The Search Incident to Arrest - Texas Style

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question of jury trial depends on the nature of these "causes of action" within a Federal Rules-based claim. Under this interpretation, the answer to the issue in *Ross* is a simple one: since the derivative action is not the type of "mixed action" in question in *Beacon Theatres* and *Dairy Queen*, but is, rather, what it has always been, after the Federal Rules as before, a single "cause of action" in equity, it does not fall within the class of cases envisioned by *Beacon Theatres* and *Dairy Queen*.

IV. Conclusion

The general direction of recent seventh amendment developments, as indicated by the *Beacon Theatres-Dairy Queen* line of cases, favors the majority in *Ross*. The Enabling Act, history, and an apparently sounder reading of the holdings of *Beacon Theatres* and *Dairy Queen* favor the dissent. Perhaps the seventh amendment is chiefly a policy statement at this remote date, its nature irrevocably changed by the adoption of the Federal Rules. If so, the majority in *Ross* is correct. With respect to precedent, however, the dissent's is the better argument.

It is possible that the emerging jury-right test will be the inverse of the historical one; the party opposing the jury right will have to show that historically there was some sort of right to be free of a jury in a particular type of non-common-law action. Whatever its ramifications on the scope of equity jurisdiction and the reach of the seventh amendment, for the time being *Ross v. Bernhard* is representative of a definite trend to expand the right to jury trial in civil actions.

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Thomas Johnson and Gerald Lamb, asleep in Johnson's car, were awakened by three men, one of whom was the defendant, Thornton. Johnson's billfold and Lamb's wristwatch were taken from them at gunpoint; they were then ordered to get into the trunk of Johnson's car. Their three assailants then drove through the city for some ten hours, Johnson and Lamb remaining captive in the trunk. During at least one of the stops, Johnson, who was able to see through his car's broken tail light, watched the three men confer with a fourth who had been following them in a pick-up truck. Later, Johnson was able to get the license number of the truck. After the car was abandoned, Lamb and Johnson pried open the trunk and called the police. Shortly thereafter, a truck fitting the description the robbery victims had given to the police was stopped in south Dallas. The driver told detectives that the suspects could be found in an apartment a few blocks away. Officers converged on the apartment, knocked, and were allowed to enter. The occupants, eight men and one woman, were all ar-

rested. A thorough search, extending to every room of the apartment, was then conducted. Weapons and stolen property found in the search of the toilet, closets, and dresser were admitted over objection, and Thornton was convicted. *Held, affirmed*: A warrantless search of an apartment for weapons is justified when incident to a lawful arrest. *Thornton v. State*, 451 S.W.2d 898 (Tex. Crim. App. 1970).

I. The Indefinite Road to Chimel

The most far-reaching exception to the general requirement that nonconsent searches be supported by a warrant is that of the search incident to a lawful arrest.[1] Apparently the first of the judicially recognized exceptions to the warrant requirement,[2] "it was this exception . . . which . . . almost swallowed up the rule."[3]

The problem has not been whether the exception was necessary. A search of the person has implicitly been a part of practical arrest procedure since the days of "hue and cry."[4] Nor has the problem been one of application. The exception is applicable so long as the arrest is lawful.[5] Instead, the problem has been one of scope: To determine how far the search incident to arrest may lawfully extend beyond the person of the arrestee. The history of this question is not easily summarized.[6] Until quite recently, court decisions defining the permissible scope of such a search were less than clear.[7]

In the 1925 case of *Carroll v. United States* the United States Supreme Court held that the legal arrest of a man carried with it the right to search for and seize "whatever is found upon his person or in his control."[8] This standard of "person and control" was not defined in *Carroll*. Nevertheless, the holding in *Agnello v. United States* soon made clear the fact that "person and control" could be construed to mean "place of arrest."[9] Some twenty-two years later, in *Harris v. United States*,[10] "place" was construed to mean every room of an apartment, although the arrest, by logical necessity, could take place only in a more confined area.

About a year after *Harris*, a new element was added to the expanded

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[1] Note, *Searches of the Person Incident to Lawful Arrest*, 69 Colum. L. Rev. 866 (1969).

