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Criminal Law--Arrest--Probable Cause for Arrest Without a Warrant

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It is the belief of this writer that the real holding of the *Parkrite* case is that there was no contract because it was not accepted, but that it would have been enforceable if assented to. First, the facts of the case show that the bailor-plaintiff did not assent to the contractual condition. Thus the court *had no contract to declare against public policy*. Second, the statement concerning public policy follows the statement relating to contractual assent. This would seem to indicate that the court merely added the statement of public policy as an afterthought—as an additional supporting leg. Third, the court makes particular note of the exact statement in *American Jurisprudence, 4* that the trend of more recent decisions is to hold these provisions binding if assented to, thus implying that the intention of the court is to follow the majority rule and enforce these provisions if acceptance is proven. It is the belief of this writer that it is also the better rule. It is a compromise between the position of the bailor-customer and the bailee-proprietor, allowing the bailee to limit his liability in proportion to his rates and insuring to the bailor an opportunity to know of and assent to or reject the contractual provision limiting the bailor's liability. This position is sound in both reason and justice to both parties.

J. Montjoy Trimble

**Criminal Law—Arrest—Probable Cause For Arrest Without A Warrant**—Defendant was arrested for burglary by officers acting without a warrant on information obtained by interrogating a witness whom they had picked up in response to a “tip” from a secret informer. A search of the defendant's automobile revealed burglary tools which were introduced in evidence over defendant's objection that his arrest, and hence the search of his car, was illegal, since not based upon a reasonable belief that he was guilty of a felony. Defendant contended that since the witness, whose identity had been given to the police by the informer, had not definitely accused him of any crime, the officers had not acted reasonably in inferring that the defendant had committed a felony even though the witness's statements were almost tantamount to an accusation. Defendant also asked the court to require the arresting officer to divulge on the witness stand the name of the informer who furnished the tip leading to the arrest and questioning of the witness. The trial court ruled against defendant on both points and defendant appealed. *Held*, judgment affirmed. *Brewster v. Comm.*, 278 S.W. 2d 63 (Ky. 1955).

*Supra* p. 2-3.
The principal holding of the case is important in further clarifying the law on what facts constitute a reasonable basis for belief that a person has committed a felony out of the presence of the arresting officer. It is well settled that accusatory statements made to an officer by an apparently creditable third person will furnish the officer reasonable grounds for believing a person has committed a felony. This case extends this principle in that it does not require that the statements be a direct accusation of a felony. For in the principal case the witness would not definitely accuse the defendant of the crime. His responses, however, virtually amounted to an accusation. For example, when asked if burglary tools could be found at the defendant’s address, the witness replied, “If he still has them.” When asked point-blank whether the defendant was with him when the burglary was committed, the witness replied, “I don’t want to get myself killed. I can’t talk on that.” It is the writer’s opinion that the police officers were amply justified in arresting the defendant on the basis of this evidence. The Court of Appeals can scarcely be criticized for holding that the officers acted reasonably in believing from the information given that the defendant had committed a felony.

It is further the writer’s opinion that the court also ruled correctly in refusing to force the police officer to divulge the name of the informer who implicated the witness whose questioning elicited the responses which brought about the defendant’s arrest. Even when a confidential informer has directly furnished the evidence leading to the defendant’s arrest, there is a split of authority as to whether the officer is privileged to refuse to reveal the identity of his informer.

1 Carroll’s Crim. Code, sec. 36(2), (1948); Russell’s Crim. Code, sec. 36(2), (MSS).
2 Comm. v. Bollinger, 198 Ky. 646, 249 S.W. 786 (1923); Comm. v. Riley, 192 Ky. 153, 232 S.W. 630 (1921); Grau v. Forge, 185 Ky. 521, 209 S.W. 369 (1919). However it will be noted that these cases contain the caveat that the testimony must be from an apparently credible source and must be given under circumstances evincing authenticity. See, for example, the discussion in Comm. v. Riley supra at 158. Also, it might be noted, the reported information must be more than the informant’s mere belief that the arrestee had committed a felony. Smallwood v. Comm., 305 Ky. 520, 204 S.W. 2d 945 (1947). In other words, an officer, who cannot arrest on his own mere suspicions that a person has committed a felony, Catching v. Comm., 204 Ky. 439, 264 S.W. 1067 (1924), likewise cannot arrest on the mere suspicions of another which have been communicated to him.

