Tulsa Law Review

Volume 5 | Issue 2 Article 4

1968

An Outline of Arrest, Search and Seizure

Duane R. Nedrud

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

 Part of the Law Commons

Recommended Citation

Duane R. Nedrud, *An Outline of Arrest, Search and Seizure*, 5 Tulsa L. J. 154 (2013).

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol5/iss2/4

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.

AN OUTLINE OF ARREST, SEARCH AND SEIZURE

By DUANE R. NEDRUD*

ARREST AND DETENTION A§1

A§1.1 *Reasonable Grounds*

"Reasonable grounds," "probable cause" and "reasonable cause" are used interchangeably. The term "reasonable grounds" is generally associated with arrest without a warrant because of the common law rule and its statutory progeny. "Probable cause" is identified with the issuance of warrants because of its fourth amendment origin. "Reasonable cause," on the other hand, seems to be a hybrid of the two, although it is usually considered statutory. Insofar as warrantless felony arrests by peace officers are concerned, the rule is virtually unchanged from its early common law beginnings. Simply stated, this rule is: an arrest may be made without a warrant by a peace officer who has reasonable grounds to believe that a felony has been committed and that the person to be arrested is the culprit.

There are a number of "reasonable grounds / probable cause" definitions. Since the "fundamental criteria" must come from the decisions of the Supreme Court,[1] one very popular Court definition is: "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable cau-

*Editor of the monthly loose-leaf Service NEDRUD THE CRIMINAL LAW, which is co-edited by Marguerite D. Oberto. The article and sectional divisions are the copyright of L. E. Publishers, Incorporated, 612 North Michigan Avenue, Chicago, Illinois. The sections in this article are those used to correlate case summaries under Tab Division A., Arrest, Search and Seizure in the loose-leaf service.

[1] Ker v. California, 374 U.S. 23 (1963).

tion in the belief that' an offense has been or is being committed."[2]

The rules for arrest are directed to the peace officer who, in his official capacity, has more authority to arrest than does a citizen. While the term "reasonable" with its connotation of flexibility appears frequently throughout the law as a whole, it should be remembered that the probable cause definition of a "man of reasonable caution" describes one who possesses a certain amount of expertise. Thus, the police officer with that expertise may be able to establish reasonable grounds where one who lacks the knowledge of the expert would not be able to do so.[3] The difficulty is not so much with the definition as with its application to the facts, particularly in the officer's communication to the court at the motion to suppress, so that the trial court can discern that the officer, knowing what he knows, seeing what he saw and/or hearing what he heard, had reasonable grounds.

A§1.2 *Warrant Requirements*

The Constitution lays down the requirements for issuance of warrants. In the arrest warrant the element of "particularly describing . . . the person . . . to be seized"[4] is satisfied by naming the person. Only in the rare instance where a "John Doe" warrant issued must there be a complete description to guide the arresting officer and to prevent a conflict with the fourth amendment.

But, as in the case of the search warrant, most of the

[2] Brinegar v. United States, 338 U.S. 160, 175-76 (1949), *as adapted from* Carroll v. United States, 267 U.S. 132 (1925). For leading Supreme Court decisions relating to arrest without a warrant, see Beck v. Ohio, 379 U.S. 89 (1964); Draper v. United States, 358 U.S. 307 (1959); Henry v. United States, 361 U.S. 98 (1959).

[3] *E.g.*, the officer on the narcotics squad would recognize the smell of marijuana or opium; he could identify narcotics paraphernalia or the packaging peculiar to narcotics.

[4] U.S. CONST. amend. IV.

controversy centers in the detailing of probable cause in the complaint or affidavit. Because an arrest warrant under the present rules seems superfluous,[5] the full impact of the importance of establishing probable cause in the complaint has not come about. It is clear that, for the arrest warrant to have been legally issued, the affiant must have given the same full disclosure necessary to show probable cause for making an arrest as has always been necessary in obtaining a search warrant.[6]

A§1.3 *Misdemeanors*

In the case of misdemeanor arrests there are two rules, both of which have a common law background. One might be denominated the strict rule: a peace officer may arrest for a breach of the peace committed in his presence, all other misdemeanor arrests must be upon a warrant.[7] The other rule is that a peace officer may arrest for any misdemeanor committed in his presence and for a breach of the peace upon the same grounds as for a felony.[8] Many states have revised

[5] *See* notes 54-56 *infra* and accompanying text. However, some caution should be expressed. As noted in Beck v. Ohio, 379 U.S. 89, 96 (1964): "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

[6] Jaben v. United States, 381 U.S. 214 (1965); Giordenello v. United States, 357 U.S. 480 (1958).

