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POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Search and Seizure: Voluntary Consent Distinguished from Submission to Lawfully Constituted Authority— In *United States v. Waller,* 108 F. Supp. 450 (N.D. Ill. 1952), defendant sought to suppress certain evidence consisting of marihuana and marked currency, on the ground they were procured by an unconstitutional search and seizure. Durkin, an enforcement officer of the Federal Bureau of Narcotics, arranged for Medley, a special employee of the same Bureau, to purchase marihuana from defendant with marked currency. After the purchase both Medley and Durkin returned to the apartment and were admitted by a person other than the defendant. Finding Waller, Durkin told him he was a federal agent, then asked him if he had sold narcotics to Medley, whether there were any other narcotics in the apartment, and whether certain currency was the same used by Medley to make the purchase. Defendant responded affirmatively to these questions, after which the agent "looked around the apartment" for some 20 or 30 minutes, then took the evidence and defendant to his office.

Rejecting the government's contention that the search was incidental to a valid arrest, the court went on to consider the question of whether defendant's conduct was a peaceful submission to a lawfully constituted authority, or whether the conduct indicated a voluntary consent on the part of the defendant. [A person may consent to search without a warrant. The constitutional rights as to searches and seizures may be waived. *Zap v. United States,* 328 U.S. 624 (1946).]

The court held the facts here indicated voluntary consent. The federal agent was not a trespasser. He had used no force to gain admittance to the apartment, and the defendant himself had raised no objection to the agent's entry. The inquiries made by the agent were not accompanied by any threat or force. The defendant not only responded to the questions, but also by affirmative action pointed out the specific location of additional contraband marihuana, which he might well have concealed. Such action constitutes voluntary consent and does not require the suppression of evidence so obtained.

Entrapment and the Use of Decoys—In *United States v. Lemons,* 200 F.2d 396 (7th Cir. 1952), defendant relied upon the defense of entrapment as a grounds for reversing his conviction. Gales, a Federal Narcotics Agent, posed as a frequenter of the apartment of "Momma" Thomas, and saw defendant pass a package to her and use language indicating it contained narcotics. Gales thereafter was introduced to the defendant, and arranged for a delivery of two ounces of heroin to himself. On delivery the arrest was made.

The general proposition is well established that decoys may be used to present an opportunity to one intending and willing to commit crime, but the use of decoys is not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but in the mind of government officers, and the accused is lured by persuasion, deceitful representation, or inducement into the commission of a criminal act, then the government is estopped by sound public policy from prosecuting the one who commits it.

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In the present case, defendant protested he obtained heroin for "Mamma" Thomas only as a favor to her, and prior to the inducement of the Federal officer had never trafficked in narcotics for profit. However, his general familiarity with the jargon of narcotics traders, the generally incredible story of how the narcotics were obtained, plus the positive proof offered by the government, was sufficient to sustain his conviction.

For other recent cases see *Lunsford v. United States,* 200 F.2d 237 (10th Cir. 1952); *Johnson v. State,* 61 So.2d 867 (Ct. App. Ala. 1952).

When is a Crime Committed "in the Presence" of an Officer Justifying Search Without a Warrant—In *Griffin v. State,* 92 A.2d 743 (Md. 1952), a police officer, by looking through a window, saw defendant and several other men, and also "a pad of slips and a conventional lottery book open on a table". The officer entered without having obtained a warrant, arrested defendant, and searched the house finding various gambling paraphernalia. On trial for the violation of statutes prohibiting lotteries and gambling, defendant objected to the admission into evidence of the gambling equipment, claiming the search to have been illegal.

The court construed the Maryland statute as giving immunity only from unreasonable search and seizure, and went on to the question of when a police officer may enter and search for evidence without a warrant. Mere belief that an article sought by law enforcement officers is concealed in a private dwelling furnishes no justification for a search, even though the facts show probable cause. But when a crime is committed "in the presence or view" of an officer, a search without a warrant is justified. A crime is considered as being committed "in the presence or view" of an officer when *any of his senses afford him knowledge that it is being committed.* Thus, knowledge of a crime may be acquired through a sense of smell [*Cope v. State,* 157 Tenn. 199, 7 S.W.2d 805 (1928), where officers observed a light in room of defendant's home, and could see figures walking near the light, and there was a strong smell from the cooking of mash and whiskey. Although the curtains were drawn, the officers entered and discovered a still. Search without warrant held justified]; or sound [*Hawkins v. Lutton,* 95 Wis. 492, 70 N.W. 483 (1897); officer searched after hearing a disturbance in a home]. In the present case, it was considered immaterial that the officer could not read any of the notations in the book or on the slips before entering the house. An officer charged with the duty of enforcing the gambling laws, can view circumstances in the light of his special experience in deciding whether a law is being violated in his presence.

Government Liability under Federal Tort Claims Act for Alleged Negligence of Federal Officer—In *United States v. Folk,* 199 F.2d 889 (4th Cir. 1952), actions were instituted under the Federal Tort Claims Act [28 U.S.C. §§1346, 2671 *et. seq.* (Supp. 1952)] to recover (1) for the death and (2) for the pain and suffering of one Hammond as a result of a wound from a bullet accidentally discharged from the pistol of an agent of the Federal Alcohol Tax Unit while the agent was in the performance of his official duties of participating in a raid upon an illicit distillery. The federal agent, Cecil, with South Carolina State constables, had surprised Hammond and three others at the distillery site. Though warned not to do so, all immediately started running away. When Cecil started running after Hammond he took the safety off his loaded automatic pistol while continuing to hold it cocked in his hand. While jumping a ditch, the pistol accidentally discharged, and

unknown to the officer, severed an artery in Hammond's arm. Cecil lost track of Hammond, though he continued the search for about five minutes. The next day Hammond's body was found about 110 yards from the place where Cecil had stopped in his pursuit. Blood was also found on several trees near where Cecil had stopped. The terrain from the distillery site to where the body of Hammond was found was largely clear, with visibility almost unhampered.

Reversing the district court, it was held that the circumstances did not warrant a finding of negligence as to the agent's conduct. Under both state and federal decisions the measure of care owed to Hammond was no higher than that owed to a mere trespasser, for he had been caught in the act of committing a federal crime and it was the agent's duty to make every reasonable effort to arrest him. It was not negligence to pursue Hammond with gun in hand and the safety catch off, for there was no telling what course of conduct Hammond might adopt. ["There must not be too strict a limitation on what a federal officer should do in carrying out a dangerous duty imposed on him by virtue of his office."] There was no reason why Cecil should have foreseen the consequences of possible injury in his handling of the gun, especially because of the high improbability that an accidental discharge would hit a rapidly moving target. Nor was there negligence in failing to make a more extended search, as the agent had no knowledge at the time that he had wounded Hammond.