

1974

Search and Seizure- Permissible Scope of a Search Incident to a Valid Custodial Arrest

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Criminal Procedure Commons](#), and the [Fourth Amendment Commons](#)

Recommended Citation

Search and Seizure- Permissible Scope of a Search Incident to a Valid Custodial Arrest, 8 U. Rich. L. Rev. 610 (1974).

Available at: <http://scholarship.richmond.edu/lawreview/vol8/iss3/9>

This Recent Decision is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Search and Seizure—PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO A VALID CUSTODIAL ARREST—*United States v. Robinson*, 94 S.Ct. 467 (1973); *Gustafson v. Florida*, 94 S.Ct. 488 (1973).

While the fourth amendment¹ does not make a warrant mandatory for all searches, it does require that all searches meet the test of reasonableness.² The search incident to a lawful arrest is one of the well-established exceptions to the warrant requirement.³ The incidental search doctrine⁴ and the exclusionary rule were first discussed by the United States Supreme Court in *Weeks v. United States*.⁵ The Supreme Court's failure to enunciate definitive standards in defining the permissible scope of a search incident to an arrest has created numerous problems for the courts and police.⁶ The limitations on the permissible scope of a search incident to an arrest have been erratic, but the most recent decisions narrowed its scope.⁷

1. U.S. CONST. amend. IV:

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.

2. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Go-Bart v. United States*, 282 U.S. 344, 356 (1931); See Simeone, *Search and Seizure Incident to Traffic Violation*, 6 St. Louis L.J. 506, 512 (1961).

3. *Jones v. United States*, 357 U.S. 493, 499 (1958).

4. In *Weeks v. United States*, 232 U.S. 383, 392 (1914), the Court while discussing the fourth amendment touched on the incidental search doctrine, merely stating that it existed.

5. The exclusionary rule established in *Weeks* requires the exclusion of evidence obtained in searches which violate the fourth amendment. However, *Weeks* applied only to federal courts. 232 U.S. 383, 397-98 (1914). *Mapp v. Ohio*, 367 U.S. 643 (1961), extended the exclusionary rule to the states.

6. Supreme Court Justices have been less than satisfied with the results of fourth amendment decisions. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) ("State and Federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty [in the law of search and seizure]") (Harlan, J., concurring); *Chapman v. United States*, 365 U.S. 610, 622 (1961) ("For some years now the field [of search and seizure] has been muddy, but today the Court makes it a quagmire.") (Clark, J., dissenting).

There has been a similar dissatisfaction in lower courts. See, e.g., *Amador-Gonzales v. United States*, 391 F.2d 308, 319 (5th Cir. 1968) (Godbolt, J., concurring).

7. In *Carroll v. United States*, 267 U.S. 132, 158 (1925) (dictum) the Court extended the scope of a search beyond a person to the places which were in his control. In *Agnello v. United States*, 269 U.S. 20, 30 (1925), the scope of the search was broadened to the place where the arrest was made. The Court then extended the proper scope of the search to the whole situs of the arrest and to anything which could be connected to the crime for which the arrest is made. *Marron v. United States*, 275 U.S. 192 (1927). Because of the broad application of *Marron*, the Court narrowed the scope of the permissible search by saying that there could not be a general rumaging for evidence. *Go-Bart v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932).

Then the Court seemed to reverse itself by authorizing the search of an entire four room

The permissible scope of the search of a person incident to a lawful arrest had not been delineated by the Court⁸ until the recent decisions of *United States v. Robinson*⁹ and *Gustafson v. Florida*.¹⁰ The arresting officer in *Robinson* had probable cause to arrest the respondent for driving without a valid operators permit. Following prescribed procedure,¹¹ the officer made a search of the respondent's person and found, in an inside coat pocket, a cigarette package containing heroin capsules. These capsules were subsequently used in the trial and conviction of the respondent for a drug offense.¹² The Court of Appeals reversed the conviction on the ground that the heroin had been obtained as a result of an illegal search.¹³ The Supreme Court, however, felt that "[i]n the case of a lawful custodial

apartment as a proper search incident to an arrest. *Harris v. United States*, 331 U.S. 145 (1947). In *Trupiano v. United States*, 334 U.S. 699 (1948), the Court limited *Harris* type searches to instances where obtaining a search warrant was impractical. The Court placed a time limitation on the search in *Preston v. United States*, 376 U.S. 364 (1964), where the search of a car was held illegal when defendant was already in custody at the police station.