[7] A few states, for example Massachusetts (with exceptions), have followed this strict rule; but changes have occurred rapidly since Mapp v. Ohio, 367 U.S. 643 (1961). Restrictions were quite prevalent pre-*Mapp*, and there was no motivation for change since the exclusionary rule did not apply to the states.

[8] This is the more typical rule. But even a rule of this type has some problems with "presence." In affording a liberal construction to the rule, it was determined that neither physical proximity nor sight is essential. In re McDonald, 249, A.C.A. 1079, 431 P.2d 507, 58 Cal. Pptr. 29 (1967).

or are revising their rules to give the peace officer the same authority to arrest for a misdemeanor as is provided in the general rule for a felony arrest.[9]

The importance of adopting the felony rule for misdemeanors is obvious: many misdemeanor arrests, especially of the traffic violation variety, result in the discovery of more serious crimes. If the arrest for the misdemeanor is illegal, the evidence of the more serious crime seized incident to the misdemeanor arrest must be suppressed.

A§1.4 *Detention—"Stop and Frisk"*

An officer can request a person to stop and ask that person questions.[10] The issue in controversy is whether the officer has the authority forcibly to detain the person if he refuses to stop. Ordinarily an officer has authority to stop an automobile to check whether it is properly registered and whether its driver has a license. But if there exist only suspicious circumstances which are insufficient to establish probable cause for arrest, what can the officer do?[11]

[9] This is one of the areas which the Supreme Court left open in Ker v. California, 374 U.S. 23 (1963). There is nothing unreasonable in providing that an arrest may be made for a misdemeanor upon the same grounds as for a felony. The common law distinction between a misdemeanor and a felony is no longer valid since the misdemeanor in today's criminal law may be a far more serious crime. For example, such a change has been effected by the judiciary in State v. Hutchins, 43 N.J. 85, 202 A.2d 678 (1964); but in New Jersey a misdemeanor is punishable by three years imprisonment. However, a distinction seems to be made as to "minor" misdemeanors.. State v. Orr, 93 N.J. Super. 140, 225 A.2d 157 (App. Div. 1966). Missouri police officers, in the metropolitan areas of St. Louis and Kansas City, have this authority by statute. Mo. REV. STAT. §§84.090, —.710 (Vernons, 1967 Supp.).

[10] But the person need not stop. Gallegos v. People, 157 Colo. App. 173, 401 P.2d 613 (1965); Moore v. State, 181 So. 2d 164 (Fla. App. 1965).

[11] *See* Coston v. State, 252 Miss. 257, 172 So. 2d 764 (1965); Pruitt v. State, 389 S.W. 2d 475 (Tex. Cr. App. 1965).

In several states law enforcement has been given the so-called "stop and frisk" authority, whereby an officer can detain a person for a reasonable length of time on "reasonable suspicion."[12] Along with the authority to detain is the authority to search the person detained to determine whether he has a weapon which might be used against the officer. In other words, the officer has the right to search in order to protect himself.[13]

SEARCH AND SEIZURE A§2

A§2.1 *Probable Cause: Warrant*

The search warrant prerequisite is an affidavit which outlines probable cause. In contrast to the arrest warrant, there is no question of the search warrant's necessity,[14] assuming that there were no grounds for making an arrest. Thus, for guidance in deciding what is and what is not probable cause and how it must be enumerated in the affidavit, the

[12] New York does so by statute. N.Y. CODE CRIM. PROC. §180-a, (McKinney, 1967 p.p.) *upheld in* People v. Peters, 18 N.Y. 2d 238, 219 N.E.2d 595 273 N.Y.S.2d 217 (1966). California has provided such a rule by judicial decision. People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). Recently New Jersey, in spite of the cases pending before the Supreme Court, has adopted a judicial "stop-and-frisk" rule. State v. Dilley, 49 N.J. 460, 231 A.2d 353 (1967).

