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Search and Seizure in California Notes and

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SEARCH AND SEIZURE IN CALIFORNIA

Although the United States Supreme Court held in *Mapp v. Ohio*[1] that evidence obtained by searches and seizures in violation of the Constitution was inadmissible in a state court as a matter of constitutional compulsion, it laid down no fixed formula for the determination of an illegal search and seizure. Basically, the constitutional test of a lawful search and seizure is that it be made pursuant to a validly issued search warrant or that it be incidental to a lawful arrest. However, such a test is so broad that it can provide only a framework for constitutional compliance. The factual situation of a case may give rise to the application of a more precise test. The courts may be required to determine first whether there was a search and seizure, and, if so, whether it was reasonable. The cases in which the legality of the search and seizure are in issue usually involve lack of a search warrant, so that the courts must ascertain if the search was incidental to a lawful arrest. This requires the application of tests of "lawful arrest," which in turn must meet the standards of "probable cause." The tests of probable cause are themselves complex. Moreover, the search must still be "incidental to the arrest," which often involves difficult concepts of time and distance.

Since the *Mapp* case the California courts have been faced with the question of whether the state or federal standards of lawful search and seizure will control. In *People v. Mickelson*[2] the Supreme Court of California made it obvious that its determination in this area would not be governed by federal rules when it stated:

> A state rule governing police procedure is not unconstitutional merely because it permits conduct in which a federal officer may not lawfully engage. The Fourth Amendment itself sets forth no more than the basic outlines of lawful law enforcement. It becomes meaningful in specific situations only by reference to the common law and statutory law governing the issuance of warrants, the authority of officers, and the power to arrest. Illegally obtained evidence may be excluded by the federal courts for various reasons . . . . Accordingly, before a state rule governing police conduct may be struck down, it must appear that neither Congress nor a state legislature could authorize it. If a state adopts rules of police conduct consistent with the requirements of the Fourth Amendment and if its officers follow those rules, they do not act unreasonably within the meaning of the amendment although different rules may govern federal officers.[3]

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[1] 367 U.S. 643 (1961).
[2] 59 A.C. 465, 30 Cal. Rptr. 18 (1963).
[3] *Id.* at 468-69, 30 Cal. Rptr. at 20.

By the same token, a California court may disregard a finding by a federal district court that the evidence sought to be admitted was the product of an illegal search and seizure.[4]

The United States Supreme Court in its recent decision, *Ker v. State of California*,[5] resolved any uncertainty as to whether state standards had been superseded by federal rules and decisions:

> [A]lthough the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment . . . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain . . . .[6]

WAS THERE A SEARCH?

Looking at the standards developed by the courts of California in their determination of whether there has been a lawful search and seizure, the most basic issue is whether there had been a search. Observing that which is open and patent is not a search.[7]

> A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search."[8]

This definition was applied in *Madris v. The Superior Court of the State of California*,[9] with the result that the district court refused to find that a search had been made when an officer had opened the door of the petitioner's automobile and discovered a gun lying in the open glove compartment. The same test was applied

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[4] Castenada v. Superior Court, 26 Cal. Rptr. 364 (1962). *Reversed on other grounds*, 59 A.C. 456, 380 P.2d 641, 30 Cal. Rptr. 1 (1963).

[5] 83 Sup. Ct. 1623 (1963).

[6] *Id.* at 1630.

[7] People v. Earl, 216 A.C.A. 664, 31 Cal. Rptr. 76 (1963).

[8] People v. Spicer, 163 Cal. App. 2d 678, 683, 329 P.2d 917, 920 (1958), quoting from People v. West, 144 Cal. App. 2d 214, 219-220, 300 P.2d 729, 742 (1956).

[9] 218 A.C.A. 86, 32 Cal. Rptr. 263 (1963).

in *People v. Reed*.[10] The police had discovered a rope, previously used to effect a robbery, protruding from under a boardwalk leading to the front door of the defendant's home. Although the discovery was made prior to the defendant's arrest, its admissibility as evidence was upheld since it had not been obtained by a search.

WAS THE SEARCH REASONABLE?