3 58 Am. Jur. 300 (1948) 59 A.L.R. 1559 (1929); 9 A.L.R. 1112 (1920). The leading case for the view that the officer is privileged is Sergurola v. U.S., 16 F. 2d 563; judgment affirmed 275 U.S. 106, 48 S. Ct. 77, 72 L. Ed. 186 (1927). The opposing view has been well presented by the Supreme Court of Mississippi in the following cases: Hill v. State, 151 Miss. 518, 118 So. 539 (1928); Hamilton v. State, 149 Miss. 231, 115 So. 427 (1928); Mapp v. State, 148 Miss. 739, 114 So. 825 (1927). There is some authority, mostly English, for the view that whether the name of the informer should be revealed is a matter for the discretion of the court. See cases collected at Anno., 83 L. Ed. 155, 159 (1939).
In this case the Court of Appeals indicates that it leans toward the view that such evidence should be disclosed and that if this had been a case where the confidential informer had directly furnished the information leading to the defendant's arrest, the officer would have been required to divulge the name of the informer. Since there seem to be no Kentucky cases directly in point, the court's dictum on the question should not be taken lightly. In coming to this conclusion, the court, it is believed, has approved the better view. To be sure, the police have an interest in protecting and keeping open their sources of information, but this must yield to the right of a defendant to show, if he can, that his arrest was without probable cause and illegal since based on unreliable testimony.

In the principal case, however, the defendant's arrest was not brought about by the testimony of the informer since the accusatory information was not furnished by the informer, but by the witness who had been questioned as a result of the informer's tip. The probative value of the information in no way depended on the informer's credibility, but upon that of the witness. Since a defendant has no right to learn the source of the officer's facts, except where the source itself is material, he had no right to know the name of the informer.

An interesting question is presented by the action of the trial judge in deciding, without submitting the issue to the jury, that the officers had acted reasonably in arresting the defendant. As a general proposition of law, it can be said that most questions of reasonableness are ordinarily for the jury. However, it is the well-settled Kentucky rule that in arrest-without-a-warrant cases, at least where the facts are not in dispute, the issue of reasonableness is for the court, not the jury.

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4 It is the writer's opinion that the Annotators in both A.L.R. and in L. Ed., supra note 3, are inclined to this view.
5 On the other hand it could be argued that the chance that the defendant could show lack of probable cause merely by learning the identity of the informer is so slight as to be outweighed by the social utility of keeping faith with confidential informers. It might also be possible to recognize the privilege in all cases except criminal prosecutions based on the information given. In a jurisdiction not following the rule of Weeks v. U. S., 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), which holds that any evidence illegally obtained in admissible, fewer problems would come up, since many of the cases examined deal with the defendant's efforts to show a lack of probable cause to make the arrest for the ultimate purpose of excluding evidence obtained in the subsequent search.
6 U.S. v. Keown, 19 F. Supp. 639, 644 and 646 (W.D. Ky. 1937); Donnelly, Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocative, 60 Yale Law Jour. 1091 (1951). Both of these were cited by the court in the instant case.
8 6 C.J.S. 598 (1937); Moreland, unpublished manuscript on Criminal Procedure, Chapter 1, p. 17; 41 Ky. L.J. 455, 456 (1953). People v. Kelvington, 104 Cal. 86, 37 Pac. 799 (1894); Filer v. Smith, 96 Mich. 347, 55 N.W. 999 (1893);
At first blush it might seem more in keeping with the traditional relationship between judge and jury to let the jury rule on the question of reasonableness, as it does for example in a negligence case. But a closer examination of the subject reveals that the real problem here is one of admissibility of evidence, which traditionally and logically belongs to the judge.9

Having found the arrest to be legal, the trial court permitted the Commonwealth to introduce as evidence the burglar's tools found in the ensuing search of the defendant's car. The car had been parked outside the house where the defendant was arrested, and had been driven to the police station and then searched by the arresting officers. The Court of Appeals agreed with the trial court that the search was valid, and rejected the defendant's contention that the officers had exceeded their right to search after making an arrest. In doing so, the court dismissed as inapplicable the case of Comm. v. Lewis,10 relied on by the defendant. The court did not elaborate on why it thought the Lewis case was inapplicable. The case seems to the writer to be in point. In the Lewis case the defendant was arrested for drunken driving. After he was in jail, his car, which, as in the instant case had been brought to the police station by the arresting officers, was searched. The search was held illegal, on the grounds that the search was not made in the presence of the arrestee and was not made as an “incident to the arrest.”11 It would seem that

