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# Recent Decisions: Criminal Law-Search and Seizure-Seizure of Backyard Drug Cache Held Incident to Arrest in House. Fixel v. State, 256 So. 2d 27 (Fla. 1971)

# RECENT DECISIONS

CRIMINAL LAW—SEARCH AND SEIZURE—SEIZURE OF BACKYARD DRUG CACHE HELD INCIDENT TO ARREST IN HOUSE. *FIXEL V. STATE*, 256 So. 2d 27 (Fla. 1971).

The defendant was convicted for possession of heroin. During a surveillance, police observed the entry and departure of known narcotics pushers to and from the defendant's apartment, and observed that during these visits the defendant went to a cache in his backyard, each time taking a package into the house. Acting upon the tip of a "reliable informant" that a large quantity of narcotics was in the defendant's apartment, the police obtained a search warrant, arrested the defendant in the apartment and picked up the cache outside. At the same time, the officers executed the search warrant, but found no narcotics in the apartment.[1] The District Court of Appeal of Florida held that the seizure was incident to a lawful arrest.[2]

The major problems presented in this case are two: first, does the determination that the object sought is contraband justify the extension of the scope of a search incident to a lawful arrest from the area under the "immediate" control of the arrestee to those areas under his "reasonable" control;[3] and, second, is the search of the backyard, incident to a lawful arrest *inside* the apartment, "reasonable" in the sense of the fourth amendment?

The limited power of search and seizure is predicated on the fourth amendment of the United States Constitution.[4] A search and seizure made without a warrant will be held reasonable only in limited situations: (1) where incident to a lawful arrest; (2) with consent; and (3) under exigent circumstances.[5]

The authorized scope of a search incident to a lawful arrest has had an inconsistent judicial history. The first case to discuss the constitutionality of a warrantless search incident to a lawful arrest was *Weeks v. United States*.[6] In *Weeks*, after the defendant was arrested some distance away from his home, the officers conducted a warrantless search of his residence. Although the Court held the search

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1. For the purpose of this analysis it will be assumed that the search was made after the arrest, not before. It should be noted, however, that Petitioner's Brief for Certiorari at 8, Fixel v. State, 256 So. 2d 27 (Fla. 1971), claims that the search was made before the arrest.
2. Fixel v. State, 256 So. 2d 27, 29 (Fla. 1971).
3. "Reasonable control" for the purpose of this paper is defined as the area where the subject is located at the time of arrest, plus those areas where it is reasonable to believe that he could exercise control during the time frame of arrest. This would include, but not be limited to, areas through which the arrestee would pass while in custody.
4. U.S. CONST. amend. IV:
   > 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 upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
5. Chimel v. California, 395 U.S. 752 (1969).
6. 232 U.S. 383 (1914).

to be invalid, they did say in dictum that a search of the *person* could be made at the time of arrest for fruits of the crime.[7]

A further expansion was made by *Carroll v. United States.*[8] In *Carroll*, the defendant was stopped while transporting contraband liquor in his car, and a search incident to Carroll's arrest revealed the liquor. In upholding the validity of the search, the *Carroll* Court expanded the *Weeks'* dictum to include that which is found in the arrestee's immediate control.[9]

The area of a lawful search incident to an arrest was expanded even further that same year in *Agnello v. United States.*[10] In this case, while holding the search invalid (since the search was that of the house of an alleged conspirator several blocks from the place of arrest), the *Agnello* Court did say, again in dictum, that arresting officers had the right to search the place where the arrest is made and seize things connected with the crime.[11]

Two years later, in *Marron v. United States*[12] the Court affirmed the dictum of *Agnello*. In *Marron*, officers making a lawful search of premises where intoxicating liquors were being unlawfully sold arrested the person in charge of the premises and, incident to arrest, seized books and papers not described in the search warrant. The *Marron* Court held that when an arrest is made for an offense occurring on the premises, the scope of search extends to all parts of the premises used for the unlawful purpose.[13]

The expansion of *Marron* to all those parts of the premises used for the unlawful purpose was somewhat limited in *Go-Bart Importing Co. v. United States.*[14] In *Go-Bart*, officers entered the office of the defendants, made lawful arrests and searched all three rooms of the office, seizing papers from a desk, safe, and other parts of the office. In holding this search unlawful, the Court distinguished *Go-Bart* from *Marron* by stating that in *Go-Bart*, the premises were not being used for an unlawful purpose, nor was a crime committed in the officers' presence.[15] Additionally, the Court reasoned that since the officers in *Go-Bart* had sufficient time and information to obtain a search warrant, their warrantless search was unreasonable and therefore illegal.[16]

