona fide.* If the arrest, even though supported by an arrest warrant or probable cause, is merely incidental to the furtherance of the main object, that of a search of the premises, the search is illegal. A good example of this was presented by the case of *Pampinella* v. *United States.*[5] The defendant in this case was a known criminal and was being kept under surveillance by Federal officers. While he was out of town the Federal officers obtained a warrant for the arrest of both defendant and his wife, charging them with harboring a criminal. The officers arrested the wife in the family home and made a search incidental thereto. It was then that the officers found an illegal gun belonging to the defendant. Several days later the charges for harboring a criminal were dropped against both defendant and his wife, and this action brought against defendant for illegal possession of the gun. The court refused the gun as evidence saying that the arrest under which the search had been made was a sham, and that it was a mere pretext to search for evidence of some sort to use against the defendant.

Although a valid arrest gives the arresting officer a right to search the person of the subject arrested, the right to search the premises incidental to the arrest is not automatic. The officer must have reasonable grounds to believe that a search of the premises will uncover objects subject to seizure and particular to this crime, which have not as yet been discovered.[6] If the officer has no reason to believe that his search will disclose objects subject to seizure in the crime for which the arrest was made, the search is classified as exploratory. In the

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[4] United States v. DiRe, 332 U.S. 581 (1948); United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960).

[5] Pampinella v. United States, 131 F. Supp. 595 (N.D. Ill. 1955).

[6] *Supra* note 5; United States v. Lerner, 100 F.Supp. 765 (N.D. Calif. 1951).

case of *Kremen* v. *United States*,[7] the arresting officers made a search of defendant's home incidental to his arrest. He had no reason to believe that his search would disclose objects pertaining to the crime for which defendant was arrested. In the court's words, he was looking for nothing in particular but for anything which might turn up. The court suppressed the evidence stating that all searches exploratory in nature were unreasonable. It matters not what the search reveals, for in law, a search is good or bad at its inception and success will not alter its character.[8] The rule against searches exploratory in nature, does not however, prevent the officer from taking visible objects. If on making the arrest on the premises, the officer sees objects subject to seizure either for the crime for which the arrest is being made or for any other; he may lawfully seize them.[9]

Then too, the search must always follow the arrest; never precede it. It is the arrest itself which confers the right to search the premises.[10] The cases hold that the search may begin with the arrest, and may proceed for such a period as the circumstances indicate would be reasonable.[11] Then too since the arrest is not made under a warrant, it too must meet certain requirements. The right of an officer to make an arrest without a warrant is dependent on an almost undefinable term: probable cause.[12]

Now that we have determined the necessary prerequisites for a search incidental to a lawful arrest, we must examine the two possible locations of the arrest: Within the premises or outside the premises.

Once the officer has made an arrest within the premises, he must determine whether or not a search thereof would be

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7 Kremen v. United States, 353 U.S. 346 (1957).

8 *Ibid.*

9 Marron v. United States, 275 U.S. 192 (1927).

10 Lee v. United States, 232 F.2d 354 (D.C. Cir. 1956); United States v. Hamm, 163 F.Supp. 4 (E.D. Mo. 1958).

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

12 For a further discussion of the requirements of an arrest without a warrant, the reader is referred to Rabinowitz v. United States, 339 U.S. 56 (1950). Also see discussion of the requirements of the Rabinowitz case in Abel v. United States, 362 U.S. 217 (1960).

deemed reasonable. The United States Supreme Court in the case of *Harris* v. *United States*,[13] set down a four step test which they felt should be used to determine the reasonableness of such a search. The four steps they set down were:

1. It must not be exploratory in nature.

2. The area searched cannot exceed the limits of the arrested person's control over the premises.

3. The search may be made only for objects subject to seizure in the crime for which the arrest is made, not those of another crime.

4. The search must only be as thorough and intensive as would be appropriate to the nature of the object sought.

The first test is based on the necessity of a reasonable belief on the officers' part that the result of the search will be some object pertaining to the crime that defendant was arrested for.[14] The right to search is based on the arrest and if the search will do nothing to further the arrest, then there should be no right.

