Marquette Law Review

Volume 48
Issue 4 *Spring 1965*

Article 11

Recent Decisions: Constitutional Law: Search and Seizure Incident to Arrest for Traffic Violation

Michael W. Wilcox

tion of Daniels,[20] which involved the investigation of the sole stockholder of a corporation which had obtained its charter in Panama and had never been subject to the jurisdiction of the United States, the Federal District Court for the Southern District of New York held that the fifth amendment privilege against self-incrimination was available to the sole stockholder of the corporation in respect to corporate books and records. The court there declared that since the corporation was not within the jurisdiction of the United States, the books and records of the corporation would be considered as those of an unincorporated association and the "group or personal interest" test of the *White* case must be applied. And if in applying this test, the corporate officer was found to hold the books and records in a purely personal capacity, he must be afforded the constitutional protection of the privilege against compulsory self-incrimination.[21]

Some text writers feel that the circumstances which prompted the framing of the fifth amendment privilege against compulsory self-incrimination are no longer present in today's society, and therefore it should be severely curtailed or abolished completely.[22] Recent opinions dealing with tax investigations, by emphasizing the importance of the visitorial power over the corporation, have substantially diminished the fifth amendment's protection as to businessmen operating through the corporation.

TERRY R. GRAY

Constitutional Law: Search and Seizure Incident to Arrest for Traffic Violation: Defendant was stopped by two officers of the vice squad, narcotics division, and placed under arrest for a brake light violation. Informed that the violation justified a search of his person and the car, defendant stated: "Go ahead, I am clean." The search of the car revealed nothing, but with the aid of a flashlight, the officers discovered a few particles of marijuana in defendant's overcoat pocket. Defendant was arrested for possession of narcotics and subsequently convicted. On appeal, in *Barnes v. State,*[1] the Wisconsin Supreme Court reversed, holding that (1) there was no consent and (2) the search incident to arrest was unconstitutional.

Determining the issue of consent, Justice Currie stated "that the consent given was tainted with duress and therefore not freely and voluntarily given. Not only was defendant then under arrest but he knew from the statement of the officer that his person would be searched regardless of whether he consented or not."[2]

---

[20] 140 F. Supp. 322 (S.D. N.Y. 1956).
[21] *Id.* at 326.
[22] Baker, *Is the Privilege an Anachronism?* 42 A.B.A.J. 633 (1956); Fink, *Privilege Against Self-Incrimination—A Critical Reappraisal,* 13 W. RES. L. REV. 722 (1962); Pittman, *Fifth Amendment: Yesterday, Today, and Tomorrow,* 42 A.B.A.J. 509 (1956).
[1] 25 Wis. 2d 116, 130 N.W. 2d 264 (1964).
[2] *Id.* at 123, 130 N.W. 2d 268.

The ensuing analysis will be directed towards the second issue in the case; *i.e.,* whether the search incident to the arrest was constitutional. The court held that

> all searches by police officers are subject to the requirement of reasonableness. . . . Not only was defendant 'patted down,' but the officers searched the inside of his overcoat pocket with a flashlight. We cannot conceive that this aspect of the search was a legitimate search for weapons. The only reasonable inference to be drawn from this action was that these vice-squad officers assigned to the narcotics division were searching for narcotics. We reject the state's contention that any search of one lawfully arrested is a valid search. Such search to be reasonable must be limited to weapons or the fruits or the instrumentalities of the crime for which the defendant was arrested.[3]

The general rule is that a search incident to a valid arrest is valid.[4] But, at this point, mention should be made of the enormous problem raised in simply attempting to define arrest. No one seems to know just exactly when an arrest does and does not take place.[5] One author has carefully delineated between the issuance of a ticket, the issuance of a summons, and summary arrest and has concluded that *any* search incident to a lawful summary arrest is reasonable, but that summary arrest should be "confined to a limited type of serious cases where a search would not be considered as offensive as one made incident to a minor traffic violation."[6] Indeed, even the court in *Barnes* stated:

> The policy of the law, which permits arrest for minor traffic violations instead of prescribing the issuance of a summons without taking the defendant into custody as the exclusive police action, might well be reconsidered. However, that lies within the province of the legislature, not this court.[7]

