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THE RIGHT OF AN OFFICER TO ARREST WITHOUT A WARRANT [MARYLAND]

In *Romans v. State*[1] the defendant was convicted in the trial court for violating a statute which made it a misdemeanor to obstruct justice by endeavoring to influence, intimidate or impede any juror, witness, or officer in any court of the state. The defendant was attempting to persuade the prosecuting witness in an abortion trial to go away and remain out of the jurisdiction of the court until after the trial. The young woman informed the police, and it was arranged that an intermediary would give a signal when the defendant arrived at a certain place to make arrangements for the witness' departure. The police, standing at a distance, saw the signal and arrested the defendant. The defendant filed exceptions to the rulings of the trial court admitting in evidence two papers found on his person at the police station after his arrest. It was asserted that since the defendant was arrested without a warrant, the arrest was unlawful and any papers taken from him while in custody under this arrest were taken in an unlawful search and were, therefore, inadmissible as evidence.

The Supreme Court affirmed the decision of the lower court upon the ground that the arrest was lawful, since no warrant is needed to make an arrest when an officer detects a person committing or about to commit a misdemeanor in his presence. Since the arrest was lawful, the evidence obtained from the person arrested was admissible.

This case presents two problems. First, when may an officer arrest without a warrant? Second, can a conviction be sustained when based on evidence seized in an unlawful arrest?

The liberty of the citizen has long been secured by important common law restrictions upon arrest.[2] These common law rules have to a large extent been defined and limited by statute,[3] but where there is no statute on the subject, any officer with authority to preserve the peace has all the common law authority of a constable or watchman[4] to make an arrest without a warrant.

The first consideration, then, in a discussion of the right of an officer to arrest without a warrant should be directed at defining the common law rules of arrest. These can be divided into two categories —the right to arrest without a warrant in the case of felonies and that right in the case of misdemeanors.

At common law, a peace officer has the right to make an arrest without a warrant to prevent the commission of a felony.[5] An officer must always interfere to prevent an attempted felony when he has reasonable grounds to believe that a felony is about to be committed,[6] and may

[1] 178 Md. 588, 16 A. (2d) 642 (1940).

[2] Magna Carta, Runnymead, June 15, 1215. "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

[3] State v. Padgett, 316 Mo. 179, 289 S. W. 954 (1926).

[4] The term "policeman" is the legal equivalent of "watchman" at common law. State v. Evans, 161 Mo. 95, 110, 61 S. W. 590 (1900).

[5] Mapp v. State, 152 Miss. 298, 120 So. 170 (1928).

[6] He cannot arrest because he has some vague idea that a person is about to commit a felony. State v. Zupan, 155 Wash. 80, 283 P. 671 (1929).

arrest the offender although the attempt to commit the felony is only a misdemeanor.[7] This seems to be a sound rule even when the attempt to commit the felony is only a misdemeanor because most attempted felonies involve a breach of the peace and it is generally recognized that an officer may arrest without a warrant to prevent breach of the peace. But there must be an immediate danger of an injury and not merely a threat of some future indefinite injury.[8]

An officer may arrest a person without a warrant who is in the act of committing a felony. In this case part of the criminal act must be committed in the presence of the officer and the crime must be in fact partly accomplished.

This presents the question as to what is meant by "in the presence of the officer." An offense is said to be committed in the presence of an officer if any of his senses afford him knowledge that a felony is being committed. Thus where an officer receives knowledge through the sense of sight,[9] smell,[10] or hearing[11] the offense is said to be committed in his presence. It has also been held that such knowledge may be gained by the officer through a mechanical apparatus.[12] Apparently an arrest could be made without a warrant if the officer received knowledge through the sense of touch or taste, although there seem to be no cases on the subject. Although the offense is committed in the officer's immediate vicinity, it is not in his presence if he does not know of its commission.[13] Likewise, where the officer does not know that an offense is being committed until after a search, it is not committed in his presence so as to justify arrest without a warrant.[14] But an arrest without a warrant is always justified where the offender admits that he is committing an offense.[15] Where an officer lawfully stops or restrains the person and an offense is committed in his presence he may arrest without a warrant,[16] but where the facts constituting the offense are made known only after an unlawful arrest the offense is not committed in the officer's presence.[17] The fact that an officer is unlawfully on the premises, however, does not make it illegal for the officer to arrest without a warrant if the offense is committed in his presence.[18]

A third situation at common law where an officer may arrest without a warrant is where the person has committed a felony although not in the presence of the officer.[19] This rule of law is necessary for the efficient administration of justice. If an officer had to get a warrant every time he saw a criminal his chances of arresting him would be considerably diminished.