Assuming that a search has been made, the court may be required to determine its reasonableness. A search is not unreasonable merely because it was effected by looking through an open transom or an existing aperture resulting from an ill-fitting door,[11] or a tiny hole drilled in the door of a hotel room[12] or apartment,[13] provided that the officer himself did not drill the hole.[14] Moreover, it "has been repeatedly held that looking through a window does not constitute an unreasonable search."[15] Thus in *People v. Murray*[16] an officer's observation of the defendant handling what appeared to be marijuana, made through the unpainted portion of a window to a men's room, was held not to violate any of the defendant's constitutional rights. The court held that once "the officer observed the defendant in possession of contraband, it was proper for him to enter and arrest defendant for a felony which was committed in his presence and he was therefore entitled to make the arrest without a warrant."[17]

WAS THERE PROBABLE CAUSE?

The United States Supreme Court has held that probable cause, the prerequisite of a lawful arrest without a warrant, exists "where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. [Citations omitted.]"[18] However, the Court will still allow the law-

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[10] 210 Cal. App. 2d 80, 26 Cal. Rptr. 428 (1962).

[11] People v. Earl, 216 A.C.A. 664, 31 Cal. Rptr. 76 (1963).

[12] People v. Regalado, 193 Cal. App. 2d 437, 14 Cal. Rptr. 217 (1961).

[13] People v. Ruiz, 146 Cal. App. 2d 630, 304 P.2d 175 (1956).

[14] People v. Earl, 216 A.C.A. 664, 31 Cal. Rptr. 76 (1963).

[15] People v. Murray, 218 A.C.A. 335, 337, 32 Cal. Rptr. 348, 349 (1963), citing as authority People v. Martin, 45 Cal. 2d 755, 296 P.2d 855 (1955); People v. Hen Chin, 145 Cal. App. 2d 583, 303 P.2d 18 (1956); People v. Rayson, 197 Cal. App. 2d 33, 17 Cal. Rptr. 243 (1961).

[16] 218 A.C.A. 335, 32 Cal. Rptr. 349 (1963).

[17] *Id.* at 338, 32 Cal. Rptr. at 349.

[18] Ker v. State of California, 83 Sup. Ct. 1630 (1963).

fulness of arrests in California to be determined by the law of that state.[19]

In California, the courts adhere to the basic rules laid down in *People v. Torres*,[20] quoted with approval in *People v. Cedeno*:[21]

> A search without a warrant is proper where it is incident to a lawful arrest based on reasonable cause to believe that the accused has committed a felony. Such a search is not rendered unlawful merely because it precedes rather than follows the arrest. [Citations omitted.] Reasonable or probable cause is shown if a man of ordinary care and prudence would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty. The test is not whether the facts on which the officer relies are sufficient to convict, but only whether the person should stand trial. [Citations.]

In *People v. Ingle*,[22] the supreme court of California stated that good faith alone would not be held sufficient to justify an arrest without a warrant. The law would look only at the facts and circumstances presented to the officer at the time he was required to act. Admittedly, the interpretation of those facts presented the difficulty. The court continued, unless "it can be said that prudent men in the position of these officers knowing what they knew and seeing what they did would not have had reasonable cause to believe and to conscientiously entertain a strong suspicion that Ingle [the defendant] was violating or had violated the law, the arrest should be held lawful."[23] It should be noted that the *Ingle* test is stated in the negative. This gives the impression that the court will assume reasonable cause, unless it is convinced from the facts that such was not the case. Should the courts apply this test, it is possible to argue that in a close case such an assumption would infringe upon the requirements of due process. The existence of reasonable or probable cause as a basis for a lawful arrest is a vital element in testing the legality of the search. Would not such an assumption give the State an unfair advantage by measureably lightening its burden of proof and requiring the defendant to disprove that which was never fully proven?

The *Ingle* and *Torres* courts defined *reasonable* cause as "a state of facts that would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."[24] *Probable* cause was defined as having more evidence for than against; it includes a

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19 *Id.* at 1632.
20 56 Cal. 2d 864, 366 P.2d 823, 17 Cal. Rptr. 495 (1961).
21 218 A.C.A. 229, 234035, 32 Cal. Rptr. 246, 250 (1963).
22 53 Cal. 2d 407, 348 P.2d 577, 2 Cal. Rptr. 14 (1960).
23 *Id.* at 414, 348 P.2d at 581, 2 Cal. Rptr. at 18.
24 *Id.* at 412, 348 P.2d at 580, 2 Cal. Rptr. at 17.

