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To Catch a Bootlegger

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TO CATCH A BOOTLEGGER

INTRODUCTION

Around chapter 242 of the *Kentucky Revised Statutes*[1] [hereinafter referred to as KRS] revolves a continuing battle between its violators and those who seek to enforce it. Over the years, attempts to evade the local option laws in dry territory have produced, on the one hand, masters of deception, who very cleverly devise methods by which to transport contraband liquor through dry territory for illegal sale. These methods have included such schemes as constructing secret compartments beneath the floor of an automobile, sending a speeding car ahead of the "load" in order to distract any police officers who might be lurking ahead, traveling miles off the normal route over back roads to avoid police, and even transporting in gasoline trucks. On the other hand, attempts to enforce local option laws in dry territory have produced masters of detection. Law enforcement officials have countered with equal ingenuity. However, they have at times stepped dangerously over that fine line which separates legal and illegal searches and seizures. Consequently, a large area of the law of search and seizure is now concerned with the restraint and search of automobiles and the seizure of illegal cargo. This body of law and its proper application has been quite controversial.

The controversy centers around the following language in the United States Constitution and similar language in section ten of the Kentucky Constitution:

> 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 of affirmation, and particularly describing the place to be searched, and the things to be seized.[2]

Applying this constitutional provision to searches of automobiles, no warrant is needed if there is probable cause to believe that the automobile is carrying illegal cargo.[3] Apparently because of the lack of an exact definition of probable cause,[4] police officers have resorted to another method of conducting searches without a search warrant; recently they have been employing the doctrine of search incident to an arrest.[5]

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[1] This chapter provides for local option elections on the issue of prohibition of the sale of alcoholic beverages. See KRS 242.370 for the section dealing specifically with search and seizure.

[2] U.S. Const. amend. IV.

[3] Carroll v. United States, 267 U.S. 132 (1925).

[4] "The variety of situations makes the statement of a definite, concise, universal rule extremely difficult, if not impossible." 52 Ky. L.J. 488, 489 (1964).

[5] See Tabor v. Commonwealth, 380 S.W.2d 245 (Ky. 1964).

Recently, in the short span of four months, the Kentucky Court of Appeals handed down three cases of major importance dealing with search for and seizure of contraband liquor in dry local option territory.[6] It is the purpose of this article to analyze and assess the impact of these new decisions on the power of the police in enforcing the local option laws in dry territory and their impact on the constitutional rights of motorists.

THE PERSON

The first of these cases, *Lane v. Commonwealth*,[7] involved a conviction of the defendant for transporting alcoholic beverages for the purpose of sale in dry territory, pursuant to KRS 242.230. The defendant was arrestd by a state trooper for improper passing. The trooper, after placing the defendant in his police cruiser, returned and searched the car, wherein he found contraband liquor. The car was owned by the defendant's wife. From these facts, the court laid down two significant points of law.

One point involved the nature of the offense which permits a search incident to an arrest. This will be taken up later in detail in connection with another Kentucky case. The other point made by the court overrules a long line of Kentucky cases holding that only the owner of an automobile can object to an illegal search of it.[8]

Only a few months before the *Lane* case, in *Brown v. Commonwealth*,[9] the court said:

> Although . . . Brown was driving the car at the time, he was not its owner. Kenneth Locke had borrowed the car for the trip and, as he was in charge of it, he appears to have been the only person *if any*, who could have complained of an illegal search; and the record does not reveal that Locke objected to the search of the automobile.
>
> This Court has held in a long line of cases that an automobile guest, and such was Brown, is not in a position to object to the search of such vehicle without a warrant.[10] (Emphasis added.)

The *Brown* case was unclear on one point: it did not answer the question, since it was not before the court, of whether Locke, who had borrowed the car from its owner, could object to an illegal search of it. The court, distinguishing a borrower from a guest, intimated that if he could object then it was because it was he who had borrowed the

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[6] Lane v. Commonwealth, 386 S.W2d 743 (Ky. 1964). See also, Conn v. Commonwealth, 387 S.W.2d 285 (Ky. 1965); Clark v. Commonwealth, 388 S.W.2d 622 (Ky. 1965).

[7] 386 S.W.2d 743 (Ky. 1964).

[8] Smith v. Commonwealth, 375 S.W.2d 242 (Ky. 1964); Combs v. Commonwealth, 341 S.W.2d 774 (1960); Pruitt v. Commonwealth, 286 S.W.2d 551 (Ky. 1955); West v. Commonwealth, 273 Ky. 779, 117 S.W.2d 998 (1938).