An officer under the common law can also arrest without a warrant where a felony has in fact been committed and the officer has reasonable grounds to believe that the person arrested is the offender, although it turns out later that the person arrested is innocent.[20] *Reasonable* suspicion, however, is not *mere* suspicion. It must be a suspicion that would induce a reasonably prudent man to believe that the suspect is guilty of the crime.[21] But if an officer believes that one of two people committed the crime he may arrest both of them,[22] although he knows that one is innocent. Some cases seem to have gone

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[7] Clark, Crim. Pro. §12 (1895).

[8] Geroux v. State, 40 Tex. 97 (1874); See Ky. L. J. 229 (1936) for a discussion of this point.

[9] Robinson v. Commonwealth, 207 Ky. 53, 268 S. W. 840 (1925). Officer saw imprint of pistol in pocket.

[10] See 15 Minn. L. Rev. 359 (1931).

[11] State v. Peters .. Mo. .., 242 S. W. 894 (1922).

[12] U. S. v. Harnish, 7 F. Supp. 305 (D. C. Me. 1934); See note, 19 Minn. L. Rev. 468 (1935).

[13] State v. Pluth, 157 Minn. 145, 195 N. W. 789 (1923).

[14] Douglas v. State, 152 Ga. 379, 110 S. E. 168 (1921).

[15] Heyward v. State, 161 Md. 685, 158 A. 897 (1932).

[16] People v. Lewis, 269 Mich. 382, 257 N. W. 843 (1934).

[17] Catching v. Commonwealth, 204 Ky. 439, 264 S. W. 1067 (1924).

[18] Ex Parte Ajuria, 57 Cal. App. 667, 207 P. 515 (1922). Contra: Taylor v. State, 120 Tex. Cr. 268, 49 S. W. (2d) 459, 461 (1932).

[19] Cline v. U. S., 9 F(2d) 621 (C. C. A. 9th, 1925).

[20] Clark, Crim. Pro. §§10-12 (1895); Commonwealth v. Cheney, 141 Mass. 102, 6 N. E. 724 (1886).

[21] Maghan v. Jerome, 88 F. (2d) 1001 (App. D. C. 1937).

[22] ". . . the public interest in the punishment of a felon requires the other's arrest for the purpose of securing his custody pending in-

so far as to justify arrest if the officer knew any facts that tended to associate the arrestee with the offense as a possible perpetrator.[23] It is usually said that credible information from others is grounds for a reasonable suspicion of guilt.[24] The federal cases seem to point in both directions.[25] Apparently no Federal Court has specifically held that information from a credible person is sufficient, since all the cases involved additional circumstances. An anonymous communication is clearly insufficient,[26] but it may justify an investigation and if it squares with other information, it may be considered one of several factors as a ground for suspicion.[27] Information received from a stranger may be reasonable grounds for suspicion if the officer talks to the person and thus has a chance to judge his credibility.[28] A telegram from another officer that he has a warrant for the arrest of a particular person gives the recipient reasonable grounds to believe that the person named committed the felony for which the warrant was issued.[29]

A final situation under the common law in which an officer is justified in arresting without a warrant in felony cases is where the officer reasonably suspects that a felony has been committed and that the person arrested committed it. The arrest is justified even though no felony has in fact been committed.[30] The test of reasonable suspicion in this situation is substantially the same as that laid down above.

The right at common law of an officer to arrest without a warrant is more limited in misdemeanor cases. An officer has the right to arrest without a warrant for a misdemeanor committed in his presence if it amounts to a breach of the peace.[31] but he cannot arrest without a warrant if the misdemeanor is not committed in his presence.[32] Under the view of some courts an officer can arrest without a warrant where a breach of the peace is threatened.[33] To justify such an arrest, however, there must be not only a threat, but some overt act in attempted execution of the threat. The cases are divided as to whether an officer can arrest without a warrant when he has reasonable grounds to suspect that a misdemeanor has been committed in his presence. One line of authority holds that the misdemeanor must in fact have been committed or attempted,[34] and the officer must determine at his peril whether an offense has been committed or not.[35] The other line of cases hold that the officer is justified in making the arrest if he has reasonable cause to believe that a misdemeanor has been committed in his presence.[36] Under no circumstances, however, can an officer arrest without a warrant for a misdemeanor on mere information or suspicion.[37] In order for an arrest without a warrant in the case of a misde-

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vestigation." Restatement, Torts §119, Comment j (1934).

