Kentucky Law Journal

Volume 48 | Issue 2 Article 10

1959

Evidence--Search and Seizure--Admissibility of Evidence Obtained in Search Incidental to Lawful Arrest

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Recent Cases

EVIDENCE—SEARCH AND SEIZURE—ADMISSIBILITY OF EVIDENCE OBTAINED IN SEARCH INCIDENTAL TO LAWFUL ARREST—Indictments were returned against the defendant and his wife charging them with selling alcoholic beverages in local option territory. Bench warrants were thereupon issued ordering their arrest. Armed with these valid warrants, officers went to defendant's residence, found only the wife at home and took her into custody. The officers proceeded to thoroughly search the house finding six halfpints of gin and eight cases of beer. Some of the beverages were found in a rear room, and the remainder in the kitchen. Defendant was subsequently arrested and both he and his wife were indicted, this time for having in their possession intoxicating beverages for purpose of sale in local option territory. Upon trial under the last idictment, the liquor seized by the officers was admitted as evidence over the defendant's timely motion to quash and he was convicted. *Held*: Reversed. The search of a man's home incidental to the lawful arrest of his wife therein, without his or her consent, contravenes section 10[1] of the Constitution of the Commonwealth of Kentucky, and evidence so obtained is incompetent and inadmissible in a prosecution of the husband. *Benge v. Commonwealth*, 321 S.W. 2d 247 (Ky. 1959).

The rule is well established in Kentucky that evidence obtained through unlawful search and seizure is inadmissible.[2] If the search of a man's home incidental to his lawful arrest therein is unlawful, it follows that evidence so obtained is inadmissible.

Until the decision in the principal case, the Kentucky law was that silence amounted to consent, and if the arrestee made no objection, the search was not unlawful.[3] Further, a search was held not to be

[1] Ky. Const., § 10 provides:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

[2] Johnson v. Commonwealth, 296 S.W.2d 210 (Ky. 1956); Reed v. Commonwealth, 233 Ky. 184, 25 S.W.2d 77 (1930); Russel v. Commonwealth, 232 Ky. 353, 23 S.W.2d 546 (1930); Jones v. Commonwealth, 227 Ky. 157, 12 S.W.2d 280 (1928); Thomas v. Commonwealth, 226 Ky. 101, 10 S.W.2d 606 (1928); Clark v. Commonwealth, 204 Ky. 740, 265 S.W. 280 (1924); Mabry v. Commonwealth, 196 Ky. 626, 245 S.W. 129 (1922); Price v. Commonwealth, 195 Ky. 711, 243 S.W. 927 (1922); Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920).

[3] Hightower v. Commonwealth, 286 Ky. 561, 151 S.W.2d 39 (1941); Patton v. Commonwealth, 273 Ky. 258, 116 S.W.2d 311 (1938); Harrison v. Commonwealth, 266 Ky. 840, 100 S.W.2d 837.

unlawful if made incidental to a lawful arrest, where a public offense for which the arrest was made was being committed in the officer's presence.[4]

In the principal case the court said that according to the testimony of the officers making the arrest the wife did not consent to the search.[4a] There is no evidence, however, that she objected to the search. It seems this fact could bring the case within the rule previously stated.

There was available to the court another case, *Commonwealth v. Phillips*,[5] on which it could have easily rested its decision if it had been disposed to take a contrary view. Although distinguishable on its facts, the statements made in that opinion would be applicable to the principal case. The arrestee had given his consent for the officers to search a bureau in his house, and the officers proceeded to search a pair of overalls hanging in the hall behind a door. The court upheld the search extending beyond that which the arrestee had consented to on the ground that his consent to search part of the premises necessarily included the right to make the search "effective and complete." The court in the course of the opinion uttered the following dictum:

> It is clear that the officer not only has the lawful power to search the person, *premises*, and possessions of the prisoner when lawfully arrested in order that he may gather such evidence as exists, but he would be blameworthy if he failed to do so. [Emphasis added][6]

Then after concluding that consent to search part of the premises included the right to make the search effective and complete, the court said:

> But, as we have seen, his consent was not necessary to authorize the officers to make the search they made on the occasion in question.[7]

The court in the principal case apparently intended to remove any ambiguity that may have previously existed and preclude the elevation of this dictum into decision, by establishing a hard and fast rule applicable to searches and seizures incidental to a lawful arrest insofar as homes are concerned.

The general rule is that search of a home without a search warrant is unlawful.[8] An exception to this rule obtains in many jurisdictions where the search is made incidental to a lawful arrest.[9]

[4] Davis v. Commonwealth, 280 S.W.2d 714 (Ky. 1955).

[4a] See Manning v. Commonwealth, 328 S.W.2d 421 (Ky. 1959). The consent of the wife who was not arrested, to search the residence, did not remove the need for a search warrant. The search was held to be unreasonable and the evidence obtained inadmissible.

[5] 224 Ky. 117, 5 S.W.2d 887 (1928).

[6] *Id.* at 122, 5 S.W.2d at 888.

[7] *Id.* at 123, 5 S.W.2d at 889.

[8] See Moreland, Modern Criminal Procedure 118 (1959).

[9] Argetakis v. State, 24 Ariz. 599, 212 P. 372 (1923); State v. Carenza.