The Court in *Chimel v. California*, 395 U.S. 752 (1969), established the present standard, which limits a search incident to a valid arrest to the arrestee's person and the area under his immediate physical control.

8. It should be noted that the Supreme Court's attention has been focused on the permissible scope of the search of homes, places of business and automobiles. Until recently the Court has paid little attention to searches of the person. In *Peters v. New York*, 392 U.S. 40 (1968), the Court's only treatment of an intrusion into an arrestee's pockets, the Court focused on the legality of the arrest; having established the lawfulness of the arrest the Court assumed the subsequent search was permissible.

The Court has made statements, as to the permissible scope of the search of a person incident to a lawful arrest, without discussing the permissible scope of the search of the person. The statement by the Court in *Chimel v. California*, 395 U.S. 752 (1969) is typical:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize evidence on the arrestee's person in order to prevent its concealment or destruction. . . . *Id.* at 762-63.

See also *United States v. Rabinowitz*, 339 U.S. 56, 61 (1950); *Harris v. United States*, 331 U.S. 145, 155 (1947); *United States v. Lefkowitz*, 285 U.S. 452, 465-66 (1932); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914).

9. 94 S. Ct. 467 (1973).

10. *Id.* at 488.

11. The Washington Police had established procedures which required them to take the operator of a vehicle driving without a valid drivers license into custody. D.C. Metropolitan Police Dept. Gen. Order No. 3, series 1959 (April 24, 1959) cited in 94 S. Ct. 471 n.2.

12. 94 S. Ct. at 468-71.

13. 471 F.2d 1082 (D.C. Cir. 1972). J. Skelly Wright writing for majority held that:

[S]uch search was unconstitutional and defendant could not be convicted of narcotics violation since upon receiving defendant's fraudulently obtained temporary operators permit officer had secured the only evidence of crime for which arrest was made which he could possibly have cause to believe was in arrestee's possession. *Id.*, at 1082.

arrest a full search of the person is not only an exception to the warrant requirement of the fourth amendment but is also a 'reasonable' search under that amendment."¹⁴

The respondent's major contention was that a search incident to a valid custodial arrest should be limited to a frisk of the suspect's outer clothing for weapons as in *Terry v. Ohio*.¹⁵ The Court in holding such a limitation too restrictive questioned whether a protective frisk would in fact offer enough protection to a police officer during the prolonged contact that follows an arrest.¹⁶ Furthermore, the Court felt that it was immaterial that the officer did not subjectively fear the arrestee, nor think that he was armed.¹⁷ The minority disagreed, feeling that a *Terry* type frisk would be sufficient to assure the officer's safety.¹⁸ Justice Rehnquist, writing for the

14. 94 S. Ct. at 477.

15. 392 U.S. 1 (1968). A policeman stopped three individuals after his observation of them led him to believe that they were "casing" a department store for an armed robbery. When the officer received an evasive response to his request that the men identify themselves, he commenced a frisk of Terry. The officer first patted down Terry's outer clothing, not intruding beneath the surface of the garments until he had detected an object which felt like a revolver. The officer reached into the clothing and confiscated a pistol. A similar search of the other two men uncovered another weapon. The Supreme Court sustained Terry's conviction for carrying a concealed weapon, holding that the frisk conducted in this fashion was a reasonable self protective measure under the circumstances, despite the officer's lack of probable cause to make an arrest.

16. The Court was concerned with the possible danger of concealed weapons, stating that it would be unreasonable to expect a police officer to place a suspect in his squad car without taking reasonable measures to insure that the suspect is unarmed. 94 S. Ct. at 476.

Justice Rehnquist cited statistics that approximately 30% of the shootings of police officers occur when the officer approaches a person seated in a car. 94 S. Ct. at 476 n.5 *citing*, Bristow, *Police Officer Shooting — A Tactical Evaluation*, 54 J. CRIM. L.C. & P.S. 93 (1963) *cited in* Adams v. Williams, 407 U.S. 143, 148 (1972).

But the minority points out that virtually all of these killings are committed with guns and knives, the type of weapons which would be detected. 94 S. Ct. at 486.

17. It is the fact of the arrest that is important. 94 S. Ct. at 476.

According to the dissent in order to make an intrusion beyond a frisk, the officer must have a reasonable belief that the suspect is armed. *Id.* at 485. *See* United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972) (a federal narcotics agent felt an object which he feared could be a knife or a razor blade but which turned out to be a folded ten-dollar bill containing a small amount of cocaine, the court found the search unlawful); Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969) (officer felt pills in subject's pockets); United States v. Gonzalez, 319 F. Supp. 563 (D. Conn. 1970) (cigarette package containing bags of heroin); Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971) (soft object in suspect's pocket which turned out to be marijuana); People v. Bueno, 475 P.2d 702 (Colo. 1970) (keys in pocket).

