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Criminal Law--Arrest by Police Officer Without Warrant--Requirement that Misdemeanor Be Committed in Arresting Officer's Presence (People v. Caliente, 12 N.Y.2d 89 (1962))

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CRIMINAL LAW — ARREST BY POLICE OFFICER WITHOUT WARRANT — REQUIREMENT THAT MISDEMEANOR BE COMMITTED IN ARRESTING OFFICER'S PRESENCE. — In two separate New York cases defendants were convicted after trial of misdemeanors relating to bookmaking.[1] In each the prosecution utilized evidence obtained by the arresting officer without a search or arrest warrant. The arrests were made pursuant to Section 177 of the Code of Criminal Procedure[2] which authorizes an arrest for a misdemeanor if the crime is committed in the arresting officer's presence. In the first case, the arresting officer observed defendant Caliente receiving paper money and paper slips from unidentified persons. The contents of the slips were unknown to the officer. On these facts he made his arrest.

In the second case the police officer made three telephone calls during which he placed wagers on horse races and baseball games. He did not know who had accepted his wagers, but he did know that the telephone number was listed in the name of Lang Premiums. After calling, he stationed himself outside the room in which the telephone was located. He then took a pencil, stuck it into the mail slot on the door and for the first time saw defendants Perlman and Bernstein. After observing them answer the phone and hearing their voices, he knew that they were the ones who accepted his wagers. Using a pass key the police officer entered and made his arrest. On appeal, the Court of Appeals reversed both convictions *holding* that in the case of a no-warrant misdemeanor arrest, no misdemeanor is committed in the arresting officer's presence unless what he directly observes or hears is sufficient, in and of itself, to sustain a conviction. *People v. Caliente,* 12 N.Y.2d 89, 187 N.E.2d 550, 236 N.Y.S.2d 945 (1962).

The Supreme Court of the United States in an historic decision, *Mapp v. Ohio,*[3] has ruled that all evidence obtained by searches and seizures, by public officers, in violation of the fourth amendment to the Constitution, is inadmissible in a state court. Thus the federal exclusionary rule[4] has become the law of New

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[1] N.Y. PEN. LAW §§ 986, 986-b.

[2] N.Y. CODE CRIM. PROC. § 177 provides: "A peace officer may, without a warrant, arrest a person, 1. For a crime, committed or attempted in his presence. . . ."

[3] 367 U.S. 643 (1961).

[4] The federal exclusionary rule prohibits the admission of evidence obtained by the police as a result of an unreasonable search and seizure. It has been followed by the federal courts since 1914. Elkins v. United States, 364 U.S. 206, 208-10 (1960). The basis of the exclusionary rule is best summarized in the following manner: If the evidence seized in violation of the fourth amendment can be used against the accused his right against such searches and seizures is of no value, and might as well be stricken from the Constitution. Weeks v. United States, 232 U.S. 383, 393 (1914).

York State by constitutional command. Prior to this decision New York had followed the admissibility rule.[5] Under this rule, evidence obtained by the police as a result of an illegal search and seizure could be introduced against the defendant at trial. The *Mapp* decision has changed this. If the arrest is unlawful, the search incident thereto is also unlawful, and the fruit of that search is not admissible in evidence.

In applying this principle[6] to the instant decisions, it is necessary to look at the New York arrest statutes,[7] in order to determine under what circumstances a police officer may make a legal arrest. With a valid warrant of arrest, a police officer may make an arrest for a felony, a misdemeanor, an offense or a traffic infraction,[8] whether or not the crime is committed in his presence. The method and time of executing an arrest warrant are set forth in the statutes. Compliance is mandatory.[9] If the statutes are not complied with in making the arrest, any search incidental to such arrest is unreasonable and any evidence thereby obtained is inadmissible.

When arresting without a warrant, a police officer may arrest for any felony, misdemeanor, offense or traffic infraction[10] committed or attempted in his presence.[11] A police officer with but two exceptions[12] may never arrest without a warrant for a mis-

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[5] The New York courts have examined the issue on four principal occasions and in each rejected the exclusionary rule for the courts of the state. People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E.2d 690 (1943); People v. Defore, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926); People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923); People v. Adams, 176 N.Y. 351, 68 N.E. 636 (1903), *aff'd*, 192 U.S. 585 (1904).