State v. Grant, 79 Mo. 113 (1883); Diers v. Mallon, 46 Neb. 121, 64 N.W. 722 (1895). The Kentucky rule appears to be the same. Grau v. Forge, supra, note 2; Bruce v. Scully, 162 Ky. 296, 172 S.W. 530 (1915); Farris v. Starks, 3 B. Monroe 4 (1842). However it is also true, according to the weight of Kentucky authority, that if the facts themselves are in dispute, the question of reasonableness as well should go to the jury. Johnson v. C. & O. Ry. Co., 259 Ky. 789, 83 S.W. 2d 521 (1935); Comm. v. Bollinger, 198 Ky. 646, 249 S.W. 786 (1923); I.C. Railroad v. Dennington, 172 Ky. 326, 189 S.W. 217 (1916). But see Tucker v. Vornbrock, 270 Ky. 712, 110 S.W. 2d 659 (1937); Lancaster v. Langston, 18 K.L.R. 299, 36 S.W. 521 (1896). From a strictly logical viewpoint this confuses the situation. It appears that the jury has lifted itself by its own boot-straps; since it will be called upon to decide the evidentiary facts, it also gets to decide the ultimate fact of reasonableness, ordinarily held to be a question of law for the court. From this it could be argued that the jury should always rule on the question of reasonableness.

Perhaps that should be the test in determining whether the judge or the jury should rule on the question of reasonableness. Let the judge rule on it when the purpose of examining the arrest is to see whether evidence obtained as a result thereof is admissible. Let the jury do so in all cases where the probability of guilt is itself an ultimate fact, e.g. in a false arrest or malicious prosecution case.10

"Id., at 278-279, 217 S.W. 2d at 626. In stating the rule in the Lewis case the court says that the search must be made in the presence of the defendant or made as an incident to the arrest. However, it is believed that the use of the disjunctive or instead of the conjunctive and was an oversight. A literal acceptance of the court's statement would permit any search of an arrestee or his property if
the search in the principal case was more than incidental to the arrest. The right to search after making an arrest is recognized for two reasons: to search for concealed weapons and to search for pertinent evidence which, if on the person of the arrestee, might be hidden or destroyed by him. It is admitted that the right to search an arrestee has gone beyond the limits which would be set if these two factors were all that were involved in the problem.\(^\text{12}\) Even so, it is submitted that this case goes too far. To be "incident to" an arrest, the search should be contemporaneous with the arrest, as was pointed out in the *Lewis* case. That portion of the *Lewis* rule apparently has been disregarded here. It is to be regretted that the court did not spell out exactly why it found the *Lewis* case inapplicable.

By way of summary, it is the opinion of the writer that the court made a perfectly reasonable extension of the law of arrest without a warrant by upholding the legality of the arrest in the instant case. While not a direct accusation of guilt, the testimony on which the arrest was based definitely afforded a reasonable belief that the defendant had committed a felony.

It is also believed that the court has reached a just, workable, logical solution to the problems which arise from the recognition of the policeman-informer privilege. In permitting the trial court to rule on the question of the reasonableness of the officer's belief that the defendant had committed a felony, the court followed the well-established Kentucky rule, which also appears to be the majority rule.\(^\text{13}\)

The opinion's only weakness is in the court's failure to elaborate on its conclusion that the search of the defendant's car was proper. More analysis of the *Lewis* case and its relation to the case at bar would have served to clarify the present court's position on the law of search and seizure incidental to an arrest.

**Tom Soyars**

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**DIVORCE—CONDONATION AS DEFENSE TO ACTION BASED ON CRUELTY—**

Plaintiff-wife brought action in the Fayette Circuit Court for divorce on grounds of cruelty. The lower court found that the parties were, made in his presence. Since this is surely not the law, it is believed that the court intended to require that the search be both in the presence of the arrestee and incident to the arrest.

\(^\text{12}\) The best-known American case on the subject is *U.S. v. Rabinowitz*, 339 U.S. 56, 70 S. Ct. 480, 94 L. Ed. 653 (1950). Other cases on the same subject are collected and annotated at 32 A.L.R. 697 (1924); 51 A.L.R. 434 (1927); 74 A.L.R. 1394 (1931); 82 A.L.R. 786 (1933). A group of typical Kentucky cases can be found at 51 A.L.R. 494 (1927).

\(^\text{13}\) *Supra*, note 8.