[13] In relation to a suspect's detention for investigation provided by the so-called "stop and frisk" laws and/or judicial decisions, it is reasonable to predict that the Supreme Court, in the cases now before it, will uphold the "frisking" of suspects for weapons and allow the admission into evidence of any weapon found; but that it will not allow the use of other evidence obtained in the "patting down," such as narcotics or burglary tools. The concern may well be that a police officer would use the authority as a subterfuge for obtaining "other" evidence which is not in accord with the purpose of the rule of self-protection of the officer. *See* N.Y. Times, Dec. 13, 1967, at 34, col. 2 (city ed.).

[14] For a few exceptions, *see* A§2.2 (automobiles) and A§2.5 (persons and places without a warrant) *infra.*

factual situations, which vary from case to case, must be examined.[15]

In contrast to arrest without a warrant (and the search incident thereto) or in the other limited areas where searches may be made without a warrant (for example, automobiles), probable cause must be related to a magistrate before the search is made. The definition of probable cause is similar to that for reasonable grounds for arrest without a warrant. However, probable cause points to the evidence to be seized and the place where it is located; that is, probable cause to believe that named evidence is in a named place. The officer may have sufficient grounds to obtain a warrant; but if they are not disclosed to the magistrate, the search warrant may be illegal.[16] Considering the fact variable in each case, the general rule is that facts and not conclusions must be presented. An officer who can rely upon his own senses to establish probable cause for a warrant has few drafting problems. Ordinarily, however, grounds for arrest depend upon information received from others. With the introduction of a source other than the affiant-officer, of necessity more care must be exercised in detailing probable cause. When, as is the usual situation, the information source is an informant, the officer must establish two things: (1) the reliability of the informant and (2) that the informant knows from his own knowledge (and not from some secondary source) that the evidence to be seized is located in the named place.[17]

A§2.2 *Other Warrant Requirements*

Having concluded that probable cause must be clearly expressed, the question then is whether it must be in writing

[15] Since there are no changes here as seem to be prevalent in the other areas, the two cases which tell the complete warrant story are Aguilar v. Texas, 378 U.S. 108 (1964) and United States v. Ventresca, 380 U.S. 102 (1965). For a thorough discussion, see D. NEDRUD, *Issuance of Warrants: Aguilar and Giordenello in* THE CRIMINAL LAW A-13 (1967).

[16] Aguilar v. Texas, 378 U.S. 108 (1964).

[17] D. NEDRUD, *supra* note 15.

or may it be oral. The fourth amendment specifies only that the warrant be supported by oath or affirmation; technically it does not require that the warrant be in writing.[18] The amendment has been assumed, if not interpreted, to prescribe a hearing before a "neutral magistrate" and to suggest the need for supervision not only of the police but also of the lower courts by the appellate courts. Some type of record seems to be indicated, if not required. It may be that probable cause need not be spelled out in the affidavit; but, at the hearing before the magistrate prior to issuance of the warrant, it would seem that recording by tape, stenographic notes or handwritten notes by the magistrate should be utilized.

In addition to the oath and the appearance before a magistrate, the fourth amendment requires a particular description of the place to be searched and the evidence to be seized. Description of the place to be searched is satisfied by the street address or the name of the occupants.[19]

The description of what is to be seized is more of a problem.[20] It is clear that "mere evidence" may be seized by warrant or as incident to an arrest.[21] If the object is subject to description—for example, a Buick automobile with the year, serial number, etc., or a .22 caliber pistol with a pearl

[18] There is some dispute whether all the information must be reduced to writing for the magistrate or whether it can also be given orally. *See* Miller v. Sigler, 353 F.2d 424 (8th Cir. 1965); Marshall v. State, 113 Ga. App. 143, 147 S.E.2d 666 (1966); State v. Titus, 107 N.H. 215, 220 A.2d 154 (1966); Commonwealth v. Crawley, 209 Pa. Super. 70, 223 A. 2d 885 (1966) (courts holding that additional information beyond the affidavit may be presented orally to the magistrate).

[19] Steele v. United States, 267 U.S. 498 (1925).

[20] E.g., Marcus v. Search Warrant of Property at 104 East Tenth Street, Kansas City, Missouri, 367 U.S. 717 (1961).