[9] 378 S.W.2d 608 (Ky. 1964).

[10] *Id.* at 611.

car. Thus, the court seemed to suggest in the *Brown* case that it would allow one who borrows an automobile to object to its illegal search. If the court in the *Brown* case did intend to make such a distinction, then it is not overruled by the holding in *Lane v. Commonwealth* because in the *Lane* case the defendant was not merely a guest, but had borrowed the car from its owner, who was the defendant's wife. Therefore, although it is made clear in the *Lane* case that one need not be the owner of an automobile to object to its unlawful search, the question still remains as to what interest one must have to object. If the interest of an owner is not necessary to give a person standing to object, then what lesser interest will suffice?

Perhaps the answer to this perplexing question can be found by looking more closely at the court's opinion in the *Lane* case. In the opinion the court cites *Jones v. United States.*[11] The Kentucky court said of the *Jones* case:

> [T]he Court thoroughly examined the question of the amount of interest a person must have in the premises or other possessions before he is in a position to object to a seizure, and subsequently have the evidence obtained suppressed by proper motion. After discussion of the special problems that had arisen in the past concerning distinctions among various classes of owners, and in some instances proprietors of property, the Court concluded that it was unnecessary and ill-advised to import into the law of the right to be free from unreasonable search and seizure, 'subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.'[12]

In the *Jones* case, the petitioner had been convicted on a narcotics charge, largely on the basis of illegally seized evidence procured from an apartment in which the petitioner was staying as a guest of the lessee of the apartment. Justice Frankfurter, speaking for the Court, took the position that distinctions such as those between "lessee," "licensee," "invitee" and "guest" were weak distinctions and should not be determinative in fashioning procedures ultimately referable to constitutional safeguards.[13] Accordingly, the Court held that although those wrongfully present upon the premises cannot invoke the privacy of the premises by a motion to suppress the use as evidence of property seized in a search of the premises, anyone legitimately on the premises where a search occurs may challenge the legality of the search by way of a motion to suppress when the fruits of the search are proposed to be used against him. Therefore, applying the above language to the facts of the *Brown* case, the defendant would have standing to move to

[11] 363 U.S. 257 (1960).
[12] Lane v. Commonwealth, 386 S.W.2d at 747.
[13] Jones v. United States, 363 U.S. at 266.

suppress the use of the illegally seized evidence against him. It would seem, from the mere fact that the Kentucky court relies heavily on the *Jones* case, that a mere guest in an automobile as was Brown would be able to have illegally seized evidence suppressed under the authority of *Lane v. Commonwealth.*

However, the problem is not so easily solved because immediately after discussing the *Jones* case, the Kentucky court said:

> When we return to the facts of the instant case we find that appellant, Cecil Lane, was in complete control and possession of the car searched. There is some secondary proof in the record that the car was registered in his wife's name, but this proof does not have the high quality of primary evidence. We have concluded therefore that his interest was such that even though he was not the owner, he was entitled to have the evidence obtained by reason of the search suppressed.[14]

Here, the court placed significance on the fact that the defendant who was seeking to suppress the evidence was the automobile owner's husband. Consequently, it is difficult to predict how the Kentucky court will go when it is called upon to decide whether a mere guest in an automobile has standing to move for the suppression of illlegally seized evidence. There does, however, seem to be a definite trend toward a holding in the guest's favor in Kentucky. To so hold would require a liberal interpretation of constitutional provisions, in view of the fact that the fourth amendment of the United States Constitution and section ten of the Kentucky Constitution guarantees the right of people to be secure against unreasonable searches and seizures in *their* persons, houses, papers, and effects. Since the word *"their"* is in the possessive case, a strict interpretation of the fourth amendment and of section ten would require that the person at least have the right to possession of the automobile which was searched; however, it seems that the court should look at the spirit of these provisions rather than the exact wording in construing them. The spirit of the constitutional guarantees against unreasonable search and seizure is one of freedom from tyrannical methods of law enforcement which will offer government officials the opportunity of becoming too powerful. Its purpose is to deter foceful seizures of evidence. To hold that a guest could not object to such searches and seizures would greatly impair this purpose. Should a free citizen be any less secure from Gestapo-type police tactics in the home or automobile of his friend than he is in his own?

THE OFFENSE

The other point of major importance made by the court in the *Lane* case, as already mentioned, involved the nature of the offense.