[2] Approval of a warrantless search so long as incident to a lawful arrest was first announced by the United States Supreme Court as dictum in Weeks v. United States, 232 U.S. 383, 392 (1914).

[3] L. Hall, Y. Kasimar, W. La Fave, J. Israel, Basic Criminal Procedure 213 (1969). "There is little doubt that more searches are made under this authority than by any other." J. Klotter, Constitutional Law for the Police 114 (1968).

[4] "Such searches and seizures naturally and usually appertain and attend such arrests." Trupiano v. United States, 334 U.S. 699, 714 (1948). For a more extensive historical treatment of the subject, see Cardozo, J., in People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923).

[5] The right to search the person without a search warrant has traditionally depended only upon the lawfulness of the accompanying arrest. *See* note 2 *supra*.

[6] Scott v. State, 7 Md. App. 505, 256 A.2d 384 (1969). For a graphic synopsis of the Supreme Court's decisions in search and seizure cases, 1914-1938, see Frankfurter, J., dissenting, in Harris v. United States, 331 U.S. 145, 175-81 (1947).

[7] J. Israel, Y. Kasimar, Criminal Law and the Court 163 (1962).

[8] 267 U.S. 132, 158 (1925).

[9] 269 U.S. 20, 30 (1925).

[10] 331 U.S. 145 (1947). Although the defendant was arrested for forgery in his living room, he was convicted of violation of a selective service law as a result of evidence discovered in the search of a desk in an adjoining room.

"person and control" standard. In *Trupiano v. United States* the Court announced that "something more in the way of necessity than merely a lawful arrest"[11] was required to sustain a full scale search absent a warrant. This new element was "time" and, essentially, it demanded a warrant for *any* search of the place of arrest when there was clearly an opportunity to secure one. Thus, a warrantless search of an arrestee's home or office required both that the arrest be legal and that the chance to get a warrant be lacking.[12] But *Trupiano* was unsuccessful in its attempt to check the broad rule which had evolved from *Carroll* and its progeny. When the problem of "time" was considered in conjunction with the problem of fixing the scope of the search incident to arrest, the criteria became hopelessly confusing.[13] Apparently for this reason, *Trupiano* was short-lived.

Two years later, in *United States v. Rabinowitz*, the Supreme Court, citing *Harris* with approval, held that arresting officers could search for and seize evidence gathered from the "place where the arrest is made."[14] *Trupiano* was explicitly laid to rest with the announcement that the practicality of getting a search warrant was not controlling in the situation of the search incident to a lawful arrest. The new test found its justification in the very words of the fourth amendment: "[T]he right . . . to be secure . . . against unreasonable . . . searches and seizures shall not be violated . . . ."[15] The Court reasoned that the fourth amendment does not require a warrant in every case; it requires only that all searches be reasonable.[16] The constitutional requirement being one of reasonableness, any reasonable warrantless search incident to a lawful arrest passes constitutional muster. The problem, of course, arises in defining "reasonableness." There is no "litmus-paper test."[17] Reasonableness, therefore, is for the court to determine—something to be ascertained from "the total atmosphere of the case."[18]

In *Rabinowitz* it was decided that "reasonableness" extended to the interior of a closed office safe. Thus, the rule in *Harris*,[19] no longer hampered by the "time" restriction of *Trupiano*, stood the test of *Rabinowitz*

[11] 334 U.S. 699, 708 (1948).

[12] The requirement of a search warrant when there is a chance to secure one necessarily presupposes the presence of probable cause to search. Otherwise, how could the required warrant be legally issued? Therefore, *Trupiano* must have meant that if probable cause to search, and not merely probable cause to arrest, were present, and only then, a search warrant was required if the search extended to the place of arrest. But this rule applied only so long as the warrant requirement could be practicably met. If probable cause to search the home of a potential arrestee arose prior to the actual arrest, the fact that the arrest was itself supported by an arrest warrant might have been used as compelling evidence that there was necessarily enough time to secure a search warrant. Such an incident search was, under *Trupiano*, necessarily illegal. But why should the addition of probable cause to search taint an otherwise legal search incident to arrest? The Court intimated that the judicial preference for warrants compelled the decision. The situation of probable cause to search arising in the interim between issuance of the arrest warrant and its execution was never considered.

