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NOTES

California Supreme Court Creates a New Exception to the Search Warrant Requirement: *People v. Sirhan*

On the morning of June 5, 1968, Sirhan Sirhan's brothers, Adel and Munir, went to the police station after seeing a newspaper picture of Sirhan in connection with the shooting of Senator Robert Kennedy. Adel was interviewed by an officer who knew that the Senator had been shot earlier that same morning. The officer also knew that a suspect was in custody, and apparently knew that the suspect's identity had not been revealed. Adel advised the officer of Sirhan's identity and stated that the brothers lived with their mother. The officer asked if a search of the home could be made. Adel acknowledged that it was his mother's house, but, as far as he was concerned, they could.¹ Fearing a possible conspiracy, the officer and two others then went with Adel to the Sirhan residence without a warrant. The ensuing search of Sirhan's bedroom produced incriminating evidence.² At Sirhan's trial, the defense objected to introduction of this evidence on the ground that there was no probable cause to support the search and, therefore, the search was unlawful. The objection was overruled and Sirhan was convicted. An automatic appeal to the Supreme Court of California followed. *Held, affirmed*: Although police officers do not have reasonable cause to believe that a house contains evidence of a conspiracy to assassinate prominent political leaders, the mere possibility that there might be such evidence fully justifies a warrantless search of the house.³ *People v. Sirhan*, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

I. THE FOURTH AMENDMENT: SEARCH WARRANT REQUIREMENT

The fourth amendment to the United States Constitution contains two clauses.⁴ The first clause affords protection from unreasonable searches and seizures. The second clause, enumerating the conditions precedent to the issuance of a warrant, clearly governs the validity of a search made pursuant to a warrant. The evidence produced by an invalid search is inadmissible at trial.⁵ However, it is not clear from the language of the amendment alone

¹ The trial court upheld the search on a finding of consent. On appeal the California Supreme Court did not reach the question of consent in upholding the search.

² The officers found an envelope bearing the notation "RFK must be disposed of like his brother was." A notebook was found containing "a prediction of America's downfall, an attack upon its leaders, and comments relating to 'doing away' with those leaders." A second notebook was discovered which contained notations such as "RFK must be assassinated" and "Ambassador Goldberg must die." *People v. Sirhan*, 7 Cal. 3d 710, 736, 497 P.2d 1121, 1138, 102 Cal. Rptr. 385, 402 (1972).

³ The lengthy opinion involves many alleged grounds for reversal. This discussion is confined solely to the fourth amendment question raised by the warrantless search of Sirhan Sirhan's bedroom.

⁴ U.S. CONST. amend. IV requires that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

⁵ *Mapp v. Ohio*, 367 U.S. 643 (1961). All fourth amendment standards, including the "exclusionary rule," which requires that evidence produced in an invalid search be excluded from trial, are applied to the states. *Ker v. California*, 374 U.S. 23 (1963).

whether a warrant is required for a valid search. There has been support for the position that the two clauses should be read separately and that searches should be governed solely by a standard of reasonableness, whether or not based upon a warrant.⁶ The Supreme Court has not followed this view,⁷ but has instead interpreted the fourth amendment as requiring that a search warrant be obtained whenever practical.⁸ Repeatedly, the Court has held that the two clauses are complementary and must be read together.⁹ The result has been that searches conducted without prior authorization by warrant are presumptively unreasonable.¹⁰

The basic aim of the warrant requirement is to protect persons against indiscriminate police actions. This is accomplished by placing a "neutral and detached magistrate"¹¹ between the police and the people. The magistrate has the responsibility of objectively determining the existence of probable cause to search. He must base his decision on specific facts; suspicion is not equivalent to probable cause and will not satisfy the mandate of the Constitution.¹² The probable cause standard demands substantial evidence that the items sought are connected with criminal activity and that the items will be found in the place searched.¹³

II. THE EXCEPTIONS: EXIGENT CIRCUMSTANCES

Although there has long been a preference for search warrants, the Court has recognized that the requirement must not be inflexible. As a practical matter, crime prevention would be thwarted if police were obligated to obtain a warrant before searching in every instance. Thus, certain specific exceptions have eroded the requirement where exigent circumstances make it impractical to procure prior authorization for the search. Early Supreme Court dicta indicated that a warrant was unnecessary for the search of a person at the time of his lawful arrest.¹⁴ This exception has been allowed for the reason that,

⁶ *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947). In *Rabinowitz* the Court stated that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." 339 U.S. at 66.

⁷ The *Harris* and *Rabinowitz* decisions came under a great deal of criticism, and were overruled in *Chimel v. California*, 395 U.S. 752 (1969).

⁸ *Terry v. Ohio*, 392 U.S. 1 (1968), held that where police make a "stop" it would not be practical to require a warrant for a "frisk" of the suspect.