[14] Lane v. Commonwealth, 386 S.W.2d at 747.

The court held that an arrest for a minor traffic violation will not allow an officer to search an automobile without a search warrant. The violation involved was improper passing. The court said:

> It is our opinion that when a person is arrested for a traffic or other minor violation, the mere fact of the arrest does not give to the officer absolute right to search the vehicle or the premises *indiscriminately*. It would be impossible to lay down a rule which would apply to all conditions and all states of facts and this opinion should not be construed to mean that a person in custody may not be searched in order to be disarmed, or to prevent escape or the immediate destruction of evidence for which he was detained.[15] (Emphasis added.)

This statement by the court immediately raises the question of where the court will draw the line. As the court indicated, this holding does not prevent an officer from searching, incident to an arrest to disarm or to prevent the destruction of evidence, *a person in custody*. Therefore it would seem that the court does draw at least one line between those taken into custody and those to whom citations are issued. This observation is borne out by the more recent case of *Conn v. Commonwealth*.[16] In that case, the defendant was stopped by a state trooper on a routine check for operators' licenses. Although the defendant produced an operator's license, he was unable to produce the registration receipt for the truck he was driving. Thereupon, the trooper issued a citation which directed the defendant to appear before the county judge at a later date. The state trooper then procured an invalid search warrant from the judge pro tempore and discovered sixty-three cases of beer in the defendant's truck in violation of the local option law. The Commonwealth argued that even if the warrant was invalid, the search was legal because it was incident to an arrest. The Court of Appeals held that the search was not valid as incident to an arrest, holding that a citation is not an arrest and concluding that a search incident to a citation is illegal. What the court said then, in the *Conn* case, is simply that there can be no search without a warrant where there has been no arrest. There is no question but that there must be an arrest in order for an officer to make a search without a warrant.[17] Simple as this point made in the *Conn* case may seem, it is of great significance because up to that time it was prevalent practice among law enforcement officers in carrying out the local option laws in dry territory to follow a suspected transporter of contraband liquor until he committed some minor traffic violation for which they would issue a citation and then proceed to search the

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[15] *Id.* at 745.

[16] 387 S.W.2d 285 (Ky. 1965).

[17] Johnson v. Commonwealth, 304 Ky. 490, 200 S.W.2d 913 (1947); Congleton v. Commonwealth, 273 Ky. 282, 116 S.W.2d 300 (1938).

automobile. Such practice obviously is only a pretext to search for evidence.

The *Conn* case does not, however, solve the problem of where the line will be drawn when there has been an arrest for a traffic violation. There can be no hard and fast rule but there can be standards. In the *Lane* case, the court lays down a standard which hits at the crux of the problem. The court cited a recent Wisconsin case,[18] which refers to the statement of the United States Supreme Court that "an arrest may not be used as a pretext to search for evidence."[19] In the *Lefkowitz* case, Justice Butler puts in a nutshell the policy behind such a standard:

> The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.[20]

Consequently, Kentucky has interpreted, in part at least, the meaning of the word "unreasonable" as used in section ten of the Kentucky Constitution and in the fourth amendment of the United States Constitution, to make illegal a search incident to an arrest where the arrest is only a pretext for the search. Such a rule is the proper one since the purpose of allowing a search incident to a valid arrest is to enable an officer to "take from his [the prisoner's] person and hold for the disposition of the court any property connected with the offense for which he is arrested that may be used as evidence against him, or any weapon or thing that might enable the prisoner to escape or do some act of violence. . . ."[21] This standard, that where an arrest is made as a pretext to search for evidence the search is unreasonable, is strict enough to prevent Gestapo-type police tactics from being practiced by Kentucky police officers, yet at the same time it is flexible enough to carry out the purposes of the doctrine of search incident to an arrest. Although it is true that it may impair apprehension of criminals in general and enforcement of local option laws in dry territory in particular, it is a reflection of the sound American principle

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[18] Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).
[19] United States v. Lefkowitz, 285 U.S. 452, 467 (1932).
[20] *Id.* at 464.
[21] Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860, 863 (1920).

that the *ends* alone can never be justification for the *means* employed to attain those ends.