18. All courts agree that there is a need to protect the police officer, but disagreement exists as to the action necessary to assure that protection. In People v. Superior Court, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972), the court held that a pat-down search for weapons incident to a traffic arrest must be predicated on a set of circumstances giving the officer *reasonable grounds* to believe that a weapon is secreted on the motorist's person (apply

majority,¹⁹ pointed to the distinction between the two cases, stating that the *Terry* doctrine was not applicable to an arrest founded on probable cause.²⁰

The respondent further argued²¹ that the search of a person incident to a lawful arrest should be limited to the fruits, instrumentalities and evidence of the crime for which the arrest is made.²² There being no fruits or

a strict *Terry* approach to arrest situations); see generally *State v. Curtis*, 290 Minn. 429, 190 N.W.2d 631 (1971); *People v. Marsh*, 20 N.Y.2d 98, 228 N.E. 2d 783, 281 N.Y.S.2d 789 (1967).

19. Joining Justice Rehnquist for the majority were Chief Justice Burger, Justices Stewart, White, and Blackmun. Justice Powell filed a concurring opinion. Justice Marshall filed a dissenting opinion in which Justices Douglas and Brennan joined. 94 S. Ct. at 477.

20. 392 U.S. at 21-22, 24-25. *Terry* did not involve an arrest for probable cause, but made it quite clear that the protective frisk for weapons which it approved might be conducted without probable cause.

The Supreme Court's language in describing the positions taken by *Terry's* counsel is of considerable significance in distinguishing the cases:

[H]e says it is unreasonable for the policeman to take that step [of searching for weapons] until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence incident to the arrest. *Id.* at 25.

21. The minority contended that the search of the contents of the package of cigarettes was illegal and the evidence gained from that search should be inadmissible. 94 S. Ct. at 486. The respondent argued that once the cigarette package was removed there was no longer any reason to look inside since the arrestee could no longer use it to harm the officer. But the Court held that in arrest situations it would be too demanding to ask a police officer to break the search down to a step by step analysis. 94 S. Ct. at 477. See *Adams v. United States*, 399 F.2d 574, 579 (D.C. Cir. 1968). Furthermore it could be argued that keeping possession of the package would create custodial problems for the police, and that there is always the possibility the package itself could harm the police officer. See generally *United States v. Mehciz*, 437 F.2d 145 (9th Cir. 1971), *cert. denied*, 402 U.S. 974 (1971).

Two Supreme Court cases suggest that the fourth amendment would permit investigation of the contents of any containers. In *Peters v. New York*, 392 U.S. 40 (1968), an officer removed an object he thought to be a weapon. The object was unidentifiable because it was contained in an opaque envelope. The officer opened the envelope and discovered burglar tools. The Court, in considering the admissibility of evidence, focused solely on the question of whether the frisk itself was reasonable. The court never questioned the officer's right to open the envelope. In *Chimel v. California*, 395 U.S. 752 (1969), the Court never intimated that the police should place any movable containers beyond the reach of the arrestee rather than open them to determine whether they contain weapons or evidence. See *United States v. Harrison*, 461 F.2d 1127 (5th Cir. 1972); *United States v. Mehciz*, 437 F.2d 145 (9th Cir. 1971), *cert. denied*, 402 U.S. 974 (1971).

22. The minority felt that all searches incident to an arrest must be based on necessity, that is, a search for weapons, or a search for evidence that could be destroyed, 94 S. Ct. 467, 480 (1973). The minority felt this was implied in *Chimel v. California*, 395 U.S. 752 (1969).

We see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the fourth amendment would otherwise require. *Id.* at 766 n.12.

instrumentalities of driving with a revoked license, no search should have been permitted other than a *Terry* type frisk,²³ and that the drugs seized should not have been admitted into evidence. Justice Rehnquist noted that, although this was the first time the Court had decided this specific issue, there is dictum justifying the use of any evidence found in a search incident to a lawful arrest.²⁴ The Court refused to impose the requirement of a connection between the objects found and the nature of the crime. The absence of probable fruits or further evidence of the particular crime for which the arrest is made does not narrow the standards applicable to a search.²⁵

As a result of *Robinson*, whenever a police officer makes a lawful custodial arrest, the arrestee retains no significant fourth amendment rights in the privacy of his person,²⁶ and a thorough search of the arrestee is

The minority also relied on the concurring opinion of Justice Fortas in *Warden v. Hayden*, 387 U.S. 294, 310 (1967). Justice Fortas felt that evidence may not be introduced if it is discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. See *Peters v. New York*, 392 U.S. 40, 67 (1968).