mind to believe, but leaves room for doubt.[25] The *Torres* test appears to be too weak, requiring as it does only strong suspicion. The officer's belief is measured merely by what a man of ordinary care and prudence would believe. This test does not recognize that a police officer, normally a man of specialized training and experience, is qualified to exercise more than ordinary care and prudence. The *Ingle* court further weakens this test by casting it in the negative, as noted above. The test of probable cause is more realistic and stringent, because it looks to the weight of evidence rather than the suspicions of a hypothetical reasonable man. Although it does not demand certainty of guilt, it does, at least, require that the officer *believe*, rather than merely *suspect*, the guilt of the person he proposes to arrest. However, it serves no useful purpose to contrast these tests, since the courts appear to disregard the distinction and refer to them interchangeably, whether they are testing the legality of an arrest or of a search.

INFORMERS

One group of cases looks to the source of the officer's information, namely, the police informer, to determine the existence of reasonable or probable cause. The district court made an exhaustive study of cases involving this problem in *People v. Cedeno*.[26]

> The reliability of the informer goes to the very heart of the concept of reasonable cause. Whether or not a police officer acts upon reasonable cause, where he relies upon information given by an informer, depends, in each instance, upon whether the reliance on the information was reasonable. . . . Accordingly, to justify reliance on the information received it is now firmly established in this state that the information must come from a reliable informant. [Citations omitted.] The informer must be known to the officer to be reliable, and must be a person whom the officer in good faith believes to be trustworthy. [Citations omitted.] Accordingly, an arrest and search may be made solely on the basis of information received from a *single reliable informant*.[27]

In making an arrest or search without a warrant, the police officer may rely on information secured from an anonymous or unreliable informant only in the case of a pressing emergency. The applicable test is: "Considering all the information in the hands of the police, would a reasonable police officer act on that information or would a reasonable police officer seek further information before making the arrest and conducting the search?"[28] In the *Cedeno* case the

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[25] *Ibid.*
[26] 218 A.C.A. 229, 32 Cal. Rptr. 246 (1963).
[27] *Id.* at 234, 32 Cal. Rptr. at 250.
[28] *Id.* at 235, 32 Cal. Rptr. at 251.

defendant was convicted on evidence obtained without either a search or arrest warrant. One of the grounds for reversal of this conviction by the district court was that the state had failed to show that the informant was reliable. Another ground was that the illegal search and arrest were not made until approximately a month after the police received the information. Thus, there were lacking both the pressing emergency required to justify a search or arrest based on information from an unreliable informant,[29] and any valid excuse for not obtaining a warrant.

Suspicious Conduct

Another group of cases holds that furtive or suspicious conduct may satisfy the requirement of reasonable cause and justify arrest without a warrant. The *Cedeno* case cites numerous examples of conduct falling into this category.[30] Such conduct may involve the appearance or demeanor of the suspect, the way he drives his car (*e.g.*, driving too slowly, or too fast, or without lights), or attempts to hide or dispose of the ubiquitous brown bag that seems to accompany narcotics addicts. While furtive gestures alone are insufficient to justify an arrest or search without a warrant,[31] the *Cedeno* court came to the conclusion that "the California cases clearly hold that information supplied by an informant who has not proven reliable, may, when coupled with a defendant's furtive or suspicious conduct, form a combination of elements that supplies the grounds for probable cause for a search or arrest without a warrant."[32]

The *Cedeno* court makes no distinction between furtive and suspicious conduct, and common sense would indicate that furtive conduct is merely a species of suspicious behavior. However, a recent case does draw the distinction by holding that furtive gestures combined with suspicious circumstances or conduct are sufficient to give rise to probable cause.[33] The suspicious conduct consisted of the defendant driving a car rapidly at 2:30 a.m. without lights, making a U-turn, and getting out of the car after being stopped instead of waiting for the police to come to him. The furtive gesture consisted of placing or picking something off the floorboard of the car. The "something" turned out to be a brown paper bag, and since the officer knew marijuana is so packaged, his search of the bag's contents was held justified.

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29 *Id.* at 236, 32 Cal. Rptr. at 252.
30 *Id.* at 240-42, 32 Cal. Rptr. at 253-54.
31 People v. Tyler, 193 Cal. App. 2d 728, 14 Cal. Rptr. 610 (1961).
32 People v. Cedeno, 218 A.C.A. 229, 242, 32 Cal. Rptr. 246, 255 (1963).
33 People v. One Chevrolet Impala, 219 A.C.A. 18, 33 Cal. Rptr. 64 (1963).

