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# Recent Case: Criminal Law - Search and Seizure - Warrantless Search Incident to Valid Arrest [*United States v. Robbins*, 424 F.2d 57 (6th Cir. 1970); *Faubion v. United States*, 424 F. 437 (10th Cir. 1970)]

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## CRIMINAL LAW — SEARCH AND SEIZURE — WARRANTLESS SEARCH INCIDENT TO VALID ARREST

*United States v. Robbins*,
424 F.2d 57 (6th Cir. 1970);
*Faubion v. United States*,
424 F.2d 437 (10th Cir. 1970).

In *United States v. Robbins*[1] and *Faubion v. United States*[2] two courts of appeals recently examined the scope of a warrantless search incident to a lawful arrest. In *Robbins*, the appellant and three companions aroused the suspicion of a motel manager by using a stolen credit card. The manager summoned the police who entered the defendants' rooms with a passkey when permissive entry was refused. The police arrested the defendants and searched their rooms. The search included their suitcases, which contained pistols and other items. The defendants and their possessions were taken to the police station where a second search of one of the suitcases produced counterfeit $20 bills, stuffed inside a glove. The appellant was tried and convicted for the possession of counterfeit money. The district court found that the officers had probable cause to make the warrantless arrests and that the search of the motel rooms was legitimate. Surprisingly, the issue of the validity of the second search was not raised at the trial. The Court of Appeals for the Sixth Circuit, one judge dissenting, affirmed the district court's findings and, in addition, found that the second search of the suitcase in the police station was lawful.[3]

In *Faubion*, the defendant had been arrested in Oklahoma on the basis of a warrant held by Arkansas authorities charging him and his wife with offenses unrelated to the present controversy.[4] Faubion and his wife waived extradition and accompanied the Arkansas authorities back to Arkansas. During the trip Faubion started to make a statement. The Arkansas authorities contended that they stopped him and apprised him of his rights, but Faubion professed that he was not warned before making his full statement.

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1 424 F.2d 57 (6th Cir. 1970).

2 424 F.2d 437 (10th Cir. 1970).

3 The court of appeals specifically asked both parties to brief this question. 424 F.2d at 58.

4 Because the court reversed the lower court's ruling on the search and seizure issue, it did not have to deal with the legality of the arrest. It concluded, however, that it was probably a valid arrest. *See* Reed v. United States, 364 F.2d 630 (9th Cir. 1966), *cert. denied*, 386 U.S. 918 (1967), *construing* OKLA. STAT. ANN. tit. 22, § 196 (1969).

Regardless, he told them there were two handguns, belonging to a friend, in his luggage. When the Faubions arrived in Arkansas, they were booked, their luggage was opened, and two guns were found. Subsequently, Faubion was convicted of interstate transportation of stolen firearms.[5] The Court of Appeals for the Tenth Circuit, one judge dissenting, reversed the district court decision, holding that the guns should have been excluded from evidence because the warrantless search was not incident to the arrest, and that Faubion did not consent to the search when he disclosed the presence of weapons in his luggage.

The law surrounding the permissible scope of a warrantless search incident to a valid arrest has varied tremendously during the past 25 years. In 1947, the United States Supreme Court in *Harris v. United States*[6] upheld a warrantless search of a four-room apartment. One year later, in *Trupiano v. United States*,[7] the Court stated that law enforcement agents must secure and use search warrants wherever "reasonably practicable."[8] Then in 1950, in *United States v. Rabinowitz*,[9] the Court rejected the *Trupiano* rule, holding that a warrantless search of an entire room was reasonable because it only extended to an area under the possession and control of the person arrested.[10] The *Rabinowitz* standard of possession and control was utilized by the Court in *Preston v. United States*,[11] where burglary tools obtained in a warrantless search of defendant's car, the search being removed in time and place from the arrest for vagrancy, were held inadmissible as evidence because the car was no longer in the possession or control of the person arrested.[12] On June 23, 1969, the

[5] Federal Firearms Act § 2(g), ch. 850, § 2(g), 52 Stat. 1251 (1938). The Federal Firearms Act was later repealed and replaced by portions of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-81 (Supp. IV, 1969).

