Search and Seizure--Search of an Automobile Without a Search Warrant

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Justice was attempting to avoid the problems that the Court would face when desperate lawyers would seize on this "unenforceable" but "valid" covenant to find a way to enforce it themselves, or else to put it into an enforceable form.

This is not a new problem, nor did it go unnoticed after Shelley v. Kraemer created it. A number of Law Journal writers expressed sentiments similar to the following, which was written just prior to Barrows v. Jackson:

Does the Supreme Court really incline toward the position that the restrictive covenants when enforced are the violations of the equal protections clause or are they invalid per se? It is probable that these decisions will give rise to actions for damages for breach of covenant. If so, the above question must of necessity be decided, for then the cause of action will not involve issues of equal protection of the laws or discrimination, but will present squarely to the Court the question of the inherent validity of the covenant itself.\(^{51}\)

The writer predicts that the Supreme Court will be faced with this question again, and in such a manner that it will have to decide unequivocally that such covenants, restrictions, terms, limitations or conditions, in any manner worded, or to be enforced are void. Otherwise, innumerable attempts in various shapes, shades, and sizes will forever be before the courts as property owners contrive other means to "restrict Negroes to their overcrowded Harlems."\(^{52}\)

ROGER B. LELAND

SEARCH AND SEIZURE—SEARCH OF AN AUTOMOBILE WITHOUT A SEARCH Warrant

In Kentucky and other states which follow the federal rule that evidence illegally obtained by law enforcement officers is not admissible, the laws surrounding search and seizure become an important factor in the administration of the criminal law. In these jurisdictions, when the evidence has been obtained by searching the accused or his effects, the defense counsel should not overlook the possibility of objecting to its admissibility on the ground that the seizure of the evi-

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\(^{51}\) Note, 33 CORN. L. Q. 293 at 294 (1947).

\(^{52}\) Note, 13 ALBANY L. REV. 92, 96 (1949).
dence was illegal. On the other hand, prosecutors and peace officers also should be familiar with the technicalities of a legal search and seizure to prevent the freeing of an obviously guilty defendant due to an ignorance of the proper procedure in gathering evidence. One perplexing phase of this branch of the criminal law involves the searching of automobiles without search warrants. Such searches may be divided into two categories: (1) Where the search is incidental to the arrest, and (2) where the officer searches the automobile upon a reasonable belief of the commission of a felony therein. It is in this order that these categories will be discussed.

First, however, it is advisable to look at the constitutional provision governing the problem. The Fourth Amendment of the Constitution of the United States provides: "... 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 on probable cause supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." The Kentucky Constitution has a similar provision. It is to be noted that the constitutional provision does not denounce all searches but only "unreasonable searches." It is upon an interpretation of this phrase that the courts have allowed the searching of automobiles without warrants. In arriving at the conclusion that the search of automobiles under certain circumstances is not unreasonable, the courts have taken into consideration the fact that since vehicles are easily moved out of the jurisdiction it would be impractical to seek out a magistrate and obtain a warrant due to the time element in such cases. Language of this import is found in United States v. Cotter. "The search here was not of a dwelling house but of an automobile, a means of rapid transportation. As to vehicles, a search warrant is not required under the Fourth Amendment because of the impracticability of its timely procurement, as against a readily movable conveyance, renders a search warrant an unavailing and therefore unnecessary process." (Italics writer's) A distinction also has been drawn between an automobile and other property in that an automobile is merely a means of transportation for use on the public highways and is not actively used on private premises, which the law guards with more a zeal from search and seizure without process. In the main, the automobile cases represent a practical adjustment to the problem of the mobility of automobiles; fundamentally, the courts cling to the theory

1 Ky. Const. Sec. 10.
that where the securing of a search warrant is practical it must be obtained.5

In the first category—where the search is incidental to an arrest—no great problem is presented, as it is a fundamental principle that when one is arrested, his person and the immediate vicinity, including the articles under his control, may be searched without a warrant.6
With the advent of the automobile, it was decided that the search of a car in which the arrested person was riding was incidental to the arrest.7 This rule is qualified by the requirement that the arrest must be a lawful one; if the arrest is unlawful, the search is also unlawful.8 It should be emphasized that the search, by the very terminology of the rule, must be "incidental" to the arrest.