THE RESTRAINT

A third recent Kentucky case dealing with search and seizure of automobiles is *Clark v. Commonwealth.*[22] This case involved a conviction of the defendant for transporting alcoholic beverages for sale in dry local option territory. Two Kentucky state troopers, while on routine duty traveling from Harlan to Cumberland, noticed that the defendant's car was setting very low in the back and that it seemed to weave slightly, although one of the troopers testified that at the time they stopped the defendant's car, he did not formulate any idea as to what the contents of the automobile might be. There was also testimony that the defendant's reputation was bad for trafficking illegally in alcoholic beverages. Walking up to the defendant's car, one trooper saw "without strain" that there was a quantity of liquor in the car. Thereupon the defendant was arrested and a search revealed more liquor in large amounts in the trunk of the automobile.

The case presented no question as to the legality of the subsequent arrest and search because it is well-settled in Kentucky that, as the court stated, "The constitutional guaranty which affords protection from an illegal search does not prohibit a seizure without a warrant where there is no need of a search; that is, where the outlawed object discovered is visible, open and obvious to anyone who even casually looks about his surroundings."[23] This statement is in accord with Kentucky precedent.[24] However, there was a problem in the case as to the legality of the restraint of the defendant. If the restraint of the defendant was illegal, then its illegality would render the subsequent arrest and search illegal and the evidence inadmissible. The court, in holding that the restraint was not illegal, said:

> We conclude no ulterior motive or special pretext was shown as a reason for stopping appellant's car; futhermore, a bonafide cause was established for the stopping. Therefore, the discovery from mere observation of the alcoholic beverages in his automobile made his arrest legal and, in consequence, made the contraband liquor competent evidence to be used in the charge preferred against him.[25]

The court relied upon *Commonwealth v. Robey,* [26] which, according to Judge Montgomery's dissenting opinion in the *Clark* case, does not

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[22] 388 S.W.2d 622 (Ky. 1965).
[23] *Id.* at 624.
[24] Hancock v. Commonwealth, 262 S.W.2d 670 (Ky. 1953); Wilson v. Commonwealth, 258 S.W.2d 497 (Ky. 1953).
[25] Clark v. Commonwealth, 388 S.W.2d at 625.
[26] 337 S.W.2d 34 (Ky. 1960).
[27] Clark v. Commonwealth, 388 S.W.2d at 625.

support the holding of the majority. The *Robey* case involved the arrest of the defendant for drunken driving. The issue was whether or not the arresting officers had legally stopped the automobile which the defendant was operating. In that case, the court laid down a rule of law governing the stopping of automobiles. The court said:

> Since the evidence in the instant case was not obtained by virtue of a *search* there is no question of a violation of the constitutional right to protection against unlawful search. If the evidence is to be held inadmissible, then, it can be only because of violation of some right of the motorist not to be *stopped.* While we are not aware of any precedent for holding that evidence obtained as a result of an officer's merely stopping a person is inadmissible, we feel that due respect for the basic right of liberty (Ky. Const. Sec. 1) should afford some protection against the unjustified or unreasonable stopping of a person by a police officer. Accordingly, it is our view that if an officer stops a motorist without bona fide cause any evidence obtained as a result of the search should be considered to have been illegally obtained and therefore inadmissible.[28]

Judge Montgomery in his dissenting opinion in the *Clark* case distinguished the *Robey* case by saying:

> The Robey case affords no comfort. There, the driver was legally arrested for a violation of the reckless driving statute and on this basis it is distinguishable. There is no claim in the case at bar that appellant was arrested for reckless driving despite the trooper's statement that ". . . . the car seemed to have a little weave to it."[29]

It is true that the cases are distinguishable. But this does not make the *Clark* case *wrong.* Nowhere is it required that there be an arrest in order to establish that there was a "bona fide cause" for stopping a motorist. The genuineness of the cause exists in the mind of the trooper at the time of the stopping. As the majority opinion points out, there is a "bona fide cause" for stopping a motorist where he is driving in an erratic manner. The court pointed out the following:

> In the case at bar appellant was observed by the troopers to be "having some difficulty" and his car "seemed to have a little weave to it." This, we believe under the authority of the Robey case, was enough irregularity in the way he handled his car to give the officers a bona fide cause to stop him. KRS 189.730(1) provides, so far as applicable here, that any trooper ". . . may, at any time, upon reasonable cause to believe that a motor vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of such motor vehicle to stop and submit such vehicle to an inspection and such test with reference thereto as may be appropriate."[30]

Judge Montgomery, on the other hand, asserted that justification of the stopping by the troopers here on the basis of KRS 189.730(1)

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[28] Commonwealth v. Robey, 337 S.W.2d at 36.
[29] Clark v. Commonwealth, 388 S.W.2d at 625.
[30] *Id.* at 624.

