University of Baltimore Law Forum

Volume 6
Number 4 *April, 1976*

Article 19

4-1976

Casenote: Warrantless Arrests

Lindsay Schlottman

control of the power within the administration. So guards assigned to be present at self-help meetings started making derogatory remarks and being insolent to outside people attending programs. This further reduced the attendance of the community volunteers (not the inmate visitors) from coming into the programs because they didn't feel they had to put up with rudeness and insults to assist in a program they were volunteering their time for.

After the riots in the Maryland prison in 1972 the administration closed all of the self-help groups and claimed they were a contributing cause of the riots. It is true that a handful of inmates were abusing the self-help meetings, but in no way did it ever reach the proportions claimed by the custodial force. What is more of a question to me is why the administration permitted the programs to reach a point of degeneration? Furthermore, if guards did witness contraband being brought into the institution, why was there never an inmate (that I know of) charged with an infration of institutional rules?

If you have read this far I hope that you will also wonder what is going on in our correctional system, and that you will take the time to take another look.

•

Warrantless Arrests

by Lindsay Schlottman

Henry Ogle Watson was arrested without a warrant on August 23, 1972 during a meeting in a public restaurant with Mr. Khoury (an informer of known reliability). Six days prior to this meeting Khoury had telephoned a postal inspector, informing the inspector that Watson possessed a stolen credit card and had approached Khoury about using the card to their mutual advantage. Learning that Watson was going to supply additional cards, the inspector asked Khoury to set up a meeting with Watson. Such a meeting, planned for August 22, was postponed by Watson to August 23, Khoury was instructed to light a cigarette at this meeting if he learned from Watson that Watson had additional credit cards. Khoury lit the cigarette, whereupon postal officers arrested Watson without a warrant and Watson was removed to the street and given his *Miranda* rights. Watson's person was searched and no credit cards were found. The postal inspector then asked Watson for permission to search his car which was in view. Watson said "Go ahead" and when the inspector said "If I find anything, it is going to go against you," Watson again replied "Go ahead." *United States v. Henry Ogle Watson,* 44 L.W. 4112 (January 26, 1976). Two credit cards were found under a floor mat. Watson subsequently was charged with possessing stolen mail (in violation of 18 U.S.C. § 1708), a felony.

Prior to his trial, Watson moved to have the cards suppressed, claiming the arrest and the search were illegal (the arrest because there was no probable cause and no arrest warrant; the search because Watson had not been told he could withhold consent). The federal district court convicted Watson for illegally possessing the two cards.

The Court of Appeals for the Ninth Circuit reversed the district court's conviction, basing the reversal on the inadmissibility of the two cards. Specifically, the Court of Appeals held that Watson's arrest was illegal because the postal inspector failed to obtain an arrest warrant, although there was time to do so. Further, the Court of Appeals held that the consent to search by Watson was coerced and therefore an invalid ground for the warrantless search of the car. *United States v. Watson,* 504 F.2d 849 (1974).

The Supreme Court, in an opinion written by Justice White (Justice Stevens taking no part in the consideration or decision of the case), reversed the Court of Appeals' decision. The Supreme Court first decided the issue of the validity of the warrantless arrest.

The statutory basis of the authority of postal inspectors to make warrantless arrests is embodied in 18 U.S.C. § 3061 (a). The Board of Governors of the Postal Service is expressly empowered to authorize (which it does by regulation 39 CFR § 232.5 (a) (1975)) Postal Service officers and employees who perform inspection duties to

"(3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested had committed or is committing such a felony." *Watson,* 44 LW 4112, 4113, citing § 3061 (a) (1976).

The Court states that probable cause

June Chaplin

existed that a § 1708 offense was being committed and therefore the inspector and subordinates had the proper statutory authority to arrest Watson without a warrant. In determining whether the arrest comported with the Warrant Clause of the Fourth Amendment, the Court reviewed legal history.

First the Court emphasized the congressional nod to postal inspectors making warrantless arrests on probable cause which is embodied in the enactment of § 3061. In a footnote, previous decisions on this issue were discussed and it was pointed out that

> "In 1968 in the face of confusion generated by these decisions and two striking down warrantless arrests by postal inspectors as not authorized by federal statute or by state law...(citations omitted), the Congress enacted 18 U.S.C. § 3061 *to make clear that postal inspectors are empowered to arrest without warrant upon probable cause* (citation to congressional records omitted)." *Watson,* 44 L.W. 4112, 4113, n.4 (1976). [emphasis added]

In short, the Court paid deference to congressional judgment and accepted such a provision as being reasonable and constitutional because of the "strong presumption of constitutionality due to an Act of Congress." *Watson,* 44 L.W. 4112, 4113 (1976), citing *United States v. Di Re,* 332 U.S. 581, 585 (1948).