The second test has been a source of many vigorous debates in the Supreme Court. The question of how much area around the individual may lawfully be termed "under his control", is difficult to answer. In the decided cases, a majority hold that the individual's control extends to his entire dwelling.[15]

The object of the third step is to limit the officers' search to those things the courts have held to be lawfully subject to seizure.

We have held in this regard that not every item may be seized which is properly inspectable by the Government

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[13] Harris v. United States, 331 U.S. 145 (1947).

[14] United States v. Lefkowitz, 285 U.S. 452 (1932); Kremen v. United States, 353 U.S. 346 (1957); United States v. Lerner, 100 F.Supp. 765 (N.D. Calif. 1951).

[15] Jones v. United States, 362 U.S. 257 (1960); Abel v. United States, 362 U.S. 217 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

> in the course of a legal search, for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, . . . However the court continued to say, Documents used as a means to commit crime are the proper subjects of search warrants . . . , and are seizable when discovered in a lawful search.[16]

Objects lawfully subject to seizure include: weapons of injury and escape, contraband, instrumentalities, and fruits of crime. The officers' search must be limited to objects of the crime for which the arrest was made, but if in this search he discovers objects subject to seizure for yet another crime he may validly seize them. For as the court said in the case of *Abel* v. *United States*,[17] if an object subject to seizure is found by an officer in the course of a lawful search, it would be senseless to say he must return it merely because it was not one of the things he was looking for.

The final test, the thoroughness and intensiveness of search in comparison with the nature of the object, depends on many factors. One such factor is the gravity of the offense. The court would tend to allow a deeper and more penetrating search if its object were a child who had been kidnapped, but on the other hand would tend to limit a search for the fruits of a petty larceny.[18] Then too the size of the object must be considered. The thoroughness of a search for a stolen automobile and that of one for a small packet of narcotics will naturally differ.[19] Time as a measure of the intensiveness of the search is limited to a reasonable time inferred from the circumstances. In the *Harris* case, five officers spent five hours searching a four room dwelling for two cancelled checks.

The four step test of the *Harris* case is extremely useful in the examination of a search incidental to a lawful arrest. It serves members of both the legal and the law enforcement

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16 Abel v. United States, 362 U.S. 217 at 234, 238, (1960).

17 *Ibid.*

18 McDonald v. United States, 335 U.S. 451 (1948); Brinegar v. United States, 338 U.S. 160 (1949).

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

professions as a guide to determine the reasonableness of such a search. As there is no statutory law on the subject and the case holdings vary so widely, the new interest created by the *Mapp* case[20] will undoubtly effect the subject of seizure incidental to a lawful arrest and may well add to or subtract from the Supreme Court's four step test.

The other possible location of a search incidental to a lawful arrest, is the arrest of the defendant outside the premises. The general rule is that if the defendant is arrested outside of his dwelling, office, or other premises protected by the fourth amendment he cannot be taken to these premises for a search of them incidental to his arrest. Since it is the arrest that gives rise to the right of search and the premises are not the place of arrest, these premises cannot be made the subject of a lawful incidental search.[21] If, however, the defendant voluntarily consents to the search, the search and any seizure made are lawful and may be used in evidence even over defendant's subsequent protests.[22] The case of *United States* v. *Mitchell*[23] provides an excellent example of the application of the above rule. Here the defendant was arrested on the sidewalk outside his home. He was taken to police headquarters where he made a voluntary confession. He then voluntarily consented to let officers search his home and in fact accompanied them there for that purpose. The court in admitting the evidence obtained during this search over defendant's objection said that the defendant's voluntary consent was a waiver of the constitutional right to refuse consent.

There has been one notable exception to the general rule that an arrest outside the premises will not uphold a search of them incidental to the arrest. In several Federal cases where the defendant had been apprehended outside the premises, the court upheld a search thereof saying that the defendant was "constructively" on the searched premises at the time of

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20 Mapp v. Ohio, *supra* note 3.