One statement as to derivation of this exception is found in the case of *United States v. Rabinowitz.*[10] The court there said:

> The right "to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed" seems to have stemmed not only from the acknowledged authority to search the person, but also from the long standing practice of searching for other proofs of guilt within the control of the accused found upon arrest.[11]

The justification for this exception has been explained upon the theory that the Constitution only prohibits[12] "unreasonable" searches and seizures, and that the circumstances may be such that a search incidental to a lawful arrest without a search warrant is perfectly reasonable and not within the constitutional prohibition.[13]

The Supreme Court of the United States in two rather recent cases has held searches of the premises in which the defendant was arrested not to be in violation of the Fourth Amendment. In *Harris v. United States,* a four-room apartment was thoroughly searched in an attempt to find two cancelled checks, which were evidence of the crime for which the defendant was being arrested. The reasonableness of the search was justified on the ground that the defendant was in the exclusive possession of the apartment, and that the checks could have been concealed in any of the four rooms.[14]

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357 Mo. 1172, 212 S.W.2d 743 (1948); State ex rel. Wong You v. District Court, 106 Mont. 347, 78 P.2d 353 (1938); State ex rel. Fong v. Superior Court, 29 Wash.2d 601, 188 P.2d 125 (1948), *cert. denied,* 337 U.S. 956 (1949); State v. Adams, 103 W. Va. 77, 136 S.E. 703 (1927) (lawful search limited to the room in which the arrest was made).

[10] 339 U.S. 56 (1950).

[11] United States v. Rabinowitz, 339 U.S. 56, 61 (1950).

[12] U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seziures, shall not be violated, and no warrants 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.

[13] The majority speaking through Mr. Justice Minton in United States v. Rabinowitz, 339 U.S. 56,60 (1950):

> It is unreasonable searches that are prohibited by the Fourth Amendment . . . It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. The right of the "people to be secure in their persons" was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions the right, without a search warrant, to search the person after a valid arrest.

[14] 331 U.S. 145 (1947). In this case, the search produced eight Notice of Classification cards and eleven registration certificates bearing the stamp of Local Board No. 7 Oklahoma County. The defendant was convicted under an indictment charging unlawful possession, concealment and alteration of the cards and certificates. The Court held these subject to seizure on the ground that the possession thereof amounted to a continuing offense against the laws of the United States.

In *Rabinowitz*, the business premises of the defendant, consisting of a one-room office, were searched incident to his arrest therein under valid warrants charging the sale of forged stamps.[15] The reasonableness of this search was justified on the grounds that the place was a business room to which the public, including the officers, was invited; the search did not extend beyond the room used for unlawful purposes; and, the possession of the forged altered stamps was a crime which rendered the search one for the objects used in the perpetration of the crime, and not merely a search for evidentiary materials.

The court, in any case in which search and seizure is involved, is confronted with the problem of balancing the interest of the people, as a community, in the suppression of crime, and the interest of the people in maintaining and protecting the privacy of the individual. A difficult task involved in searches incidental to lawful arrests is drawing the line establishing the limits within which a search will not be unreasonable and therefore not in violation of constitutional rights. When a court has sanctioned such searches the possibilities for them become almost unlimited.

Once officers know that they can search premises incidental to a valid arrest, it is a fair assumption that in their zeal to apprehend criminals they will be prone to conduct such searches. From their point of view there is always the possibility that they may find something of evidentiary value, and that a court may well conclude that the search was reasonable. As an example, it is quite possible for an innocent person to be lawfully arrested in some cases upon "reasonable belief."[16] If the arrest is so made, the requirements of "probable cause," supported by "oath or affirmation," and a "description as nearly as may be of the things to be seized" are completely replaced by the "reasonable belief" of the officer making the arrest. Certainly the search of an innocent person's home upon the "reasonable belief" of the officer is not desirable. This renders that portion of the constitution prohibiting unreasonable searches and seizures meaningless, and offers little if any protection from intrusions upon the privacy of the individual.

The argument could be made that if the search was "unreasonable"

[15] Although the warrant was not put in evidence, it contained, as a government witness testified on cross examination, more than just the sale of forged stamps. It contained other information which had been obtained through statements by a printer taken into custody with overprinting plates in his possession, that the defendant was one of his customers to whom he had delivered large amounts of stamps bearing forged overprints. United States v. Rabinowitz, 339 U.S. 56 (1950).

[16] Ky. Cr. Code § 36 (1959) provides:

> A peace officer may make an arrest . . . [without warrant for arrest] when he has reasonable grounds for believing that the person arrested has committed a felony.

the evidence would be inadmissible. This protects the defendant from the use of evidence so obtained, and the common interest of the people in the suppression of crime far outweighs the inconvenience suffered by the individual. Or, if the search was "reasonable," the rights of the individual have not been infringed upon. However, this line of reasoning affords the individual no protection whatsoever from a search; it merely prevents the use of evidence so obtained if, and only if, the search is determined to be unreasonable. This is surely not what the framers of the Kentucky Constitution intended when they made provision for the people to "be secure in their persons, houses, paper and possessions, from unreasonable search and seizure."

When, however, a court rules that a search of one's home incidental to a valid arrest therein is unlawful and evidence so obtained is inadmissible, the incentive for such searches is greatly diminished. As a result officers desiring to search one's home will not do so until the constitutional requirements have been fulfilled, thereby insuring the privacy of the individual against unwarranted invasions.

It would appear that the policy adopted by the Kentucky court in the principal case could well be summarized in the words of Mr. Justice Holmes in his dissenting opinion in the case of *Olmstead v. United States*:[17]

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.[18]

It is submitted that if the effect of the principal case is to establish a hard and fast rule that the search of a man's home incidental to his lawful arrest therein, without his consent, is unlawful, the purpose and intent of the framers of the Constitution to insure the security of the people in their homes from unreasonable search and seizure, will be served. This is true notwithstanding the fact that some few criminals will escape conviction because the necessary evidence to establish their guilt could not be obtained in a search of their home incidental to their lawful arrest therein.

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[17] 227 U.S. 438 (1928).
[18] Olmstead v. United States, 277 U.S. 438, 470 (1928).