Next, earlier Supreme Court decisions were analyzed, with the conclusion that "there is nothing in the Court's prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony." *Watson,* 44 L.W. 4112, 4113-4115 (1976). The *Gerstein* case was cited as support for the determination that the warrant requirement for all arrests would impose an "intolerable handicap" on law enforcement procedures. *Gerstein v. Pugh,* 420 U.S. 103,113 (1975). The crux of the matter is whether there is probable cause for the arrest, not whether there is a warrant or time to get one. *Watson,* 44 L.W. 4112, 4114 (1976).

For further support, the Court looked to common law and state constitutions and statutes which adopted the following common law rule:

> "...that a peace officer was permitted to arrest without a warrant for a misdemeanor or a felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest." *Watson,* 44 L.W. 4112, 4114 (1976).

Early state cases construing this rule were discussed *(Rohan v. Sawin,* 59 Mass. (5 Cush.) 281 (1851); *Wakeley v. Hart,* 6 Binn. 316 (Pa. 1814); and others).

The Court then noted that in 1792 Congress provided that federal marshals had the power to execute the laws equal to that of state sheriffs. This power has been cited in statutes up to the present time where, by recent statutes, federal marshals specifically are given authority to make warrantless arrests for felonies on probable cause. In short, the Court is pointing to another congressional nod to warrantless arrests by federal authorities.

As another basis for the conclusion that Watson's arrest was legal, the Court looked to state legislation. Almost all states expressly authorize felony arrests on probable cause without a warrant. Also, the American Law Institute has formulated a model statute which, in § 120.1 of A Model Code of Prearraignment Procedure:

> "...authorize[s] an officer to take a person into custody if the officer has reasonable cause to believe that the person to be arrested has committed a felony, or has committed a misdemeanor or petty misdemeanor in his presence." *Watson,* 44 L.W. 4112, 4115 (1976).

The Court then returned to congressional approval of warrantless arrests. FBI agents, who have authority to make warrantless arrests, are so authorized *only upon* exigent circumstances. *Watson,* 44 L.W. 4112, 4115, n.13 (1976).

In concluding the opinion on Watson's arrest, the Supreme Court categorized the argument that arrest warrants should be sought where practicable to do so as "judicial preference." *Watson,* 44 L.W. 4112, 4116 (1976). In short, based on legal history (common law, state constitutional and statutory precedents, federal legislation and Supreme Court decisions), the Court concluded that even where exigent circumstances do not exist warrantless arrests may be proper.

The Supreme Court simply determined that because Watson's consent to the search of his car wasn't the product of an illegal arrest, and further, because the Court of Appeals resolved the issue of voluntariness of Watson's consent on the basis of an illegal arrest, that his consent should be reviewed. In a cursory manner, the Court looked over the details of the consent and decided that the fact of the arrest plus the failure of postal authorities to inform Watson that he could withhold consent to the search did not result in his consent being involuntary. The search was therefore found to be valid.

Chief Justice Burger and Justices Blackmun, Powell and Rehnquist joined in Justice White's opinion.

Justice Stewart filed a brief opinion concurring in the result in which he stated that the arrest which was based upon probable cause, made in a public place and not in a private place and in broad daylight, did not violate the Fourth Amendment.

Justice Powell wrote a concurring opinion in which he noted that the case could be disposed of on the ground that Watson's consent to the search was voluntary, *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), even assuming the warrantless arrest was unconstitutional, *Wong Sun v. United States,* 371 U.S. 471 (1963). However, he focused on the arrest to determine its validity.

The decision of the Court has created "a certain anomaly," stated Justice Powell,

> "...by its being the first square holding that the Fourth Amendment permits a duly authorized law enforcement officer to make a warrantless arrest in a public place even though he had adequate opportunity to procure a warrant after developing probable cause for arrest." Watson, 44 L.W. 4112, 4117 (1976).