[6] 331 U.S. 145 (1947).

[7] 334 U.S. 699 (1948).

[8] *Id.* at 705.

[9] 339 U.S. 56 (1950).

[10] There were many critical commentaries concerning the confusion which followed *Rabinowitz*. *See, e.g.*, J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 87-117 (1966); Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969).

[11] 376 U.S. 364 (1964).

[12] *But see* Cooper v. California, 386 U.S. 58 (1967), where the Court upheld the warrantless search of a car during which heroin was found in the glove compartment. The car had been impounded "as evidence" pursuant to a California statute which provided for the seizure and forfeiture of vehicles used in violation of the narcotics laws. The search occurred 1 week after the defendant was arrested for selling heroin to a police informer. *Cooper* is based in part on the *Rabinowitz* rationale which emphasized the reasonableness of the search as opposed to whether it was reasonable to procure a search warrant. *Rabinowitz* was overruled by Chimel v. California, 395 U.S.

Supreme Court overruled *Harris* and *Rabinowitz* in *Chimel v. California*.[13] The new *Chimel* rule states that a warrantless search incident to a valid arrest can extend only to an area in the immediate vicinity of the person arrested, where a weapon might be obtained or where the arrested person might be able to destroy evidence.

The court in *Faubion* held the warrantless search invalid without employing the *Chimel* decision.[14] It reasoned that the search was not incident to a valid arrest because it was not contemporaneous in time and place with the arrest.[15] In addition, the court held that Faubion did not consent to the search because he did not employ the traditional language conveying voluntary accession to the invasion. The substance of Faubion's statement was probable cause to sustain an affidavit for a search warrant, but it did not bring the search within the permissible scope of the fourth amendment.

The main argument of the dissenting opinion in *Faubion*, summarily dismissed by the majority, was that a search was not involved. The dissent pointed out that in order to constitute a search there must be the element of intent. The police in this case were merely conducting an inventory procedure and had no intention of discovering any evidence to be used in prosecuting the crime charged.

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752 (1969). Therefore, in the future, *Cooper* will only be good authority in those cases where, under a statute, an automobile is deemed to be an instrumentality of the crime. *See* Chambers v. Maroney, 399 U.S. 42, 49 n.7 (1970).

[13] 395 U.S. 752 (1969).

[14] Since the search in *Faubion* took place prior to the date of the *Chimel* decision, June 23, 1969, the *Faubion* court did not consider *Chimel* applicable. On the other hand, both the majority and dissent in *Robbins* cite *Chimel* as applicable, although the *Robbins* opinion does not indicate when the searches of the suitcase took place. In the Sixth Circuit, however, *Preston* had been recognized as a prelude to a *Chimel* rule in Colosimo v. Perini, 415 F.2d 804 (6th Cir. 1969), *vacated and remanded on other grounds*, 399 U.S. 519 (1970). The Supreme Court has not passed on the retroactive application of *Chimel*. Shipley v. California, 395 U.S. 818 (1969); Von Cleef v. New Jersey, 395 U.S. 814 (1969). It may, however, do so in the near future. *See* Williams v. United States, 418 F.2d 159 (9th Cir. 1969), *cert. granted*, 397 U.S. 986 (1970). (No. 1125, 1969 Term; renumbered No. 81, 1970 Term).

[15] *Accord*, Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Preston v. United States, 376 U.S. 364, 367 (1964).

Cases both before and after *Chimel* have recognized that in certain exigent circumstances a valid warrantless search not incident to an arrest may be made. One example is the "automobile cases" where, because of the mobile nature of the automobile, the Court has allowed a warrantless search of the vehicle before it can be removed from the jurisdiction in which the warrant must be sought. Even in these cases, however, the arresting officer must have probable cause to believe that incriminating evidence will be found in the automobile. *See* Chambers v. Maroney, 399 U.S. 42 (1970); Brinegar v. United States, 338 U.S. 106 (1949); Carroll v. United States, 267 U.S. 132 (1923). Other examples are hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967), and consent, Zap v. United States, 328 U.S. 624 (1946).