The limited view of *Go-Bart* was reinforced that same year in *United States v. Lefkowitz,*[17] where officers with an arrest warrant searched desk drawers and a cabinet. Although the officers held a valid arrest

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7. *Id.* at 392.
8. 267 U.S. 132 (1925).
9. *Id.* at 158.
10. 269 U.S. 20 (1925).
11. *Id.* at 30.
12. 275 U.S. 192 (1927).
13. *Id.* at 199.
14. 282 U.S. 344 (1931).
15. *Id.* at 357-58.
16. *Id.* at 358.
17. 285 U.S. 452, 463-64 (1932).

warrant, the Court held the seizure unconstitutional because: (1) a crime had not been committed in the presence of the officers; (2) the officers lacked sufficient probable cause to obtain a search warrant; and (3) the arrest warrant did not authorize a search of the premises.

Thus far, the search of a place where an arrest was made, as distinguished from a search of the person arrested, depended upon whether the crime had been committed in the presence of the arresting officer; all court-approved searches-incident beyond the person arrested had occurred where the arresting officer witnessed the commission of a crime.

A turbulent period followed *Go-Bart* and *Lefkowitz*. Within a four-year span, three cases alternately expanded and limited the scope of a lawful search incident to arrest. In *Harris v. United States*,[18] the Court took an expansionist view. An arrest warrant was obtained against Harris for his alleged involvement in the interstate transportation of a forged check. He was arrested in his apartment and officers undertook a five-hour search of the entire four-room apartment. In the course of this search, the police found a sealed envelope marked "George Harris, Personal Papers", in his desk drawer. Opening this envelope, the officers found altered selective service documents later used in convicting Harris for draft law violations. The court rejected Harris' fourth amendment claim, upholding the search of the entire four-room apartment as incident to the lawful arrest.[19]

A year after the *Harris* decision, the Court took an about-face in *Trupiano v. United States*.[20] In *Trupiano*, officers raided an illicit distillery, saw one of several persons operating the still, arrested him and seized the still. The Court held the arrest lawful but the search *un*lawful, reasoning that there was time to obtain a search warrant before the raid; the Court held that officers must secure and use search warrants whenever reasonably practicable.[21]

*Trupiano* was overruled two years later in *United States v. Rabinowitz*.[22] In *Rabinowitz*, police officers were informed that the defendant was dealing in stamps with forged overprints. After securing a warrant for his arrest, the police arrested the defendant in his office and searched his desk, safe, and file cabinets for ninety minutes before they seized the stamps. The *Rabinowitz* Court said that the test was not whether it was reasonably practicable to obtain a search warrant, but whether the search itself was reasonable.[23] For the next decade, the *Harris-Rabinowitz* rule was used, especially in lower court cases, to

18. 331 U.S. 145 (1947).
19. *Id.* at 151-52.
20. 334 U.S. 699 (1948).
21. *Id.* at 705.
22. 339 U.S. 56 (1950).
23. *Id.* at 66.

justify an expansion by police officers of the physical area of searches incident to a lawful arrest.[24]

In 1969, the Supreme Court, increasingly sensitive to the fourth amendment, overruled *Harris* and *Rabinowitz* in *Chimel v. California.*[25] In *Chimel*, officers, with an arrest warrant but without a search warrant, entered Chimel's house with the consent of his wife, and when Chimel entered he was served with the arrest warrant. Although he denied the officers' request to "look around," the police searched the entire house on the basis of the lawful arrest and seized certain items. The *Chimel* Court held that, assuming that the arrest was valid, the warrantless search of the defendant's house could not be constitutionally justified as incident to that arrest.[26] The Court further stated that a search incident to a lawful arrest is reasonable only if limited to the arrestee's person or areas within his immediate control (areas into which he might reach to grab a weapon or to destroy evidence).[27] Thus, if the police desire to search any other area at the time of the arrest or thereafter, they are required to obtain a search warrant.[28]

The changed philosophy of the Court was also reflected in *Coolidge v. New Hampshire.*[29] In *Coolidge*, the defendant was arrested in his house. A simultaneous thorough search of the car in his driveway, including a vacuuming for hair samples, was made in order to seek evidence which would link the defendant to a recent murder. The Court held that the search and seizure of the automobile were not sustainable as incident to a lawful arrest. Although this search was made prior to *Chimel*, and *Chimel* was held not to be retroactive,[30] the *Coolidge* Court took judicial notice of *Chimel* and its narrowing of the permissible scope of a search incident to an arrest.[31]

The holding in *Fixel v. State*[32] is unique for several reasons. First, it takes the holding of *Chimel* (limiting the search incident to an arrest to the arrestee's person or areas within his immediate control) and expands it to areas not only outside of the arrestee's reach, but outside his house and in his backyard. Second, the court makes a distinction between contraband and mere evidence.