It has been stated that "in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines it's validity,"[8] but it would appear that *Henry v. United States*[9] would control here because of the "bleed-through" of the fourteenth amendment. In that case, it was held that "when the officers interrupted the two men and restricted their liberty of movement, the

---

[3] *Id.* at 126, 130 N.W. 2d at 269.
[4] United States v. Rabinowitz, 339 U.S. 56 (1950).
[5] See the careful discussion by Judge Kaufman in United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960).
[6] Agata, *Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone,* 7 ST. LOUIS U.L.J. 1, 9, 38 (1962).
[7] 25 WIS. 2d 116, 126, 130 N.W. 2d 264, 269 (1964).
[8] United States v. DiRe, 332 U.S. 581, 589 (1948); see State v. Phillips, 262 Wis. 303, 308, 55 N.W. 2d 384, 386 (1952), where our court held that "an arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subject the person arrested to the actual control and will of the person making the arrest."
[9] 361 U.S. 98 (1959).

arrest, *for purposes of this case,* was complete."[10] (Emphasis added.) Because of the phrase "for the purposes of this case," the pervasiveness of *Henry* has been suspect,[11] but presumably our court, disregarding their previous holding in *State v. Phillips,*[12] held that Barnes was arrested under the *Henry* definition.

The United States Supreme Court has recently stated that "unquestionably, when a person is lawfully arrested, the public have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime."[13] A search incident to an arrest extends to things under the accused's immediate control[14] and, depending on the circumstances of the case, the place where he is arrested.[15] As regards motor vehicles, "what may be an unreasonable search of a house may be reasonable in the case of a motorcar."[16] The reasoning that any search incident to a traffic violation is constitutional has been best explained by a court that rejected it: "(1) [A] traffic violation is a misdemeanor; (2) a police officer has a right to arrest when a misdemeanor is committed in his presence; (3) an arresting officer has the right to search the person of one whom he arrests."[17]

To best understand the recent group of cases that *Barnes* now joins[18] and the reason for the present interest in this area of search and seizure, it is necessary to discuss the dilemma in which the police have found themselves because of the mandate in *Mapp v. Ohio.*[19] Prior to the imposition of the exclusionary rule on the states by *Mapp,* those states not adhering to the rule were not burdened with the necessity of justifying their searches.[20] With the appellate courts now being forced to determine the reasonableness of the searches, the police understandably turned to the ideal justification—make the search incident to a traffic arrest. However, the possibility of abuse in this fringe area, which constitutes a narrowly construed exception to the rigid require-

---

[10] *Id.* at 103.
[11] See United States v. Bonanno, 180 F. Supp. 71, 85 (S.D.N.Y. 1960).
[12] 262 Wis. 303, 55 N.W. 2d 384 (1952). See also State v. Sullivan, 395 P. 2d 745 (Wash. 1964) and United States v. Boston, 330 F. 2d 937 (2d Cir. 1964).
[13] Preston v. United States, 376 U.S. 364, 367 (1964).
[14] Carroll v. United States, 267 U.S. 132 (1925).
[15] Agnello v. United States, 269 U.S. 20 (1925).
[16] Preston v. United States, *supra* note 13, citing Carroll v. United States, *supra* note 14. See also Husty v. United States, 282 U.S. 694 (1913); and Commonwealth v. Katz, 202 Pa. Super 629, 198 A. 2d 883 (1964).
[17] People v. Watkins, 19 Ill. 2d 11, 166 N.E. 2d 433, 436 (1960).
[18] People v. Watkins, 19 Ill. 2d 11, 166 N.E. 2d 433 (1960); People v. Mayo, 19 Ill. 2d 136, 166 N.E. 2d 440 (1960); People v. Gonzales, 356 Mich. 247, 97 N.W. 2d 16 (1959); People v. Zeigler, 358 Mich. 355, 100 N.W. 2d 456 (1960); State v. Michaels, 60 Wash. 2d 638, 374 P. 2d 989 (1962); State v. Harris, 265 Minn. 260, 121 N.W. 2d 327 (1963).
[19] 367 U.S. 643 (1961).
[20] *But see* People v. Gonzales, *supra* note 18, where the court held that the search was unreasonable even though the evidence was admissible because the court was not bound by the exclusionary rule.

ment of a search warrant,[21] is patent; in fact, it has been judicially recognized that it is virtually impossible today to drive an automobile on the road without violating some sort of traffic law or ordinance.[22] While one must sympathize with the police in the fact that one of their most effective methods of law enforcement and crime detection has been suddenly and rudely thrown into a state of confusion and uncertainty,[23] the fact remains that a search violating the fourth amendment is not constitutional.

