Warrantless Search of Arrestee's Property Inaccessible to Him at Time of Search Not Valid as Incident to Lawful Arrest

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quately addressed by section 7-204(2) of the UCC. Accordingly, it would appear inequitable to hold a bailee liable for the entire value of the stored property especially since he may never have been aware of the actual value of the goods. It is submitted, therefore, that a more evenhanded approach towards remedying potentially fraudulent activity in bailment situations is warranted. One possible approach would be to limit statutorily the amount of damages recoverable in either a negligence or conversion action to a value declared at the commencement of the bailment.

Peter N. Cubita

Warrantless search of arrestee's property inaccessible to him at time of search not valid as incident to lawful arrest

The fourth amendment to the Constitution protects an indi-
individual from unreasonable searches and seizures. Although generally, warrantless searches have been found to be presumptively unreasonable per se, certain limited exceptions exist whereby a search conducted in the absence of a warrant may be sustained as reasonable. One such exception permits the search of an arrestee's person and the area "within his immediate control" as "incident to a lawful arrest." Notably, however, courts applying the

197 The fourth amendment to the Constitution provides:

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.

U.S. Const. amend. IV. The fourth amendment is applicable to the states through the fourteenth amendment. Terry v. Ohio, 392 U.S. 1, 8 (1968); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

The central focus of the amendment is to place a disinterested magistrate between a possibly "overzealous" officer and the individual searched in order to guard against unreasonable invasions of privacy interests. Johnson v. United States, 333 U.S. 10, 13-14 (1948); see United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Schrock & Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1148 (1978). The fourth amendment, however, does not confer upon the individual a general right of privacy. Katz v. United States, 389 U.S. 347, 350-51 (1967); see United States v. Chadwick, 433 U.S. 1, 11 n.6 (1977).


The burden is on the state to show that the warrantless search was justified by exigent circumstances and, therefore, was reasonable. Vale v. Louisiana, 399 U.S. 30, 34 (1970); People v. Clements, 37 N.Y.2d 675, 686, 339 N.E.2d 170, 177, 376 N.Y.S.2d 480, 490 (1975) (Wachtler, J., dissenting), cert. denied, 425 U.S. 911 (1976).

200 Chimel v. California, 395 U.S. 752, 763 (1969). The search incident to a lawful arrest is an early exception to the warrant requirement. In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court, in dictum, observed that English and American Law has always recognized that it is lawful to conduct a search of the accused's person when lawfully arrested. Id. at 392. The justification for a warrantless search incident to an arrest is to seize weapons that could be used to effect an escape or assault an officer, and to thwart the destruction of ephemeral evidence. Chimel v. California, 395 U.S. 752, 763 (1969); Preston v. United States, 376 U.S. 364, 367 (1964); Haddad, supra note 199, at 203; see Arkansas v.
incident to arrest exception have differed in their interpretation of what constitutes the arrestee’s area of immediate control. Recently, in People v. Belton, the Court of Appeals held that the warrantless search of a jacket not immediately accessible to an arrestee at the time of the search was unreasonable and, conse-


It has been held that to be valid, a search incident to a lawful arrest must be substantially contemporaneous with that arrest. See United States v. Chadwick, 433 U.S. 1, 15 (1977); Shipley v. California, 395 U.S. 818, 819 (1969); Preston v. United States, 376 U.S. 364, 367 (1964); Stoner v. California, 376 U.S. 483, 486 (1964); Agnello v. United States, 269 U.S. 20, 30-31 (1925). In Preston, the Supreme Court observed that the justifications for allowing a search incident to arrest are “absent where a search is remote in time or place from the arrest.” 376 U.S. at 367. But see United States v. Edwards, 415 U.S. 800 (1974). The Edwards Court upheld the warrantless search of the defendant’s clothing 10 hours after the arrest as incident to the arrest. Id. at 801-02. Disregarding that the “administrative mechanics” of the arrest were completed and that ample time was available to procure a warrant, the Court asserted that if the search was reasonable at the moment of arrest, then it was also reasonable a “substantial” time later. Id. at 804, 807; see Abel v. United States, 362 U.S. 217, 239 (1960); Note, Warrantless Search Incident To Arrest: New Standards for Delayed Searches, 46 U. Colo. L. Rev. 587, 593 (1975). Subsequent to its decision in Edwards, however, the Court reaffirmed the requirement set forth in Stoner and Preston that the search be substantially contemporaneous with the arrest. United States v. Chadwick, 433 U.S. 1, 15 (1977); see United States v. Ross, No. 79-1624, slip op. at 17 (D.C. Cir. Apr. 17, 1980).

