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Criminal Law—Search Incident to an Arrest

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just those who through *no added* fault happen to cause a fatal injury. Where drunkenness actually causes death, the situation is different. Criminal liability normally attaches to homicide that is neither justifiable nor excusable. In the absence of causal relationship between death and the fault of the defendant, the homicide would be excusable. Given that relationship the homicide would be culpable. The distinction evidently stems from the general belief that wrongful conduct warrants punishment either for itself or when it results in special harm, but not otherwise. A rule of absolute liability would abrogate the distinction between excusable and inexcusable homicide and would punish drunkenness as though it had caused special harm when in fact it had not. The suggested presumption, on the other hand, would retain the normal distinction, which is based on the community's sense of justice. Of course, the present rule, requiring the prosecution to prove proximate cause, preserves the distinction also.[26]

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Search Incident to an Arrest. In a recent case, *State v. Michaels*,[1] the Washington Supreme Court announced a new rule for search and seizure incident to an arrest: the purpose of the arrest circumscribes the area and nature of the search.

The Pierce County Sheriff's department notified the King County department that the defendant was driving a certain car believed to contain gambling devices. Two King County deputies sought out his car and followed it. After he made an illegal left turn, the officers directed him to stop his car. After citing him for that violation, they opened the auto's trunk and discovered suitcases containing dice, magnets and magnetized dice.

On appeal from his conviction for the possession of gambling devices,[2] the state supreme court held that the arrest for the traffic violation was made as a pretext for the search for the gambling devices, and as such, did not furnish legal support necessary for the search. Therefore, the search was invalid, and the trial court erred in denying the appellant's motions to suppress illegally seized evidence.[3]

[26] The present law in Washington is that set forth in State v. Baker, 56 Wn.2d 846, 355 P.2d 806 (1960). The extreme importance of this special concurring opinion lies in the fact that it falls short of becoming a majority opinion by *one* vote.

[1] 160 Wash. Dec. 639, 374 P.2d 989 (1962).

[2] RCW 9.47.030.

[3] State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922) established the exclusionary rule in Washington, which compels the exclusion at trial of all evidence obtained by

Decided in 1922, *State v. Gibbons* established the broad framework of Washington's law of arrest.[4] The court reversed a conviction when a police officer arrested upon mere suspicion and upon the hope that a search warrant would be waiting for him when he arrived at the station with his prisoner. The court said:

> It is not pretended that appellant was suspected of committing a crime amounting to a felony; nor even that the sheriff had any actual knowledge that appellant was then committing the misdemeanor of unlawfully having intoxicating liquor in his possession.[5]

In the following year the court clarified and expanded its statements in *Gibbons*.[6] Police officers, suspecting that the defendant was engaging in bootlegging activities, followed his auto, observed a suitcase being transferred into it, and made the arrest. The court followed the common law of arrest,[7] including the right of the police to arrest on reasonable cause. It discussed search and seizure:

> It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged. If a search may be made of the person or clothing of the person lawfully arrested, then it would follow that a search may also be properly made of his grip or suitcase which he may be carrying. From this it seems to us to follow logically that a similar search, under the same circumstances, may be made of the automobile of which he has possession and control at the time of his arrest. This is true because the person arrested has the immediate physical possession, not only of the grips or suitcases which he is carrying, but also of the automobile which he is driving and of which he has control.[8]

Into this framework the court has fitted numerous subsequent cases. The principle was perhaps widened in *State v. McKindel*,[9] which held

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a search or seizure proscribed by the provisions of Article I, Section 7 of the Washington Constitution, which is the guarantee against unreasonable searches and seizures. See also State v. Buckley, 145 Wash. 87, 258 Pac. 1030 (1927), and Mapp v. Ohio, 367 U.S. 643 (1961); the latter imposes the exclusionary rule on all state proceedings through the Fourth and Fourteenth Amendments to the Federal Constitution. State v. Dersiy, 121 Wash. 455, 209 Pac. 837 (1922) added the requirement that for the exclusionary rule to apply there must be a timely motion to suppress evidence made by the defendant.

[4] 118 Wash. 171, 203 Pac. 390 (1922).

[5] 118 Wash. at 182, 203 Pac. at 394.

[6] State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923).