On the other hand, the apparent motioning of someone away from a door and then slamming it in an officer's face was not such suspicious conduct as would give rise to reasonable cause to believe that the defendant was guilty of a felony.[84] The court observed:

> There are many reasons other than guilt of a felony why an occupant of an apartment may not wish himself or others present exposed to the immediate view of a stranger, even if the stranger is a police officer. If refusal of permission to enter could convert mere suspicion of crime into probable cause to arrest the occupant and search his home, such suspicion alone would become the test of the right to enter, and the right to be free from unreasonable police intrusions would be vitiated by its mere assertion.[85]

It is suggested that this approach, as well as that taken by the *Cedeno* court, which requires more than suspicious conduct as a basis for probable cause, are more conducive to the achievement of the fundamental purposes of the search and seizure clause. The police officer initially must determine whether the actor's conduct is suspicious. His decision will be formed by his judgment of factual circumstances attendant upon the incident. His judgment may be colored by his experience, prejudices, and even the state of his digestion. The court then is left with the task of devising tests to determine whether his judgment was sound. This is impossible since in any given situation there may be present such intangible factors to affect his judgment as the defendant's tone of voice, his hesitancy or evasiveness in responding to questions, or a hostile attitude. The officer's assessment of the situation may be correct. But how can a court or jury determine the soundness of his judgment, not having been present at the scene and being unable to ascertain the various elements which must have entered into the exercise of the officer's judgment? If the court allows the existence of suspicious conduct alone to serve as a sufficient basis for probable cause, then it is in effect giving extraordinary weight to one man's judgment. The fundamental right to be free from unreasonable searches and seizures will not be protected by allowing the police such unchecked power.

SURVEILLANCE

Probable cause may also be grounded on information obtained through police surveillance. The court will distinguish between "clandestine observations by police officers of premises devoted to common use by the general public—such as, for example, the shopping areas and public hallways and elevators of [a] department

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[84] Tompkins v. Superior Court, 59 A.C. 75, 378 P.2d 113, 27 Cal. Rptr. 889 (1963).
[85] *Id.* at 78, 378 P.2d at 115, 27 Cal. Rptr. at 891.

store . . ." and the surveillance of those places which are "ordinarily understood to afford personal privacy to individual occupants."[36] General exploratory searches will be condemned. The court's disapproval of the manner in which the surveillance was conducted may result in the decision that an unreasonable search was made. On the other hand, if the surveillance is proper, the discoveries gained during its course may serve as grounds for probable cause for a subsequent arrest.[37]

It should also be noted that in California it has been "consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning."[38] In the interests of self-protection, if the circumstances warrant it, the officer may require the occupant to submit to a superficial search for concealed weapons. "Should the investigation then reveal probable cause to make an arrest, the officer may arrest the suspect and conduct a reasonable incidental search."[39]

WAS THE SEARCH INCIDENTAL TO AN ARREST?

Whether the search in fact precedes or follows an arrest, it "must be incidental to the arrest and contemporaneous therewith as to time and integrated as to place."[40] In *Castenada v. Superior Court of Los Angeles County*[41] the defendant, apparently under the influence of narcotics, was arrested at the home of a narcotics user. Without a search warrant the police took the handcuffed prisoner to three different homes, two occupied by his relatives and one his own in an effort to locate his cache of narcotics. The court found that the search was not incidental to his arrest. In another case, the police, without a warrant, allegedly arrested the defendant and searched him at his home. This was followed by a search of a hotel room, also conducted without a search warrant. Because of the distance of the second place searched from the place of the purported arrest, the second search was found to be not incidental to the arrest.[42] In both of these cases, the fact that searches were conducted at some distance from the place of the defendant's ap-

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36 Britt v. Superior Court, 58 Cal. 2d 469, 472, 374 P.2d 817, 819, 24 Cal. Rptr. 849, 851 (1962).

37 See *e.g.*, People v. Williams, 218 A.C.A. 102, 32 Cal. Rptr. 277 (1963).

38 People v. Mickelson, 59 A.C. 465, 467, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 20 (1963).

39 *Ibid.*

40 Madris v. Superior Court, 228 A.C.A. 86, 91, 32 Cal. Rptr. 263, 267-68 (1963).

41 59 A.C. 456, 380 P.2d 641, 30 Cal. Rptr. 1 (1963).