The New York Court of Appeals also has observed the need for the search to be simultaneous with the arrest. E.g., People v. Evans, 43 N.Y.2d 160, 166, 371 N.E.2d 528, 531, 400 N.Y.S.2d 810, 813 (1977); People v. Fitzpatrick, 32 N.Y.2d 499, 508, 300 N.E.2d 139, 143, 346 N.Y.S.2d 793, 799 (1973); People v. Lewis, 26 N.Y.2d 547, 551, 260 N.E.2d 538, 540, 311 N.Y.S.2d 905, 908 (1970). The Evans Court went so far as to remark that “the search and arrest must constitute a single res gestae.” 43 N.Y.2d at 166, 371 N.E.2d at 531, 400 N.Y.S.2d at 813.

The permissible area of search has been alternately extended and curtailed. Compare United States v. Rabinowitz, 339 U.S. 56, 66 (1950), overruled, Chimel v. California, 395 U.S. 752, 756-58 (1969) with Trupiano v. United States, 334 U.S. 699, 705 (1948). In Rabinowitz, the search of an entire room where the arrest occurred was upheld, since the Supreme Court declared that the proper test was whether the search was reasonable, and not whether it was reasonable to obtain a search warrant. 339 U.S. at 66. Chimel, however, overruled Rabinowitz, declaring that no justification existed for the search to go beyond that area where the arrestee could “obtain weapons or evidentiary items.” 395 U.S. at 766. Although Chimel was addressed to the warrantless search of an entire house, it has been applied to searches of personal luggage in automobiles. Arkansas v. Sanders, 442 U.S. 753, 764-65 n.13 (1979); see 2 W. LAFAVE, SEARCH AND SEIZURE § 7.1, at 499 (1978); Note, Criminal Law: The Effect of Chimel v. California on Automobile Search and Seizure, 23 Okla. L. Rev. 447, 450-52 (1970); Comment, Chimel v. California: A Potential Roadblock to Vehicle Searches, 17 U.C. L.A. L. Rev. 626, 636-40 (1970).

quently, the evidence obtained therefrom must be suppressed.\textsuperscript{203}

In Belton, the defendant was a passenger in a car stopped by a state trooper for a traffic violation.\textsuperscript{204} While questioning the driver, the officer detected the odor of marijuana emanating from the car and noticed an envelope on the floor of the type frequently used in packaging the drug for sale.\textsuperscript{205} After ordering all four occupants from the car, frisking them,\textsuperscript{206} and inspecting the envelope, the trooper ascertained that the envelope contained marijuana.\textsuperscript{207} The officer arrested the occupants, who were still outside the car, and then searched the pockets of the jackets on the back seat.\textsuperscript{208} In one of them, he found a quantity of cocaine and the defendant’s identification.\textsuperscript{209} At his subsequent trial for possession of a controlled substance, the defendant moved to suppress the evidence obtained during the search.\textsuperscript{210} The Ontario County Court denied the motion,\textsuperscript{211} and the Appellate Division, Fourth Department, affirmed.\textsuperscript{212}