There had been a growing acceptance of the minority view in the jurisdictions that had considered the question. See *Amador-Gonzales v. United States*, 391 F.2d 308, 315 (5th Cir. 1968); *Charles v. United States*, 278 F.2d 386 (9th Cir. 1960); *U.S. v. Page*, 298 A.2d 233 (D.C. Cir. 1972); *People v. Superior Court*, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972); *People v. Molarius*, 146 Cal. 2d 129, 303 P.2d 350 (1956); *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16 (1959); *State v. Curtis*, 240 Minn. 429, 190 N.W.2d 631 (1971); *State v. O'Neal*, 251 Ore. 163, 167, 444 P.2d 951, 953 (1968); *Barnes v. State*, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).

23. Judge Wright in his dissenting opinion in *Worthy v. United States*, 409 F.2d 1112, 1115 (D.C. Cir. 1968) agreed, stating that a *Terry* type search was all that was necessary for the protection of police officers.

24. In *Schmerber v. California*, 384 U.S. 757 (1966) the Supreme Court stated:

[E]arly cases suggest that there is an unrestricted right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize fruits or evidence of crime. . . . [o]nce a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the fourth amendment's purpose to attempt to confine the search to those objects alone. *Id.* at 769 (citations omitted).

See also *Charles v. United States*, 278 F.2d 386, 388-89 (9th Cir. 1960), *cert. denied*, 364 U.S. 831 (1960); see note 8 *supra*.

However, the Court would still retain some restrictions on the scope of searches. 94 S. Ct. at 477, *citing Rochin v. California*, 342 U.S. 165 (1952) (pumping a person's stomach to get narcotics was held to be an unreasonable search). *But see Schmerber v. California*, 384 U.S. 757 (1966) (blood samples taken with a hypodermic needle for determination of alcoholic content held a reasonable search).

25. 94 S. Ct. at 476.

26. Justice Powell in his concurring opinion in *Gustafson* briefly summarized the Court's reasoning in both *Robinson* and *Gustafson*. *Id.* at 494.

Prior to *Robinson* and *Gustafson* there had been a definite trend not to allow thorough searches incident to an arrest for a minor traffic offense, because it was felt that such searches

reasonable.²⁷ Thus, the fact of the custodial arrest, not the nature of the crime, is the key to whether a full search is permissible.

In *Gustafson v. Florida*,²⁸ the petitioner was arrested for not having his drivers license in his possession. The arresting officer conducted a thorough pat-down search of the petitioner during which he discovered a cigarette box containing marihuana. The petitioner was tried and convicted for the unlawful possession of marihuana.²⁹ The Florida Supreme Court upheld the conviction concluding that the search leading to the discovery of the marihuana was not unreasonable.³⁰ The Supreme Court held that a full search of the arrestee's person made incident to a lawful custodial arrest did not violate his fourth amendment rights.³¹

The Court's reasoning in *Gustafson* was essentially the same as that in *Robinson*.³² There were, however, a few important factual distinctions. The petitioner, Gustafson, had committed a trivial offense that carried no minimum mandatory sentence, and unlike *Robinson* there were no police regu-

were unreasonable intrusions on the right of privacy of normally law-abiding citizens. See *Amador-Gonzales v. United States*, 391 F.2d 308 (5th Cir. 1968) (heroin seized after search of automobile after arrest for minor traffic offense held inadmissible as evidence); *People v. Superior Court*, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970) (search of passenger after speeding violation held illegal); *State v. Curtis*, 290 Minn. 429, 190 N.W.2d 631 (1971) (admission of marihuana into evidence barred because search after arrest for defective tail lights held illegal); *People v. Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967) (arrest of defendant on speeding warrant, not grounds to search defendant's person); *Ellsworth v. State*, 295 P.2d 296 (Okla. Crim. 1956) (search of auto after arrest for failure to use turn signal, held unlawful); *State v. O'Neal*, 251 Ore. 163, 444 P.2d 951 (1968) (arrest for driving without a valid operators permit, did not justify search of defendant's wallet); *Commonwealth v. Dussel*, 439 Pa. 392, 266 A.2d 659 (1970) (arrest for running a stop light and inability to produce registration not grounds to search vehicle); *Barnes v. State*, 25 Wis. 2d 116, 130 N.W.2d 264 (1964) (search of pockets with flashlight after arrest for minor traffic offense held to be unreasonable).