⁹ See, e.g., *Katz v. United States*, 389 U.S. 347 (1967); *Stoner v. California*, 376 U.S. 483 (1964); *Jones v. United States*, 357 U.S. 493 (1958); *McDonald v. United States*, 335 U.S. 451 (1948). In *Agnello v. United States*, 269 U.S. 20, 33 (1925), a case involving the warrantless search of a house, the Court stated that "[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant."

¹⁰ "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

¹¹ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹² *Henry v. United States*, 361 U.S. 98, 101 (1959); *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

¹³ See Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

¹⁴ "It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested

given probable cause for the arrest, there is also cause to search the arrestee for destructible evidence and for dangerous weapons which might be used against police. The exception has since become deeply embedded in criminal procedural law.¹⁵

Closely related to a search incident to arrest is a search carried on while in "hot pursuit" of a suspect. In *Warden v. Hayden*¹⁶ police, without a warrant, followed a suspect into his home only five minutes after he had entered it. They began a search which produced evidence used in the suspect's conviction. The Supreme Court upheld the search, again reasoning that an exigent circumstance was presented in which a police officer's life might be endangered or evidence of the crime destroyed.

Given a valid initial intrusion, the "plain view" exception¹⁷ allows police to seize evidence which is open to view and which is discovered inadvertently.¹⁸ The Court has reasoned that once police have lawfully intruded into a private area, it is no greater intrusion to allow them to seize evidence found in plain view.¹⁹ This exception is also based upon probable cause. Before it can be applied, the initial intrusion must have been founded upon a warrant (which must be supported by probable cause), or upon a warrant exception such as lawful arrest or hot pursuit (in which cases there is also probable cause to search²⁰).

The Supreme Court has sanctioned exceptions to the warrant requirement generally whenever there is probable cause to believe that evidence of a crime is about to be destroyed or made inaccessible to police.²¹ Connected with these exceptions are automobile searches, which have given rise to yet another set of exigent circumstances.²² Since the vehicle could be quickly moved out of the locality or jurisdiction in which the warrant must be sought, the time necessary to procure a warrant would obviously make that course impractical. Thus, given probable cause,²³ police may make a warrantless search of auto-

to discover and seize the fruits or evidence of crime." *Weeks v. United States*, 232 U.S. 383, 392 (1914).

¹⁵ See, e.g., *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Marron v. United States*, 275 U.S. 192 (1927).

The scope of the search incident to a lawful arrest has been extended from the arrestee's person to the surrounding area from which he might seize destructible evidence or weapons. *Chimel v. California*, 395 U.S. 752 (1969).

¹⁶ 387 U.S. 294 (1967).

¹⁷ A complete explanation of the "plain view" doctrine may be found in *Coolidge v. New Hampshire*, 403 U.S. 443, 465-72 (1971).

¹⁸ Inadvertence is required to prevent the "plain view" exception from authorizing a general exploratory search. To allow police to seize evidence which they know in advance will be found in plain view "would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." *Id.* at 471.

¹⁹ *Id.* at 467.

²⁰ *Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294 (1967).

²¹ See, e.g., *Vale v. Louisiana*, 399 U.S. 30 (1970) (warrantless search held invalid where there was no reason to believe that narcotics were about to be destroyed by the petitioner's relatives); *Schmerber v. California*, 384 U.S. 757 (1966) (warrantless taking of blood sample from petitioner accused of driving while intoxicated held valid due to rapid dissipation of alcoholic content).

²² See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925).

²³ "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Carroll v. United States*, 267 U.S. 132, 154 (1925).

mobiles in most instances.²⁴

The above exceptions have a very important common characteristic in that each requires probable cause.²⁵ An exception to the warrant requirement applies only to the need for prior judicial authorization and not to the necessary element of probable cause to search. This important distinction was enunciated in *Chambers v. Maroney*:

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.²⁶

More simply stated, a legal search may be authorized in one of two ways: (1) with a search warrant that has been based upon probable cause; or (2) under exigent circumstances coupled with probable cause.²⁷ There is even considerable authority for the proposition that, to encourage use of the warrant, the standard for probable cause justifying warrantless searches should be more stringent than the standard justifying the judicial issuance of the warrant.²⁸

III. PEOPLE V. SIRHAN

At the trial, one of the officers who searched Sirhan's bedroom testified that there was nothing which "indicated [defendant] was engaged in any conspiracy" and that the officers had no prior knowledge of any evidence of conspiracy.²⁹ It is doubtful whether under the facts of this case any court could have found sufficient probable cause to support a search warrant. However, this court considered the existence of probable cause to be irrelevant. The court stated simply that the "officers did not have reasonable cause to believe that the house contained evidence of a conspiracy."³⁰ Although the standard of probable cause was not met, the search was upheld.