The majority of the courts makes no distinction as to whether the arrest is for a felony or a misdemeanor. In the latter case, a traffic violation is enough to justify a search in conjunction with the arrest.9 However, in the writer's opinion, this type of random search is not within the original purpose of allowing a search incidental to the arrest. The original justification for the rule was two-fold. First, the search was necessary to prevent the person arrested from escaping or doing injury to the officers or himself with some weapon to which he might have access. Second, the search was necessary to disclose evidence of the crime or implements used to effect the crime for which the arrest was made. In showing the lack of these justifications in a traffic case, it is necessary to consider a typical traffic violation. For example, in a reckless driving case, if the officer is at all suspicious of the occupants of the automobile, he will thoroughly search it in connection with the arrest; this will include not only the easily accessible part of the automobile but also the locked trunk and glove compartments. The question then arises: Is the search of the locked trunk and glove compartments lawful? To this the answer would seem to be, "no." However, such searches are common practice and at least one case supports the conclusion that they are lawful.10

7 Billings v. Commonwealth, 223 Ky. 381, 3 S. W. 2d 770 (1928); People v. Overton, 293 Mich. 44, 291 N. W. 216 (1940); Melton v. State, 110 Tex. Cr. 439, 10 S. W. 2d 384 (1927).
8 State v. Pluth, 157 Minn. 145, 195 N. W. 789 (1923); Hughes v. State, 145 Tenn. 544, 238 S. W. 588 (1922).
10 People v. Barg, 384 Ill. 172, 51 N. E. 2d 168 (1943). The courts also seem to support that conclusion by the terminology used in their opinions in the
However, on what basis can such a search be justified on the principles set forth? Admittedly, there is a possibility that the arrestee could obtain a weapon from a locked glove compartment, but this is very remote since usually he does not have access to the keys after the arrest and even though he had another set of keys it would be improbable that he would be able to open the compartment with the officers standing near the car, or by him. And there would be even less likelihood that he could obtain a weapon from the trunk, at least not enough probability to justify the search on that basis. In disposing of the second justification in such cases—that the search was necessary to disclose evidence of the crime for which the arrest was made—it is sufficient to ask: What evidence is there to be disclosed in one of the compartments of the car which would be of value in a reckless driving or speeding violation? The writer knows of no evidence in such a case that could be concealed in these parts of the vehicle.

Probably the courts' reasoning for allowing the seizure of evidence of a different crime than that for which the arrest is made (which is what generally happens in a search and seizure in connection with a traffic offense, since the evidence usually found consists of intoxicating liquor or stolen property) is based upon the type of rationalization found in the case of Harris v. United States. In that case the Supreme Court of the United States held that in connection with an arrest for forgery the search could extend beyond the person of the one arrested to include the premises under his immediate control, which under the circumstances extended the search to all five rooms of the arrestee's apartment. During this extensive search, draft cards, the possession of which was unlawful, were seized although unconnected with the crime for which the defendant was arrested. The reasons for allowing such an all inclusive search seem to rest on the fact that since Harris was in exclusive possession of all of the rooms, his control naturally extended to such rooms, and in such rooms fruits of the crime and other evidence pertaining to the crime could be concealed. As mentioned before, however, such reasoning does not apply to the automobile in a traffic violation case because the vehicle, although in the arrestee's possession, could not conceivably conceal any evidence of the crime; therefore, the search which discloses the illegally possessed articles should be illegal since there is no reasonable basis for it. It is submitted that the type of reasoning in the Harris case, when applied to a

\[3881 \text{ U. S. 145 (1947).}\]
situation involving a search of a locked glove compartment or the trunk of an automobile as incidental to a lawful arrest of the driver for a traffic violation, gives rise to too many instances where the search and not the arrest is the object of the arrest. While the requirement that the arrest be in good faith prohibits making the search the real object, there is little evidence other than that offered by the officer concerning the good faith of the arrest. To cite an example, it is the custom for officers who suspect that a car is transporting contraband to follow it until a traffic violation occurs. The driver is then arrested and the car searched under the guise of its being incidental to the arrest. In such a situation, the likelihood of showing bad faith on the officer's part is practically nil, and yet the citizen's car has been searched without a warrant, on mere suspicion, which, as will be discussed in connection with the next category, is clearly an unreasonable search. It is submitted that this is wrong and definitely contravenes the original purpose which the framers of the Constitution had in mind in prohibiting unreasonable searches and seizures.

