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# PERMISSIBLE POLICE PRACTICE: RECENT DEVELOPMENTS

HOWARD H. BOYLE, JR.\*

A good starting point for discussion of recent developments in permissible police practice is found in the new Wisconsin Criminal Code. The Code, though substantive, evokes questions of procedure where it pioneers in areas of crime. The particular innovation I have in mind is Section 939.32 dealing with attempts to commit a felony.

## ARREST WITHOUT WARRANT FOR ATTEMPT CRIMES

Wis. Stat. §939.32 (1959) makes it a crime to attempt the commission of a felony, but whether such crime is a misdemeanor or felony depends on the type of felony attempted. As you know, crime is classified according to the punishment prescribed—crimes punishable by imprisonment in the state prison being felonies, all others are misdemeanors.<sup>1</sup> Crimes punishable by imprisonment in the state prison are those for which imprisonment of one year or more is provided (except in a few cases where imprisonment in the county jail is specified).<sup>2</sup> In the attempt statute punishment is one-half the maximum penalty for the completed felony. So attempt to commit a felony punishable by less than two years imprisonment is a misdemeanor, while attempt to commit a felony punishable by two years or more of imprisonment is a felony. Included in the misdemeanor group are: Misconduct in public office,<sup>3</sup> Commercial gambling,<sup>4</sup> Prostitution,<sup>5</sup> Issuance of worthless check,<sup>6</sup> Bribery of witness,<sup>7</sup> Negligent use of weapon,<sup>8</sup> Defamation,<sup>9</sup> Fraud on hotel or restaurant keeper,<sup>10</sup> Threaten communication of derogatory information,<sup>11</sup> Dealing with gambling devices,<sup>12</sup> Purchasing claims at less than full value,<sup>13</sup> and Interference with custody of child.<sup>14</sup> This distinction between misdemeanors and felonies is important on the question of permissible police practice in making an arrest without a warrant be-

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<sup>1</sup> WIS. STAT. §939.60 (1959).

<sup>2</sup> WIS. STAT. §959.044 (1959).

<sup>3</sup> WIS. STAT. §946.12 (1959).

<sup>4</sup> WIS. STAT. §945.03 (1959).

<sup>5</sup> WIS. STAT. §944.30 (1959).

<sup>6</sup> WIS. STAT. §943.24 (1959).

<sup>7</sup> WIS. STAT. §946.61 (1959).

<sup>8</sup> WIS. STAT. §940.20 (1959).

<sup>9</sup> WIS. STAT. §942.01 (1959).

<sup>10</sup> WIS. STAT. §943.21 (1959).

<sup>11</sup> WIS. STAT. §943.31 (1959).

<sup>12</sup> WIS. STAT. §945.05 (1959).

<sup>13</sup> WIS. STAT. §946.14 (1959).

<sup>14</sup> WIS. STAT. §946.71 (1959).

cause the officer's privilege to so arrest for a misdemeanor is different from his privilege to so arrest for a felony. An officer may arrest without a warrant for a felony where the felony is committed in his presence or where he has probable cause to believe or reasonably suspect that a felony has been committed by the person arrested. However, in general, an officer is not privileged to arrest without a warrant for a misdemeanor. The two exceptions to this latter rule are, first, a breach of peace in the officer's presence; and, second, reasonable grounds to believe that the person arrested has committed a misdemeanor and will not be apprehended unless immediately arrested or that property damage may be done unless there is an immediate arrest. Therefore, an arrest without a warrant might well be illegal where the crime was attempted gambling, attempted prostitution, attempt to issue a worthless check, attempted interference with custody of child and the other misdemeanor attempts cited. In such cases the police officer could easily exceed his authority and detention of the person arrested would be unlawful.

There is another feature of the attempt statute which affects the matter of arrest. One element of the crime is continued purpose to commit the felony involved. Where the actor voluntarily desists in his attempt, there is no crime. If, therefore, before arrest, the actor had voluntarily abandoned his attempt, there would be no crime, and the arrest would be illegal.