Justice Powell emphasized that warrantless searches are outside the Constitu-

tion except in a few limited circumstances; thus the seizure of the person, "the taking hold of one's person," should logically be limited in the same manner. *Watson,* 44 L.W. 4112, 4117 (1976). He, however, acceded to the Court's conclusion on the validity of the arrest and also enumerated the practical problems in law enforcement if the Court of Appeals' decision were allowed to stand. Justice Powell concluded that the Court's sustaining of the warrantless arrest upon probable cause, "...despite the resulting divergence between the constitutional rule governing searches and that now held applicable to seizures of the person..." was justified. *Watson,* 44 L.W. 4112, 4118 (1976).

Justice Marshall, joined by Justice Brennan, filed a dissenting opinion, based on the thesis that the Court did not decide the case on the narrow question presented. Justice Marshall determined that the arrest was valid since exigent circumstances were present (the officers had knowledge that a felony was being committed in their presence and that the suspect possessed the incriminating evidence).

However, Justice Marshall criticized the historical precedent which the Court relied upon in approving the arrest of Watson. He analyzed common law principles and concluded that "...the lesson of the common law, and those courts in this country that have accepted its rule, is an ambiguous one..."; further, he criticized the Court's "unblinking literalism" in its analysis. *Watson,* 44 L.W. 4112, 4121 (1976).

Next, citing *Marbury v. Madison,* 1 Cranch 137 (1803), as authority, Justice Marshall was critical of the deference the Court pays to state and federal statutes which have codified the common law rule. He emphasized that the existence of a statute is no defense to an unconstitutional practice.

He then examined the warrant requirement of the Fourth Amendment. Justice Marshall agreed with Justice Powell that, logically, arrests and searches should be treated similarly in regard to this warrant requirement. The privacy rights of citizens are certainly better protected when a warrant is required for an arrest. Further, the legitimate governmental interest in law enforcement is not unduly burdened by this requirement. In sum, when a warrant can be procured, it should be. Justice Marshall stated, "I believe the proper result is application of the warrant requirement, as it has developed in the search context, to all arrests." *Watson,* 44 L.W. 4112, 4124-4125 (1976). In reference to the search issue, Justice Marshall suggested that because it was of some complexity and had not been thoroughly briefed for the Court, the issue should be remanded.

•

Constitutional Quiz

by Ronald Shapiro

1. One spouse's consent to a search of the family residence, if voluntary and intelligent, renders the search valid, even if it was made without a warrent, without probable cause and without a warning from the police that such a search can legally be refused.

Answer: True. Anyone with control over the premises can consent to its search; knowledge of the legal right to refuse is not always required for a valid consent.

2. Police have rented a hotel room next to a room in which they have probable cause to believe a major narcotics sale will take place. They may, without a warrant, place a device on the wall of their room to overhear the talk in the next room.

Answer: False. The police must obtain a court order.

3. Police arrest A, physically torture him, and obtain a statement revealing the location of evidence implicating B and C as well as A in a robbery. The evidence is admissible against B and C.

Answer: True. The Fourth Amendment rights of B and C have not been violated; consequently, they lack standing to challenge the torture of A.

4. It is not constitutionally required, even in a serious felony prosecution, for a state to require a twelve-person jury or a unanimous verdict of the jurors.

Answer: True. Neither is necessary for the interposition of the "commonsense judgment" of a group of laymen between the accused and his accuser.

5. The Fifth Amendment privilege against self-incrimination can be invoked by a witness at a Congressional inquiry.

Answer: True. Unless the witness is granted immunity, as was John Dean when he testified before the Watergate Committee.

6. The Constitution vests the entire "power of pardon and reprieves for offenses" against the United States in the President.

Answer: True. Except in cases of impeachment.

7. A state judge's salary is immune from federal income tax.

Answer: False. The income tax has no real impact on the state's sovereign functions.

8. Actions by a state which give preference to local commerce over commerce from out of state are prohibited.

Answer: True, unless Congress permits such preferences in the legislation governing such commerce.

9. The burning of draft cards is a protected form of free speech under the First Amendment and thus cannot constitutionally be prosecuted.

Answer: False. Merely because the person burning the draft card thereby intends to express an idea, his conduct is not considered speech protected by the First Amendment.

10. The abstract advocacy of a doctrine — even that the government should be forcibly overthrown — is constitutionally protected as free speech.

Answer: True. A "clear and present danger of violence" is not presented.