[21] Warden v. Hayden, 387 U.S. 294 (1967), allows the seizure of evidence if statutes so provide. CAL. PENAL CODE § 1524 *as amended*, (West 1967 Supp.), allows the seizure of "evidence."

handle—then of course the constitutional requirements are easily met. But if bulk material, the form of which can be changed, is the object of the seizure, a general description, such as heroin or marijuana, may be sufficient.[22] Again "particularity" as with "reasonableness" depends upon the facts and circumstances.

Limitations may be placed upon the time a warrant may be executed by specifying in the daytime or the nighttime.[23]

A§2.3 *Incident to Arrest—Arrest or Search for One Offense, Seizure for Another*

This topic is the end product of an arrest on reasonable grounds,[24] although it may be a factor where a search warrant is issued and evidence of other crimes is discovered in the search.[25]

Assuming that the arrest is based upon reasonable grounds, a determination whether the search is legal entails examination both of the extent of the search and the area the search may cover and still be incident to the arrest[26] and the intensity of the search and seizure.[27] The seizure of mere evidence is now authorized.[28] The facts and circumstances of each case govern because, again, the issue is "reasonableness."

When the matter seized is not that for which the arrest

[22] *E.g.*, Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967) ("book-making paraphernalia" was found adequate).
[23] Jones v. United States, 357 U.S. 493 (1958).
[24] See text accompanying notes 1-3 *supra*. The exclusionary rule only comes into play if evidence is seized incident to an illegal arrest. An illegal arrest as such does not necessarily affect the conviction. E. g., Howard v. Allgood, 272 F. Supp. 381 (E.D. La. 1967).
[25] *E g.*, Seymour v. United States, 369 F.2d 825 (10th Cir. 1966).
[26] Harris v. United States, 331 U.S. 145 (1947).
[27] Kremen v. United States, 353 U.S. 346 (1957).
[28] Warden v. Hayden, 387 U.S. 294 (1967).
[29] Harris v. United States, 331 U.S. 145 (1947).

was made, still another issue is raised.[29] It must be determined whether the original arrest or search is a pretext to search for another crime. This is a factual matter. In resolving it, much emphasis must be placed on the question of whether the arresting officer would have, in good faith, made the arrest or search without the ulterior motive of hoping to find evidence of another offense.[30]

A§2.4 *Automobiles*

The search of automobiles is dominated by the *Carrol-Preston-Cooper* doctrine. First, the *Carrol*[31] element permits the search of an automobile without a warrant because of its mobility. But this by no means eliminates the requirement of probable cause. Second, the *Preston*[32] element is somewhat of a limitation on *Carroll* since it requires that search be accomplished while the automobile is still mobile. If the automobile has become immobilized, as by having been impounded, a warrant is essential. The *Cooper*[33] element modifies *Preston* and permits the search of an impounded automobile which by statute has been forfeited because of its use in a crime. *Cooper* may extend beyond its stated limitation, however. It may allow characterization of the automobile as an instrumentality of crime. Thus where the automobile was used in the commission of rape or robbery and has been impounded on grounds similar to those permitting confiscation of a weapon, the automobile may be subject to examination as a gun is subject to a ballistics test.[34]

A matter related to an actual automobile search is the

[30] While Preston v. United States, 376 U.S. 364 (1964), is deemed more of a doctrine related to the search of automobiles, it now appears that Mr. Justice Black was primarily concerned that the initial arrest was for vagrancy. See his opinion for the majority in Cooper v. California, 386 U.S. 58 (1967).

[31] Carroll v. United States, 267 U.S. 132 (1925).

[32] Preston v. United States, 376 U.S. 364 (1964).

[33] Cooper v. California, 386 U.S. 58 (1967).

[34] Weaver v. Lane, 382 F.2d 251 (7th Cir. 1967).

observing of evidence through the automobile window. This does not amount to a search, and a warrant should not be required for a valid seizure.[35] Also to be considered is the caretaking operation[36] as a necessary permissible function.

A§2.5 *Persons and Places—Without a Warrant*

No search warrant is required to permit legal seizure of evidence in places or things open to view without the need of a search. The search of a prisoner or one about to be imprisoned does not require a warrant.[37] Also excepted from the requirement of a warrant are "border" searches which may extend not only to a person but also to an automobile.[38] While commonly associated with cause for entry, "exigent circumstances," such as the saving of a life, can eliminate the need of a search warrant. Nor is a warrant required if the property to be seized[39] or the place to be searched[40] is governmental.