"falls into the category of pretext or subterfuge condemned in the *Mitchell* case."[31] That case, *Commonwealth v. Mitchell*,[32] held that although it is legal for troopers to engage in the systematic and indiscriminate stopping of all motor traffic on the highway for the good faith purpose of inspecting drivers' licenses, it cannot be done where there is an ulterior motive of circumventing the constitutional safeguards against unreasonable searches. Therefore, it seems that the major question in the *Clark* case on which Judge Montgomery and the majority of the court were in disagreement was whether or not under the facts of that particular case the troopers had a bona fide cause for stopping the defendant, wtih Judge Montgomery basing his opinion that there was no bona fide cause chiefly on the fact that the troopers had not arrested the defendant for reckless driving or any other traffic violation. That this was Judge Montgomery's main objection is also indicated by his statement that "The Supreme Court has recently condemned the stopping of a motor vehicle with neither an arrest warrant nor a search warrant."[33] He was referring to *Beck v. Ohio*,[34] a very recent case decided by the United State Supreme Court. In the *Beck* case the issue was completely different from the issues in the *Clark, Robey,* and *Mitchell* cases. In *Beck,* the defendant was pulled over to the curb, arrested, and taken to the police station where the police searched his person and found a number of clearing house slips. As the court said, "The constitutional validity of the search in this case, then, must depend upon the constitutional validity of the petitioner's arrest."[35] In other words, the issue was whether at the time of the arrest, the officers had probable cause to make the *arrest.* The issue of what kind of cause would permit officers to merely *stop* a motor vehicle was not before the court. The *Clark* case is quite distinguishable, for there the question was whether a slight weaving of an automobile gave the troopers a bona fide cause to *stop* the automobile under the authority of KRS 189.730(1). If so, then the arrest was not invalid in this respect since some contraband liquor was laying in the car in plain view of the troopers when they approached the car.[36]

Consequently, the holding in *Clark v. Commonwealth* should not

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[31] *Id.* at 626.
[32] 355 S.W.2d 686 (Ky. 1962).
[33] Clark v. Commonwealth, 388 S.W.2d at 626.
[34] 379 U.S. 89 (1964).
[35] *Id.* at 91.
[36] It should be noted that the court reversed *Clark* on the ground that Clark was charged with *transporting,* which cannot be proved by possession alone. But the question with which we are concerned is whether or not there was a bona fide cause to stop the defendant's automobile.

shock the conscience of the avid supporter of the right to travel upon the highways without unreasonable restraint by police officers. At a time when travel upon the highways is a major health hazard, it should not be a discomfort to know that police officers have the authority to stop and investigate an automobile which seems to be weaving down the highway. Nor should one feel that his hard-won liberty is being infringed upon when an officer, while engaged in such an investigation and upon seeing contraband cargo laying in the car seat, makes an arrest for transporting such cargo. On the contrary, would not one be shocked if a trooper was forced to proceed with his investigation as if he never saw the illegal cargo because the courts would refuse to admit it into evidence?

CONCLUSION

Thus, Kentucky has laid down significant rules of law in the area of search and seizure in these three recent cases. Although these cases do reflect to some degree a trend toward greater judicial protection of a citizen's rights to travel upon the highways free from unreasonable interference by police officers, those upon whom the duty falls to enforce the dry local option laws should not be discouraged. On the contrary, they should take pride in the fact that these high standards imposed by the court to serve as guidelines in making arrests and searches place them among police forces with the highest standards of practice in the world.

The cases discussed in this article doubtlessly restrict Kentucky police forces in their enforcement of the dry local option laws. Law enforcement officials should react positively by devoting more time and energy toward improving the effectiveness of methods which do not contravene constitutional guarantees. By beginning at the very base of the law enforcement hierarchy, law enforcement officials should institute new programs for thoroughly training all police officers in the application of new methods of crime detection. Obviously, such programs would take a great deal of the taxpayers' dollars, but ininstead of asking whether we can afford them, one should ask whether we can afford to sacrifice hard-won freedoms in exchange for the easier and less expensive methods of law enforcement which subject every citizen to harassment from police officers. Recent Kentucky cases demonstrate that the Kentucky Court of Appeals is awakening to the ideal that liberty is far more important than the capture and conviction of one bootlegger.

Robert J. Greene