[6] See SOBEL, THE LAW OF SEARCH AND SEIZURE (1962). In his survey of the law of search and seizure, Judge Sobel discusses the practical effect of the *Mapp* decision on the criminal law and procedure of New York State.

[7] N.Y. CODE CRIM. PROC. §§ 167-182.

[8] N.Y. CODE CRIM. PROC. § 150. A traffic infraction is deemed to be a misdemeanor for purposes of procedure. Squadrito v. Griebsch, 1 N.Y.2d 471, 476-77, 136 N.E.2d 504, 507-08, 154 N.Y.S.2d 37, 41-42 (1956).

[9] People v. Baxter, 178 Misc. 625, 36 N.Y.S.2d 1020 (Oneida County Ct. 1942).

[10] N.Y. VEHICLE AND TRAFFIC LAW § 155.

[11] N.Y. CODE CRIM. PROC. § 177(1).

[12] Under § 602 of the New York Vehicle and Traffic Law, a peace officer may, without a warrant, arrest a person, in case of a violation of either § 600 or § 601 (leaving the scene of an accident without reporting; leaving the scene of an injury to certain animals without reporting), which in fact has been committed, though not in his presence, when he has reasonable cause to believe that the violation was committed by such person. Also, by authority of § 1193 of the Vehicle and Traffic Law a police officer may in the same manner as provided above in § 602 arrest a person in case of a violation of § 1192 (operating a motor vehicle or motorcycle while in an intoxicated condition), if such violation is coupled with an accident or collision in which such person is involved.

demeanor, offense or traffic infraction not committed in his presence.[13] Every such arrest is invalid as is every search incidental to it. The police officer has one remaining avenue of arrest open to him. He may arrest without a warrant for a crime not committed in his presence when he has probable cause to believe that a felony has been committed and probable cause to believe that the person arrested committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it.[14] Prior to 1958, the statute required that a felony must in fact have been committed, but due to an amendment in that year,[15] it is now sufficient if the officer has probable cause to believe the crime to be a felony, although it is later discovered that in fact it was a misdemeanor or, indeed, no crime at all.

The primary concern in the two instant cases is a misdemeanor arrest without an arrest or search warrant. For such an arrest to be legal, the crime must have been committed in the arresting officer's presence. Prior to *Mapp,* the courts of New York did not give much thought to "presence." Since New York followed the admissibility rule, even if the arrest was invalid, evidence thereby obtained could still be used to convict the accused.

An early New York case[16] which did consider the presence problem laid down a liberal standard. The court said: "Personal presence includes corporeal extension within the sphere of sense perception. Presence is not the same as view."[17] Since the statute did not specify how much evidence the officer had to perceive, the court laid down the following rule to guide police officers in making no-warrant misdemeanor arrests:

> If a police officer is in bodily reach of a person then and there actually engaged in the commission of a misdemeanor, and perceiving indications of the commission of the offense sufficient to induce reasonable belief intending performance of duty, proceeds to arrest such person, the arrest is lawful as for the commission of a crime in the officer's presence.[18]

The courts at this time considered that the purpose of allowing arrests without a warrant was to secure apprehension and iden-

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[13] People v. Foster, 10 N.Y.2d 99, 106-07, 176 N.E.2d 397, 401, 217 N.Y.S.2d 596, 601 (1961) (dissenting opinion).

[14] N.Y. CODE CRIM. PROC. § 177(4).

[15] *Ibid.*

[16] People v. Esposito, 118 Misc. 867, 872, 194 N.Y. Supp. 326, 332 (Ct. Spec. Sess. 1922) (memorandum decision). For a case that discusses the presence problem in depth, see Agnello v. United States, 290 Fed. 671, 678-79 (2d Cir. 1923).

[17] People v. Esposito, *supra* note 16, at 872, 194 N.Y. Supp. at 332.

[18] People v. Esposito, 118 Misc. 867, 872-73, 194 N.Y. Supp. 326, 332-33 (Ct. Spec. Sess. 1922) (memorandum decision).

tification with promptness.[19] This attitude is evident in the above guide, which placed great emphasis on the good faith belief of the arresting officer.

