Kentucky Law Journal

Volume 43 | Issue 3 Article 10

1955

Search and Seizure Under the Fourth Amendment

William C. Brafford Jr.
University of Kentucky

claimed indebtedness. Apparently the problem still remains as to the construction of these two statutes where the primary purpose of the litigation is to obtain a declaration of *rights* under Chapter 418 of the Kentucky Revised Statutes.

By the enactment of the amendment to Kentucky Revised Statute section 21.060 in 1952, the Legislature reduced to a great extent the number of cases which would appear on the Court of Appeals docket. There can be no doubt that this was the primary aim of the statute and a very commendable one. But it is submitted that if the "rights" of individual litigants in declaratory judgment suits and in injunctive proceedings, which from their very nature are not susceptible of having a monetary value placed upon them for purposes of appeal, are to be sacrificed in order that the court's docket may be lightened, then the statute should be repealed or amended in order that this situation may be remedied. If this is not done the court should overrule its previous decision in the *Brashear* case and adopt the interpretation of the statute presented by this note.

WENDELL SAFRIET WILLIAMS

[Editor's note—After this note had completed the editorial process, the Court of Appeals decided *McLean* v. *Thurman*, 273 S.W. 2d 825 (Ky., Dec. 17, 1954). The court held that the Legislature, in amending the statute, did not intend to deny appeals in those actions in which the amount or thing in controversy is not translatable into a monetary valuation. The court expressly overruled the case of *Brashear* v. *Payne*, in so far as it conflicted with the *McLean* decision.]

SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

The purpose of this note is to examine two of the three basic problems arising under the Fourth Amendment, namely: (1) compulsory production of materials to be used solely as evidence; and (2) the extent to which a search and seizure can be made without a warrant. A third problem which often arises concerns the extent of a search and seizure as incidental to a valid arrest. This latter problem will not be covered in this note.

(1) *Compulsory Production of Materials To Be Used Solely As Evidence.*

The first important case in which the Supreme Court had occasion to interpret the Fourth Amendment was *Boyd* v. *United States*.[1] This was not technically a search and seizure case but the Court, nevertheless, applied the Fourth Amendment. To provide a more effective

[1] 116 U. S. 616 (1885).

means of enforcing the Revenue Acts, Congress provided in 1874, by appropriate legislation, that in any proceeding, other than a criminal proceeding, arising under the revenue laws, the Court could, in its discretion on motion by the Government, issue an order to a defendant or claimant to produce his books, invoices, and papers which might tend to prove any allegation made by the United States Government. This legislation provided further, that if the papers were produced, they could be used as evidence; if they were not produced, the allegations of the District Attorney in making the motion for the court order would be taken as confessed. The *Boyd Case* arose on an information in rem, filed by a U. S. District Attorney, in a case of seizure and forfeiture of property, against 35 cases of plate glass seized by the Collector of Revenue as having been imported in fraud of the revenue laws. The defendant, on order from the court, produced a certain invoice of an earlier shipment of plate glass—which invoice was desired to be used *solely as evidence* in the case—but he objected to the validity of the order challenging the law under which it was made as being contrary to the Fourth Amendment, as well as to the Fifth, which, among other things, protects a person against self-incrimination. The lower court permitted the evidence to be used and a judgment of forfeiture was given. The Supreme Court in an unanimous opinion reversed the decision and declared the law unconstitutional.

Justice Bradley, who wrote the opinion, considered first the problem of whether this was a "search and seizure". To the Government's argument that the mere ordering that the papers be produced under the Act was not the same as a search and seizure, he pointed out the fact that failure to produce the papers would result in the allegations of the Government being taken as confessed and concluded:

> . . . a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.[2]

The question remained whether this was an *unreasonable* search and seizure under the Fourth Amendment. It was contended by the counsel for the Government that the compulsory production of papers was a legitimate proceeding sanctioned by long usage and the authority of judicial decision. After a historical review, in order to ascertain what proceedings were meant to be included in the Fourth Amendment as "unreasonable searches and seizures," Justice Bradley concluded:

---

[2] *Id.* at 622.

> . . . any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free American government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of a despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.[3]

As to the question of the Fifth Amendment, Justice Bradley, after finding that this case of forfeiture was *equivalent* to a criminal proceeding, said that the proceeding was within the *spirit of both* amendments and added:

> . . . the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.[4]

Thus it became settled by this decision that the compulsory production of one's private papers to be used solely as evidence in a criminal case is within the prohibition of both the Fourth and Fifth Amendments.