[13] For example, Chief Justice Vinson was obviously under the impression that the whole notion of the validity of a warrantless search incident to a lawful arrest had been emasculated. 334 U.S. at 710-11 (Vinson, C.J., dissenting).

[14] 339 U.S. 56, 61 (1950).

[15] U.S. CONST. amend. IV, cited in *Rabinowitz*, 339 U.S. at 60.

[16] 339 U.S. at 60.

[17] 339 U.S. at 63.

[18] *Id.* at 66.

[19] *See* note 10 *supra*, and accompanying text.

to remain essentially unaltered. This nebulous test for reasonableness spawned a vigorous dissent from Mr. Justice Frankfurter.[20] He elaborated upon his dissent in *Harris* and traced the holdings of the Court to the case in question: What was barely implicit in the very early cases had evolved first into dictum and ultimately into a declaration of constitutional law.[21]

Despite the indefiniteness of the standard in *Rabinowitz* and the relative uncertainty of the constitutionally permissible scope of the warrantless search incident to a lawful arrest, the case remained the leading statement in that area of the law for nineteen years.

II. The Rationale of Chimel

The search of the home of T. S. Chimel prompted a re-examination of the problem of the scope of a search incident to a lawful arrest. The Court's approach to the situation in *Chimel v. California*[22] differed radically from that taken in *Rabinowitz*.[23] Rather than assuming the exception, Mr. Justice Stewart, writing for the majority, began his analysis with the assumption that, with rare exception, the search of a man's home requires a warrant. True enough, the fourth amendment does not require a warrant for every search, and searches incident to lawful arrests remain a judicially recognized exception to the warrant requirement. But the absense of a warrant necessarily requires the prosecution to justify the constitutionality of such a search.[24] The Court made clear the fact that the burden of the state to show the reasonableness of the warrantless search was not conclusively met by merely proving the legality of the arrest. Chimel's conviction was reversed because the prosecution failed to show any constitutional justification for the warrantless search of the petitioner's entire house.[25]

The Court did not neglect to explain exactly what would have been reasonable under the circumstances in *Chimel* and, for that matter, what would satisfy fourth amendment reasonableness in any case involving the warrantless search incident to a lawful arrest. First, it is reasonable for an arresting officer to search the arrestee's person for the sake of the officer's own safety and to prevent the arrestee's forceful escape. The fact that fruits of the crime, rather than the weapons used to perpetrate the offense, are discovered as a result of the personal search does not prevent the seizure of such evidence nor taint its admissibility. Although the emphasis is on the safety of the arresting officer, the problem of the destruction of potentially incriminating evidence discussed in the very early cases[26] is not to be ignored in conducting the search. Second, a search of the area within the arrestee's "immediate control" is reasonable for both of the previously mentioned reasons.

[20] 339 U.S. at 68 (Frankfurter, J., dissenting).
[21] *Id.* at 75.
[22] 395 U.S. 752 (1969).
[23] Steele, *Criminal Law and Procedure, Annual Survey of Texas Law*, 24 Sw. L.J. 229, 238 (1970).
[24] 395 U.S. at 760, citing United States v. Jeffers, 342 U.S. 48, 51 (1951).
[25] *Id.* at 766.
[26] *See, e.g.*, United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926).

As in *Rabinowitz*, the limitations of "person and control" were given effect in *Chimel*. But the nebulous concept of "control" was clarified by accentuating the qualification of "immediacy."[27] The Court in *Chimel* explicitly pointed out what necessarily followed from its new standard of "immediate control." The phrase was construed to mean "within the reach of the arrestee."[28] This construction was based upon the premise that an officer cannot *reasonably* fear that which the arrestee cannot readily obtain.[29]

Thus, the indefiniteness and uncertainty of the earlier decisions was laid aside for a new, more definite rule: A legal arrest carries with it the right of the arresting officer to search both the person of the arrestee and that area within the arrestee's physical reach for whatever weapons and fruits of the crime he can discover. The question of permissible scope was resolved with far greater certainty than in any previous decision.[30] *Chimel* remains the leading statement of the law in the area of search incident to arrest.