21 Agnello v. United States, 269 U.S. 20 (1925); United States v. Coffman, 50 F.Supp. 823 (S.D. Calif. 1943); United States v. Alberti, 120 F.Supp. 171 (S.D. N.Y. 1954).

22 United States v. DuPont, 169 F.Supp. 572 (D. Mass. 1959).

23 332 U.S. 65 (1944).

the arrest.[24] The cases in which this exception has been recognized are few, and the circumstances under which it was allowed were quite narrow. In all these cases, the defendants were in the act of committing the crime at the time the officer intended to make his arrest, and were leaving that place at the time they were in fact arrested. Perhaps the greatest extension of this exception occurred in the case of *United States* v. *Jackson*.[25] Narcotics agents were keeping a house under surveillance at four twenty a.m. on information that a narcotics violation was being committed. The two defendants emerged from the house, entered an automobile and drove about a city block before they were overtaken and arrested by the officers. They were immediately searched; one had narcotics in his possession and both had keys to the dwelling they had just left. The agents took both defendants back to the dwelling and made a search thereof, in the process finding additional supplies of illegal narcotics. The agents were armed with neither search nor arrest warrants. On considering the motion to suppress the evidence, the court said that since the defendants controlled the premises, had emerged therefrom immediately before their arrest, and the search was confined to evidence of the narcotics violation for which they were arrested the search was not unreasonable. Even though the arrest was made a block away, the search was contemporaneous with the arrest and in the course of the same transaction. The court did say, however, that the hour, four twenty a.m. had influenced their decision as they were aware of the impossibility of obtaining a search warrant at this time.

The officer cannot deliberately delay arresting the defendant in order to make a search of his dwelling incidental thereto. In a nineteen fifty Federal court case,[26] officers trailed defendant down a quiet street, rejecting many suitable opportunities to arrest him. When he entered his home officers followed, arresting him and making a search of his home incidental thereto. In terming the search unreasonable, the court said that it appeared that the only reason the officers

[24] Kelly v. United States, 61 F.2d 843 (8th Cir. 1932); Clifton v. United States, 224 F.2d 329 (4th Cir. 1955); Brock v. United States, 256 F.2d 55 (5th Cir. 1958).

[25] 149 F.Supp 937 (D. D.C. 1957).

[26] McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950).

delayed their arrest was for the purpose of searching his home to obtain evidence to convict him. They continued, saying, that this purposeful delay violated the defendant's rights under the fourth amendment. If, however, the officer had as a secondary purpose, the desire to search the defendant's home, and there is no proof that he deliberately bypassed a suitable opportunity outside the premises, the search will be upheld.[27]

Of course if the officer finds the defendant outside the premises and lures him back into them by means of misrepresentation or fraud, a search of the premises incidental thereto would be unreasonable.[28]

Since a search of premises incidental to a lawful arrest without a search warrant is an exception to a constitutional requirement, the courts have tended to limit, and apply strict standards to its use. Some of the leading members of the legal profession have viewed this exception with skepticism, while others have vigorously opposed it.[29] Though it has been opposed and strictly interpreted, this exception holds an increasing place of importance in the law on search and seizure. With the recent *Mapp* case[30] requiring evidence obtained in an illegal search and seizure to be excluded in all courts, state and federal, this exception has tended to be relied on more and more by law enforcement officers. Members of the bar in agreement with it or not, must become familiar with this exception and its requirements for the best interests of their clients.

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[27] Leahy v. United States, 272 F.2d 487 (9th Cir. 1959).

[28] United States v. Alberti, 120 F.Supp. 171 (S.D. N.Y. 1954).

[29] See J. Frankfurter's dissents in Harris v. United States, 331 U.S. 145 (1947); and United States v. Rabinowitz, 339 U.S. 56 (1950).

[30] Mapp v. Ohio, 367 U.S. 643 (1961).