But this protection is not as broad as one might think at first blush. The reasoning applied in the *Boyd* case to a private person does not carry over as a practical matter into a case where corporate papers are sought to be produced. Although a corporation is within the protection of the Fourth Amendment,[5] it is not similarly within the protection of the Fifth so as to protect an individual officer of the corporation when incriminating papers of the corporation are sought to be produced.[6] The question often arises as to just what are corporate, as distinguished from individual, papers. The position of the Court was clearly stated in the recent case of *United States* v. *White*.[7]

---

[3] *Id.* at 631, 632.

[4] *Id.* at 633.

[5] That a corporation is within the protection of the Fourth Amendment is settled by Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920). The lower court in this case issued a subpoena for the production of evidence which subpoena was based on knowledge secured in violation of the Fourth Amendment. The court, in reversing the conviction, held that the rule in Weeks v. United States, 232 U. S. 383 (1914) in which it was held that evidence obtained by an unreasonable search and seizure in violation of the Fourth Amendment could not be used in a subsequent trial to obtain a conviction, could not be evaded by taking two steps instead of one.

[6] Essgee Co. v. United States, 262 U. S. 151 (1923).

[7] 322 U. S. 694 (1944).

In this case, during the course of a grand jury investigation into alleged irregularities in the construction of a Naval Supply Depot, the district court issued a *subpoena duces tecum* directing the International Union of Operating Engineers to produce some of its records. The respondent, an assistant supervisor, appeared and declined to produce the demanded documents "upon the ground that they might tend to incriminate the Union, myself as an officer thereof, or individually." To sustain his position he relied on the Fourth and Fifth Amendments. He was cited for contempt, the court holding his refusal inexcusable, and was sentenced to thirty days in jail.

The Supreme Court in upholding the conviction held that neither the Fourth nor the Fifth Amendment was applicable in this case, because the constitutional privilege against self-incrimination was essentially a personal one, applying only to natural individuals and hence could not be utilized by or on behalf of any organization, such as a corporation. The Court said that basically the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the Government to enforce its laws. The Court, conceding that the distinction between corporate and individual papers is at times very fine, laid down the following test:

> . . . whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.[8]

The court concluded that labor unions national or local, incorporated or unincorporated, are clearly within the scope of this test.

Thus it seems that in cases involving corporations and some other organizations the *Boyd* reasoning does not apply. Although the Government cannot, because of the limitations imposed by the Fourth and Fifth Amendments, subpoena a person's private papers to be used in evidence against him, they may often reach the same result largely by subpoening those of a corporation of which he is a member. The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. It is fortunate, however, that the privilege does not extend to corporations which are not, of course, persons. If the cloak of the privilege were to be thrown around their impersonal records and documents, effective enforcement of many federal laws, especially those relating to Inter-

[8] *Id.* at 701.

state Commerce, would be impossible. The fact that the state and federal governments charter corporations and have visitorial powers over them also provides another convenient vehicle for justification of governmental investigation of corporate books and papers.[9] The framers of the Constitutional guarantee against compulsory self-disclosure were interested primarily in protecting individual civil liberties and it is not believed that it should be extended to protect corporate interests, so as to nullify governmental regulations even if individuals are at time indirectly affected.

(2) *Search and Seizure Without a Warrant.*

(A) Automobiles and other highly mobile objects.

The Fourth Amendment has never been interpreted to require that *every* valid search and seizure be effected under the authority of a search warrant. For example, the guaranty of freedom from unreasonable searches and seizures is construed as recognizing a necessary differences between the search of a dwelling house or other structure with regard to which a valid search warrant may readily be obtained without much danger of removal of the incriminating evidence, and the search of an automobile, or boat for contraband goods, where it is not practical to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be obtained.[10] A rule followed by some federal courts, prior to its repudiation by the Supreme Court, permitted an indiscriminate search of automobiles on the highway for contraband, whether or not there was *probable cause* for the belief that contraband was being carried.[11] Such decisions permitted the finding of contraband in the vehicle to justify the search. This doctrine has, however, been repudiated, and the Supreme Court, while recognizing the peculiar situations involved in the search of a vehicle on a highway, makes the test of legality of such a search without a search warrant depend upon a probable cause for belief by the officer that the automobile is carrying contraband.[12]

In *Carrol* v. *United States*,[13] prohibition agents stopped and searched the defendant's car on a highway leading from Detroit to

---

[9] See discussion, *Id.* at 700.