#### INTERROGATION AFTER ARREST AND BEFORE ARRAIGNMENT

Another matter which has been undergoing development in recent cases is the police privilege to interrogate prisoners after arrest but before arraignment. The extent of the police privilege to interrogate in such situation has never been clearly spelled out. It is argued that inasmuch as probable cause is required to support every arrest, there is no police function further than maintaining custody between the time of arrest and arraignment before a magistrate where such probable cause is tested. Under this view, no interrogation after arrest and before arraignment would be justified. However, practical law enforcement seems to require some modification of this view. In the 1939 Wisconsin case of *Peloquin v. Hibner*<sup>15</sup> the court stated that the sheriff "and the district attorney were entitled to a reasonable time . . ., as a matter of law, to determine whether to make a formal complaint against" the prisoner. In the context of that case, interrogation was part of the investigative procedure. In 1950 Mr. Justice Hughes conceded the right to "fairly question a suspect" but whether he was speaking of a before arrest or an after arrest situation is not clear from the facts of *State v. Francisco*,<sup>16</sup> the case in which such language was used. A clear after-

<sup>15</sup> 231 Wis. 77, 86, 285 N.W. 380 (1939).

<sup>16</sup> 257 Wis. 247, 253, 43 N.W. 2d 38 (1950).

arrest situation appeared in the 1956 Wisconsin case of *State v. Stortucky*,<sup>17</sup> and there the court held that, "The situation is comparable to that in *State v. Goodchild*<sup>18</sup> . . . where it was held that the defendant's constitutional rights were not violated when he was taken to the state crime laboratory and there interrogated by a member of the staff." However, a year later the United States Supreme Court decided *Mallory v. United States*,<sup>19</sup> in which it stated, in a unanimous opinion, that:

The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

and

It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

The decision in this case was expressly based on violation of Rule 5(a) Federal Rules of Criminal Procedure but because of constitutional undertones to the question, its inhibition might well be extended to the states under the Due Process Clause—as was done in *Mapp v. Ohio*<sup>20</sup> to *Wolf v. Colorado*<sup>21</sup> regarding search and seizure.

Police concern at what the *Mallory* case might be doing to their privilege of interrogation has been great. And the subsequent case of *Reck v. Pate*<sup>22</sup> has not given them comfort. In the *Reck* case, Justice Douglas, concurring, stated:

It is true that the police have to interrogate to arrest; it is not true that they may arrest to interrogate.

The footnote to this statement says: "In ordinary circumstances, the police, under law, are to conduct investigations of crime by interview, and not by interrogation. Typically, it is the Grand Jury or a Court, not the police, which has the power to compel testimony, subject to the limitations of relevance and privilege. . . . To allow the police to use their power to arrest as a substitute for the power of subpoena is, I think, to strip the Fifth Amendment of its meaning." A month later, however, the U.S. Supreme Court in wrestling with "the problem of reconciling society's need for police interrogation with society's need for protection from the possible abuses of police interrogation," put the rule in these words:

<sup>17</sup> 273 Wis. 362, 377, 77 N.W. 2d 721 (1956).

<sup>18</sup> 272 Wis. 181, 74 N.W. 2d 624 (1956).

<sup>19</sup> 354 U.S. 449, 454 (1957).

<sup>20</sup> 367 U.S. 643 (1961).

<sup>21</sup> 338 U.S. 25 (1949).

<sup>22</sup> 367 U.S. 433 (1961).

. . . [T]he Fourteenth Amendment does not prohibit a state from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive. \* \* \* It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved. . . .

That was the *Culombe v. Connecticut* case.<sup>23</sup>

Police do have some privilege to interrogate after arrest but before arraignment, but the extent of such privilege is obviously minimal.

#### THE MERELY TRUSTWORTHY CONFESSION

In this same area is the matter of admissibility of confessions. For some time, the rule in Wisconsin has been :

. . . [T]hat the ultimate test of the admissibility of a confession is not whether it was voluntary or was induced by threats or promises or physical violence but whether it was obtained under such circumstances as to be testimonially untrustworthy.<sup>24</sup>

It is true that in *State v. Bronston*<sup>25</sup> the court indicated that force, threats and promises could still render a confession inadmissible, but reading the words to such effect in context, it is not deemed that a change in rule was intended.

"Testimonially trustworthy," therefore, has been the test in Wisconsin for the admissibility of confessions—but because of a recent United States Supreme Court decision it can be so no longer. In *Rogers v. Richmond*<sup>26</sup> the United States Court held that testimonial trustworthiness can not be the sole test of a confession's admissibility into evidence. The other test now required is that confessions be voluntary, that is, free from coercion, "either physical or psychological." The court says that taking an involuntary confession offends the Due Process rights of the prisoner. Accordingly, if a testimonially trustworthy but coerced confession were to now be admitted into evidence by a Wisconsin Court—as the prosecution was formerly free to do—the Federal Court would step in on habeas corpus to undo any resulting conviction.

