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Criminal Procedure--Search and Seizure-- Admissibility of Evidence Obtained in Search Incidental to Arrest Without a Warrant

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imposed to deter like conduct.²⁰ A similar penalty should be sufficient to insure strict adherence to CR 75.01, without denying a review on the merits.

As has been stated, the lawyer is supposed to be and must be a trained technician and must have a sound working knowledge of the tools of his trade; he must properly use the Rules of Civil Procedure in order to secure a review of his case by the court.²¹ However, since lawyers are susceptible to making mistakes, they and their clients should not have to bear the burden of dismissal when their mistakes result in no injustice or prejudice to their adversaries.

William A. Logan

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—ADMISSIBILITY OF EVIDENCE OBTAINED IN SEARCH INCIDENTAL TO ARREST WITHOUT A WARRANT. Defendant was arrested for drunken driving. He was arrested without a warrant after officers noticed his car being driven in an erratic manner. Upon searching the car, the arresting officers found a pistol concealed under a coat on the front seat. Defendant was taken to jail and one of the officers swore out a warrant for drunken driving. While this charge was pending, defendant was indicted and tried for carrying concealed a deadly weapon. Defendant made a timely motion to suppress all evidence obtained in the search of the automobile, claiming that the evidence was incompetent because the primary question of his guilt or innocence of the drunken driving charge had never been determined. The trial court overruled the motion and admitted the evidence. The jury were instructed that if they believed beyond a reasonable doubt that the defendant operated his automobile while under the influence of intoxicating beverages in the presence of the arresting officers, and if they further believed that he carried concealed a deadly weapon, they would find him guilty. The jury returned a verdict of guilty, and defendant appealed from a judgment entered thereon. *Held*: The trial court erred in admitting the evidence and the judgment of conviction was reversed. "Where an original and separate charge based on the offense for which the accused was arrested is pending in a court and subsequently the accused is charged in another court of a separate offense, no evidence which was obtained solely as a result of a search

²⁰ CR 75.05, *supra* note 14.

²¹ See Clay, "The Use and Abuse of the Rules of Civil Procedure," 47 Ky. L.J. 161 *passim* (1959).

made after the arrest for the initial charge is admissible in the trial of the second offense *until* the offender is *found guilty* in the first court."¹ [Emphasis added.] *Thomason v. Commonwealth*, 322 S.W.2d 104 (Ky. 1959).

Kentucky has long held that evidence obtained in an unlawful search is inadmissible as evidence in a criminal prosecution.² The obvious policy behind this is to protect the public against the unreasonable searches and seizures prohibited by section 10 of the Kentucky Constitution.³ Only a minority of jurisdictions, however, feel that such a rule is necessary to implement the prohibition against unreasonable searches.⁴

Kentucky also holds that an arrest for a misdemeanor is unlawful if made without a warrant and the accused is later found not guilty.⁵ The basis of this holding is section 36 of the Kentucky Criminal Code which provides that a police officer may arrest without a warrant "when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." The Kentucky court is clearly correct in its interpretation of this section. Under it an officer is allowed to arrest for misdemeanors only when the "offense is committed in his presence," not when he has "reasonable grounds to believe" that such an offense is being committed. Thus, any arrest without a warrant for a misdemeanor not actually committed in the officers presence is an unlawful arrest. A search incidental to an unlawful arrest is an illegal search and evidence obtained thereby is inadmissible.⁶ The final determination of the defendant's guilt or innocence of the misdemeanor for which he was arrested is conclusive as to whether there was an offense committed in the officer's presence.⁷

Since a verdict of not guilty is conclusive evidence that no misdemeanor was committed in the officer's presence, and since many persons are arrested for misdemeanors without warrants and never convicted, unlawful arrests are frequent. In order to protect an officer from irresponsible jury action or other uncertainties of the law, the Court of Appeals has refused to impose civil liability for such an

¹ *Thomason v. Commonwealth*, 322 S.W.2d 104, 107 (Ky. 1959).

² See *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920). See also *Miller v. Commonwealth*, 235 Ky. 825, 32 S.W.2d 416 (1930); *Walters v. Commonwealth*, 199 Ky. 182, 250 S.W. 839 (1923); *Ash v. Commonwealth*, 193 Ky. 452, 236 S.W. 1032 (1922).

³ See *Youman v. Commonwealth*, *supra* note 2.

⁴ *Moreland*, *Modern Criminal Procedure* 130 (1959).

⁵ *Parrott v. Commonwealth*, 287 S.W.2d 440 (Ky. 1956).

⁶ See *Parrott v. Commonwealth*, *supra* note 5; *Billings v. Commonwealth*, 223 Ky. 381, 3 S.W.2d 770 (1928).