But see *People v. Brown*, 14 Cal. App. 3d 507, 92 Cal. Rptr. 473 (1971) (full body search incident to minor traffic arrest lawful if transportation to magistrate is necessary); *People v. Davis*, 247 Mich. 536, 226 N.W. 337 (1929); *Watts v. State*, 196 So. 2d 79 (Miss. 1967); *State v. Coles*, 20 Ohio Misc. 12, 249 N.E.2d 553 (1969) (arrest for operating vehicle without rear light or registration plate gave rise to a lawful search of motorist and vehicle for weapons); *State v. Giragosian*, 107 R.I. 657, 270 A.2d 921 (1970) (defendant arrested for not having a drivers license subject to search); *Lane v. State*, 424 S.W.2d 925 (Tex. Crim. 1967), *cert. denied*, 392 U.S. 929 (1967) (search of defendant's auto and person incident to arrest for speeding lawful).

27. 94 S. Ct. at 477.

28. 94 S. Ct. 488 (1973).

29. *Id.* at 490.

30. 258 So. 2d 1 (Fla. 1972).

31. 94 S. Ct. at 491.

32. The Court relies on *Robinson* as precedent. *Id.* at 469.

lations which required the officer to take the arrestee into custody.³³ The majority, however, felt that these factual differences were of no constitutional significance,³⁴ and held as in *Robinson*, that once the suspect has been taken into custody it is the fact of the arrest which gives rise to the authority to search, and the arrestee's constitutional right of privacy is legitimately abated.³⁵

Robinson and *Gustafson* give the police a standard procedure that can be easily understood and readily applied. Although it is extremely difficult to strike an appropriate balance between the personal privacy of the arrestee and the physical security of an arresting officer,³⁶ fourth amendment rights should not be abrogated simply to make police procedure less taxing.³⁷ The Court demonstrates a great deal of trust in the police, a feeling that is not shared by all. The Court, by deciding that the arrest itself establishes the reasonableness of the search, has infringed upon the average law-abiding citizen's right to privacy and personal dignity.

C. R. G.

33. Petitioner's counsel, in *Gustafson*, pointed out in his oral argument before the Supreme Court that the Florida courts invariably dismiss the charge if the defendant shows up in court with a valid license. 14 CRIM. L. RPTR. 4040 (Oct. 17, 1973).

Furthermore, *Robinson* was arrested for driving with a revoked permit and deliberately falsifying an application, an offense which, in the District of Columbia, carries a mandatory minimum jail term, a mandatory minimum fine or both. D.C. CODE § 40-302 (d)(1968).

It should be noted that the officer in *Robinson* stated that as a matter of procedure the police always conducted a full body search if they were going to take the arrestee into custody, and that they always took the arrestee into custody when found driving with a revoked permit. See note 11 *supra*. However, the arresting officer in *Gustafson* stated that he only took the arrestee into custody about four out of ten times in an arrest for a minor traffic violation. The arresting officer stated if the arrestee was not a local resident he was more likely to be taken into custody. S. Ct. at 490 n.3.

34. 94 S. Ct. at 491.

35. It should be noted that *Gustafson* did not question the validity of the arrest just the validity of the search. The Court worked on the presumption that the arrest was in fact valid. 94 S. Ct. at 492 (Stewart, J., concurring).

36. One suggested solution to the problem would be for the legislatures to make minor traffic offenses civil actions. This would make motorists feel more secure knowing that a minor traffic violation standing alone could not establish the basis for a search. Another suggestion has been to have the legislatures define exactly what offenses warrant a custodial arrest, thus taking away the discretionary powers of the arresting officer. Comment, *Search Incident to Arrest for Minor Traffic Violations*, 11 AM. CRIM. L. REV. 801, 804 (1973).

37. For a general discussion of the problem, see Comment, *Search Incident to Arrest for Minor Traffic Violations*, 11 AM. CRIM. L. REV. 801 (1973); Note, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866 (1969); Note, *Scope Limitations for Searches Incident to Arrest: United States v. Robinson*, 59 VA. L. REV. 724 (1973); Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 432 (1969).

For a concise summary of Virginia Law on incidental search see C. BERRY, *ARREST, SEARCH AND SEIZURE*, 100-11 (1973).