[10] 47 AM. JUR. 513 (1943).

[11] United States v. Bateman, 278 F. 231 (1922) (Based on the impossibility of enforcing the Eighteenth Amendment if warrants were necessary for a search of automobiles); United States v. Fenton, 268 F. 221 (1920) (Where the right to search was placed on the ground that the illegal transportation of liquor forfeits it to the government and the possessor has no right to it).

[12] Brinegar v. United States, 338 U. S. 160 (1949); Carrol v. United States, 267 U. S. 132 (1925).

[13] 267 U. S. 132 (1925).

Grand Rapids, Michigan, a leading highway for carrying of contraband liquor from Canada, and seized a quantity of liquor discovered in the search. The agents had heard that the defendants were "bootleggers," and they had on a previous occasion negotiated with two of them to purchase some liquor, but delivery was not made. On this particular night the agents saw a car which they recognized as belonging to the Carrols, two of the defendants. They followed the car; then stopped and searched it. The agents had no warrant to arrest the men or to search the car. The occupants were tried and convicted and appealed to the Supreme Court on the ground that the evidence was obtained in violation of the Fourth Amendment and hence, could not be used against them.

After stating that in many cases, both under the common law and the constitution, search may be legally made without a warrant the Court said:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of the circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure and destruction, the search and seizure are valid.[14]

It was concluded that "probable cause" furnished the "line of distinction between legal and illegal seizure of liquor in vehicles", and is a "reasonable distinction" that "fulfills the guaranty of the Fourth Amendment."[15] Probable cause was said to exist, "if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed . . ."[16] The court found this situation to have existed and said that the officers were entitled to use their reasoning facilities as to the facts of which they had previous knowledge.[17]

In *United States* v. *Lee*,[18] the Court applied the principle formulated in the *Carrol* case to a boat seized on the high seas. In this case a Coast Guard boat was patrolling a designated area beyond the twelve-mile limit when a motor boat was seen. After throwing a search light on it, and detecting what was thought to be cases of liquor piled in the bottom, it was brought to port where it was

---

[14] *Id.* at 149.
[15] *Id.* at 155.
[16] *Id.* at 161.
[17] To the same effect is Husty v. United States, 282 U. S. 694 (1931). To show probable cause in order to justify the search of an automobile the Court said, "it is enough if the apparent facts which come to his attention are sufficient, in the circumstances to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched." See also Dumbra v. United States, 268 U. S. 435 (1925); Stacey v. Emery, 97 U. S. 642 (1878).
[18] 274 U. S. 559 (1927).

searched, the liquor found, and the defendants arrested. The Supreme Court pointed out that a federal statute authorized the seizure on the high seas of American vessels subject to forfeiture for violation of revenue laws and "it is fairly to be inferred that they are likewise authorized to board and search such vessels when there is probable cause. . . ."[19] The Court then found that there was probable cause and held the seizure lawful, relying on the *Carrol* case. A factor supporting the finding of probable cause in this case is the fact that the boat, a small one, was beyond the twelve-mile limit. There have been many other applications of the exceptional rule that an officer can search an automobile or other mobile object without a warrant upon probable cause.[20]

(B) Determination of probable cause by use of the senses.

An analogous problem is occasioned in cases where officers, by use of their senses, have a reasonable belief that a crime is being committed in their presence. This involves the problem whether search and seizure can be made of a dwelling or other structure without process in such cases. Many lower Federal courts have held that sufficient probable cause may exist to cause an officer to believe that an offense is being committed in his "presence," by knowledge gained through sight,[21] hearing,[22] smell,[23] or a combination of his senses.[24] Does this necessarily justify a search without a search warrant? Before the question was presented to the Supreme Court the answer seemed to be yes.[25] However, in *Taylor* v. *United States*,[26] the Supreme Court seemed to put a different complexion on the problem. Prohibition agents, after receiving complaints over a period of a year, went to the defendant's address. Deciding to investigate, they went to a garage on the premises and, smelling the odor of whiskey coming from within, they flashed a light inside and saw cardboard cases which they thought contained liquor. Thereupon they broke in and found 122 cases of whiskey. The defendant subsequently arrived and was arrested. The search and seizure had been undertaken with the hope of

---

[19] *Id.* at 562.