III. THORNTON v. STATE—THE TEXAS VIEW

Retroactivity. The permissible scope of a warrantless search incident to arrest was a central issue in *Thornton v. State*. While the Texas Court of Criminal Appeals was very aware of the permissible scope as defined by *Chimel*,[31] the robbery by assault for which Thornton was convicted occurred prior to that decision. Therefore, the first question facing the Texas court in *Thornton* was whether *Chimel* would apply retroactively in Texas.

The opinion in *Chimel* itself made no comment respecting potential retroactive effect. Furthermore, in *Shipley v. California*,[32] the Supreme Court declined to seize the opportunity to declare *Chimel* retroactive.[33] To this date, the question of retroactivity of the *Chimel* standard has been left to the states. As of the date of *Thornton*, only Alaska[34] and New Mexico[35] had given *Chimel* retroactive effect while the Second[36] and Fifth Circuits[37] had expressly declined to do so. It was not surprising that Texas chose to apply *Chimel* prospectively only.[38]

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[27] The prior failure of the courts to explicitly define or limit "control" was earlier recognized as the small mistake which fostered the hint in *Carroll*, the dictum in *Agnello*, and, eventually, the holding in *Harris*. The early cases, perhaps, had intended that "control" be applied in the lay sense of the term, implying little more than immediate accessibility. But the more common and realistic sense of the term was soon abandoned for a more legalistic definition. Indeed, in *Rabinowitz*, "control" was all but defined as "constructive possession"—extending as far as the closed areas of the room where the arrest was made. *See, e.g.*, 339 U.S. at 75 (Frankfurter, J., dissenting).

[28] 395 U.S. at 762.

[29] *See* note 39 *infra*.

[30] The prior indefiniteness that pervaded this whole area of the law was often best stated by the Justices themselves. *See, e.g.*, J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 114 (1966).

[31] By the time *Thornton* was heard on appeal, *Chimel* was six months old.

[32] 395 U.S. 818 (1969).

[33] Perhaps this was because the Court was able to resolve the illegality of the search in *Shipley* under pre-*Chimel* standards.

[34] Fresneda v. State, 458 P.2d 134 (Alas. 1969).

[35] State v. Rhodes, 80 N.M. 729, 460 P.2d 259 (1969).

[36] United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969).

[37] Lyon v. United States, 416 F.2d 91 (5th Cir. 1969).

[38] The Texas court's reasoning in declining retroactive effect was also based upon the well-

Distinguishability. The question of *Chimel*'s retroactivity having been decided, Thornton's contention that the search was illegal was probably met. There would seem to be little doubt as to the validity of this search under the *Rabinowitz* standard. But the Texas court did not dismiss *Chimel* on this ground alone; it also declared *Chimel* to be factually distinguishable from *Thornton v. State.* The question necessarily becomes: What would be the result had the *Thornton* search occurred post-*Chimel*?

The Texas court noted the extensiveness of the search incident to Thornton's arrest in setting out the facts of the case. The search was not limited to the defendant's person nor to the area within his immediate control. Closets, toilets, and the undersides of mattresses all were searched, producing both the weapons used to perpetrate the robbery and the fruits of the crime. But the court stated that *Chimel* was factually distinguishable because there the search was for fruits of the crime—stolen property taken in a burglary. In *Thornton*, on the other hand, the officers were searching for pistols—the instruments believed to have been used to effect the robbery. The search of the entire apartment was said to have been purely for the protection of the police. The fact that the officers discovered the fruits of the crime as well was inconsequential.

From this reasoning it would follow that the validity of a warrantless search incident to a lawful arrest depends upon whether the officers in any given situation are searching for weapons or for fruits of the crime. A search for weapons beyond the reach of the person arrested becomes justifiable; if the search is made in good faith and solely for the protection of the arresting officer, its spatial scope would be essentially unrestricted. Limited by these factors alone, a search might go beyond pre-*Chimel* standards and still be lawful.

The holding in *Chimel* supports a different conclusion. The motivation for the search is not the governing factor. The area which the search encompasses controls. Indeed, in *Chimel* the Court was quick to point out that the search incident to arrest was necessary not only for the protection of the arresting officer, but also to prevent the destruction of evidence by the arrestee. What the arresting officer is searching for is of negligible importance under *Chimel.* Where the officer is searching justifies or condemns the search in question.

