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Criminal Procedure--Narrowing the Doctrine of the Trespassing Officer

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that a corporation is justified, in the interests of its stockholders, in seeking to control stock ownership through the option to buy, and that restrictions may operate effectively upon transfers by death. In the case of small, closely-held corporations, such restrictions serve a widely approved and sometimes urgent purpose.

If the policy favoring reasonable restrictions may be accepted as valid, the present decision should be closely evaluated and perhaps regarded as distinguishable on future occasions. If the restriction policy is approved, only to have its application defeated whenever an individual shareholder dies, then the interests of corporate ownership groups are needlessly impaired.

Jesse S. Hogg

Criminal Procedure—Narrowing the Doctrine of the Trespassing Officer—State Police officers, dressed in street clothes and driving an unmarked car, drove off a public highway onto the private property of the defendant. Acting on information of bootlegging and on personal observation of an unusual flow of traffic to and from an abandoned service station on the defendant’s property, the officers turned into the encircling drive, approached the back door and ordered beer. When the defendant returned from the building with the order, the officers placed him under arrest, seized the beer and proceeded to search the nearby building. The defendant was convicted of the illegal sale of intoxicating liquors, fined and imprisoned. He appealed unsuccessfully to the Rowan Circuit Court, and then to the Court of Appeals, assigning as error the admission into evidence of the beer taken from his person. Held: affirmed. The officers were not trespassers but were business invitees. They could properly arrest for a misdemeanor committed in their presence and make an incidental search of the defendant’s body and seize the beer found thereon. Staton v. Commonwealth, 307 S.W. 2d 570 (Ky. 1957).

The court reasoned that the officers making the arrest were customers, not trespassers, regardless of their intent. The court cited no authority, but distinguished Alfred v. Commonwealth, the principal case relied on by the defendant. In that case the court held that when


22 12 Fletcher, Cyclopedia Corporations sec. 5454, at 306 (Perm ed. 1957 rev. vol.)

23 Ibid.


2 272 S.W. 2d 44 (Ky. 1954).
officers trespassed onto a defendant's private premises, and looked through a car window, this constituted an illegal search and the subsequent arrest and seizure were improper. The court distinguished the instant case on the grounds that (a) here the arrest did not arise from a search and seizure at all, but rather from a voluntary sale to a customer constituting a misdemeanor committed in an officer's presence, and (b) the officers here were not trespassers at all.  

The case is of two-fold importance. It narrowed a line of previous cases in which the court had held that when an officer was illegally upon the premises of the defendant, any subsequent arrest or search and seizure growing out of such a trespass was illegal. The case is also a most interesting commentary upon the delicacy of the research system upon which all lawyers must rely, in that the report of the case, in both the syllabus and the keyed headnote, makes a statement, purportedly the holding of the court, which was never properly before the court for its consideration.  

Under the provisions of section 36 of the Kentucky Criminal Code, a peace officer may make an arrest "[W]ithout a warrant, when a public offense is committed in his presence. . . ." In interpreting this provision the Court of Appeals has consistently held that an officer who has made a valid arrest may make an incidental search and seizure of the person arrested, without violating the state Constitutional prohibition against unreasonable search and seizure. It was therefore necessary in the present case for the Commonwealth to show that the arrest was valid if the evidence afterwards seized was to be admissible. Towards that end, the Commonwealth argued that no

3 Staton v. Commonwealth, 307 S.W. 2d 570 (Ky. 1957).
4 In the present case the following statement was made in both the syllabus and the keyed headnote, which was carried in turn into the digest systems as the holding of the Court of Appeals:

". . . and defendant's subsequent arrest without a warrant was lawful, and beer and whiskey found in the search of premises without a search warrant was admissible."

From the transcript of the trial and from the appellate briefs, it is clear that no evidence obtained by the search of the premises was ever introduced, or offered in evidence. The problem of how far an incidental search and seizure may be extended following an arrest is complicated enough on its merits, without being confused by statements not made by a court in its decision, and on issues never before the court for its consideration. It is not unlikely that future cases of incidental search, either in this Commonwealth, or beyond its borders, will cite this case as authority for a conclusion it never reached.

6 Kentucky Constitution, Article 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."
warrant of any kind was required to allow officers to go onto the premises and purchase liquor, "whether those premises be public or private." Once such a sale was made, it constituted an offense committed in the presence of the officer, and the subsequent arrest and seizure were valid. The contention of the defendant was simple: the officers were trespassers without a warrant, and anything they did while in that capacity was illegal.