[20] Jenkins v. United States, 161 F. 2d 99 (C.C.A. 10th Cir. 1947); Medina v. United States, 158 F. 2d 955 (C.C.A. 5th Cir. 1946); Bruner v. United States, 150 F. 2d 865 (C.C.A. 10th Cir. 1945).

[21] Gay v. United States, 8 F. 2d 219 (C.C.A. 9th Cir. 1925).

[22] Benton v. United States, 28 F. 2d 695 (C.C.A. 4th Cir. 1928).

[23] Mulrooney v. United States, 46 F. 2d 995 (C.C.A. 4th Cir. 1931).

[24] Pong Ying v. United States, 66 F. 2d 67 (C.C.A. 3rd Cir. 1933); Felio. V. United States, 55 F. 2d 161 (C.C.A. 8th Cir. 1932).

[25] United States v. Barkowski, 268 F. 408 (1920). See also, McBride v. United States, 284 F. 416 (1922) in which search of a stable without a warrant in reliance on smell was upheld.

[26] 286 U. S. 1 (1932).

securing evidence upon which to indict and convict him. The defendant moved to exclude the evidence on the ground that the search and seizure made without a warrant was in violation of his constitutional rights. The Supreme Court reversed the conviction emphasizing that the agents had abundant opportunity to secure a search warrant. Justice McReynolds concluded:

> Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable searches.[27]

In *Johnson* v. *United States*,[28] substantially the same problem was before the court. Here, narcotic agents having been tipped off by a reliable source, went to a hotel and smelling burning opium coming from a room, entered without a search warrant, found opium and then arrested the defendant. The opium seized was used to secure a conviction under the narcotics laws. The defendant appealed challenging the search of her home as a violation of the Fourth Amendment. The Court, in reversing the conviction, conceded that "at the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant," and said that "no reason is offered for not obtaining a search warrant except the inconvenience of the officers." The Court then pointed out that the search was of permanent premises, not of a movable vehicle. In speaking of the Fourth Amendment the Court added:

> Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the competitive enterprise of ferreting out crime.[29]

This rule that a search warrant must be obtained where it is practicable was again applied in *Trupiano* v. *United States*,[30] the Court stating that "agents must secure and use search warrants whenever reasonably practicable."[31] However, a later decision, *United States* v. *Rabinowitz*,[32] cast some doubt as to the proper rule. Although the question before the Court was one of the extent to which officers might search a dwelling in connection with a lawful arrest, the court in the course of its opinion, uttered the following language.

> To the extent that Trupiano v. United States . . . requires a search warrant solely on the basis of the practicability of procuring it rather

---

[27] *Id.* at 6.
[28] 333 U. S. 10 (1948).
[29] *Id.* at 14.
[30] 334 U. S. 699 (1948).
[31] *Id.* at 705.
[32] 339 U. S. 56 (1950).

> than upon the reasonableness of the search after a lawful arrest, that case is overruled.[33]

Two recent federal cases[34] have seized upon the language in the *Rabinowitz* case to reinstate the rule that officers can arrest for crime committed in their "presence" when appraised by their senses of its commission, and as incidental to this, make a search for things used in the crime. This rule cannot be seriously disputed, and is in accord with the long settled rule that an officer can arrest without a warrant for a felony committed in his presence.[35]

What about the case where officers act on "probable cause" alone, as on information from a reliable informer, where there is not a crime committed in their "presence"? It is submitted that in this type of case a search warrant should be required. The circumstances in such cases do not justify a search without a warrant. The Court has not, as yet, gone so far as to hold that a search warrant can be dispensed with in cases where only "probable cause" exists, although undoubtedly this is true in cases where officers detect crime being committed in their presence. This is as it should be. No amount of probable cause to believe that contraband articles are being kept in a permanent structure should justify an entrance into it, without consent, or without a search warrant.

WILLIAM C. BRAFFORD, JR.

[33] *Id.* at 66.
[34] Johnson v. United States, 199 F. 2d 231 (C.C.A. 4th Cir. 1952); United States v. Baxter, 89 F. Supp. 732 (1950).
[35] See A. L. I. Code Crim. Proc., sec. 231 (1930).