A§2.6 *Consent—Abandonment*

Consent to search may be given by a suspect or prospective defendant or by third persons. The consent of the defendant must be voluntary and uncoerced. Although there is presently no requirement that *Miranda v. Arizona*[41] warnings be given, that they have not been given could become a factor where consent is challenged.[42] As in the weighing

[35] *E.g.*, United States v. Callahan, 256 F. Supp. 739 (Minn. 1966); State v. Hill, 422 P.2d 675 (Ore. 1967).
[36] Harris v. United States, 370 F.2d 477 (D. C. Cir. 1966); People v. Gil, 248 Cal. App.2d 189, —— P.2d ——, 56 Cal.Rptr. 88 (1967); St. Clair v. State, 1 Md. App. 605, 232 A.2d 565 (1967).
[37] Arabia v. State, 421 P.2d 952 (Nev. 1966).
[38] *E.g.*, Thomas v. United States, 372 F.2d 252 (5th Cir. 1967).
[39] Davis v. United States, 328 U.S. 582 (1946).
[40] United States v. Donato, 269 F. Supp. 921 (E.D. Pa. 1967).
[41] 384 U.S. 436 (1966).
[42] An exception is the new Oregon rule holding that Miranda requirements are applicable. It may be the only jurisdiction

of the admissibility of a confession, a "totality of the circumstances" test is appropriate to determine voluntariness of consent. However, there is added difficulty where the consent is given after arrest.[43]

The consent of a third person also must be voluntary, but it is possible to obtain a third person's consent even though the defendant might have objected.[44] Generally a wife,[45] a parent[46] or a girl friend[47] may be in a position to consent; but the basis therefor must be joint control, such as cotenant or ownership. A landlord has no authority to consent to a search by others of the tenant's rented premises, although he may have the right of entry on his own.[48] If a room or particular property is abandoned, there is no invasion of privacy occasioned by a search.[49]

A§2.7 *Inspections*

There are many governmental inspections affecting individuals and businesses. Where inspection of individuals, including area inspections are concerned, it is now clear that a warrant may be required, with the denial of consent a prerequisite to obtaining the warrant. This is an entirely

which so holds at this time. State v. Williams, 432 P.2d 679 (Ore. 1967). A more typical case is Weeks v. State, 417 S.W. 2d 716 (Tex. Cr. App. 1967).

[43] While consent may be given after arrest, *e.g.*, People v. Campuzano, 254 A.C.A. 60, —— P.2d ——, 61 Cal. Rptr. 695 (1967), it is to be viewed with caution. United States v. Shropshire, 271 F. Supp. 521 (E. D. La. 1967).

[44] *Cf.* United States v. White, 268 F. Supp. 998 (D.D.C. 1966).

[45] The wife's consent has been held valid even where the husband is present but interposed no objection. People v. Bryan, 254 A.C.A. 249, —— P.2d ——, 62 Cal. Rptr. 137 (1967).

[46] State v. Carder, 9 Ohio St.2d 1, 222 N.E.2d 620 (1966).

[47] United States v. Airdo, 380 F.2d 103 (7th Cir. 1967). *Contra*, People v. Rodriguez, 79 Ill. App. 2d 26, 223 N.E.2d 414 (1967) (no showing of equal right or joint control).

[48] Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961).

new concept promulgated in *Camara v. Municipal Court*[50]; because of its recent origin no cases construing it are available.

Businesses are also protected by the warrant prerequisite where fire, health and building code inspections are concerned.[51] Some limitations in these areas are quite possible, though none have yet been voiced. It is still undetermined whether there is an implied or future waiver of the warrant requirement when the inspection is based upon the privilege granted a licensee, such as tavern, meat market or taxicab operators.[52]

EFFECTING THE ARREST, SEARCH OR SEIZURE A§3

A§3.1 *Entry*

To enter lawfully may call for notice. However, "exigent circumstances" may excuse notice and permit a reasonable search to proceed.[53]

A§3.2 *Warrant Essential*

A warrant is necessary to make a search which is not incident to an arrest. However, an arrest warrant still seems to be superfluous and complicates what might otherwise be a rather easily applied rule.[54] Even if the arrest warrant is issued upon an insufficient complaint, the arrest can be legal