The Court of Appeals has decided a series of cases holding that an arrest, or a search and seizure, made by an officer illegally on the property of the defendant was invalid, and evidence procured thereby was inadmissible. The first of these was Simmons v. Commonwealth.\(^7\) In that case an officer, investigating the source of an uncommon noise, knocked on the door of the defendant's room opening off a hallway in an apartment building. The knock caused the door to open, disclosing, in addition to the sleeping form of the defendant, a supply of moonshine. The court held that, assuming that the officer had a legal right to be in the hallway, the "forced opening" of the door constituted an illegal entry into private premises without a warrant and his discoveries were inadmissible. In a similar case, the court rejected evidence of the operation of a still on the grounds that the mere commission of a crime in the officer's presence did not render admissible evidence of a crime discovered while he was illegally trespassing on the private property of the defendant.\(^8\)

In Keohler v. Commonwealth,\(^9\) county patrolmen had gone onto the premises of the defendant to serve civil orders of execution and delivery, and had discovered whiskey in the illegal possession of the defendant. The court held that since the officers had no legal power to execute these orders, they were trespassers, and that discoveries made while in that capacity were not admissible merely because the discovery of the evidence constituted per se the commission of a misdemeanor in the officers' presence.\(^10\) In Miller v. Commonwealth,\(^11\) a federal officer had gone onto private property, allegedly to request a drink of water. While the water was being hoisted from a well the

\(^7\) Brief for the Appellee, page 3, Staton v. Commonwealth, 307 S.W. 2d 570 (Ky. 1957).
\(^8\) 203 Ky. 621, 262 S.W. 972 (1924).
\(^10\) 222 Ky. 670, 1 S.W. 2d 1072 (1928).
\(^11\) Ky. Rev. Stat. sec. 242.230(2) provides that:
"No persons shall possess any alcoholic beverage unless it be lawfully acquired and is intended to be used lawfully, and in any action the defendant shall have the burden of proving that the alcoholic beverages found in his possession were lawfully acquired and were intended for lawful use."
\(^12\) 235 Ky. 825, 32 S.W. 2d 416 (1930).
officer spied, through a crack in a nearby building, tubs containing illicit mash. The Commonwealth argued, as in the present case, that the officer was legally on the premises by the implied consent of the owner, and that the sight of the illegal mash constituted an offense in his presence for which he could make a valid arrest and an incidental search. The court considered this argument "far-fetched."

In each of these latter two cases the court appeared to reason that a technical trespass by an officer, however mistaken or in belief of right he might have been, rendered a discovery of evidence constituting the commission of a crime in the officers' presence inadmissible. If the Constitution thus clearly invalidates the actions of officers whose technical trespass was not made with the intent to avoid the necessity for obtaining a warrant, should it not a fortiori condemn the arrests made by officers willfully and deliberately trespassing for the very purpose of making an arrest without a warrant? To avoid this objection, the court concluded that the officers in the instant case were not trespassers at all, but rather were business invitees, the recipients of an implied invitation "extended to officers as well as to members of the thirsty public generally." But by characterizing the officers as "business invitees" the court has opened the door to entries upon private property whenever, in the opinion of the officers, the comings and goings of others indicate that the premises are "open to business." The validity of the entry and the subsequent arrest will thus turn on mere suspicions of the officers. It seems settled that an officer cannot lawfully enter upon private property upon the mere suspicion or belief that a misdemeanor is being committed therein, for the purpose of viewing the inmates, and then arrest on the theory that the act is in his presence. The court might have considered that enough evidence was presented to the senses of the officers from their position on the road as to constitute an offense committed in their presence. This construction of the facts would test the validity of the entry and arrest not upon the dangerously vague suspicions of the

13 The holding of the court in the Miller case is obscure. The decision was clear that the seizure of the evidence was illegal; but the court did not distinguish whether any of three factors, or all of them determined that result. The same result could have been reached by holding that either (a) the officers were trespassers at the time of their discovery, (b) no crime had been committed in the officer's presence prior to the time of the physical search of the premises, or (c) no arrest of the defendant had been made prior to search. The Court found against all three factors alternatively, and held the evidence inadmissible.
14 Staton v. Commonwealth, 807 S.W. 2d 570, 571 (Ky. 1957).
15 The use in criminal cases of tort classifications of trespassers and business invitees, raises the obvious question of future extension. In the next case will the court stop at the distinction settled on here, or will it extend its mantle over the licensee, who, like the business invitee, is the recipient of an implied invitation?
officers as to a “business invitation,” but on the narrower criterion of what constitutes the commission of an offense “in the presence” of an officer. In Giannini v. Garland, the court held:

[If the officer by his presence becomes informed through any of his senses of material elements of the particular crime, which has a tendency to produce in the minds of a reasonably prudent person that it is morally certain that the principal fact occurred, the offense may be considered as having been committed in his presence, although he did not discover all of the elements necessary to the completion of the offense. . . .]

This construction might have proved a safer and more workable guide to future decision.

Conclusion

From an examination of the cited authorities, one must conclude that the court has narrowly distinguished this case from a line of previous cases with which it could have been soundly coupled. The characterization of the officers as customers rather than trespassers seems strained, particularly in the light of the provisions of the Criminal Code which do not provide for an arrest without a warrant for misdemeanors on reasonable belief. Certainly while a different holding might have engendered cries of unnecessary protection of the criminal element, it should be noted that there was no showing that a warrant could not have been obtained, or any suggestion that the delay would have allowed the quarry to escape. As to the argument that such protection unduly frustrates effective law enforcement, the Supreme Court has answered through Mr. Justice Jackson that:

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.18

Donald D. Harkins

DOMESTIC RELATIONS—ENFORCEABILITY OF ANTENUPTIAL CONTRACTS CONCERNING THE RELIGIOUS TRAINING OF CHILDREN—A Protestant woman and a Catholic man, in contemplation of marriage, entered into a contract whereby they agreed that their children should be