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24. *See, e.g.*, Kernick v. United States, 242 F.2d 818 (8th Cir. 1957); Clifton v. United States, 224 F.2d 329 (4th Cir. 1955); Rhodes v. United States, 224 F.2d 348 (5th Cir. 1955); United States v. Jackson, 149 F. Supp. 937 (D.D.C. 1957), *aff'd.* 250 F.2d 772 (D.C. Cir. 1957); Smith v. United States, 254 F.2d 751 (D.C. Cir. 1958); United States v. Fowler, 17 F.R.D. 499 (S.D. Cal. 1955).
25. 395 U.S. 752 (1969).
26. *Id.* at 768.
27. *Id.* at 763.
28. *Id.*
29. 403 U.S. 443 (1971).
30. Williams v. United States, 401 U.S. 646 (1971).
31. Coolidge v. New Hampshire, 403 U.S. 443, 456 (1971).
32. 256 So. 2d 27 (Fla. 1971).

The *Fixel* court, while taking note of the *Coolidge* holding, distinguished its case on the grounds that, while *Coolidge* was concerned with "mere evidence,"[33] the objects seized in Fixel's backyard were contraband.[34] The *Fixel* court implies that the requirements for warrantless seizure of contraband are necessarily less stringent than the requirements for seizure of mere evidence.[35]

While on the surface *Fixel* seems to oppose the holdings of both *Chimel* and *Coolidge*, it can be construed as being merely an attempt by the court to expand the areas allowed for a search incident to a lawful arrest. This apparent expansion was made by distinguishing a reasonable search for mere evidence from a reasonable search for contraband. *Chimel* and *Coolidge*, the most recent Supreme Court holdings on the subject, limit the scope of a search incident to arrest to those areas under the "immediate" control of the arrestee, while *Fixel* broadens the scope of the search for contraband to include those areas under the "reasonable" control of the arrestee. Both *Chimel* and *Coolidge*, however, emphasize that fourth amendment "reasonableness" is the ultimate criterion by which a search incident to a lawful arrest must be judged.

The rationale for the *Fixel* decision rests in the distinction between mere evidence and contraband. While this distinction between *Fixel* and *Coolidge* may be valid, it does not appear to justify the broad expansion in scope of a search incident to a lawful arrest to the point it has been carried by this Florida court.

As defined by *Chimel*, a search incident to a lawful arrest must be limited to the arrestee's person or areas within his immediate control. Even if the area for cases involving contraband were extended to what is reasonable, it surely would not reach beyond the walls or barriers where the arrestee is found, or to areas through which the arrestee would not pass while in police custody. Therefore, without even questioning the theoretical distinction drawn by *Fixel*, the application of that distinction to the facts does not appear to justify the court's conclusion.

Whereas *Fixel* could be construed as being consistent with the law espoused by *Coolidge*, it certainly violates the spirit of the *Coolidge*

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33. 403 U.S. at 471.

34. It is important to note that the destruction of the distinction between mere evidence and contraband in Warden v. Hayden, 387 U.S. 294 (1967), refers only to the status of the seized objects after it has already been determined that the search itself was lawful. The distinction between mere evidence and contraband is a relevant factor, however, before the determination has been made as to the legality of the search.

35. 256 So. 2d at 29:

> In the case before us the distinguishing facts are: (1) the initial intrusion was legitimate because the police had observed the commission of a crime, *i.e.*, the sale of heroin to known pushers. Therefore, there was probable cause to enter on the premises and arrest the defendant; (2) a search was not necessary because the police observed the replacement of the heroin; (3) heroin is contraband and is a dangerous substance.

holding, as well as that of *Chimel.* Moreover, since the facts of the *Fixel* case indicate an obvious practicability of obtaining a search warrant for the backyard without risk of destruction of the object of the seizure, a warrantless seizure does not appear to be reasonable. As the late Justice Harlan articulated in his dissent to *United States v. White:*[36]

> . . . Official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement. . . .