On appeal, the Court of Appeals reversed, holding that the warrantless search of the jacket was not an incident to the arrest and, hence, could not be upheld as reasonable.\textsuperscript{215} Chief Judge Cooke, writing for the majority,\textsuperscript{214} initially acknowledged that upon arrest, the danger exists that the subject may attempt to destroy evidence of a crime or obtain a weapon.\textsuperscript{215} Hence, the Court continued, it is both reasonable and necessary that a speedy warrantless search “of the arrestee’s person and the area within his immediate control” be conducted.\textsuperscript{216} Nevertheless, stated the ma-

\begin{footnotes}
\footnote{203}{50 N.Y.2d at 449, 407 N.E.2d at 421, 429 N.Y.S.2d at 575.}
\footnote{204}{Id.}
\footnote{205}{Id.}
\footnote{206}{Id.}
\footnote{207}{Unlike a search, a frisk can be performed without arresting the suspect. \textit{See}, e.g., \textit{People v. Bowles}, 29 App. Div. 2d 996, 996, 289 N.Y.S.2d 526, 528 (3d Dep’t 1968), \textit{cert. denied}, 396 U.S. 865 (1969).}
\footnote{208}{50 N.Y.2d at 449, 407 N.E.2d at 421, 429 N.Y.S.2d at 575.}
\footnote{209}{Id.}
\footnote{210}{Id.}
\footnote{211}{See \textit{id. See generally CPL §§ 710.20, .40, .70 (1971 & Supp. 1979-1980); W. RICHARDSON, supra note 198, § 561(a).}
\footnote{212}{See 66 App. Div. 2d at 199, 416 N.Y.S.2d at 923-24.}
\footnote{213}{Id. at 201, 416 N.Y.S.2d at 925.}
\footnote{214}{50 N.Y.2d at 449, 407 N.E.2d at 421, 429 N.Y.S.2d at 575.}
\footnote{215}{Chief Judge Cooke was joined by Judges Jones, Wachtler, Fuchsberg, and Meyer. Judge Gabrielli filed a dissenting opinion in which Judge Jasen joined.}
\footnote{216}{50 N.Y.2d at 450, 407 N.E.2d at 422, 429 N.Y.S.2d at 576; \textit{see note 200 supra.}
\footnote{217}{50 N.Y.2d at 450, 407 N.E.2d at 422, 429 N.Y.S.2d at 576 (citing \textit{Chimel v. California}, 395 U.S. 752, 763 (1969)).}}
ajority, the arrestee's privacy interest in possessions not within his immediate grasp is not forfeited once he is "effectively neutralized" or the "object is within the exclusive control of the police." Therefore, any search extended into these areas is unlawful. The "critical inquiry," the Court announced, is whether the defendant had access to the property at the time of search. Noting that in the case before it, the defendant's jacket was "within the exclusive custody and control of the police," the occupants of the car were "safely away from the vehicle," and their transportation to the police station was "imminent," the Court concluded that the exigencies necessary to justify the warrantless search were absent. Thus, it was held that evidence obtained from the illegal search should be suppressed.

Dissenting, Judge Gabrielli objected to the majority's disregard for the findings of fact made by the lower courts. It had been determined below and amply supported in the record, the dissent noted, that, at the time of the search, the jackets were accessible to the defendants and not yet within the exclusive control of the police. Hence, according to Judge Gabrielli, the conclusion was inescapable that, having been incident to a lawful arrest, the search was reasonable.

The holding in Belton, that items not immediately accessible to an arrestee may not legally be subjected to a warrantless search, constitutes a marked departure from the position previously adhered to by the Court of Appeals. Belton expressly overruled earlier cases of the Court which had upheld warrantless searches of

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50 N.Y.2d at 451, 407 N.E.2d at 422, 429 N.Y.S.2d at 576. The Court observed that although the arrest may establish the authority for the search, "it does not transform the initial predicate into carte blanche justification to rummage through all articles" associated with the arrestee. Id.

Id.

Id. at 452, 407 N.E.2d at 423, 429 N.Y.S.2d at 577.