#### QUESTIONABLE OBSERVATION AND SOUND DETECTION PROCEDURES

Nor has everything been quiet on the search and seizure front. Back in 1928 it was decided that going into the basement of the large office building in which defendants maintained an office, and there attaching taps to wires which serviced defendants' telephones, did not constitute

<sup>23</sup> 367 U.S. 568 (1961).

<sup>24</sup> 258 Wis. 45, 53, 44 N.W. 2d 537 (1950).

<sup>25</sup> 7 Wis. 2d 627, 97 N.W. 2d 504 (1959).

<sup>26</sup> 365 U.S. 534 (1961).

a search and seizure. That was the case of *Olmstead v. United States*<sup>27</sup> and the court there said:

But [liberal construction] can not justify enlargement of the language employed [in the 4th Amendment] . . . to apply the words "search and seizure" as to forbid hearing or sight.

The 1940 case of *Goldman v. United States*<sup>28</sup> found no Fourth Amendment violation in the use of a detectaphone placed on the outer wall of a private office so as to reveal anything which was said in such office. In 1952 the U.S. Supreme Court again refused to disapprove the use "of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods."<sup>29</sup> But in 1961, in *Silverman v. United States*,<sup>30</sup> this matter seemed to take a turn. In the *Silverman* case the Supreme Court held that use of a spike mike constituted an illegal search and seizure. A spike mike is a foot long spike with a microphone attached to the blunt end. The spike mike in the *Silverman* case had been inserted several inches into a party wall servicing defendant's premises until it hit a heating duct. Defendant's entire heating system was thus converted into a conductor of sound. The Court found no need to overrule the earlier *Olmstead*, *Goldman* and *On Lee* cases, but instead rested its decision on the fact that here there had been "an unauthorized physical penetration." However, more significantly, the court mentioned "the parabolic microphone which can pick up a conversation three hundred yards away, and a certain technique whereby a room is flooded with a certain type of sonic wave, which will make it possible to overhear everything said in a room without even going near it, and an instrument which can pick up a conversation through an open office window on the opposite side of a busy street"; and the court left open the Fourth Amendment implications in the use of such devices.

In the recent case of *Lanza v. New York*,<sup>31</sup> the court stated:

The petitioner's argument thus necessarily begins with two assumptions: . . . and that surreptitious electronic eavesdropping under certain circumstances may amount to an unreasonable search or seizure. As to the second there can be no doubt.

It seems, therefore, that any invasion of protected privacy by way of electronic listening devices will constitute an illegal search and seizure.

#### STANDING TO QUESTION ILLEGAL SEARCH

Another legal development in the search and seizure field occurred in the 1960 case of *Jones v. United States*.<sup>32</sup> It has always been recog-

<sup>27</sup> 277 U.S. 438, 465 (1928).

<sup>28</sup> 316 U.S. 129 (1940).

<sup>29</sup> *On Lee v. United States*, 343 U.S. 747, 753 (1952).

<sup>30</sup> 365 U.S. 505 (1961).

<sup>31</sup> 370 U.S. 139 (1962).

<sup>32</sup> 362 U.S. 257 (1960).

nized that an accused has no standing to question the constitutionality of a search and seizure where he does not possess some right in regard to the premises searched or the property seized. Prior to the 1960 *Jones* Case such right or interest was required to be substantial. However, as a result of this case, merely slight interest in the place searched or property seized is now sufficient to support a complaint of unconstitutionality. Being "legitimately on the premises" has been set up as a standard under the modern rule. And any possessory claim would appear to suffice in the case of wrongful seizure.

#### SHOWING OF INTEREST IN SEIZED CONTRABAND

This 1960 *Jones* case also made another change in the law. Formerly the accused had to affirmatively show standing as a condition precedent to his objections of unconstitutional search and seizure. In a case where possession itself constituted the crime, this requirement put an accused in the dilemma of making an incriminatory claim for the purpose of testing his constitutional rights. For instance, where narcotics are taken from a person in connection with his arrest for possessing narcotics, by claiming ownership of the contraband he admits the crime, and by denying ownership he deprives himself of standing necessary to raise the constitutional issue. The 1960 *Jones* case did away with need for such preliminary showing—at least in those cases where the crime is possession of the article seized. This decision is binding only on lower federal courts. It remains to be seen whether state courts will follow this United States Supreme Court lead, and whether the doctrine will be applied to cases other than those in which possession itself is the crime.

Should this holding be extended to crimes other than those of possession, an interesting point is raised. Suppose the prosecution would show that the accused lacked the requisite proprietary and possessory interest. It would seem that the accused could still raise the constitutional question because controverting such showing would require him to do just what the *Jones* case relieves him from doing.