[23] See note, 31 J. C. L. 465, 466 (1940).

[24] Perkins, The Law of Arrest, 25 Ia. L. Rev. 201, 239 (1940).

[25] See comment, 25 Ia. L. Rev. 368 (1940) for a collection of the cases.

[26] People v. Guertins, 224 Mich. 8, 194 N. W. 561 (1923).

[27] People v. Ward, 226 Mich. 45, 196 N. W. 971 (1924).

[28] U. S. V. Baldocci 42 F (2d) 567 (S. D. Cal., 1930) tends to support the view that information from a credible person alone is not enough to justify arrest without a warrant, while Brady v. United States, 300 Fed. 540 (C. C. A. 6th, 1924) and Ard. v. U. S., 54 F. (2d) 358 (C. C. A. 5th, 1931) support the opposite view.

[29] Kratzen v. Mathews, 233 Mich. 452, 206 N. W. 882 (1926).

[30] The early English rule was that an officer could arrest on suspicion only if a felony had in fact been committed. This requirement of actual commission of the felony was later repudiated in Samuel v. Fayne, 1 Doug. 359 (1780). Under American authorities, "a peace officer may, without a warrant, arrest a person where he has reasonable grounds to believe that a felony has been or is being committed, and reasonable ground to believe that the person to be arrested has committed or is committing it." A. L. I. Code of Criminal Procedure §§21 (d). See note, 24 Ky. L. J. 229, 231 (1936) for a discussion of this point.

[31] People v. McGurn, 341 Ill. 632, 173 N. E. 754 (1930).

[32] Adair v. Williams, 24 Ariz. 422, 210 P. 853, 26 A. L. R. 278 (1922).

[33] See 4 Am. Jur., Arrest §26, n.6 for a collection of cases.

[34] Adair v. Williams, 24 Ariz. 422, 210 P. 853, 26 A. L. R. 278 (1922).

[35] Edgin v. Talley, 169 Ark. 662, 276 S. W. 591, 42 A. L. R. 1194 (1925).

[36] People v. Esposito, 194 N. Y. S. 326, 118 Misc. 867 (1922).

[37] 6 C. J. S. Arrest §6 (c) (4).

meanor to be legal, the arrest must be made at the time the offense is being committed,[38] or a reasonable time thereafter,[39] or upon immediate pursuit of the offender.[40]

Since arrest without a warrant can be made at Common Law only for those misdemeanors which amount to a breach of the peace, it becomes necessary to decide what amounts to a "breach of the peace." In general, it includes any violation of public order or disturbance of the public tranquility by any act which tends to provoke or incite others to violence.[41] Violence is not a necessary element,[42] and the threat of immediate force toward the person, land or chattels of another which constitutes a crime amounts to the breach of the peace.[43] It may be occasioned by an affray or assault,[44] the use of profane language in public,[45] or by needlessly making loud noises.[46]

At common law there were two exceptions to the rule that a misdemeanor must amount to a breach of the peace in order to justify arrest without a warrant—namely, night walking, and riding armed. This authority was given by statutes so ancient that the statutory origin was forgotten and the privilege was regarded as one existing at common law.[47]

The common law rules have in most states been either codified, enlarged, or restricted by statutes. Some states provide that a peace officer is authorized to arrest any person found by him to be violating any law of the state or any municipal ordinance, or for any public offense committed in his presence, even if it does not amount to a breach of the peace.[48] Other statutes restrict the power of a police officer to arrest without a warrant to cases where he has seen an offense committed or knows it has been committed and has reasonable grounds to apprehend an escape. Under the latter statutes the burden is upon the policeman, and he acts at his peril as to whether an offense has been committed.[49] Other statutes limit the authority of arrest without a warrant to situations in which an immediate arrest is necessary to prevent an escape.[50] In several jurisdictions the entire subject of arrest is regulated by statute. In these jurisdictions the statutory mode of procedure must be closely followed or the arrest will be illegal.[51] The only sure way for an officer to know the law of arrest in his state is to study his state statutes and compare them with the common law to determine whether his authority has been enlarged or dimished, or whether the statutes merely codify the common law. Of course it is possible that a statute might be declared unconstitutional if tested,[52] but it would be unwise for an officer to depend on this.

