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SEARCH INCIDENT TO A TRAFFIC ARREST: THE *ROBINSON-GUSTAFSON* REASONABLE PER SE RULE

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Courts have long recognized that there exist certain exceptions to the fourth amendment's requirement of a warrant as a precondition to searches and seizures. One such exception has been the search of the person incident to a lawful arrest. Although long recognized it had not been fully articulated by the Supreme Court until the recent cases of *United States v. Robinson*[1] and *Gustafson v. Florida*.[2] In 6 to 3 decisions, the court, speaking through Justice Rehnquist, laid down the rule that once an arrest has been effectuated, a full search of the person is always reasonable. These cases are of particular importance as they involved traffic violations, an area in which state and lower federal courts have been inclined heretofore to place limitations upon the right of searches of the person incident to arrest.

The *Robinson* case involved the following facts: Defendant Robinson had initially been stopped by one officer Jenks, four days prior to his arrest, for a routine traffic check. At this time Jenks noticed a discrepancy between the birthdates on defendant's operator's permit and draft registration card. A subsequent investigation determined that Robinson's license had been revoked and that he had obtained a new one by reapplying using a different birthdate. Upon observing Robinson driving an auto four days later, Jenks stopped defendant's car and placed him under arrest for driving with a revoked operator's permit.[3] Subsequent to the arrest, officer Jenks conducted a full field search of Robinson. During the search, officer Jenks found a crumpled cigarette package in Robinson's coat pocket. Although he did not con-

1. United States v. Robinson, 414 U.S. 218 (1973).
2. Gustafson v. Florida, 414 U.S. 260 (1973).
3. Under 40 D.C. § 302(d) (1968), this offense carries a mandatory minimum jail term, a mandatory minimum fine, or both.

sider the package to contain a weapon, he nonetheless opened it and discovered 14 gelatin capsules. Later analysis found the capsules to contain heroin, upon which a conviction was obtained.[4]

On appeal before the Court of Appeals for the District of Columbia Robinson argued that the search conducted by the police officer exceeded its permissible scope and intensity, such scope and intensity being limited by the type of crime for which arrest was made and the absence of evidence or fruits in a traffic offense. After remanding the case for a further evidentiary hearing on the scope of the search,[5] the court of appeals reversed the holding of the District Court, stating that searches in such cases should be limited to a pat down search for weapons.[6]

In the *Gustafson* case, the defendant was stopped for a routine spot check after his car was seen weaving once or twice over the centerline. When it was discovered that Gustafson did not have his operator's permit on his person, the officer used his discretionary power and took the defendant into custody.[7] The officer then proceeded to conduct a pat down search of Gustafson. He removed a cigarette box from the defendant's coat pocket and opened it. Inside the box were found marijuana cigarettes which led to his conviction. The District Court of Appeals of Florida, Fourth Circuit, reversed Gustafson's conviction, holding that the search conducted by the officer was unreasonable and in violation of the fourth and fourteenth amendments.[8] The Supreme Court of Florida reversed that decision, reinstating the conviction.[9]

The facts of these cases are typical of a myriad of state and lower federal court cases decided in recent years. Both cases involved custodial traffic arrests: in *Robinson* the custodial arrest was mandatory; in *Gustafson*, more typical of the average traffic situation, the decision to take the offender into custody was discretionary with the officer. Many courts which have faced the issue of search incident to arrest in traffic cases and other minor crimes have invalidated general searches of the person.[10] The limitations placed on such searches vary from

4. 21 U.S.C. § 174 (1964) (repealed 1970); 26 U.S.C. § 4704(a) (1964) (repealed 1970).
5. United States v. Robinson, 447 F.2d 1215 (D.C. Cir. 1971).
6. United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972).
7. FLA. STAT. ANN. § 322.15 (1968).
8. Gustafson v. State, 243 So. 2d 615 (4th D.C.A. Fla. 1971).
9. State v. Gustafson, 258 So. 2d 1 (Fla. 1972).
10. *See, e.g.*, Grundstrom v. Beto, 213 F. Supp. 912 (N.D. Tex. 1967); People v.

general rules prohibiting all searches incident to these offenses without independent probable cause,[11] to those permitting a search but limiting it to a protective *Terry*-type "pat-down".[12]