In recent years, the concept of "presence" and the purpose behind the no-warrant arrest statute has undergone a change in the minds of the New York judiciary. They no longer emphasize that the purpose of the no-warrant arrest is to secure apprehension and identification with promptness. Conceding that this is still the main idea behind allowing them, the courts now call attention to the presence requirement set forth in the statute as a protection to our citizens against lawless law enforcement.[20] Today, a speedy arrest will be upheld only if it is a lawful one. To be a lawful arrest, the courts require strict compliance with the presence requirement of the no-warrant arrest statute. The liberal standard of the past has gone and a rigid standard has taken its place.

Cases like *People v. Moore* [21] demonstrate the new rule. In the *Moore* case, the police officer saw four men severally approach the defendant and hand him paper money. The court said:

> The officer's testimony of what he observed would not, without more, prove the commission of any crime since mere evidence of persons handing money to another person does not prove a crime.[22]

It can be seen that the courts are no longer referring to the officer's reasonable or good faith belief as factors making a no-warrant misdeameanor arrest legal. As held in *Moore,* the officer must observe the elements of the crime, suspicion being insufficient justification for making the arrest.

The majority opinion in the instant cases further emphasizes the strict approach to the presence requirement in the no-warrant arrest statute. The rule to be derived from both cases is to the effect that what is directly observed and heard must, in and of itself, sustain a conviction. That is to say, unless sufficient evidence to convict is apparent to the arresting officer, the crime is not committed in his "presence." Therefore, the arrest is unlawful and any further evidence seized incident thereto is inadmissible, notwithstanding the degree of probable cause for the arrest or the

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[19] *Id.* at 872, 194 N.Y. Supp. at 332.

[20] "The investigation of crime does not require and, certainly, does not justify a disregard of basic rights on the part of law enforcement officials. The legislature has deliberately and carefully enacted legislation authorizing an arrest without a warrant in limited fact situations, and police officers may not ignore the law's demands because they believe that effective policing or the end in view calls for such conduct." People v. Cherry, 307 N.Y. 308, 311, 121 N.E.2d 238, 240 (1954).

[21] 11 N.Y.2d 271, 183 N.E.2d 225, 228 N.Y.S.2d 822 (1962).

[22] *Id.* at 273, 183 N.E.2d at 226, 228 N.Y.S.2d at 824.

persuasiveness of the additional evidence. The Court in *Caliente* ruled that the mere act of accepting money and pieces of paper, without more, does not constitute a crime. In *Perlman* and *Bernstein,* the Court ruled that placing bets over the telephone with persons then unknown did not constitute a crime being committed in the officer's presence.

From these two decisions, it appears that the Court is requiring the arresting officer to have knowledge of both the person and the criminal act in order for a crime to have been committed in his presence. In the *Caliente* case, the officer had knowledge of the person, but he could not know from the evidence before him that a criminal act was being committed. In the *Perlman* and *Bernstein* case, the officer had knowledge of the criminal act since he was a party thereto, but he did not know the identity of the criminals. The fact that he later learned their identities by pushing back the mail slot does not change the rule. If the officer did not have cause to make the arrest before such observation was made, his act constituted an unreasonable search [23] and all evidence thereby obtained was inadmissible.[24]

Judge Dye, in his dissent, argued that even if the search and seizure were illegal, there was no showing that these defendants had any standing to object to the right of privacy allegedly invaded. The theory behind this position is that under the exclusionary rule, the evidence is excluded in order to provide a remedy for a wrong done to the defendant. Therefore, if the defendant has not been wronged, he is not entitled to the relief of the exclusionary rule. Accordingly, no wrong is inflicted upon the defendants unless they can show that they have an interest in the premises searched. Since this was not shown, Judge Dye concluded that no wrong was committed which would require resort to the exclusionary rule. The rule has been firmly established, however, that if a person is charged with the possession of the fruits of an illegal search and seizure,[25] he is the person aggrieved by the search and seizure.[26] Such person may then move to

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[23] Johnson v. United States, 333 U.S. 10, 15-17 (1948).

[24] People v. O'Neill, 11 N.Y.2d 148, 153, 182 N.E.2d 95, 98, 227 N.Y.S.2d 416, 419 (1962).

[25] N.Y. PEN. LAW § 986(b) provides: "Any person . . . . who shall knowingly have possession of any writing, paper or document representing or being a record, made by a person engaged in bookmaking . . . shall be guilty of a misdemeanor."

