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Criminal Law—Constitutional Law—Search and Seizure—Admissibility of Evidence Incident to Arrest

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> the legalistic requirements of the law dealing with commercial contracts and wills. It is not inconceivable to me that the law could formulate a slightly different type of contract, at least proof of it, to cover this social problem; in fact, I think it is the duty of the law to recognize and give effect to these arrangements.[9]

The court's decision in the principal case is consistent with its earlier holdings. Beginning in the late 1930's, the court reversed its prior liberal approach to the question of oral contracts to devise.[10] The decision in the principal case has polarized the conflicting viewpoints in the court as to the validity of the present approach.

CRIMINAL LAW

Constitutional Law—Search and Seizure—Admissibility of Evidence Incident to Arrest. Defendant was riding as a guest in a car when Seattle police stopped the car and arrested the driver for twice turning without signaling and for failure to produce a valid driver's license. Defendant and the other passengers in the automobile were also arrested and taken to jail. The car was impounded. A search of the car the next day, accomplished without a search warrant, disclosed two revolvers hidden under the dash. At defendant's subsequent trial on robbery charges, the revolvers were admitted in evidence despite defendant's motion to suppress and objection. The trial court ruled that, although defendant's arrest was unlawful, he had no standing to claim the privilege against unreasonable searches and seizures. On appeal from defendant's conviction, *held:* A search of an impounded car without a warrant, conducted one day after an arrest, is not incident to the arrest, and evidence so obtained is inadmissible in a criminal prosecution of a passenger in the car. *State v. Riggins,* 64 Wn.2d 897, 395 P.2d 85 (1964).

The Washington court, long before the Supreme Court's historic decision in *Mapp v. Ohio,*[1] indicated approval of the federal "exclusionary rule."[2] This rule declares that evidence obtained by an unlawful search

[9] 65 Wash. Dec.2d at 743, 399 P.2d at 608.

[10] See, *e.g.,* Resor v. Schaefer, 193 Wash. 91, 74 P.2d 917 (1937); Payn v. Hoge, 21 Wn.2d 32, 149 P.2d 939 (1944); Jennings v. D'Hooghe, 25 Wn.2d 702, 172 P.2d 189 (1946). As late as 1939, however, a student writer was able to state that "The Washington Court has, heretofore, been liberal in finding a contract to devise when orally made." Comment, 14 WASH. L. REV. 30, 34 (1939). See Shattuck, *Contracts in Washington, 1937-1957,* 34 WASH. L. REV. 24, 503-05 (1959).

[1] 367 U.S. 643 (1961).

[2] See State v. Gunkel, 188 Wash. 528, 63 P.2d 376 (1936), and cases cited therein; Comment, *The Washington Law of Arrest Without Warrant—Incidental Search,* 36 WASH. L. REV. 501, 510-11 (1961).

may be excluded by a defendant's timely motion to suppress.[3] If an arrest is unlawful, any search incident to it is unlawful.[4] If an arrest is lawful, the search must still be incident to the arrest in order to be lawful.[5] Given a lawful arrest, however, the Washington court has been reluctant to conclude that the search was not incident to the arrest.[6] In *State v. Olsen*,[7] the court held that a search of the defendant's car subsequent to the time the defendant was arrested and placed in jail on a charge of negligent driving was incident to the arrest. Weapons and burglary tools discovered during the search were admissible as evidence against the defendant.

In the principal case, the court observed that defendant's arrest was unlawful. It proceeded, however, to deem itself bound by the recent Supreme Court decision in *Preston v. United States*.[8] Without discussing the validity of the arrest involved, the Court in *Preston* laid down the following rule: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."[9] Because the defendant's arrest was unlawful, it would seem that the court could have reached the same result in the principal case without relying upon *Preston*.[10] Apparently, therefore, *Olsen*[11] has been overruled sub silentio, and the court has established new, stricter requirements for *all* searches without warrants. This result seems highly desirable in light of the absence of the rationale for contemporaneous searches when the defendant is safely locked up and his vehicle secured.[12]

As the trial court's decision in the principal case indicates, the Wash-

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[3] Professor Morris has traced the federal exclusionary rule back to Weeks v. United States, 232 U.S. 383 (1914), and Boyd v. United States, 116 U.S. 616 (1886). Morris, *The End of an Experiment in Federalism—a Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 409-15 (1961).

[4] State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948).

[5] State v. Raum, 172 Wash. 680, 21 P.2d 291 (1933).

[6] See, *e.g.*, State v. Deitz, 136 Wash. 228, 239 Pac. 386 (1925), 1 WASH. L. REV. 210 (1926); State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923). In State v. Brooks, 57 Wn.2d 422, 357 P.2d 735 (1960), a search *prior* to arrest was held incidental thereto.

[7] 43 Wn.2d 726, 263 P.2d 824 (1953).

[8] 376 U.S. 364 (1964). The defendant was arrested for vagrancy while seated with two companions in a parked car. The car was impounded, and a subsequent search without a warrant disclosed evidence which was used to convict the defendant and others of conspiracy to rob a bank.

[9] *Id.* at 367.

[10] See State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948).

[11] State v. Olsen, 43 Wn.2d 726, 263 P.2d 824 (1953). See text accompanying note 7 *supra*.