In reaching a conclusion opposite to these cases the Supreme Court chose to ignore the plethora of modern case law in this area. The majority opinion commenced by embarking upon an historical analysis of the exception to the fourth amendment's warrant requirement in the area of search incident to arrest. Although admitting that virtually all of the statements of the Court "affirming the existence of an unqualified authority to search are dicta,"[13] Justice Rehnquist concluded that the line of cases subsequent to *Weeks*,[14] taken with the common law developments prior to that decision, imply an affirmative authority to search. The majority then continued to remove impediments by placing a factual limitation on the *Terry* case by concluding that arrest necessitates a different standard of search from a mere stop. The majority's key holding was that:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.[15]

From this rather broad holding, the Court has apparently established completely modified general principles for searches incident to arrest. First, the Court is taking a categorical approach to the reasonableness of a search incident to arrest. By the subtle shift in application of the fourth amendment's reasonableness test to the arrest, rather than the particular search conducted, the Court has moved away from a case by case analysis of the scope of the individual search[16] and has

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Adams, 32 N.Y.2d 451, 299 N.E.2d 653, 346 N.Y.S.2d 229 (1973); Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).

11. United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); Commonwealth v. Lewis, 442 Pa. 98, 275 A.2d 51 (1971).

12. Cowdin v. People, 491 P.2d 569 (Colo. 1971); Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).

13. 414 U.S. at 230.

14. Weeks v. United States, 232 U.S. 383 (1914).

15. 414 U.S. at 235.

16. Sibron v. New York, 392 U.S. 40 (1968); Mapp v. Ohio, 367 U.S. 643 (1961); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

instead expressed the need only to examine the reasonableness and/or probable cause existing for the arrest. The arrest being valid, the search is *per se* reasonable. The only limits placed upon the scope of the search is that of the *Rochin v. California* case,[17] which is the "patently abusive" search which is violative of an individual's due process rights.

The Court also rejected the need for a subjective or objective fear that the defendant may be armed for the search to be initiated.

> Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that (the officer) did not indicate any subjective fear of the respondent, or that he did not himself suspect that the respondent was armed.[18]

Once the search has been lawfully initiated the officer can seize any fruits, instrumentalities, or contraband probative of criminal conduct.

In his concurring opinion, Justice Powell viewed the lawful custodial arrest as a surrender of any expectation of privacy under the fourth amendment: "If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern."[19]

The minority opinion, written by Justice Marshall, placed great emphasis on the necessity of a case by case approach, rather than a categorical approach, to the question of reasonableness in searches. The basic premise for this stance was the belief that some nexus must exist between the need to make a search and the direction which the individual intrusion takes. Thus the minority did not take issue with the right to a limited frisk for the purpose of discovering weapons when an officer makes an incustody arrest. However, Justice Marshall stressed that a search which is reasonable in its inception may violate the fourth amendment by virtue of its intolerable intensity and scope. The dissent argued that since the underlying rationales for permitting a *Terry* search and for permitting the search of a traffic violator are identical—a search for weapons—the scope of the searches must be the same. Because the officers in these cases exceeded that scope, the evidence obtained should have been excluded as violative of the fourth amendment's requirement of reasonableness in the conduct of searches.

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17. Rochin v. California, 342 U.S. 165 (1952).
18. 414 U.S. at 236.
19. 414 U.S. at 237 (Powell, J., concurring).

Although the Supreme Court stated in *Robinson* that its decision was grounded in the language of earlier Supreme Court cases and the history of the right to search incident to arrest at common law, this conclusion does not seem fully justified by a thorough examination of the existing case law.