[49] Abel v. United States, 362 U.S. 217 (1960); Argo v. United States, 378 F.2d 301 (9th Cir. 1967).
[50] 387 U.S. 523 (1967).
[51] See v. City of Seattle, 387 U.S. 541 (1967).
[52] *Id.*
[53] The leading cases are Miller v. United States, 357 U.S. 301 (1958) and Ker v. California, 374 U.S. 23 (1963).
[54] For a more complete discussion, see D. NEDRUD, *Warrants Essential* in THE CRIMINAL LAW A-31 (1967). Although the Supreme Court seems to give credence to the need for valid arrest warrants, Giordenello v. United States, 357 U.S. 480 (1958); the typical answer is given in Lee v. United States, 363 F.2d 469, 472 (8th Cir. 1966): "Where there is probable cause for the arrest of a person for a felonious offense, the

if in fact there was sufficient evidence upon which a warrant could issue.[55] If sufficient grounds exist to arrest prior to a search, evidence may be legally seized as incident to the arrest even though the officer had a search warrant based upon an insufficient affidavit.[56]

A§3.3 *Authority—Resisting Arrest—Force*

The authority to arrest may be given by statute or by the common law. There is nothing from a constitutional standpoint which would preclude a state officer from arresting state-wide or a federal officer from arresting nation-wide. Some officers, such as narcotic agents or border patrolmen, may have authority to arrest limited to certain crimes only. Provisions are usually made for "hot pursuit" to enable an officer to arrest outside his state.[57]

Authority also exists for a citizens arrest. Except as changed by statute, the requirement generally is that the citizen know that a felony was committed and have reasonable grounds to believe that the person to be arrested committed the felony. Misdemeanor arrests by citizens were nonexistent at common law, although some authority was granted a citizen to arrest for a breach of the peace committed in his presence.

absence of a warrant is immaterial, and, the arrest being valid, the search and seizure that followed was incidential thereto and valid. The mere fact that the Government might have had sufficient time to obtain a warrant for his arrest would not invalidate an otherwise legal arrest with the ensuing reasonable search and seizure." Bell v. United States, 371 F.2d 35 (9th Cir. 1967) (assuming warrant invalid). *See also* People v. Grubb, 250 A.C.A. 820, —— P.2d ——, 58 Cal. Rptr. 670 (1967).

[55] For a thorough discussion, see Ford v. United States, 352 F.2d 927, 933 (D. C. Cir. 1966), with a look to the future in the concurring opinion of Judge Wright.

[56] State v. Allen, 232 A.2d 315 (Sup. Ct. Conn. 1967).

[57] UNIFORM ARREST ACT. *E.g.*,ILL. REV. STAT. ch. 38, § 107-4 (b), (c) (1965).

Supposedly a person may resist an illegal arrest. To condone resistance permits the person sought to be restrained to judge whether the officer has constitutional and statutory reasonable grounds. Such a decision is further complicated by the distinction between felony and misdemeanor arrests. To alleviate this situation some statutes now make it a crime to resist either a legal or an illegal arrest.

The force exerted to effect an arrest must be reasonable as well as befitting of the crime. The use of deadly force is permitted an officer to subdue a felon. Such a force may not be applied against a misdemeanant unless the need for self-defense of the officer is interjected; the regular self-defense rules then apply.

A§3.4 *Execution: Warrant*

Generally the warrant for arrest or search must be executed and returned in accordance with a statute. The usual procedure for service is by reading or by handing the warrant to the person to be arrested or present at the time the search is to be made.

The return of the warrant by the officer who executed it may require that he present the person arrested before the nearest magistrate. The search warrant return requires an inventory of the things seized.

The search warrant also may be limited as to the time of its execution, so that a warrant specifying service in the daytime is void if executed at night.[58]

A§3.5 *Delay in Arrest or Search*

The problem of delay in arrest from the time probable cause accrues may be analogous to speedy trial problems. Involved is possible prejudice to the defense which may result from inability to obtain witnesses who remember the day or

[58] Jones v. United States, 357 U.S. 493 (1958).

the event or a memory failure on the part of the defendant himself.[59]

The delay in arrest or search is frequently occasioned by the desire to make the most of the arrest or search. The question in these cases is whether the delay is a pretext to obtain additional evidence or to search beyond the scope which would be allowed as incident to the arrest or under the search warrant.[60]