42 People v. Haven, 59 A.C. 738, 381 P.2d 927, 31 Cal. Rptr. 47 (1963).

prehension led to the conclusion that the search was not incidental to the arrest and was illegal.

WAS THERE CONSENT?

Although evidence may have been obtained through an otherwise illegal search and seizure, still it will be held admissible if the court finds the defendant consented to the search.[43] Such a doctrine is subject to grave abuse and its application can severely strain the bounds of credulity. For example, in the *Castenada* case the defendant's conviction was affirmed on an intermediate appeal on grounds that the defendant had consented to the search. The court had found no difficulty in arriving at this conclusion, although the evidence indicating that during the search the defendant had inquired at least twice whether the officers had a search warrant and the police had admitted to him they had not; he was in custody and handcuffed at the time; he had made repeated efforts to lead the officers away from his cache of heroin as he was taken from home to home over a space of several hours during the extended search. The decision was reversed by the California supreme court, which found it "abundantly clear that petitioner did not freely and voluntarily consent to the search. . . ."[44] The district court of appeal in the *Castenada* case had indicated that the defendant's failure to object to a search was evidence of consent.[45] Had the decision stood, illegally obtained evidence would have been admissible if implied consent could be found in circumstances in which an individual is virtually powerless to prevent the search.

The supreme court of Calfornia has significantly restricted the doctrine of consent in its recent decision in *People v. Haven.*[46] The facts of the case read like a comedy of errors. The police, while keeping defendant's home under surveillance, observed the entry of known narcotics users. The police delayed a week before they made their search, which was conducted without a warrant, although they could have obtained one in the interim. This was their first error. Their second was to enter the defendant's home without his consent, thereby making an illegal entry. Their third error was to search the defendant without arresting him (or so it was alleged and it appears the court so believed). The search of the defendant's person produced a key to a hotel room, which under the circumstances the court held to be the product of an illegal search. The

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[43] See Note 3 SANTA CLARA LAW. 180 (1963).

[44] Castenda v. Superior Court, 59 A.C. 456, 460, 380 P.2d 641, 643, 30 Cal. Rptr. 1, 3 (1963).

[45] Castenda v. Superior Court, 26 Cal. Rptr. 364 (1962).

[46] 59 A.C. 738, 381 P.2d 927, 31 Cal. Rptr. 47 (1963).

next mistake was to take the defendant and his wife, neither presumably under lawful arrest, to the hotel room and there make another search. This was held illegal on two grounds. Such search was illegal since it was effected without a lawful arrest or a search warrant. But, even assuming an arrest had been made, the second search would still be illegal since it was conducted at some distance from the place of arrest, and hence was not incidental to the arrest. In the face of all this the police alleged the defendant had consented to the search, and the evidence—the product of the second search and seizure—was used to convict the defendant. The supreme court, in reversing the conviction, ruled that although evidence obtained by a search following an illegal arrest normally is inadmissible, it may be admitted if the search was consented to, but that consent must have been given before the illegal arrest took place. The court expressly disapproved language in several cases which indicated that consent given immediately after an unlawful arrest might validate the search. A search and seizure made pursuant to consent secured immediately following an illegal entry or arrest "is so inextricably bound up with the illegal conduct" that such consent would not be held to be voluntarily given, and the product of a search and seizure under such circumstances would be inadmissible.[47]

Decisions such as those in the *Haven* and *Cedeno* cases are laudable for their logic, precision and clarity. Thinking is apt to become muddied in an area in which factual situations are so variable and involved that merely to sort out the sequence of events and place the pertinent facts in their proper prospective becomes a feat in itself. No less difficult is it to apply tests which are often vague and inconclusive. The court's deliberations may be further complicated by its realization of the impact its decision will have. Will it give credence to an over-zealous police officer who swears the defendant consented to the search, when common sense indicates the contrary to be the case? Or will the court brand the police conduct illegal and free an individual who was in fact caught red-handed? What is the effect on the public, who may not understand that more basic issues were in the balance than the vindication or conviction of the particular defendant? Will the public lose confidence in its courts and respect for the police? The court is bound to render a decision which meets basic constitutional requirements. Such requirements can best be met, and the individual's rights safeguarded, when, as in the *Haven* case, a precise test can be laid down, which the police readily understand and follow, and which the courts can apply without a tortured interpretation of the facts.

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[47] *Ibid.*