⁷ *Thomason v. Commonwealth*, 322 S.W.2d 104 (Ky. 1959); *Parrott v. Commonwealth*, 287 S.W.2d 440 (Ky. 1956).

unlawful arrest if the officer had reasonable grounds to believe that an offense was being committed in his presence.⁸ Thus, although many arrests are unlawful, there is adequate protection for the officer and there is seldom any civil liability. The effect, insofar as the officer is concerned, is the same as if he were permitted to arrest when he has reasonable grounds to believe that a misdemeanor is being committed in his presence.

The result is not the same, however, for the person arrested. If there is a verdict of not guilty, the arrest was unlawful and any evidence obtained thereby is rendered inadmissible, regardless of the kind of evidence seized, and regardless of the seriousness of the crime committed.⁹

The instant case is an extension of the Kentucky law on the inadmissibility of such evidence. Heretofore the court has held that if the defendant has been found not guilty of the preliminary offense, the arrest was conclusively unlawful, and any evidence obtained through the arrest is inadmissible in a subsequent trial on a separate offense.¹⁰ Also, if there was no charge pending on the offense for which the arrest was made, the court in a trial on the separate offense must submit the question of guilt or innocence of the preliminary offense to the jury.¹¹ If the jury believed the defendant guilty of the preliminary offense, then they could consider the evidence obtained in determining whether he was guilty of the separate offense. The present case is a corollary of the latter rule. If the preliminary charge is pending, there can be no admission of the evidence obtained in the search incidental to an arrest on the preliminary charge *unless* and *until* the defendant is convicted of the preliminary charge.

Although the principal case is unquestionably a logical extension of precedent, it might be questionable on the basis of overall public policy. Refusing to admit evidence obtained in an unlawful search is the only practical protection that the public can have against unreasonable intrusions by officers. The constitution prohibits *unreasonable* searches and seizures, however, not *unlawful* searches and seizures.¹² A search made incidental to an unlawful arrest is not necessarily unreasonable. The question of reasonableness is not entirely dependent upon the legality of the arrest. A search made inci-

⁸ See *Sizemore v. Hoskins*, 314 Ky. 436, 235 S.W.2d 1011 (1951); *Goins v. Hudson*, 246 Ky. 517, 55 S.W. 388 (1932).

⁹ See *Parrott v. Commonwealth*, 287 S.W.2d 440 (Ky. 1956).

¹⁰ *Ibid.*

¹¹ *Gossett v. Commonwealth*, 308 Ky. 729, 215 S.W.2d 279 (1948); *Barnes v. Commonwealth*, 305 Ky. 481, 204 S.W.2d 801 (1947); *Billings v. Commonwealth*, 223 Ky. 381, 3 S.W.2d 770 (1928).

¹² Ky. Const. § 10 provides in part: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure. . . ."

dental to an arrest without a warrant upon reasonable grounds may well be a reasonable search even though no offense was in fact committed in the officer's presence.

Neither the Kentucky Constitution nor the Kentucky Criminal Code explicitly require the result reached in the instant case.¹³ Here there may not have been an unreasonable search. The fact that the defendant had not been tried on a preliminary charge of drunken driving might raise a presumption that the arrest was illegal until a conviction was had. Even if this presumption should arise, there is no need to *conclusively* presume that the search incidental to the arrest was an unreasonable search.

The admission of evidence procured in a search incidental to an arrest for a misdemeanor without a warrant should not depend upon the defendant's being convicted of the offense for which he was arrested. Such a rule may needlessly permit many criminals to escape prosecution for serious felonies if they can obtain an acquittal or dismissal of the preliminary charge. The question should be one of the reasonableness of the search, as required by the constitution. This would provide an accused adequate protection, and there is no need for the Kentucky court to afford him a broader basis for protection by equating unreasonable searches with searches incidental to unlawful arrests.

Carl R. Clontz

DEDICATION OF STREETS—PRESCRIPTION—RIGHTS OF ABUTTING PROPERTY OWNERS—Martha Salyers and Marshall Tackett bought lots in a platted subdivision on opposite sides of a street dedicated to the public use by the subdivider in 1920. The street was outlined by plowed furrows at the time of the dedication and had since grown up in weeds and been used as pasture; it had never been used by the public nor accepted by the town as a city street.¹ Tackett erected a building near the dead end of the street, fenced the street in, and used it in connection with his adjoining land for cultivation and pasture. In a suit by Salyers seeking an injunction to compel re-

¹³ "The constitutional provision does not undertake to define what constitutes an unreasonable search and seizure, but it is *judicially* settled that all illegal searches are 'unreasonable.'" [Emphasis added.] *Manning v. Commonwealth*, 328 S.W.2d 421, 423 (Ky. 1959).

¹ The opinion suggests that the street in question was a city street, but appellee's petition for rehearing and the court's application of the "County" section of Ky. Rev. Stat. § 413.050 (see note 23, *infra*) make it obvious the street was outside the city limits.