Criminal Law -- Tests of Legality of Searches and Seizures in North Carolina and Federal Courts

Hugh Brown Campbell

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was tried exactly the same as if the indictment had been letter perfect or exactly like it will be on new trial. The dissenting opinion is more in keeping with modern liberal decisions.\textsuperscript{7}

J. H. Sembower.


Four federal cases\textsuperscript{1} decided within the past five months call attention to the conflict between the right of the state to make reasonable searches and seizures and the individual right to be secure against unreasonable searches and seizures. Here are opposed the social need that crime be repressed and the social need that law shall not be flouted by the insolence of office.\textsuperscript{2}

Search warrants were unknown to the common law and "crept in by imperceptible practice."\textsuperscript{3} The Fourth Amendment embodies an old common law principle\textsuperscript{4} of protection against unreasonable searches and seizures and though it does not apply to the states,\textsuperscript{5} nevertheless all the states have included its equivalent in their constitutions.\textsuperscript{6} The purpose of this protection, obviously, was not to afford a shield to the guilty. That it should be so is an inescapable incident to the preservation of the right to the people generally and affords a challenge to the law enforcement machinery to solve and reduce this result to a minimum.

If the situation is one where a lawful arrest may be made, then, it is permissible to search the person and things under the control and in the possession of the arrested person at the time of the arrest.\textsuperscript{7}

\textsuperscript{1}AM. LAW INST. CODE OF CRIM. PROC. §159.
\textsuperscript{4}Entick v. Carrington, 19 How. St. Tr. 1030, 2 Wils. K. B. 274 (1765).
\textsuperscript{5}Wilkes v. Wood, 19 How. St. Tr. 1153 (C. B., 1763); Entick v. Carrington, supra note 3.
\textsuperscript{7}N. C. CONST., art. 1, §15; Fraenkel, Concerning Searches and Seizures (1921) 34 HARV. L. REV. 361.
Arrest without a warrant has been sanctioned from the earliest times.\textsuperscript{8} It is permissible where reasonable grounds existed for belief that a felony has been committed and where a breach of the peace was committed in the presence of the officer.\textsuperscript{9} Some jurisdictions have extended the latter to misdemeanors in general.\textsuperscript{10}

When, however, a search becomes necessary to procure evidence to justify the arrest a different question is presented. Thus where it is a misdemeanor to carry concealed weapons the officer cannot arrest a person in his presence unless the offense can be detected through the senses.\textsuperscript{11} This has been carried over to the liquor cases.\textsuperscript{12}

In \textit{Carroll v. U. S.}\textsuperscript{13} the emphasis was not placed on the arrest but the right to search was treated as independent. Probable cause as a sufficient ground for search was there adopted regardless of whether the act in question amounted to a felony or misdemeanor. The prohibition is against unreasonable searches and seizures and if there is probable cause then it would appear not to be within its scope.

This reversal of emphasis affords a possible justification for the holding in a recent North Carolina case.\textsuperscript{14} Nevertheless, the principle has not been expressly adopted, but rather the technical distinction between felonies and misdemeanors has been disregarded in stressing the enforcement of the liquor laws. Thus arrests for misdemeanors have been held valid though not detected by the senses of the officer and probable cause only existed.\textsuperscript{15} Where liquor is being transported in a vehicle, North Carolina, by statute,\textsuperscript{16} demands more than probable cause, specifically, actual sight or personal knowledge acquired through the senses. This results in a nebulous distinction between a man walking and one riding\textsuperscript{17} and fails to recognize the

\begin{itemize}
\item \textsuperscript{8} \textit{Stephen, History of the Criminal Law} (1883) 189.
\item \textsuperscript{9} \textit{Wharton, Criminal Procedure} (10th ed. 1889) 71.
\item \textsuperscript{10} \textit{State v. Deitz, supra note 6; Wilgus, Arrest Without a Warrant} (1924) 22 MICH. L. REV. 673, 703-709.
\item \textsuperscript{12} Douglass v. State, 152 Ga. 379, 110 S. E. 168 (1921).
\item \textsuperscript{13} \textsuperscript{227} U. S. 132, 45 Sup. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790 (1925); (1927) 26 MICH. L. REV. 827.
\item \textsuperscript{14} \textit{State v. Simmons, 183 N. C. 684, 110 S. E. 591 (1922). (Officers suspecting D of liquor violation followed him in house and opened suitcase, found liquor and arrested D.)}
\item \textsuperscript{15} \textit{State v. Campbell, 182 N. C. 911, 110 S. E. 86 (1921).}
\item \textsuperscript{16} N. C. PUB. LAWS (1923) c. 1, §6, N. C. ANN. CODE (Michie, 1927) §3411 (f); \textit{State v. Godette, 188 N. C. 497, 125 S. E. 24 (1924).}
\item \textsuperscript{17} \textit{State v. Jenkins, 195 N. C. 747, 143 S. E. 538 (1928); (1928) 7 N. C. L. REV. 67.}
\end{itemize}
reasonable difference between a vehicle and a building which is ad-
ered to in the federal rule. North Carolina thus goes farther in
permitting arrests but not so far in permitting searches. If there is
no probable cause and mere suspicion alone, a fortiori the search is
illegal.\textsuperscript{18}