The second problem suggested by this case is whether a conviction should be based on evidence seized in an unlawful arrest. Federal and state constitutional provisions make such a search and seizure illegal. But there is nothing to indicate that such evidence, while illegally obtained, is not admissible evidence in a criminal trial. The purpose of the various constitutional provisions against unlawful search and seizure was to provide against any attempt by the legislature to authorize any unreasonable search or seizure.[53]

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[38] People v. Ostrosky, 160 N. Y. S. 493, 95 Misc. 104, 34 N. Y. Cr. 396 (1916).

[39] Oleson v. Pinock, 68 Utah 507, 251 P. 23 (1926).

[40] Oleson v. Pinock, supra.

[41] As to what constitutes breach of the peace see Wilgus, Arrest without Warrant,, 22 Mich. L. Rev. 573-575 (1924).

[42] State Ex rel Thompson v. Reichman, 135 Tenn. 653, 665, 188, S. W. 225 (1916).

[43] A. L. I. Restatement, Torts §116.

[44] Commonwealth v. Tobrin, 108 Mass. 426,. 11 Am. Rep. 375 (1871).

[45] Davis v. Burgess, 54 Mich. 514, 20 N. W. 540 (1884).

[46] People v. Johnson, 86 Mich. 175, 48 N. W. 870, 13 L. R.A. 163 (1891).

[47] Note, 23 Ky. L. J. 391, 394 (1935).

[48] Adair v. Williams, 24 Ariz. 422, 210 P. 853, 26 A. L. R. 278 (1922).

[49] U. S. v. Rembert, 284 F. 996 (D. C. Tex., 1922).

[50] Edgin v. Talley, 169 Ark. 662, 276 S. W. 591, 42 A. L. R. 1194 (1925).

[51] Cunningham v. Baker, 104 Ala. 160, 16 So. 68, 70 (1894).

[52] Some statutes conferring authority on an officer to make an arrest without a warrant for a misdemeanor not committed in his presence have been held unconstitutional. See note, 3 Ohio State University L. J. 329, 332 (1937).

[53] Williams v. State, 100 Ga. 511, 519-20, 28 S. E. 624 (1897).

Thus there is an immunity against the legalization of a trespass. But once the trespass has been made and the evidence obtained, there seems little justification for saying that it cannot be used. This would be placing a double immunity in the search and seizure clause—one against the legalization of a trespass, and another affecting a rule of evidence.[54]

Nevertheless, the federal and a growing minority of state courts, including Illinois, do not permit such evidence to be used. The argument in support of this view is that a suit for trespass is inadequate protection against unlawful search and seizure and to hold otherwise would make the right worthless.[55] The majority of states allow evidence obtained in an illegal arrest to be admitted[56] They advance three main reasons for this rule: (1) Collateral issues in the trial of the case will be avoided.[57] (2) the suit for trespass is sufficient to enforce the right against unlawful search by officers, especially since it is the only remedy against unlawful search by private persons,[58] and (3) if the evidence is inadmissable, criminals who are undoubtedly guilty will be allowed to go free because an overzealous officer unwittingly made an illegal arrest and search.[59]

The fundamental problem confronting the courts is the balancing of the need for the protection of the individual and the necessity that the law shall not be flouted by the insolence of officers, against the social need that criminals shall be apprehended and crime repressed. It is difficult, if not impossible, to arrive at a satisfactory balance. It seems, however, that the majority view that evidence obtained on illegal arrest is admissible is the better one. Certainly the constitutional and statutory provisions against unlawful search were never meant to be a shield behind which criminals could hide. The citizen who is wronged and should be protected, has sufficient remedy in trespass.

In view of the previous decisions it seems that the present case was correctly decided. Even if the arrest had been illegal it would seem that under the better view the evidence should have been admitted.

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[54] See Harno, Evidence Obtained by Illegal Search and Seizure, 19 Ill. L. Rev. 303, 308 (1925).
[55] See Note, 31 J. C. L. 465. 467 (1940).
[56] Wigmore on Evidence (3d. ed.) §§2183-2184.
[57] State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938).
[58] Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910 (1893); People v. DeFore, 242 N. Y. 13, 150 N. E. 585 (1926).
[59] People v. DeFore, 242 N. Y. 13, 150 N. E. 585 (1926); State v. Reynolds, 101 Conn. 224, 125 A. 636 (1924).