The next category to be discussed is the one where the search is based upon a reasonable belief that a felony is being committed in the automobile. This is the basis for the search. In these situations, the actual language of the courts has brought into usage the rule of "probable cause." The basis for this rule, as previously discussed, rests upon the factor of mobility of the motor vehicle which renders it impractical to obtain a search warrant. "Probable cause" is a rather elusive phrase and raises a judicial question which is dependent on the facts of the particular case; however, a definition inaugurated by Chief Justice Taft in the case of Carroll v. United States is probably the one most alluded to by the courts. In that case, the Chief Justice stated that "probable cause" exists, "upon a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction...." The Supreme Court decided there that "probable cause" did exist where the automobile, which was coming from a known source of liquor supply, was stopped on a highway and searched without a warrant by prohibition agents, who knew the persons within the automobile to be bootleggers and knew that the automobile was the same one used in an attempt to sell the officers whiskey a short time before the search. The fact that the whiskey was so concealed as

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12 McKnight v. U. S., 183 F. 2d 977 (D. C. Cir. 1950); Henderson v. U. S., 12 F. 2d 528 (4th Cir. 1926).
14 267 U. S. 133 (1925).
15 Id. at 149.
not to be evident to their senses did not invalidate the search. Although this decision, in applying the definition, has been severely criticized, it is a landmark case in the field and has had no small effect upon the state courts in defining "probable cause" and interpreting it. A later Supreme Court case, Husty v. United States, set forth basically the same definition as the Carroll case; however, it clarified the problem slightly by stating that it is not necessary that the arresting officer should have before him legal evidence of the suspected illegal act, if there is reasonable belief of its existence. Most courts have concluded that "probable cause" exists where it has been induced by the senses or by reliable information. In commenting on information received as a basis for probable cause, Cornelius in his work on search and seizure states that where the information given the officer was given anonymously, that in itself will not constitute probable cause for stopping and searching the automobile, while, if the information was furnished by a reliable person, it will. In all cases, it is necessary that the probable cause be evident before the search, and the officer does not justify the illegal search by finding articles or contraband subject to seizure in the vehicle on a search of it without probable cause.

In all events, regardless of the amount of probable cause involved, either before or after the search, such probable cause will not justify the search of the person within the automobile unless, of course, he has been arrested. It is to be noted that all the points discussed above in relation to probable cause involve automobiles on the highways or places to which the public has access. When the vehicle is upon private property, generally such searches are under the high protection accorded such premises. Thus a search of an automobile on private premises without a warrant for the search of the premises is a violation of the constitutional guaranty.

In Kentucky, the rule as to "probable cause" is basically the same as in other jurisdictions. A 1948 decision held that an automobile may not be stopped on the highway and searched without a warrant unless

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16 Black, A Critique of the Carroll Case, 29 Col. L. Rev. 1068 (1929).
17 282 U. S. 694 (1931).
18 Ferrell v. Commonwealth, 204 Ky. 548, 264 S. W. 1078 (1924); State v. Loftis, 316 Mo. 878, 292 S. W. 29 (1927); 79 C. J. S. 850-851 (1952).
19 Cannon v. U. S., 158 F. 2d 952 (5th Cir. 1946); Medina v. U. S. 158 F. 2d 955 (5th Cir. 1946).
20 Cornelius, Search and Seizure (2nd ed. 1930).
21 Elardo v. State, 164 Miss. 625, 145 So. 615 (1933); Graves v. State, 1 Tex. Cr. 26, 20 S. W. 2d 769 (1929); Weaver v. State, 129 Tex. Cr. 529, 59 S. W. 2d 396 (1933).
23 56 C. J. 1197 (1932).
a misdemeanor is being committed in the presence of the officer or he has probable cause to believe that a felony has been committed. In defining the phrase, it is stated:

[Probable cause is synonymous with reasonable cause. It means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that grounds exist for the search, or that the person sought has committed a felony, or such a state of facts as would lead a man to believe, or to entertain a strong suspicion, that property is possessed subject to forfeiture or that a person has committed a felony. Probable cause does not mean prima facie evidence of guilt.]

Kentucky is in accord with the majority of jurisdictions in holding that a search based upon mere suspicion is illegal. However, where an automobile is stopped and searched on mere suspicion but such search is consented to by the occupant, the consent makes the procedure a legal one.

Since the problem of probable cause is solved in each case by applying the definition of the phrase to the particular circumstances and facts of that case, a practical approach to the question of what constitutes probable cause is to examine particular holdings on the subject. The following represent typical holdings. In a 1928 Mississippi case, the automobile was being driven at a late hour and the occupants were boisterous. It was held that no probable cause existed. In United States v. Shelton et al., probable cause did exist where an occupant of the automobile was a flagrant violator and there were the additional facts that the officers had information that he was using the automobile to transport whiskey and it was apparent that the automobile was heavily loaded. Probable cause was again present in a Kentucky case, where the officer saw several kegs in the rear seat and smelled whiskey. An interesting case often cited is United States v. Cotter. There the officers undertook to follow the defendant's automobile because he had the reputation of being a bootlegger. The court held that the liquor found was not admissible in the federal prosecution because the mere fact that the accused was a known bootlegger did not amount to probable cause. In other cases, the fact that the accused was a reputed bootlegger plus other facts has met the