[7] See generally, Comment, *The Washington Law of Arrest Without Warrant—Incidental Search*, 36 WASH. L. REV. 501 (1961).

[8] 124 Wash. at 370, 214 Pac. at 843. See also State v. Thomas, 183 Wash. 643, 49 P.2d 28 (1935).

[9] 148 Wash. 237, 268 Pac. 593 (1928).

that once police officers are lawfully on the premises, they may take cognizance of unlawful activity (or its means of commission) which they discover, even though these are totally unrelated to the conduct for which the search or arrest was originally instituted.

Twenty years later the court said, in a similar case:

> [T]he mere fact that relators are now charged with the commission of a crime other than the one for which they were arrested does not invalidate the arrest or the search incidental thereto, nor does it of itself render the property seized incapable of being admitted as evidence upon prosecution for the crime charged, if such evidence be otherwise competent. Property seized either under a valid search warrant or as incident to a lawful arrest may be used in the prosecution of a suspected person for a crime other than the one for which he was arrested or for which a search warrant was issued.[10]

The Washington position conformed to the law of virtually all common law jurisdictions:

> The rule that a search incidental to a valid arrest is reasonable has always been recognized in this country and in England. It is, of necessity, as old as the law of arrest itself. Consequently, it did not create any departure in the law when the courts, federal and state, decided that such a search did not come within constitutional prohibitions against "unreasonable search."[11]

In *Michaels* the court was faced not only with the general propositions outlined above, but was also directly confronted with two other Washington cases which were quite similar factually. In *State v. Deitz* the court pronounced the following:

> The rule is that, where a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have, and which may be used to establish the offense, may be seized and held as evidence in the prosecution.[12]

As the defendant drove his auto onto the grounds of an amusement park, officers arrested him because his auto had defective equipment. Breaking into the locked trunk, they discovered illegal alcohol. The defendant's conviction was affirmed, the court citing *State v. Hughlett*[13] and saying:

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[10] State *ex rel.* Fong v. Superior Ct., 29 Wn.2d 601, 609, 188 P.2d 125 (1948).
[11] MORELAND, MODERN CRIMINAL PROCEDURE 119 (1959). See also United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).
[12] 136 Wash. 228, 230, 239 Pac. 386, 387 (1925).
[13] 124 Wash. 366, 214 Pac. 841 (1923).

> He had been legally placed under arrest. The officers had the right to search the automobile. In making the search they discovered evidence of another crime. It cannot be said that this evidence was illegally obtained and should therefore be suppressed. We do not think that the rule should be thus restricted.[14]

In *Michaels* the court purported to meet and distinguish the *Deitz* case. It said:

> We held [in *Deitz*] that, since the officers had the right to search the car, the search was lawful, and the evidence was not illegally obtained. The question of whether an arrest can be used as a pretext for searching an automobile was not at issue in that case and was not decided.[15]

But, neither does that contention appear in the brief of the appellant in the instant case, although the court suggests otherwise: "The defendant urges, however that the search was not incident to the arrest, but rather the arrest was a mere pretext for searching the automobile to see what might be uncovered."[16]

Actually there is no indication that either Dietz or Michaels argued in his brief that his arrest was only a pretext. In both cases the facts suggest that the officers had ulterior motives for making an arrest. But in *Michaels* the court inquired into the officers' motives and in *Deitz* it did not. The distinction made by the court, between *Deitz* and *Michaels* appears to be without basis, and the effect is a severe limitation on the rule set forth in *Deitz*.

The other case similar to *Michaels* is *State v. Olsen*,[17] in which police officers arrested the defendant for negligent driving and impounded his car. A search of the car disclosed a loaded pistol behind the folding armrest in the rear seat, a set of burglar's tools lodged between the radiator and the grill and a "sap" and a police badge on a ledge under the dashboard. The court, in *Michaels*, characterized the *Olsen* case in the following language:

> While [the car's] contents were being inventoried for safe keeping, the officers found evidence of another crime, with which he was charged and of which he was convicted. We held that the evidence was obtained lawfully. Again, there was no contention that the arrest was made for the sole purpose of searching the car. The case stands for the proposition that, where an automobile has been impounded for a reasonable cause, and its contents are inventoried for such a reasonable and lawful

[14] 136 Wash. at 231, 239 Pac. at 387.
[15] 160 Wash. Dec. at 644, 374 P.2d at 992.
[16] 160 Wash. Dec. at 643, 374 P.2d at 991.
[17] 43 Wn.2d 726, 263 P.2d 824 (1953).