If the scope of searches incident to lawful arrest is to be extended (even if limited to situations involving contraband), it is probable that law enforcement officials will withhold service of an arrest warrant until the subject is in an area the police want to search but for which they lack probable cause to obtain a search warrant. This precise point was raised in *Chimel.*[37]

The above situation is analogous to delaying service of a search warrant until a time when the executing officers know that the subject of the order is absent. In *United States v. Gervato,*[38] officers armed with a warrant to search the defendant's premises delayed service until a time when they were sure no one was present. After their knocks had gone unanswered, the officers broke into the premises and conducted a search. In holding this search unreasonable, the *Gervato* court, quoting from *Miller v. United States,*[39] stated:[40]

> . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interests against unlawful invasion of the house.

In conclusion, Mr. Justice Bradley's admonition almost a century ago in *Boyd v. United States*[41] bears repeating here:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and heads to gradual depreciation of the right, as it consisted more in sound than in substance. It is

36. 401 U.S. 745, 781 (dissenting opinion).
37. 395 U.S. at 767.
38. 340 F. Supp. 454 (E.D. Pa. 1972).
39. 357 U.S. 301 (1958).
40. 340 F. Supp. at 464.
41. 116 U.S. 616 (1886).

the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[42] † J.M.V.

## TORTS—LIABILITY OF A LAND OWNER TO INADVERTENT TRESPASSERS IN MARYLAND—OWNERS OF A WATCHDOG HELD NOT LIABLE FOR DAMAGES TO TRESPASSERS. *BRAMBLE V. THOMPSON*, 264 Md. 518, 287 A.2d 265 (1972).

In *Bramble v. Thompson*,[1] adults (plaintiffs) were boating in the daytime when they tied up at the defendants' pier. After the plaintiffs disembarked, they were attacked by a German shepherd dog, which defendants kept for the purpose of protecting their business property, including the pier.

Although the owners knew of the dog's vicious propensities, the court of appeals held that demurrers in favor of the defendants were properly sustained[2] because the plaintiffs ". . . failed to allege that a relationship existed between the parties which imposed a duty upon [defendants] to prevent their dog from injuring [the plaintiffs]."[3] In Maryland no duty is owed by a property owner to a trespasser,[4] and

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42. *Id.* at 635.

† The Court of Appeal of Florida, after holding that the seizure of heroin was lawful as a search incident to a valid arrest, cited "Cf. Cobb v. State, Fla. App. 1968, 213 So.2d 492." That case holds that the grounds of a building, even within the curtilage, are *not* protected by the fourth amendment, and evidence secured therefrom by a trespassing police officer *is* admissible. Thus, by justifying the search herein, the court apparently is eager to avoid reliance on *Cobb*. This casenote of necessity assumes that a backyard *is* protected by the fourth amendment.

A petition for a Writ of Habeas Corpus was brought in the federal district court and denied: Fixel v. Wainwright, No. 72-922-CIV-JE (S.D. Fla., filed Oct. 25, 1972). That court's opinion was based on the open-view doctrine, and it also failed to address itself to the threshold question presented by *Cobb*. The situation is further complicated by the fact, brought out for the first time by this court, that Fixel was a mere tenant, and that the backyard was held by the trial court to be a "common area."

Further, it deserves mention that in discussing the open view doctrine, the district court alluded to the inadvertency requirement set forth in Coolidge v. New Hampshire, 403 U.S. 443 (1971), but made no attempt to apply that requirement to the facts of this case. The undisputed facts of the case indicate that the surveillance in question was planned, and not in the least inadvertent. There also appears to be serious question as to whether the police were lawfully in the position from which the "open view" was made (a shed within the hedged curtilage).

1. 264 Md. 518, 287 A.2d 265 (1972).
2. At the trial court a demurrer was sustained for the defendants, and the plaintiffs were given leave to amend their pleading. When the plaintiffs failed to amend within the alloted time, the trial court entered a judgement of *non pros*. The plaintiffs then initiated another suit alleging that they were only "inadvertent trepassers." A demurrer to this second action was sustained by the trial court, without leave to amend, on the basis that the plaintiffs failed to allege the breach of any duty owed them. Appeals from both judgments were consolidated and were before the Court of Appeals in the instant case.
3. Bramble v. Thompson, 265 Md. 518, 521, 287 A.2d 265, 267 (1972).
4. "[T]he owner of land owes no duty to a trepasser or licensee, even one of tender years, except to abstain from willful or wanton misconduct and entrapment." Fopma v.