It appears that only two cases have gone to the fullest extent possible and held that a traffic arrest will not make a search incident to an arrest ipso facto reasonable.[24] Without drawing any distinction between the person and the automobile, the court in *People v. Gonzales*[25] held that "since no further detention was contemplated, there was no need to search for weapons or other means of possible escape from custody."[26] In *People v. Watkins*[27] it was said that "when no more is shown than that a car was parked too close to a crosswalk or too far from a curb, the constitution does not permit a policeman to search the driver."[28] Other states, taking judicial notice of the numerous attacks which have been made on law enforcement officers seeking to interrogate occupants of automobiles, hold that even though there are no fruits or instrumentalities flowing from the traffic violation, the officer at least has the right to search for weapons.[29]

The salient feature of these recent cases is the obvious shift of the emphasis of the court. Heretofore, the courts had looked merely to the *validity of the arrest*; now they seem to be looking at the *incidentalness*

[21] In Jones v. United States, 357 U.S. 493, 499 (1958), it was stated that "the exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them."

[22] Brinegar v. State, 97 Okla. Crim. 299, 262 P. 2d 464 (1953).

[23] See the dissent in People v. Zeigler, *supra* note 18, 100 N.W. 2d at 467, where Justice Smith said: "At the extreme, it is clear that search made solely upon caprice is not reasonably justified by the circumstances. Yet, at the other extreme, we will not demand of the officer that he weigh the circumstances confronting him with the detachment and precision of a laboratory technician while the seconds may be ticking away his span of life. No more is required of him than that he act with the prudence and reason demanded of any responsible official in the conduct of his duties, in the light of the surrounding circumstances." Also, Judge Learned Hand's statement in *In re* Fried, 161 F. 2d 453, 465 (2d Cir. 1947), is particularly apposite: "The protection of the individual from oppression and abuse by the police and enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise."

[24] People v. Watkins, *supra* note 18; People v. Gonzales, *supra* note 18.

[25] See note 18 *supra*.

[26] *Id.*, 97 N.W. 2d at 20.

[27] See note 18 *supra*.

[28] *Id.*, 166 N.E. 2d at 437.

[29] See Brook v. State, 21 Wis. 2d 32, 123 N.W. 2d 535 (1963), where a police officer was killed by the driver of a car stopped because of a loose license plate. The officer was not aware that the driver had just completed a burglary.

of the search and judicially recognizing that while it may be perfectly reasonable to search the person and automobile of one arrested for drunken driving on the theory that the search might disclose the intoxicant, it is quite unreasonable to search the person and automobile of one arrested for driving with a defective brake light. Clearly, then, the courts in *Barnes* viewed the arrest as merely a subterfuge and the law is well settled that "an arrest may not be used as a pretext to search for evidence."[30] But how do you preclude this conduct and still retain incidental searches? The test remains one of reasonableness,[31] only now a search is reasonable only to the extent that it was made necessary by the arrest.[32] The court in *Barnes* is in effect asking three questions of the searching officer:

(1) What were you looking for?
(2) Why were you looking for it there?
(3) Why were you looking for it in that manner?

These three questions all concern the basic thing the court is now concerned with—the *relationship* of the search to the arrest.

However, there are several instances where the traffic officer is not precluded from conducting a search. Even though a search may not always be incident to an arrest, a search of the vehicle can be based on probable cause that a crime has been committed and that the vehicle contains contraband.[33] Thus, in *Watkins,* where the defendant was arrested for the seemingly inconsequential violation of parking too near a crosswalk, the police had probable cause to search because (1) they knew defendant, (2) defendant knew them, (3) he had been arrested on several previous occasions, and (4) he ran when he saw the police giving his car a ticket.[34]