Id.

Id. at 454, 407 N.E.2d at 424, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).

Id. (Gabrielli, J., dissenting). The dissent argued that the present case is "illustrative of the type of situation in which a warrantless search is most appropriate." Id. (Gabrielli, J., dissenting). Emphasizing that the search was conducted by a lone policeman in the presence of four unknown individuals, Judge Gabrielli concluded that the majority erred in assuming from the facts that both the arrestees and their property had "been conclusively and safely reduced to the complete control of the officer, as a matter of law." Id. at 455, 407 N.E.2d at 425, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).

Id. at 454, 407 N.E.2d at 425, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).
property clearly within the exclusive control of the police, purportedly on the basis of the incident to arrest exception.\textsuperscript{225} These decisions, it appears, by sanctioning an arbitrary standard of exigency predicated solely on contemporaneity with the arrest, had subverted the express purpose of the fourth amendment.\textsuperscript{226} Also overruled, albeit implicitly, were prior decisions wherein the novel “maximum intrusion” test had been applied to validate warrantless searches of “particularized” property undertaken at or near

\textsuperscript{225} In the course of its decision, the \textit{Belton} Court overruled People v. De Santis, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978), \textit{cert. denied}, 443 U.S. 912 (1979), and People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974). In \textit{De Santis}, the Court had upheld the warrantless search of a suitcase in a police substation, notwithstanding that the suitcase was under exclusive police control at the time of search and that it was known to be free from weapons or explosives. 46 N.Y.2d at 86, 385 N.E.2d at 578-79, 412 N.Y.S.2d at 840. The search was validated due to its “close nexus” to the time and place of the arrest, and not because the arrestee could gain access to the suitcase. Id. at 89, 385 N.E.2d at 580, 412 N.Y.S.2d at 842. Similarly, in \textit{Darden}, the Court found no difficulty in sustaining the warrantless search of an attache case already in police custody since at the time of arrest, the defendant was in possession of the case. 34 N.Y.2d at 180, 313 N.E.2d at 51, 356 N.Y.S.2d at 585.

Notably, prior to \textit{Belton}, it was unsettled in New York whether a search incident to an arrest had to be restricted to those items the defendant could have reached when stopped by the police, \textit{see} People v. Darden, 34 N.Y.2d at 180, 313 N.E.2d at 51, 356 N.Y.S.2d at 585; People v. Fitzpatrick, 32 N.Y.2d 499, 508, 300 N.E.2d 139, 143, 346 N.Y.S.2d 793, 799, \textit{cert. denied}, 414 U.S. 1033 (1973); People v. Floyd, 26 N.Y.2d 558, 563, 260 N.E.2d 815, 817, 312 N.Y.S.2d 193, 196 (1970) (dictum), or to those items that the defendant could have reached at the time the search was commenced, \textit{see} People v. Fields, 45 N.Y.2d 986, 988-90, 385 N.E.2d 1040, 1040-41, 413 N.Y.S.2d 112, 112-13 (1978); People v. Williams, 37 N.Y.2d 206, 208, 333 N.E.2d 160, 160, 371 N.Y.S.2d 880, 881 (1975). In holding that “the critical inquiry focuses upon the extent to which the arrestee may gain access to the property,” and that no warrantless search is permissible after an item is in the exclusive control of the police or after the defendant is neutralized, the \textit{Belton} Court restricted lawful warrantless searches incident to arrest to those items the defendant could reach at the time the search is commenced. 50 N.Y.2d at 451, 407 N.E.2d at 422, 429 N.Y.S.2d at 576. At the very least, therefore, \textit{Belton} overrules \textit{Darden} and \textit{Fitzpatrick} on this issue. \textit{See} Arkansas v. Sanders, 442 U.S. 753, 763 (1979); United States v. Chadwick, 433 U.S. 1, 15 (1977).