Thus, the dissent concluded that the police action did not constitute a search, much less an illegal search.[16]

The *Robbins* court found both the original search and the second search of the suitcase at the police station consistent with the *Chimel* rule. The first search of the immediate premises was validated since the officers had probable cause to believe there were concealed weapons. The second search was validated as a continuation of the first. Because local police practice required the arrested persons to be brought into the police station and allowed to make a phone call within 1 hour of the arrest, the court considered the arrest, the gathering of personal effects, the transportation to the station, and the search at the station all parts of the continuous first search.

The court also upheld the second search on the separate ground that it was the duty of the officers to make an inventory of the contents of the suitcase, but it did not cite any authority on this point. Police inventories of an arrested person's personal effects are conducted in order to protect his belongings while he is in police custody. They do not constitute a search and seizure provided that all intent to search for specific evidence is lacking. If incriminating articles are found during a legal inventory they can be admissible as evidence at trial.[17] *Robbins* demonstrates that inventory procedures are subject to abuse. How could the second search be both a continuation of a search and an inventory involving no specific intent to search? And, as the *Robbins* dissent pointed out, "it is questionable whether examining a glove for its contents can be considered a legitimate aspect of an inventory procedure."[18]

In addition, the dissent in *Robbins* pointed out that the first search of the suitcase was invalid according to the rules of *Preston* and *Chimel*, because the defendants were in no position to destroy evidence or endanger the safety of the officers; they were in handcuffs before the search began. Since the first search was invalid, a continuation of it could hardly be upheld. Furthermore, regardless of the validity of the first search, the second search was not incident to the arrest because it was not contemporaneous in time or place

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[16] It seems obvious, however, that having been told there were guns in the suitcase, the police were searching for the guns, not merely making an inventory.

[17] *See* United States v. Blackburn, 389 F.2d 93, 95 (6th Cir. 1968); Cotton v. United States, 371 F.2d 385, 392-93 (9th Cir. 1967); Baskerville v. United States, 227 F.2d 454, 456 (10th Cir. 1955); People v. Hambrick, 98 Ill. App. 2d 481, 240 N.E.2d 696 (1968). *See also*, State v. Dempsey, 22 Ohio St. 2d 214, 259 N.E.2d 745 (1970), where the inventory procedure received judicial approval although defendant's conviction was reversed on other grounds.

[18] 424 F.2d at 60.

with the arrest.[19] The *Chimel* rule recognizes that warrantless searches incident to valid arrests are not desirable and should only be permitted when absolutely necessary to protect the arresting officers or the evidence. Thus, there is no justification for a warrantless search removed in time or place from the arrest, even if it is a continuation of a valid search.

The *Faubion* decision is consistent with past decisions which state that the authority of a magistrate is necessary to search in all but extreme cases.[20] *Faubion* should not be considered a roadblock to efficient law enforcement. The police had enough evidence to obtain a warrant and there was no danger of the suitcase being taken away before the warrant could be obtained. If they had not had enough evidence to get a warrant, they would have had no probable cause to search the suitcase, making such a search a clear fourth amendment violation. Even though the *Faubion* court was not bound by *Chimel*, it realized that strict adherence to the spirit of *Chimel* will place no restrictions on police apart from the clear proscriptions of the fourth amendment.

The *Robbins* decision, on the other hand, indicates two existing problems in the area of a warrantless search incident to a valid arrest. First, there is the danger of courts simply disregarding the *Chimel* rule, probably because they think it unreasonably hampers law enforcement. The Supreme Court can do little about this problem except through reversals. Second, there is the danger that courts will circumvent *Chimel* by upholding illegal searches as valid inventories. Inventories are obviously necessary, and the police cannot be expected to disregard incriminating evidence found during inventories. But it will often be impossible to determine whether the officer involved had an intent to search for the evidence found during an inventory. Thus, the Court will have to sharply define the limits of a legal inventory to protect arrested persons from indiscriminate searches of their personal possessions.

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[19] *See* cases cited note 15 *supra.*

[20] *See, e.g.*, Preston v. United States, 376 U.S. 364 (1964); Brett v. United States, 412 F.2d 401 (5th Cir. 1969); United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969).