One of the earliest proclamations of the right to search incident to arrest by the Supreme Court was made in *dictum* in *Weeks v. United States*:

> What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right of Government, always recognized under the English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime. This right has been uniformly maintained in many cases.[20]

Eleven years later, *Carroll v. United States*[21] was decided. Although the case involved a search which was not grounded on the doctrine of a search incident to arrest, the Court expressed in *dicta* logic similar to that found in *Weeks*. In the same year, the case of *Agnello v. United States*[22] limited in time and place what was considered to be a search incident to arrest. While holding that the search of the defendant's home after his arrest at the home of a co-conspirator was not incident to his arrest, the Court reaffirmed the *dicta* of *Carroll* and *Weeks*:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.[23]

The cases since *Agnello* echo these justifications for a search incident to arrest.[24] None of these cases can be cited for the proposition that the fact of lawful arrest always establishes the authority to conduct a full search. The constant emphasis has been on the existence of underlying circumstances in the arrest situation which point to the justifi-

20. Weeks v. United States, 232 U.S. 383, 392 (1914).
21. Carroll v. United States, 267 U.S. 132 (1925).
22. Agnello v. United States, 269 U.S. 20 (1925).
23. *Id.* at 30.
24. Preston v. United States, 376 U.S. 364 (1964); Harris v. United States, 331 U.S. 145 (1947); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

cations for the search; *i.e.* the likelihood of fruits, instrumentalities, or evidence, as supplying reasonable grounds for the search incident to arrest. Thus the language in *Peters v. New York*[25] was a reaffirmation of a long existing principle rather than a "novel and far reaching limitation"[26] or careless language as the majority in *Robinson* and *Gustafson* attempted to characterize it. In the *Peters* case the Court stated:

> . . . the incident search was obviously justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." *Preston v. United States*, 376 U.S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects.[27]

Equally unsubstantiated is the Court's statement that the common law history of England and the United States conclusively support the categorical fact-of-arrest-reasonable-*per se* approach. Although a number of early state courts took this approach, it was never the law of England, and some early state cases emphasized the need for limitations on the search incident to arrest.[28] Of particular interest with regard to this issue is the English case of *Leigh v. Cole*, where it was said:

> . . . With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend upon all the circumstances of the case.[29]

Further, the English cases which allow a search incident to arrest have been explicit in demonstrating the evidentiary purpose of the

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25. Peters v. New York, 392 U.S. 40 (1968).
26. 414 U.S. at 229.
27. 392 U.S. at 67.
28. For early cases holding that the fact of arrest always justifies a search, People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923); Closson v. Morrison, 47 N.H. 482 (1867); for those suggesting limitations, cases cited at note 32 *infra*.
29. Leigh v. Cole, 6 Cox Crim. L. Cas. 329, 332 (Oxford Cir. 1853).

search, based on the crime for which the person was arrested.[30]

Opinions emphasizing the necessity of an evidentiary purpose to justify searches of the person incident to arrest are not lacking in American case law either.[31] As in the English cases, there can be found thought that the search need not only be properly incident to a lawful arrest, but, additionally, must be reasonably calculated to achieve legitimate ends. As stated in an early Florida case:

> . . . [A] reasonable search and seizure that is properly incident to a lawful arrest may be made in a reasonable and proper manner by the officer making the lawful arrest; but the search and seizure should not be inappropriate to the reasonable requirements for making effective a lawful arrest.[32]

Thus the categorical approach taken by the Supreme Court does not enjoy widespread support from an historical analysis. Those cases which proposed limitations on such searches are more consonant with other objectives repeatedly asserted by the Court, in particular the general prohibition of exploratory searches,[33] and the assertion made again and again in this area of the law that reasonableness is to be decided on a case by case basis.[34]

Based on the assumption more reasonably drawn from these cases, that the fundamental basis of the search-incident exception lies not in the fact of arrest, but in the presence of underlying justifications for the search, many state and lower federal courts have struck down searches incident to traffic arrests, and in some cases for other minor crimes as well, where these justifications were non-existent.[35] The

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30. This was clearly the case in Dillon v. O'Brien and Davis, 16 Cox Crim. Cas. 245 (Exch. Ireland 1887), although the Court quotes it to support its fact-of-arrest approach. *See* 10 HALSBURY, LAWS OF ENGLAND 356 (3rd ed. Simonds 1955).

31. Holker v. Hennesey, 141 Mo. 527, 42 S.W. 1090 (1897).

32. Haile v. Gardner, 82 Fla. 355, 91 So. 376, 378 (1921). *See also* Pickett v. Marcucci's Liquors, 112 Conn. 169, 151 A. 526 (1930); State v. Merritt, 86 Fla. 164, 99 So. 230 (1923); Hebrew v. Pulis, 73 N.J.L. 621, 64 A. 121 (Court of Errors and Appeals, 1906).

33. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Agnello v. United States, 269 U.S. 20 (1925).

34. Cases cited note 16 *supra.*

35. United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969); Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); Grundstrom v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967); United States v. Tate, 209 F. Supp. 762 (D. Del. 1962); State v. Quintana, 92 Ariz. 267, 376 P.2d 130 (1962); People v. Superior Court of Los Angeles County, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972); Cowdin v. People, 491 P.2d 569 (Colo. 1971); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433, *cert. denied,* 364 U.S. 833 (1960); People v. Mayo, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); State v. Schevchuk, 291 Minn. 365, 191 N.W.2d 557 (1971); People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d

reasoning of these cases is persuasive. Their basic premise is that all searches must be reasonable. In the case of a search incident to a lawful arrest, this standard of reasonableness is not met by anything inherent in the right to take the offender into custody.[36] The search must stand or fall in light of the particular circumstances surrounding the arrest, and the nature of the crime for which the arrest was made.[37] The arrest does not make the search reasonable; the probable existence of a legitimate search-object does. Where the nature of the crime for which the arrest was made would indicate that the suspect may be armed or that he may have in his possession fruits, instrumentalities or evidence of the crime, reasonable grounds are provided to conduct a full search of the person.[38]

Additional circumstances may provide these reasonable grounds where the nature of the crime, in and of itself, does not. What these circumstances must consist of has been a point of disagreement among the courts. Some courts have taken the position that these circumstances must amount to independent probable cause to conduct the search.[39] From this point of view the ensuing search with probable cause can hardly be termed incident to the arrest at all. More often the cases say that the fact of arrest, coupled with "special circumstances" will provide reasonable grounds for the search; the nebulous term "special circumstances" being something less than the probable cause required to support a search not incident to an arrest.[40] Thus, in the Illinois case of *People v. Watkins*[41] a search was allowed where it was ". . . reasonable for the arresting officers to assume that they were dealing with a situation more serious than a parking violation."[42]

Some courts have gone beyond these cases, adopting the rationale of the stop-and-frisk cases, allowing a pat-down weapons search in all instances.[43] While the nature of the crime or facts of the particular

789 (1967); Watt v. State, 487 P.2d 961 (Okla. Crim. App. 1971); Lawson v. State, 484 P.2d 1337 (Okla. Crim. App. 1971); Commonwealth v. Lewis, 442 Pa. 98, 275 A.2d 51 (1971); Commonwealth v. Dussell, 439 Pa. 392, 266 A.2d 659 (1970); Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).

36. United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969).

37. *Id.*

38. Cases cited note 35 *supra.*

39. Cases cited note 11 *supra.*

40. *See, e.g.,* People v. Superior Court of Los Angeles County, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972); Lawson v. State, 484 P.2d 1337 (Okla. Crim. App. 1971).

41. People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433, *cert. denied,* 364 U.S. 833 (1960).

42. *Id.* at 437.

43. Cases cited note 12 *supra.*

arrest may not point toward the probable existence of a specific search-object, the history of assaults on police officers, coupled with the prolonged officer-arrestee contact which will be present in every custodial arrest, justifies the limited intrusion of a pat-down search. As in the stop-and-frisk cases, the reason for the pat-down is the protection of the officer, but the important distinction in the arrest cases is that there need be no apprehension that the person to be searched is armed.[44] While some search is allowed in all instances of custodial arrest, the absence of a legitimate search-object because of the nature of the crime provides a limitation on the intensity of the search.

In adopting the categorical fact-of-arrest approach the Supreme Court avoided some of the larger issues particularly present in the traffic arrest situation. The traffic arrest is a unique, if frequent, kind of confrontation between state and citizen. While opinions announcing limitations on the right to search incident to traffic arrests have made much of the lack of logical connection between the arrest and the search, it is apparent that these courts are relying on more practical policy factors drawn from the peculiar status of the traffic offense, as compared with other crimes.[45] One might agree with Mr. Justice Powell that while the "essential premise" of the fourth amendment is the protection of the person's legitimate expection of privacy, in many cases we must accept an abatement of these rights in the face of "legitimate and overriding governmental concern."[46] However, to abate a citizen's rights in the face of an arrest for a serious misdemeanor or a felony is fundamentally different from a similar abatement based on a traffic arrest. The traffic violation is a creature of modern society, growing out of myriad rules and regulations with which, in astounding numbers, even the most honest and innocent run afoul. It stands alone in its lack of criminal culpability, not rising even to the status of most misdemeanors, with which it is often classed. It is difficult to see what legitimate governmental concern could override the individual's right of privacy in his person and personal effects, where the object of taking the party into custody is only that he should post security for a future appearance in a traffic court.