The court cited several United States Supreme Court cases involving the

²⁴ However, the opportunity for search must be truly fleeting. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the police had known of the involvement of the car for over two weeks before the search and had had ample opportunity to obtain a search warrant. There were, therefore, no exigent circumstances and the search was invalid.

²⁵ See notes 20, 23 *supra*, and accompanying text. Consent to search is also an exception to the warrant requirement. It is deemed a waiver of the need to show probable cause. *Stoner v. California*, 376 U.S. 483 (1964). See also *Zap v. United States*, 328 U.S. 624 (1946).

²⁶ 399 U.S. 42, 51 (1970).

²⁷ However, in *Terry v. Ohio*, 392 U.S. 1 (1968) the Court did allow a very limited warrantless search of a suspect's outer garments where there was no showing of the usual standard of probable cause. The Court reasoned that the intrusion was so slight and the danger to police so great that only a lesser showing of probable cause is needed. The "frisk" was allowed where the officer "stopped" the suspect upon observing suspicious activity. The opinion made it clear that any further search or detention of the suspect would have required the higher standard of probable cause. This lesser standard of probable cause has not been extended beyond the "stop and frisk" situation.

²⁸ *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969).

²⁹ 7 Cal. 3d at 735, 497 P.2d at 1138, 102 Cal. Rptr. at 402.

³⁰ *Id.* at 739, 497 P.2d at 1140, 102 Cal. Rptr. at 404.

search of dwellings as providing authority for its decision.³¹ However, none of the cases cited lend support to the proposition that a search may be justified upon an exigent circumstance without a sufficient showing of probable cause. In all but two of the cited cases, the Supreme Court found that there were no exigent circumstances and held the searches invalid without deciding whether probable cause existed. Although these cases illustrate that an exigent circumstance may supersede the necessity of securing a search warrant, they do not hold that probable cause is unnecessary. In the remaining two cases, *Chimel v. California*³² and *Warden v. Hayden*,³³ there were exigent circumstances, but there was also probable cause to search. The former involved a search incident to a lawful arrest, and the latter involved hot pursuit. In *Warden v. Hayden* the Supreme Court, after holding that the lack of a search warrant was excused by the exigent circumstance, stated that "the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment."³⁴ This language further emphasizes the requirement, apparently overlooked by the California court, that even in a situation involving exigent circumstances, the standard of probable cause must be met.

The California court stated that it was reasonable to believe that there might have been a conspiracy, that the crime was of enormous gravity and involved more than possibly idle threats, and that, therefore, the "mere possibility" of evidence of a conspiracy fully warranted the officers' actions.³⁵ Conceding that these factors did combine to create an exigent situation where fast action would be necessary, only one-half of the requirement for a valid search was met. By the court's own admission, probable cause did not exist. In effect, the court held that the "mere possibility" of evidence helped to create the exigent circumstance and the same "mere possibility" gave sufficient cause to justify the search. The California Supreme Court has not only recognized a new set of exigent circumstances creating an exception to the warrant requirement, but has also introduced into the exception a new standard of cause to justify the search. "Mere possibility" has been substituted by the California court for probability.³⁶

³¹ The cases cited are: *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Vale v. Louisiana*, 399 U.S. 30 (1969); *Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294 (1967); *United States v. Jeffers*, 342 U.S. 48 (1951); *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948).

In its opinion the court also cited for authority two California cases involving the search of dwellings, *People v. Roberts*, 47 Cal. 2d 374, 303 P.2d 721 (1956) and *People v. Superior Court (Peebles)*, 6 Cal. App. 3d 379, 85 Cal. Rptr. 803 (1970). However, neither of these cases held that probable cause was not present or that it was unnecessary for the warrantless search. In *People v. Roberts* police entered an apartment upon hearing sounds of distress and found incriminating evidence in plain view. In *People v. Superior Court* the police had information that materials for making bombs were in the apartment; hot pursuit was also involved. In a third case cited by the court, *People v. Gomez*, 229 Cal. App. 2d 781, 40 Cal. Rptr. 616 (1964), officers searched the pockets of an unconscious man having convulsions to discover what was wrong with him. Here again it was not held that probable cause was unnecessary. However, it could be argued that in light of *Terry v. Ohio* the normal standard of probable cause was not necessary due to the limited intrusion. See note 27 *supra*.

³² 395 U.S. 752 (1969).

³³ 387 U.S. 294 (1967).

³⁴ *Id.*

³⁵ 7 Cal. 3d at 739, 497 P.2d at 1140, 102 Cal. Rptr. at 404.

³⁶ In *Brinegar v. United States*, 338 U.S. 160, 175 (1949), the Supreme Court stated