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27 Marsh v. Commonwealth, 255 Ky. 484, 74 S. W. 2d 943 (1934).
29 Sellers v. Lofton, 149 Miss. 849, 116 So. 104 (1928).
31 Ferrell v. Commonwealth, 204 Ky. 548, 264 S. W. 1078 (1924).
32 Supra, note 3.
probable cause requirements. Such a case is *United States v. Gilliam.* The sheriff told federal officers that he had reliable information that the accused was going in his automobile to get moonshine at a reputed moonshiner's hideout. This, coupled with the fact that the officers saw him leave the hideout, gave them probable cause. It is interesting to compare this case with one where the information was received by an anonymous phone call. This, together with the fact that the automobile was heavily laden, did not amount to probable cause. Naturally, there is no limit to the situations which may arise involving the element of probable cause, but it is hoped that the examples cited, which have been passed upon by the courts, will aid the reader better to understand what constitutes probable cause.

**Conclusion and comments**

Under certain circumstances, the search of an automobile without a search warrant is not unreasonable within the meaning of the constitutional guaranty which prohibits "unreasonable searches." These circumstances occur in two situations: (1) Where the search is incidental to a valid arrest; (2) Where the search is based upon a reasonable belief that a felony is being committed within the vehicle.

In the first situation, it is sufficient if the arrest is made for a misdemeanor as well as a felony. An arrest for a traffic violation will in fact justify a search of the vehicle. In the writer's opinion, the searching of the easily accessible parts of an automobile in connection with an arrest for a traffic violation is permitted by one of the justifications for the rule, but that the searching of the not so easily accessible parts, such as the locked glove compartment and the trunk, should not be permitted, although the courts apparently make no distinction as to what parts of the vehicle may be searched. In allowing a search of the entire automobile, the broad existing rule has given rise to a situation where an arrest for a traffic violation is often made for the sole purpose of searching the automobile, which in effect deprives the citizen of his fundamental right to be protected from an unreasonable search.

In commenting on the second category into which such cases fall—where the search is based upon a reasonable belief of guilt—it is submitted that the existing law is reasonable. It is believed that fundamentally the rule is related to the more well-known proposition that an officer can arrest upon a reasonable belief; if he can make an arrest under such circumstances *a fortiori* he may search to see if his reasonable belief is true. It must be admitted too that the rule is one of good

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\(^{33}\) 87 F. Supp. 808 (E. D. Tenn. 1950).

\(^{34}\) U. S. v. Allen 16 F. 2d 320 (E. D. Fla. 1926).
social policy since (1) it gives police officers a much needed power in combating the increasing use of automobiles in the perpetration of crime, and (2) it permits officers to search a person's car, without subjecting him to the humiliation of being arrested, if the search discloses that no crime has been committed. The writer's main criticism of the rule is its lack of notoriety and use among those who enforce the law, especially on the state and local levels. Many officers, in fact, do not know that a search may be made on reasonable belief; they consider that one may only be made in connection with a lawful arrest—the situation found in the first category in this discussion. Such officers are limited to one-half of the grounds for lawful searches and seizures because of their lack of knowledge of the full possibilities of the law.

GARDNER L. TURNER

HOMICIDE—THE KENTUCKY NEGLIGENT VOLUNTARY MANSLAUGHTER

In the recent case of Long v. Commonwealth\(^1\) the Kentucky Court of Appeals again had before it for consideration the Kentucky negligent voluntary manslaughter doctrine. In this case the defendant was convicted of voluntary manslaughter and appealed, urging: (1) that the verdict was not sustained by the evidence, and (2) that the instructions were erroneous. It appeared that on the evening before the killing the deceased Collins, one Perdue, and defendant Long had a drinking party at the home of Perdue. Collins was killed the next morning by a shot at close range. Defendant Long denied that there was any fight and testified that he had brought along his shot gun for the purpose of going hunting the next day; that having decided to leave, he reached under the bed for the gun, where he had put it previously, and as he pulled it out, it accidentally discharged. The Commonwealth failed to produce a single witness who actually saw the shot fired. The trial court gave an instruction on voluntary manslaughter for grossly careless or reckless use of a firearm. The Court of Appeals affirmed, saying that there was evidence to indicate that the defendant was reckless in handling the gun, and in the course of the opinion further added:

This case . . . seems to fall within the rule that when the accused admits the killing the burden is upon him to show to the satisfaction of the jury that he is blameless.\(^2\)

\(^1\) 262 S. W. 2d 809 (Ky. 1953).
\(^2\) Id. at 811.