SUPPRESSION OF EVIDENCE A§4

A§4.1 *Motion—Objection—Hearing—Harmless Error*

The federal rules,[61] as well as many state rules, require a pretrial motion to suppress the evidence, followed by an objection at the trial itself. Failure to comply with these prerequisites constitutes a waiver. There is, however, a possible exception that waiver cannot be implied when the defendent does not know of his constitutional rights.[62]

If search is pursuant to a warrant, the burden of showing that the property seized was obtained illegally may properly be placed on the defendant.[63] If there is no warrant, the burden rests with the state.[64] Some states permit the state to appeal the order granting suppression.[65] If the motion to suppress is denied, appeal may be taken by the defendant even after a plea of guilty.[66]

[59] This is established in the District of Columbia by the Ross doctrine, Ross v. United States, 349 F.2d 210 (D. C. Cir. 1965). For an analysis, see the case note on Wood v. United United States, 370 F.2d 214 (D. C. Cir. 1966), in 41 TUL. L. REV. 926 (1967).

[60] Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967).

[61] FED. R. CRIM. P. 41(e).

[62] Henry v. Mississippi, 379 U.S. 443 (1965) (assuming that the failure to object is not a trial tatic).

[63] *E.g.*, State v. Elkins, 422 P.2d 250 (Ore. 1966).

[64] *Id.*

If the evidence is admitted, its challenge is subject to the "harmless error rule."[67]

A§4.2 *Standing*

The fourth amendment protects the individual's right of privacy. Where the defendant at trial seeks to prevent the admission of evidence alleged to have been illegally seized, the question whether his privacy has been invaded may arise.[68] If he has a right to be where he is or to have the evidence where it is, the police action could invade his privacy.[69]

A§4.3 *Disposition: Seized Matter*

Contraband, irrespective of the legality of its seizure, need not be returned and may be destroyed. Stolen merchandise, even though it is not admissible in evidence, may be returned to the theft victim.

A§4.4 *Derivative Evidence: "Fruit of the Poisonous Tree"*

The exclusionary rule itself is a "fruit of the poisonous tree" doctrine.[70] But, as applied to the seizure of evidence, the term ordinarily is thought to indicate a step beyond the actual seizure of the evidence. In other words, if the illegally seized evidence was the basis for discovery of a witness who would not otherwise have been found or if it was used in an interrogation which elicited a confession, the witness or

[65] CAL. PENAL CODE § 995. (West, 1956).
[66] N. Y. CODE CRIM. PROC. § 813-c, (McKinney, 1962 p.p.); *see* People v. Rivera, 20 N.Y.2d 669, 282 N.Y.S.2d 279, 229 N.E.2d 59 (N.Y. 1967).
[67] Fahy v. Connecticut, 375 U.S. 85 (1963); Chapman v. California, 365 U.S. 610 (1961).
[68] Schenck v. United States, 249 U.S. 47 (1919).
[69] Jones v. United States, 362 U.S. 257 (1960); United States v. Jeffers, 342 U.S. 48 (1951).
[70] The expression "fruit of the poisonous tree" was first applied by Mr. Justice Frankfurter to evidence obtained by eavesdropping. Nardone v. United States, 308 U.S. 338 (1939).

the confession may be tainted by the illegally seized evidence.[71]

A§4.5 *Informer Privilege*

The informer is recognized by all courts as indispensable to law enforcement. If the informer's identity is divulged, his future use is destroyed, and his life may be put in jeopardy.

An informer is protected, but his protection is not unlimited. Where the informer's information is the basis for establishing probable cause, it may not be necessary to disclose his name if his reliability has been previously established.[72] Even if his reliability has not been established, his name still may not be revealed if the information has been otherwise verified or corroborated.[73]

However, if the informer participated in the transaction or was an observer, his status is no longer merely that of a transmitter of information. The defence may then demand that he be produced as a material witness to prove that the defendant was in fact not guilty of the alleged crime or to establish the defense of entrapment.[74]

[71] Wong Sun v. United States, 371 U.S. 471 (1963).

[72] The many informer privilege cases now have been solidified by McCray v. Illinois, 386 U.S. 300 (1967).

[73] *Id.*

[74] Roviaro v. United States, 353 U.S. 53 (1957).