> purpose as the protection of the owner from thefts and the officers from false claims, if evidence of the crime is discovered, it can be used in a prosecution.[18]

It is doubtful that the officers would have examined the grill-radiator aperture had they been interested merely in making an inventory of the car's contents. Rather, they were probably looking for something like what they found. The court attempts to distinguish *Michaels* from *Olsen* on the facts because this is the only way to escape the applicability of the following rule announced in *Olsen:*

> The arrest was for traffic violations committed in the presence of the arresting officer. It was a lawful arrest.... The search of the car was legal as an incident of the lawful arrest, for under the circumstances the officers are not confined to a search of the person but may search the automobile which the person arrested was driving.... The fact that the appellant was charged with a crime, other than the one for which he was originally arrested, does not invalidate the arrest or the search which took place incident to the arrest.[19]

From this statement it is doubtful that even a successful factual distinction would produce a result favorable to Mr. Michaels. The rule so emphatically announced in *Olsen* seems equally to encompass the facts of the *Michaels* case, regardless of whether they differed from those of the *Olsen* case. In *Michaels,* however, the court ignored the portion of the Olsen opinion quoted above.

The court also ignored another similar case,[20] which was cited in the state's brief. There the court affirmed the grand larceny conviction of a defendant who was sitting in an illegally parked car when patrolmen approached and questioned him, and thereupon observed stolen merchandise in the car. The court said,

> It was a reasonable course for a police officer to take in handling a case of an illegally parked car when someone was sitting in it. Once lawfully in that position, the officer could observe what was there to be seen.[21]

In none of these cases—*Deitz, Olsen,* and *Brooks*—did the court consider the intent of the arresting officers—it was not thought to be significant. But in *Michaels* it became the decisive factor. It is no longer the rule in Washington that every search incident to a valid arrest is valid for whatever it turns up. The new rule—the *Michaels*

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[18] 160 Wash. Dec. at 644, 374 P.2d at 992.
[19] 43 Wn.2d at 728, 263 P.2d at 826.
[20] State v. Brooks, 57 Wn.2d 422, 357 P.2d 735 (1960).
[21] 57 Wn.2d at 427, 357 P.2d at 738.

rule—might be stated as follows: Searches incident to a valid arrest which turn up evidence of a crime other than the one for which the arrest was purportedly made are valid only if the arresting officer intended to find only that which would connect with the crime for which the arrest was purportedly made. Or, discovery of evidence of another crime must be unwitting or accidental to be successfully used in a subsequent prosecution.

Put another way, the ostensible purpose of the arrest circumscribes the area and the nature of the search. The precise holding that an arrest may not be made as a pretext for a search fits in the middle of a three-link chain. The arrest was invalid *because* its purpose was invalid. *Because* the arrest was invalid, the search and seizure incident thereto was invalid.

The court cited *State v. Cyr*[22] for the proposition that the arrest may not be merely the pretext for the subsequent search. There, however, the arrest, search, and prosecution all concerned the same offense.

The court cited *United States v. Lefkowitz*[23] to establish that "an arrest may not be used as a pretext to search for evidence." That language is not relevant here, because in *Lefkowitz* the court was employing the word *evidence* in a different and more technical sense (to make the distinction between instrumentalities of a crime and mere evidence).[24] That *Lefkowitz* is inapplicable for the purpose cited is clearly shown by an excerpt:

> Here, the searches were exploratory and general and made solely to find evidence of respondent's guilt of the alleged conspiracy or some other crime.... The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner... and from searches such as those made for the seizure of counterfeit coins, burglars' tools, *gambling paraphernalia,* and illicit liquor in order to prevent the commission of a crime. (Emphasis added.)[25]

The court's struggle was not confined to the problem of distinguishing prior cases on the merits. It also engaged in substantial judicial gymnastics even to arrive at the main issue. There were two procedural problems—the standing of the defendant to object to the

[22] 40 Wn.2d 840, 246 P.2d 480 (1952).
[23] 285 U.S. 452 (1932).
[24] See Gouled v. United States, 255 U.S. 298 (1921).
[25] 285 U.S. at 465, 466.

search and seizure (since he claimed no ownership interest in the auto) and his failure to present in proper form the assignment of error relating to the trial judge's denial of his motion to suppress evidence. The brief of the state and the court's treatment of these points indicate that the court would have been justified from its previous decisions in refusing to consider the case on the merits.[26]

It is clear that the court changed the rule, in spite of its obvious effort to harmonize the cases. Is the change a good one?