A man's home is still his castle and belief, no matter how well
founded, that an article sought is concealed in a dwelling, furnishes
no justification for a search of that place without a warrant.\textsuperscript{19} Such
warrant cannot be issued to secure evidentiary matter only\textsuperscript{20} and in
liquor cases cannot be secured by a federal officer for a bona fide re-
sidence unless a commercial feature is involved.\textsuperscript{21} This protection,
however, does not extend to woods and open fields at a distance from
the residence;\textsuperscript{22} nor to unoccupied houses not within the curtilage;\textsuperscript{23}
 nor to a bare licensee.\textsuperscript{24}

The privilege to be free from unlawful searches and seizures is a
personal one and may be waived\textsuperscript{25} but such waiver must appear by
clear and positive proof and not be open to question, for the courts
do not put the citizen in the position of either contesting the officer's
authority by force or waiving his constitutional privileges.\textsuperscript{26} If the
defendant disclaims dominion over the place and property he cannot
question the validity of the search, two cases\textsuperscript{27} hold, but a recent

\textsuperscript{18}Batts v. State, 194 Ind. 609, 144 N. E. 23 (1924); Eiler v. State, 196 Ind.
562, 149 N. E. 62 (1925); State ex rel Houston v. De Herrodora, 192 N. C.
749, 136 S. E. 6 (1926).
\textsuperscript{19}Agnello v. U. S., 269 U. S. 20, 46 Sup. Ct. 4, 70 L. ed. 145 (1925), 51
A. L. R. 409 (1927).
\textsuperscript{21}Staker v. U. S., 5 F. (2d) 312 (C. C. A. 6th, 1925); (1931) 5 Cin. L.
Rev. 103.
\textsuperscript{22}Hester v. U. S., 265 U. S. 57, 44 Sup. Ct. 445, 68 L. ed. 898 (1924);
Simmons v. Commonwealth, 210 Ky. 33, 275 S. W. 369 (1923); (1927) 13 Va.
L. Reg. (N. S.) 164.
\textsuperscript{23}Robie v. State, 36 S. W. (2d) 175 (Tex. 1931). Contra: Welch v. State,
154 Tenn. 60, 289 S. W. 510 (1926).
\textsuperscript{24}Duke v. Commonwealth, 201 Ky. 365, 255 S. W. 725 (1923). But see
Ct. 94, 69 L. ed. 467 (certiorari denied).
\textsuperscript{26}Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. ed. 654 (1920);
Dukes v. U. S., 275 Fed. 142 (C. C. A. 4th, 1921); U. S. v. Ruffner, supra note
1; Coleman v. Commonwealth, 219 Ky. 139, 292 S. W. 771 (1927); State v.
Luna, 266 S. W. 755 (Mo. App. 1924); Hancock v. State, 35 Okla. Cr. App. 96,
248 Pac. 1115 (1926); cf. State ex rel. Muzzy v. Uotila, 71 Mont. 351, 229 Pac.
\textsuperscript{27}McMillan v. U. S., 26 F. (2d) 58 (C. C. A. 8th, 1928); Patterson v. U. S.,
31 F. (2d) 737 (C. C. A. 9th, 1929).
appears more consistent in that the government should not be permitted to maintain that he is the owner for the purpose of convicting him and not the owner for the purpose of searching.

The following rule is suggested as a solution to the conflict:

(1) where the object to be searched is a building there shall be no searches without a warrant, except as incidental to a valid arrest; and

(2) where the object is not a building searches shall be permitted on probable cause.

HUGH BROWN CAMPBELL.

Equity—Injunctions—Power to Enjoin an Extraterritorial Nuisance.

In a case brought in the Supreme Court of the United States by the state of New Jersey to enjoin the city of New York from dumping garbage into the Atlantic Ocean and thereby fouling the New Jersey beaches, one of the contentions of the defendant was that since the actual dumping occurred on the high seas beyond the territorial waters of the United States, the court had no jurisdiction. The court held that having jurisdiction of the party defendant it could in the exercise of its original equity jurisdiction, grant the injunction.1


3 U. S. v. Murray, supra note 1.