A final point reached by at least two other courts,[47] but not con-

44. *Compare* cases cited at note 12 *supra with* Terry v. Ohio, 392 U.S. 1 (1968) *and* Sibron v. New York, 392 U.S. 40 (1968).

45. Cases cited note 35 *supra.*

46. Case cited note 19 *supra.*

47. Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); Commonwealth v. Freeman, 293 A.2d 84 (Pa. Super. 1972).

sidered in these opinions of the Supreme Court, deals with the interrelationship between the degree of allowable search and the already apparent problem of the pretext or search-motivated arrest. Although not squarely before the Court in either *Robinson* or *Gustafson*, this possibility of abuse bears significantly on the problem. The categorical "fact-of-arrest" approach will lend support to the use of such search-motivated or bad faith arrests. This follows from the fact that the arrest in these situations is almost always based on a traffic or a status crime, and, in the search-motivated arrest, the allowing of a full search in all instances makes the arrest more fruitful.

Faced with an obvious pretext situation Judge Wisdom, in *Amador-Gonzales v. United States*,[48] argued for the logical nexus approach in all cases, noting:

> The significant element in this case is the danger that the lowly offense of a traffic violation—of which all of us have been guilty at one time or another—may be established as the basis for searches circumventing the rights quaranteed by the Fourth Amendment. This danger exists in lawful traffic arrests as well as in pretextual arrests.[49]

Demanding that there be a logical nexus between the crime for which the arrest was made and the search removes much of the difficulty in this area. The arrest will simply not support exploratory search. It also alleviates the often times impossible burden of proving that the arrest was motivated in bad faith. Moreover, where the custodial arrest is discretionary such a limitation reduces the possibility of searches based on the racial, socio-economic or age biases of the particular officer.

Thus, there is a great deal more to the issues of the right and the scope and intensity of searches incident to arrests than whether one position or the other is more readily supported by history and the intent of the framers. From the point of view of the traffic arrest, it is a peculiarly modern problem capable of fruitful analysis only after examination of current conditions in light of the basic principles inherent in the fourth amendment. The denomination of a search as reasonable merely because it is incident to an arrest does not, ipso facto, deny its intrusive character. Where the specific intrusion cannot be justified by the legitimate needs of government it is patently violative of the fourth amendment's fundamental meaning. Particularly in the area of

48. 391 F.2d 308.
49. *Id.* at 318.

traffic arrests, the categorical fact-of-arrest approach fails to meet these standards.

Regardless of the particular limiting approach adopted, that limitations should exist in such situations is much more consonant with the general principles of the fourth amendment. The cases limiting the right to search in some instances represent a ratification of the general rule that in dealing with fourth amendment cases, the question of reasonableness is to be decided on a case by case basis.[50] They reaffirm the long standing abhorrence of the general exploratory search[51] and the principle that a lawful intrusion provides no basis for a search of greater intensity than is warranted under the circumstances.[52]

The failure of the Supreme Court in these two cases to adopt the limited approach should neither defeat the logic of the previous state cases contra, nor should it preclude further independent analysis of this area of criminal procedure. The issues are too complex and the potential for abuse too great to apply the fact-of-arrest approach to arrests for all crimes. Thus, this area presents an opportunity for the states to exercise their right, often referred to by the Supreme Court, to define and develop their own standards consistent with the minimum requirements set forth by the Supreme Court.[53]

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50. Cases cited note 16 *supra.*

51. Harris v. United States, 331 U.S. 145 (1947); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

52. Terry v. Ohio, 392 U.S. 1 (1968).

53. Spencer v. Texas, 385 U.S. 554 (1967); Ker v. California, 374 U.S. 23 (1963).