[12] In *Preston*, the Court pointed out that the justification for contemporaneous searches without warrants is to seize weapons which might be used to assault an officer or effect an escape and to prevent destruction of evidence. Preston v. United States, 376 U.S. 364, 367 (1964).

ington court had previously limited full application of the exclusionary rule by the requirement that the defendant must have some possessive rights in the articles seized, or in the site of their seizure, in order to object to their introduction. In *State v. Much*,[13] the defendant had no standing to move to suppress where "no ownership with possessive rights" to any of the articles seized was averred. In *State v. Vennir*,[14] a motion to suppress was denied where the defendant claimed no ownership of liquor seized or of the automobile in which it was found. Although a similar requirement of standing has been reiterated in subsequent cases,[15] it was eased somewhat in *State v. Michaels*.[16] The defendant in *Michaels*, apparently only a bailee of the car searched, had standing to move to suppress evidence seized from it.

In the principal case, the trial court seems to have relied on the cases prior to *Michaels* which clearly required possessive rights.[17] Because the Washington court did not discuss the issue of standing, these earlier cases may have been overruled sub silentio. The United States Supreme Court held in *Jones v. United States*[18] that anyone legitimately on premises where a search occurs may challenge its legality when its fruits are proposed to be used against him. In *Preston*, however, standing was not discussed even though the defendant did not own the car or claim the articles seized. The failure of the Washington court to discuss standing in the principal case suggests that *Michaels* must now be interpreted as strictly in accord with *Jones*.

The *Jones* rule was based upon interpretation of a federal procedural rule,[19] and it may not be applicable in Washington without some further explanation.[20] Assuming that the *Jones* rule does apply in Washington,

[13] 156 Wash. 403, 287 Pac. 57 (1930).
[14] 159 Wash. 58, 291 Pac. 1098 (1930).
[15] See State v. Wooten, 44 Wn.2d 177, 266 P.2d 342 (1954); State v. Funk, 170 Wash. 560, 17 P.2d 11 (1932).
[16] 60 Wn.2d 638, 374 P.2d 989 (1962), 38 WASH. L. REV. 320 (1963).
[17] See Brief for Respondent, pp. 4, 9-11, State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962).
[18] 362 U.S. 257 (1960).
[19] FED. R. CRIM. P. 41(e).
[20] See Weeks, *Standing to Object in the Field of Search and Seizure*, 6 ARIZ. L. REV. 65, 72 (1964), where Jones v. United States, 362 U.S. 257 (1960), is interpreted as relying on FED. R. CRIM P. 41(e) to establish, rather than to limit, the requirement of standing. Indeed the author indicates, *id.* at 77, that the state courts are now restricted to the alternatives of following the relatively lenient requirements of *Jones* or rejecting the standing requirement entirely. This would indicate that the *Jones* decision is incorporated in the fourth amendment as a *maximum* standing requirement, a view finding some support in Ker v. California, 374 U.S. 23, 34 (1963), where it was stated: "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures . . . 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.* See Jones v. United States, 362 U.S. 257 (1960)." (Emphasis added.)

a person unlawfully on premises where a search occurs can not complain if evidence obtained during the search is used against him. Anyone else is, and should be, protected from unlawful official invasion of privacy.

Jurisdiction—Habeas Corpus—State Jurisdiction Over Constitutional Questions Pending in Federal Court. In July, 1960, petitioner Don Anthony White was convicted of murder in the first degree and sentenced to death. The Washington Supreme Court affirmed the conviction,[1] and certiorari was denied by the United States Supreme Court.[2] In February 1964, the Washington court denied petitioner's application for writ of habeas corpus.[3] Petitioner then applied for writ of habeas corpus in the federal district court. This petition raised a new issue based on facts asserted to have come to the attention of petitioner's counsel subsequent to the denial of the application by the Washington court.[4] Respondent penitentiary superintendant maintained that petitioner had failed to exhaust his state remedies in regard to this issue pursuant to 28 U.S.C. section 2254.[5] The district court ordered that the cause be held in abeyance subject to petitioner's submission of a new application to the state supreme court. Upon petitioner's application to the Washington Supreme Court for writ of habeas

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[1] State v. White, 60 Wn.2d 551, 374 P.2d 942 (1962).

[2] White v. Washington, 375 U.S. 883 (1963).

[3] *In re* White v. Rhay, 64 Wn.2d 15, 390 P.2d 535 (1964).

[4] The petition, as quoted in Judge Finley's opinion, read in part as follows:

"4. Petitioner was held in police custody, and questioned over a period of eleven days before he was provided with counsel; and because of his weakened mental and physical condition during such custody, without counsel, and without having had a hearing before a magistrate, the entire circumstance of the police procedure was intimidating and coercive.

. . . .

VII. Petitioner was denied due process and the guarantees of the Sixth Amendment to the Constitution of the United States because he was not provided counsel when needed, and because his physical and mental condition was so debilitated and diseased that he could not intelligently or competently waive the right to counsel, about which he was not informed and which the record discloses, he knew nothing about. The admission and confessions of petitioner, made without advice of counsel, and introduced at trial, violated petitioner's Sixth Amendment rights.

1. The record discloses that petitioner was at no time advised that he did not have to give a statement or to submit to interrogation, and there are no facts from which any inference can be drawn that petitioner knew or understood that he had a right to remain silent." 65 Wash. Dec.2d at 714, 399 P.2d at 537.

[5] 28 U.S.C. § 2254 (1958), provides in part: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." In Duffy v. Wells, 201 F.2d 503, 504 (9th Cir. 1952), it was stated: "Section 2254 does not *deny jurisdiction* where the state remedies have not been exhausted. That section provides only that the application shall not be 'granted' unless it appears that the state remedies have been exhausted. . . ." (Emphasis added.)