Several reasons support an affirmative answer. First, the rights of suspects must be weighed against the interests of society. It can be contended that by following the traditional rule only the guilty are adversely affected, and the criminal should not be able to gain refuge in the assertion that subsequent revelation disclosed that he was guilty of a crime greater than the one first discovered. On the other side it is urged that to allow such searches is to honor only the form and not the spirit or intent of constitutional provisions that guarantee freedom from oppressive and unreasonable searches and seizures. The latter argument prevailed in *Michaels*. It is a sound argument. These guarantees were meant to protect substantive rights, not merely to proscribe certain police procedures that infringe those rights. If police can invariably find a way to search, the constitutional guarantee against unreasonable searches has effectively disappeared.

A related consideration is the effect of such a decision upon the balance of power between state courts and the U.S. Supreme Court in the area of constitutional freedoms. Recently the Supreme Court has manifested an ever-increasing interest in the rights of citizens before state courts and at the hands of state police officials.[27] In all of these instances the Court has, through the use of the Fourteenth Amendment Due Process Clause, effectively precluded the state courts from formulating and applying their own rules in large areas of judgment.

The state courts undoubtedly desire to avoid reversal by the U.S. Supreme Court, and it is probable that by rendering decisions such as the one in *Michaels* the state courts will preserve their independence. The *Michaels* decision, favoring the rights of the accused over the

[26] Three judges dissented in the Michaels case, one on all three points, one on the search and seizure and methods of raising the objection, and the other on the standing point alone.

[27] Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure exclusionary rule); Rogers v. Richmond, 365 U.S. 534 (1961) (involuntary confessions); Elkins v. United States, 364 U.S. 206 (1960) (use of illegally searched and seized evidence by state officers in federal courts); Gideon v. Wainwright, 83 S.Ct. 792 (1963) (right to counsel).

interests of the state, appears to harmonize with the decisions of the Supreme Court.

Perhaps, then, the court made the "correct" decision. That this type of thinking probably influenced the court is reflected in Judge Finley's opinion. He reluctantly concurred in the result, saying that he favors the abandonment of the exclusionary rule, but noting *Mapp v. Ohio*,[28] he says that because the Supreme Court has foreclosed this area of consideration to the state courts, he is compelled to vote with the majority. He clearly dislikes the judicial straitjacket imposed by the Court, and undoubtedly future considerations of like constitutional questions will be deliberated with an eye toward Washington, D.C.

While no jurisdiction has apparently gone so far as Washington has in *Michaels*, a recent decision from the ninth circuit suggests a similar position. In *Charles v. United States*[29] the court employed the following language, though, on the facts, it affirmed a conviction obtained in the Hawaii district court:

> However, if police action is not justified by or connected with the arrest, such as when a search of the place of arrest is designed to uncover evidence of a crime other than the one upon which the arrest was made, the further intrusion upon privacy cannot be tolerated. When a search has nothing to do with the arrest, it cannot be deemed incident to the accused's apprehension. Divorced from the search, the fact of arrest does not justify impairment of the right to privacy.[30]

In summation, the Washington court, in *State v. Michaels*, has pioneered a new position in the Washington case law of search and seizure, a position that is much more solicitous of the personal civil liberties of the individual citizen. Although the court said that it was adhering to the principle of stare decisis, the effect of *Michaels* is to overturn much previous case law. The result helps to maintain a healthy relationship between the state and federal courts and to preserve individual civil liberties.

It remains to be seen if Washington will adhere to the new position; use it as a starting point for further developments; or retreat from it It is hoped that the virtual dearth of precedents from other jurisdictions will not cause the court to retreat.

HAYES ELDER

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[28] 367 U.S. 643 (1961).
[29] 278 F.2d 386 (9th Cir. 1960). *Cf.* Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961), and McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950).
[30] 278 F.2d at 388.