Another assuagement, as far as the police are concerned, to the traffic violation situation is that anything seized that is in plain view of the officer is not taken pursuant to a search and may give the officer probable cause to arrest and search further.[35] Thus, where defendant was stopped by the police for speeding and the officer observed a rifle lying on the back seat, the court held that the police had probable cause to arrest for a game violation. The stolen money and buglarious tools

[30] United States v. Lefkowitz, 285 U.S. 452, 467 (1932). See also Taglavore v. United States, 291 F. 2d 262 (9th Cir. 1961).
[31] United States v. Rabinowitz, 339 U.S. 56 (1950).
[32] See Note, *Search and Seizure Incident to Arrest for Traffic Violations,* 14 HASTINGS L. J. 459 (1963).
[33] Carroll v. United States, 267 U.S. 132 (1925); Husty v. United States, 282 U.S. 694 (1931).
[34] See State v. Quintana, 92 Ariz. 267, 376 P. 2d 130 (1962), where the court upheld a search of defendant's person after he was stopped for speeding. Since his "entire decorum was that of nervousness," the court held that the police were justified in having a reasonable suspicion that the car was stolen and thus could search his person for weapons.
[35] State v. Krogness, 388 P. 2d 120 (Ore. 1963).

subsequently uncovered in the search of the car were incident to a valid arrest.[36] As simple as these two concepts appear to be on their face, they will most likely be the key issues on which many of the traffic violation searches will now turn.

Since the court now examines the incidentalness of the arrest, one question that immediately presents itself is how far the holding in *Barnes* can be logically extended. Surely there are many arrests that would not justify a search of the person; *e.g.*, arrests for stock fraud, income tax evasion, driving without the consent of the owner, adultery, or lewd and lascivious behavior. This is just one of many ramifications of *Barnes v. State* that our court will have to grapple with in the near future.

In conclusion, then, the inquiry in *Barnes* suggests two problems. The first of these is whether there are only certain types of violations to which a search is constitutionally incidental. The second, closely related to the first, is whether there are only certain types of objects that can be seized in the search. The court in *Barnes* seems to have answered both of these questions. The court suggests that weapons may be the appropriate objects of a search, but that the search must be limited to places where weapons might be accessible to the person arrested. However, save a search for weapons, the officer may search only for the fruits of the crime or instrumentalities.[37] Thus, in Wisconsin, the "limitations on the fruit to be gathered tend to limit the quest itself."[38]

MICHAEL W. WILCOX

---

[36] *Ibid.*

[37] Thus our court appears to adopt the rule that objects of mere evidentiary value may not be seized; see Gouled v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616 (1885); Morrison v. United States, 263 F. 2d 487 (D.C. Cir. 1959); Williams v. United States, 263 F. 2d 487 (D.C. Cir. 1959); Annot., 129 A.L.R. 1296, 1300-01 (1940); and Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172 (1964). Under this distinction, only four types of objects can be seized: (1) means or instrumentalities by which the crime was committed, (2) the fruits of the crime, (3) weapons, and (4) contraband. FED. R. CRIM. P. 41(b). In the recent case of Brown v. State, 24 Wis. 2d 491, 502, 129 N.W. 2d 175, 180 (1964), the court said that "the police may, without a warrant, conduct a search of the person in order to protect themselves, and they may also search premises immediately under his control if there is also probable cause to believe the search will reveal *evidence* and instrumentalities of the crime for which the arrest was made." (Emphasis added; footnotes omitted.) Query, does *Barnes* sub silentio overrule *Brown?*

[38] United States v. Poller, 43 F. 2D 911, 914 (2nd Cir. 1930). Other useful law review articles in this general area are: Note, *Search and Seizure—Search Incident to Arrest for Traffic Violation*, 1959 WIS. L. REV. 347; Note, *Searches and Seizures Incident to Arrests for Minor Traffic Violations in Illinois*, 1960 U. ILL. L. F. 440; 6 WAYNE L. REV. 413 (1960); Simeone, *Search and Seizure Incident to Traffic Violations*, 6 ST. LOUIS U. L. J. 506 (1961); 9 BUFFALO L. REV. 382 (1960); Collins, *Toward Workable Rules of Search and Seizure —An Amicus Curiae Brief*, 50 CALIF. L. REV. 421 (1962); and Rothblatt, *The Arrest: Probable Cause and Search Without a Search Warrant*, 35 MISS. L. J. 252 (1964).