The spatial limitation imposed by *Chimel* is based upon the limits within which the arresting officer's reasonable fear might extend.[39] Patently, the fear that extends to another room is not a reasonable fear. "Immediate control" fixes the scope. It is only as flexible as the reach of the person

recognized criteria for deciding questions of retroactive application set forth in Stovall v. Denno, 388 U.S. 293, 297 (1967). There, the Supreme Court recognized, *inter alia,* that the extent of reliance on the old standard by law enforcement authorities was, to some extent, controlling in deciding whether the new standard would apply prospectively only. Certainly, the Dallas police must have relied upon the controlling effect of *Rabinowitz* in arresting and searching Thornton and his comrades.

[39] 395 U.S. at 762. The Court implicitly asked: How can an officer's *reasonable* fear for his own safety or his concern for the preservation of destructible evidence ever extend beyond the reach of the arrestee?

arrested.[40] Under this standard, the arrest of a man in his living room does not authorize a search of his bedroom closet, nor does it justify a peek into his commode. The holdings of the two cases are more easily distinguished than are the facts.[41]

The facts in each case, however, are hardly perfectly analogous. The differing circumstances surrounding the search in each instance pose a more difficult question: Can *Thornton* and *Chimel* be conclusively distinguished on grounds other than those relied upon by the Texas court?

In *Thornton* the incident search encompassed a small apartment. The search in *Chimel* covered a three-bedroom house, from attic to garage. In *Thornton* there were nine people in the apartment at the time of the arrest. In *Chimel* only one person was at home when police officers entered and only two were present at the time of the arrest and search. In the Texas case all nine occupants were arrested, although the arrest of six was arguably without probable cause and, hence, unjustified. *Chimel* reveals that only the defendant was taken into custody. In *Thornton* the suspects were believed to be armed, having committed robbery by assault only hours earlier. In *Chimel* the defendant was believed to have committed the burglary of a coin shop. It is conceivable that the arresting officers in *Thornton* might have reasonably feared that nine people in a relatively confined area could successfully resist arrest or destroy nearby evidence or even effect an escape unless both weapons and fruits were quickly searched out and seized. Furthermore, nine potential arrestees, well-placed in a small apartment, might easily put the entire dwelling within the reach of the persons arrested. Whether these circumstances justify a search which extends inside closets and under mattresses has not been authoritatively determined.[42] Such a situation was not before the Court in *Chimel*. Furthermore, no post-*Chimel* case has considered the steps that an arresting officer might take to prevent possible intervention by a third party in the arrest procedure.[43] Had it been considered, this issue of third person intervention might have been resolved by *Thornton*. As it stands, unfortunately, *Thornton* only frustrates *Chimel*'s attempt to redefine the search incident to arrest as a carefully delineated exception to the warrant requirement, an exception not to be construed as a justification for searches which might otherwise be invalid.[44]

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[40] Note, *The Scope of Search When Incident to a Lawful Arrest*, 23 Sw. L.J. 959, 962 (1969).

[41] In a concurring opinion in *Thornton*, Judge Onion agreed with the majority that *Chimel* should not have retroactive effect. He reasoned that this sufficiently disposed of the search question. He could not agree, however, that *Chimel* and *Thornton* were distinguishable. He found the facts in *Thornton* analogous to *Harris* which, along with *Rabinowitz*, was expressly overruled by *Chimel*.

[42] A very strict reading of *Chimel* would necessarily make such a search illegal. However, in at least one variation on *Chimel*, the Supreme Court of Maryland refused to construe the case to mean that the permissible scope of searches incident to arrest was strictly confined to the arm's length of the arrestee. Scott v. State, 7 Md. App. 505, 256 A.2d 384, 389 (1969).

[43] Even assuming that an officer has no right to search the person of a bystander at the scene of the search incident to arrest, might the officer nevertheless search for potentially destructible evidence or weapons which might be available to the arrestee's companion?

[44] *See* 1969 DUKE L.J. 1084, 1087. Before *Chimel*, if probable cause to search the home of a potential arrestee could not be found, this strict requirement could be substantially alleviated by merely arranging to arrest the suspect at home rather than on the street. The incident right to