\textsuperscript{226} It is settled that the reasonableness of warrantless searches is a function of exigency. \textit{See} Chimel v. California, 395 U.S. 752, 762-63 (1969). The fact of contemporaneity of search and arrest, as the Supreme Court has recently indicated, \textit{see} United States v. Chadwick, 443 U.S. 1, 15 (1977), is not a determinant of exigency, but rather it is an element thereof. \textit{See} note 200 \textit{supra}. Therefore, as the Court noted in \textit{Chadwick}, “warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as an incident to that arrest if either the ‘search is remote in time or place from the arrest,’ or no exigency exists.” 433 U.S. at 15; \textit{see} Arkansas v. Sanders, 442 U.S. 753, 766 (1979). In People v. De Santis, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978), \textit{cert. denied}, 443 U.S. 912 (1979), and People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974), however, the Court focused solely on the search’s “close nexus” in time and place to the arrest, \textit{see} note 225 \textit{supra}, thereby rendering the proximate concurrence of search and arrest dispositive, and eroding the protection of the fourth amendment.
the time of arrest.\footnote{227} Categorizing the search of property inaccessible to an arrestee as a less objectionable intrusion than either the arrest itself\footnote{228} or than the posting of a guard while a search warrant was sought,\footnote{229} the Court previously had sustained such searches. In the wake of Belton's conclusion that an arrestee does not forfeit his privacy interest in nonaccessible items upon arrest, it certainly appears that such result no longer would obtain. 

By recognizing as dispositive the extent to which an arrestee may obtain access to the property searched, the decision in Belton appears to comport with prevailing Supreme Court authority.\footnote{230}
Indeed, the Supreme Court recently has reiterated that where the property to be searched has been reduced to the exclusive control of the police, thus eliminating the possibility that it could be reacquired or destroyed by the arrestee or a third party prior to the time required to obtain a search warrant, the exigent circumstances which would have justified a warrantless search no longer exist. Such reasoning, followed in Belton, which recognizes the legitimacy of an incident to arrest search only where it is demonstrated that at the time of the intrusion the safety of the arresting officers or the continued viability of evidence were realistically implicated, seems to best preserve the sanctity of the constitutional prohibition of unreasonable searches.

Mark Goldstein


231 Arkansas v. Sanders, 442 U.S. 753, 755 (1979). In Sanders, the Supreme Court held unlawful the warrantless search of a suitcase seized from the trunk of a taxi where it was clear that the police were in control of the car and its occupants. Id. The Court, conceding that it granted review to rectify misinterpretations of its decision in United States v. Chadwick, 433 U.S. 1 (1977), held that where the police have exclusive control of the article to be searched, the search of the property should await the issuance of a warrant. 442 U.S. at 766.

232 One method which effectuates the purpose of fourth amendment protection is the system of telephonic search warrants. Notably, in the federal system, a federal magistrate is empowered to issue a warrant “based upon sworn oral testimony communicated by telephone or other appropriate means.” Fed. R. Crim. P. 41(c)(2). The rule was promulgated “for the purpose of enabling warrants to be procured as expeditiously as possible.” United States v. Strother, 578 F.2d 397, 400 n.3 (D.C. Cir. 1978). To successfully suppress evidence obtained from the search, under the federal rule, there must be a showing of “bad faith” on the part of the police officer in procuring the warrant. Fed. R. Crim. P. 41(c)(2)(G).

At least two state jurisdictions have telephonic search warrant statutes. Ariz. Rev. Stat. Ann. §§ 13-3914(c), 13-3915(c) (1978); Cal. Penal Code § 1528(b) (West Supp. 1980). See generally Marek, Telephonic Search Warrants: A New Equation for Exigent Circumstances, 27 CLEV. ST. L. REV. 35 (1978). It is suggested that were such procedure to be legislatively adopted in New York, it would permit the prompt discovery and seizure of evidence, while preserving the arrestee’s legitimate expectation of privacy in his property.