[26] Jones v. United States, 362 U.S. 257 (1960). The issue of defendant's standing was decided with reference to Rule 41(e) of the Federal Rules of Criminal Procedure which states: "A person aggrieved by an unlawful search and seizure may move . . . to suppress for use as evidence anything so obtained. . . ." Jones v. United States, *supra* at 260. The Court in ruling on defendant's standing said: "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed

suppress the evidence without first showing that he has an interest in property seized, or in the premises searched.[27] New York has apparently adopted this approach, for in *People v. Loria*[28] the court sustained the right of a defendant to suppress evidence seized in the home of another. Defendants Perlman and Bernstein were entitled to the protection of this rule since they were being charged with possession of bookmaking records.[29]

Judge Burke dissented[30] on different grounds than did Judge Dye. He expressed the view that probable cause should be sufficient to justify a misdemeanor no-warrant arrest. He stated that if the majority rule were adopted, the Court would be faced with the task of reviewing countless "no-warrant misdemeanor convictions to determine not only if there is sufficient evidence to support the conviction, but, collaterally, whether such evidence was apparent to the arresting officer prior to the search."[31] Judge Burke would appear to be advocating a return to the result reached at a time when the rapid apprehension of the misdemeanor criminal was the paramount consideration in the courts' construction of the presence requirement in Section 177 of the Code of Criminal Procedure.[32] This, however, is no longer the view of the courts. As Judge Fuld stated in *People v. Lane*,[33]

> What is significant and decisive is that "the imperative of judicial integrity" demands that the court should give sanction neither to illegal enforcement of the criminal law nor to the corrosive doctrine that the end justifies the means.[34]

It is apparent that important legal and social questions are involved in these cases. The primary question is whether or not

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as a 'person aggrieved by an unlawful search and seizure. . . .' " Jones v. United States, *supra* at 264.

[27] Jones v. United States, *supra* note 26, at 261-65.

[28] 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).

[29] N.Y. PEN. LAW § 986(b).

[30] Judge Burke concurred in People v. Moore, 11 N.Y.2d 371, 183 N.E.2d 225, 228 N.Y.S.2d 822 (1962), which had facts similar to *People v. Caliente* in that paper money was passed in both cases. However, the *Caliente* case had the additional fact of paper slips being passed. Judge Burke perhaps felt this was sufficient to spell out the commission of a crime in the arresting officer's presence.

[31] People v. Caliente, 12 N.Y.2d 89, 99, 187 N.E.2d 550, 555, 236 N.Y.S.2d 945, 952 (1962).

[32] People v. Esposito, 118 Misc. 867, 872, 194 N.Y. Supp. 326, 332 (Ct. Spec. Sess. 1922).

[33] 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961).

[34] *Id.* at 357, 179 N.E.2d at 342, 223 N.Y.S.2d at 202. See also Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion). "Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law. . . ."

the presence requirement ought to be strictly enforced. The conflict exists between a strict interpretation which emphasizes the personal liberty of the individual and a liberal interpretation which emphasizes the maintenance of public order and the dispensing of justice. Certainly there is something to be said for both sides. But it would appear that any hedging on the strict application of protections from the power of the state involves great risks to individual freedom. The fact that it has been contended that an estimated seventy-five per cent of arrests made today are illegal [35] indicates that many law enforcement officers are either willing to make illegal arrests, or are unaware of the requirements of a lawful arrest. If personal liberty is to be protected, the burden falls on the members of the judiciary who can preserve it by strictly enforcing the presently existing statutory requirements for a legal arrest. If this course of action makes too onerous the task of law enforcement officers, the solution lies in a modification of the laws governing arrest. This should be accomplished by legislative action, not by a failure of the courts to strictly enforce the law as presently written.

FEDERAL JURISDICTION — REMOVAL BY THIRD-PARTY DEFENDANT TO A DISTRICT COURT UNDER § 1441 OF THE JUDICIAL CODE.— In an action between two citizens of New York, not involving a federal question, defendant served a third-party complaint on a citizen of California who then had the action removed to a federal district court. The third-party defendant maintained the district court had jurisdiction on two grounds: (1) the diversity required by section 1441(b) of the Judicial Code [1] existed between the movant and the third-party plaintiff, and (2) under section 1441(c),[2]

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[35] HOUTS, FROM ARREST TO RELEASE 24 (1958).

[1] 28 U.S.C. § 1441(b) (1958). "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

[2] 28 U.S.C. § 1441(c) (1958). "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."